COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Agenda for the Meeting on June 18-20, 1992

(**Note:** The meeting will be held in the Sixth Floor Conference Room, No. 636, of the Administrative Office of the United States Courts, at 811 Vermont Avenue, N.W., Washington, D.C. Sessions will commence at 8:30 a.m. each day.)

I. Introduction, Announcements and Opening Remarks of the Chairman.

II. Standing Committee Items:

   a. Judge Gerry's memorandum on continuing the Standing Committee and Advisory Committees.

   b. Report of the Long Range Planning Committee.

   c. Report on the Local Rules Project.

   d. Report of the Subcommittee on Style.

   e. Creation of an Advisory Committee on Rules of Evidence.

III. Report of the Advisory Committee on Criminal Rules.

IV. Report of the Advisory Committee on Appellate Rules.

V. Report of the Advisory Committee on Bankruptcy Rules.

VI. Report of the Advisory Committee on Civil Rules.

VII. Preparation of the Report to the Judicial Conference.

VIII. Plans for the next meeting.

6/3/92

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June 11, 1992

MEMORANDUM TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

At the request of Judge Keeton, I am sending you herewith a copy of my letter of June 11th to him regarding the proposed rules amendments.

Judge Keeton asked that you be prepared to discuss the issues presented at the forthcoming meeting.

Judith W. Krivit
for
Joseph F. Spaniol, Jr.
Secretary

Attachment

cc: Chairmen & Reporters of
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Dean Daniel R. Coquillette
Professor Mary P. Squiers

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BY FAX

June 11, 1992

Honorable Robert E. Keeton
United States District Judge
Room 306, John W. McCormack
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Boston, Massachusetts 02109

Dear Judge Keeton:

As I indicated to you on the telephone yesterday, I have hesitated writing this letter because I fear it may be taken as opposition to the proposed rules amendment, which is not the case. My concern arises from what I believe to be the responsibility of the Standing Committee to consider what obstacles and pitfalls lie ahead as proposals cleared for submission are passed on by the Judicial Conference to the Supreme Court and, if adopted by the Court, to the Congress. To me there are danger signals (red flags) appearing everywhere.

Foreign embassies continue to raise questions about the proposed changes in the rules relating to the service of process and the taking of depositions abroad. See the letter from the British Embassy dated April 9, 1992 that was made available to the Advisory Committee at its April 15th meeting and later sent to the Standing Committee. A further letter from the State Department is expected this week. If these proposals go forward, surely another diplomatic note to the Court will follow. The Committee, it seems to me, might then be faced with the task of explaining to the Court (or perhaps to the Chief Justice at the Judicial Conference) why these proposals after having previously been returned by the Court for further study, with the first diplomatic note attached, were not changed to satisfy the concerns of foreign governments.

In regard to the proposed discovery rules, the dissatisfaction persists and appears to be growing. We have the letters from Morrison and Lacovara. Many phone calls to our office also seem to indicate that segments of the bar are organizing to present arguments possibly to the Supreme Court and most certainly to the Congress. In these circumstances

Congressional hearings are very likely and, if held, would certainly bring delay and possibly even tinkering with the rules.

All this is somewhat reminiscent of the disaster occuring when the proposed Evidence Rules were first presented to the Congress and the entire rules program fell into disrepute in some quarters.

All I suggest is that the Standing Committee consider these matters along with the recommendations being submitted.

Sincerely,

Joseph F. Spaniol, Jr.
Secretary

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June 15, 1992

Mr. Edwin D. Williamson
United States Department of State
The Legal Adviser
Washington, D.C. 20520

Re: Proposed Amendments to Rules 4 and 26 of the Federal Rules of Civil Procedure

Dear Mr. Williamson:

Thank you for your letter of June 12, 1992, setting forth the views of the Department of State on the most recent draft of proposed amendments to Rules 4 and 26 of the Federal Rules of Civil Procedure. We are sending copies to the member of the Judicial Conference Committee on Rules of Practice and Procedure for their consideration. Your comments are greatly appreciated.

Sincerely,

Joseph F. Spaniol, Jr.
Secretary

cc: Committee on Rules of Practice
& Procedure
Chairmen & Reporters of
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Professor Mary P. Squiers

United States Department of State

The Legal Adviser

Washington, D.C. 20520

VIA FAX 633-8699
June 12, 1992

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Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

RE: Proposal to Amend Rules 4 and 26 of the Federal Rules of Civil Procedure

Dear Mr. Spaniol:

I am writing with regard to the latest proposal to amend Rules 4 and 26, and to make conforming changes to Rule 28, of the Federal Rules of Civil Procedure, as contained in the submission of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure dated May 1, 1992.

The Department of State consulted with the Department of Justice in the preparation of the Comments by the Department of Justice in opposition to the proposed revisions, contained in their letter to you from Assistant Attorney General Stuart M. Gerson. The Comments attached to Mr. Gerson's letter included certain views of this Department.

We would like to make it clear that it is the view of this Department that the proposed revisions of Rule 4(d) and (f) and Rule 26(a), as presently drafted, will adversely affect international judicial cooperation, weaken United States treaty relationships under the Hague Conventions on Service and the Taking of Evidence Abroad, and unnecessarily create difficulties with our major trading partners on issues of territorial sovereignty.

The United States government seeks, and U.S. litigants benefit from, international cooperation in matters affecting transnational litigation. In our judgment, certain aspects of the proposed revisions require special attention because they may erode current levels of transnational judicial cooperation, or make future progress in these areas more difficult. In particular, we have great concern regarding those changes in Rules 4 and 26, which pose the possibilities of service of process or discovery in contravention of foreign law or applicable international convention.

Thus, the provision in proposed Rule 4(d) extending the waiver of service of summons provision to parties located in foreign countries may be viewed by foreign governments as a direct violation of their sovereign right to determine the manner in which persons or entities within their territory may be subjected to foreign jurisdiction. Proposed Rule 4(f)(3) encourages U.S. litigants to press upon our courts the conclusions that a given foreign rule or procedure "does not provide a lawful means by which service can be effected." Similarly, proposed Rule 26(a)(5) establishes a standard which encourages U.S. parties to demonstrate that discovery methods authorized by a treaty are "inadequate or inequitable" and thus need not be followed in a given case.

Adoption of these Rules without modification will lead to charges by other nations that the United States has authorized direct violation of law within foreign jurisdictions. This will inevitably both weaken the level of judicial cooperation we have sought in many areas and impair our ability to obtain effective treatment under the Hague Conventions on Service of Process and Taking of Evidence Abroad.

It should be noted that adoption of such rules may well lead to denial of enforcement in foreign jurisdictions of American judgments based on such procedures, which is a result not reflected in the summary presented to the Standing Committee.

Finally, a number of countries party to the Hague Conventions on Service and Evidence have expressed serious concern about the proposed amendments. While foreign governments are normally reluctant to make such concerns a matter of public record out of deference to national processes, the Governments of Britain, Switzerland and now Ireland have made public note of their concern, as reflected in diplomatic notes that have been forwarded to the Committee. We believe that the concerns expressed by these governments deserve more attention for the insight they afford into how the proposed unilateral action by the United States will be received by other countries, especially with regard to the Hague Conventions to which the United States is a party.

The Department would regret the avoidable difficulties with other countries, and especially those parties with the United States to these two Conventions, that are almost certain to arise if the proposed amendments referred to above and the Committee Notes were to be approved as presently drafted.

On behalf of the Department of State, I request that this letter, Mr. Gerson's letter covering DOJ's Comments, the Notes from the British Embassy and the Embassy of Switzerland, and the Aide-Memoire from the Embassy of Ireland be included in the documentation that is sent to the Supreme Court with the proposed amended rules.

Sincerely yours,

Edwin D. Williamson

Enclosures:(4)
April 1992 DOJ letter
Note from British Embassy
Note from Switzerland
Aide-Memoire

cc:DOJ - David Epstein (w/o enclosures)
(via FAX 514-6584)

Justice 1st early April

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

Joseph F. Spaniol
Secretary
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and Procedure
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Dear Mr. Spaniol:

In anticipation of the meeting on April 13-15, 1992, of the Advisory Committee on Civil Rules, we are transmitting the comments on behalf of the Department of Justice and the Department of State to the proposed revisions to Federal Rules 4(d) and (f) involving service of process on individuals in foreign states, and Rule 26(a)(5) involving extraterritorial discovery.

The comments in opposition to the proposed revision of Rule 4(d) and (f) are the common views of the Department of Justice and the State Department. The Department of Justice and the State Department both oppose the proposed revisions to Rule 26(a). The attached document reflects the position of the Department of Justice. While the State Department has not endorsed the Department of Justice's comments on Rule 26(a), it has provided supplemental comments stating their views with respect to this issue, which are included in the attached document. The paragraphs provided by the State Department are indicated by appropriate introductory clauses.

We would be grateful if you forward our comments to the members of the Committee in time to allow full consideration of our comments at the April meeting.

Sincerely,

Stuart M. Gerson
Assistant Attorney General

COMMENTS ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROPOSED REVISIONS TO RULE 4(D)(SERVICE OF PROCESS ON INDIVIDUALS IN FOREIGN STATES), AND TO RULE 26(A)(5)(EXTRATERRITORIAL DISCOVERY)

Rule 4(d) and (f)

The Department of Justice and the State Department are opposed to the revised rule 4(d) and certain portions of Rule 4(f), which in tandem provide for methods of service on individuals in foreign states, as unnecessary and potentially in conflict with notions of foreign judicial sovereignty and the Hague Service Convention.

Current Rule 4(e) and (i)(1) regulate service in foreign countries. Service of process may be made on a party in a foreign country: 1) in a manner prescribed by the country in which service is to be made; 2) by letter of request; 3) by personal delivery; 4) by receipted mail addressed and dispatched by the clerk of court; 5) "as directed by order" of the United States court in which the action is filed. In addition, service may comply with a method contained in a statute or rule of state court, or contained in an order served in lieu of summons.

In the proposed revisions, issues of service in foreign countries are primarily affected by proposed Rules 4(d) and 4(f). Proposed Rule 4(d) provides for a waiver of service of summons, regardless of the location of the party to be served, and shifts costs of service to a party which declines to waive formal service. Proposed Rule 4(f) provides that, in the absence of waiver of service, service may be effected by

1) internationally agreed means;
2) in the absence of an internationally agreed means of service, or if the agreement permits,
a) by service in a manner prescribed by the country in which service is to be made;
b) by letter of request;
c) by personal delivery, unless prohibited by the law of the foreign country;
d) by receipted mail addressed and dispatched by the clerk of court, unless prohibited by the law of the foreign country;
e) by diplomatic service, if authorized by the Department of State and not prohibited by the law of the foreign country;
3) by means directed by the U.S. court, even if those means violate the law of the foreign country in which service is to be made, if the court finds that internationally agreed means or the law of the foreign country "will not provide a lawful means by which service can be effected" or in cases of urgency, will not permit service within the time required by the circumstances.

According to the Reporter's notes, the purposes of the revision and the objectives of proposed Rule 4(d) are to save costs and to foster cooperation among adversaries and counsel. However, current methods of service are generally inexpensive, if they involve costs at all. There is thus no demonstrated need for this revision. Furthermore, the procedures contemplated in proposed Rules 4(d) and 4(f)(3) run counter to principles of foreign judicial sovereignty followed by other countries, including many of our treaty partners, and thus may become a source of friction rather than cooperation among adversaries, counsel, and the respective governments. Indeed, the Department of State has already received several diplomatic notes objecting to features of the proposed revisions relating to Rules 4, 26, and 28.

Currently, a range of methods is available to effect service abroad. The Hague Service Convention, which is in force in 39 countries, provides service free of charge between parties within the jurisdiction of member states. Service abroad through the provisions of other treaties, such as the Inter-American Convention on Letters Rogatory, is not costly. Furthermore, many countries currently allow service by mail. Occasionally, service abroad may be expensive where process servers are required. However, this is the exception and not the rule.

The proposed revision to Rule 4(d) creates a purported duty, enforceable in United States courts, requiring a foreign entity to save costs of service for a plaintiff in the United States -- even if, for instance, the state where the foreign entity is to be served prohibits such waivers, or would as a matter of policy refuse to recognize the jurisdiction of the United States court over the action. Indeed, over the years some countries have expressed their objections, either to service by mail in general or to the proposed waiver system. Despite the disclaimer in the Notes of the Advisory Committee, foreign governments may well view, as an offense to their judicial sovereignty, a request for consent to an act otherwise proscribed by the domestic sovereign, with sanctions threatened in the courts of the other sovereign if consent is withheld.

In addition, the proposed "waiver of service" provision conflicts with the Hague Service Convention, which has mandatory effect where applicable, and which provides the only means for effecting service of process between parties to the Convention. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S.Ct. 2104 (1988). As the Supreme Court recognized in Schlunk, the Hague Service Convention was intended "to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad." 108 S.Ct. at 2107. The Convention achieves these purposes by the creation of a central authority in each signatory state to assist in the service of

process. The central authority itself serves or arranges to have served "by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory." Article 5, paragraph 1, sub-paragraph a. A United States provision authorizing "waiver of service" thus does not conform to formal service of process which was intended by the Hague Service Convention. For example, the United Kingdom has submitted a diplomatic note to the State Department objecting to the "waiver of service" provision on the grounds that it is inconsistent with its notions of judicial sovereignty.

Indeed, under the Convention the proposed "waiver of service" may be a legal nullity. The Convention's negotiating history shows that transmissions abroad that do not culminate in service are not included within the scope of the treaty. 108 S.Ct. at 2109. Non-compliance with the Hague Service Convention can have serious adverse consequences for American litigants, even if the method of service they employ complies with the requirements of United States municipal law. The "waiver of service" provision will mislead litigants into believing that proper service has been made for the purpose of enforcing resulting United States judgments in foreign jurisdictions. As the Court warned in Schlunk, the American plaintiff may later determine in an enforcement action in the foreign country where the defendant was served that the "waiver of service" provision failed to conform to the forum's municipal law and that the Convention provided the exclusive means of valid service. Thus, parties who follow the "waiver of service" rule may find it difficult, if not impossible, to obtain enforcement of their judgments abroad. See Schlunk at 2111.

Proposed Rule 4(f)(3) allows the court to authorize service, when circumstances justify, by means "not authorized by international agreement or not consistent with the law of a foreign country." The present counterpart to this revised rule, Rule 4(i)(1)(E), generally provides for service by alternate means, "as directed by order of the court."

We prefer current Rule 4(i)(1)(E) to its proposed replacement, revised Rule 4(f)(3). The Advisory Committee Notes identify the following types of problems as the justification for proposed Rule 4(f)(3): exceptional service in urgent circumstances, failure of a foreign state's Central Authority to effect service within the six-month period provided by the Hague Convention, and refusal of a Central Authority to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States.

We are opposed to the revised rule as unnecessary in light of the flexibility of the present rule and mechanisms in the Hague Service Convention to resolve these problems. Article 15 of the Convention allows a judge to order provisional or

protective measures in cases of urgency, and allows a case to proceed to judgment if service by Convention methods has not been effected in six months. Under Article 13 of the Convention, a state may refuse to comply with a request for service only if compliance would infringe the sovereignty or security of the state. Article 13 specifically states that a Central Authority may not refuse service solely on the ground that the receiving authority claims exclusive subject-matter jurisdiction over the action or that the internal law of the receiving state would not permit the action upon which the application for service is based. Finally, Article 14 of the Convention states that any difficulties in connection with the transmission of judicial documents for service shall be settled through diplomatic channels. In fact, some of the problems outlined in the Advisory Committee Notes, such as refusal of certain foreign central authorities to serve complaints with punitive damage counts, have been satisfactorily resolved as a result of meetings of representatives of states party to the Hague Service Convention under the auspices of the Hague Conference on Private International Law.

Conversely, with respect to non-Convention states, the Department views as unwise the approach in the revised rule to set fixed conditions upon the authority of federal courts to order service in derogation of foreign law. It is preferable to retain the flexibility of the present rules, which authorize the court to look closely at the particular circumstances of each case in determining the propriety of an order of service by extraordinary means. There is the further problem that the proposed revision will encourage courts to authorize service by means which violate foreign law. This places litigants at a risk of which they might not be aware that foreign courts will refuse to recognize any judgment based on service of process not in compliance with the rules of the foreign state.

Finally, we join with the Department of State in strongly opposing proposed Rule 4(f)(2)(C)(iii). Department of State regulations strictly prohibit Foreign Service officers from serving civil process or similar materials on behalf of private litigants, and we would not wish to see incorporated into the Federal Rules anything that might, however indirectly, encourage such procedures. See 22 C.F.R. 92.85, 7 Foreign Affairs Manual 960a. Nor would the Department of State authorize such service as an exception to policy, except possibly in truly extraordinary circumstances where a governmental interest of the United States would arguably be involved. Moreover, service of civil process is not generally recognized as a diplomatic or consular function, and some states would have strong objections if United States Foreign Service Officers were to engage in such practices. Cf., [1961] Vienna Convention on Diplomatic Relations; [1963] Vienna Convention on Consular Relations, Art. 5(j).

Rule 26 (a)(5)

We are opposed to the revised Rule 26(a)(5) as an unwarranted departure from current law in this area. The proposed revision also invites misapplication and abuse.

Current Rule 26(a) sets forth the methods of discovery. The Rule makes no distinction as to whether the discovery sought is domestic or foreign based. The proposed revision to Rule 26(a) provides that "discovery at a place within a country having a treaty with the United States applicable to such discovery shall be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty."

As stated in the Department's earlier comments on this revision, our main concern was that application of the proposed rule did not take into account the United States' position which was upheld in the Supreme Court's decision in In re Societe Nationale Industrielle Aerospatiale, 107 S.Ct. 2542, 2557-2568 (1987). In Aerospatiale the majority of the Court held that the Hague Evidence Convention did not provide exclusive or mandatory procedures for obtaining discovery located in a foreign signatory's territory, and that the district courts retained the jurisdiction to order discovery under the Federal Rules of Civil Procedure. Id. at 2554. The Aerospatiale court rejected "as unwise" an invitation to announce a general rule that would have required first resort to Convention procedures whenever discovery was sought from a foreign litigant. Id. at 2555. Instead, the Court viewed Hague Evidence Convention procedures as one of the options to be considered by the trial court in its management of discovery. Finally, the Aerospatiale court endorsed a particularized comity analysis, scrutinizing in each case such factors as the respective interests of the foreign nation and of the United States. Id. at 2555-2556.

This proposed rule seeks to revise the majority holding in Aerospatiale, a case which the United States views as correctly decided, by displacing the particularized comity analysis in certain circumstances and requiring that Treaty methods are mandatory in those circumstances unless found to be "inadequate or inequitable." However, no justification is presented for embracing a rule rejected by the Supreme Court. The Department believes that, in dealing with areas such as this in which discovery procedures and international concerns intersect, the Aerospatiale court acted wisely in prescribing an analysis for the district courts which focuses on the particular facts of each case.

Insofar as the proposed revision may be read as embodying a "first use" policy requiring exhaustion of the procedures of the

Hague Evidence Convention when evidence is sought at a place within the territory of a state party to the Convention, the revision adopts a position also rejected by Aerospatiale, at p. 2555, and which contravenes a long-standing position of the Department of Justice. A rule of first recourse to Convention methods establishes the wrong balance in seeking to reconcile the fundamental interest of U.S. litigants in "the just, speedy, and inexpensive determination of litigation" with the legitimate concern to avoid unnecessary irritants in our relations with other governments. The approach adopted by the Rules Advisory Committee gives too little weight to the additional time, expense, and uncertainty imposed by international discovery methods. At the same time, it cuts too broadly in the effort to deal with the small proportion of cases in which routine discovery methods may produce friction in foreign relations.

Finally, proposed Rule 26(a) would sanction the use of discovery methods that may violate the laws of another country (See Advisory Committee Notes). While this is arguably permissible under U.S. law, it would create friction and misunderstanding in Hague Convention states which follow strict notions of foreign judicial sovereignty, such as Germany. In fact, such intrusive acts could lead to the possibility of criminal prosecution and penalties under the laws of some countries, such a Switzerland. In this connection, two countries (Switzerland and the United Kingdom) have filed diplomatic notes with the State Department objecting to the proposed revision of Rule 26(a). While the Advisory Committee Notes reveal that the Committee is properly concerned about the implications of this position and has counseled caution to the district courts before such a step is taken, the Department believes that the Committee position represents a misinterpretation of Aerospatiale. Discovery activities in contravention of the law of a foreign state within whose territory the discovery occurs would be "abusive" within the Supreme Court's comity analysis. Id. at 2557. Indeed, the Supreme Court has specifically cautioned the lower courts, when considering foreign discovery requests, "to take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. We do not articulate specific rules to guide this delicate task of adjudication." Id. In fact, such potential violations would factor into the comity test in the form of objections to be raised by the party resisting discovery. United States courts have authority to impose sanctions for non-compliance with discovery orders. Societe Internationale v. Rogers, 357 U.S. 197 (1958). Such sanctions can help rectify inequities that American litigants may experience as a result of restrictive discovery practices in foreign jurisdictions, and can do so without offending foreign judicial sovereignty. It would, however, be improper for a United States court to order that depositions, inspections of

property, or other judicial acts take place on foreign soil which are violative of the law of the foreign state. This would be contrary to the Hague Evidence Convention, interfere with the foreign judicial sovereignty of both Treaty and non-Treaty countries, complicate foreign relations, and subject unwary American litigants either to unnecessary expense when acting upon U.S. judicial orders which are not recognized in foreign states, or even to penal sanctions under the laws of some countries.

The Department of State has requested us to state that it also does not support amended Rule 26 in its present form. In the State Department's view, the proposed amended Rule makes an apparent distinction between discovery "at a place within a country having a treaty with the United States applicable to such discovery" and evidence to be produced within the United States. However, the particularized comity analysis required by the Supreme Court in Aerospatiale is applicable to all cases where evidence is to be produced that is located in another country party with the United States to a treaty setting out procedures for discovery, whether that evidence is to be made available in the foreign country or in the United States. In this connection the Court pointed out that the text of the Hague Evidence Convention "draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves; nor does it purport to draw any sharp line between evidence that is 'abroad' and evidence that is within the control of a party subject to the jurisdiction of the requesting court." Aerospatiale at p. 2554.

QUERY= WHAT REAL VALUE TO THE TREATY UNDER THAT CIRCUMSTANCE? VIEW

COMMITTEE PROPOSED CHANGE: FIRST USE UNLESS [illegible] RATHER THAN BASED ON FAIRNESS ANALYSIS CASE BY CASE

Among other things, the Department of State believes that amended Rule 26 would create confusion as to the need, consistent with the decision of the Supreme Court in the Aerospatiale case, for a particularized analysis in all cases where a treaty applies with regard to discovery of evidence located in another party country. Moreover, the State Department is concerned that the exception in the proposed revised Rule 26 when treaty methods are deemed "inadequate or inequitable" might supplant the particularized analysis in such cases and result in failure by the courts to give due consideration to the interests of the foreign nation involved.

For the foregoing reasons, the Department of Justice considers the proposed revision to Rule 26(a) to be ill-advised. The current rule, read in conjunction with the Supreme Court decision in Aerospatiale, accommodates both the legitimate concerns of the parties and of the district court in adequate, timely discovery, and the interests of the states in maintaining

due respect for national sovereignty. The current rule should be preserved.[1]

[1] The objections raised by the United States to the proposed revision to Rule 26(a) apply to the proposed revision to Rule 28 as well, which incorporates the proposed revisions to Rule 26(a) in specifying persons before whom depositions may be taken in foreign countries.

L/PIL Doc.
AC 44/HC/3

NOTE NO: 63

Her Britannic Majesty's Embassy present their compliments to the Department of State and have the honour to refer to the Proposed Amendments To The Federal Rules of Civil Procedure that were transmitted on November 19, 1990 to the United States Supreme Court by the Administrative Office of the United States Courts, by direction of the Judicial Conference. These proposed amendments are before the Supreme Court for approval and transmittal to the Congress.

The British Government have a substantial concern with respect to a number of the proposed amendments insofar as they address such elements of U.S. federal court procedure as the service of the summons and complaint on a defendant outside the United States, the assertion of personal jurisdiction by United States courts over such foreign defendants, and the conduct of discovery proceedings with respect to persons outside the United States. The proposed rule changes also bear on important matters embraced by international conventions to which both the United States and the United Kingdom are parties, in particular the Convention on the Service Abroad of Judicial and Extra- judicial Documents in Civil or Commercial Matters (Hague Service Convention) and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention).

Her Majesty's Government request the Department of State to transmit to the Supreme Court in an appropriate fashion the views expressed in this Note.

A draft of some proposed revisions to the Federal Rules of Civil Procedure was published for comment in the United States in October, 1989. The British Government submitted comments on that draft to the Judicial Conference. The draft of proposed amendments which has been transmitted to the Supreme Court is different from this prior draft in significant respects.

The British Government's comments on the proposed amendments are as follows:

(1) The proposed new paragraph (d)(2) of Rule 4 would impose on a defendant who has received notice of the commencement of the action a duty to waive service of the summons. Inasmuch as this procedure, which would coerce a waiver of service of the summons, would be equally applicable to United Kingdom citizens resident in the United Kingdom, the British Government would object to it. The waiver system would conflict with the Hague Service Convention, and it would be oppressive, since agreement would be elicited under the threat of the proposed sanction in costs. This being so, the British Government does not see how the proposed system can be termed consensual (Advisory Committee Notes, p. 30). We believe that the waiver procedure would be objectionable to many other foreign governments as well.

The Hague Service Convention allows judicial documents to be sent directly to persons abroad only where the State of destination does not object. However, the British Government would object to the proposed waiver system for commencing proceedings against those resident in the United Kingdom. The proposed system would, moreover, run contrary to the public policy of the United Kingdom, which is that litigation affecting persons resident in the United Kingdom and commenced in foreign jurisdictions should be properly documented in public form. In the British Government's view, the fact that this device "should be useful in dealing with ... those who are outside the United States and can be actually served only at substantial and unnecessary expense" (Advisory Committee Notes, p. 29) is not in itself sufficient justification. This is a matter which should be discussed in the Hague Conference itself. The British Government therefore urge that the proposed waiver of service provision be dropped at least as to service outside the United States of those persons who are citizens and residents of a nation which is a party to the Hague Service Convention.

There is another, more specific, concern prompted by proposed new subparagraph (j)(1) of Rule 4 providing that service upon a foreign state or political subdivision thereof shall be effected pursuant to 28 U.S.C. § 1608 (a provision of the Foreign Sovereign Immunities Act). The Advisory Committee Note explains that the waiver-of-service provision is inapplicable to actions against governments served pursuant to this provision (p. 37). However, the thrust of the revision appears to be to make the waiver-of-service provision applicable to foreign government "instrumentalities and agencies" which are distinguished from "foreign states or political subdivisions." This distinction is contrary to the evident intention in the Foreign Sovereign Immunities Act which is to give special consideration to service on all foreign governments and their entities, regardless of whether those entities are separate legal persons or not.

(2) The proposed revision of Rule 26, which contains general provisions governing discovery, purports to reflect a policy of comity and of balanced accommodation to international agreements bearing on methods of discovery, including the Hague Evidence Convention. (Advisory Committee Notes, pp. 57-8). While these expressions in the Committee Notes supporting principles of comity and recourse to the procedures of the international agreements are appropriate and commendable, the scope apparently given to these principles in proposed paragraph (a) of Rule 26 and the accompanying Notes is unduly narrow and inadequate.

The proposed new Rule 26(a) would provide that a United States district court may authorize discovery within a country having a treaty with the United States applicable to such discovery by methods other than those authorized by the treaty,

if the court finds the treaty methods "inadequate or inequitable." In this regard, the court could even authorize the use of discovery methods that violate the laws of the other country. (Advisory Committee Notes, p. 58). Moreover, the Advisory Committee Notes further declare that the rule of comity stated in this Rule does not apply either to (a) discovery of documents and things from parties who are subject to the court's personal jurisdiction, and who may be required to produce such materials at the place of trial, or to (b) the taking of depositions of parties or persons controlled by parties who may be deposed within the United States. The Notes then state that, nonetheless, comity "may" be employed in matters to which the requirement of the rule does not apply. (Advisory Committee Notes, p. 57).

As has been observed, the intended approach of the drafters, while somewhat confusing, appears to be to enable a U.S. judge to disregard the discovery methods provided by the Hague Evidence Convention and applicable foreign law and order discovery to take place in a foreign country by another method, even if that method violates the law of the other country. The British Government submit that such an approach is inconsistent with the Hague Evidence Convention and principles of comity generally. It is likely to lead to friction and confrontation if U.S. parties attempt to conduct discovery in countries contrary to the law of those countries.

The British Government are also surprised and disappointed by the Advisory committee's statement that comity "may" be employed with respect to discovery from parties who are subject to the U.S. court's personal jurisdiction. The British Government note, in this regard, the Supreme Court's decision in the Aerospatiale case, 482 U.S. 522 (1987), although, with respect, it does not necessarily accept that this decision correctly represents the position in international law. The majority of the Supreme Court expressed very clearly the view that comity concerns must be considered even where the discovery is sought from a foreign litigant that is subject to the jurisdiction of the U.S. court. 482 U.S. at 540-46. The minority of the Court, in that decision, urged a position which would give even greater weight in international discovery matters to compliance with international agreements and to principles of comity. 482 U.S. at 547-58.

Accordingly, the British Government submit that the proposed Rule 26(a), when read in the context of the accompanying Advisory Committee Notes, is inconsistent with international law and comity, as well as with the pertinent decisions of the Supreme Court.

(3) The proposed new Rule 28(b) addresses the taking of depositions in foreign countries. It would make determination of the applicable procedure, including use of the Hague Evidence Convention, subject to the provisions of the new Rule 26(a). This means presumably that the U.S. court could decide that compliance with treaty procedures would be "inadequate or inequitable" and hence need not be observed. In sum, a U.S. court might order the holding of a deposition in a foreign country even if doing so were in violation of that country's law or policy. (Advisory Committee Notes, p. 58). The British Government would consider such an approach to be inconsistent with international law and comity and unacceptable.

As noted, Her Majesty's Government request the Department of State to transmit to the Supreme Court in an appropriate fashion the views expressed in this Note. Her Majesty's Government would appreciate the Supreme Court's consideration of these points when the Court reviews the draft of the proposed Rule amendments.

The British Government may comment on this matter in public, making the points indicated above, if they consider it appropriate.

Her Britannic Majesty's Embassy avail themselves of this opportunity to renew to the Department of State the assurance of their highest consideration.

BRITISH EMBASSY
WASHINGTON DC

20 FEBRUARY 1991

EMBASSY OF SWITZERLAND

The Embassy of Switzerland presents its compliments to the Department of State and has the honor to refer to the Proposed Amendments to the Federal Rules of Civil Procedure transmitted to the United States Supreme Court on November 19, 1990 by the Administrative Office of the United States Court at the direction of the Judicial Conference.

The Government of Switzerland desires to express its concerns about the proposed amendments to Rule 26 subparagraph (a), and the Committee Notes thereto, which relate to the procedures to be followed by U.S. courts in obtaining evidence from foreign countries.

The Government of Switzerland reiterates its general view, as expressed on previous occasions, that the use of international judicial assistance should be encouraged in order to avoid violation of international law, in particular intrusions into the sovereignty of foreign nations. In this regard, the Government of Switzerland objects to two particular aspects of the proposed amendments.

First, the proposed Committee Notes state that, under Rule 26 (a), the rule of comity will not apply where discovery is sought from a party over whom a U.S. court claims personal jurisdiction. In other words, United States courts would be directed to seek evidence by the use of unilateral procedures regardless of commitments made by the United States under international agreements such as the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. This position would be contrary to that agreed to by the United States through its participation in the Special Commission of the Hague Conference on Private International Law (April 17-20, 1989), which concluded that "all contracting States ... must give priority to the procedures laid out by the (Hague Evidence) Convention when requesting evidence located abroad". Furthermore, this position would conflict with the statement of the United States

Department of State
Washington, D.C. 20520

Supreme Court in Societe Nationale Industrielle Aerospatiale v. United States Distric Court for the Southern District of Iowa that the Hague Evidence Convention draws no distinction between evidence obtained from parties subject to the jurisdiction of the requesting court and parties who are not.

Second, the Government of Switzerland is also concerned by the express statement in the Committee Notes that a United States court may authorize the use in a foreign country of discovery methods that may violate the laws of that country. This statement, if adopted, would be contrary to international law and represent a virtual repudiation of the Hague Evidence Convention. In particular, the taking of evidence on behalf of foreign interests in Switzerland without authorization is a violation of Article 271 of the Swiss Penal Code. The enactment into law of the proposed amendments will not be a defense to prosecutions for violations of Article 271.

The foregoing objections of the Government of Switzerland are based on a concern that the proposed amendments would codify procedures under which United States courts and litigants may feel compelled to seek evidence in Switzerland without the permission of the Government of Switzerland. Adoption of these amendments, therefore, may increase the number and extent of discovery-related conflicts between the United States and Switzerland, and consequently interfere with the long-successful pattern of friendly cooperation between the two nations in resolving legal disputes.

The Government of Switzerland requests the Department of State to transmit to the United States Supreme Court in appropriate fashion the views expressed herein and would appreciate their consideration by the United States Supreme Court when it reviews the proposed amendments.

The Embassy of Switzerland avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

Washington, D.C.,
October 10, 1991

EMBASSY OF SWITZERLAND

Aide-Memoire

With reference to the proposed amendments to The Federal Rules of Civil Procedure (that were transmitted on 19 November, 1990 to the United States Supreme Court by the Administrative Office of the United States Courts, by direction of the Judicial Conference) the Irish authorities are concerned as to the impact of some of the proposed amendments on Irish persons, whether individuals or bodies corporate, resident in Ireland. The Embassy would be grateful therefore if the Department could clarify that:

1. the new Rule 4(d)(2), concerning: "Waiver of service; Duty to save costs of service; request to waive.", does not mean that an Irish person resident in Ireland can be requested to waive service on receipt of a notice and request dispatched by mail (or other means including faxes); nor does it mean that an Irish person resident in Ireland would be penalised in a subsequent award as to costs in a U.S. Court because he had not agreed to the initial request for waiver of service;

2. it is not the intention of the proposed amendments to the Federal Rules to side step the requirement that litigation affecting persons resident in Ireland and initiated in foreign jurisdictions should be properly documented in public form;

3. when it is stated in the Committee Notes that "the court is not precluded by the rule from authorising, to assure that discovery is adequate and equitable, the use of discovery methods that may violate the laws of another country", it is not intended that the US Court would "authorise" discoveries in Ireland in circumstances where the execution of the US Court's Order might be in breach or violation of Irish law;

4. Rule 28(b), subject to the provisions of Rule 26(a), does not mean that a US Court would order the taking of a deposition in Ireland in circumstances where the execution of the US Court's Order might be in breach or violation of Irish law.

REPORT TO THE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FROM THE

SUBCOMMITTEE ON LONG RANGE PLANNING

JUNE 1992

Introduction. This is the first biannual Report from the Subcommittee on Long Range Planning. For the most part, this Report is informational, with two purposes. First, the Subcommittee will identify the long range projects now under consideration by the several Advisory Committees. Second, the Subcommittee will describe its organizational efforts and some preliminary ideas of its own undertaking. The Subcommittee has only one action item for consideration by the Standing Committee and, for the sake of convenience, it is placed first.

Action Item. The Subcommittee recommends that the Standing committee refer Judge Schwarzer's idea of amending the Federal Rules of Civil Procedure to authorize State-Federal trial court coordination of complex litigation to the Advisory Committee on Civil Rules for study and some recommendation.

This recommendation requires some brief background. Judge William W. Schwarzer, U.S. District Judge for the Northern District of California and currently Director of the Federal Judicial Center, presented a co-authored paper at the National Conference on State-Federal Judicial Relationships, held in April 1992. The paper studied the phenomenon of the so-called "mass litigation," in which numerous lawsuits arise from a single event or course of conduct and which often results in different courts entertaining a multitude of claims involving the same claims and the same parties. The focus of the study was on the problems that arise when there are parallel proceedings in state and federal trial courts. The paper chronicled several mass litigations and described the state-federal efforts at coordination, such as calendar coordination, coordinated discovery, joint settlement efforts, joint motions hearings, and joint trials. The authors sought to analyze the implications of such coordination and to assess its advantages and disadvantages. They conclude that the Federal Rules of Civil Procedure might be amended to give explicit authorization for this coordination. The authors suggest that this could be done generally or by a more specific and elaborate system of procedures spelled out in a new rule. A summary of the paper is attached as APPENDIX A.

The individual members of the Subcommittee do not endorse this general proposal or any particular amendment. However, your Subcommittee deems this proposal worthy of Standing Committee

referral to the Advisory Committee on Civil Rules for study and some recommendation back.

The remaining items in this Report are informational items only, although the Subcommittee would welcome your suggestions and comments.

Long range matters pending before the Standing Committee. As part of its recent reorganization, the Standing Committee has created both the Subcommittee on Long Range Planning and the Subcommittee on Style. The Subcommittee on Style, chaired by Professor Wright, has hired Mr. Bryan Garner as a Consultant. This Subcommittee is now beginning its effort to assure that the rules be grammatically and stylistically correct and as clear and as consistent as the subject matter may permit.

A number of other pending proposals may be described as long range. The Standing Committee currently is considering whether there is a need for a separate new advisory committee on the Rules of Evidence. This is an "action item" for the June 1992 meeting of the Standing Committee; the Subcommittee members will record their individual positions on the issue at the appropriate time. The Local Rules Project continues to strive for implementation of its final report. As the members of the Standing Committee are aware, during his tenure Chairman Keeton has circulated several memoranda suggesting new directions for rulemaking. These have been lodged with the Subcommittee and Dean Coquillette, Reporter to the Standing Committee, for further consideration. One example is the suggestion that the rules be renumbered in a uniform numbering system. While a draft of this report was being circulated, the renumbering idea became linked with a proposal for the wholesale editing of the Civil Rules for style. In May, Chairman Keeton appointed a new Subcommittee on Substantive and Numerical Integration of the Federal Rules of Procedure. The Subcommittee on Long Range Planning endorses this effort.

Long range matters pending before the Advisory Committee on Civil Rules. The Advisory Committee on Civil Rules is completing substantial revisions of Rules 4, 54, 56, and the revisions on discovery and opinion testimony for a 1993 "package." These revisions are, at once, the normal output of the rulemaking process and long range proposals. Rule 4 has been in the works for nine years; Rule 56 for eight years; Rule 54 for six years; disclosure for four years; Rule 11 and opinion testimony for three years. The only other rule currently under active study is Rule 23. We note that the normal turnover in the Standing Committee and the Advisory Committee -- which results in setting new priorities -- is shorter than these periods of consideration. From the point of view of the Advisory Committee, the Standing Committee generates helpful suggestions for study at points of overlap among the sets of rules.

Having celebrated the fiftieth anniversary of the civil rules in 1988, some have suggested it is time for a complete overhaul of the entire set of rules. If this were to be undertaken, an introductory question would be whether this should be done within the existing framework of rulemaking, or whether the task should be given over to an ad hoc committee, broadly representative of the bar, that would report back either to the Judicial Conference or to the Supreme Court directly, as was done in 1938. The considered opinion of Professor Carrington, Reporter to the Advisory Committee on Civil Rules, is that the rules "deserve a rest."

Long range matters pending before the Advisory Committee on Criminal Rules. The Advisory Committee on Criminal Rules has several proposals out for public comment and several other particular proposals under study. Three proposals under consideration have long term implications. At its January 1992 meeting, the Standing Committee considered a report from its Subcommittee on Style about the possibility of somehow making technical, nonsubstantive amendments to the rules without the necessity of seeking Supreme Court and Congressional approval. The Advisory Committee on Criminal Rules, and the other Advisory Committees, are considering this matter. Second, the Advisory Committee received an A.B.A. Resolution asking it to address the problems of the so-called "megatrial," characterized by a multiplicity of counts and multiple defendants and defense counsel, and arguably requiring special procedures. The matter was referred to the Standing Committee, which opted to postpone, at least for the present, any consideration of national rules on this subject. Third, the Advisory Committee is continuing its efforts to implement the Local Rules Project Report by developing amendments to Rule 57.

Long range matters pending before the Advisory Committee on Appellate Rules. The Advisory Committee on Appellate Rules has several long range proposals under consideration. Several of these originated in the Local Rules Project and the Advisory Committee's follow-on effort continues apace. The Advisory Committee is drafting a new appellate rule permitting technical, nonsubstantive amendments to the rules, without the necessity for seeking Supreme Court and Congressional approval. Finally, the Advisory Committee is considering cautiously and with care how best, if at all, to exercise its new authority under the 1990 amendment to the Rules Enabling Act, 28 U.S.C. §2072, to define the "final judgment" requirement by rule.

Long range matters pending before the Advisory Committee on Bankruptcy Rules. The work of the Advisory Committee on Bankruptcy Rules is largely dictated by statutory amendments to the Bankruptcy Code. For example, Congress currently is considering adding a new Chapter 10 to the Code to govern reorganization of small businesses. If that legislation passes,

the Advisory Committee will propose necessary new rules and amendments. Congress also is considering the creation of a commission to study and recommend further revisions in the bankruptcy laws. The Advisory Committee will continue to monitor congressional activity.

The Advisory Committee has established a subcommittee on technology to study and consider amendments to the Bankruptcy Rules to implement technological advances in the bankruptcy courts. Long range proposals will seek to implement new procedures using state-of-the-art technology. Eventually, this may culminate in the installation of a digitalized information transfer process in the Bankruptcy system. An important first step in this process is the proposed new Rule 9036, currently out for public comment, that will authorize electronic distribution of certain information from a clerk's office to consenting creditors without using paper documents.

Liaison with the Long Range Planning Committee of the Judicial Conference. At its January 1992 meeting, the Standing Committee approved the draft prepared by the Subcommittee entitled, A Proposal for Long Range Planning for the Rules Committees of the Judicial Conference. This Report was transmitted to the Long Range Planning Committee of the Judicial Conference by the Chairman of the Standing Committee. Judge Wilfred Feinberg, Circuit Judge on the United States Court of Appeals for the Second Circuit, has been assigned as the liaison member of that Committee to the Standing Committee. Professor Baker, who chairs the Subcommittee, has been appointed as the liaison member of the Standing Committee.

Chairman Keeton represented the Standing Committee at the Long Range Planning Seminar, sponsored by the Long Range Planning Committee of the Judicial Conference, held in March 1992. The Seminar convened all the chairs of the committees of the Judicial Conference to focus on long range planning in the third branch. One theme of special relevance to rulemaking was that preliminary surveys conducted by the FJC indicate that federal trial judges agree that there is a need for stronger judicial management of trials and pretrial proceedings. Chairman Keeton's report on the Seminar is attached as APPENDIX B.

Matters currently under consideration by the Subcommittee. There are several matters currently under consideration by the Subcommittee. These may be simply listed here. Parentheticals indicate the Subcommittee member(s) with primary responsibility.

* The Committee on Automation and Technology of the Judicial Conference is preparing a pilot study of electronic document processing in federal court to test the thesis of a "paperless court." The Committee's Chairman, District Judge J. Owen Forrester, has suggested that rule changes likely

will be necessary. That effort is being monitored. (Keeton)

* Several environmental organizations have requested that the Standing Committee allow the filing of legal pleadings on double-sided paper and require use of "unbleached" paper to reduce the amount of paper as well as the environmental impact of the paperwork in federal courts. The Subcommittee has requested some assessment of these ideas from the Administrative Office of U.S. Courts. (Keeton)

* The Final Report of the Federal Courts Study Committee and its extensive Working Papers will be reviewed for potential long range rulemakng ideas. (Easterbrook & Baker)

* The Reporter to the Standing Committee, Dean Coquillette, and Professor Mary P. Squiers are supervising the creation and maintenance of a bibliography of the secondary literature on federal procedure. This ongoing bibliography will include the various studies of the FJC and other similar agencies, as well as books and articles. It will be organized along the same lines as the different sets of rules. The Subcommittee will review the bibliography to identify long range proposals for rulemaking. (Coquillette, Squiers, & Baker)

* The numerous provocative memoranda of Chairman Keeton, issued since he joined the Standing Committee, are being culled for long range proposals. (Keeton & Baker)

* How courts handle scientific, technical, and statistical evidence and procedures has been the object of recent consideration by the Federal Courts Study Committee and the Carnegie Commission. (Easterbrook)

* The controversial and controverted Report from the President's Council on Competitiveness, entitled Agenda for Civil Justice Reform in America (August 1991), contains many recommendations for procedural reforms. The Report and supporting documents are being studied. (Easterbrook)

* The Subcommittee is exploring the need to reexamine the organization and procedures that are followed in federal court rulemaking. This includes coordination within the Judicial Conference and communication with Congress. (Peterson)

* The Civil Justice Reform Act of 1990, Pub. L. No. 101-640, 104 State. 5089, harkened a new era of experimentation with court procedures and alternative dispute resolution. Congress initiated a nationwide experiment aimed at reducing

expense and delay in civil litigation. See generally Carl Tobias, Judicial Oversight of Civil Justice Reform, 139 F.R.D. 49 (1992). One of the legislative and judicial expectations is that particular procedural innovations might eventually result in rule changes. Reform proposals likely will emerge from the reports and evaluations that are mandated in the statute. The Subcommittee is considering how best to go about monitoring these developments. (Baker & Coquillette)

Respectfully submitted,

Subcommittee on Long Range Planning
Thomas E. Baker, Chair
Frank H. Easterbrook
Edwin J. Peterson

Robert E. Keeton, ex officio
Daniel R. Coquillette, ex officio

APPENDIX A

William W Schwarzer
Nancy E. Weiss
Alan Hirsch

JUDICIAL FEDERALISM IN ACTION: COORDINATION OF LITIGATION IN STATE AND FEDERAL COURTS (SUMMARY)

Numerous lawsuits often arise from a single event or course of conduct, the use of a product, or the presence of a substance. Such "mass litigation" can lead to different courts entertaining a multitude of claims involving identical or nearly identical issues and many of the same parties. Mass litigation often results in great expense and delay, duplicative proceedings, and inconsistent results. These problems are exacerbated when the lawsuits span the state and federal court systems. In such situations, coordination between the state and federal courts can promote economy, efficiency, and fairness. Formal legislative proposals to effect intersystem aggregation have been suggested but not enacted. However, little attention has been given to the potential of *informal* arrangements to coordinate related litigation between state and federal judges. The purpose of this paper is to explore the potential benefits and limitations of informal coordination under existing law of litigation pending in the two systems, and to assist judges presiding over such litigation in developing coordination arrangements.

We studied several pieces of mass litigation involving intersystem coordination, interviewing the judges and reviewing relevant documents. These cases involved calendar coordination, coordinated discovery, joint settlement efforts, and joint motions hearings. Some judges even contemplated joint state-federal trials. We collected information about how judges initiated coordination and the different methods they implemented at each stage of the litigation process. We asked the judges which procedures proved most successful and how difficulties in the process were resolved. Based on this information, we analyzed the

implications of state-federal coordination and its advantages and disadvantages.

Most judges found that discovery creates the greatest need and presents the greatest opportunity for coordination. Coordinated scheduling of discovery enables lawyers to prepare simultaneously for discovery in both courts. Judges can share information, discuss rulings, and consider sharing resources such as special masters and document depositories. Courts and attorneys can also develop joint state-federal discovery plans, giving common structure to the process and facilitating coordination. Some judges have conducted joint hearings on discovery motions, with both judges presiding.

Even in the absence of a common discovery schedule or plan, courts can provide that the product of discovery in one case may be used in companion cases. Courts may simply accept discovery initially developed for other cases, or they may arrange for joint depositions, interrogatories, and document and physical evidence retention plans.

Differences in state and federal procedural and evidentiary rules have not impeded joint discovery. Those differences are generally minor. Even when they are not, coordination has been achieved by glossing over differences on the theory that what goes on in discovery need not affect admissibility at trial. In some instances, courts have applied federal law (which is generally more liberal than state law). At other times, one court has completely deferred to the other, allowing it to conduct all discovery proceedings and apply its own rules and procedures. Another approach has been to have the federal court resolve issues raised by federal case attorneys and the state court resolve issues raised by state case attorneys. In addition, attorneys can be encouraged to discuss conflicts and come to an agreed resolution before raising matters with the judges.

State and federal judges have also coordinated settlement efforts. Recognizing that settlement of either the state or the federal cases often requires settling the cases in both courts, some judges have been able to achieve a global resolution of the entire litigation.

Coordinated alternative dispute resolution (ADR) methods offer a viable approach to multiforum litigation. In the L'Ambiance Plaza building collapse litigation, state and federal judges collaborated in an intensive mediation process that led to a settlement within eleven months. Both judges can also conduct informal joint settlement discussions and hearings with the parties, or they can agree to have one of the judges or a settlement master conduct the discussions. Or they can simply share information helpful to evaluating and recommending settlements for other cases.

Joint hearings have also been used for purposes other than discovery and settlement. Some judges have used them at the outset of litigation to establish a joint case management framework. State and federal judges have also jointly presided over hearings involving various other matters such as class certification and summary judgment motions.

Joint hearings achieve many of the benefits of consolidation before a single judge while preserving the involvement and distinct interests of both systems. They enable judges to share information, insights, and even case management techniques, all of which can help expedite litigation. Joint hearings also help establish the "cultural setting" for state-federal cooperation, demonstrating cooperation by the judges and encouraging emulation by the attorneys.

Complications arise because of differences between federal and state rules or disagreement over the application of the rules in a particular case. However, judges have been able to resolve these matters. In most instances, they have reached consensus and issued consistent rulings—either the same order under separate captions or joint rulings. At other times, the judges, after a joint hearing, have pursued their own paths. Even when joint hearings result in divergent rulings, they are economical, and the judges benefit from one another's experience and insight.

The final step in coordination would be a joint state-federal trial. Although such trials offer the potential of great savings and have been considered by several judges, none has been conducted. There are several obstacles to joint trials, including logistical difficulties, differences in governing rules, and the possibility of the state and federal cases

producing inconsistent verdicts. Separate juries for the state and federal cases would probably be required. Some judges are nevertheless confident that a joint trial is possible, especially if it is brief.

The paper notes many patterns in the case studies and draws several lessons from them. Early contact between judges enables them to coordinate their schedules, consider joint discovery, and begin thinking about cooperative approaches. (Federal judges usually initiate contact, but this need not always be the case.) Initial conversations tend to focus on general perspectives and areas appropriate for state-federal coordination. Later communication tends to focus on scheduling, keeping abreast of the cases in the other court, and consulting on matters of procedure or substantive law. Information can be exchanged as necessary by mail, fax and telephone.

Perhaps most important to successful coordination is the strength of the personal and working relationship developed between the judges. Most judges agree that coordination is more about personalities than procedures. Successful coordination requires flexibility, innovation, and a willingness to compromise in order to develop arrangements acceptable to both courts. One judge observed that coordination requires "diplomacy, consideration, courtesy, and some degree of informality."

Attorneys can promote and facilitate intersystem coordination. They are generally aware of the related cases pending in the different courts and can thus be a valuable source of information for the judges. Many judges have appointed the same lead counsel for both the state and federal cases. Cooperation among attorneys has limits, however, and tension can result when the state and federal attorneys have different interests.

Coordination works best when the state and federal courts are in close proximity and when cases have been independently aggregated within the state and federal systems. When all cases in one system are before a single judge, that judge can structure the litigation and ensure uniform treatment of the cases. This approach, in turn, facilitates implementation of a coherent plan for state-federal coordination.

Finally, the judicial environment within the jurisdiction makes a difference. Where state and federal judges are accustomed to talking to each other and attending functions together, they are likely to find it easier to initiate and maintain coordination.

State-federal coordination enables judges to achieve greater economy, efficiency, and consistency. However, intersystem coordination has potential drawbacks as well, most of which stem from the fact that it can undermine the traditional jurisdictional boundaries of the state and federal systems.

Coordination requires judges to make joint decisions involving both case management and legal interpretation. Certain risks inhere in joint decision making. Several judges acknowledge the tension between consistency and correctness. There may be situations where acting consistently with another court is more important than issuing what the judge considers to be the perfect ruling. However, judges must exercise care to avoid compromising the substantive rights of the parties. Also, in a shared power relationship, one court may exert too much influence, and the methods and interpretations of the other court may be lost. In several of the cases studied, the federal court essentially controlled the litigation.

Perhaps most important, intersystem coordination can diminish the litigants' benefit of their forum selection. Parties may have had good reason for selecting one court system over another, and when judges work together, influence one another, or mold their rulings to conform to the other's system, litigants may lose the advantages of their chosen forum. The potential problem of denying litigants independent consideration in their own forum is most acute when state and federal courts collaborate in deciding issues of substantive law. One important question that arises is whether federal and state courts should defer to one another on questions of state and federal law respectively. The need for consistency may justify the federal court giving the state court's interpretation of state law more weight than it otherwise might, and while the state court should not automatically follow the federal court's determinations on federal law, it may accord them great weight. All of the issues mentioned should be

placed in the balance with economy and efficiency in arriving at the appropriate approach to coordination.

The paper concludes that informal intersystem coordination can offer great benefits, but requires commitment, imagination, flexibility, and care. This study of the experiences of judges who have coordinated their proceedings should be helpful to other judges in considering whether to coordinate their cases and the best methods for doing so.

APPENDIX B

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

March 31, 1992

Professor Thomas E. Baker
Texas Tech University
School of Law
Box 40004
Lubbock, Texas 79409-0004

Dear Tom:

Here are some brief paragraphs about the Long-Range Planning Seminar in Washington on March 17-18, 1992.

The goal was modest: Believing that planning is not "a box of tricks" or "a bundle of techniques" and is "not the application of scientific methods" to decision, but "is the application of thought, analysis, imagination, and judgment," [quoting Peter Drucker, 1973] the Long-Range Planning Committee, in this Seminar, sought

> to use your thought, analysis, imagination, and judgment. But, for this seminar anyway, we ask you to use those attributes <u>not</u> to suggest new solutions to contemporary problems, but to analyze what the federal judiciary can reasonably expect planning processes to accomplish. We want to discuss, for example, not the pluses and minuses of legislatively prescribed minimum sentences, but how judicial branch planning might have helped the federal justice system to avoid mandatory minimums.
>
> The seminar will take up two questions, in small-group and plenary sessions:

- If the federal courts had been engaged in a systematic planning process twenty-five years ago -- starting around 1967 -- could they have avoided some of the problems now vexing the administration of justice in the federal courts? (for Tuesday's discussion)

- Looking forward from 1992, how can the courts achieve goals they might set for themselves for fifteen years from now -- i.e., in about 2007? (For this part of the seminar -- Wednesday's session -- we will use your responses to the survey mailed to you on February 26 to derive some hypothetical judicial system goals; these readings, considerably shorter than Tuesday's, will be available by Tuesday, probably before.)

Seminar on Long-Range Planning 1 (Fed. Jud. Center, March 17-18, 1992).

During about half the seminar periods, the participants were separated into five groups, each group focusing on one of the following areas:

- federal courts and crime
- federal courts and civil disputes
- federal and state courts
- federal court structure and organization
- federal courts and science technology.

The remaining sessions were plenary sessions. Most of these sessions focused on reports from the small-group sessions. One of the plenary sessions included a presentation by Gregory Schmid of the Institute for the Future on "Trends Anticipated in the Next Fifteen Years," including demographic, social, and economic trends that are likely to have an effect on the nature and scope of the workload of the judiciary, state and federal.

One point of special relevance to rulemakers is that the quick-and-informal survey conducted by the Federal Judicial Center (referred to in the quotation above) disclosed striking agreement among the judges surveyed on a need for stronger management by trial judges of both trials and pretrial proceedings. Is this

view held by others on the federal bench? State bench? Bar? Public? The Federal Judicial Center may seek information on these subjects by expanding its survey and doing it more formally. Very likely all of us will hear more about this in the next year or two.

Best regards.

Sincerely,

Bob

Robert E. Keeton

Memorandum

TO: Joseph Spaniol

FROM: Mary P. Squiers

RE: Material to Be Distributed to the Committee Members

DATE: June 8, 1992

Attached is the memorandum which Judge Keeton has suggested be distributed to the Committee members prior to our June 18 meeting. It is my understanding that, at that meeting, we will seek a vote from the Committee authorizing the distribution of this memorandum to the district courts to assist them in their renumbering of local rules. To that end, I have written a draft recommendation which you may, or may not, wish to use:

> This past spring, Judge Keeton communicated with the district courts concerning the need for uniform numbering among the jurisdictions. Some of the courts were concerned about how to integrate their respective Delay and Expense Reduction Plans into the numbering system as originally proposed by the Local Rules Project. The memorandum entitled "An Example of a Proposed Numbering System for Local Rules, Including a Civil Justice Delay and Expense Reduction Plan" is intended to assist these districts in this regard. At this time, the Committee authorizes distribution of this Memorandum to all of the district courts.

I appreciate your willingness to send this Memorandum to the Committee at the last minute. If you have any questions, please feel free to contact me. Thanks.

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

Memorandum

TO: Hon. Robert E. Keeton

FROM: Mary P. Squiers

RE: An Example of a Proposed Numbering System for Local Rules, Including a Civil Justice Delay and Expense Reduction Plan

DATE: May 28, 1992

What follows is an example of a proposed numbering system for local rules which incorporates a Civil Justice Delay and Expense Reduction Plan. This example is intended to assist the districts as they begin to renumber their local rules in compliance with the recommendation of the Judicial Conference. *See* Report of the Judicial Conference (September, 1988) 103.

Because the existing rules and plans in the ninety-four districts vary in great detail, both in subject matter and format, it is difficult to provide guidance relying on one district's rules which may be helpful to many districts. Accordingly, I chose to renumber a "fictitious" district court's local rules and Plan. The directives in this district are based on a composite of many district courts' rules and Plans. For instance, the numbering is based on several districts' current numbering systems; the chapter format is based on others'. Lastly, the actual titles of rules are taken from many of the jurisdictions' local rules. I also incorporated several different Delay and Expense Reduction Plans into these rules. The list of rules in this fictitious court is quite lengthy. I did not attempt to reduce the number of rules since I wanted to cover the subject matter of as many courts' rules as possible. I do not suggest, however, that courts do or should have such a lengthy listing of rules.

I believe this proposed numbering is quite easy to follow. The rules of the fictitious jurisdiction are listed down the left side of the page. The proposed numbering, in compliance with the recommendation of the Local Rules Project and the Judicial Conference, is on the right side of the page. When there is a proposed number that applies to all the subparts of a local rule, that number is placed alongside the title of the rule. If a particular subpart, however, should be located under a different number, a proposed number is placed alongside that subpart. For instance, the first rule in the fictitious jurisdiction is "100. Title—Effective Date of These Rules—Compliance and Construction." This rule is comprised of five subparts. The designation of "LR1.1" is placed adjacent to the title of this rule, indicating that all of the subparts are appropriately subparts of this one local rule. The subpart entitled "100-3. Sanctions and Penalties for

Noncompliance" is, however, renumbered as "LR1.3" indicating that this subpart should not be in the same rule as the other subparts.

Proposed Numbering

Chapter I—General Rules

100.	Title—Effective Date of These Rules—Compliance and Construction.	LR1.1
	100-1. Title.	
	100-2. Scope.	
	100-3. Sanctions and Penalties for Noncompliance.	LR1.3
	100-4. Definitions.	
	100-5. Effective Date; Transitional Provision.	
101.	Sessions of the Court.	LR77.4
	101-1. Regular Sessions.	
102.	Divisions of the Court.	LR3.2
	102-1. Number of Divisions.	
	102-2. Transfer of Civil Actions.	
110.	Attorneys—Admission to Practice—Standards of Conduct—Duties.	LR83.5
	110-1. Admission to the Bar.	
	110-2. Standards of Professional Conduct.	
	110-3. Student Practice.	
	110-4. Appearance, Substitution, and Withdrawal.	
	110-5. Discipline.	LR83.6
120.	Court Library.	LR77.6
	120-1. Use of the Library.	
121.	Court Reporters.	LR80.1
	121-1. Fee Schedule.	
122.	Money in the Custody of the Clerk.	LR67.2
	122-1. Receipt and Deposit of Registry Funds.	
	122-2. Investment of Registry Funds.	
	122-3. Disbursement of Registry Funds.	LR67.3
130.	Format of Pleadings and Other Papers—Filing of Papers.	LR5.1
	120-1. Form; Legibility	
	120-2. Filing by Clerk—Nonconforming Documents Rejected.	Deleted
131.	Time Periods.	
	131-1. Computation of Time.	LR6.1
	131-2. Extensions of Time by Clerk.	LR6.2

		Proposed Numbering
132.	Clerk of the District Court.	
	132-1. Location and Hours.	LR77.1
	132-2. Custody and Withdrawal of Files.	LR79.1
	132-3. Custody and Disposition of Exhibits	LR79.1
	132-4. Orders Grantable by Clerk.	LR77.2
140.	Publicity.	LR83.4
	140-1. Photography and Broadcasting.	
145.	Security in the Courthouse.	LR83.4
	145-1. Weapons Not Permitted.	

Chapter II—Civil Rules

200.	Institution of Civil Proceedings.	
	200-1. Identification of Counsel.	LR11.1
	200-2. Caption and Title.	LR10.1
	200-3. Jury Demand.	LR38.1
	200-4. Class Actions.	LR23.1
	A. Complaint.	
	B. Class Certification.	
	C. Restrictions Regarding Communications with Actual or Potential Class Members.	
	200-5. Three-Judge Court.	LR9.2
	200-6. Claim of Unconstitutionality.	LR24.1
	200-7. Social Security Cases.	LR9.1
205.	Differentiated Case Management	LR40.1CJ
	205-1. Purpose and Authority.	
	205-2. Definitions.	
	205-3. Date of DCM Application.	LR1.1CJ
	205-4. Conflicts with Other Rules.	LR1.1CJ
	205-5. Tracks and Evaluation of Cases.	
	205-6. Case Information Statement.	
	205-7. Track Assignment and Case Management Conference.	
	205-8. Status Hearing and Final Pretrial Conference.	
	205.9. Alternative Dispute Resolution.	
206.	Early, Firm Trial Dates	LR40.1CJ
	206-1. Presumptive Trial Date	
	206-2. Firm Trial Date for Track "A" Cases	
	206-3. Firm Trial Date for Track "B" and "C"	
	206-4. Continuances After Firm Trial Date is Set	
	206-5. Parties Informed of Case Status	

	Proposed Numbering
210. Service of Pleadings and Other Papers.	
210-1. Service by Mail.	LR4.1
210-2. Proof of Service.	LR5.2
210-3. Filing with the Court.	LR5.1
215. Motion Practice.	LR7.1 (If these rules refer to summary judgment motions, a notation should be made at LR56.1 referring the reader to this rule.)
215-1. Motions; to Whom Made.	
215-2. Notice and Supporting Papers.	
215-3. Opposition and Reply.	
215-4. Briefs and Memoranda.	
A. When Required.	
B. Form of Briefs, Memoranda, and Appendices.	
C. Contents of Briefs.	
D. Contents of Appendices.	
E. Number of Papers.	
F. Nonconforming Papers Rejected.	Deleted
215-5. Filing.	
215-6. Affidavits.	
215-7. Temporary Restraining Orders.	LR65.2
215-8. Preliminary Injunctions.	LR65.1
215-9. Continuances and Withdrawal of Motions.	
215-10. Extensions, Enlargements, or Shortening of Time.	
215-11. Submission of Orders to a Judge.	
220. Prejudgment Remedies.	LR66.1
220-1. Receivers.	
225. Discovery Filing and Service Practice.	LR5.5
225-1. Filing.	
225-2. Service.	
230. Discovery.	
230-1. Form of Certain Discovery Documents.	LR26.1
230-2. Interrogatories.	LR33.1
230-3. Requests for Production.	LR34.1
230-4. Requests for Admission.	LR36.1
230-5. Depositions.	LR30.1
A. Who May Attend Depositions.	
B. Videotape Depositions.	
230-6. Physical and Mental Examination.	LR35.1
230-7. Form of Discovery Motions.	LR37.2
230-8. Informal Conference to Settle Discovery Disputes.	LR37.1
230-9. Preliminary Discovery.	LR26.2CJ

		Proposed Numbering
235.	Pretrial and Setting for Trial.	LR16.1
235-1.	Status Conference.	
235-2.	Status Conference Order.	
235-3.	Pretrial Conference.	
235-4.	Pretrial Conference Statement.	
235-5.	Pretrial Order.	
235-6.	Objections to Proposed Testimony and Exhibits.	
235-7.	Dismissal for Lack of Prosecution.	LR41.1
240.	Settlement.	LR68.1
240-1.	Settlement Conference.	
245.	Jury	
245-1.	Six-Person Juries.	LR48.1
245-2.	Voir Dire.	LR47.1
245-3.	Proposed Instructions.	LR51.1
245-4.	Objections to Proposed Instructions.	LR51.1
245-5.	Assessment of Jury Costs.	LR54.2
250.	Exhibits.	LR39.3
250-1.	Use of Exhibits.	
255.	Trial Date.	LR40.3
255-1.	Continuance of Trial Date.	
260.	Conduct in the Courtroom.	
260-1.	Courtroom Decorum.	LR83.3
260-2.	Examination of Witnesses.	LR43.1
260-3.	Communication with Jurors.	LR47.2
265.	Judgment.	LR58.1
265-1.	Form of Judgment.	
270.	Taxation of Costs.	LR54.1
270-1.	Procedure for Taxing Costs.	
275.	Attorneys' Fees.	LR54.3
275-1.	Procedure for Determining Attorneys' Fees.	
280.	Executions.	LR58.2
280-1.	Procedure for Execution.	
285.	Petitions to Stay Execution of State Court Judgments.	LR62.1
285-1.	Procedure to Stay Execution of State Court Judgments.	

		Proposed Numbering
290.	Bonds and Sureties.	
	290-1. When Required.	LR65.1.1
	290-2. Qualifications of Surety.	LR65.1.1
	290-3. Removal Bond.	Delete
	290-4. Examination of Sureties.	LR65.1.1
	290-5. Supersedeas Bonds.	LR62.2

Chapter III—Magistrates

300.	Duties of Magistrates.	LR72.1
	300-1. Assignment of Duties to Magistrates.	
310.	Assignment of Duties to Magistrates.	LR72.1
	310-1. Assignment of Duties to Magistrates.	
320.	Review of Magistrates' Determinations.	LR74.1
	320-1. Procedure for Review.	
330.	Chief Magistrate.	LR72.1
	330-1. Selection of Chief Magistrate.	
	330-2. Duties of Chief Magistrate.	
340.	Trials of Civil Cases Upon Consent of the Parties.	LR73.1
	340-1. Procedure for Obtaining Consent.	
	340-2. Effect of Magistrate's Result.	
350.	Prisoner Petitions.	LR72.1
	350-1. Responsibilities of Magistrates.	

Chapter IV—Alternative Dispute Resolution.

400.	General Provisions.	LR53.1CJ
	400-1. General Provisions.	
405.	Mandatory Arbitration.	LR53.2CJ
	405-1. Actions Subject to Mandatory Arbitration.	
	405-2. Procedure for Referral to Arbitration.	
	405-3. Selection and Compensation of Arbitrators.	
	405-4. Award and Judgment.	
	405-5. Trial De Novo.	
410.	Voluntary Arbitration.	LR53.3CJ
	410-1. General Provisions.	
415.	Early Neutral Evaluation.	LR53.4CJ
	415-1. General Provisions.	
420.	Mediation	LR53.5CJ
	420-1. General Provisions.	

		Proposed Numbering
425.	Summary Jury Trial 425-1. General Provisions.	LR53.6CJ
430.	Summary Bench Trial 430-1. General Provisions.	LR53.7CJ
435.	Other ADR Procedures 435-1. General Provisions.	LR53.8CJ
440.	Civil Justice Delay and Expense Reduction Plan. [The last local rule for the district consists of a table that cross references each of the directives in the Plan with its local rule number.]	LR83.7CJ

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F SPANIOL, JR
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F RIPPLE
APPELLATE RULES
SAM C POINTER JR
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

May 27, 1992

MEMORANDUM TO THE MEMBERS OF THE STANDING COMMITTEE:

SUBJECT: Substantive and Numerical Integration of Federal Rules of Procedure

I have asked Judge Pratt to chair a new Subcommittee on Substantive and Numerical Integration of Federal Rules of Procedure. I am asking each of our Liaison Members to serve as a member of this Subcommittee (i.e., Judge Sloviter - Appellate, Judge Ellis - Bankruptcy, Judge Bertelsman - Civil, Mr. Wilson - Criminal, Mr. Perry - Evidence, and Professor Baker - Long Range Planning).

Two developments have led me to the decision to create this Subcommittee and ask it to proceed expeditiously to give us a preliminary report of its thinking on June 18, 1992 and its recommendations at the December 1992 meeting.

The first development is a tentative plan (to be considered at our June 1992 meeting) for development (by the Subcommittee on Style and the Advisory Committee on Civil Rules) of a recommendation to the Standing Committee in December 1992 regarding amendments of style for the entire set of Federal Rules of Civil Procedure. The Subcommittee on Style will be making its recommendations to the Advisory Committee on Civil Rules for their consideration at their November 1992 meeting. (I will invite discussion at our June meeting of coordinating this expedited consideration of the style of the Rules of Civil Procedure with consideration of the style of each of the other sets of rules if the Advisory Committees in Appellate, Criminal, and Bankruptcy are interested in such a plan.)

The second development is that our consultations about proposed amendments of provisions in the several separate sets of

rules on the subject of "Technical and Conforming Amendments" has underscored, for me at least and I understand for many others, the advantages of having a single rule on this subject, rather than four or five separate rules of identical (or even worse, disparate) text. We could better accomplish this substantive integration if we sent it out for public comment simultaneously with a proposal for numerical integration.

If you have a special interest or a view you wish considered by the new Subcommittee, I encourage you to call or write to Judge Pratt promptly.

Robert E. Keeton

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

CONFIDENTIAL

TO: Committee on Rules of Practice and Procedure

FROM: Daniel R. Coquillette, Reporter

DATE: May 19, 1992

At our last meeting of January 16-17, 1992, the Committee requested me to prepare a report on the creation of a new Committee on the Rules of Evidence, "describing all the various options that have been suggested to our Committee or have been identified in its preliminary discussions." Among the questions I was asked to address was whether the Committee should recommend to the Judicial Conference a new Advisory Committee on the Rules of Evidence, or whether the Committee should create an informal sub-committee, or whether no action should be taken. An excellent account of why these issues have been raised at this time can be found in an article by the Hon. Edward R. Becker and Aviva Orenstein, "The Federal Rules of Evidence After Sixteen Years - The Effect of 'Plain Meaning' Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revisions of the Rules" to be published in the April 1992 issue of the George Washington University Law Review. All members of the Committee who do not have this article should call Linda Glennon at (617)552-4340, and a copy will be sent at once. See Also, Margaret A. Berger's helpful article "The Federal Rules of Evidence: Defining and Refining the Goals of Codification," 12 Hofstra Law Review 255 (1982-83).

OPTIONS

At the January meeting, the Chairman asked all members to communicate their views to me, and I have now heard from almost every member. I have also received comments from Judge Becker himself, Professor Ronald J. Allen of Northwestern University, and a number of other experts. All of these comments fall roughly into seven "camps." Here are these options in roughly descending order of formal action:

1. To recommend to the Judicial Conference that a regular fifth Advisory Committee on the Rules of Evidence be created. [Hereafter the "Regular Advisory Committee" option.] The Committee would have all the usual features, including a Reporter. It would be appointed by the Chief Justice exactly like the existing Advisory Committees. William R. Wilson, Jr. has written at length in support of this proposal and, rather than repeat his arguments, I have attached his letter as "Appendix I" to this report. This approach largely follows the recommendation of the Becker-Orenstein article.

2. Redesignate the Advisory Committee on Rules of Criminal Procedure as the Advisory Committee on Rules of Criminal Procedure and Rules of Evidence. The Advisory Committee on Rules of Criminal Procedure recommends this option. A Memorandum explaining their recommendation will be sent to you when it is received from them.

3. Recommend an Advisory Committee on Rules of Evidence with special features. This option will be called the "Special Advisory Committee." This proposal would establish an Advisory Committee with formal overlapping memberships with the four existing Advisory Committees and the Standing Committee. It would be suggested that the Chief Justice appoint five overlapping members, one each at the recommendation of the five existing Committee Chairmen. These would be full voting members. There would also be six or more other members who would not overlap with the other committees. All members would be formally appointed by the Chief Justice. This would, except for the "overlapping" members, be identical to a regular Advisory Committee. The Chairman and Reporter think this option is worth serious consideration and may be the best choice.

4. A fourth option is to appoint an ad hoc Sub-Committee on Evidence, consisting of both existing members of the Standing Committee and the Advisory Committees, selected by the Chair of the Standing Committee in consultation with the Chairs of the Advisory Committees. There would be no new Reporter or new additional members, and, therefore, no formal need for Judicial Conference action or action by the Chief Justice. The Reporter to the Standing Committee would provide support services. This is similar to the model established by Judge Joseph Weiss and the Standing Committee in 1987. At that time, the Standing Committee saw no need for the Sub-Committee to be active, but such a Sub- Committee could easily be very active if the members so chose. This option is well articulated and described in a letter from Alan W. Perry, attached as "Appendix II." Judge Bertelsman, Chief Justice Peterson, Judge Pratt, and Judge Stotler have written letters in agreement with Perry's letter.

   Judge Stotler's thoughtful letter suggests that this option not be given a name like "ad hoc Sub-Committee" because the word "ad hoc" gives a negative implication, and the committee would be more than just a "sub-committee" of any one committee. As Judge Stotler observes "I have learned that the answer to 'What's in a name?' is 'a lot!'" She suggests the name "Joint Rules Committee on Evidence." For this reason, this option will not be called a "Sub-Committee," but the "Joint Committee on Rules of Evidence" option. Judge Stotler's letter is attached as "Appendix III."

5. Several members have proposed that a Sub-Committee of the Standing Committee be created to study the problem and make a final report. Professor Thomas E. Baker has eloquently argued this view, and I attach his letter as "Appendix IV" rather than just repeat it here. This option will be called the "Study Sub-Committee."

6. Appoint a separate Reporter for Rules of Evidence under Option 3, 4, or 5 (as well as under Option 1.)

7. The Reporter to the Standing Committee could be directed to receive and investigate all inquiries relating to evidentiary problems, in consultation with the Reporters of the other existing Advisory Committees.

DISCUSSION

I would strongly oppose both Options 1 ("Regular Advisory Committee") and Option 7. The problem with Option 1 is that the issues presented by evidentiary problems are too closely related to the on-going work of the existing Advisory Committees. More overlap is needed to avoid needless repetition and conflict. The current dispute over the proposed revisions to Civil Rule 26 and to FRE 702 is just one example of the problem.

On the other hand, Option 7 is only acceptable if one disagrees with the entire Becker-Orenstein thesis. I, for one, agree that there is real work to do, and that there is a need for a designee to receive and act on complaints and to monitor Congressional and other initiatives. As Reporter to the Standing Committee, I would be happy to take on this function, but, acting alone, I would not have the necessary credibility for those seeking major review.

Options 2, 3, 4, 5 and 6 all have some Committee support. I am still waiting for a final proposal from the Advisory Committee on Criminal Rules to learn more about Option 2. Option 5 ("Study Sub-Committee") simply buys time. I am not convinced that we would learn much more through study that we do not know already. Option 6, a separate Reporter for Rules of Evidence, is equally consistent with Option 1, 3, 4, and 5.

This leaves Options 3 and 4. The choice between Option 4 ("Joint Rules Committee") and Option 3 ("Special Advisory Committee") depends largely on one's judgement as to the amount of serious work to be done. At the least, a "Joint Rules Committee" would have to be much more active than the prior ad hoc Committee established in 1987. Substantial responsibilities would have to be undertaken, with the Reporter to the Standing Committee in support.

In the end, the Chairman and this Reporter see advantages in Option 3 ("Special Advisory Committee"). A review of the American Bar Association Section of Litigation Study, Emerging Problems Under the Federal Rules of Evidence (Stephen Saltzburg & Gregory Joseph, Reporters) (2nd ed. 1991) and the Criminal Justice Section Study (1987) The Federal Rules of Evidence, A Fresh Review and Evaluation, 120 F.R.D. 299 indicates that the Becker-Orenstein thesis is at least partly correct. In particular, sixteen years have passed without a careful overall review. There is a need for a forum for debate on some of the more important issues. For example, there are "Circuit Splits" concerning FRE 103, 407, 703, 801 (d) (1) (B), 803 (3), 804 (b) (1) and 803 (24) and 804 (b) (5), the FRE 702 controversy, and the applicability of evidence rules in sentencing hearings. Further, as the Becker-Orenstein article has observed, the Advisory Committee notes contain a number of small errors, should be reviewed and updated. Becker-Orenstein, supra, 94-95.

Option 4 ("Joint Rules Committee") simply distributes more work to already over-loaded Advisory Committees and to their Reporters. Option 3 ("Special Advisory Committee") brings new resources to bear, while maintaining strong connections with the ongoing work of the other Advisory Committees. It will also have substantial credibility if its new members are carefully selected. This model also provides the Judicial Conference and the Chief Justice with important input into the effort to address problems with the Rules of Evidence. Professor Wright has observed that there should be an audit of the rules at least "once every 25 years," even if few changes prove necessary. The "Special Advisory Committee" can provide that function, while also fully meeting our charge under 28 U.S.C.§ 2073 (6), which, as Becker-Orenstein have observed, states that "the Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence . . . . (emphasis added).

Appendix I

Letter by William R. Wilson, Jr.

February 17, 1992

WILSON, ENGSTROM, CORUM & DUDLEY
LAWYERS
809 WEST THIRD STREET
P. O. BOX 71
LITTLE ROCK, ARKANSAS 72203
501/375-6453

WM. R. WILSON, JR. †
STEPHEN ENGSTROM †
ROXANNE T. WILSON
GARY D. CORUM
TIMOTHY O. DUDLEY

† ALSO ADMITTED TO PRACTICE IN ALASKA

FAX (501) 375-6014

February 17, 1992

Dean Daniel T. Coquillette
Boston College Law School
885 Centre Street
Newton, Massachusetts 02159

Dear Dan:

Since I "left out" of New Orleans a day early, I did not know that we were invited to write you with our views regarding our notions on the advisability of an Advisory Committee on the Rules of Evidence.

I got this information when I received a copy of Tom Baker's letter to you dated February 11, 1992.

It is my opinion that such an advisory committee would be in order. Unlike Tom, I have written a treatise on evidence. In fact, I have written several of them for trial judges, but they have been largely ignored. I have proof positive that the federal district judges in Arkansas ignore my missives because only week before last, at an Arkansas Bar seminar, the majority of them professed little or no knowledge about the proposed changes to the Federal Rules of Civil Procedure and F.R.E. 702. I have sent a memo to each federal judge in Arkansas after each Standing Committee meeting since I have been a member, and these memos covered only these proposed changes. Forgive me for digressing with a forlorn lament.

I am pretty much in agreement with the Becker/Orenstein article. Further, I do not share the view of some who believe that a new advisory committee would feel duty bound to propose changes. To the contrary, it seems to me that this committee could be a slow-walking, slow-talking type of committee, but could go into action when a significant number of folks believe something needs changing.

It may be that Congress is not in a cold sweat to do anything about the "hole" created by the failure to give us some definitive rules on privileges, but, as a practicing street lawyer, I feel the need. Further, I believe most folks who try cases in federal court share this view. Arkansas adopted the

Uniform Rules not long after the Federal Rules of Evidence became effective, and I think the privileges, as defined by the Uniform Rules, balance the competing interests pretty well. This means you don't have to go back to law school each time a privilege question comes up in discovery or in the trial itself. And, as I understand it, this is the main purpose of having a good set of evidentiary rules in the book.

In the areas where the Federal Rules of Evidence and the Uniform Rules differ (presumptions for example), I think the Uniform Rules are superior. As I recall, the Supreme Court sent Congress a set of rules which were virtually identical to the Uniform Rules, and the major differences between the two sets resulted from congressional changes. It seems to me that it might be a good time to go back and try to get this squared away.

I agree that the law of evidence needs a certain stability. At the same time, if any set of rules need to be clear, simple and definitive as possible, it is the rules of evidence. It goes without saying that trial judges and trial lawyers often do not have time to go to the library before applying such rules.

My inclination is against sending this issue to the Subcommittee on Long-Range Planning. Back when I was a younger lawyer, I served on several long-range planning committees, attended several conferences on the subject, and have been on a goodly number of "retreats" where this was the project. I have learned that my thinking is far too finite for me to put much stock in long-range planning.

The adoption of the Federal Rules of Evidence has been a wonderful thing. Before they were adopted, nothing kept me stretched tighter than continually doing trial briefs on anticipated evidence problems. Nothing -- and I mean nothing -- is more exasperating than having a trial judge make an off-the-wall ruling such as, "a statement is not hearsay if it was made in the presence of a party", a "police officer can testify to anything he damn well pleases as long as it is 'background' for why he went to the scene", and the like. Of course, you still get these gut-bustin' rulings from time to time, but at least a conscientious judge can usually be persuaded to give up his courthouse lore evidence if you have a definitive set of rules at hand.

It seems to me that a committee which could react when change is needed, and fine tune the rules as we go along, would be a good thing. If I were persuaded that such a committee would make work and start making changes for the fun of it, I would be agin (sic) the concept; but, again, I do not believe this would be the case.

Cordially,

Bill W | By RP

Wm. R. Wilson, Jr.

WRWjr/rep

cc: Other Members of Standing Committee
Chairs and Reporters, Advisory Committees

Appendix II

Letter by Alan W. Perry

February 28, 1992

Forman, Perry, Watkins & Krutz
Attorneys at Law
Suite 1200
One Jackson Place
188 East Capitol Street
Jackson, Mississippi 39201

Post Office Box 22608
Jackson, Mississippi 39225-2608
Telephone (601) 960-8600
Telecopier (601) 960-8613

February 28, 1992

Writer's Direct Number:

(601) 969-7833

Dean Daniel T. Coquillette
Boston College Law School
885 Centre Street
Newton, Massachusetts 02159

Re: Proposed Committee to Study Evidence Rules

Dear Dan:

Bill Wilson's letter of February 17, 1992, prompted me to forward my suggestions.

From viewing the comments of others, it seems to me that there is a fair amount of sentiment in favor of some committee. I share that view.

The only question for me is whether it needs to be (a) an Advisory Committee patterned on the existing advisory committees or (2) an ad hoc committee composed of members of the Standing Committee and/or existing Advisory Committees. (I recognize that "and/or" would never pass the Style Committee.)

I favor the intermediate proposal -- establishment of a committee composed of representatives of the Standing Committee and existing Advisory Committees to deal with the relatively few areas in which there appears to be a clear consensus for action.

As the "new kid on the block," my concerns about a permanent Advisory Committee are probably not well-informed; but you asked and here they are:

1. An ad hoc committee is consistent with the view that only a limited, one-time revision is necessary. Creating a separate committee with continuing responsibility only for the Evidence Rules may well fulfill the adage that work expands to fill the time allotted. A permanent committee would virtually assure frequent recommended charges.

2. Appointment and organization of a new Advisory Committee will probably mean unnecessary delay.

Sincerely yours,

FORMAN, PERRY, WATKINS & KRUTZ

Alan W. Perry

AWP/clh
cc: Other Members of Standing Committee
Chair and Reporters, Advisory Committees
0228APDC

Appendix III

Letter by the
Hon. Alicemarie H. Stotler

February 6, 1992

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
ITS / 799-2055

February 6, 1992

Dean Dan Coquillette, Reporter
USJC Standing Committee on Rules
of Practice & Procedure
Boston College of Law
885 Centre Street
Newton, Massachusetts 02159

Re: 1. Committee on Rules of Evidence

Summary: Recommendation for Intra-Advisory and Standing Committee membership for FRE Oversight Committee

2. 1989 Local Rules Project: Final Report

Summary: Request reference copy

Dear Dean Coquillette:

1. Committee on Rules of Evidence.

Operating on the assumption that our committee will respond positively to the overtures for some body to be watching over the development of the Federal Rules of Evidence, I submit the following considerations.

At least three configurations for an oversight body to monitor the Federal Rules of Evidence come to mind: (1) a new Advisory Committee with new chair and committee members to be appointed by the Chief Justice; (2) a new sub-committee of an existing Advisory Committee; and, (3) a new sub-committee of the Standing Committee composed of intra-Advisory Committee members, with one or more Standing Committee members.

Version One is the Becker proposal for an Advisory Committee on the Federal Rules of Evidence. This may have considerable appeal, especially to those outside the Standing and Advisory Committees, and we should give it due weight.

Since rules of evidence currently figure prominently in pre-trial civil practice, e.g., admissible evidence in support of or opposition to summary judgment motions, there is logic in keeping them with the Advisory Committee on Civil Rules. Thus, a la Version Two above, a sub-committee of the Civil Rules Advisory Committee would be well placed.

Finally, I supposed a version of the last form at the New Orleans meeting, musing that if Judges Hodges and Pointer were without other things to do, then they could co-chair a Joint Committee on the FRE.

In essence, the last-mentioned is what our stop-gap measure is anyway, with Judge Pointer's designees sitting with Judge Hodges' Evidence Sub-committee. The Standing Committee already has its liaison member in place. Since Prof. Saltzman chairs that Sub-committee, I find it a happy situation for the moment.

In fact, I believe, without much additional thought or pressure, that I could be happy for a longer period with this remedy if the rest of our number were similarly inclined.

The earlier ad hoc committee created by Judge Gignoux and chaired by Judge Weis was apparently of a similar form. Such an in-house committee has the advantage of having all affected components of the various Advisory Committees available to each other and in attendance at the meetings of the Standing Committee. It also has the attributes of a closed shop which could result in criticism of us for hoarding the fun stuff.

If we try the intra-advisory/standing committee format again, the chair must not only call meetings of the committee, but it would have to attend the work arguably cut out for it by virtue of Professor Schlueter's recent publication "Emerging Problems Under The Federal Rules of Evidence." (I took heart in his parenthetical confession at New Orleans that only a few sections truly need revising.)

I regret to advise that I have learned that the answer to "what's in a name?" is "a lot!" Therefore, I would counsel against "ad hoc" in the new committee's title. Some grander title such as "Joint Rules Committee on Evidence" might convey the permanency and dedication of the Judicial Conference to a most important body of law.

2. 1989 Local Rules Project Report

Please forward a copy of this report at your convenience. When our Ninth Circuit Judicial Council met with the Ninth Circuit's USJC committee chairs and members late last month, Chief Judge Wallace advised that this Circuit is definitely moving on the matter of uniformity for local rules. Senior District Judge Laughlin E. Waters of my district, the Central District of California, is the chair of that effort. He will soon write to you or Professor Squiers also seeking a copy of the Report.

Thank you for your attention to my thoughts and suggestions and my request. Please feel free to call if you would like to discuss these matters further.

Sincerely,

ALICEMARIE H. STOTLER
U. S. District Judge

cc: Judge Keeton
Professor Wright

Appendix IV

Letter by Thomas E. Baker

February 11, 1992

TEXAS TECH UNIVERSITY
School of Law

Box 40004
Lubbock, TX 79409-0004
(806) 742-3791
FAX (806) 742-1629

February 11, 1992

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

Dear Dan:

My understanding of our discussion of the proposal to create an Advisory Committee on Evidence Rules is that you will draft some alternatives for consideration at the next meeting of the Standing Committee. As I recall, we were invited to write to you to "put in our two cents."

I have not written a treatise on evidence. I have not even read a treatise on evidence. But I have read the Becker/Orenstein article and I am not fully convinced. There can be no quarrel with the proposition that the advisory committee device was necessary in the process of drafting the Federal Rules of Evidence. Likewise, there can be no argument that a new Advisory Committee should be created, if we were to conclude that the Federal Rules of Evidence are in need of wholesale review and rewriting. The Becker/Orenstein "brief" does not convince me of that, however.

There does not seem to be a groundswell of the reformer's zeal among those who use the rules, trial attorneys and district judges, as far as I can tell. The biggest drafting "hole" is in the area of privileges, but I cannot detect any change there on the part of Congress. The Becker/Orenstein article performs the valuable service of compiling the list of problems and conflicts, but again, I do not find the examples particularly breathtaking, either individually or taken together. Are these really serious problems? Do they arise frequently in the trial of cases?

My impression is that we should consider a smaller solution to a smaller problem. I would favor creation of an ad hoc committee to study the Becker/Orenstein article and to make a recommendation to the Standing Committee whether to create a permanent Advisory Committee or whether the problems raised in

the article can be adequately addressed within the existing organization of our Standing Committee and Advisory Committees. This ad hoc committee could be appointed by the Chair of the Standing Committee and might include the Chairs and the Reporters of the Advisory Committees. Alternatively, or perhaps at the same time, why not ask each of the four Advisory Committees to provide the Standing Committee with their formal reactions and recommendations? The Advisory Committees might prefer the approach already taken by the Advisory Committee on Criminal Rules, to create a subcommittee on evidence rules.

It seems to me that the law of evidence requires a certain stability. The fact that there have been few changes to the Rules of Evidence is not, in my opinion, a shortcoming of the Rules of Evidence. Rather, it troubles me that we make so many and so frequent changes in the other sets of rules. Furthermore, during my tenure on the Standing Committee, I have found it helpful to hear the sometimes different views from the civil side and the criminal side on proposed changes of the evidence rules. Also I have never noticed any reluctance to address needed evidence rules changes within the existing rulemaking procedure. My academic loyalty normally would draw me towards a full-employment bill for law professors such as this. This time, however, my enthusiasm for reform is underwhelming. I would like to hear the considered opinions of the trial judges and the trial lawyers before I cast my vote. Color me dubitante.

This matter reminds me of comments I have heard off and on that it might be worthwhile for our Standing Committee to step back from rulemaking and examine the whole process of rulemaking. Perhaps, this is appropriate for the Subcommittee on Long-Range Planning.

Thank you for your consideration.

Sincerely,

Tom

Thomas E. Baker
Alvin R. Allison Professor

TEB:lw
cc: Members, Standing Committee
Chairs and Reporters, Advisory Committees

Chicago-Kent College of Law
Illinois Institute of Technology

565 West Adams Street
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February 11, 1992

Mr. Joseph F. Spaniol, Jr.
Secretary, Standing Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. Spaniol:

Enclosed please a copy of the letter I have sent to The Chief Justice and Judges Keeton, Hodges and Pointer. The letter reflects the serious concern of many evidence law teachers and scholars about the current process for amending the Federal Rules of Evidence, Civil Procedure, and Criminal Procedure. In my capacity as Chair of the Evidence Section of the American Association of Law Schools, I offered to serve as a conduit for the expression of these concerns to appropriate committees of the Judicial Conference.

If you have any questions, or need further information, you may write me or call me at (312) 906-5215.

Sincerely yours,

Dale A. Nance
Associate Professor of Law

attachment

February 11, 1992

The Honorable William H. Rehnquist
Chief Justice of the United States

The Honorable Robert E. Keeton
Chair, Judicial Conference Standing Committee
on Rules of Practice and Procedure

The Honorable William T. Hodges
Chair, Judicial Conference Advisory Committee
on Criminal Rules

The Honorable Sam C. Pointer, Jr.
Chair, Judicial Conference Advisory Committee
on Civil Rules

Dear Mr. Chief Justice and Judges Keeton, Hodges, and Pointer:

As law professors working in the field of evidence, we wish to express our disappointment over the lack of focus on particular problems of evidence in the procedure for amending the Federal Rules of Civil and Criminal Procedure and of Evidence. We believe that the Standing Committee should provide for specialized scrutiny both of the Federal Rules of Evidence and of the evidentiary effects of changes in the Federal Rules of Civil and Criminal Procedure.

Two currently proposed amendments illustrate the problem with the present committee structure. First, proposed Rule of Civil Procedure 26(a)(3)(c) provides that most objections to exhibits are waived if not made before trial. The virtual abolition of trial objections to exhibits could result in a major revision of the Rules of Evidence affecting pretrial motions practice and resulting in the absence of foundation witnesses from trial. At present, the commentary does not refer to the evidentiary significance of the proposed amendment. Whether or not such changes are beneficial, this significance ought to be considered. Similarly, we believe that proposed rule of Evidence 702 could have benefitted from more evidentiary expertise. Without delving into the substance of the proposed amendment--which is enormously important and highly controversial--it is perhaps sufficient for present purposes to note the misleading reference in the commentary to the status of the rule of *Frye v. United States* in the federal courts.

We urge the Standing Committee to ensure that proposed amendments to the Federal Rules of Evidence and of Criminal and Civil Procedure that have a significant effect on evidence law and practice receive adequately focused and knowledgeable review. Particular means might include reconstitution of the Advisory Committee on the Rules of Evidence, creation of a joint subcommittee of the Advisory Committees on Civil and Criminal Procedure, or resort to a conference subcommittee to resolve differences on evidence issues between the Advisory Committees on Civil and Criminal Procedure.

We believe that the Rules of Evidence are sufficiently important, and a sufficiently distinct body of law, to warrant such steps. These steps would be particularly helpful in harmonizing the law of evidence in civil and criminal proceedings, taking into account both those circumstances in which similar evidentiary considerations cut across the two contexts and those in which different considerations warrant different treatment.

Respectfully submitted,

David E. Aaronson
Washington College of Law
American University

Ronald Jay Allen
School of Law
Northwestern University

Terence J. Anderson
School of Law
University of Miami

Louis Barracato
School of Law
Catholic University of America

Patricia W. Bennett
School of Law
Mississippi College

Margaret A. Berger
Brooklyn Law School

Bruce Berner
School of Law
Valparaiso University

Susan Bitensky
Detroit College of Law

Chris Blair
School of Law
The University of Tulsa

Walker Blakey
School of Law
University of North Carolina

William J. Bridge
School of Law
Southern Methodist University

Robert Calhoun
School of Law
Golden Gate University

Craig Callen
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Joseph A. Colquitt
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The University of Alabama

Mark Cammack
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James M. Concannon
School of Law
Washburn University

John E. Corkery
John Marshall Law School

Alan D. Cullison
School of Law
University of Connecticut

James W. Diehm
School of Law
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Mark M. Dobson
Shepard Broad Law Center
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David L. Faigman
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Terre E. Foster
Law Center
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Steven I. Friedland
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Nova University

Richard D. Friedman
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University of Michigan

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School of Law
Case Western Reserve University

Elliot B. Glicksman
Thomas M. Cooley Law School

Michael H. Graham
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University of Miami

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University of Iowa

Alan D. Hornstein
School of Law
University of Maryland

Jeremiah F. Healy, III
New England School of Law

John Frazier Jackson
School of Law
Capital University

Randolph N. Jonakait
New York Law School

William R. Jones
Salmon P. Chase College of Law
Northern Kentucky University

Marc Kadish
Chicago-Kent College of Law
Illinois Institute of Technology

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

June 15, 1992

Professor Charles Alan Wright
The University of Texas at Austin
School of Law
727 East 26th Street
Austin, Texas 78705

Dear Charlie:

In accordance with your letter of June 5, 1992, we are circulating a copy of Professor Victor J. Gold's article entitled "Do the Federal Rules of Evidence Matter?" to the members of the Standing Committee.

Sincerely,

Joseph F. Spaniol, Jr.
Secretary

cc: Standing Committee
Chairmen & Reporters of
Advisory Committees
Dean Daniel R. Coquillette
Professor Mary P. Squiers

CHARLES ALAN WRIGHT

WILLIAM B. BATES CHAIR FOR THE
ADMINISTRATION OF JUSTICE

THE UNIVERSITY OF TEXAS
SCHOOL OF LAW

June 5, 1992

Mr. Joseph F. Spaniol, Jr.
Administrative Office of the
United States Courts
Washington, DC 20544

Dear Joe:

One of the issues before the Standing Committee at our meeting in two weeks will be what, if anything, to do about the Rules of Evidence.

The April issue of Loyola-Los Angeles Law Review is a thick symposium entitled Does Evidence Law Matter?. There are many excellent articles in it, but I am enclosing a photocopy of the article by my collaborator on the Evidence unit of my Treatise, Victor J. Gold. It seems to me that his article, Do the Federal Rules of Evidence Matter?, 25 Loy. L.A. L.Rev 909 (1992), is relevant to the issue that we will have to confront in Washington. It might be useful if you could distribute copies of this to the Standing Committee.

Sincerely,

Charlie

Enclosure

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DO THE FEDERAL RULES OF EVIDENCE MATTER?

*Victor J. Gold**

I. INTRODUCTION

Before the Federal Rules of Evidence, federal evidence law was a confusing conglomerate of common law and statutes. Much of this law was ancient and of dubious merit. The Federal Rules were intended to reform and then assemble in a single document all the significant aspects of federal evidence law.[1] The goal was to simplify that law, make its content more certain and its application more uniform, efficient and fair.[2]

Nearly a generation after the Federal Rules were enacted and after many thousands of decisions purporting to apply them, there is reason to doubt the extent to which the Rules have achieved their goals. Of course, measuring the success of the Rules is not easy. It is impossible to "grade" the Rules by evaluating each trial and appellate application like an answer to a multiple-choice exam. Many issues under the Rules do not easily lend themselves to "objective test" treatment.[3] Moreover, the Rules address an enormous number of issues. To completely review the impact of every Rule would require a multi-volume treatise.[4]

However, a summary of the case law in one area of the Rules' coverage—witness competency and impeachment—is possible here. This sum-

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1. H.R. REP. No. 650, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7075; S. REP. No. 1277, 93d Cong., 2d Sess. 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7051; Diane Kiesel, Comment, *One Person's Thoughts, Another Person's Acts: How the Federal Circuit Courts Interpret the* Hillman *Doctrine*, 33 CATH. U. L. REV. 699, 699 (1984).

2. H.R. REP. No. 650, *supra* note 1, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 7075 (stating that Rules represent milestone to better administration of justice in federal courts by providing clear, precise and readily available rules for trial judges that will be uniformly applicable throughout federal judicial system); STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 12 (1990) (stating that Rules' goals "are to provide speedy, inexpensive and fair trials designed to reach the truth.").

3. Ironically, most evidence law professors, including the author, seem to prefer this mode of testing students.

4. Since the author does not have to read bluebooks, he has had plenty of time to read the cases and write about them. A more detailed analysis of the issues discussed in this Essay can be found in 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE (1990), and in a forthcoming volume of that treatise.

mary reveals some disturbing developments. In some instances, courts have twisted or ignored the clear language of the Rules and continued to apply old common law.[5] In other cases, courts have created new common law to address issues that fall within the scope of a Rule.[6] In still other cases, courts have found discretion to decide admissibility where the Rules set forth standards intended to limit discretion.[7] Finally, in many instances undefined terms or convoluted phraseology have led the courts to ignore or completely misconstrue what the Rules say.[8] In short, these cases cast doubt on whether the Rules have achieved their goals or even made much of a difference in the way courts deal with some important issues.

After a discussion of a few examples, the reasons for these developments will be explored. That analysis will call into question the efficacy of a codification of evidence law in the form taken by the Federal Rules. Specifically, this Essay suggests that a pure common law approach to the development of evidence law is preferable to rules that employ a balancing test or ambiguous language.

II. PROBLEMS WITH WITNESS COMPETENCY AND IMPEACHMENT IN ARTICLE VI

A. Rule 601

Rule 601 sets the tone for Article VI of the Federal Rules and for much of the modern law concerning witness competency and impeachment. That Rule states that "[e]very person is competent to be a witness," subject to limited exceptions not pertinent here.[9] The Rule represents a significant departure from the traditional common law of witness competency. In the words of the Advisory Committee, the Rule effects a "general ground clearing," eliminating almost all the categories of witness incompetency recognized at common law.[10] The Advisory Committee emphasized that the Rule eliminates all mental or moral qualifications for testifying.[11] Thus, Rule 601 converts the issues formerly addressed by the common law of witness competency into credibility questions to be resolved by the trier of fact.

Notwithstanding the unambiguous language of Rule 601, the federal

5. *See infra* notes 9-36 and accompanying text.
6. *See infra* notes 9-36 and accompanying text.
7. *See infra* notes 41-52 and accompanying text.
8. *See infra* notes 37-40 and accompanying text.
9. FED. R. EVID. 601.
10. FED. R. EVID. 601 advisory committee's note.
11. *Id.*

courts have failed to take seriously the "ground clearing" terms of the provision. Instead, the courts have concluded that the Rule leaves them with the power to disqualify witnesses with limited mental or moral capacities.[12] Decisions following the enactment of Rule 601 frequently assume the existence of judicial power to conduct competency hearings[13] and psychiatric examinations to determine competency,[14] both of which the Rule had seemingly rendered obsolete. While a few courts have taken the literal language of Rule 601 more seriously, most courts apparently do not treat witness competency issues any differently than they did before the enactment of Rule 601.[15] As a consequence of ignoring the clear language of Rule 601, courts have undermined the goal of making competency determinations more certain and simple.

B. Rules 602 and 603

Some authorities have resurrected common law mental and moral competency requirements in the guise of interpreting Rules 602[16] and 603.[17] Some courts read Rule 602 as imposing a mental capacity requirement, suggesting that witnesses lack personal knowledge unless they can

12. United States v. Ramirez, 871 F.2d 582, 584 (6th Cir.), *cert. denied*, 493 U.S. 841 (1989) (recognizing that Rule 603 allows judge to exclude testimony if person unable to take or comprehend oath or affirmation); *see infra* notes 16-23 and accompanying text.

13. *See, e.g.*, United States v. Peyro, 786 F.2d 826, 831 (8th Cir. 1986); United States v. Hyson, 721 F.2d 856, 863-64 (1st Cir. 1983); Batchelor v. Cupp, 693 F.2d 859, 865 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983); United States v. Martino, 648 F.2d 367, 384 (5th Cir. June 1981), *cert denied*, 456 U.S. 949 (1982); State v. Smith, 370 N.W.2d 827, 835 (Wis. Ct. App. 1985); *see also* United States v. Odom, 736 F.2d 104, 111 (4th Cir. 1984) ("[A] district judge has great latitude in the procedure he may follow in determining the competency of a witness to testify."); United States v. Raineri, 91 F.R.D. 159, 163 (W.D. Wis. 1980) ("[T]he form of a competency inquiry should be left to the trial judge's discretion.").

14. *See, e.g.*, *Martino*, 648 F.2d at 384; United States v. Jackson, 576 F.2d 46, 48 (5th Cir. 1978); United States v. Haro, 573 F.2d 661, 665-66 (10th Cir.), *cert. denied*, 439 U.S. 851 (1978); United States v. Pacelli, 521 F.2d 135, 140 n.4 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

15. *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 601-10 to 601-11 (1991) ("Thus the practice remains much as it has been in determining that the witness meets minimum credibility standards."); *see also* United States v. Gomez, 807 F.2d 1523, 1527 (10th Cir. 1986) (stating that trial judges have broad discretion to determine competence of witnesses; failing to even acknowledge existence of Rule 601); *Raineri*, 91 F.R.D. at 163 (reducing Rule 601 to mere rebuttable presumption of competence); John E. B. Myers, *The Testimonial Competence of Children*, 25 J. FAM. L. 287, 301, 303 (1986-87) ("While there is only a handful of federal decisions dealing with Rule 601 and witness competence, the cases that are available indicate that federal courts continue to draw upon common law principles of competence. . . . [These] decisions reveal that when genuine competency issues arise, federal courts tip their hats to Rule 601, and then move beyond its seemingly all-inclusive language to discuss and rely upon common law principles of witness competence.").

16. FED. R. EVID. 602.

17. FED. R. EVID. 603.

comprehend their observations to an extent that makes their testimony trustworthy.[18] Similarly, many courts establish a moral capacity requirement by concluding that the oath or affirmation requirement of Rule 603 cannot be satisfied unless the witness appreciates the nature of truth and the duty to tell the truth.[19]

On its face, Rule 602 does not justify excluding testimony on the ground that a witness lacks the mental capacity to make testimony trustworthy. The Rule requires no more than that the trier of fact find there is evidence "sufficient to support a finding" that the witness has personal knowledge.[20] This standard should be satisfied if a reasonable juror or judge could believe that the witness perceived the matters testified to. Based on the Rule's standard, it is up to the jury, not the judge, to decide if the witness is trustworthy. Rule 603 likewise imposes no moral capacity requirement. The Rule requires only that the witness perform the mechanical act of taking an oath or affirmation in a form calculated to awaken the witness's conscience and impress his or her mind with the legal duty to tell the truth.[21] Nothing in the Rule suggests that the witness must in fact have his or her conscience awakened and mind so impressed. A member of the Advisory Committee reports that the Committee specifically considered and rejected imposition of any standard of moral qualification.[22] Further, in his testimony before Congress

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18. *See, e.g.*, United States v. Ramirez, 871 F.2d 582, 584 (6th Cir.) ("[A] person might be impaired to the point that he would not be able to satisfy the 'personal knowledge' requirement of Rule 602."), *cert. denied*, 493 U.S. 841 (1989).

19. *See, e.g.*, United States v. Odom, 736 F.2d 104, 110-13 (4th Cir. 1984) (stating that witness may be disqualified if judge determines witness does not understand duty to testify truthfully); United States v. Lightly, 677 F.2d 1027, 1028 (4th Cir. 1982) ("[E]very witness is presumed competent to testify, . . . unless . . . he does not understand the duty to testify truthfully."). *But see* United States v. Roach, 590 F.2d 181, 185-86 (5th Cir. 1979) (asserting that language and legislative history of Rule 601 indicate common law incompetency law abolished, thus eliminating need to evaluate mental capacity of witness for competency purposes); United States v. Lemere, 16 M.J. 682, 686 (A.C.M.R. 1983) (stating that all witnesses are competent under Rules 601 and 603; thus, child witness's agreement to tell truth and efforts to impress upon witness her duty to testify truthfully were sufficient even if efforts not entirely successful and witness confused truth, falsity, reality and fantasy); United States v. Allen, 13 M.J. 597, 600 (A.F.C.M.R. 1982) (determining that preliminary questions put to child witness calculated to awaken her conscience and impress upon her that she had to provide truthful answers; witness competent to testify under Rules 601 and 603 regardless of whether questions actually accomplished intended purpose).

20. FED. R. EVID. 602.

21. FED. R. EVID. 603.

22. 3 WEINSTEIN & BERGER, *supra* note 15, at 603-06:

> The question remains whether Rule 603 operates as a rule of competency authorizing a judge to reject testimony because he regards the witness as inherently untruthful. . . . [The Advisory Committee] rejected a standard of moral qualification as unenforceable and argued that the main function of such a standard would be to

in support of Rule 601, the Reporter for the Federal Rules made the point that the very presence of the oath or affirmation requirement in Rule 603 diminished the need for competency evaluations of the sort conducted at common law.[23] It is ironic then that Rule 603 has been turned into a vehicle for undermining Rule 601's general statement that every witness is competent.

C. *The Use of Hypnosis to Refresh Recollection*

These are not the only instances where the efficacy of Rule 601 has been questionable. Since the enactment of the Federal Rules of Evidence, dozens of appellate decisions have considered the competency of a witness whose recollection has been refreshed through hypnosis.[24] The recent intensity of the debate on this subject is especially notable since almost all cases[25] and articles[26] on the subject date from after enactment

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impress witnesses with their duty to tell the truth, a function that could be accomplished more directly when administering the oath or affirmation required by Rule 603.

Id.

23. See HOUSE SPECIAL SUBCOMM. ON REFORM OF FEDERAL CRIMINAL LAWS OF THE COMM. ON THE JUDICIARY, 93d Cong., 1st Sess. (1973) (statement of Edward W. Cleary), *reprinted in* 3 JAMES F. BAILEY, III & OSCAR M. TRELLES, II, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, Doc. 11, at 95 (1980), discussing Rule 603:

> No mental or moral qualifications for witnesses are specified. (Rule 601) . . . The real utility of voir dire examination in this area has been to impress upon the witness his duty to tell the truth, and this function is served more directly and effectively by the requirement that the oath or affirmation be administered in a form to awaken the conscience of the witness and impress upon his mind his duty to testify truthfully (Rule 603).

Id.

24. For this issue addressed in civil cases, see, for example, Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974); Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973); Jean E. Maess, Annotation, *Fact that Witness Undergoes Hypnotic Examination As Affecting Admissability of Testimony in Civil Case*, 31 A.L.R.4th 1239 (1984). For this issue addressed in criminal cases, see, for example, Greenfield v. Robinson, 413 F. Supp. 1113 (W.D. Va. 1976); Rodriguez v. State, 327 So. 2d 903 (Fla. Dist. Ct. App. 1976); Harding v. State, 246 A.2d 302 (Md. 1968), *cert. denied*, 395 U.S. 949 (1969); Jones v. State, 542 P.2d 1316 (Okla. Crim. App. 1975); Gregory G. Sarno, Annotation, *Admissability of Hypnotic Evidence at Criminal Trial*, 92 A.L.R.3d 442 (1979).

25. The first reported decision concerning the use of hypnosis for enhancement of a witness's memory was Harding v. State, 246 A.2d 302 (Md. 1968), *cert. denied*, 395 U.S. 949 (1969). As recently as 1980 one of the most prominent commentators in the area was able to state: "Evidence textbooks and law journals have largely ignored hypnosis of witnesses as a means of enhancing witness recall." Bernard L. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313, 327 (1980) (citations omitted).

26. *See, e.g.*, Eric M. Alderman & Joseph A. Barnette, *Hypnosis on Trial: A Practical Perspective on the Application of Forensic Hypnosis in Criminal Cases*, 18 CRIM. L. BULL. 5 (1982); James E. Beaver, *Memory Restored or Confabulated by Hypnosis—Is it Competent?*, 6

of the Federal Rules. This is largely because most of the scientific literature concerning the reliability problems presented by hypnotically-refreshed recollection was published after enactment of the Rules.[27] Thus, this issue tests the Rules' ability to deal with new problems.

The use of hypnosis to refresh recollection appears to present a question of witness competency. The essential difference between a rule of competency and a rule of admissibility is that the former focuses on a witness's characteristics while the latter focuses on characteristics of the evidence. Objections to the use of hypnosis to refresh recollection flow from a concern for the effects of suggestion, confabulation and overconfidence on a witness.[28] This concern is especially acute, some experts claim, because it is impossible to accurately detect the influence of such effects on any given recollection of the witness.[29] In other words, a rule founded on such concern is based not on a judgment that specific testimony is unreliable, but on the assumption that the witness is not a sufficiently credible source of information to permit him or her to testify. Thus, a rule that questions the propriety of refreshing recollection through hypnosis is in fact a rule of competency, focusing on witnesses' characteristics in a way reminiscent of traditional competency rules concerning insane or drugged witnesses. Like the insane or drugged witness, the witness who has been hypnotized to refresh his or her recollection is arguably incompetent because the witness is unable to know what the truth is.[30]

The courts have taken various approaches to this question of competency. Some courts hold that the use of hypnosis to refresh recollection does not render the witness incompetent, but is a factor bearing on credibility.[31] Other courts have held that the witness is per se incompetent to

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U. PUGET SOUND L. REV. 155 (1983); Diamond, *supra* note 25; Robert B. Faulk, *Posthypnotic Testimony—Witness Competency and the Fulcrum of Procedural Safeguards*, 57 ST. JOHN'S L. REV. 30 (1982); Lawrence Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1 (1964); Ira Mickenberg, *Mesmerizing Justice: The Use of Hypnotically-Induced Testimony in Criminal Trials*, 34 SYRACUSE L. REV. 927 (1983); Robert C. Perry, *The Trend Toward Exclusion of Hypnotically Refreshed Testimony—Has the Right Question Been Asked?*, 31 KAN. L. REV. 579 (1983); Robert S. Spector & Teree E. Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567 (1977).

27. Probably the most frequently cited authority is Martin T. Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311 (1979).

28. *See* Diamond, *supra* note 25, at 333-40.

29. *Id.*

30. State v. Martin, 684 P.2d 651, 657 (Wash. 1984) (Stafford, J., concurring).

31. The Ninth Circuit has considered the issue more frequently than any other federal court. It has consistently ruled that the use of hypnosis to refresh recollection does not render the witness incompetent, but rather, presents a question of credibility for the trier of fact to resolve. *See* United States v. Awkard, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885

testify as to any subject discussed while under hypnosis.[32] Another group of courts has held that the witness is incompetent to testify except as to those matters the witness recalled prior to hypnosis.[33] Yet another group of courts admit the testimony if certain safeguards are present.[34] Most federal courts apply a balancing approach, permitting the witness to testify if the value of the testimony is reliable and outweighs the risks presented by unreliable testimony.[35]

Consideration of Rule 601 has been almost entirely omitted in this

(1979); United States v. Adams, 581 F.2d 193, 198 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); Kline v. Ford Motor Co., 523 F.2d 1067, 1069 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974). Only a handful of other federal courts have confronted the issue. Other federal decisions holding that the issue is one of credibility, not competency, are United States v. Waksal, 539 F. Supp. 834, 838 (S.D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983), and United States v. Narciso, 446 F. Supp. 252, 281-82 (E.D. Mich. 1976).

32. *See, e.g.*, People v. Shirley, 31 Cal. 3d 18, 54, 723 P.2d 1354, 1375, 181 Cal. Rptr. 243, 265, *cert. denied*, 458 U.S. 1125 (1982); State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980); Commonwealth v. Nazarovitch, 436 A.2d 170, 177-78 (Pa. 1981); State v. Coe, 750 P.2d 208, 211 (Wash. 1988); *see also* Diamond, *supra* note 25 (favoring per se rule of exclusion).

33. *See* State *ex rel.* Collins v. Superior Court, 644 P.2d 1266, 1295-96 (Ariz. 1982); Elliotte v. State, 515 A.2d 677, 681-82 (Del. 1986); State v. Moreno, 709 P.2d 103, 105 (Haw. 1985); People v. Zayas, 510 N.E.2d 1125, 1134 (Ill. App. Ct. 1987); Strong v. State, 435 N.E.2d 969, 970-71 (Ind. 1982); State v. Collins, 464 A.2d 1028, 1044 (Md. 1983); Commonwealth v. Kater, 447 N.E.2d 1190, 1197-98 (Mass. 1983); People v. McIntosh, 376 N.W.2d 653, 657 (Mich. 1985); State v. Blanchard, 315 N.W.2d 427, 430-31 (Minn. 1982); State v. Patterson, 331 N.W.2d 500, 504 (Neb. 1983); People v. Hughes, 453 N.E.2d 484, 495-96 (N.Y. 1983), *cert. denied*, 492 U.S. 908 (1989); State v. Peoples, 319 S.E.2d 177, 188 (N.C. 1984); Robison v. State, 677 P.2d 1080, 1085 (Okla.), *cert. denied*, 467 U.S. 1246 (1984); Commonwealth v. Taylor, 439 A.2d 805, 808 (Pa. 1982). One judge has referred to the cases adopting this modified per se incompetent approach as representing an "emerging consensus." State v. Wren, 425 So. 2d 756, 760 (La. 1983) (Calogero, J., concurring in part and dissenting in part).

34. Those safeguards include: (1) a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session; (2) the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense; (3) any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form; (4) before inducing hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them; (5) all contacts between the hypnotist and the subject must be recorded; and (6) only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post hypnotic interview. State v. Hurd, 432 A.2d 86, 95-97 (N.J. 1981); *accord* Brown v. State, 426 So. 2d 76, 91 (Fla. 1983); House v. State, 445 So. 2d 815, 826-27 (Miss. 1984); State v. Beachum, 643 P.2d 246, 252 (N.M. 1981); State v. Weston, 475 N.E.2d 805, 812 (Ohio 1984); State v. Adams, 418 N.W.2d 618, 623-24 (S.D. 1988).

35. Bundy v. Dugger, 850 F.2d 1402, 1416 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989); McQueen v. Garrison, 814 F.2d 951, 958 (4th Cir.), *cert. denied*, 484 U.S. 944 (1987); United States v. Kimberlin, 805 F.2d 210, 219 (7th Cir. 1986), *cert. denied*, 483 U.S. 1023 (1987); Harker v. Maryland, 800 F.2d 437, 441 (4th Cir. 1986); Wicker v. McCotter, 783 F.2d 487, 492 (5th Cir.), *cert. denied*, 478 U.S. 1010 (1986); Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1123 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986); United States v.

debate.[36] The number and variety of common law approaches devised to deal with this issue are a measure of the extent to which the goal of uniformity has been frustrated by this omission. This failure of Rule 601 is in part attributable to the absence in the Federal Rules of a definition of "competency" making clear the scope of that concept.

D. Rule 606(b)

Rule 606(b) is a good example of another sort of problem. That Rule makes a juror incompetent to impeach a verdict.[37] Rule 606(b) has generated a significant amount of litigation, with courts applying conflicting readings of the Rule.[38] This problem is largely owing to the Rule's confusing structure and language. Its first sentence contains nearly one hundred words, nine of which are "or."[39] Key terms, such as

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Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984); United States v. Charles, 561 F. Supp. 694, 697 (S.D. Tex. 1983).

36. No federal decision in this area has used Rule 601 as a basis for decision. The court in *United States v. Valdez* cited Rule 601 in passing but treated the issue as one of admissibility controlled by Rule 403. 722 F.2d at 1201. In a decision rendered shortly after the Federal Rules went into effect, the court in Kline v. Ford Motor Co., 523 F.2d 1067, 1069-70 (9th Cir. 1975), based its decision on a finding that the witness was competent but the court did not cite Rule 601. *See also Kimberlin*, 805 F.2d at 217 n.3 ("We think the more logical approach to the question is to determine whether the experience of hypnosis has rendered a witness incompetent to testify."). At least one federal court has squarely held Rule 601 is not applicable. *Sprynczynatyk*, 771 F.2d at 1122. ("Quite simply, we do not view this issue as a competency question but as an evidentiary problem within the control of the district court and governed by federal law.").

Many decisions conclude that admissibility rules concerning scientific evidence should be applied when considering the use of hypnotically-refreshed recollection. *See, e.g.*, People v. Shirley, 31 Cal. 3d 18, 54, 723 P.2d 1354, 1375, 181 Cal. Rptr. 243, 264, *cert. denied*, 459 U.S. 860 (1982); *Hughes*, 453 N.E.2d at 496. Other cases conclude that the admissibility of testimony produced by hypnotically-refreshed recollection is governed by the principles underlying Rule 403. *See, e.g.*, *Sprynczynatyk*, 771 F.2d at 1123; *Valdez*, 722 F.2d at 1201-03. The two approaches appear to be closely related. *See* Contreras v. State, 718 P.2d 129, 135 (Alaska 1986) ("The *Frye* standard is essentially a 'prejudice-versus-probative value test,' similar to Evidence Rule 403.").

Even if it is not absolutely clear that the use of hypnotically-refreshed recollection raises a competency issue, the question is a close one. Thus, the extent to which the courts have ignored Rule 601 in this area would still be remarkable.

37. FED. R. EVID. 606(b).

38. A good example is the United States Supreme Court's recent decision concerning Rule 606(b) in Tanner v. United States, 483 U.S. 107 (1987). With four Justices dissenting, the Court held that the Rule rendered jurors incompetent to testify that they and other jurors had been under the influence of alcohol or drugs during the trial. *Id.* at 126-27. The decision disappointed the expectations of the commentators. *See* 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 289, at 143-44 (1979); 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 606[4], at 606-28 to 606-50.

39. On reading Rule 606(b), one is reminded of how those who proposed a Federal Rules of Evidence regarded the condition of evidence law before the Rules: "What is lamented is

exceptions permitting jurors to testify concerning "extraneous prejudicial information" and "outside influence," are ambiguous and nowhere defined. Courts have expended little effort to decipher the meaning of these terms, often treating them as interchangeable or abandoning the language of the Rule entirely in favor of the hybrid "extraneous influence."[40] Thus, the Rule's goals of simplification and certainty are frustrated by a combination of poor drafting and judicial unwillingness or inability to address the problems thereby created.

E. Rule 608

Rule 608 also presents more than its share of interpretation and application problems.[41] The Rule purports to regulate the admissibility of evidence offered to prove the witness's character for "truthfulness or untruthfulness."[42] The Rule plainly does not deal with evidence offered to impeach on some other basis, such as bias, lack of capacity or contradiction. Unfortunately, it is often unclear whether an item of evidence merely undermines credibility in one of these ways or also impeaches the witness's character for truthfulness or untruthfulness.[43] Where this is unclear, many authorities claim that courts have discretion whether to apply Rule 608.[44]

This distends the notion of discretion, thereby conferring on the courts power that the Rule withholds. Judicial discretion to decide admissibility exists where the Rules fail to state an applicable standard. The fact that the established standards may be vague or difficult to apply

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their infinitesimal, meticulous, petty elaboration into a mass not capable of being perfectly mastered and used by everyday judges and practitioners." THOMAS F. GREEN, JR., COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, RULES OF EVIDENCE: A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS (1962), *reprinted in* 1 BAILEY & TRELLES, *supra* note 23, Doc. 4, at 42 (1980).

40. *See, e.g.*, United States v. Bassler, 651 F.2d 600, 602 (8th Cir.), *cert. denied*, 454 U.S. 1151 (1981); Virgin Islands v. Gereau, 523 F.2d 140, 149 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

41. Again, the drafters failed to define terms that are basic to determining the scope of the Rule and the nature of admissible and inadmissible evidence. Among the basic terms that need to be defined are "extrinsic evidence," "character" and "credibility."

42. FED. R. EVID. 608.

43. *See, e.g.*, Outlaw v. United States, 81 F.2d 805, 807-08 (5th Cir. 1936) ("Whether impeachment . . . by proof of contradictory statements constitutes . . . an attack on . . . character . . . has been much debated. . . . [S]ometimes the contradictory statement appears to raise only a question of memory or mistake, while under other circumstances it seems to indicate a want of trustworthiness.").

44. *E.g.*, EDWIN W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 49, at 117-18 (3d ed. 1984); 3 LOUISELL & MUELLER, *supra* note 38, § 308, at 251; 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 608[08], at 608-67.

does not mean the courts have discretion to ignore those standards. At most the interpretation and application problems created by vague rules mean the courts need some room to exercise judgment as to the meaning of that language. Calling this discretion invites the courts to simply ignore the standard and create their own standard or decide cases on an ad hoc and standardless basis, thereby undermining the Rules' goals of uniformity and certainty.

F. Rule 609

Rule 609 poses similar problems. That provision permits the impeachment of a defendant in a criminal prosecution by evidence of a prior felony conviction.[45] The evidence is admissible only if the court determines that its probative value outweighs its prejudicial effect.[46] In some instances, the evidence is admissible only if its probative value "substantially outweighs" prejudice.[47] The language of the rule suggests the burden is on the prosecution to show that probative value outweighs any prejudice.

However, appellate courts generally defer to the trial court's determination if there is any way to rationalize the balance struck.[48] This deference accorded to trial courts has been justified on the ground that Rule 609 grants broad discretion to admit or exclude evidence.[49] Some courts have concluded that this discretionary power is so broad that trial court balancing under Rule 609 is "virtually unreviewable."[50]

This overstates the discretion granted by the Rule. Because preju-

45. FED. R. EVID. 609(a)(1). Rule 609(a)(2) also permits impeachment by evidence of convictions involving dishonesty or false statements. FED. R. EVID. 609(a)(2).

46. FED. R. EVID. 609(a)(1).

47. FED. R. EVID. 609(b) (requiring probative value to substantially outweigh prejudice where conviction more than 10 years old).

48. *See, e.g.*, United States v. Brown, 784 F.2d 1033, 1039 (10th Cir. 1986) (upholding trial court's conclusion that probative value outweighed prejudice although apparently neither trial nor appellate court considered prejudicial effects); United States v. Givens, 767 F.2d 574, 579 (9th Cir.), *cert. denied*, 474 U.S. 953 (1985) (stating that Rule 609(a)(1) requirements are met so long as trial court states that it balanced probative value against prejudice); United States v. Fountain, 642 F.2d 1083, 1092 (7th Cir.), *cert. denied*, 451 U.S. 993 (1981) (holding that since it was possible to conclude that probative value of conviction evidence outweighed prejudice, "we cannot say the judge's ruling was an abuse of discretion"); United States v. Cook, 608 F.2d 1175, 1187 (9th Cir. 1979) ("[Trial judge's] balancing of the respective values contemplated in Rule 609 at best was inarticulate, and at worst revealed that he misconceived the purpose of the rule. However, the ruling did not constitute an abuse of discretion, as appropriate reasons could have been given for it."), *cert. denied*, 444 U.S. 1034 (1980).

49. United States v. Lipscomb, 702 F.2d 1049, 1068 n.69 (D.C. Cir. 1983) ("[A]ll [circuits] agree that the ultimate standard of review under Rule 609(a)(1) is whether the district court has abused its discretion.").

50. United States v. Pedroza, 750 F.2d 187, 202-03 (2d Cir. 1984), *cert. denied*, 479 U.S.

dice and probative value are complex concepts that are largely incommensurable, it takes little effort to rationalize any result in cases where the balance is even remotely close. The Rule's allocation of the burden of proof has no function if appellate courts defer to the trial court whenever its decision can be rationalized. Although it is true that balancing probative value against prejudice requires judgment, the exercise of this judgment is limited by the Rule's allocation of the burden to the prosecution.[51] Balancing that is not affected by this limitation simply rewrites the careful compromise of conflicting values reached by Congress and embodied in Rule 609.[52]

III. Reasons For These Problems

The problems identified above cannot be lightly dismissed.[53] Ignoring the language of a Rule, recognizing discretion where it does not exist or expanding discretion beyond the scope granted, creating new common law or applying old common law in lieu of the Rules—these judicial acts undermine the foundations of a code-based system of law. The mounds of cases still trying to solve the problems of interpretation presented by the Rules quickly dispel the notion that the problems described in this Essay are rare or that the Rules simplified and made more certain the law of evidence.

The question, then, is why do these problems arise? The answer lies

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842 (1986); United States v. Washington, 746 F.2d 104, 107 (2d Cir. 1984) (Newman, J., concurring).

51. *See Lipscomb*, 702 F.2d at 1063.

> [T]he district court must carefully and thoughtfully consider the information before it to determine if probativeness outweighs prejudice to the defendant. This balancing must not become a ritual leading inexorably to admitting the prior conviction into evidence. . . . [T]he burden is on the government to show that the probative value of a conviction outweighs its prejudicial effect to the defendant.

Id.; *see also* United States v. Hendershot, 614 F.2d 648, 653 (9th Cir. 1980).

> Although appellate courts should not overturn evidentiary rulings of trial courts based on the proper exercise of their discretion, it is a primary obligation of appellate courts to insist that this discretion be exercised within the applicable framework of legal rules. In some instances this framework may impose no standard at all or none other than good faith and the avoidance of arbitrariness. In others it is more restrictive. The framework of Rule 609(a)(1) is one of the latter. Congress, after much debate, created a framework in which, with respect to a defendant, the burden of persuasion is placed upon the prosecution and a particular process of weighing is required. Both we and the trial courts must respect that decision.

Id.

52. *See Lipscomb*, 702 F.2d at 1063 n.54 ("Once the balancing stage is reached, the nature of the compromise reached by the Conference Committee precludes any presumption that prior felony convictions should be admitted.").

53. The fact that this Essay makes no comment about Federal Rules of Evidence 610 through 615 should not be taken as a suggestion that the author believes that those Rules do not present similar problems.

in the nature of both the rulemakers and the judiciary. If any evidence codification is to work, it must take into consideration the limitations of those who are asked to write and apply it.

The problems described in this Essay are in part the fault of the rulemakers themselves.[54] The Rules are frequently confusing, utilizing undefined terms where meaning is not clear from context. Further, rather than providing a clear rule regulating admissibility, the Rules repeatedly make reference to discretion and the weighing of probative value against prejudicial impact.[55] As with the terms themselves, the manner in which they might be balanced is left undefined. This virtually invites the judiciary to assume an undisciplined, ad hoc approach to applying the Rules.

One reason for the rulemakers' performance is clear: rulemaking is a political process, the lifeblood of which is compromise. While compromise permits rules to be enacted, it frequently undermines clarity and definitiveness. As a political institution it was impossible for Congress to refrain from regarding the Rules in political terms. The Advisory Committee was frequently forced to permit politics to drive its efforts. The alternative might have been rejection of the Rules.

Paradoxically, another reason for Congress's performance was simply lack of political interest. In explaining one of the drafting incongruities of the version of Rule 609 originally enacted, Justice Scalia observed that the bill proposing the Federal Rules was "relatively inconsequential legislation."[56] In other words, many of the Rules were insufficiently political to merit more interest from Congress.

Finally, many of the instances of loose drafting and reliance on discretion found in the Rules are due to the nature of certain evidence issues. Some issues present value conflicts that are not easily resolved. Unable to state a definitive rule, the rulemakers equivocated with vague language or left the issue to the courts' discretion. Rules 608 and 609 are good examples of such value conflicts. The admission of character evidence to impeach a witness promotes the value of accurate factfinding by enabling the trier of fact to properly weigh the reliability of testimony.[57] On the other hand, such evidence might be misused by the trier of fact to draw improper and unfairly prejudicial inferences.[58] Balancing these val-

54. By "rulemakers," I mean both the evidence law experts who drafted the Rules and the members of Congress that evaluated the proposed Rules and enacted them into law.

55. *E.g.*, FED. R. EVID. 403, 412, 609(a)(1).

56. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

57. FED. R. EVID. 608(a) ("[T]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation . . . .").

58. *See* FED. R. EVID. 609(a); H.R. REP. No. 650, *supra* note 1, at 4, *reprinted in* 1974

ues produced two of the most confusing provisions in the Federal Rules.

Whatever the reasons for the rulemakers' failures, the impression one takes away from reading the Rules is that they often appear closer to a draft of general principles than a finished set of rules. Implicit in every undefined term and convoluted clause is the hope that the courts will finish the job of rulemaking.

However, trial courts are by their nature unable and unwilling to rewrite this draft. The complexity of Rules like 606, 608 and 609 makes thoughtful application at the trial level all but impossible. Trial courts must resolve evidentiary issues quickly to keep from prolonging proceedings that are often already tortuously cumbersome. Thus, where a Rule does not define terms or state a clear standard for admissibility, trial courts lack the time to analyze the policies and legislative history of the rule to discover insight into its meaning. Trial lawyers could mitigate this, but as a group they seem to lack the knowledge of evidence law required to educate the judiciary. Further, the natural inclination of a trial judge when faced with unclear rules and lawyers suggesting different interpretations is to read discretion into vague language or fall back on the familiar common law learned in law school.

Congress could have anticipated this judicial inclination to expand and abuse the discretionary powers created by the Rules. Trial judges, particularly those with lifetime tenure, are notorious for doing what they want. Thus, it should not be surprising to learn that these judges will take every opportunity presented by vague language and grant of discretion to avoid the thrust of a rule. After all, evidence rules can be limits on the powers of the trial judge, allocating power to attorneys and juries, the very people whom a trial judge is hired to control.

Unlike trial judges, appellate judges are not pressured to make quick rulings on evidence questions. However, there is an understandable reluctance to reverse, even where a careful analysis of a rule may indicate the trial court erred. Appellate courts are mindful of the constraints under which trial courts operate and are loathe to require retrials because of evidence law errors. Thus, where the language of the rule permits, appellate courts are inclined to justify the trial judge's decision on the grounds of discretion. Where this is not possible, appellate courts can avoid reversal by sailing the case into that Bermuda Triangle of legal analysis, the Harmless Error Doctrine.[59] The frequency with which this

U.S.C.C.A.N. at 7084; S. REP. NO. 1277, *supra* note 1, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 7061.

59. FED. R. CRIM. P. 52(a) ("[A]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); Harrington v. California, 395 U.S. 250, 251-52

doctrine is invoked and the language of the Rules is stretched tells us something important about the attitude of appellate judges. When Justice Scalia suggested that Congress regarded the Federal Rules as "relatively inconsequential,"[60] he was also giving us a good look into how he and many other appellate judges regard evidentiary issues. The infrequency with which the Supreme Court hears cases under the Federal Rules of Evidence tends to confirm this suggestion. In short, an appellate court is generally not the place where evidence law will be properly applied or developed. It must happen at the trial level.

IV. WHAT TO DO

These observations call into question the efficacy of an evidence code, at least in the form frequently taken by the Federal Rules of Evidence. A successful codification must be based on a realistic notion of the nature of trial judges: they do not wish to see their powers limited. This suggests that rulemakers cannot rely on trial judges to fine-tune ambiguous rules. Rather, rulemakers must keep rules short and simple. Terms must be defined and ambiguity kept to a minimum. Rules must establish limits from which the trial courts cannot escape. The trial courts might actually grow to favor such rules because they can make the job of judging easier.

Where precise rules cannot be written because of doctrinal and political conflict, it makes sense to allow courts to develop common law rather than force them to cope with rules difficult to fathom.[61] Where rulemakers are unable to provide a clear statement of doctrine, codification does not solve problems, it creates new ones. Judicial efforts to develop doctrine are discouraged because judges are forced to conform to language drafted to avoid rather than resolve issues. Further, courts can justify a result by pointing to the Rule and the discretion it provides, rather than pointing to policy or logic.

The risk inherent in giving courts this power is that they may abuse it, leading to inconsistency, uncertainty and unfairness. After all, these are the judicial abuses that made the Federal Rules necessary. Thus, it is possible that abandoning evidence rules in favor of a common law approach could make worse the problems described in this Essay.

But this Essay does not suggest there should be no rules of evidence.

(1969) (asserting harmless error doctrine permits conviction to stand despite constitutional error if court finds beyond reasonable doubt error did not affect outcome of case).

60. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 508 (1989) (Scalia, J., concurring).

61. This is precisely what the Federal Rules do in connection with privileges. *See* FED. R. EVID. 501.

Rather, we should only have rules that can be stated simply and understandably. This is no more than saying we should only have those rules with a chance of preventing abuse. Of course, as to the remaining issues where courts could be given direct responsibility for developing law, there would still be room for abuse. Judges would still have the inclination to assume that their powers are broad. But it makes sense to hope, if not assume, that courts would act more responsibly when given more responsibility. If the courts did not so act, evidence law will be no worse off than it is now. But society may be better off because it would be clear who is to blame.

CRIMINAL

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Federal Rules of Criminal Procedure

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

DATE: May 14, 1992

I. INTRODUCTION

At its meeting in April 1992, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure. This report addresses those proposals and the recommendations to the Standing Committee. A GAP Report and copies of the Rules and the accompanying Committee Notes are attached along with a copy of the minutes of the Committee's April 1992 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

In July 1991, the Standing Committee approved amendments in a number of Rules and directed that they be published for public comment. Comments were received on several of the proposed amendments and were carefully considered by the Advisory Committee at its April 1992

meeting. The following discussion briefly notes any significant changes in the language of the proposed amendment and the Committee's recommended action:

A. Rule 12(i). Production of Statements.

This amendment, which requires production of a witness's statements after he or she has testified at a pretrial suppression hearing, received no written comments. The amendment was approved by the Advisory Committee by a unanimous vote. The Committee recommends that this amendment be approved and forwarded to the Judicial Conference.

B. Rule 16(a). Disclosure of Experts.

As approved for publication, the amendment to Rule 16(a) closely tracked a similar amendment to Civil Rule 26. After considering public comments to the Rule, including strong opposition from the Department of Justice, the Committee by a vote of 6 to 5 (The Chair cast the tie-breaking vote) approved a modified amendment which requires production of a "summary" of the expected expert testimony, etc. The Advisory Committee recommends that the amendment to Rule 16(a) be forwarded to the Judicial Conference.

C. Rule 26.2. Production of Statements.

This amendment requires production of a witness's statements after the witness has testified at trial; it recognizes similar amendments in Rules 12.1, 32(f), 32.1, 46 and in Rule 8 of the Rules Governing § 2255 Hearings. Those few comments which were received on this Rule were generally supportive of the amendment. The Committee, however, ultimately deleted references in the Rule to the fact that the witness's prior statement could be ordered disclosed after the court had considered the witness's "affidavit." Now, only the witness's "testimony" triggers the disclosure requirements. The amendment was approved by a 9 to 1 vote with one abstention.

The Advisory Committee recommends that the proposed amendment be approved and forwarded to the Judicial Conference.

D. Rule 26.3 Mistrial.

Rule 26.3 is a new rule which requires the trial court to obtain the views of both sides before ruling on a mistrial motion. Only one comment was received on this amendment and it was favorable. No major changes were made

in the Rule as published and the Committee approved this amendment by a unanimous vote. The Committee recommends that this Rule be approved and forwarded to the Judicial Conference.

E. Rule 32(f). Production of Witness Statements.

This amendment requires production of a witness's statements after they have testified at a sentencing hearing. Only one comment was received; it raised no major objections to the amendment. The Committee, however, removed any reference to affidavits. Thus, disclosure is required only after the witness actually testifies. This amendment was approved by a 9 to 0 vote with one abstention. The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

F. Rule 32.1. Production of Statements.

The amendment to Rule 32.1 requires disclosure of a witness's prior statements after the witness has testified at hearing to revoke or modify probation or supervised release. As originally published, disclosure would have been required after the court considered the witness's affidavit. That reference was deleted by the Committee. No written comments were received on this amendment. The amendment was approved by a vote of 9 to 0 with one abstention. The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

G. Rule 40. Committment to Another District.

The amendment to Rule 40 permits transmission of a facsimile copy of a warrant. Only one comment was received and it suggested that the original warrant be transmitted promptly; that proposal was rejected and the amendment was approved by a unanimous vote. The Advisory Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

H. Rule 41. Search and Seizure.

Only one comment was received on this amendment, which permits consideration of a facsimile transmission in deciding whether to issue a search warrant. The comment recommended that the original be promptly forwarded. That suggestion was not adopted. The Committee decided, however, that the word "judge" following the words "Federal magistrate" should be removed to conform the rule to the definition of that term in Rule 54. The amendment was approved by a unanimous vote. The Advisory Committee

recommends that the amendment be approved and forwarded to the Judicial Conference.

I. Rule 46(i). Production of Statements.

This amendment requires disclosure of a witness's statements after the witness has testified a detention hearing. Although few comments were received on this rule, the Department of Justice strongly opposed the amendment on the grounds that the requirement at such an early stage in the case makes it extremely difficult to locate prior statements of its witnesses. After lengthy discussion, the Committee approved the amendment (with references to affidavits being removed) by a vote of 8 to 1. The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

J. Rule 8, Rules Governing Section 2255 Hearings.

This amendment requires production of a witness's statements after the witness has testified a Section 2255 hearing. The one comment received on this amendment pointed out the potential difficulty of locating a witness's prior statements where the hearing is held years later. After deleting references to "affidavits," the Committee approved the amendment by a vote of 9 to 0 with one abstention.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

A. In General.

At its April 1992 meeting, the Advisory Committee considered proposed amendments to a several Rules. It recommends that the following amendments be approved for publication and comment from the bench and the bar. Copies of the proposed amendments and the Committee Notes are attached.

B. Rule 16(a)(1)(A). Disclosure of Statements by Organizational Defendants.

The proposed amendment to Rule 16 fills a perceived gap in criminal discovery: disclosure of statements by persons associated with an organizational defendant. The amendment requires government disclosure of first, statements which would be discoverable as party admissions and second, a person's statements concerning acts for which the organization would be vicariously liable. The amendment is similar to one proposed recently by the American Bar

Association. The proposed amendment was adopted by the Advisory Committee by a unanimous vote.

C. Rule 29(b). Motion for Judgment of Acquittal.

This amendment, which was suggested by the Department of Justice, would treat motions for a judgment of acquittal in the same way, regardless of whether they are made at the close of the government's case or at the close of all of the evidence. That is, it permits the trial court to defer ruling on a motion for a judgment of acquittal made at the close of the government's case either before or after the jury returns its verdict. If the decision is reserved, only that evidence presented at the time of the motion may be considered. Although this amendment will not affect a large number of cases, the Committee believes that it strikes a good balance between the defendant's interest in avoiding a second trial and the government's interest in preserving its right to appeal a Rule 29 motion. The amendment was approved by the Committee by an 8 to 2 vote.

D. Rule 57. Rules by District Courts.

The proposed amendments to Rule 57 are intended to track similar amendments in the Civil, Appellate, and Bankruptcy Rules. The proposed amendment was approved by a unanimous vote.

E. Rule 59. Technical Amendments.

As with the proposed amendments to Rule 57, supra, the proposed amendments to Rule 59 are intended to track similar amendments in the Civil, Appellate, and Bankruptcy rules. In unanimously approving the proposed amendments, the Committee included the proviso that if the Standing Committee believed that references to statutory changes should be deleted from the proposed amendment, the Committee would concur with that view. The Committee has suggested a similar amendment to Federal Rule of Evidence 1102, infra.

IV. TECHNICAL AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

The Advisory Committee recommends that Rule 32(e) be deleted. As written, the provision no longer accurately reflects the law regarding probation. In the Committee's view, this change could be treated as a technical amendment.

If the provision is deleted, it can be replaced by the proposed amendment discussed above regarding disclosure of a witness's statements.

If the Standing Committee agrees that the current Rule 32(e) should be repealed, the Advisory Committee recommends that new Rule 32(f), which was circulated for public comment, supra, should be redesignated as Rule 32(e).

V. RULES OF EVIDENCE.

A. Rules Circulated for Public Comment; Rules 702 & 705

There are currently no Evidence Rules out for public comment which have been proposed by the Criminal Rules Committee. At its April 1992 meeting, however, the Committee discussed the proposed amendments to Federal Rules of Evidence 702 and 705. As before, it believes that there are still serious concerns about the proposed amendments as they apply to criminal trials. After extended discussion on the proposed amendments, the Committee voted unanimously to urge the Standing Committee to table the proposed amendments pending resolution of the question of which entity should be responsible for proposing amendments to the Rules of Evidence, discussed infra.

B. Proposed Amendments to Federal Rules of Evidence.

1. The Committee proposes that an amendment to Federal Rule of Evidence 804(a) be approved for circulation for public comment. The proposed amendment, which is attached, would permit the trial court to decide that a hearsay declarant of "tender years" is unavailable due to a "substantial likelihood that testifying would result in seriour physical, psychological, or emotional trauma..." The amendment would fill a gap in the Federal Rules of Evidence and recognizes a rule which most states have adopted in one form or another: child hearsay statements. The amendment is not limited to child declarants, however. It extends to those whose emotional or psychological age is akin to that of a child.

2. Proposed Amendment to Rule 1102.

The Committee proposes that Federal Rule of Evidence 1102 be amended to permit the Judicial Conference to make technical changes, etc. to the Federal Rules of Evidence in

the same manner proposed for similar changes in the Criminal, Civil, Appellate, and Bankruptcy Rules. A copy of the proposed amendment and Committee Note are attached. The Committee recommends that the proposed amendment be circulated for public comment.

C. Proposal to Create Advisory Committee on Evidence Rules.

1. In General.

During the last year the Committee has dedicated portions of three of its meetings to the discussion of what, if any, changes should be made in the procedures for proposing or considering proposed changes to the Federal Rules of Evidence. At the Fall 1991 meeting, the Chair appointed a special subcommittee to review the Rules of Evidence for possible problem areas and, if appropriate, propose amendments. The subcommittee, chaired by Professor Steve Saltzburg did so, and as a result several amendments are under active consideration. One of them, an amendment to Rule 804, is discussed supra.

As noted in the following discussion, for approximately the last eight years, the primary responsibility for the Rules of Evidence has rested in the Criminal Rules Advisory Committee. For reasons cited in the following discussion, the Committee believes that on the whole the existing structure has worked fairly well and that there should be no new Advisory Committee for the Rules of Evidence.

2. Background.

The Committee understands that at present there appear to be three principal options for dealing with the Rules of Evidence: First, create a new Evidence Advisory Committee. Second, create an ad hoc committee composed of members from the Criminal and Civil Rules Committees. Third, maintain the status quo with some clarification as to which Committee would have primary jurisdiction.

At its April 1992 meeting, Professor Saltzburg provided an in-depth account of how the Criminal and Civil Rules Committees had agreed some years ago to deal with amendments to the Rules of Evidence. He indicated that in 1985, the Judicial Conference had asked the Chief Justice to appoint an Evidence Advisory Committee. When no action was taken on that proposal, the Chairs of the Standing Committee (the late Judge Gignoux) and the Criminal Rules (Judge Lacey) and Civil Rules (Judge Weiss) Advisory Committees agreed that

the primary responsibility for monitoring the evidence rules would reside in the Criminal Rules Committee. In making that decision, the Chairs believed that those instances where evidence issues would tend to be dispositive on appeal were more likely to occur in criminal, rather than civil, cases. Since then, the Criminal Rules Committee has routinely monitored and considered proposed evidence amendments which affect both civil and criminal practice. For example, in the late 1980's the Committee undertook the major project of gender-neutralizing the Rules of Evidence. In the last several years the Criminal Rules Committee has, on the average, submitted at least one evidence amendment each year to the Standing Committee for its consideration.

The Committee believes that the rules of evidence do not require the close monitoring and changes that rules of procedure do. There is also concern among members of the Committee that a new advisory committee would be inclined to set an active agenda which would almost certainly take on a life of its own and generate undesirable and unnecessary length and complexity in the rules of evidence. Some members have observed that despite suggested changes from academic commentators, the rules of evidence have worked well without frequent amendments.

3. Recommendation

The Advisory Committee recommends that the Criminal Rules Advisory Committee's name be changed to the "Advisory Committee for Rules of Criminal Procedure and Evidence" and that some provision be made for additional input from the other Advisory Committees. especially the Civil Rules Committee. One option would be for the addition of several Civil Rules Committee members who would be permitted to vote on proposed amendments to the Rules of Evidence.

4. Justifications for Recommendation.

The Committee believes that leaving the responsibility for the Rules of Evidence in the Criminal Rules Committee, and clarifying that role through a minor name change, is the most appropriate course of action. In reaching that conclusion the Committee has carefully considered the following points:

First, the Committee agrees with the view that the Rules of Evidence should be monitored. Second, it is important to fix the authority for doing so. Third, the Rules of Evidence have worked well since they went into effect in 1975. Where changes have been necessary they have been made. For example, the Criminal Rules Committee in the

last two years has recommended amendments to Rule 404 and 609 which were ultimately made. Fourth, there is some relationship between the rules of procedure and the Rules of Evidence and it makes sense to have one of the procedural rules committees involved in the process of recommending amendments to the rules of evidence. Fifth, to the extent that there may be a conflict between the civil and criminal practice, those conflicts can be addressed through coordination with the Civil Rules Committee. Sixth, evidence issues are more likely to be dispositive, on appeal, in a criminal case than in a civil case. Finally, the Criminal Rules Committee has the background, experience, and institutional memory for dealing with the evidence rules. For example, one of the members and the Reporter are law professors who teach evidence and routinely write and lecture on the subject. Another member of the Committee is an adjunct law professor who teaches evidence. At one other member of the Committee was active in the drafting of the Rules of Evidence in 1974.

The Committee believes that it would be helpful for the public to see that despite the absence of massive amendments to the rules of evidence, the Committee has been active in considering amendments which specifically and directly target a needed change. One possible means of educating the public would be to publish the Committee's actions regarding the rules of evidence in the Federal Rules Decisions.

VI. CONTINUATION OF CRIMINAL RULES COMMITTEE

The Committee understands that every five years the Judicial Conference considers whether the individual Advisory Committees should continue in existence. At its April 1992 meeting, the Committee unanimously voted to recommend to the Standing Committee that the Criminal Rules Committee be continued.

Attachments:

GAP Report
Proposed Amendments
Minutes of April 1992 Meeting

TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Rules of Criminal Procedure

SUBJECT: GAP Report: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 12, 16, 26.2, 26.3, 32, 32.1, 40, 41, 46, and Rule 8 of the Rules Governing Section 2255 Hearings.

DATE: May 15, 1992

At its July 1991 meeting, the Standing Committee approved the circulation for public comment of proposed amendments to the following Rules of Criminal Procedure and Rules Governing Section 2255 Hearings:

Rule 12(i). Production of Statements.
Rule 16(a). Disclosure of Experts.
Rule 26.2(c). Production of Statements.
Rule 26.3. Mistrial.
Rule 32(f). Production of Statements.
Rule 32.1(c). Production of Statements.
Rule 40. Committment to Another District.
Rule 41(c). Search and Seizure.
Rule 46(i). Production of Statements.
Rule 8, Rules Governing Section 2255 Hearings.

The Advisory Committee has considered the written submissions from members of the public who responded to the request for comment as well as the recommendations of the Standing Committee's Subcommittee on Style. Summaries of any comments on each Rule, the Rules, and the accompanying Committee Notes are attached. The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. Rule 12(i). Production of Statements.

There were no written comments on the amendment to Rule 12(i). In addition to stylistic changes, the Committee deleted the introductory, "Except as herein provided" language. The amendment deleting the last portion of the subdivision removed the necessity for that language.

2. Rule 16(a). Disclosure of Experts.

The Committee has made several substantive changes to the rule. In response to serious concerns from the Department of Justice, the Committee removed language from

the amendment which would have required a detailed statement of the testimony, etc. to be given by the expert witness. Some changes were also made in the Committee Note to reflect the fact that under the amendment, only a "summary" would be required. The Committee does not believe that the changes require republication and further comment.

3. Rule 26.2(c). Production of Statements.

In addition to changes in style, the Committee removed any reference in the amendment to "affidavits." Thus, as rewritten, a witness's prior statement need only be produced after that witness has actually testified. Similar changes were also made in the amendments to Rules 32(f), 32.1, 46, and Rule 8, Rules Governing Section 2255 Hearings.

4. Rule 26.3. Mistrial.

The Committee has made no changes in the Rule.

5. Rule 32(f). Production of Statements.

Only one comment was received on this amendment and it was favorable. As with the proposed amendment to Rule 26.2, discussed supra, the Committee has removed the reference to "affidavits" and made other suggested stylistic changes. If the Standing Committee agrees to forward this amendment and also to approve the Advisory Committee's recommendation that the current Rule 32(e) be repealed, then this amendment should be redesignated as 32(e).

6. Rule 32.1(c). Production of Statements.

The Committee removed the reference to "affidavits," as noted supra, and made several stylistic changes.

7. Rule 40(a). Committment to Another District.

Several changes in style were made to the amendment.

8. Rule 41(c). Search and Seizure.

The Committee deleted the word "judge" which had followed the words "federal magistrate," in order to conform the rule to the definition for that term found in Rule 54. The word "judge" had apparently been inadvertently included in the proposed amendment to reflect the change in the title of United States Magistrate Judge. However, in the context of this rule, a "federal magistrate" also includes other judges in the federal judiciary. The Committee Note was

revised slightly to reflect the Committee's decision not to expand the amendment to other electronic transmissions.

9. Rule 46(i). Production of Statements.

In addition to several sytlistic changes, the Committee deleted reference to "affidavits." The Committee Note was revised slightly to reflect concerns raised by the Department of Justice and one other commentator that it might be difficult to locate witness statements at early stages of a criminal prosecution. The Note indicates that if a statement is not available at the time of the detention hearing, the court may reconsider the issue if the statement is subsequent produced.

10. Rule 8, Rules Governing Section 2255 Hearings.

In addition to stylistic changes, the Committee deleted the reference to the fact that introduction of a witness's affidavit would trigger the requirement to produce that witness's statements.

Attachments:
Summaries of Comments
Lists of Commentators
Rules and Committee Notes

RULES OF CRIMINAL PROCEDURE*

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

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(i) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING. ~~Except as herein provided, rule~~ Rule 26.2 ~~shall apply~~ applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer ~~shall be~~ is deemed a government witness ~~called by the government, and upon a claim of privilege the court shall excise the portions of the statement containing privileged matter~~ .

COMMITTEE NOTE

The amendment to subdivision (i) is one of a series of contemporaneous amendments to Rules 26.2, 32(f), 32.1, 46, and Rule 8 of the Rules Governing § 2255 Hearings, which extended Rule 26.2, Production of Witness Statements, to other proceedings or hearings conducted under the Rules of Criminal Procedure. Rule 26.2(c) now explicitly states that the trial court may excise privileged matter from the requested witness statements. That change rendered similar language in Rule 12(i) redundant.

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* New matter is underlined. Omitted matter is lined through.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 12

I. SUMMARY OF COMMENTS: Rule 12(i)

The Committee received no written comments addressing the proposed amendment to Rule 12(i)

II. LIST OF COMMENTATORS: Rule 12(i)

None

III. COMMENTS: Rule 12(i)

None

Rule 16. Discovery and Inspection

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

* * * * *

(E) EXPERT WITNESSES. At the defendant's request, the government must disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence-in-chief at trial. This summary must describe the opinions of the witnesses, the bases and the reasons therefor, and the witnesses' qualifications.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), ~~and~~ (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the

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

government or other government agents in connection with the investigation or prosecution of the case~~.~~ Nor does the rule authorize the discovery or inspection ~~or~~ of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

* * * * *

(b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

(1) *Information Subject to Disclosure.*

* * * * *

(C). EXPERT WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence-in-chief at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications.

COMMITTEE NOTE

New subdivisions (a)(1)(E) and (b)(1)(C) expand federal criminal discovery by requiring disclosure of the intent to rely on expert opinion testimony, what the testimony will consist of, and the bases of the testimony. The amendment is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination. See Eads, Adjudication

by Ambush: Federal Proscecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery, 67 N. C. L. Rev. 577, 622 (1989).

Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose information regarding its expert witnesses if the defendant first requests the information. Once the requested information is provided, the government is entitled, under (b)(1)(C) to reciprocal discovery of the same information from the defendant. The disclosure is in the form of a written summary and only applies to expert witnesses that each side intends to call during its case-in-chief. Although no specific timing requirements are included, it is expected that the parties will make their requests and disclosures in a timely fashion.

With increased use of both scientific and nonscientific expert testimony, one of counsel's most basic discovery needs is to learn that an expert is expected to testify. See Gianelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 793 (1991); Symposium on Science and the Rules of Legal Procedure, 101 F.R.D. 599 (1983). This is particularly important if the expert is expected to testify on matters which touch on new or controverisal techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's qualifications which in turn will permit the requesting party to determine whether in fact the witness is an expert within the definition of Federal Rule of Evidence 702. Like Rule 702, which generally provides a broad definition of who qualifies as an "expert," the amendment is broad in that it includes both scientific and nonscientific experts. It does not distinquish between those cases where the expert will be presenting testimony on novel scientific evidence. The rule does not extend, however, to witnesses who may offer only lay opinion testimony under Federal Rule of Evidence 701. Nor does the amendment extend to summary witnesses who may testify under Federal Rule of Evidence 1006 unless the witness is called to offer expert opinions apart from, or in addition to, the summary evidence.

Second, the requesting party is entitled to a summary of the expected testimony. This provision is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion. In some instances, a generic description of the likely witness and that witness's qualifications may be sufficient, e.g., where a DEA

laboratory chemist will testify, but it is not clear which particular chemist will be available.

Third, and perhaps most important, the requesting party is to be provided with a summary of the bases of the expert's opinion. Rule 16(a)(1)(D) covers disclosure and access to any results or reports of mental or physical examinations and scientific testing. But the fact that no formal written reports have been made does not necessarily mean that an expert will not testify at trial. At least one federal court has concluded that that provision did not otherwise require the government to disclose the identity of its expert witnesses where no reports had been prepared. See, e.g., United States v. Johnson, 713 F.2d 654 (11th Cir. 1983, cert. denied, 484 U.S. 956 (1984)(there is no right to witness list and Rule 16 was not implicated because no reports were made in the case). The amendment should remedy that problem. Without regard to whether a party would be entitled to the underlying bases for expert testimony under other provisions of Rule 16, the amendment requires a summary of the bases relied upon by the expert. That should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts.

The amendments are not intended to create unreasonable procedural hurdles. As with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 16(a)(1)(E)

I. SUMMARY OF COMMENTS: Rule 16(a)(1)(E)

The Committee received comments from six individuals or organizations which generally supported the proposed amendments which would require pretrial disclosure of expert testimony. The Justice Department also commented on the proposed amendment and cited several reasons for strongly opposing the change. Several commentators offered suggested changes concerning the scope of the disclosure requirement and the timing requirements.

II. LIST OF COMMENTATORS: Rule 16(a)(1)(E)

1. Robert Garcia, Prof., Los Angeles, CA., 3-18-92
2. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92
3. Benedict P. Kuehne, Esq., Miami, Fla., 11-18-92
4. Robert S. Mueller, Esq. & J William Roberts, Esq., Wash. D.C., 4-16-92
5. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92
6. Charles Pereyra-Suarez, Esq.,Los Angeles, CA, 2-14-92
7. Myrna S. Raeder, Prof., Los Angeles, CA, 1-31-92

III. COMMENTS: Rule 16(a)(1)(E)

Robert Garcia
Law Professor
Los Angeles, CA
Feb. 26, 1992

Professor Garcia supports the proposed amendment but concludes that it suffers from several limitations. First, the rule should require government notice without a request from the defense. Second, the government should be required to make its disclosure a reasonable time before trial and before any suppression hearings. Third, the government should be required to provide as much discovery in criminal

as in civil cases. He believes that proposed amendments to Civil Rule 26 and Rule of Evidence 702 will provide greater notice in civil cases. He also notes that the rule should explicitly provide procedures for permitting the defense ample time to prepare its case in light of the government disclosures, including a provision for deposing expert witnesses.

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Mr. Hess has submitted a report from the Los Angeles Chapter of the Federal Bar Association which questions the need for the amendment to Rule 16; the issue of disclosure of experts has not been a problem in the Central District of California. In fact, the requirement might work to the disadvantage of the defense which will normally not have the resources to compile the report required by the proposed amendment. The amendment also requires the defense to make pretrial assessments of what, if any, expert testimony will be offered -- something that it may not always be able to do in terms of cost and strategy.

Benedict P. Kuehne
Private Practice
Miami,. Fla
Oct. 28, 1991

The commentator generally supports the proposed amendment to Rule 16 in that it will promote broader discovery and discourage trial by ambush.

Robert S. Mueller, III, Esq.
J. William Roberts, Esq.
US Justice Department & Advisory Committee of US Attorneys
Washington, D.C.
April 16, 1992

The Justice Department and the Attorney General's Advisory Committee of United States Attorneys is opposed to the proposed amendment to Rule 16(a)(1)(E). The commentators believe that the proposal would be "inimical to the interests of justice" and would "lead to greated opportunities to distort the truth-seeking function of the trial." In their view, there is no major problem with the current disclosure requirements and that the current

provisions in Rule 16 strike a fair balance. The rule is also overbroad in that it would include "summary" witnesses and other nonscientific expert witnesses. Those types of witnesses may not be identified until after the trial has begun. The amendment would also permit the defense to shape its defense improperly. And it would also slow down the plea negotiation process; defendants will wait until they see who the expert witnesses are before negoitiating. Finally, the amendment will burden the litigation system by fostering needless litigation.

Lawrence B. Pedowitz, Esq.
Chair, Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Mr. Pedowitz has submitted a report from the Criminal Law Committee of the Association of the Bar of New York City. That report generally supports the proposed amendment to Rule 16 but suggests that it be expanded to parallel similar provisions in Civil Rule 26. It also questions whether the disclosure should apply to non-traditional expert witnesses and notes the problems that could arise from the prosecution's good-faith failure to supply disclosure where it decides during trial, for example, to present expert testimony.

Charles Pereyra-Suarez
Federal Courts Committee, LA County Bar Assoc.
Los Angeles, CA
Feb. 14, 1992

This commentator endorses the report filed by the Los Angeles Chapter of the Federal Bar Association, supra.

Myrna S. Raeder
Law Professor
Los Angeles, CA
Jan. 31, 1992

Professor Raeder generally supports the proposed amendment but suggests that first, the amendment be changed to reflect last minute decisions to present expert testimony and. Second, to discourage intentional delay the rule should be amended to require a specific time for compliance. Third, she is concerned about the requirement that a complete statement of all opinions be included; she perceives a potential problem with litigation over whether

the expert may be permitted to vary his or her testimony from the "script" in the disclosure. Finally, she questions the possible relationship with this amendment and Rule 16(a)(1)(D) and 16(a)(1)(B), which require disclosure of reports and examinations and tests. She suggests that the issue be, at a minimum, addressed in the accompanying commentary.

Rule 26.2. Production of Witness Statements ~~of Witnesses~~

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(c) PRODUCTION OF EXCISED STATEMENT. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise any portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the government, and, ~~in the event of a conviction and an appeal by the defendant~~ if the defendant appeals a conviction, must ~~shall~~ be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

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(d) RECESS FOR EXAMINATION OF STATEMENT. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings ~~in the trial for the examination of such statement and for~~

~~preparation for its use~~ so that counsel may examine the statement and prepare to use it in the ~~trial~~ proceedings.

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(g) SCOPE OF RULE. Subdivisions (a)-(d) and (f) of this rule apply at a suppression hearing conducted under Rule 12, at trial under this rule, at sentencing under Rule 32(f), at a hearing to revoke or modify probation or supervised release conducted under Rule 32.1(c), at a detention hearing conducted under Rule 46(i), and at an evidentiary hearing conducted under Section 2255 of Title 28, United States Code.

COMMITTEE NOTE

New subdivision (g) recognizes other contemporaneous amendments in the Rules of Criminal Procedure which extend the application of Rule 26.2 to other proceedings. Those changes are thus consistent with the extension of Rule 26.2 in 1983 to suppression hearings conducted under Rule 12. See Rule 12(i).

In extending Rule 26.2 to suppression hearings in 1983, the Committee offered several reasons. First, production of witness statements enhances the ability of the court to assess the witnesses' credibility and thus assists the court in making accurate factual determinations at suppression hearings. Second, because witnesses testifying at a suppression hearing may not necessarily testify at the trial itself, waiting until after a witness testifies at trial before requiring production of that witness's statement would be futile. Third, the Committee believed that it would be feasible to leave the suppression issue open until trial, where Rule 26.2 would then be applicable. Finally, one of the central reasons for requiring production of statements at suppression hearings was the recognition that by its nature, the results of a suppression hearing have a profound and ultimate impact on the issues presented at trial.

The reasons given in 1983 for extending Rule 26.2 to a suppression hearing are equally compelling with regard to other adversary type hearings which ultimately depend on accurate and reliable information. That is, there is a continuing need for information affecting the credibility of witnesses who present testimony. And that need exists without regard to whether the witness is presenting testimony at a pretrial hearing, at a trial, or at a post-trial proceeding.

As noted in the 1983 Advisory Committee Note to Rule 12(i), the courts have generally declined to extend the Jencks Act, 18 U.S.C. § 3500, beyond the confines of actual trial testimony. That result will be obviated by the addition of Rule 26.2(g) and amendments to the Rules noted in that new subdivision.

Although amendments to Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255 specifically address the requirement of producing a witness's statement, Rule 26.2 has become known as the central "rule" requiring production of statements. Thus, the references in the Rule itself will assist the bench and bar in locating other Rules which include similar provisions.

The amendment to Rule 26.2 and the other designated Rules is not intended to require production of a witness's statement before the the witness actually testifies.

Minor conforming amendments have been made to subsection (d) to reflect that Rule 26.2 will be applicable to proceedings other than the trial itself. And language has been added to subsection (c) to recognize explictly that privileged matter may be excised from the witness's prior statement.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 26.2

I. SUMMARY OF COMMENTS: Rule 26.2

Of the four commentators submitting statements on the proposed amendment to Rule 26.2 (production of witness statements), three favored the change. One suggested that the term "privileged information" in the amendment was ambiguous and another suggested that the concept of production of statements should be extended to other adversary type hearings. The Justice Department opposed the amendment insofar as it extends to pretrial detention hearings.

II. LIST OF COMMENTATORS: Rule 26.2

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92.
2. Benedict P. Kuehne, Esq., Miami, Fla., 11-18-92.
3. Robert S. Mueller, III, Esq. & J.Williams Roberts, Esq., Wash. D.C., 4-16-92.
4. Lawrence B. Pedowitz, Esq.,New York, NY, 2-15-92

III. COMMENTS: Rule 26.2

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Mr. Hess believes that there are several problems with the proposed amendment to Rule 26.2. First, he notes that there is no definition of "privileged information" in the Rule. He questions whether that term applies to more than the common law privileges. Second, it is not clear from the Rule how the withholding of privileged information is to be dealt with if it is exclupatory under Brady v. Maryland. Third, the remedy for violations is inadequate. Finally, he points out that the foregoing problems of defining "privileged information" also exist in the other disclosure rules (e.g., Rule 32(f), 32.1, 46).

Benedict P. Kuehne
Private Practice
Miami,. Fla
Oct. 28, 1991

Mr. Kuehne believes that extending the Jencks Act requirements in Rule 26.2 to other hearings is appropriate because it will enable the opposing party to question a witness thoroughly. At the same time, unwarranted disclosure will be prevented. Further, the disclosure requirments will avoid surprise, expedite the proceedings, and reduce disagreements which arise under Brady.

Robert S. Mueller, III, Esq.
J. William Roberts, Esq.
US Justice Department & Advisory Committee of US Attorneys
Washington, D.C.
April 16, 1992

The Justice Department and the Attorney General's Advisory Committee of United States Attorneys is opposed to the proposed amendment to Rule 26.2 insofar as it extends to pretrial detention hearings for two reasons. First, such hearings frequently involve dangerous persons and premature disclosure of witness statements could lead to harm to the witness. Second, there is also great difficulty in collecting witness statements at such an early stage in the prosecution. On balance, the benefits of the rule are outweighed by the burdens on the government.

Lawrence B. Pedowitz, Esq.
Chair, Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Speaking on behalf of the Criminal Law Committee of the New York Bar Association, Mr. Pedowitz wholeheartedly agrees with the underlying rationale for the amendment. He suggests that Rule 26.2 be extended to other adversary type hearings, such as motions for new trials, and motions to dismiss indictments. He also urges the Standing Committee to recommend to Congress that the Jencks Act and the corresponding rules to be amended to give the court discretion to order production of a witness's statement before the witness testifies. He also recommends that the Committee Note include language which appears in the 1979 Note to the Rule to the effect that the rule is not intended to discourage the practice of earlier, voluntary disclosure.

Rule 26.3 Mistrial

Before ordering a mistrial, the court must provide an opportunity to the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.

COMMITTEE NOTE

Rule 26.3 is a new rule designed to reduce the possibility of an erroneously ordered mistrial which could produce adverse and irretreviable consequences. The Rule is not designed to change the substantive law governing mistrials. Instead it is directed at providing both sides an opportunity to place on the record their views about the proposed mistrial order. In particular, the court must give each side an opportunity to state whether it objects or consents to the order.

Several cases have held that retrial of a defendant was barred by the Double Jeopardy Clause of the Constitution because the trial court had abused its discretion in declaring a mistrial. See United States v. Dixon, 913 F.2d 1305 (8th Cir. 1990); United States v. Bates, 917 F.2d 388 (9th Cir. 1990). In both cases the appellate courts concluded that the trial court had acted precipitately and had failed to solicit the parties' views on the necessity of a mistrial and the feasibility of any alternative action. The new Rule is designed to remedy that situation.

The Committee regards the Rule as a balanced and modest procedural device that could benefit both the prosecution and the defense. While the the Dixon and Bates decisions adversely affected the government's interest in prosecuting serious crimes, the new Rule could also benefit defendants. The Rule ensures that a defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes that the prospects for a favorable outcome before that particular court, or jury, are greater than they might be upon retrial.

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 26.3

I. SUMMARY OF COMMENTS: Rule 26.3

Only two comments were received on the proposed Rule 26.3 and both of those favored the new rule.

II. LIST OF COMMENTATORS: Rule 26.3

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92

2. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92

III. COMMENTS: Rule 26.3

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Mr. Hess briefly states that his organization supports the change to Rule 26.3.

Lawrence B. Pedowitz, Esq.
Chair, Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Speaking as the chair for the Criminal Law Committee of the New York Bar Association, Mr. Pedowitz indicates that his committee endorses the proposed rule because it will reduce the possibility of an erroneously ordered mistrial.

Rule 32. Sentence and Judgment

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~~(e) PROBATION. After conviction of an offense not punishable by death or life imprisonment, the defendant may be placed on probation if permitted by law.~~

(e) PRODUCTION OF STATEMENTS AT SENTENCING HEARING

(1) In General. Rule 26.2 (a)-(d), (f) applies at a sentencing hearing under this rule.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The original subdivision (e) has been deleted due to statutory changes affecting the authority of a court to grant probation. See 18 U.S.C. 3561(a). Its replacement is one of a number of contemporaneous amendments extending Rule 26.2 to hearings and proceedings other than the trial itself. The amendment to Rule 32 specifically codifies the result in cases such as United States v. Rosa, 891 F.2d 1074 (3d. Cir. 1989). In that case the defendant pleaded guilty to a drug offense. During sentencing the defendant unsuccessfully attempted to obtain Jencks Act materials relating to a co-accused who testified as a government witness at sentencing. In concluding that the trial court erred in not ordering the government to produce its witness's statement, the court stated:

> We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the "bottom-line" for the defendant,

> particularly where the defendant has pled guilty. This being so, we can perceive no purpose in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if accepted, add substantially to the defendant's sentence. In such a setting, we believe that the rationale of Jencks v. United States...and the purpose of the Jencks Act would be disserved if the government at such a grave stage of a criminal proceeding could deprive the accused of material valuable not only to the defense but to his very liberty. Id. at 1079.

The court added that the defendant had not been sentenced under the new Sentencing Guidelines and that its decision could take on greater importance under those rules. Under Guideline sentencing, said the court, the trial judge has less discretion to moderate a sentence and is required to impose a sentence based upon specific factual findings which need not be established beyond a reasonable doubt. Id at n. 3.

Although the Rosa decision decided only the issue of access by the defendant to Jencks material, the amendment parallels Rules 26.2 (applying Jencks Act to trial) and 12(i) (applying Jencks Act to suppression hearing) in that both the defense and the prosecution are entitled to Jencks material.

Production of a statement is triggered by the witness's oral testimony. The sanction provision rests on the assumption that the proponent of the witness's testimony has deliberately elected to withold relevant material.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 32(f)

I. SUMMARY OF COMMENTS: Rule 32(f)

The Committee received only one written comment relating to Rule 32(f) and that commentator favored the amendment.

II. LIST OF COMMENTATORS: Rule 32(f)

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92

III. COMMENTS: Rule 32(f)

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Speaking on behalf of the Los Angeles Chapter of the FBA, Mr. Hess expresses approval of the proposed amendment to Rule 32. He does express some concern about the relationship between this rule and Rule 26.2, which includes the general term, "privileged information."

Rule 32.1. Revocation or Modification of Probation or Supervised Release.

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(c) PRODUCTION OF STATEMENTS

(1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The addition of subdivision (c) is one of several amendments that extend Rule 26.2 to Rules 32(f), 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. As noted in the Committee Note to Rule 26.2, the primary reason for extending that Rule to other hearings and proceedings rests heavily upon the compelling need for accurate information affecting the witnesses' credibility. While that need is certainly clear in a trial on the merits, it is equally compelling, if not more so, in other pretrial and posttrial proceedings in which both the prosecution and defense have high interests at stake. In the case of revocation or

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

modification of probation or supervised release proceedings, not only is the defendant's liberty interest at stake, the government has a stake in protecting the interests of the community.

Requiring production of witness statements at hearings conducted under Rule 32.1 will enhance the procedural due process which the rule now provides and which the Supreme Court required in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973). Access to prior statements of a witness will enhance the ability of both the defense and prosecution to test the credibility of the other side's witnesses under Rule 32.1(a)(1), (a)(2), and (b) and thus will assist the court in assessing credibility.

A witness's statement must be produced only if the witness testifies.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 32.1

I. SUMMARY OF COMMENTS: Rule 32.1

Only one commentator expressed views on the proposed amendment to Rule 32.1 and he supported the change.

II. LIST OF COMMENTATORS: Rule 32.1

1. Robert L. Hess, Los Angeles, CA, 1-24-92.

III. COMMENTS: Rule 32.1

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Speaking on behalf of the Los Angeles Chapter of the FBA, Mr. Hess expresses approval of the proposed amendment to Rule 32.1 He does express some concern about the relationship between this rule and Rule 26.2, which includes the general term, "privileged information."

Rule 40. Commitment to Another District.

(a). APPEARANCE BEFORE FEDERAL MAGISTRATE. If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person must ~~shall~~ be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant must ~~shall~~ be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person must ~~shall~~ be held to answer upon a finding that such person is the person named in the indictment, information or warrant. If held to answer, the defendant must ~~shall~~ be held to answer in the district court in which the prosecution is pending~~,~~ -- provided that a warrant is issued in that district if the arrest warrant was made without a warrant~~,~~ -- upon production of the warrant or a certifed copy thereof. The warrant or certified copy may be produced by facsimile transmission.

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* New matter is underlined. Matter to be deleted is lined through.

COMMITTEE NOTE

The amendment to subdivision (a) is intended to expedite determining where a defendant will be held to answer by permitting facsimile transmission of a warrant or a certified copy of the warrant. The amendment recognizes an increased reliance by the public in general, and the legal profession in particular, on accurate and efficient transmission of important legal documents by facsimile machines.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 40

I. SUMMARY OF COMMENTS: Rule 40

Two commentators offered their views on the proposed amendment which would permit a magistrate to consider a facsimile transmission of a warrant. Both favored the amendment although one suggested that the original copy of the warrant should be promptly transmitted to the court.

II. LIST OF COMMENTATORS: Rule 40

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92.

2. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92

III. COMMENTS: Rule 40

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Mr. Hess, on behalf of the organization, supports the change to Rule 40; it "appropriately reflects technological advances." He suggests, however, that the original or certified copy of the warrant be forwarded promptly by nonfacsimile means so that it may be included in the Court file.

Lawrence B. Pedowitz, Esq.
Chair, Criminal Law Committee
Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Mr. Pedowitz, as chair of the Criminal Law Committee for the New York Bar Association, offers a brief statement of support for the amendment. He notes that the amendment reflects a reasonable attempt to adapt procedural rules to changing technology.

Rule 41. Search and Seizure.

(c) ISSUANCE AND CONTENTS.

(2) *Warrant Upon Oral Testimony.*

(A) If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate may issue a warrant based upon sworn ~~oral~~ testimony communicated by telephone or other appropriate means ~~.~~ , including facsimile transmission.

COMMITTE NOTE

The amendment to Rule 41(c)(2)(A) is intended to expand the authority of magistrates and judges in considering oral requests for search warrants. It also recognizes the value of, and the public's increased dependence on facsimile machines to transmit written information efficiently and accurately. As amended, the Rule should thus encourage law enforcement officers to seek a warrant, especially when it is necessary, or desirable, to supplement oral telephonic communications by written materials which may now be transmitted electronically as well. The magistrate issuing the warrant may require that the original affidavit be ultimately filed. The Committee considered, but rejected, amendments to the Rule which would have permitted other means of electronic transmission, such as the use of computer modems. In its view, facsimile transmissions provide some method of assuring the authenticity of the writing transmitted by the affiant.

The Committee considered amendments to Rule 41(c)(2)(B), Application, Rule 41(c)(2)C), Issuance, and Rule 41(g), Return of Papers to Clerk, but determined that allowing use of facsimile transmissions in those instances would not save time and would present problems and questions concerning the need to preserve facsimile copies.

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* New matter is underlined. Deleted matter is lined through.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 41(c)

I. SUMMARY OF COMMENTS: Rule 41(c)

One commentator submitted a brief statement supporting the proposed amendment.

II. LIST OF COMMENTATORS: Rule 41(c)

1. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92

III. COMMENTS: Rule 41(c)

Lawrence B. Pedowitz, Esq.
Chair, Criminal Law Committee
Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Mr. Pedowitz, as chair of the Criminal Law Committee for the New York Bar Association, offers a brief statement of support for the amendment to Rule 41. He notes that the amendment reflects a reasonable attempt to adapt procedural rules to changing technology.

Rule 46. Release from Custody

* * * * *

(i) PRODUCTION OF STATEMENTS.

(1) In General. Rule 26.2(a)-(d) and (f) applies at a detention hearing held under 18 U.S.C. § 3144.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, at the detention hearing the court may not consider the testimony of a witness whose statement is withheld.

COMMITTEE NOTE

The addition of subdivision (i) is one of series of similar amendments to Rules 26.2, 32, 32.1, and Rule 8 of the Rules Governing Proceedings Under 28 U.S.C. § 2255 which extend Rule 26.2 to other proceedings and hearings. As pointed out in the Committee Note to the amendment to Rule 26.2, there is continuing and compelling need to assess the credibility and reliability of information relied upon by the court, whether the witness's testimony is being considered at a pretrial proceeding, at trial, or a posttrial proceeding.. Production of a witness's prior statements directly furthers that goal.

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

The need for reliable information is no less crucial in a proceeding to determine whether a defendant should be released from custody. The issues decided at pretrial detention hearings are important to both a defendant and the community. For example, a defendant charged with criminal acts may be incarcerated prior to an ajudication of guilt without bail on grounds of future dangerousness which is not subject to proof beyond a reasonable doubt. Although the defendant clearly has an interest in remaining free prior to trial, the community has an equally compelling interest in being protected from potential criminal activity committed by persons awaiting trial.

In upholding the constitutionality of pretrial detention based upon dangerousness, the Supreme Court in United States v.Salerno, 481 U.S. 739 (1986), stressed the existence of procedural safeguards in the Bail Reform Act. The Act provides for the right to counsel and the right to cross-examine adverse witnesses. See, e.g., 18 U.S.C. § 3142(f)(right of defendant to cross-examine adverse witness). Those safeguards, said the Court, are "specifically designed to further the accuracy of that determination." 481 U.S. at 751. The Committee believes that requiring the production of a witness's statement will further enhance the fact-finding process.

The Committee recognized that pretrial detention hearings are often held very early in a prosecution, and that a particular witness's statement may not yet be on file, or even known about. The amendment nonetheless envisions that both sides should make reasonable efforts to locate such statements, assuming that they exist. If a witness's statement is not discovered until after the pretrial detention hearing, the court may examine the statement and reopen the proceeding if the statement would have a material bearing on the court's decision. See 18 U.S.C. § 3142(f).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 46

I. SUMMARY OF COMMENTS: Rule 46

Of the three comments received on the proposed amendment to Rule 46 (production of statements at detention hearing), two of the commentators favored the change. Two commentators, including the Justice Department, raised concerns about the problem of producing a witness's statement at a pretrial detention hearing. At such an early stage in the proceeding it may be difficult to obtain such statements. The Justice Department adds a note of concern about potential danger to prosecution witness.

II. LIST OF COMMENTATORS: Rule 46

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92.
2. Robert S. Mueller, III, Esq. & J. William Roberts, Esq., Wash. D.C., 4-16-92
3. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92

III. COMMENTS: Rule 46

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Speaking on behalf of the Los Angeles Chapter of the FBA, Mr. Hess expresses approval of the proposed amendment to Rule 46. He does express some concern, however, about the relationship between this rule and Rule 26.2, which includes the general term, "privileged information."

Robert S. Mueller, III, Esq.
J. William Roberts, Esq.
US Justice Department & Advisory Committee of US Attorneys
Washington, D.C.
April 16, 1992

The Justice Department and the Attorney General's Advisory Committee of United States Attorneys are opposed to

the proposed amendment to Rule 26.2 insofar as it extends to pretrial detention hearings for two reasons. First, such hearings frequently involve dangerous persons and premature disclosure of witness statements could lead to harm to the witness. Second, there is also great difficulty in collecting witness statements at such an early stage in the prosecution. On balance, the benefits of the rule are outweighed by the burdens on the government.

Lawrence B. Pedowitz, Esq.
Chair, Criminal Law Committee
Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Speaking on behalf of the Criminal Law Committee of the New York Bar Association, Mr. Pedowitz voices approval of the concept underlying the disclosure requirements of the amendment. But he points out that in light of the fact that detention hearings often occur prior to indictment, it may be extremely difficult for the prosecutor to gather all of the prior statements of a witness. He therefore recommends that the Standing Committee add a provision which grants the magistrate or court some latitude in requiring disclosure.

Rule 8. Evidentiary Hearing.

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(d) Production of Statements at Evidentiary Hearing.

(1) In General. Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) applies at an evidentiary hearing under these rules.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, at the evidentiary hearing the court may not consider the testimony of the witness whose statement is withheld.

COMMITEE NOTE

The amendment to Rule 8 is one of series of parallel amendments to Federal Rule of Criminal Procedure, 32, 32.1, and 46 which extend the scope of Rule 26.2 (Production of witness statements) to proceedings other than the trial itself. The amendments are grounded on the compelling need for accurate and credible information in making decisions concerning the defendant's liberty. See the Advisory Committee Note to Rule 26.2(g). A few courts have

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

recognized the authority of a judicial officer to order production of prior statements by a witness at a § 2255 hearing, see, e.g., United States v. White, 342 F.2d 379, 382, n.4 (4th Cir. 1959). The amendment to Rule 8 grants explicit authority to do so. The amendment is not intended to require production of a witness's statement before the witness actually presents oral testimony.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 8, RULES GOVERNING SECTION 2255 HEARINGS

I. SUMMARY OF COMMENTS: Rule 8, § 2255 Hearings

Two commentators submitted written statements on the proposed amendment. Although both favored the change, one raised concerns about the ability of the prosecution to locate a witness's statements after a great lapse of time and the other commentator raised concerns about the ambiguous term "privileged information" which is incorporated in this amendment by Rule 26.2.

II. LIST OF COMMENTATORS: Rule 8, § 2255 Hearings

1. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92.

2. Lawrence B. Pedowitz, Esq.,New York, N.Y., 2-15-92

III. COMMENTS: Rule 8, § 2255 Hearings

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Speaking on behalf of the Los Angeles Chapter of the FBA, Mr. Hess expresses approval of the proposed amendment to Rule 8 of the Rules Governing Section 2255 hearings. He expresses some concern about the relationship between this rule and Rule 26.2, which includes the general term, "privileged information."

Lawrence B. Pedowitz, Esq.
Chair, Criminal Law Committee
Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Mr. Pedowitz, speaking on behalf of the Criminal Law Committee of the New York Bar Association, expresses strong support for the underlying rationale of disclosure requirements in the amendment. He notes, however, that where § 2255 hearings are held years after the fact, the

prosecutor may encounter problems in assembling prior statements of a witness. He recommends that the court be given some discretion in ordering disclosure where the task of gathering such statements is "unfairly burdensome."

Rule 16. Discovery and Inspection

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) Information Subject to Disclosure.

(A) STATEMENT OF DEFENDANT. Upon request of a defendant the government must ~~shall~~ disclose to the defendant and make available for inspection, copying or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must ~~shall~~ also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a ~~Where the~~ defendant which is an

RULES OF CRIMINAL PROCEDURE*

organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person ~~the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury~~ who (1) was, at the time of making the statement ~~that testimony~~, so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement ~~conduct constituting the offense~~, or (2) was, at the time of offense, personally involved in the alleged conduct constituting the offense and so situated as a ~~an~~ director, officer, ~~or~~ employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the ~~witness~~ person was involved.

* * * * *

COMMITTEE NOTE

The amendment is intended to clarify that the discovery and disclosure requirements of the rule apply equally to individual and organizational defendants. See In re United States, 918 F.2d 138 (11th Cir. 1990)(rejecting distinction between individual and organizational defendants). Because an organizational defendant may not know what its officers or agents have said or done in regard to a charged offense,

it is important that it have access to statements made by persons whose statements or actions could be binding on the defendant. See also United States v. Hughes, 413 F.2d 1244, 1251-52 (5th Cir. 1969), vacated as moot, 397 U.S. 93 (1970)(prosecution of corporations "often resembles the most complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth").

The amendment defines defendant in a broad, nonexclusive, fashion. See also 18 U.S.C. § 18 (the term "organization" includes a person other than an individual). And the amendment recognizes that an organizational defendant could be bound by an agent's statement, see, e.g., Federal Rule of Evidence 801(d)(2), or be vicariously liable for an agent's actions. The amendment does not address, however, the issue of what, if any, showing an organizational defendant would be required to establish that a particular person was in a position to legally bind the organizational defendant. But as with individual defendants, the organizational defendant is entitled to the statements without first seeking court approval. If disclosure is denied and the defendant seeks relief from the court, the Committee envisions that the organizational defendant might have to offer some evidence, short of a binding stipulation or judicial admission, that the person in question was able to bind legally the defendant.

RULES OF CRIMINAL PROCEDURE

Rule 29. Motion for Judgment of Acquittal

* * * * *

(b) RESERVATION OF DECISION ON MOTION. ~~If a motion for judgment of acquittal is made at the close of all the evidence, t~~ The court may reserve decision on ~~the~~ a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

COMMITTEE NOTE

The amendment permits the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all of the evidence. Although the rule as written did not permit the court to reserve such motions made at the end of the government's case, trial courts on occasion have nonetheless reserved ruling. See, e.g., United States v. Bruno, 873 F.2d 555 (2d Cir.), cert. denied, 110 S.Ct. 125 (1989); United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988). While the amendment will not affect a large number of cases, it should remove the dilemma in those close cases where at the end of the government's case the trial court would feel pressured into making an immediate, and possibly erroneous, decision or violating the rule as presently written by reserving its ruling on the motion.

The amendment also permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in being able to appeal, should a guilty verdict result, a subsequent unfavorable ruling and thus attempt to have the verdict reinstated. Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Thus, the government's right to appeal a rule 29 motion is only preserved where the ruling is reserved until after the verdict.

In addressing the issue of preserving the government's right to appeal and at the same time recognizing double jeopardy concerns, the Supreme Court observed:

> We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution. In United States v. Wilson, 420 U.S. 332 (1975), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in United States v. Ceccolini, 435 U.S. 168 (1978), we described similar action with approval: "The District Court had sensibly made its finding on the factual question of guilty or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceeding in the District Court, but merely a reinstatement of the finding of guilt." Id. at 271.

United States v. Scott, 437 U.S. 82, 100 n. 13 (1978). By analogy, reserving a ruling on a motions for judgment of acquittal strikes the same balance as that reflected by the Supreme Court in Scott.

Reserving a ruling on a motion made at the end for the government's case does pose problems, however, where the defense decides to present its evidence and run the risk that its evidence would support the government's case. To minimize that problem, the amendment provides that the trial court is to consider only the evidence submitted at the time

of the motion in making its ruling, whenever made.

RULES OF CRIMINAL PROCEDURE

Rule 57. Rules by District Courts

(a) IN GENERAL. Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate notice and an opportunity to comment, make and amend rules governing its practice which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules. Any local rules promulgated under this rule must be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States. In all cases not provided by rule, the district judges and magistrate judges may regulate their practice in any manner consistent with these rules or those of the district in which they act.

(b) EFFECTIVE DATE AND NOTICE. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district court is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial

RULES OF CRIMINAL PROCEDURE

council and the Administrative Office of the United States Courts and shall be made available to the public. ~~In all cases not provided by rule, the district judges and magistrate judges may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.~~

COMMITTEE NOTE

Rule 57 provides flexibility to district courts to promulgate local rules of practice and procedure. But experience has demonstrated several problems. The amendments are intended to address those problems. First, as originally written, Rule 57 only prohibited rules which were inconsistent with the rules of criminal procedure. No mention was made of local rules which might attempt to paraphrase or merely duplicate an existing rule of criminal procedure. Such duplication can confuse practitoners where it is not entirely clear whether the national or local rule should prevail. Duplication can also obscure any local variations or special requirements. The amendment now specifically prohibits such. The prohibition would also apply to local rules which merely attempt to paraphrase a rule of criminal procedure.

Second, the absence of any uniform numbering of local rules can become an unnecessary trap for unwary counsel who may be unaware of applicable local provisions. To remedy that problem, the amendments require that local rules conform in numbering with any uniform system of numbering devised by the Judicial Conference of the United States.

RULES OF CRIMINAL PROCEDURE

Rule 59. Effective Date; Technical Amendments

(a) These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

(b) The Judicial Conference of the United States may amend these rules or explanatory notes to conform to statutory changes, to correct errors in grammar, spelling, cross-references, or typography and to make other similar technical changes of form or style.

COMMITTEE NOTE

The amendment is intended to streamline the process of correcting clerical or other technical matters which appear from time to time in the Rules. For example, recent technical amendments were required in Rule 54 to reflect supreceding statutes which affected the prosecution of cases in Guam and the Virgin Islands by indictment or information. Currently such changes are formally revieved by the Supreme Court and Congress pursuant to the Rules Enabling Act.

FEDERAL RULES OF EVIDENCE

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant --

* * * * *

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity, or there is a substantial likelihood that testifying would result in serious physical, psychological, or emotional trauma to a declarant of tender years.

COMMITTEE NOTE

The amendment to Rule 804 is intended to fill a perceived gap in Federal Evidence. Although a majority of the States have adopted some variation of a child hearsay exception, either in their Rules of Evidence or in statutory form, no such exception exists in the Federal Rules of Evidence. The effect of the State adoptions has been that hearsay statements by child victims or witnesses may be admitted if certain procedural prerequisites are met.

The amendment does not adopt a specific exception for child hearsay statements. But it recognizes that calling a person of tender years to testify may present substantial dangers to the declarant. Thus, Rule 804(a)(4) has been amended to reflect that a declarant of tender years may be "unavailable" for purposes of the exceptions in the Rule due to a substantial likelihood of physical, psychological or emotional trauma. If the court finds the declarant

unavailable under those circumstances, the hearsay statement may be admissible under any of the exceptions in Rule 804(b), including the residual hearsay exception in Rule 804(b)(5). The Committee envisions that most litigation arising from this amendment will involve the residual exception.

The "declarant of tender years" provision has been included in Rule 804 to avoid confrontation clause problems, especially in criminal cases. See Idaho v. Wright, ____ U.S. ____, 110 S.Ct. 3139, 3147 (1990).

Unlike Uniform Rule 807 (Child Victims or Witnesses), and many similar State child-hearsay provisions, the amendment to Rule 804 does not include detailed procedural requirements Instead, the Rule leaves to the trial court the task of considering the surrounding circumstances of the making of the statement in determining whether the hearsay statement of a declarant of tender years is trustworthy. As noted by the Court in Idaho v. Wright, supra, the Constitution does not impose a "fixed set of procedural prerequisites to the admission of such statements at trial" and in some cases procedural requirements as conditions precedent might be inappropriate or unnecessary. 110 S.Ct. at 3148.

The Committee considered, but rejected, setting a particular age for child declarants under the Rule. Instead, it chose to use the broader term "tender years" to recognize that the provision could extend to older declarants whose mental and emotional age were comparable to that of a child. Regardless of the age of the declarant, unavailability requires a showing of a risk of serious harm to the declarant.

The amendment is not intended to preclude use of any other hearsay exception which might be available, such as excited utterances under Rule 803(2) or statements made for the purpose of medical diagnosis or treatment under Rule 803(4).

FEDERAL RULES OF EVIDENCE

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code. The Judicial Conference of the United States may amend these rules or explanatory notes to conform to statutory changes, to correct errors in grammar, spelling, cross-references, or typography and to make other similar technical changes of form or style.

COMMITTEE NOTE

The amendment streamlines the process of correcting or changing clerical or technical matters which appear from time to time in the Rules. For example, a purely technical change was made recently to the statutory reference in Rule 1102 to reflect statutory changes in the statutes governing the procedure for promulgating rules of procedure and evidence. Currently such technical changes are formally reviewed by the Supreme Court and Congress pursuant to 28 U.S.C. § 2071, et. seq..

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

April 23, 24, 1992
Washington, D.C

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on April 23 and 24, 1992. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Keenan, acting chair, called the meeting to order at 9:00 a.m. on Thursday, April 23, 1992 at the Administrative Office of the United States Courts. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. James DeAnda
Hon. John F. Keenan
Hon. Sam A. Crow
Hon. D. Lowell Jensen
Hon. B. Waugh Crigler
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were: Judge Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Mr. Joe Spaniol, Mr. Peter McCabe, Mr. David Adair, Ms. Judith Krivit, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. William Eldridge of the Federal Judicial Center. Judge Harvey Schlesinger was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Due to the temporary absence of Judge Hodges, Judge Keenan welcomed the attendees and noted that all of the members were present with the exception of Judge Hodges, who was expected shortly and Judge Schlesinger whose docket prevented him from attending the meeting. Judge Keenan extended a welcome to the two new members, Judge Jensen and Magistrate Judge Crigler. He noted that Mr. William

Wilson, Standing Committee member acting as liaison to the Advisory Committee, was not able to attend due the recent death of his wife. On behalf of the Committee, Judge Keenan extended deepest sympathies to Mr. Wilson.

II. APPROVAL OF MINUTES

Judge Crow moved that the minutes of the Committee's November meeting in Tampa, Florida be approved. Mr. Karas seconded the motion which carried by a unanimous vote.

III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Special Order of Business: Request by Federal Bureau of Prisons Regarding Arraignments

Mr. J. Michael Quinlan, Director of the Federal Bureau of Prisons spoke briefly to the Committee, urging it to reconsider proposed amendments to the Federal Rules of Criminal Procedure which would permit arraignment of detainees through closed-circuit television or some similar arrangement. He noted that problems of security and the sheer numbers of arraignments involving detainees threatened to gridlock the system. He added that there are approximately 119,000 such hearings a year. In particular he asked the Committee to consider amending Rules 10 and 43 to permit arraignments without the defendant actually appearing in court. Judge Keenan and the Reporter indicated that the matter would be placed on the Fall 1992 agenda.

B. Rules Approved by the Supreme Court and by Congress

The Reporter informed the Committee that several Rules approved by the Supreme Court and sent to Congress had become effective on December 1, 1991: Rule 16(a)(1)(A) (Disclosure of Evidence by the Government), Rule 35(b)(Reduction of Sentence) and Rule 35(c)(Correction of Sentence Errors). In addition, technical amendments in Rules 32, 32.1, 46, 54(a), and 58 became effective on that date.

C. Rules Approved by the Standing Committee and Circulated for Public Comment

The Reporter indicated that a number of rules which had been approved by the Standing Committee for public comment were back before the Committee for its reconsideration. He indicated that very few written comments had been received on the proposed amendments and that most of those had been positive. The Reporter also noted that the "Style"

subcommittee of the Standing Committee had presented its suggested changes in the language to all of the Rules and that unless otherwise noted, those changes should be a part of the approved versions forwarded to the Standing Committee. Judge Keeton added that it was not the intent of the Standing Committee that the style committee make any substantive changes to the Rules themselves. The Committee then addressed each of the proposed Rules.[1]

1. Rule 12(i). Production of Statements.

The Reporter indicated that no written comments had been received on the proposed amendment. After brief discussion in which it was noted that the introductory language in the Rule should refer to "these Rules," Mr. Karas moved that the Rule be forwarded to the Standing Committee. Mr. Marek seconded the motion which carried by a unanimous vote.

2. Rule 16(a). Disclosure of Experts.

The Reporter informed the Committee that the proposed amendment to Rule 16(a) had generated some comments from the public. Several had raised the issue of the scope of the rule, the lack of specific timing requirements, the relationship between this provision and others in Rule 16, and the difficulty of knowing in advance of trial which experts would be called to testify.

Mr. Karas moved that the Rule be approved and forwarded to the Standing Committee for its approval. Mr. Doar seconded the motion.

Mr. Pauley referred to a letter sent by the Justice Department to the Advisory Committee which expressed strong opposition to the amendment. He noted that there did not seem to be any real problems which required the amendment and that the Committee should consider the full panoply of experts that would potentially fall within this amendment. In particular, he noted that "summary" experts would be covered and that the amendment did not cover problems which would arise if the government did not know in advance of trial which witnesses it would call. Judge Hodges noted the the Department's letter in opposition to the amendment had been received by the Committee almost two months after the official comment period ended.

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1. Although the rules are noted here in chronological order to facilitate referencing, they were not discussed in this exact order.

Professor Saltzburg endorsed the concept of the amendment. He indicated that the language "at the request of the defendant," should stay in and observed that if problems develop with application there will be time for any further amendments. He indicated that the problem of the parties not knowing who the witnesses would be could be addressed by extending the amendment only to those witness that a party "expected" to call. Mr. Marek echoed Professor Saltzburg's support for the amendment and disagreed with the Department's assertions that defendants are not currently being surprised by government experts.

Judge DeAnda spoke in favor of the amendment and noted that the timeliness requirements would affect both the government and the defense. Judge Jensen added that the underlying concept of the Rule was good but that he was opposed to the requirement for a written report. Mr. Pauley again expressed concern about the amendment and added that it would require the government to present its theory of the case to the defendant before trial.

After some additional discussion on the options available to the Committee, the chair called the question on the existing motion to send the amendment forward as published. That motion failed by a vote of 8 to 2.

Professor Saltzburg then moved that changes be made in the amendment which would address some of the concerns raised during the discussion:

> "At the defendant's request, the government must disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence-in-chief at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications."

Mr. Marek seconded the motion. Mr. Doar expressed some concern about whether the new language should leave out the reference to the underlying data relied upon by the expert witness. Mr. Pauley noted that the new language addressed some of the concerns raised by the Department of Justice but in an extended discussion of the issue, stated that the amendment and the debate it would generate were not needed because currently no problem exists. In his view, the amendment goes far beyond what is necessary and will generate needless litigation. The suggestion was made that the Committee Note to the amendment note some distinction between non-expert "summary" witnesses.

The Committee's vote on the motion was 5 to 5. But the motion ultimately carried on the tie-breaking vote by the Chair, Judge Hodges. Professor Saltzburg then moved that the Committee recommend to the Standing Committee that no further public comment be sought on the amendment. That vote as well was a tie vote (5 to 5) but ultimately carried when the Chair voted in the affirmative.

Professor Saltzburg thereafter moved that conforming changes be made in Rule 16(b)(1)(C), that they be forwarded to the Standing Committee with the recommendation that no futher public comment be solicited. That motion was seconded by Mr. Marek and carried by a unanimous vote.

In further discussion on Rule 16, Judge Keenan suggested that the Committee Note should indicate the potential problems with fungible experts and the amendment is not intended to create unreasonable procedural hurdles. Mr. Marek expressed concern about disclosure of experts who are not fungible. It was noted by several members during the ensuing discussion that Rule 16(d) provides an avenue of relief for both sides.

3. Rules 26.2 and 46. Production of Statements.

The Reporter informed the Committee that the public comments on the amendment to Rule 26.2 were generally supportive of the change. One commentator suggested that similar amendments be extended to the rules addressing dimissal of indictments (Rule 12(b)(1)) and motions for new trials (Rule 33). That same commentator pointed out that there would be difficulty producing statements at pretrial detention hearings and hearings held under Section 2255. Another commentator indicated that the term "privileged information" should be defined.

Mr. Pauley referred to the letter prepared by the Department of Justice which opposed the amendment to Rule 26.2 and Rule 46 insofar as those amendments would apply to disclosure of statements at pretrial detention hearings. He had no problem with the concept of Rule 26.2 but expressed concern about the extension of production requirements to pretrial proceedings. A major problem, he noted, would be the difficulty of gathering statements at such an early stage in the prosecution. He added that there are no real problems requiring the amendment, that the amendment will simply cause additional litigation, and will pose dangers to government witnesses.

Mr. Karas responded that there can be a real problem where individuals are detained for lengthy periods of time. Further, he noted that the Supreme Court in Salerno

recognized the importance of the court receiving accurate information in deciding pretrial detention issues. Professor Saltzburg suggested that the Committee note reflect that the parties are expected to proceed in good faith and that if statements are later discovered they should be given to the court and let it decide whether to reopen the issue of detention. Mr. Marek also spoke in favor of the amendment noting that a recent report from the Judicial Conference indicated a growing crisis in pretrial detentions; in his view, there was a real need for accurate information at that stage. He emphasized that the government attorney can simply tell his or her witnesses to bring their statements with them. Subsequently discovered statements would trigger a re-opening of the issue if they demonstrated a material difference with the witness's testimony.

Magistrate Crigler raised concerns about the scope of the rule and queried whether the rule envisioned that statements of affiants and hearsay declarants would be produced. After some discussion on that point, the Reporter observed that the word "affidavit" in Rule 26.2 and other similiar rules posed some problems because Rule 26.2(a) apparently only envisions that the witness's "testimony" would trigger the disclosure requirements.

Mr. Pauley moved that any references to pretrial detention hearings be removed from the proposed amendment to Rule 26.2. Magistrate Crigler seconded the motion.

Judge Keeton, in response to the Reporter's observations regarding the use of affidavits indicated that the term should probably remain because prosecutors often produce affidavits as part of their proof. He added that in his view, the rule would not extend to hearsay declarants.

The motion was defeated by a margin of 7 to 1.

Mr. Pauley subsequently stated that the Committee Note should be revised to reflect that only testimony of a witness would trigger the rule. Judge Jensen moved that the reference to affidavits should be removed from Rule 46 itself. Mr. Karas seconded the motion which carried by a 7 to 1 vote with one abstention.

Mr. Karas moved that Rule 46, as amended, be forwarded to the Standing Committee for its approval. Professor Saltzburg seconded the motion which carried by an 8 to 1 vote.

Judge Jensen then moved that the reference to affidavits should be removed from the other pending

amendments (and accompanying Committee Notes) addressing production of witness statements: Rule 32(f), Rule 32.1, and Rule 8 in the Rules Governing § 2255 Hearings. Professor Saltzburg seconded the motion which carried by a 6 to 1 margin with two absentions.

Mr. Marek moved that the amended Rule 26.2 be fowarded to the Standing Committee for its approval. Mr. Karas seconded the motion which carried by a vote of 9 to 1 with one absention.

4. Rule 26.3. Mistrial.

The Reporter informed the Committee that only one comment had been received on the proposed change and that it was favorable. Mr. Pauley moved that the amendment be forwarded to the Standing Committee for approval. Judge DeAnda seconded the motion. The motion was approved by a unanimous vote.

5. Rule 32(f). Production of Witness Statements.

The Reporter advised the Committee that only one comment had been received on Rule 32(f) and it related to the potential problem of defining "privileged information." Mr. Marek thereafter moved that the Committee approve the amendment (with references to affidavit removed) and Judge Keenan seconded the motion. It carried by a 9 to 0 margin with one absention.

6. Rule 32.1. Production of Witness Statements.

The Committee was informed by the Reporter that no written comments were received on this proposed amendment. Mr. Marek moved that the proposed amendment (with the references to affidavits removed, supra) be fowarded to the Standing Committee for its approval. Professor Saltzburg seconded the motion which carried by a 9 to 0 vote with one absention.

7. Rule 40. Committment to Another District.

The Reporter indicated that the single comment on the proposed amendment suggested that a nonfacsimile copy be transmitted promptly so that it could be included in the court documents. There was some discussion on whether the rule should be amended to include other means of "electronic transmission," e.g., computer-modem transmissions. The consensus was that it should not because the types of documents involved in Rule 40 proceedings did present special concerns about authenticity of the original documents, as opposed to other court "papers" which would

normally not involve such issues. The suggestion was made that the Committee Note should refer to the decision not to include provision for other electronic transmissions. Magistrate Crigler moved that Rule 40 be approved and forwarded to the Standing Committee with the recommendation that it be sent to the Judicial Conference. Professor Saltzburg seconded the motion which carried by a unanimous vote.

8. Rule 41. Search and Seizure.

The Committee was informed that only one comment was received on this proposed amendment and it, as with the comment on Rule 40, supra., suggested that the rule require prompt transmission of the original documents to the court. Although no action was taken on that suggestion it was suggested that the Committee Note could observe that the issuing magistrate could require that the original written affidavit be filed. After additional discussion it was agreed that the word "judge" following the words, "Federal magistrate" should be removed. Professor Saltzburg moved that the proposed amendment be approved and fowarded to the Standing Committee for its approval. Mr. Pauley seconded the motion which carried by a unanimous vote.

9. Rule 46. Production of Statements.

[This proposed amendment was discussed, and approved, in conjunction with the proposed amendment to Rule 26.2, discussed supra].

10. Rule 8. Rules Governing Section 2255 Hearings.

The Reporter indicated that the only written comment received on this proposed amendment reflected concerns about the difficulty of obtaining statements from witnesses which had been made perhaps years earlier. Mr. Marek moved that the Rule be approved and forwarded to the Standing Committee for its approval. Mr. Karas seconded the motion which carried by a margin of 9 to 0 with one absention.

D. Reports by Subcommittees on Rules of Criminal Procedure

1. Report of Subcommittee on Rules 3, 4, and 5, Oral Arrest Warrants and Time Limit for Hearing by Magistrate.

Judge Hodges reported that after additional discussion and study the Subcommittee on Rules 3, 4, and 5 had determined that no changes should be made at this time to those rules.

2. Report of Subcommittee on Rule 32. Allocution Rights of Victims.

Judge Hodges provided background on proposed amendments to Rule 32 concerning use of a model rule to govern sentencing proceedings and that the time may have come to revisit the issue of whether Rule 32 itself should be revised. He had thus circulated to the Subcommittee a draft revision of Rule 32. Judge DeAnda noted that the Subcommittee had failed to reach any consensus on the best way to provide for victim allocution rights. There was extensive discussion on what, if any, changes should be made. Mr. Marek moved that the matter be referred back to the Subcommittee for further study. Judge Jensen seconded the motion.

Mr. Marek provided a lengthy analysis of what he perceived to be four major areas of concern: (1) the role of the probation officer (e.g. to what extent the probation officers should resolve factual and legal disputes; (2) the issue of what burden of proof should apply to sentencing evidence; (3) the problem of victim allocution rights; and (4) the question of disclosure of the probation officer's recommendation. He noted that there would also be less important issues to be addressed. Judge Hodges encouraged the Committee to offer its thoughts on those and other issues which could be addressed in any further amendments. Most of the discussion centered on the role of the probation officer. Some observed that the system seems to work well while others questioned whether using the probation officers was the more efficient method. The consensus seemed to be that there was really no viable substitute for using the probtion officers, although some attention should be given to what their roles should be.

Professor Saltzburg observed that Judge Hodges" draft was a good starting point and that the Committee should consider sending it out for public comment.

[At this point further discussion was deferred until later in the meeting]

After additional discussion on the issue, Judge Hodges indicated that he would work further on his draft and that with the assistance of the Reporter he would circulate that draft, along with a Committee Note, to members of the Subcommittee. That matter would then be placed on the Fall 1992 agenda. He also appointed Judge Keenan to the Subcommittee to replace Judge Everett, who was no longer a member of the Advisory Committee. Judge Hodges' action thus

mooted the need to vote on Mr. Marek's earlier motion to refer the matter back to the Subcommittee

3. Report of Subcommittee on the Federal Rules of Evidence.

Professor Saltzburg reported on the work of the Subcommittee and indicated that it was prepared to offer several suggested amendments to the Rules of Evidence.

a. Rule 407. Subsequent Remedial Measures.

Professor Saltzburg indicated that the Subcommittee had considered and rejected a draft amendment to Rule 407 prepared by the Reporter. That amendment would have applied the Rule's limitations to strict liability cases. He noted that there is a split in the circuits, and that commentators have targeted the Rule as a candidate for an amendment. But the Subcommittee believed that the differences in application of strict liability principles was sufficiently to pose real problems of defining strict liability for purposes of Rule 407. He thereafter moved that the Committee not approve any amendment to Rule 407 concerning strict liability cases. Judge Crow seconded the motion which carried unanimously.

At this point the Committee entered into an extensive discussion on the issue of whether an additional Advisory Committee should be formed to handle evidence amendments. Judge Hodges provided some background information on Judge Becker's proposal to create a free-standing Advisory Committee on the Rules of Evidence. Judge Keeton indicated that as part of the process of reviewing the need for the existing Advisory Committees, Judge Becker's proposal would be on the agenda for the Standing Committee's June 1992 meeting. He indicated that three options existed: First, create a new Evidence Advisory Committee. Second, create an ad hoc committee composed of some new members and members from the Criminal and Civil Rules Committee. And third, maintain the status quo with some clarification on which Committee would have primary jurisdiction. He urged the members of the Committee to consider those options and make their views known to the Standing Committee.

Professor Saltzburg provided an in-depth account of how the Criminal and Civil Rules Committees had agreed some years ago to deal with amendments to the Rules of Evidence. He indicated that the Judicial Conference had asked the Chief Justice to appoint an Evidence Advisory Committee. But when no action was taken on that proposal, the Chairs of the Criminal Rules and Civil Rules Committees had agreed that the primary responsibility for monitoring the evidence rules

would reside in the Criminal Rules Committee. The Committee, he reminded, has routinely monitored and considered proposed evidence amendments which affect both civil and criminal practice. For example, in the late 1980's the Committee undertook the major project of gender-neutralizing the Rules of Evidence.

Judge Hodges conducted an informal straw poll of the Committee. The members indicated unanimously that they did not favor establishment of a new free-standing Evidence Advisory Committee. In the extensive discussion which followed, several members noted the distinction between rules of evidence and rules of procedure; the rules of evidence which do not require the sort of close monitoring and changes that rules of procedure do. There was also concern that a new committee would be inclined to set an active agenda which would almost certainly take on a life of its own and generate unnecessary amendments. Several observed that despite suggested changes from academic commentators, the rules of evidence have worked well.

Ultimately, Professor Saltzburg moved that the Standing Committee be advised that the Criminal Rules Advisory Committee recommends that the Committee's name be changed to the "Advisory Committee for Rules of Criminal Procedure and Rules of Evidence" and that some provision be made for additional input from the Civil Rules Committee, such as the addition of several members who would be permitted to vote on proposed evidence amendments. Judge Keenan seconded the motion. The motion carried by a vote of 9 to 1.

In the following discussion, Professor Saltzburg reflected that there were several key points to be considered in deciding to continue using the Criminal Rules Committee as the primary committee for the evidence rules. First, the Committee agrees with Judge Becker's view that the rules of evidence should be monitored. Second, it is important to fix the authority for doing so. Third, the rules of evidence have worked well since they went into effect in 1975. Where changes have been necessary they have been made. For example, the Criminal Rules Committee in the last two years has recommended amendments to Rule 404 and 609 which were ultimately made. Fourth, there is some relationship between the rules of procedure and the rules of evidence and it makes sense to have one of the procedural "rules" committees involved in the process of recommending amendments to the rules of evidence. Fifth, to the extent that there may be a conflict between the civil and criminal practice, those conflicts can be addressed through coordination with the Civil Rules Committee. Finally, the Criminal Rules Committee has the background, experience, and institutional memory for dealing with the evidence rules.

He added that it would be helpful for the public to see that despite the absence of massive amendments to the rules of evidence, the Committee has been active in considering amendments which specifically and direct target a needed change. He queried whether the Committee's actions regarding the rules of evidence could be published in the Federal Rules Decisions.

b. Rule 801(d). Definition of Hearsay.

Professor Saltzburg indicated that the Reporter had also circulated to the Subcommittee a draft amendment to Rule 801(d)(2)(E) which would address, in part, the problem addressed by the Supreme Court in Bourjaily v. United States. That case indicated that in deciding whether a conspiracy existed, for purposes of admitting a co-conspirator's statement, the court could consider the statement itself. The Subcommittee believed that the time was not yet ripe for tackling that issue and moved to table the proposed amendment. Judge Crow seconded the motion and it carried unanimously.

c. Rule 412. Rape Cases; Relevance of Victim's Past Behavior

The evidence subcommittee had also considered amendments to Rule 412 which would apply that rule to all civil and criminal cases. Professor Saltzburg noted that both the Reporter and he had circulated proposed amendments. The Reporter's version tended to be narrower in scope and required fewer changes to the existing rule. His was broader in scope and amounted to a major change in text.

Mr. Pauley had no objection to extending the rule to civil cases but expressed concern about completely rewriting a rule that was drafted by Congress.

There was some discussion on what, if any, action was contemplated by Congress regarding possible amendments to Rule 412. Several commented that although the Congress had taken no action, there was still time in the current legislative session to do so.

Professor Saltzburg moved that the Committee approve the concept of the amendments to Rule 412 and recirculate a draft for the next meeting. Magistrate Crigler seconded the motion which carried by a 9 to 0 vote with one absention.

d. Rule 804. Child Hearsay Statements.

Professor Saltzburg noted that the Reporter had also circulated a draft amendment to Rule 804 which would

specifically address child hearsay statements. The Reporter's version would add an "unavailability" provision to Rule 804(a) and a specific child hearsay exception in Rule 804(b). Professor Saltzburg believed that the issue could be addressed by simply adding language to Rule 804(a)(4) to provide for declarants of tender years. That provision would cover not only children but also adults who have the mental age of children. Assuming a declarant was unavailable under that provision, the catch-all provision in Rule 804(b)(5) could be relied upon for the exception itself.

In the following discussion there was general support for the amendment although a number of members expressed concern about going too far with the exception. They believed the exception should only apply to children.

Judge DeAnda moved that Rule 804(a)(4) be amended to include declarants of tender years and that it be forwarded to the Standing Committee for public comment. Mr. Pauley seconded the motion. It carried by a 9 to 1 vote.

d. Proposal from DEA to Amend Rules of Evidence

Professor Saltzburg noted that the DEA has suggested a possible amendment to the Federal Rules of Evidence which would make DEA Form 7 as prima facie evidence. After a brief discussion, Magistrate Crigler moved that the issue be referred to the Justice Department for its views. Mr. Doar seconded that motion which carried by a unanimous vote.

e. Rules 702, 703, and 705. Expert Testimony.

Professor Saltzburg observed that there were still serious problems with the proposed amendments to Rules 702, 703, and 705. The Reporter observed that a recent poll of trial judges indicated that although there was support for limiting expert testimony, a significant number of respondents noted that they were not inclined to see the rule applied to criminal cases. Professor Saltzburg moved that the Standing Committee be apprised that the Committee still opposed the proposed amendments to Rules 702, 703 and 705 and recommended that the Standing Committee table those amendments pending resolution of the jurisdiction question. Judge Keenan seconded the motion which carried unanimously.

E. Other Rules Under Consideration by the Advisory Committee

1. Rule 6(e). Grand Jury Testimony.

Judge Hodges indicated that the Department of Justice had proposed several amendments to Rule 6. In an extensive discussion of the issue, Mr. Pauley presented the Department's reasons for the amendments. The first was an attempt to overrule the Supreme Court's decision in United States v. Sells Engineering in that it would permit the sharing of grand jury information with government attorneys investigating civil law violations or claims. Sells, he indicated, greatly restricted the ability of the civil attorneys to investigate civil law issues. The second amendment would address issues raised in United States v. Baggot which held that other government agencies could not have access to grand jury information unless litigation was pending. He cited several examples of the inconsistencies of these cases and the problems which had resulted.

Mr. Pauley moved that the requested amendments to Rule 6(3)(3)(A) be approved and forwarded to the Standing Committee. Judge Jensen seconded the motion.

Professor Saltzburg agreed with the concept in the Department's memo but stated that there is an issue of whether it should be announced that material is being shared with the civil attorneys. Judge Hodges observed that if such material would be more widely shared that there might be a move for a bill of rights for grand jury witnesses. Mr. Marek queried whether there was really a problem requiring the amendment. And Mr. Doar expressed concern about the amendments. In his view, criminal and civil cases should be kept separate. The fact that before Sells the government was able to share grand jury information does not mean that it was right to do so.

The motion was defeated by a 3 to 5 vote with 2 absentions. Professor Saltzburg thereafter moved that the the Chair solicit the views of the Civil Rules Committee on this amendment. Judge Keenan seconded the motion which carried by a 9 to 1 vote.

Regarding the second amendment, Mr. Pauley moved that Rule 6(e)(3)(C) be amended and forwarded to the Standing Committee for publication. Judge Keenan seconded the motion.

Mr. Pauley urged the Committee to view this amendment as simply efficient use of governmental resources. In the discussion which followed, several Committee members noted the role of secrecy in grand jury proceedings and the dangers posed by sharing testimony with other agencies. Those dangers, responded Mr. Pauley, could be monitored by the courts. Professor Saltzburg observed that the proposed amendment would make a major change in the way the

government used grand jury testimony, which might be a good change. Nontheless, he favored sending the matter to the Civil Rules Committee first. Mr. Pauley strenuously objected to that suggestion.

The Committee ultimately rejected the motion by 4 to 5 with one absention.

2. Rule 11. Proposal to Require Advice Concerning Consequences of Guilty Plea

Judge Hodges informed the Committee that Mr. James Craven had suggested that Rule 11 be amended. The amendment would require that any defendant who was not a United States citizen be advised that a plea of guilty might result in deportation, exclusion from admission to the United States, or denial of naturalization. The brief discussion which followed focused on the practical problems associated with giving this, and similar advice which really focuses on the potential collateral consequences of a guilty plea. Judge Keenan moved that the proposed amendment be disapproved. Judge DeAnda seconded the motion which carried unanimously.

3. Rule 16. Proposal to Consider Amendments.

Judge Hodges indicated that Mr. Wilson had suggested that Rule 16 be considered in light of growing concerns about federal criminal discovery. But in his absence, the matter would be carried over to the Fall 1992 meeting.

4. Rule 16(a)(1)(A). Disclosure of Statements by Organizational Defendants

The Reporter indicated that in response to the Committee's direction at the November 1991 meeting, he had drafted proposed amendments to Rule 16 concerning disclosure of statements by organizational defendants. In a brief discussion it was noted that the Rule and the Committee Note should differentiate between statements by agents which would be discoverable as party admissions and an agent's statements concerning acts for which the organization would be vicariously liable. Mr. Karas moved that the amendment be forwarded to the Standing Committee for public comment. Judge Crow seconded the motion. It carried unanimously.

5. Rule 29(b). Proposal to Delay Ruling on Motion for Acquittal.

The Committee continued its discussion of an amendment to Rule 29(b) which had been suggested by the Department of Justice and addressed at the November 1991 meeting. Additional drafting of the amendment made clear that the

judge could only consider evidence admitted at the time of the motion in considering whether to grant a deferred motion. Judge Crigler moved that the amendment be forwarded to the Standing Committee for public comment. Judge Keenan seconded the motion which carried by an 8 to 2 vote.

6. Rule 32(e). Proposal to Repeal.

Mr. Pauley moved that Rule 32(e), a provision addressing probation, be repealed because it no longer reflected the law and that it be treated as a technical amendment. Professor Saltzburg seconded the motion. The motion carried by a unanimous vote.

7. Rule 49. Proposal to Require Two-Sided Printing.

Judge Hodges informed the Committee that the Environment Defense Fund had recommended amendments in the various rules of procedure to require that only double-sided, unbleached paper, be used for all court documents. After a brief discussion, Judge Keenan moved that the Chair communicate with the proponent of the amendment and explain that the whole matter of using alternatives to paper filings was being considered by other committees in the Judicial Conference. Mr. Karas seconded the motion which carried unanimously.

8. Rule 57. Proposal Regarding Local Rules.

The Reporter indicated that the Standing Committee had asked the various reporters for the Committees to draft appropriate language which would provide additional guidance on the promulgation of local rules. The Reporter indicated that he had drafted suggested language for inclusion in Rule 57, which governs local rules. That language was intended to avoid unnecessary duplication between the Criminal Rules themselves and the local rules and to provide for possible uniform numbering systems by the Judicial Conference. After brief discussion, Mr. Karas moved that the amendment be forwarded to the Standing Committee for public comment. Professor Saltzburg seconded the motion which carried unanimously.

9. Rule 59. Technical Changes.

The Reporter informed the Committee that the Standing Committee had also directed the Reporters to explore the possibility of amending the various Rules to provide authority to the Judicial Conference to make purely technical changes to the Rules without the need for forwarding them through the Supreme Court to Congress for action. The Reporter had suggested such amendments to Rule

59 and Federal Rule of Evidence 1102. Professor Saltzburg moved that the amendments be approved and forwarded to the Standing Committee as follows:

> "The Judicial Conference of the United States may amend these rules or explanatory notes to conform to statutory changes, to correct errors in grammar, spelling, cross-references, or typography and to make other similar technical changes of form or style."

The motion carried a provisio that if the Standing Committee believed that any reference to statutory changes should be deleted, the Advisory Committee would concur. Judge Crow seconded the motion. The motion carried by a unanimous vote.

VI. MISCELLANEOUS AND DESIGNATION OF TIME AND PLACE OF NEXT MEETING

A. Continuation of Advisory Committee on Criminal Rules

The Committee was advised that every five years the Judicial Conference considers whether to continue in existence the individual committees, including the Advisory Committees. After a brief discussion, Judge Crow moved that the Standing Committee recommend the continuation of the Criminal Rules Committee. Judge Keenan seconded the motion. It carried by a unanimous vote.

B. Designation of Next Meeting

Judge Hodges announced that the next meeting of the Committee would be held in Seattle, Washington on October 12 and 13, 1992.

The meeting adjourned at 11:40 a.m. on Friday, April 24, 1992.

APPELLATE

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

TO: Honorable Robert E. Keeton, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

FROM: Honorable Kenneth F. Ripple, Chair
Advisory Committee on Appellate Rules KFR

DATE: June 2, 1992

The Advisory Committee on Appellate Rules submits the following items to the Standing Committee on Rules:

1. Proposed amendments to Federal Rules of Appellate Procedure 3, 3.1, 4, 5.1, 10, 25, 28, and 34, approved by the Advisory Committee on Appellate Rules at its April 30, 1992 meeting. These proposed amendments were published in August 1991. A public hearing was scheduled for December 4, 1991 in Chicago, Illinois but was canceled for lack of interest. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments. The Advisory Committee recommends withdrawing the proposed amendments to Rule 35 but requests that the Standing Committee approve the other published rules, in their amended form, and send them to the Judicial Conference. Part A of this report includes the amended rules. Part B identifies and discusses the primary criticisms and suggestions; it also explains the changes made in the text or notes after publication; and it discusses any disagreement among the Advisory Committee members concerning the changes. Part C is a summary of the written comments received.

2. Proposed amendments to Federal Rules of Appellate Procedure 3(c), 12, and 15, approved by the Advisory Committee on Appellate Rules by telephone conference after its April 30 meeting. Proposed amendments, dealing with the Torres problem, were published under expedited procedures in February 1992 for a three month

period. The Advisory Committee has reviewed the written comments and now suggests different changes in Rule 3(c), proposes a new subdivision for Rule 12, and suggests style changes in Rules 3(c) and 15(a) and (e). Part D of this report contains the revised rules; it also discusses the major criticisms and suggestions made by the commentators; it explains the changes made in the rules and notes after publication; and, it discusses any disagreement among the Advisory Committee members concerning the approach taken in the revised draft. Part E is a summary of the written comments received.

3. Proposed amendments to Federal Rules of Appellate Procedure 35, and 47. These proposals were approved at the Advisory Committee's April 30th meeting and the Advisory Committee requests the Standing Committee's approval of them for publication. If approved, these new proposals could be published along with the proposed amendments approved for publication by the Standing Committee at its January, 1992 meeting (proposed amendments to Appellate Rules 25, 28, 38, 40, and 41). Part F of this report contains the draft amendments to Rules 35 and 47. Part F also contains proposed amendments to Federal Rule of Appellate Procedure 6(b)(2)(i); these amendments conform Rule 6 to the Rule 4(a)(4) amendments.

In response to Judge Gerry's letter of March 24, requesting that each Judicial Conference committee evaluate the need for the Committee, we recommend that the Advisory Committee on the Federal Appellate Rules be maintained and that it retain its present and traditional relationship with the Standing Committee on Practice and Procedure.

cc: Chairs and Reporters other Advisory Committees
Members and Reporter, Advisory Committee on Appellate Rules

Rule 3.1. Appeals from a Judgments Entered by a Magistrates Judge in a Civil Cases

When the parties consent to a trial before a magistrate judge under ~~pursuant to~~ 28 U.S.C. § 636(c)(1), ~~an appeal from a judgment entered upon the direction of a magistrate shall~~ any appeal from the judgment must be heard by the court of appeals ~~pursuant to~~ in accordance with 28 U.S.C. § 636(c)(3), unless the parties~~, in accordance with 28 U.S.C. § 636(c)(4),~~ consent to an appeal on the record to a district judge ~~of the district court~~ and thereafter, by petition only, to the court of appeals, in accordance with 28 U.S.C. §636(c)(4). ~~Appeals to the court of appeals pursuant to~~ An appeal under 28 U.S.C. § 636(c)(3) ~~shall~~ must be taken in identical fashion as an appeals from any other judgments of the district court.

COMMITTEE NOTE

The amendment conforms the rule to the change in title from "magistrate" to "magistrate judge" made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990). Additional style changes are made; no substantive changes are intended.

Rule 4. Appeal as of Right - When Taken

(a) Appeals in a Civil Cases.-

(1) Except as provided in paragraph (a)(4) of this Rule, ~~I~~in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 ~~shall~~ must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals ~~shall~~ must note thereon the date ~~on which it was~~ when the clerk received the notice and ~~transmit~~ send it to the clerk of the district court and ~~it shall be deemed~~ the notice will be treated as filed in the district court on the date so noted.

(2) ~~Except as provided in (a)(4) of this Rule 4, a~~ A notice of appeal filed after the ~~announcement of~~ court announces a decision or order but before the entry of the judgment or order ~~shall be~~ is treated as filed ~~after such entry and on the day thereof~~ on the date of and after the entry.

(3) If ~~a timely notice of appeal is filed by a~~ one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date ~~on which~~ when the

first notice ~~of appeal~~ was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure: ~~is filed in the district court by any party:~~

~~(i)~~ (A) for judgment under Rule 50(b);

~~(ii)~~ (B) ~~under Rule 52(b)~~ to amend or make additional findings of fact under Rule 52(b), whether or not ~~an alteration of~~ granting the motion would alter the judgment; ~~would be required if the motion is granted;~~

~~(iii)~~ (C) ~~under Rule 59~~ to alter or amend the judgment under Rule 59; ~~or~~

~~(iv)~~ (D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal; or

(E) ~~under Rule 59~~ for a new trial under Rule 59,

and to a Rule 60 motion served within 10 days after the entry of judgment. ~~the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion disposing of the last of all such motions. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be~~

~~filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.~~ A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. An amended notice of appeal must be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees ~~shall~~ will be required for ~~such~~ filing an amended notice.

* * *

(b) Appeals in a Criminal Cases.- In a criminal case, a defendant must file the notice of appeal ~~by a defendant shall be filed~~ in the district court within 10 days after the entry either of ~~(i)~~ the judgment or order appealed from, or ~~(ii)~~ of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order--but before entry of the judgment or order--~~shall be~~ is treated as filed ~~after such entry and on the day thereof~~ on the date of and after the entry . If a defendant makes a timely motion specified immediately below,

in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:

(1) for judgment of acquittal;

(2) for ~~in~~ arrest of judgment; ~~or~~

(3) for a new trial on any ground other than newly discovered evidence; or

(4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment,

~~has been made an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment.~~ A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later.

Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal ~~shall~~ must be filed in the district court within 30 days after ~~the entry of~~ (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered ~~in~~ on the criminal docket. Upon a showing of excusable neglect, the district court may--before or after the time has expired, with or without motion and notice--extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

(c) Appeal by an Inmate Confined in an Institution.- If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing

may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c), the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

Committee Note

Note to Paragraph (a)(1). The amendment is intended to alert readers to the fact that paragraph (a)(4) extends the time for filing an appeal when certain posttrial motions are filed. The Committee hopes that awareness of the provisions of paragraph (a)(4) will prevent the filing of a notice of appeal when a posttrial tolling motion is pending.

Note to Paragraph (a)(2). The amendment treats a notice of appeal filed after the announcement of a decision or order, but before its formal entry, as if the notice had been filed after entry. The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before the entry of the order, see Acosta v. Louisiana Dep't of Health & Human Resources, 478 U.S. 251 (1986) (per curiam); Alerte v. McGinnis, 898 F.2d 69 (7th Cir. 1990). Because the amendment of paragraph (a)(4) recognizes all

notices of appeal filed after announcement or entry of judgment--even those that are filed while the posttrial motions enumerated in paragraph (a)(4) are pending--the amendment of this paragraph is consistent with the amendment of paragraph (a)(4).

Note to Paragraph (a)(3). The amendment is technical in nature; no substantive change is intended.

Note to Paragraph (a)(4). The 1979 amendment of this paragraph created a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending. The 1979 amendment requires a party to file a new notice of appeal after the motion's disposition. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule. See, e.g., Averhart v. Arrendondo, 773 F.2d 919 (7th Cir. 1985); Harcon Barge Co. v. D & G Boat Rentals, Inc., 746 F.2d 278 (5th Cir. 1984), cert. denied, 479 U.S. 930 (1986).

The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion, is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

Because a notice of appeal will ripen into an effective appeal upon disposition of a posttrial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a posttrial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the Committee does not believe that an additional notice of appeal is needed.

The amendment provides that a notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to

bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Paragraph (a)(4) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is served within 10 days after entry of judgment. This eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, e.g., Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988); Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986). To conform to a recent Supreme Court decision, however--Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988)--the amendment excludes motions for attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed. R. Civ. P. 58.

Note to subdivision (b). The amendment grammatically restructures the portion of this subdivision that lists the types of motions that toll the time for filing an appeal. This restructuring is intended to make the rule easier to read. No substantive change is intended other than to add a motion for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such a motion is the equivalent of a Fed. R. Civ. P. 50(b) motion for judgment notwithstanding the verdict, which tolls the running of time for an appeal in a civil case.

The proposed amendment also eliminates an ambiguity from the third sentence of this subdivision. Prior to this amendment, the third sentence provided that if one of the specified motions was filed, the time for filing an appeal would run from the entry of any order denying the motion. That sentence, like the parallel provision in Rule 4(a)(4), was intended to toll the running of time for appeal if one of the posttrial motions is timely filed.

In a criminal case, however, the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a posttrial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment. United States v. Hashagen, 816 F.2d 899, 902 n.5 (3d Cir. 1987). To make it clear that a notice of appeal need not be filed before entry of judgment, the amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence providing that an appeal may be taken within 10 days after the entry of an order denying the motion; the amendment says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last such motion outstanding. (Emphasis added) The change recognizes that there may be multiple posttrial motions filed and that, although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that a notice of appeal filed before the disposition of any of the posttrial tolling motions becomes effective upon disposition of the motions. In most circuits this language simply restates the current practice. See United States v. Cortes, 895 F.2d 1245 (9th Cir.), cert. denied, 495 U.S. 939 (1990). Two circuits, however, have questioned that practice in light of the language of the rule, see United States v. Gargano, 826 F.2d 610 (7th Cir. 1987), and United States v. Jones, 669 F.2d 559 (8th Cir. 1982), and the committee wishes to clarify the rule. The amendment is consistent with the proposed amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed. R. Crim. P. 35(c), which authorizes a sentencing court to correct any arithmetical, technical, or other clear errors in sentencing within 7 days after imposing the sentence. The Committee believes that a sentencing court should be able to act under Criminal Rule 35(c) even if a notice of appeal has already been filed; and that a notice of appeal should not be affected by the filing of a Rule 35(c) motion or by correction of a sentence under Rule 35(c).

Note to subdivision (c). In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that a pro se prisoner's notice of appeal is "filed" at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the amendment is similar to that

in Supreme Court Rule 29.2.

Permitting an inmate to file a notice of appeal by depositing it in an institutional mail system requires adjustment of the rules governing the filing of cross-appeals. In a civil case, the time for filing a cross-appeal ordinarily runs from the date when the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross-appeal has expired. To avoid that problem, subdivision (c) provides that in a civil case when an institutionalized person files a notice of appeal by depositing it in the institution's mail system, the time for filing a cross-appeal runs from the district court's receipt of the notice. The amendment makes a parallel change regarding the time for the government to appeal in a criminal case.

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

(a) Petition for Leave to Appeal; Answer or Cross Petition. An appeal from a district court judgment, entered after an appeal ~~pursuant to~~ under 28 U.S.C. § 636(c)(4) to a district judge ~~of the district court~~ from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. . . .

Committee Note

The amendment conforms the rule to the change in title from magistrate to magistrate judge made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990).

Rule 10. The Record on Appeal

* * *

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered. -

* * *

(3) Unless the entire transcript is to be included, the appellant shall, within the ~~10 days~~ 10-day time provided in paragraph (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal, and shall serve on the appellee a copy of the order or certificate and of the statement. ~~If the~~ An appellee ~~deems~~ who believes that a transcript ~~or~~ of other parts of the proceedings ~~to be~~ is necessary, ~~the appellee~~ shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of ~~such~~ the designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

Committee Note

The amendment is technical and no substantive change is intended.

Rule 25. Filing and Service

(a) Filing.- Papers required or permitted to be filed in a court of appeals ~~shall~~ must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing ~~shall not be~~ is not timely unless ~~the papers are received by the clerk~~ the clerk receives the papers within the time fixed for filing, except that briefs and appendices ~~shall be deemed~~ are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except~~ing~~ special delivery, is ~~utilized~~ used. Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief ~~which~~ that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge ~~shall~~ must note thereon the date of filing and ~~shall~~ thereafter ~~transmit~~ give it to the clerk.

Committee Note

The amendment accompanies new subdivision (c) of Rule 4 and extends the holding in Houston v. Lack, 487 U.S. 266 (1988), to all papers filed in the courts of appeals by persons confined in institutions.

Rule 28. Briefs

(a) Appellant's Brief. ~~of the appellant.-~~ The brief of the appellant ~~shall~~ must contain, under appropriate headings and in the order here indicated:

* * *

(5) An argument. The argument may be preceded by a summary. The argument ~~shall~~ must contain the contentions of the appellant ~~with respect to~~ on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

* * *

(b) Appellee's Brief. ~~of the Appellee.-~~ The brief of the appellee ~~shall~~ must conform to the requirements of ~~subdivisions~~ paragraphs (a)(1)-(5), except that ~~a statement of jurisdiction, of the issues, or of the case, need not be made unless the appellee is dissatisfied with the statement of the appellant.~~ none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

25 (3) the statement of the case;

26 (4) the statement of the standard of review.

27 * * *

Committee Note

Note to paragraph (a)(5). The amendment requires an appellant's brief to state the standard of review applicable to each issue on appeal. Five circuits currently require these statements. Experience in those circuits indicates that requiring a statement of the standard of review generally results in arguments that are properly shaped in light of the standard.

Rule 34. Oral argument

* * *

(c) Order and Content of Argument.- The appellant is entitled to open and conclude the argument. ~~The opening argument shall include a fair statement of the case.~~ Counsel ~~will not be permitted to~~ may not read at length from briefs, records, or authorities.

* * *

Committee Note

Subdivision (c). The amendment deletes the requirement that the opening argument must include a fair statement of the case. The Committee proposed the change because in some circuits the court does not want appellants to give such statements. In those circuits, the rule is not followed and is misleading. Nevertheless, the Committee does not want the deletion of the requirement to indicate disapproval of the practice. Those circuits that desire a statement of the case may continue the practice.

ISSUES AND CHANGES
Proposed Amendments to the Federal Rules of Appellate Procedure
Published August, 1991

Rule 3

There were no comments on the proposed amendments to Rule 3. The proposed amendments to Rule 3 are interrelated to the proposed amendments to Rule 4.

The changes approved by the Advisory Committee in Rule 3 after its publication were suggested by the Standing Committee's Style Subcommittee. The apparent intent of the Style Subcommittee is to review and revise those rules that the advisory committees propose amending. The Advisory Committee for Appellate Rules was favorably impressed with the work done by the Style Subcommittee, and for the most part adopted its suggestions. However, the Advisory Committee has some hesitation about the advisability of making style changes in some but not all rules. For example, the Style Subcommittee put rule headings and subheadings in initial capitals in each of the rules containing proposed amendments. Will that mean that until the advisory committee has proposed amendments as to each of the 48 appellate rules, there will be inconsistent capitalization of the headings? In Rule 3, the Advisory Committee's proposed amendment affects only subdivision (d), as a result there is a proposal to put initial capitals in the heading of subdivision (d), but not subdivisions (a), (b), (c), or (e). The Advisory Committee could easily recommend changing the headings of the other subdivisions of Rule 3 to initial capitals--making Rule 3 internally consistent--but other suggested alterations of a rule, or part of a rule, can not be integrated into the remaining rules without more substantive reflection.

Rather than individually list the style changes that have been made in the rules and the committee notes, a copy of the Style Subcommittee's proposed amendments is attached as an appendix to Part B.

The Advisory Committee unanimously approved many, but not all, of the changes recommended by the Style Subcommittee. Those changes that were approved, were approved unanimously and have been incorporated into the revised draft of Rule 3. This memorandum will discuss only the suggestions that were not adopted by the Advisory Committee. The line references here are to the line numbers on the Style Subcommittee's draft.

1. At line 3, it was suggested that "serve notice of the filing ... by mailing a copy" be changed to "send a copy of." The Advisory Committee did not adopt this suggestion because the term "service" is a term of art with substantive implications that need further exploration. Similarly at lines 28, 31, and 38, the verb "serve" is retained and not replaced by "sent." Also at line 44, the verb "mails" is retained and not replaced by "are sent."

2. At several points throughout the rule, it was suggested that "district clerk" or "appellate clerk" replace "clerk of the district court" or "clerk of the court of appeals." The Advisory Committee decided to retain "clerk of the district court" and "clerk of the court of appeals" to avoid confusion. The term "district clerk" could include a bankruptcy clerk, and "appellate clerk" could refer to a clerk in a district court whose assignment is to prepare the district court papers for appeal.

3. At line 13, the Style Subcommittee suggested deleting "named in the notice." The Advisory Committee is of the view that the notice should designate the court to which the party believes an appeal should be taken. The rule should clearly indicate where the clerk of the district court should send a notice of appeal. It is for the court of appeals to determine whether it has jurisdiction under the applicable statute.

Rule 3.1

There were no comments on the proposed amendment to Rule 3.1 The Advisory Committee unanimously approved all of the Style Subcommittee's recommendations and the changes have been incorporated in the revised draft.

Rule 4

The proposed amendments to Rule 4 serve two main purposes: first, to eliminate the trap for a litigant who files a notice of appeal before a posttrial motion or while a posttrial motion is pending; and second, to "codify" the Supreme Court's decision in Houston v. Lack, holding that a notice of appeal filed by an inmate confined in an institution is timely if it is deposited in the institution's internal mail system, with postage prepaid, on or before the filing date.

No comments were submitted concerning subdivision 4(c),

dealing with inmate filings, or subdivision 4(b), dealing with appeals in criminal cases. Five commentators offered suggestions for improving subdivision 4(a). Four of them generally supported the proposed amendments; their suggestions were "fine tuning." One commentator suggested taking an entirely different approach to the 4(a)(4) trap; the committee considered but rejected his suggestion.

The changes made after publication are:

1. "Except as provided in paragraph (a)(4) of this Rule" is added to the beginning of paragraph (a)(1). This cross-reference is intended to alert a reader to the fact that the time for filing a notice of appeal may be delayed by the provisions of paragraph (a)(4).

2. At line 39-40 of this amended draft (line 24 of the published draft), the rule states that a motion for attorney's fees will extend the time for filing a notice of appeal if a district judge enters an order, under Rule 58, extending the time for appeal.[1] Two changes have been made here; first, the description of a Rule 58 order is changed. The published draft described a Rule 58 order as one "delaying entry of judgment and extending the time for appeal." In fact, a Rule 58 order usually will be entered after a district court has entered judgment; therefore, a Rule 58 order extends the time for appeal, it does not delay entry of judgment. Thus the amended description deletes the reference to "delaying entry of judgment."

   Second, lines 39-40 of the amended rule state that a district court may enter a Rule 58 order extending the time for appeal until the district court awards attorney's fees. The published rule stated (at lines 21-25) that a district court could enter a Rule 58 order extending appeal time until the district court awards <u>costs</u> or attorney's fees. Because proposed Rule 58 does not authorize a district court to delay finality of a judgment to award costs, the reference to costs has been deleted.

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[1] The Civil Rule 58 order referred to is contained in a proposed amendment to that rule which is at the same stage of development as the proposed amendments to Appellate Rule 4(a). If any changes are made in proposed Civil Rule 58, the cross-reference in proposed Appellate Rule 4(a) will need to be reexamined.

3. At lines 52-53 the words "effective to appeal from the judgment or order, or part thereof, specified in the notice of appeal" have been added. The Advisory Committee believes that this change, in conjunction with the following sentence, makes it clear that the first-filed notice of appeal covers only those judgments or orders specified in the notice, and that to obtain review of an order disposing of a posttrial motion the notice of appeal must be amended to specify that order.

4. Line 55 states that a party must amend a previously filed notice of appeal to obtain "[a]ppellate review of" an order disposing of a posttrial tolling motion. The published draft (at line 43) stated that "an appeal from" such orders requires amendment of any previously filed notice of appeal. Because, in some circuits, a decision disposing of certain the posttrial motions is not independently appealable but is reviewable only on appeal from the underlying judgment, it is more accurate to speak of "appellate review of" such orders.

5. At line 51, the words "announcement or" have been added between "after" and "entry." This change reinforces the general rule in paragraph (a)(2) that a notice filed after announcement of a decision or order but before entry of the order is treated as filed after the entry.

6. Lines 61-62 state that "[n]o additional fees are required for filing an amended notice of appeal."

7. As with the other rules, the Advisory Committee adopted most of the suggestions made by the Style Subcommittee. This memorandum discusses only those instances when the Advisory Committee disagreed with or altered the suggestions made by the Style Subcommittee.

   a. The Style Subcommittee suggested (line 6 of its draft) that the rule refer to notices filed after the judge announces a decision (emphasis added). The Advisory Committee changed that to after the "court" announces a decision (line 17 of the amended rules).

   b. At lines 9-10 and 93-94 of the Style Subcommittee draft, it is suggested that the rule treat notices filed after announcement but before entry as filed "on the date of entry." The Advisory Committee has changed that to "on the date of and after the entry" (lines 20 and 71 of the amended rules).

c. At line 24 of the Style Subcommittee draft, it is suggested that the rule state that the time for appeal runs from the entry of the "order disposing of the last such motion." The Advisory Committee added the word "outstanding" (line 29 of the amended rules) before the period to eliminate ambiguity. Without the modifier, it is possible to read the phrase as referring to the posttrial motion filed last even though earlier filed motions have not yet been decided. The same language appears at lines 68, 80, 100, and 130 of the Style Subcommittee draft and the changes appear at lines 55, 61, 76, and 95 of the amended rules.

d. At lines 139 to 142, the Advisory Committee decided not to make the changes suggested by the Style Subcommittee because the Advisory Committee added a new item to its agenda dealing with the relationship of these lines to 18 U.S.C. § 3731 and the Advisory Committee does not want to make any changes in these lines until it has had further opportunity to consider that item.

e. At page 13 of the Style Subcommittee's draft, the Style Subcommittee suggested that the note accompanying paragraph (a)(3) should state that the amendment "merely tightens the phrasing" rather than stating that the amendment "is technical in nature." Because there is a long tradition of referring to style changes as "technical" and because both the public and the Congress are familiar with and comfortable with that phrasing, the Advisory Committee decided to retain the reference to the changes as "technical in nature."

8. Several changes have been made to the Committee Notes. Most of the changes simply conform the notes to the changes made in the text of the rule. In addition, the Advisory Committee has dropped language suggesting that a special statistical category be created for notices of appeal held in abeyance under the new rule. (The last two sentences of the second paragraph explaining paragraph (a)(4) have been deleted.)

No one on the Committee favored the alternate approach suggested by one commentator. The recommendation was to retain current Rule 4(a)(4) and allow ad hoc relief by amending Rule 26. The Committee rejected the suggestion for two reasons.

First, the committee favors an approach that eliminates the

trap[2], over one that gives a court discretion to "rescue" a litigant caught in the trap.

Second, it is not clear that the commentator's suggestion could work. Specifically, the commentator suggested amending Rule 26 to authorize a party caught in the 4(a)(4) trap to ask a court to suspend that provision in Rule 4 which invalidates a notice of appeal filed prior to the disposition of a posttrial tolling motion. The suggestion assumes that it is Rule 4(a)(4) that makes a notice of appeal a nullity if it is filed during the pendency of one of the posttrial tolling motions. While it is true that 4(a)(4) states a notice is a nullity if it is filed during the pendency of any of the named motions, there is a line of cases indicating that, at least as to some of the motions, it is the motions themselves that make the appeal premature. The motions suspend the finality of the underlying judgment, making appeal premature. See United States v. Dieter, 429 U.S. 6, 8 (1976) (per curiam); In re X-Cel, Inc., 823 F.2d 192 (7th Cir. 1987). If it is the motion--not Rule 4--that makes appeal premature, suspending the provision in Rule 4 will not cure the problem. The approach taken in the published draft avoids that problem by providing that a notice is held in abeyance and becomes effective upon disposition of the motion.

Rule 5.1

There were no comments submitted on the proposed amendments to Rule 5.1 that change "magistrate" to "magistrate judge." The Advisory Committee unanimously accepted all of the changes suggested by the Style Subcommittee and they have been incorporated in the amended draft.

Rule 10

There were no comments submitted regarding the proposed amendment to Rule 10; the amendment corrects a printer's error. The Advisory Committee unanimously accepted most of the changes

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[2] Rule 4(a)(4) currently provides that if a notice of appeal is filed before the district court disposes of all posttrial tolling motions, the notice of appeal is a nullity and a new notice of appeal must be filed after the disposition of the motions. Many litigants, especially those whose motions are denied, fail to file new notices of appeal and their right to appeal is lost.

suggested by the Style Subcommittee and those changes have been incorporated in the amended draft.

The Advisory Committee altered the Style Subcommittee's suggestions at lines 13 through 15 of the Subcommittee's draft. The Style Subcommittee suggested that the second sentence of paragraph (b)(3) state: "An appellee who desires a transcript of other parts of the proceedings shall . . . file and serve on the appellant a designation the additional parts . . .." The Advisory Committee concluded that dropping the word "necessary" from the second sentence of paragraph (b)(3) would be a substantive change. The Advisory Committee unanimously agreed to change the sentence as follows: "An appellee who believes that a transcript of other party of the proceeding is necessary, shall . . .." (See lines 11-13 of the amended draft.)

The Advisory Committee also retained the "technical" amendment language in the Committee Note.

Rule 25

The proposed amendments to Rule 25 extend the holding in Houston v. Lack to all papers filed by persons confined in institutions. No comments were submitted regarding these amendments. The Advisory Committee unanimously adopted all of the Style Subcommittee's suggestions and they have been incorporated into the amended draft.

Rule 28

The proposed amendment to Rule 28 requires that a party's opening brief include a statement of the standard of review. Only one comment was received and it was not directed at the substance of the amendment. The commentator urged that the Advisory Committee further amend Rule 28 to state that the requirements of Rule 28 are exclusive and cannot be altered or supplemented by local rules. Although one member of the Advisory Committee agreed with the commentator, the Advisory Committee did not adopt the suggestion because, at this time, it has not concluded its discussions about uniformity and the proper role of local rules. Local experimentation with the contents of briefs has proven to be a good testing ground for new requirements. The proposed amendment, as well as the recently added jurisdictional statement requirement, were both prompted by positive experience with local rules.

The Advisory Committee unanimously adopted the Style Subcommittee's suggestions and the changes have been incorporated in the amended draft.

Rule 34

The proposed amendment deletes the requirement that an opening argument include a statement of the case. No comments were submitted. The Advisory Committee unanimously adopted the Style Subcommittee's suggestions and the changes have been incorporated in the amended draft.

Rule 35

The proposed amendment to Rule 35 would create a uniform method for calculating a majority for purposes of hearing or rehearing a case in banc. The proposal does not count vacancies or recusals when determining whether a majority favors granting an in banc hearing. However, it provides that the number of judges participating in an in banc vote must be a majority of the active judges, including any who may be recused.

Five adverse comments were received. The Chief Judges of four circuits wrote in opposition of the proposal. Three of the chief judges believe that the method used by a circuit to convene an in banc hearing is a uniquely internal function. They further note that the courts of appeals have historically had the power to define the base from which a majority is determined and that no compelling reason has been advanced in support of the proposed change. The fourth chief judge opposes the amendment primarily because it would lower significantly the number of judges needed to convene an in banc hearing; he also expresses support for allowing each circuit to continue to determine its own procedure for convening an in banc hearing. The fifth commentator opposes the approach taken in the published draft because, in his opinion, it allows too small a number of judges to convene the court in banc, but he, unlike the chief judges, favors a uniform rule. This commentator would include recused judges in the base so that a circuit could convene in banc only when a majority of all judges in regular active service favor the in banc hearing.

One commentator, who commented favorably upon all the published drafts, supports the amendment but without any substantive comments.

As a result of the strong opposition, the Advisory

Committee voted to withdraw the proposed amendment; seven members favored withdrawal, none opposed it, and one member abstained. The abstaining member believes that a uniform rule should govern such a fundamental matter as the process used to convene a court in banc.

DRAFT
4-21-92

**PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE***

Rule 3. Appeal as of Right — How Taken[1]

* * * * *

(d) Service of *[Serving]* the notice *[Notice]* of appeal *[Appeal]*. — The clerk of the district court shall serve notice of the filing of [send a copy of[2]] a notice of appeal by mailing a copy thereof to [each party's] counsel of record of each party other than the appellant [(apart from the appellant's)], or, if a party is not represented by counsel, to the party's last known address[.] of that party; and t. The [district] clerk shall transmit forthwith [forthwith send] a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals[.] named in the notice and the clerk of the district court [The district clerk] shall [likewise] transmit [send] copies [a copy] of any later docket entries [entry] in that [the] case to the [appellate] clerk[.] of the court of appeals. When an appeal is taken by a defendant [a

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[1] The Style Subcommittee has uniformly put rule headings in initial capitals.

[2] The Style Subcommittee wishes to alert the Appellate Rules Advisory Committee to this change. The use of "send" is perhaps a substantive change, but the wording seems more likely than "mail" to endure as technology advances. To simplify, we likewise recommend "send" instead of "transmit."

defendant appeals] in a criminal case, the clerk of the district court [district clerk] shall also serve [send] a copy of the notice of appeal upon [to] the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served [sent] the date on which [when] the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date on which the notice of appeal was received by the clerk [when the clerk received the notice of appeal]. Failure of the clerk [The clerk's failure] to serve [send] notice shall [does] not affect the validity of the appeal. Service shall be [is] sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies [are sent[3]], with the date of mailing.

* * * * *

[3] The passive-voice verb is a superior alternative to repeating "clerk" in this way.

COMMITTEE NOTE

Note to subdivision [paragraph] 3(d).[4] The amendment requires the district court clerk to transmit [send] to the [appropriate appellate] clerk of the appropriate court of appeals copies [a copy of every] of all docket entries in a case following [after] the filing of a notice of appeal. This amendment accompanies the amendment to Rule 4(a)(4)[,] which provides that in a case in which [when] one of the post trial [posttrial] motions enumerated in Rule 4(a)(4) is filed, a notice of appeal filed before the disposition of the motion will become [becomes] effective upon disposition of the motion. The court of appeals needs to be advised that the filing of a post trial [posttrial] motion has suspended a notice of appeal. The court of appeals also needs to know when the district court has ruled on the motion. Transmitting [Sending] copies of all docket entries following [after] the filing of a notice of appeal [is filed] should provide the courts of appeals with the necessary information.

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[4] Bryan Garner, the consultant to the Style Subcommittee, has spoken with Judge Pointer and Dean Carrington about the use of "subdivision" and "paragraph" — terms used inconsistently in some of the drafts that the Subcommittee is working on. We've learned that, since at least 1938, the standard order has been as follows:

Rule 1

(a) Subdivision

(1) Paragraph

(A) Subparagraph

(i) Item.

The Subcommittee has therefore made the references in these amendments consistent with the established policy of the federal drafters. Where a specific paragraph is referred to (e.g., (a)(4)), it is preceded by "paragraph" instead of "subdivision."

Rule 3.1. Appeals [Appeal] from [a] Judgments [Judgment] Entered by [a] Magistrates Judges [Judge] in [a] Civil Cases [Case]

When the parties consent to a trial before a magistrate judge pursuant to [under] 28 U.S.C. § 636(c)(1), an appeal from a judgment entered upon the direction of a magistrate judge shall [any appeal from the judgment must] be heard by the court of appeals pursuant to [in accordance with] 28 U.S.C. § 636(c)(3), unless the parties, in accordance with 28 U.S.C. § 636(c)(4), consent to an appeal on the record to a district judge ~~of the district court~~ and thereafter, by petition only, to the court of appeals[, in accordance with 28 U.S.C. § 636(c)(4)]. Appeals [An appeal] to the court of appeals pursuant to [under] 28 U.S.C. § 636(c)(3) shall [must] be taken in identical fashion as [an] appeals [appeal] from [any] other judgments [judgment] of the district court.

COMMITTEE NOTE

The amendment conforms the rule to the change in title from ["]magistrate["] to ["]magistrate judge["] made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990).

Rule 4(a)(4)

If any party makes a timely motion under the Federal Rules of Civil Procedure: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; (iv) under Rule 54 for costs or attorney's fees if a district court under Federal Rule of Civil Procedure 58 enters an order delaying entry of judgment and extending the time for appeal; or (v) under Rule 59 for a new trial, or if any party serves a motion under Rule 60 of the Federal Rules of Civil Procedure within 10 days after the entry of judgment, the time for appeal for all parties shall run from the entry of the order disposing of the last of all such motions.

Using a bulleted list (with letters, for ease of reference) not only displays the points better, but also improves the sentence structure:

If any party makes a timely motion of a type in the list that follows, the time for appeal for all parties runs from the entry of the order disposing of the last such motion. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);
(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;
(C) to alter or amend the judgment under Rule 59;
(D) for costs or attorney's fees under Rule 54 if a district court under Rule 58 delays entry of judgment and extends the time for appeal; and
(E) for a new trial under Rule 59, or if any party serves a Rule 60 motion within 10 days after the entry of judgment.

Rule 4. Appeal as of Right — When Taken

(a) *Appeals [Appeal] in [a] civil [Civil] cases [Case].* —

* * * * *

(2) ~~Except as provided in (a)(4) of this Rule 4, a~~ A notice of appeal filed after the announcement of [judge announces] a decision or order but before the entry of the judgment or order shall be [is] treated as filed after such entry and on the day thereof [on the date of entry[5]].

(3) If ~~a timely notice of appeal is filed by~~ a [one] party timely files a [timely] notice of appeal, any other party may file a notice of appeal within 14 days after the date on which [when] the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party makes a timely motion [of a type specified immediately below, the time for

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[5] The Style Subcommittee would like the Appellate Rules Committee to consider this suggested revision. We want to ensure that it will not change the substance of the rule.

appeal for all parties runs from the entry of the order disposing of the last such motion. This provision applies to a timely motion[‘] under the Federal Rules of Civil Procedure[:] ~~is filed in the district court by any party~~

(A) for judgment under Rule 50(b);

(B) under Rule 52(b) to amend or make additional findings of fact [under Rule 52(b)], whether or not an alteration of [granting the motion would alter] the judgment[;] would be required if the motion is granted;

(C) under Rule 59 to alter or amend the judgment [under Rule 59]; ~~or~~

(D) under Rule 54 for costs or attorney's fees [under Rule 54] if a district court under Federal Rule of Civil Procedure 58 enters an order delaying [delays] entry of judgment and extending [extends] the time for appeal; or

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[‘] See footnote 5.

(E) under Rule 59 for a new trial [under Rule 59], or if any party serves a [Rule 60] motion under Rule 60 of the Federal Rules of Civil Procedure within 10 days after the entry of judgment[.], the time for appeal for all parties shall run [runs] from the entry of the order ~~denying a new trial or granting or denying any other such motion~~ disposing of the last of all such motions. ~~A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.~~ A notice of appeal filed after entry of the judgment but before disposition of any of the above motions shall be in abeyance and shall become effective upon [is ineffective until] the date of the

entry of an order that disposes of the last of all such motions [disposing of the last such motion]. An appeal from an order disposing of any of the above motions requires amendment of the party's [the party, in compliance with Appellate Rule 3(c), to amend a] previously filed notice of appeal[.] in compliance with Rule 3(c). Any such [An] amended notice of appeal shall [must] be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last of all such motions [motion].

* * * * *

(b) *Appeals [Appeal] in [a] criminal [Criminal] cases [Case]*. — In a criminal case[,] a defendant shall [must] file the notice of appeal ~~by a defendant shall be filed~~ in the district court within 10 days after the entry [either] of (i) the judgment or order appealed from[,] or [of] (ii) a notice of appeal by the Government. A notice of appeal filed after the announcement of a

decision, sentence[,] or order[—]but before entry of the judgment or order[—]shall be [is] treated as filed after such entry and on the day thereof [on the date when the judgment is entered']. If a [defendant makes a] timely motion [specified immediately below, in accordance with] under the Federal Rules of Criminal Procedure[, an appeal from a judgment of conviction must be taken within 10 days after the entry of an order disposing of the last such motion, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:]

(1) for judgment of acquittal[;]

(2) for ~~in~~ arrest of judgment[;] ~~or~~

(3) for a new trial on any ground other than newly discovered evidence[;] or

(4) for a new trial based on the ground of newly discovered evidence if the motion is

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' The Style Subcommittee would like the Appellate Rules Committee to consider this suggested change. We want to ensure that it will not change the substance of the rule.

made before or within 10 days after entry of the judgment[,], ~~has been made~~ an appeal from a judgment of conviction may be taken within 10 days after the entry of an order ~~denying the motion~~ disposing of the last of all such motions, or within 10 days after the entry of the judgment of conviction, whichever is later. ~~A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment.~~ A notice of appeal filed after announcement of [the court announces] a decision, sentence, or order[,] but before disposition [it disposes] of any of the above motions[,] shall be in abeyance and shall become effective upon [is ineffective until] the date of the entry of an order that disposes [disposing] of the last of all such motions [motion], or upon [until] the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective without amendment to

appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal shall [must] be filed in the district court within 30 days after ~~the entry of~~ (i) the entry of the judgment or order appealed from or (ii) the filing of [any defendant files] a notice of appeal[.] by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered in [on] the criminal docket. Upon a showing of excusable neglect[,] the district court may[—]before or after the time has expired, with or without motion and notice[—]extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before disposition of

such [entry of the order disposing of the] motion.

(c) Appeals by [an] inmates [Inmate] confined [Confined] in [an] institutions [Institution]. — If an inmate [a person] confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration [()]in compliance with 28 U.S.C. § 1746[())] setting forth the date of deposit and stating that first-class postage has been prepaid. In [a] civil cases [case] in which the first notice of appeal is filed in the manner provided in this paragraph [subdivision] (c), the 14 day [14-day] period provided in [paragraph] (a)(3) of this Rule 4 for [an]other parties [party] to file [a] notices [notice] of appeal shall run [runs] from the date [when] the [district court receives the] first notice of appeal[.] is received by the district court. In [a] criminal cases [case] in which a defendant

files a notice of appeal in the manner provided in this paragraph [subdivision] (c), the 30 day [30-day] period for the government to file its notice of appeal shall run [runs] from the entry of the judgment or order appealed from or from the [district court's] receipt of the defendant's notice of appeal[,] by the district court.

COMMITTEE NOTE

Note to Subdivision [Paragraph (a)](2). The amendment treats all notices [a notice] of appeal filed after [the] announcement of [a] decisions [decision] or orders [order,] but before [its] formal entry[,] of such orders as if the notices of appeal [notice] had been filed after such entry. The amendment deletes the language that made subdivision [paragraph] (a)(2) inapplicable to notices [a notice] of appeal filed after announcement of the disposition of post trial motions [a posttrial motion] enumerated in [paragraph] (a)(4) but before the entry of such orders [the order], see, Acosta v. Louisiana Dept. [Dep't] of Health & Human Resources, 478 U.S. 251 (1986) (per curiam); and Alerte v. McGinnis, 898 F.2d 69 (7th Cir. 1990). Because the amendment of subdivision [paragraph] (a)(4) recognizes all notices of appeal filed after entry of judgment[—]even those that are filed while the post trial [posttrial] motions enumerated in [paragraph] (a)(4) are pending,[—]the amendment of this subdivision [paragraph] is consistent with the amendment of subdivision [paragraph] (a)(4).

Note to Subdivision [Paragraph] (a)(3). The amendment is technical in nature, [merely tightens the phrasing;] no substantive change is intended.

Note to Subdivision [Paragraph] (a)(4). The 1979 amendment of this subdivision [paragraph] created a trap for [an] unsuspecting litigants [litigant] who file notices [files a notice] of appeal before post trial motions [a posttrial motion], or while post trial motions are [a posttrial motion is] pending. The 1979 amendment requires parties [a party] to file new notices [a new notice] of appeal after [the motion's] disposition of the motions. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal[,] and several courts have expressed dissatisfaction with the rule. See, e.g., Averhart v. Arrendondo, 773 F.2d 919 (7th Cir. 1985); Harcon Barge Co. v. D & G Boat Rentals, Inc., 746 F.2d 278 (5th Cir. 1984), cert. *denied*, 479 U.S. 930 (1986).

The amendment provides that notices [a notice] of appeal filed before [the] disposition of the [a] specified post trial motions [posttrial motion] will become effective upon disposition of the motions. A notice of appeal filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion, is, in effect, suspended until the disposition of the motion [motion is disposed of, whereupon]. Upon disposition of the motion, the previously filed notice of appeal becomes effective to grant [effectively places] jurisdiction to a [in the] court of appeals. The Committee realizes that holding notices [a notice] of appeal in abeyance will create a new species of appeal that is not truly "pending" and recommends that[,] for statistical purposes[,] appeals [an appeal] held in abeyance not be counted as pending. A new statistical classification may be appropriate.

Because notices [a notice] of appeal will ripen into [an] effective appeals [appeal] upon disposition of post trial motions [a posttrial motion], in some instances there will be appeals [an appeal] from judgments [a judgment] that have [has] been altered substantially because the motions were [motion was] granted in whole or in part. Many such appeals will be

dismissed for want of prosecution when the appellant fails to meet the briefing schedule. However, [But] the appellee also may [also] move to have [strike] the appeal[.] stricken. When responding to such a motion, the appellant would have an opportunity to state that[,] even though some relief sought in a post trial [posttrial] motion was granted, the appellant still plans to pursue the appeal. The [Since the] appellant's response would provide the appellee with sufficient notice of the appellants' [appellant's] intentions[,] that the Committee does not believe that an additional notice of appeal is needed.

The amendment provides that a notice of appeal filed before the disposition of a post trial [posttrial] tolling motion is sufficient to bring the underlying case to the court of appeals. If the judgment is altered upon disposition of a post trial [posttrial] motion, however, and [if] a party wishes to appeal from the disposition of the motion, the party must amend the notice of appeal to so indicate.

Subdivision [Paragraph] (a)(4) also is [also] amended to include[, among motions that extend the time for filing a notice of appeal,] motions [a Rule 60 motion] under Rule 60 that are [is] served within 10 days after entry of judgment[.] among the motions that extend the time for filing a notice of appeal. This eliminates the difficulty of determining whether a post trial [posttrial] motion made within 10 days after entry of a judgment is a motion under Rule 59(e) [motion], which tolls the time for filing an appeal, or a motion under Rule 60 [motion], which historically has not tolled the time. The amendment is consistent [comports] with the practice in several circuits that treat [of treating] all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). *See, e.g.*, Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988); Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986). However, to [To] conform to recent Supreme Court decisions, [however —]Buchanan v. Stanships, Inc., 485 U.S. 265 (1988); [and] Budinich v. Becton Dickinson and [&] Co., 486 U.S. 196

(1988); [—]the amendment excludes motions for costs and attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order delaying the entry of judgment and extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed. R. Civ. P. 58.

Note to subdivision (b). The amendment grammatically restructures the portion of this subdivision that lists the types of motions that toll the time for filing an appeal. This restructuring is intended to make the rule easier to read. No substantive change is intended other than to add motions [a motion] for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such motions are [a motion is] the equivalent of a Fed. R. Civ. P. 50(b) motions [motion] for judgment notwithstanding the verdict, which toll [tolls] the running of time for appeals in civil cases [an appeal in a civil case].

The proposed amendment also eliminates an ambiguity from the third sentence of this subdivision. The third sentence currently provides that if one of the specified motions is filed, the time for filing an appeal will run from the entry of any order denying the motion. That sentence, like the parallel provision in Rule 4(a)(4), was intended to toll the running of time for appeal if one of the post trial [posttrial] motions is timely filed. However, in criminal cases [In a criminal case, however,] the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a post trial [posttrial] motion may be disposed of more than 10 days before sentence is imposed, i.e. [i.e.,] before the entry of judgment. United States v. Hashagen, 816 F.2d 899, 902 N.5 [n.5] (3d Cir. 1987). To make it clear that a notice of appeal need not be filed before entry of judgment, the proposed amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence which

provides [providing] that an appeal may be taken within 10 days after the entry of an order denying the motion and[;] [the amendment] says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last of such motions [motion]. (Emphasis added) [(emphasis added).] The change recognizes that there may be multiple post trial [posttrial] motions filed and that[,] although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that notices [a notice] of appeal filed before [the] disposition of any of the post trial [posttrial] tolling motions shall become [becomes] effective upon disposition of the motions. In most circuits this language simply restates the current practice, see [. See] United States v. Cortes, 895 F.2d 1245 (9th Cir. 1990). However, two [Two] circuits[, however,] have questioned that practice in light of the language of the rule, see United States v. Gargano, 826 F.2d 610 (7th Cir. 1987), and United States v. Jones, 669 F.2d 559 (8th Cir. 1982), and[.] the [The] committee [therefore] wishes to clarify the rule. The amendment is consistent with the proposed amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed. R. Crim. P. 35(c)[,] which authorizes [a] sentencing courts [court] to correct [any] arithmetic [arithmetical], technical, or other clear errors in sentencing within 7 days after the imposition of [imposing the] sentence. The Committee believes that a sentencing court should be able to act under Criminal Rule 35(c) even if a notice of appeal has already been filed[;] and that a notice of appeal should not be affected by the filing of a motion under Rule 35(c) [motion] or by correction of [a] sentence pursuant to [under] Rule 35(c).

Note to subdivision (c). In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that [a] *pro se* prisoners' [prisoner's] notices [notice] of appeal are [is] "filed" at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the

amendment is similar to that in Supreme Court Rule 29.2.

Permitting inmates to file notices [a notice] of appeal by depositing the notices [it] in [an] institutional mail systems [system] requires adjustment of the rules governing the filing of cross appeals [cross-appeals]. In a civil case[,] the time for filing a cross appeal [cross-appeal] ordinarily runs from the date on which [when] the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross appeal [cross-appeal] has expired. To avoid that [problem], subdivision (c) provides that in civil cases [a civil case] when [an] institutionalized persons file notices [person files a notice] of appeal by depositing them [it] in [the] institutions' [institution's] mail systems [system], the time for filing cross appeals [a cross-appeal] shall run [runs] from the district courts' [court's] receipt of the notices of appeal [notice]. A parallel provision is made [The amendment makes a parallel change] regarding the time for the government to bring appeals in criminal cases [appeal in a criminal case].

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

(a) *Petition for Leave to Appeal; Answer or Cross Petition.* — An appeal from a district court judgment, entered after an appeal pursuant to [under] 28 U.S.C. § 636(c)(4) to a district judge ~~of the district court~~ from a judgment entered upon direction of a magistrate judge in a civil case,

may be sought by filing a petition for leave to appeal . . . .

COMMITTEE NOTE

The amendment conforms the rule to the change in title from magistrate to magistrate judge made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990).

Rule 10. The Record on Appeal

* * * * *

(b) *The transcript [Transcript] of proceedings [Proceedings]; duty of appellant to order; notice to appellee if partial transcript is ordered [Duty of Appellant to Order; Notice to Appellee If Partial Transcript Is Ordered].* —

* * * * *

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days [10-day] time provided in [paragraph] (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal[,] and shall serve on the appellee a copy of the order or certificate and of the statement. If the [An] appellee deems [who desires] a transcript ~~or~~ of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such [the] designation the appellant has ordered

such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

* * * * *

COMMITTEE NOTE

The amendment is technical and [merely tightens the phrasing;] no substantive change is intended.

Rule 25. Filing and Service

(a) *Filing*. — Papers required or permitted to be filed in a court of appeals shall [must] be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be [is not] timely unless the papers are received by the clerk [the clerk receives the papers] within the time fixed for filing, except that briefs and appendices shall be [are] deemed [treated as] filed on the day of mailing if the most expeditious form of delivery by mail, excepting [except] special delivery, is utilized

[used]; and except further that papers [Papers] filed by [an] inmates confined in institutions are [an institution are] timely filed if they are deposited in the institutions' [institution's] internal mail systems [system] on or before the last day for filing. Timely filing of papers by [an] inmates confined in institutions [an institution] may be shown by [a] notarized statements or declarations [statement or declaration] [(]in compliance with 28 U.S.C. § 1746[)] setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief which [that] may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall [must] note thereon the date of filing and shall thereafter transmit [give] it to the clerk.

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COMMITTEE NOTE

The amendment accompanies new subdivision (c) of Rule 4 and extends the holding in Houston v. Lack, 487 U.S. 266 (1988), to all papers filed in the courts of appeals by persons confined in institutions.

Rule 28. Briefs

(a) *[Appellant's] Brief of the appellant*. — The brief of the appellant shall [must] contain[,] under appropriate headings and in the order here indicated:

* * * * *

(5) An argument. The argument may be preceded by a summary. The argument shall [must] contain the contentions of the appellant with respect to [on] the issues presented, and the reasons therefor, with citations to the authorities, statutes[,] and parts of the record relied on. The argument also shall [must also] include [for each issue] a concise statement of the applicable standard of review for each issue, which[; this statement] may be presented [appear] in the discussion of each issue or under a separate heading preceding [placed before] the discussion of the issues.

* * * * *

(b) *[Appellee's] Brief of the Appellee*. — The brief of the appellee shall [must] conform to the requirements of subdivisions [paragraphs] (a)(1)-

(5), except that ~~a~~ statements of jurisdiction, of the issues, ~~or~~ of the case, or of the standard of review need not be made unless the appellee is dissatisfied with the statement of the appellant.

[none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the standard of review.]

* * * * *

COMMITTEE NOTE

Note to subdivision [paragraph] (a)(5). The amendment requires appellants' briefs [an appellant's brief] to state the standard of review applicable to each issue on appeal. Five circuits currently require such [these] statements[,] and those [Experience in those] circuits' experience [circuits] indicates that requiring a statement of the standard of review generally results in arguments being [that are] properly shaped in light of the standard.

Rule 34. Oral Argument

* * * * *

(c) *Order and content [Content] of argument [Argument].* — The appellant is entitled to open and conclude the argument. ~~The opening argument shall include a fair statement of the case.~~ Counsel will not be permitted to [may not] read at length from briefs, records[,] or authorities.

* * * * *

COMMITTEE NOTE

Subdivision (c). The amendment deletes the requirement that the opening argument shall [must] include a fair statement of the case. The Committee proposed the change because in some circuits the court does not want appellants to give such statements. In those circuits[,] the rule is not followed and is misleading. However, [Nevertheless,] the Committee does not want the deletion of the requirement to

indicate disapproval of the practice. Those circuits that desire a statement of the case may continue the practice.

Rule 35. Determination of causes [a Cause] by the Court in Banc[*]

(a) *When hearing or rehearing in banc will be ordered [When a Hearing or Rehearing in Banc Will Be Ordered]*. — A majority of the circuit judges who are currently in regular active service and who are not disqualified from participating in the case may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc, except that no in banc hearing or rehearing may be ordered if the number of judges not disqualified is less than a majority of those currently in regular active service. Such a [A] hearing or rehearing [in banc] is not favored and ordinarily will not be ordered except [in two circumstances:] (1) when consideration by the full court is necessary to secure or maintain

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[*] The phrase "in banc" could be rendered either "In Banc" or "in Banc" in a title. The Style Subcommittee has rendered it as if the "in" were a preposition instead of a particle.

Incidentally, the majority of the Subcommittee prefers the spelling "en banc" – the predominant spelling in the United States. But, given the spelling in the statute ("in banc"), the Subcommittee has decided not to create an inconsistency.

uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

* * * * *

COMMITTEE NOTE

The circuits are divided as to [differ on] whether vacancies and recusals are [should be] counted in determining whether a majority of the judges in regular active service has ordered a case to be heard or reheard in banc. The amendment establishes a uniform rule that vacancies and recusals are not counted, i.e. [i.e.], that the base from which the majority is determined consists only of the judges currently in regular active service who are not disqualified. The amendment also establishes a quorum requirement that the number of nondisqualified judges must constitute a majority of the active judges, including those who may be recused. Without such a quorum requirement, if seven of twelve active judges were disqualified, for example, an in banc could be ordered by a three-to-two vote among the five judges available to sit.

Part C
Summary of comments
Re: rules published 8/91

COMMENTS
PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE
PUBLISHED AUGUST, 1991

SUMMARY OF COMMENTS REGARDING
PROPOSED AMENDMENTS TO FED. R. APP. P. 4

Six commentators submitted remarks on the proposed amendments to Fed. R. App. P. 4.

One commentator supports the proposed amendments without further elaboration.

Four commentators support the approach taken in the proposed amendments but suggest language changes:

1) two commentators suggest adding language that clarifies whether an additional fee must be paid when filing an amendment indicating intent to appeal from an order disposing of a posttrial motion;
2) two commentators suggest clarifying the nature and form of an amended notice with regard to
   - whether it is a new notice of appeal that must be separately docketed or whether it is an amendment of the notice in an existing appeal, and
   - whether it should be styled "Notice of Appeal," "Amendment to Notice of Appeal," or "Amended Notice of Appeal" and what level of formality is required in the body of the notice;
3) one commentator suggests adding a cautionary note to rule 4(a)(1) that would discourage filing notices of appeal while posttrial motions are pending;
4) one commentator notes that some decisions disposing of post-trial motions are not appealable independent of an appeal from the decision in the underlying case and suggests a language change consistent with that fact;
5) one commentator suggests a language change that would emphasize that the first-filed notice of appeal is sufficient to appeal the decision in the case but an amendment is needed to perfect an appeal from any of the postjudgment orders; and
6) one commentator suggests eliminating the language in 4(a)(4)(iv) regarding "delaying entry of judgment" and substituting in its place language that more accurately reflects the proposed change in Fed. R. Civ. P. 58.

One commentator favors an entirely different approach to loss of the right to appeal that can be created by the 4(a)(4) trap. He suggests making no change in Rule 4 but amending Rule

26. The Rule 26 amendment would allow a court to suspend that portion of Rule 4 which states a notice of appeal is a nullity if it is filed before disposition of the posttrial motions. He suggests that the suspension should be granted unless the opposing party can demonstrate prejudice or show cause for not doing so. If the approach taken in the published draft is used, the commentator suggests language changes 1) because a motion for attorneys' fees is not a motion "under Rule 54"[3], 2) because a district court cannot enter an order "delaying entry of judgment", and 3) because there is no time limit for filing motions for attorneys' fees.[4]

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[3] A proposed amendment to Fed. R. Civ. P. 54, published concurrently with the proposed amendment to Fed. R. App. P. 4, would make a motion for attorneys' fees a Rule 54 motion.

[4] A proposed amendment to Fed. R. Civ. P. 54, published concurrently with the proposed amendment to Fed. R. App. P. 4, would impose a 14 day time limit on filing motions for attorneys' fees.

Part C
Summary of comments
Re: rules published 8/91

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 4

1. Mr. Gilbert F. Ganucheau
Clerk
United States Court of Appeals
600 Camp Street
New Orleans, Louisiana

Generally supports the approach taken in the amendment but suggests:

A. Clarifying whether the amendment needed to appeal from an order disposing of a posttrial motion is a new notice that must be docketed separately or an amendment that is filed in the existing appeal. He recommends that it be treated as an amendment to an existing appeal.

B. Clarifying whether an additional fee must be paid when filing an amendment indicating intent to appeal from an order disposing of a posttrial motion.

C. Adding a cautionary note to rule 4(a)(1) to discourage filing a notice of appeal while a post-trial motion is pending.

2. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee of the Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
Northridge, California 91326

Supports all the proposed changes.

3. Professor Peter Lushing
Benjamin N. Cardozo School of Law
Yeshiva University
Brookdale Center
55 Fifth Avenue
New York, New York 10003

Notes that some decisions disposing of posttrial motions are not independently appealable but are reviewable only on appeal from the judgment in the underlying case. He suggests a language change consistent with that fact.

4. Alan B. Morrison, Esquire
Director
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Generally supports the approach taken in the draft but suggests:

A. specifying how a party makes the "amendment" required to appeal from denial of a posttrial motion (in an "Amendment to Notice of Appeal" or in a "Notice of Appeal" or even in an "Amended Notice of Appeal?");

B. clarifying whether an additional filing fee will be charged when an amended notice of appeal is filed.

5. Luther T. Munford, Esquire
Chair, Federal and Local Rules Subcommittee of the ABA Litigation Section's Appellate Practice Committee
2829 Lakeland Drive
P.O. Box 55507
Jackson, Mississippi 39296-5507

Favors a different approach to loss of the right to appeal that can be created by the 4(a)(4) trap. He suggests keeping the current rule but amending Fed. R. App. P. 26(b). The Rule 26 amendment would allow a court to suspend that portion of Rule 4(a)(4) that makes a notice of appeal a nullity if it is filed before disposition of the posttrial motions. He suggests that the suspension should be granted unless the opposing party can demonstrate prejudice or show good cause for not doing so.

With regard to new 4(a)(4)(iv), Mr. Munford notes that a motion for attorneys' fees is not a motion "under Rule 54," that a district court cannot enter an order "delaying entry of judgment," and that the rule needs some time restriction. [Reporter's note: Proposed Civil Rules 54 and 58 are responsive to the first and third portions of the comments summarized in this paragraph.]

6. Elizabeth A. Phelan, Esquire
Appellate Practice Subcommittee of the Litigation Section of the Colorado Bar Association
1881 Ninth Street, Suite 210
Boulder, Colorado 80302

"Strongly" supports the proposed changes but suggests

language clarifying that the first-filed notice of appeal must be amended to perfect an appeal from any of the post-judgment orders. Suggests eliminating the language in 4(a)(4)(iv) regarding "delaying entry of judgment" and substituting in its place "granting tolling effect to the motion" or some other similar language that more accurately reflects the proposed change in Fed. R. Civ. P. 58.

SUMMARY OF COMMENTS REGARDING
PROPOSED AMENDMENTS TO FED. R. APP. P. 28

There were two comments on the proposed requirement that an opening brief include a statement of the standard of review.

One commentator simply supported this proposal along with all of the other proposed amendments to the appellate rules without further elaboration.

The other commentator urged the inclusion of a statement that the requirements of Rule 28 regarding the contents of briefs are exclusive and cannot be altered or supplemented by local rules. In other words, the commentator wants the rule to prohibit circuit by circuit variations from the requirements of Rule 28.

Part C
Summary of comments
Re: rules published 8/91

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 28

1. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
Northridge, California 91326

Supports this proposed amendment as well as all others.

2. Alan B. Morrison, Esquire
Director
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Does not oppose the proposed requirement that an opening brief include a statement of the standard of review. Urges the committee to state that the requirements of Fed. R. App. P. 28 regarding the contents of briefs are exclusive and cannot be altered or supplemented by local rule.

SUMMARY OF COMMENTS REGARDING
PROPOSED AMENDMENT OF FED. R. APP. P. 35

Six commentators submitted remarks concerning the proposed amendment of Fed. R. App. P. 35.

One commentator supports this proposed amendment, as well all other proposed amendments to the appellate rules, without further comment.

One commentator supports development of a uniform rule but believes that recusals should be counted when determining whether a majority of a court favors in banc review. He suggests that, at a minimum, a circuit should convene in banc only if a majority of two-thirds of the members of the circuit favor the in banc. (The draft requires participation by a majority of the members and a favorable vote by a majority of them.) Another commentator also opposes the proposed amendment because it lowers significantly the number of judges needed to bring about an in banc; but rather than favoring development of a uniform rule, he expresses mild support for allowing each circuit to continue to determine its own procedure.

Three commentators oppose not only the approach taken in the draft but any rulemaking that would curtail the ability of the circuits to define for themselves the base from which a majority is determined for purposes of convening an in banc hearing.

Part C
Summary of comments
Re: rules published 8/91

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 35

1. Honorable Stephen Breyer
Chief Judge
United States Court of Appeals
U.S. Courthouse Room 1617
Boston, Massachusetts 02109

Opposes the proposed amendment because it significantly lowers the number of judges needed to bring about an in banc. He expresses mild support for allowing each circuit to continue having its own rule governing the process used to convene an in banc hearing.

2. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
Northridge, California 91326

Supports this proposed amendment as well as all others.

3. Honorable Monroe G. McKay
Chief Judge
United States Court of Appeals
6012 Wallace Bennett Federal Building
Salt Lake City, Utah 84138-1181

Endorses Chief Judge Sloviter's statement in opposition to amendment of Rule 35.

4. Alan B. Morrison, Esquire
Director
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Supports resolving by rule the question of whether vacancies and recusals should be counted in determining whether a majority of judges have voted to hear or rehear a case in banc but opposes the approach taken in the published draft. The commentator favors maximum participation by judges in an in banc proceeding. At a minimum, he suggests requiring participation by at least two-thirds of the total membership of a circuit.

5. Honorable Helen W. Nies
Chief Judge
United States Court of Appeals
717 Madison Place, N.W.
Washington, D.C. 20439

Endorses Chief Judge Sloviter's statement in opposition to the proposed amendment of Fed. R. App. P. 35.

6. Honorable Dolores K. Sloviter
Chief Judge
United States Court of Appeals
601 Market Street
Philadelphia, Pennsylvania 19106

Opposes the proposed amendment on the grounds that defining the body that establishes circuit precedent is a uniquely local function and the courts of appeals should retain their power to define individually the base from which a majority of the court is counted for purposes of convening an in banc hearing.

Part C
Summary of comments
Re: rules published 8/91

Except that Mr. Hart's letter expressed support for all of the proposed amendments, there were no comments submitted regarding the proposed amendments to the following rules:

1. Rule 3 (conforming amendments to the changes proposed in Rule 4)
2. Rule 3.1 and 5.1 (changing "magistrate" to "magistrate judge")
3. Rule 10 (correcting a printer's error)
4. Rule 25 (extending the ruling in Houston v. Lack to all papers filed by persons confined in institutions so that filing is timely if papers are deposited in the institution's mail systems on or before the filing date)
5. Rule 34 (deleting the requirement that an opening argument shall include a statement of the case).

Part D
Rules published February 1992
Issues and changes and
Revised drafts - June 1992

PROPOSED AMENDMENTS - FED. R. APP. P. 3(c) & 15(a) & (e)
Issues and changes
Revised drafts

Rule 3(c) of the Federal Rules of Appellate Procedure requires that a notice of appeal "specify the party or parties taking the appeal." In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), the Supreme Court held that a court of appeals has no jurisdiction to hear the appeal of a party not properly identified as an appellant and that the phrase "et al.," is insufficient to identify an unnamed party as an appellant. Id. at 318. Following the Torres decision, the courts of appeals have struggled with how much specificity is sufficient to identify an appellant. A rule change is important because of the current confusion among the courts of appeals.

Because of the importance of the Torres problem, at its January 1992 meeting, the Standing Committee approved immediate publication of the proposed amendments to Fed. R. App. P. 3(c) and 15(a) and (e), as well as Forms 1, 2, and 3. Because the Standing Committee believes that the Torres problem is sufficiently important to justify shortening the usual publication period, the Committee voted to publish the rules and forms only for three months rather than the usual six months. (Although subpart (e) of Rule 15 is not related to the Torres question, publication of all the suggested amendments to Rule 15 at one time was approved.) Public hearings were scheduled for April 8, 1992, but were canceled due to lack of interest.

The published drafts require that each appellant be "named" in the notice of appeal, except in class actions. Although the Standing Committee approved publication of the draft amendments to Rules 3 and 15, the Standing Committee requested that the Advisory Committee continue to explore other alternatives that might better preserve as many appeals as possible.[5]

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[5] A special note accompanying the published rules states:

> The Committee, after receiving public comment, may explore other variations of the proposed amendment here submitted and may recommend a modified amendment without asking for further public comment, Accordingly, the Committee welcomes suggestions of other means to identify appellants in a notice of appeal.

There has been a division of opinion among the members of the Advisory Committee regarding the best way to resolve "the Torres problem."

At the December 1991 meeting a majority of the Advisory Committee supported the published draft -- requiring that each appellant be named -- because it is definitive. The naming requirement allows both the court and all parties to know precisely who is taking the appeal. Consequently, the rule is easy to administer. Naming also requires each litigant to make an explicit choice about taking an appeal. Arguably, the draft resolves the ambiguity of the present rule by telling lawyers and litigants that shorthand methods will not suffice.

The published draft accomplishes these goals by incurring costs, costs that some of the Advisory Committee consider unacceptable. The greatest is the possibility that the right of appeal will be lost because of an inadvertent omission of a party's name. One can also argue that a requirement that a notice of appeal list all names will simply be overlooked by a practicing lawyer because in all other filings with a district court after the complaint such terms as "et al." are sufficient.

For these reasons, some members of the Advisory Committee have opposed the approach taken in the published draft and have favored alternatives that would make it harder for a party to lose a right to appeal through mistaken nomenclature. One such alternative, explored briefly at the Committee's December meeting and in more depth at its April meeting, attempts to resolve the problem of the lost appellant by providing, in essence, that once any party brings an appeal all other litigants are parties to the appeal. Drafts prepared by both Judge Easterbrook and Professor Mooney, modeled on Supreme Court Rule 12.4, were considered at the Advisory Committee's April meeting.

The Supreme Court model leaves to a court of appeals the task of sorting out those parties who actually have an interest in being active in the appellate proceeding. It also requires that a court of appeals realign the parties for purposes of briefing schedules, etc. The clerks of the courts of appeals met in late February and discussed the possibility of amending Rule 3(c) along the lines of Sup. Ct. R. 12.4. The clerks and chief deputies unanimously agreed that given the volume in the courts of appeals, this task would be a formidable one. It is this volume problem that may make the analogy to the Supreme Court's practice limp. Because most petitions for certiorari are denied,

the Supreme Court needs to deal with the realignment problem in only a relatively few cases. Nevertheless, the Advisory Committee agrees that some administrative cost incurred to save an appeal is salutary. Indeed, in its work on Rule 4(a)(4), it settled on an approach that creates some administrative costs in order to ensure that appeals are not lost through inadvertence.

Following the close of the comment period, the Advisory Committee had a telephone conference to discuss the comments and to attempt to reconcile the two differing viewpoints. Two of the seven commentators opposed the approach taken in the published draft; the other five commentators offered suggestions for refining the draft. The Committee tried to balance sensibly the very real concerns of definiteness, certainty, and ease of administration against the possibility of inadvertent and excusable loss of appellate rights. As a result, it proposes new amendments to Rule 3(c) and to Rule 12.

Rule 3. Appeal as of Right--How Taken

* * *

(c) Content of the Notice of Appeal.-- ~~The~~ A notice of appeal ~~shall~~ must specify the party or parties taking the appeal by naming each appellant either in the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has

been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must ~~, shall~~ designate the judgment, order, or part thereof appealed from, and ~~shall~~ must name the court to which the appeal is taken. An appeal ~~shall~~ will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

Committee Note

Note to subdivision (c). The amendment is intended to reduce the amount of satellite litigation spawned by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). In Torres the Supreme Court held that the language in Rule 3(c) requiring a notice of appeal to "specify the party or parties taking the appeal" is a jurisdictional requirement and that naming the first named party and adding "et al.," without any further specificity is insufficient to identify the appellants. Since the Torres decision, there has been a great deal of litigation regarding whether a notice of appeal that contains some indication of the appellants' identities but does not name the appellants is sufficiently specific.

The amendment states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as "et al.," which are sufficient in all district court filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether

it is objectively clear that a party intended to appeal. A notice of appeal filed by a party proceeding pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice clearly indicates a contrary intent.

In class actions, naming each member of a class as an appellant may be extraordinarily burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); or if the named plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1980). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as a representative of the class.

Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing ~~of~~ the Record

* * *

(b) Filing a Representation Statement.--Within 10 days after filing a notice of appeal, or at such other time designated by a court of appeals, the attorney who filed the notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal

by that attorney.

~~(b)~~ (c) Filing ...

Committee Note

Note to new subdivision (b). This amendment is a companion to the amendment of Rule 3(c). The Rule 3(c) amendment allows an attorney who represents more than one party on appeal to "specify" the appellants by general description rather than by naming them individually. The requirement added here is that whenever an attorney files a notice of appeal, the attorney must soon thereafter file a statement indicating all parties represented on the appeal by that attorney. Although the notice of appeal is the jurisdictional document and it must clearly indicate who is bringing the appeal, the representation statement will be helpful especially to the court of appeals in identifying the individual appellants.

The rule allows a court of appeals to require the filing of the representation statement at some time other than specified in the rule so that if a court of appeals requires a docketing statement or appearance form the representation statement may be combined with it.

Changes Since Publication

Obviously the new draft is significantly different from the published draft. The new draft makes it clear that naming each appellant is the surest way to perfect an appeal on behalf of each of them; however, the draft gives an attorney representing more than one party flexibility to use general descriptive terms as long as the notice makes it clear who intends to appeal. The companion amendment to Rule 12, requiring a representation statement, is intended to assist the court of appeals and the other parties in identifying the individual appellants.

Two commentators suggested that the rule should require listing the names of the parties in the body of the notice and that naming parties in the caption should not be sufficient. The draft continues to provide that naming in the caption is sufficient. It would create an unnecessary trap to treat the names in the caption as insufficient.

A provision is added to the rule dealing with pro se appellants. A notice of appeal filed by a pro se appellant is

sufficient to perfect an appeal on behalf of the signer's spouse and minor children if they are parties, unless the notice indicates a contrary intent.

With regard to class actions, the published rule provided that it would be sufficient for a notice to indicate that it is filed on behalf of the class. The revised draft requires that the notice name one person qualified to bring the appeal as representative of the class.

No substantive changes are made in Rule 15. Only two comments were submitted regarding Rule 15; both support the approach taken in the draft which requires that a petition for review or enforcement of agency orders name each party seeking review. Both comments were from persons who oppose the naming requirement in Rule 3. They support the naming requirement in Rule 15 principally because the notice is the first document filed with any court. The Committee note accompanying subdivision (a) is amended because it previously stated that subdivision (a) was a conforming amendment to Rule 3(c). Style changes are made in Rule 15, consistent with the changes recommended by the Style Subcommittee in other rules.

Only one minor change is made in the published forms even though substantive changes have been made in Rule 3(c), and Forms 1 and 2 are governed by Rule 3(c). The published forms indicate that each appellant/petitioner should be named in the body of the notice of appeal. Although that requirement has been relaxed in Rule 3, naming remains the preferred method and the published amendments to the forms remain appropriate. However, because Rule 3(c) authorizes alternative means an asterisk and footnote referring the reader to Rule 3(c) have been added to Forms 1 and 2.

Rule 15. Review or Enforcement of Agency Orders - How Obtained; Intervention

(a) Petition for Review of Order; Joint Petition. - Review of an order of an administrative agency, board, commission, or officer (hereinafter, the term "agency" ~~shall~~ will include agency, board, commission, or officer) ~~shall~~ must be obtained by filing with the clerk of a court of appeals ~~which~~ that is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal). The petition ~~shall specify the parties~~ must name each party seeking review either in the caption or in the body of the petition. Use of such terms as "et al.," or "petitioners," or "respondents" is not effective to name the parties. The notice of appeal also must ~~and shall~~ designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency ~~shall~~ must be named respondent. The United States ~~shall~~ will also be

~~deemed~~ a respondent if ~~so~~ required by statute, even though not ~~so~~ designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

* * *

(e) Payment of Fees. - When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the clerk of the court of appeals the fees established by statute, and also the docket fee prescribed by the Judicial Conference of the United States.

Committee Note

Subdivision (a). The amendment is a companion to the amendment of Rule 3(c). Both Rule 3(c) and Rule 15(a) state that a notice of appeal or petition for review must name the parties seeking appellate review. Rule 3(c), however, provides an attorney who represents more than one party on appeal the flexibility to describe the parties in general terms rather than naming them individually. Rule 15(a) does not allow that flexibility; each petitioner must be named. A petition for review of an agency decision is the first filing in any court and, therefore, is analogous to a complaint in which all parties must be named.

Subdivision (e). The amendment adds subdivision (e). Subdivision (e) parallels Rule 3(e) that requires the payment of fees when filing a notice of appeal. The omission of such a requirement from Rule 15 is an apparent oversight. Five circuits have local rules requiring the payment of such fees, see, e.g., Fifth Cir. Loc. R. 15.1, and Fed. Cir. Loc. R. 15(a)(2).

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff }
}
v. } Notice of Appeal
}
C.D., Defendant }

Notice is hereby given that ~~C.D., defendant above named,~~ [_____ (here name all parties taking the appeal)_____, (plaintiffs) (defendants) in the above named case,*] hereby appeals to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the ____ day of _____, 19__.

(s)_____
Attorney for ~~C.D.~~ [___]
[Address:_____]

* See Rule 3(c) for permissible ways of identifying appellants.

In the proposed forms, it is suggested that the text that is stricken be deleted and that bracketed material be added.

Form 2. Notice of Appeal to a Court of Appeals From a Decision of the [United States] Tax Court

~~TAX COURT OF THE UNITED STATES~~

[UNITED STATES TAX COURT]
Washington, D.C.

A.B., Petitioner	)	
	)	
v.	)	Docket No. _____
	)	
Commissioner of Internal Revenue, Respondent	)	

Notice of Appeal

Notice is hereby given that ~~A.B.~~ [_____ here name all parties taking the appeal* _____], hereby appeals to the United States Court of Appeals for the _____ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, 19__ (relating to _____).

(s)_____
Counsel for ~~A.B.~~ [_____]
[Address:_____]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 3. Petition for Review of Order of an Agency, Board, Commission or Officer

United States Court of Appeals for the _____ Circuit

A.B., Petitioner }
}
v. } Petition for Review
XYZ Commission, Respondent }

~~A.B.~~ [____(here name all parties bringing the petition)____] hereby petitions the court for review of the Order of the XYZ Commission (describe the order) entered on _____, 19__.

[(s)]_____
Attorney for Petitioners
Address:_____

Part E
Summary of comments
Re: rules published 2/92

COMMENTS
PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE
PUBLISHED FEBRUARY 1992

SUMMARY OF COMMENTS REGARDING
PROPOSED AMENDMENTS TO FED. R. APP. P. 3(c)

Seven commentators submitted remarks on the proposed amendments to Fed. R. App. P. 3(c).

Two commentators opposed the general approach taken in the published draft; the remaining commentators suggested refinements of the proposed draft.

Both commentators opposing the approach taken in the published draft favored approaches that would better protect a party's right to appeal. Judge Easterbrook suggested amending Rule 3(c) in a manner analogous to that used Supreme Court Rules 12.4 and 18.2 so that all parties to the proceeding in the court whose judgment is to be reviewed are automatically parties in the court of appeals. Mr. Levy of the Public Citizen Litigation group suggested amending Rule 3 to state that use of "such phrases as 'all plaintiffs,' 'the plaintiffs,' 'plaintiffs A, B, et al.,' or 'all defendants except X' shall suffice to specify all such parties who are described by the phrase and who are represented by the attorney signing the notice."

The other five commentators made specific suggestions for improving the draft amendments:

1. Two commentators questioned the adequacy of the portion of the amendment dealing with class actions. One of them suggested that the rule should require the designation of at least one person qualified to take the appeal, and the other suggested that the rule require the notice of appeal to name each class representative or proposed class representative who seeks to prosecute the appeal.
2. One commentator suggested that requiring a notice of appeal to "name each party taking the appeal" is capable of ambiguity in situations where multiple parties are represented by separate counsel who would file separate notices.
3. One commentator suggests that the parties should be named in the body of the notice, that naming in the caption should not be an option.
4. Another commentator agreed that the parties should be named in the body of the notice; he also suggested that

the rule require a statement that an appeal is being taken, and that the Foman standard of "prejudice" should be incorporated in the rule.

Part E
Summary of comments
Re: rules published 2/92

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 3(c)

1. Honorable Frank H. Easterbrook
United States Circuit Judge
319 South Dearborn Street
Chicago, Illinois 60604

Judge Easterbrook notes that the proposed amendment clarifies the level of specificity needed to identify the parties taking an appeal so that any lawyer who reads the rule can file an effective notice of appeal. However, Judge Easterbrook notes that the clarity achieved by the change would come at the expense of parties whose lawyers do not read the rule and thus fail to follow it. He suggests taking a different approach. Unless there is evidence that such an approach causes prejudice to other parties or disrupts the administration of the courts, Judge Easterbrook advocates adopting a rule that will protect meritorious claims to the greatest extent possible. He suggests amending Rule 3(c) along the line of Supreme Court Rules 12.4 and 18.2 so that all parties to the proceeding in the court whose judgment is to be reviewed are automatically parties in the court of appeals.

Judge Easterbrook favors the amendments to Rule 15, because it makes sense to require identification - for the first time in <u>any</u> court - of the persons contesting an administrative decision.

2. Honorable Ruth Bader Ginsburg
United Stated Circuit Judge
United States Court of Appeals
Washington, D.C. 20001

Judge Ginsburg questions the adequacy of that portion of the amendment dealing with class actions. She suggests that the rule should require the designation of <u>at least one person qualified to take the appeal</u>.

3. Paul A. Levy, Esquire
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Public Citizen believes that the proposed rule substitutes

one trap for another. Public Citizen suggests amending Rule 3 to state that "[u]se of such phrases as 'all plaintiffs,' 'the plaintiffs,' 'plaintiffs A, B, et. al.,' or 'all defendants except X' shall suffice to specify all such parties who are described by the phrase and who are represented by the attorney signing the notice."

4. Professor Robert J. Martineau
University of Cincinnati
College of Law
Cincinnati, Ohio 45221-0040

Professor Martineau suggests stylistic changes and three substantive changes. He suggests that naming the appellants in the caption should not be sufficient and that the rule should require naming each appellant in the body of the notice. He also suggests that the rule should require a notice of appeal to state that an appeal is being taken. He further suggests incorporating the "prejudiced" standard established by the Supreme Court in Foman v. Davis, 371 U.S. 178, 181 (1962) for finding a notice of appeal so defective as to require dismissal.

5. George W. Morton, Jr., Esquire
Morton, Thomforde & Morton
620 Market Street
Knoxville, Tennessee 37902

Mr. Morton states that "name each party taking the appeal" is capable of ambiguity in situations where multiple parties are represented by separate counsel and he suggest that changing the language to "name the party taking an appeal might be less ambiguous.

6. Honorable Paul M. Rosenberg
United States Magistrate Judge
244 U.S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201-2675

Magistrate Judge Rosenberg believes that the rule should require the parties to be named in the body of a notice of appeal and not in the caption because the caption may be used as a matter of course.

7. Richard C. Warmer, Esquire
O'Melveny & Myers
555 13th Street, N.W.
Washington, D.C. 20004-1109

Mr. Warmer suggests that in class action appeals, the rule should require the notice of appeal to name each class representative or proposed class representative who seeks to prosecute the appeal.

Part E
Summary of comments
Re: rules published 2/92

SUMMARY OF COMMENTS ON
PROPOSED AMENDMENTS TO FED. R. APP. P. 15

Three persons submitted comments on the proposed amendments to Fed. R. App. P. 15. Two commentators support the proposed amendments to Rule 15 even though they oppose the parallel proposed amendments to Rule 3. These two commentators support the requirement that a petition for review of an agency decision list the name of each person seeking review of the agency decision because the petition for review is the first filing in any court and therefore it is analogous to a complaint filed in a district court. The third commentator supported the proposed amendment but suggested that the rule should require listing the names in the body of the petition/notice and that listing names in the caption should not be sufficient.

Part E
Summary of comments
Re: rules published 2/92

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 15

1. Honorable Frank H. Easterbrook
Circuit Judge
United States Court of Appeals
219 South Dearborn Street
Chicago, Illinois 60604

Supports the requirement that a notice of appeal name the persons contesting the administrative decision because the notice is the first filing in any court and, therefore, is analogous to a complaint filed in a district court.

2. Paul A. Levy, Esq.
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Supports the proposed amendment requiring that the notice of appeal name each petitioner because it is the first filing with a court and it is filed in a court of appeals rather than in a district court.

3. Honorable Paul M. Rosenberg
United States Magistrate Judge
244 U.S. Courthouse
101 W. Lombard Street
Baltimore Maryland 21201-2675

Magistrate Judge Rosenberg believes that the rule should require the parties to be named <u>in the body</u> of a notice of appeal and not in the caption.

NEW PROPOSALS

At the Advisory Committee's April 30, 1992, meeting the Committee approved proposed amendments to two additional rules, Rules 35 and 47.

The **proposed amendment of Rule 35** inserts language stating that the pendency of a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari. The Advisory Committee believes that the amendment should eliminate confusion arising from the distinction, with regard to the time for filing a petition for certiorari, between a petition for panel rehearing and a suggestion for rehearing in banc.

A petition for panel rehearing suspends the finality of a court of appeals judgment until a rehearing is denied or a new judgment is entered following the rehearing. Therefore, the time for filing a petition for certiorari runs from the date of the denial of the petition or the entry of a subsequent judgment. In contrast, a suggestion for rehearing in banc does not toll the running of time for seeking certiorari.

When a suggestion for rehearing in banc is filed without a petition for rehearing, a litigant often wrongly assumes that the filing time for a petition for certiorari is extended and delays filing a petition for certiorari until the time for filing has passed. The amendment places a warning in Rule 35, that the time is not extended.

The **proposed amendment of Rule 47** was prepared at the request of the Standing Committee to require uniform numbering of local rules and deletion of all language in local rules that merely repeats the language of the national rules. In addition, the proposed amendment states that internal operating procedures should not be used as disguised local rules.

Rule 35. Determination of a Causes by ~~the~~ a Court in Banc

(c) Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion Does not stay Mandate.- If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date ~~on which~~ when the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion, whether or not included in a petition for rehearing, ~~shall~~ will not affect the finality of the judgment of the court of appeals, extend the time for filing a petition for certiorari, or stay the issuance of the mandate.

Committee Note

Subdivision (c). The amendment makes no substantive change; it simply includes within the text of the appellate rules the rule enunciated in Supreme Court Rule 13.4. The committee hopes that inclusion of this language will alert litigants and lawyers to the fact that, although a petition for panel rehearing suspends the finality of a court of appeals judgment and extends the time for filing a petition for certiorari, a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari.

Rule 47. Rules ~~by~~ of a Courts of Appeals

After giving appropriate public notice and opportunity for comment, ~~E~~ each court of appeals by action of a majority of the circuit judges in regular active service may ~~from time to time~~ make and amend rules governing its practice ~~not in~~ that are consistent with, but not repetitive of, these ~~rules~~ Federal Rules of Appellate Procedure. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.~~ All generally applicable directions to parties or their lawyers regarding practice before a court must be in local rules rather than internal operating procedures or standing orders. Any local rule that relates to a topic covered by the Federal Rules of Appellate Procedure must be numbered to correspond to the related federal rule. ~~Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~ The clerk of each court of appeals must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. In all cases not provided for by rule, a court of appeals may regulate its practice in any manner not inconsistent with these federal rules.

Committee Note

The primary purpose of these amendments is to make local rules more accessible. The amendments make three basic changes. First, the rule mandates a uniform numbering system under which local rules are keyed to the national rule. For example, Rule 27 or these rules governs motions; if a court of appeals prescribes a rule governing motions, the court of appeals must number the rule in a manner that indicates that the local rule relates to motions, such as Circuit Rule 27 or Local Rule 27.1. If a local rule on a topic covered by the federal rules uses the same number, notice of the existence of the local rule and accessibility to it are improved. In addition, tying the number of a local rule to the corresponding national rule should eliminate the perceived need to repeat language from the national rules in the local rules.

Second, the rule also requires courts of appeals to delete from their local rules all language that merely repeats the national rules. Repeating the requirements of a national rule in a local rule obscures the local variation. Eliminating the repetition will leave only the local variation and the existence of a local rule will signal a special local requirement. In addition, the restriction prevents the interpretation difficulties that arise when there are minor variations in the wording of a national and a local rule.

Third, the rule requires a court of appeal to observe the distinction between a rule and an internal operating procedure. An internal operating procedure should not contain a directive to a lawyer or a party; an internal operating procedure should deal only with how a court conducts its internal business. Placing a practice oriented provision in the internal operating procedures may cause a practitioner, especially one from another circuit, to overlook the provision.

The opening phrase of the rule regarding publication and a period for comment before adoption of a rule simply reflects procedures mandates by the 1988 amendment of 28 U.S.C. § 2071.

At the Advisory Committee's April 30th meeting, the Committee also approved amending Rule 6(b)(2)(i) to conform that provision to the proposed amendment to Rule 4(a)(4). The Committee referred the rule to the Bankruptcy Advisory Committee for its consideration. With the concurrence of the Chair and Reporter of the Bankruptcy Advisory Committee, the Advisory Committee on Appellate Rules submits these changes for your consideration.

Rule 6. ~~Appeals in bankruptcy cases from final judgments and orders of district courts or of bankruptcy appellate panels~~ Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or of a Bankruptcy Appellate Panel.

* * *

(b)(2)(i) Effect of a Motion for Rehearing on the Time for Appeal. If any party files a timely motion for rehearing under Bankruptcy Rule 8015 ~~is filed~~ in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties ~~shall~~ runs from the entry of the order ~~denying the rehearing or the entry of the subsequent judgment~~ disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. An amended notice of appeal must be filed within the time prescribed

by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.

Committee Note

Note to Subparagraph (b)(2)(i). The amendment accompanies concurrent changes to Rule 4(a)(4). Although Rule 6 never included language such as that being changed in Rule 4(a)(4), language that made a notice of appeal void if it was filed before, or during the pendency of, certain posttrial motions, courts have found that a notice of appeal is premature if it is filed before the court disposes of a motion for rehearing. See, e.g., In re X-Cel, Inc., 823 F.2d 192 (7th Cir. 1987); In re Shah, 859 1463 (10th Cir. 1988). The committee wants to achieve the same result here as in Rule 4, the elimination of a procedural trap.

BANKRUPTCY

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

ROBERT E. KEETON
CHAIRMAN

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CHAIRMEN OF ADVISORY COMMITTEES
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WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

May 8, 1992

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

On behalf of the Advisory Committee on Bankruptcy Rules, I have the honor to transmit proposed amendments to the Bankruptcy Rules for consideration by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The preliminary draft of proposed changes to the rules was circulated to members of the bench and bar in August, 1991. Comments were received from 34 respondents after publication of the preliminary draft, including those who testified at the public hearing held in Pasadena, California on February 28, 1992, and those who responded in writing. A report of the comments received after publication of the preliminary draft is enclosed.

The Advisory Committee has made several changes to the preliminary draft after the public comment period. The changes are explained in the enclosed memorandum dated May 5, 1992. Also enclosed is a memorandum dated May 7, 1992, on the proposed amendment to Rule 5005(a) that has been the subject of substantial controversy.

A summary of the proposed amendments is provided for your convenience:

(1) Rules 1010 and 1013 contain technical amendments to delete references to the official forms for the summons and the

order for relief in an involuntary case. These forms were deleted from the official forms effective August 1, 1991.

(2) Rule 1017 is amended to clarify that the date of the filing of a notice of conversion in a case under chapter 12 or chapter 13 of the Bankruptcy Code is treated as the date of the entry of the order of conversion for the purpose of applying Rule 1019. Rule 1019 governs the conversion of a case to a chapter 7 liquidation case.

(3) Rule 2002 is amended to avoid the necessity of sending to the Washington, D.C., address of the Securities and Exchange Commission various notices in connection with a chapter 11 case if the Commission prefers to have the notices sent to a local office. The amendment also clarifies that certain notices are to be sent to the Securities and Exchange Commission only if the Commission has filed a notice of appearance or has made a request filed with the court.

(4) Rule 2003 is amended to extend the time for holding the meeting of creditors in chapter 13 cases by ten days so that courts will have greater flexibility for scheduling the meeting. This change will enable courts, if they so desire, to hold the confirmation hearing and the meeting of creditors on the same day while complying with the minimum notice requirements set forth in Rule 2002.

(5) Rule 2005 is amended to change the word "magistrate" to "magistrate judge." This amendment conforms to § 321 of the Judicial Improvements Act of 1990, Pub. L. 101-650 (1990), which changed the title of United States magistrate to United States magistrate judge.

(6) Rule 3009 is amended to delete the requirement that the court approve the amounts and times of distributions in chapter 7 cases. This change recognizes the role of the United States trustee in supervising trustees.

(7) Rule 3015 is amended to provide a time limit for filing a debt adjustment plan after a case is converted to chapter 13 from a different chapter. In addition, procedures relating to objections to confirmation and post-confirmation modification of plans are also added to the rule. Several of these provisions are now contained in Rules 3019 and 3020. A technical correction is also made to clarify that the plan or summary of the plan must be included with each notice of the confirmation hearing in chapter 12 cases pursuant to Rule 2002(a).

(8) The title to Rule 3018 is amended to indicate that the rule is applicable only in chapter 9 municipality and chapter 11 reorganization cases.

(9) Rule 3019 is amended to limit its application to modification of plans in chapter 9 municipality cases and chapter 11 reorganization cases. Provisions relating to modification of plans in chapter 12 and chapter 13 cases are dealt with in Rule 3015 as changed by the proposed amendments.

(10) Rule 3020 is amended to limit its application to confirmation of plans in chapter 9 and chapter 11 cases. Provisions relating to confirmation of chapter 12 and chapter 13 plans are included in Rule 3015 as changed by the proposed amendments.

(11) Rule 5005 is amended to prohibit the clerk from refusing to accept for filing any paper presented for the purpose of filing solely because it is not presented in proper form. This amendment conforms to the 1991 amendment to Rule 5(e) F.R.Civ.P.

(12) Rule 6002 is amended to conform to the language of § 102(1) of the Bankruptcy Code and to clarify that, in the absence of a request for a hearing, an actual hearing is not required to determine the propriety of a prior custodian's administration of property of the estate.

(13) Rule 6006 is amended to delete the requirement for an actual hearing when a hearing is not requested in connection with a motion relating to the assumption, rejection, or assignment of an executory contract or unexpired lease.

(14) Rule 6007 is amended to clarify that an actual hearing is not required if a hearing is not requested and there are no objections in connection with a motion regarding the abandonment of property of the estate.

(15) Rule 9002 contains a technical amendment necessary to conform to the use of the term "district judge" instead of "judge" in the proposed amendment to Rule 16 F.R.Civ. P.

(16) Rule 9019 is amended to conform to the language of § 102(1) of the Code which clarifies that an actual hearing is not required if a hearing is not requested in connection with a motion to approve a compromise or settlement.

(17) Rule 9036 is added to provide for the electronic transmission of certain notices as an alternative to the mailing of notices pursuant to Rule 2002.

Rule 1010. Service of Involuntary Petition and Summons; Petition Commencing Ancillary Case

On the filing of an involuntary petition or a petition commencing a case ancillary to a foreign proceeding the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. When a petition commencing an ancillary case is filed, service shall be made on the parties against whom relief is sought pursuant to § 304(b) of the Code and on ~~such~~ any other parties as the court may direct. The summons ~~shall conform to the appropriate Official Form and a copy~~ shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition ~~to~~ be served by mailing copies to the party's last known address, and by ~~not less than~~ at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(f) and Rule 4(g) and (h) F.R.Civ.P. apply when service is made or attempted under this rule.

COMMITTEE NOTE

This rule is amended to delete the reference to the official form. The official form for the summons was abrogated in 1991. Other amendments are stylistic and make no substantive change.

Rule 1013. Hearing and Disposition of a Petition in an Involuntary ~~Cases~~ Case

(a) CONTESTED PETITION. The court shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter any other appropriate ~~orders~~ order.

(b) DEFAULT. If no pleading or other defense to a petition is filed within the time provided by Rule 1011, the court, on the next day, or as soon thereafter as practicable, shall enter an order for the relief ~~prayed for~~ requested in the petition.

(c) [Abrogated] ~~ORDER FOR RELIEF. An order for relief shall conform substantially to the appropriate Official Form.~~

COMMITTEE NOTE

Subdivision (c) is abrogated because the official form for the order for relief was abrogated in 1991.

Other amendments are stylistic and make no substantive change.

Rule 1017. Dismissal or Conversion of Case; Suspension

* * * *

(d) PROCEDURE FOR DISMISSAL OR CONVERSION. A proceeding to dismiss a case or convert a case to another chapter, except pursuant to §§ 706(a), 707(b), 1112(a), 1208(a) or (b), or 1307(a) or (b) of the Code, is governed by Rule 9014. Conversion or dismissal pursuant to §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013. A chapter 12 or chapter 13 case shall be converted without court order on the filing by the debtor of a notice of conversion pursuant to §§ 1208(a) or 1307(a) and the filing date of the ~~filing of the~~ notice shall be deemed the date of the conversion order for the ~~purpose~~ purposes of applying § 348(c) of the Code and Rule 1019. The clerk shall forthwith transmit to the United States trustee a copy of ~~such~~ the notice.

* * * *

COMMITTEE NOTE

Subdivision (d) is amended to clarify that the date of the filing of a notice of conversion in a chapter 12 or chapter 13 case is treated as the date of the conversion order for the purpose of applying Rule 1019. Other amendments are stylistic and make no substantive change.

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

* * * *

(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) in a chapter 11 reorganization case, to the Securities and Exchange Commission ~~at Washington, D.C., and~~ at any ~~other~~ place the Commission designates, ~~in a filed writing~~ if the Commission has filed either a notice of appearance in the case or ~~has made~~ a written request ~~in a filed writing~~ to receive notices; . . . .

* * * *

COMMITTEE NOTE

Subdivision (j) is amended to avoid the necessity of sending an additional notice to the Washington, D.C. address of the Securities and Exchange Commission if the Commission prefers to have notices sent only to a local office. This change also clarifies that notices required to be mailed pursuant to this rule must be sent to the Securities and Exchange Commission only if it has filed a notice of appearance or has filed a written request. Other amendments are stylistic and make no substantive change.

Rule 2003. Meeting of Creditors or Equity Security Holders

(a) DATE AND PLACE. In a chapter 7 liquidation or a chapter 11 reorganization case, ~~Unless the case is a chapter 9 municipality case or a chapter 12 family farmer's debt adjustment case~~, the United States trustee shall call a meeting of creditors to be held ~~not less~~ no fewer than 20 ~~nor~~ and no more than 40 days after the order for relief. In a chapter 12 family farmer debt adjustment case, the United States trustee shall call a meeting of creditors to be held ~~not less~~ no fewer than 20 ~~nor~~ and no more than 35 days after the order for relief. In a chapter 13 individual's debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 50 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a later ~~time~~ date for the meeting. The meeting may be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest. If the United States trustee designates a place for the meeting which is not regularly staffed by the United States trustee or an assistant who may preside at the meeting, the meeting may be held not more than 60 days after the order for relief.

* * * *

COMMITTEE NOTE

Subdivision (a) is amended to extend by ten days the time for holding the meeting of creditors in a chapter 13 case. This extension will provide more flexibility for scheduling the meeting of creditors. Other amendments are stylistic and make no substantive change.

Rule 2005. Apprehension and Removal of Debtor to Compel Attendance for Examination

* * * *

(b) REMOVAL. Whenever any order to bring the debtor before the court is issued under this rule and the debtor is found in a district other than that of the court issuing the order, the debtor may be taken into custody under the order and removed in accordance with the following rules:

(1) If the debtor is taken into custody under the order at a place less than 100 miles from the place of issue of the order, the debtor shall be brought forthwith before the court that issued the order.

(2) If the debtor is taken into custody under the order at a place 100 miles or more from the place of issue of the order, the debtor shall be brought without unnecessary delay before the nearest available United States magistrate judge, bankruptcy judge, or district judge. If, after hearing, the magistrate judge, bankruptcy judge, or district judge finds that an order has issued under this rule and that the person in custody is the debtor, or if the person in custody waives a hearing, the magistrate judge, bankruptcy judge, or district judge shall ~~issue an~~ order ~~of~~ removal, and the person in custody shall be released on conditions ~~assuring~~ ensuring prompt appearance before the court ~~which~~ that issued the order to compel the attendance.

* * * *

COMMITTEE NOTE

Subdivision (b)(2) is amended to conform to § 321 of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, which changed the title of "United States magistrate" to "United States magistrate judge." Other amendments are stylistic and make no substantive change.

Rule 3009. Declaration and Payment of Dividends in a Chapter 7 Liquidation ~~Cases~~ Case

In a chapter 7 ~~cases~~ case, dividends to creditors shall be paid as promptly as practicable ~~in the amounts and at the times as ordered by the court~~. Dividend checks shall be made payable to and mailed to each creditor whose claim has been allowed, unless a power of attorney authorizing another entity to receive dividends has been executed and filed in accordance with Rule 9010. In that event, dividend checks shall be made payable to the creditor and to the other entity and shall be mailed to the other entity.

COMMITTEE NOTE

This rule is amended to delete the requirement that the court approve the amounts and times of distributions in chapter 7 cases. This change recognizes the role of the United States trustee in supervising trustees. Other amendments are stylistic and make no substantive change.

Rule 3015. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment ~~and~~ or a Chapter 13 Individual's Debt Adjustment ~~Cases~~ Case

(a) CHAPTER 12 PLAN. The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by § 1221 of the Code.

(b) CHAPTER 13 PLAN. The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 15 days thereafter, and such time ~~shall~~ may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 15 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.

(c) DATING. Every proposed plan and any modification thereof shall be dated.

(d) NOTICE AND COPIES. The plan or a summary of the plan shall be included with each notice of the hearing on confirmation mailed pursuant to Rule 2002~~(b)~~. If required by the court, the debtor shall furnish a sufficient number of copies to enable the clerk to include a copy of the plan with the notice of the hearing.

(e) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of the plan and any modification thereof filed pursuant to subdivision (a) or (b) of this rule.

(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation of

a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, before confirmation of the plan. An objection to confirmation is governed by Rule 9014. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(g) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by

51 Rule 9014.

COMMITTEE NOTE

Subdivision (b) is amended to provide a time limit for filing a plan after a case has been converted to chapter 13. The substitution of "may" for "shall" is stylistic and makes no substantive change.

Subdivision (d) is amended to clarify that the plan or a summary of the plan must be included with each notice of the confirmation hearing in a chapter 12 case pursuant to Rule 2002(a).

Subdivision (f) is added to expand the scope of the rule to govern objections to confirmation in chapter 12 and chapter 13 cases. The subdivision also is amended to include a provision that permits the court, in the absence of an objection, to determine that the plan has been proposed in good faith and not by any means forbidden by law without the need to receive evidence on these issues. These matters are now governed by Rule 3020.

Subdivision (g) is added to provide a procedure for post-confirmation modification of chapter 12 and chapter 13 plans. These procedures are designed to be similar to the procedures for confirmation of plans. However, if no objection is filed with respect to a proposed modification of a plan after confirmation, the court is not required to hold a hearing. See § 1229(b)(2) and § 1329(b)(2) which provide that the plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved. See § 102(1). The notice of the time fixed for filing objections to the proposed modification should set a date for a hearing to be held in the event that an objection is filed.

Amendments to the title of this rule are stylistic and make no substantive change.

Rule 3018. Acceptance or Rejection of ~~Plans~~ Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

* * * *

COMMITTEE NOTE

The title of this rule is amended to indicate that it applies only in a chapter 9 or a chapter 11 case. The amendment of the word "Plans" to "Plan" is stylistic.

Rule 3019. Modification of Accepted Plan Before Confirmation in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

In a chapter 9 or chapter 11 case, ~~After~~ after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

COMMITTEE NOTE

This rule is amended to limit its application to chapter 9 and chapter 11 cases. Modification of plans after confirmation in chapter 12 and chapter 13 cases is governed by Rule 3015. The addition of the comma in the second sentence is stylistic and makes no substantive change.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

(a) DEPOSIT. In a chapter 11 case, prior to entry of the order confirming the plan, the court may order the deposit with the trustee or debtor in possession of the consideration required by the plan to be distributed on confirmation. Any money deposited shall be kept in a special account established for the exclusive purpose of making the distribution.

(b) ~~OBJECTIONS~~ OBJECTION TO AND HEARING ON CONFIRMATION IN A CHAPTER 9 OR CHAPTER 11 CASE.

(1) Objection. ~~Objections~~ An objection to confirmation of the plan shall be filed and served on the debtor, the trustee, the proponent of the plan, any committee appointed under the Code, and ~~on~~ any other entity designated by the court, within a time fixed by the court. Unless the case is a chapter 9 municipality case, a copy of every objection to confirmation shall be transmitted by the objecting party to the United States trustee within the time fixed for ~~the~~ filing ~~of~~ objections. An objection to confirmation is governed by Rule 9014.

(2) Hearing. The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(c) ORDER OF CONFIRMATION. The order of confirmation shall conform to the appropriate Official Form and notice of entry

thereof shall be mailed promptly as provided in Rule 2002(f) to the debtor, the trustee, creditors, equity security holders, and other parties in interest. Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).

(d) RETAINED POWER. Notwithstanding the entry of the order of confirmation, the court may ~~enter all orders~~ issue any other order necessary to administer the estate.

COMMITTEE NOTE

This rule is amended to limit its application to chapter 9 and chapter 11 cases. The procedures relating to confirmation of plans in chapter 12 and chapter 13 cases are provided in Rule 3015. Other amendments are stylistic and make no substantive change.

Rule 5005. Filing and Transmittal of Papers

(a) FILING. The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

* * * *

COMMITTEE NOTE

Subdivision (a) is amended to conform to the 1991 amendment to Rule 5(e) F.R.Civ.P. It is not a suitable role for the office of the clerk to refuse to accept for filing papers not conforming to requirements of form imposed by these rules or by local rules or practices. The enforcement of these rules and local rules is a role for a judge. This amendment does not require the clerk to accept for filing papers sent to the clerk's office by facsimile transmission.

Rule 6002. Accounting by Prior Custodian of Property of the Estate

* * * *

(b) EXAMINATION OF ADMINISTRATION. On the filing and transmittal of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, after notice and a hearing, ~~on notice~~ the court shall determine the propriety of the administration, including the reasonableness of all disbursements.

COMMITTEE NOTE

Subdivision (b) is amended to conform to the language of § 102(1) of the Code.

Rule 6006. Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases

* * * *

(c) ~~HEARING~~ NOTICE. ~~When~~ Notice of a motion ~~is~~ made pursuant to subdivision (a) or (b) of this rule~~, the court shall set a hearing on notice~~ shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.

COMMITTEE NOTE

This rule is amended to delete the requirement for an actual hearing when no request for a hearing is made. See Rule 9014.

Rule 6007. Abandonment or Disposition of Property

(a) NOTICE OF PROPOSED ABANDONMENT OR DISPOSITION; OBJECTIONS; HEARING. Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. ~~An objection may be filed and served by a~~ A party in interest may file and serve an objection within 15 days of the mailing of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.

(b) MOTION BY PARTY IN INTEREST. A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate.

(c) [Abrogated] ~~HEARING. If a timely objection is made as prescribed by subdivision (a) of this rule, or if a motion is made as prescribed by subdivision (b), the court shall set a hearing on notice to the United States trustee and to other the entities as the court may direct.~~

COMMITTEE NOTE

This rule is amended to clarify that when a motion is made pursuant to subdivision (b), a hearing is not required if a hearing is not requested or if there is no opposition to the motion. See Rule 9014. Other amendments are stylistic and make no substantive change.

Rule 9002. Meanings of Words in the Federal Rules of Civil Procedure When Applicable to Cases under the Code

The following words and phrases used in the Federal Rules of Civil Procedure made applicable to cases under the Code by these rules have the meanings indicated unless they are inconsistent with the context:

* * * *

(4) "District court," "trial court," "court," "district judge," or "judge" means bankruptcy judge if the case or proceeding is pending before a bankruptcy judge.

* * * *

COMMITTEE NOTE

This rule is revised to conform to the use of the term "district judge" instead of "judge" in the Federal Rules of Civil Procedure. See F.R.Civ.P. 16(b) as amended in 1993.

Rule 9019. Compromise and Arbitration

(a) COMPROMISE. On motion by the trustee and after notice and a hearing ~~on notice to~~ , the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct ~~such other entities as the court may designate, the court may approve a compromise or settlement~~.

COMMITTEE NOTE

Subdivision (a) is amended to conform to the language of § 102(1) of the Code. Other amendments are stylistic and make no substantive change.

Entire Rule should by underlined.
This is a Brand new rule.

Rule 9036. Notice by Electronic Transmission

Whenever the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. Notice by electronic transmission is complete, and the sender shall have fully complied with the requirement to send notice, when the sender obtains electronic confirmation that the transmission has been received.

COMMITTEE NOTE

This rule is added to provide flexibility for banks, credit card companies, taxing authorities, and other entities that ordinarily receive notices by mail in a large volume of bankruptcy cases, to arrange to receive by electronic transmission all or part of the information required to be contained in such notices.

The use of electronic technology instead of mail to send information to creditors and interested parties will be more convenient and less costly for the sender and the receiver. For example, a bank that receives by mail, at different locations, notices of meetings of creditors pursuant to Rule 2002(a) in thousands of cases each year may prefer to receive only the vital information ordinarily contained in such notices by electronic transmission to one computer terminal.

The specific means of transmission must be compatible with technology available to the sender and the receiver. Therefore, electronic transmission of notices is permitted only upon request of the entity entitled to receive the notice, specifying the type of electronic transmission, and only if approved by the court.

Electronic transmission pursuant to this rule completes the notice requirements. The creditor or interested party is not thereafter entitled to receive the relevant notice by mail.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

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CHAIRMEN OF ADVISORY COMMITTEES
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APPELLATE RULES
SAM C. POINTER, JR.
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

May 5, 1992

TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Explanation of Changes Made Subsequent to the Original Publication of the August 1991 Preliminary Draft of the Proposed Amendments to the Bankruptcy Rules

The Advisory Committee on Bankruptcy Rules considered the testimony of each witness at the public hearing held in Pasadena, California, on February 28, 1992, and all other communications received from interested individuals and groups who responded to the Advisory Committee's request for comments on the preliminary draft of proposed amendments to the Bankruptcy Rules published in August, 1991. Changes in language for clarification or stylistic improvement have been made.

The significant changes made by the Advisory Committee subsequent to the original publication of the preliminary draft of the proposed amendments to the rules are:

PART III
CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

Rule 3002. Filing Proof of Claim or Interest

The Advisory Committee has deleted the proposed amendments to Rule 3002(a) and (c).

The proposed amendment to Rule 3002(a) contained in the preliminary draft would require secured creditors to file proofs of claim for their secured claims to be allowed in chapter 7,

chapter 12, and chapter 13 cases. The proposed change was controversial, and the Advisory Committee decided to withdraw and reconsider it and also to consider possible alternative or additional amendments for future presentation to the Standing Committee.

The proposed amendment to Rule 3002(c), which also was controversial, would give the court discretion to extend the time for filing a proof of claim in a chapter 13 case if the failure to file was due to excusable neglect. The Advisory Committee intends to reconsider the need or wisdom of this change, and to study possible alternative amendments.

Rule 3015. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment or a Chapter 13 Individual's Debt Adjustment Case

The title of this rule has been changed to more accurately reflect the content of the rule.

A sentence has been added to subdivision (f) to provide that, in the absence of an objection, the court may determine that a chapter 12 or chapter 13 plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on these issues. Rule 3020(b)(2), presently applicable in chapter 9, chapter 11, chapter 12, and chapter 13 cases, contains the same provision. As amended, however, Rule 3020 will not apply in chapter 12 and chapter 13 cases. The heading of subdivision (f) has been changed to more accurately reflect the content of the subdivision.

PART V
COURTS AND CLERKS

Rule 5005. Filing and Transmittal of Papers

The Committee Note has been changed to delete the suggestion that the clerk may advise a party or counsel, or may be directed to inform the court, that a paper is not in proper form. The procedures relating to filed papers that are not in proper form are left to local rules and practices. A sentence was added to the Committee Note to clarify that the amendment does not require the clerk to accept for filing papers sent by facsimile transmission.

PART IX
GENERAL PROVISIONS

Rule 9002. Meanings of Words in the Federal Rules of Civil Procedure When Applicable to Cases under the Code

Subdivision (4) has been changed to provide that the phrase "district judge," when used in the Federal Rules of Civil Procedure made applicable to cases under the Code, means "bankruptcy judge" if the case or proceeding is pending before a bankruptcy judge. This is a technical amendment made necessary by the proposed amendment to F.R.Civ.P. 16(b) that will change the word "judge" to "district judge." F.R.Civ.P. 16 is made applicable to adversary proceedings by Bankruptcy Rule 7016. The Advisory Committee recommends that this change be made without publication for public comment because it is technical and does not make any substantive change.

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CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

May 6, 1992

TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendments to the Bankruptcy Rules Regarding Local Rules and Technical Amendments, and Duplication of Numbers in National Rules

At its meeting in January 1992, the Standing Committee adopted three resolutions that require action by the advisory committees.

I. Uniform Numbering of Local Rules and Prohibition on Local Rules that Duplicate National Rules.

The Standing Committee adopted the following resolution:

> "That the Advisory Committees propose amendments to rule 83, criminal rule 57, appellate rule 47, and bankruptcy rule 9029, by June 1992, said proposed amendments to be along the following lines: Local rules shall be numbered in a uniform system approved by the Judicial Conference of the United States patterned after rules prescribed under sections 2075 and 2072 of title 28, United States Code. Local rules shall not repeat provisions contained in these rules."

The Standing Committee requested that the various Advisory Committees communicate with each other to achieve uniformity in

language regarding the various national rules that deal with local rule numbering. The Advisory Committee on Bankruptcy Rules, in adopting proposed amendments, considered, and used as a model for style, a draft of a proposed amendment to Civil Rule 83 that the Reporter received from Hon. Sam C. Pointer, Jr., Chairman of the Advisory Committee on Civil Rules, in February 1992.

At its meeting on March 26, 1992, the Advisory Committee on Bankruptcy Rules approved proposed amendments to Bankruptcy Rule 9029 (copy attached as Exhibit A). In addition, similar amendments to Bankruptcy Rule 8018 were approved by the Advisory Committee (copy attached as Exhibit B), which deals with local rules governing appeals to the bankruptcy appellate panel or district court. Although Rule 8018 was not mentioned in the Standing Committee resolution, that rule also governs local rules and should be amended. The Reporter to the Advisory Committee on Bankruptcy Rules transmitted copies of these proposed amendments to the Reporters to the other advisory committees on April 2, 1992.

The attached exhibits also indicate amendments to change the phrase "not inconsistent with" to "consistent with" in Rules 9029 and 8018. Civil Rule 83 is being amended at this time to change "not inconsistent with" to "consistent with" so that the language will conform to that found in 28 U.S.C. § 2071. Similar changes should be made to the Bankruptcy Rules for the sake of uniformity of style.

II. Technical Amendments.

The Standing Committee adopted the following resolution:

> "That the Advisory Committees shall propose amendments to the rules providing, in substance, as follows: The Judicial Conference of the United States shall have power to correct typographical and clerical errors or other purely verbal or formal matters in rules. The Reporters should confer to achieve uniform language in the amendments to be proposed."

Prior to the meeting of the Advisory Committee on Bankruptcy Rules in March, the Committee had received from Judge Pointer a draft of a proposed amendment to Civil Rule 84 regarding technical amendments to the rules. The draft received from Judge Pointer was considered by the Advisory Committee.

The draft of the proposed amendment to Civil Rule 84 places the provision dealing with technical amendments to the rules in the rule that now governs only the official forms. The Advisory Committee on Bankruptcy Rules believes that it would be more appropriate to add a new rule dealing with technical corrections to the rules because that subject is separate from the subject of official forms. The only common thread that these two subjects have is that the Judicial Conference may make the changes, but the Advisory Committee does not believe that that is a sufficient reason to combine them into one rule.

Attached as Exhibit C is a draft of a new rule, Bankruptcy Rule 9037, dealing with technical corrections that was approved by the Advisory Committee at the March meeting. The language on the draft is based on similar language in the draft received from

Judge Pointer. However, the Advisory Committee departed from Judge Pointer's draft to some extent because of its concern that the rule be very limited and that it not permit non-technical amendments that conform to statutory changes.

The Advisory Committee's vote in favor of the proposed new rule on technical amendments was premised on the understanding that the purpose of this rule is to make it unnecessary to bring minor technical changes to the Supreme Court and Congress, but it is not the purpose of this rule to have rules or committee notes drafted by anyone other than the Advisory Committee.

III. Duplication of Numbers Within Existing Federal Rules.

The Standing Committee adopted the following resolution:

> "That the various advisory committees report to the Standing Committee, by November 30, 1992, concerning the need for and appropriateness of a numbering system of the various Federal Rules that would end duplication of numbers within existing Federal Rules."

The Advisory Committee discussed this resolution at its meeting on March 26th. The consensus of the Committee is that there is no need to end duplication of numbers and that the current numbering system is working well.

The Advisory Committee also believes that, if duplication of numbers is to end, the Bankruptcy Rules should be the only body of rules that uses four digits. All Bankruptcy Rules have four digit numbers. The Civil, Appellate, and Criminal Rules do not use any four digits numbers. Although there are four digit numbers in the Evidence Rules (Evidence Rules 1001-1008, 1101-

1103), most of the Evidence Rules have three digit numbers. Moreover, there are historical reasons for the use of four digits for all Bankruptcy Rules. The former Bankruptcy Rules, that were repealed and replaced by the current Rules in 1983, used three digits. The use of four digits was deliberate so that confusion between the old and the new rules would be minimized. Another change in the Bankruptcy Rule numbering system at this time would cause further confusion and should be avoided.

Exhibit A

Rule 9029. Local Bankruptcy Rules

Each district court by action of a majority of the judges thereof may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make and amend rules of practice and procedure which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Local rules made by a district court or by bankruptcy judges pursuant to this rule shall be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States. In all cases not provided for by rule, the court may regulate its practice in any manner ~~not inconsistent~~ consistent with the Official Forms ~~or~~ and with these rules or those of the district in which the court acts.

COMMITTEE NOTE

This rule is amended to prohibit local rules that are merely duplicative of, or a restatement of, the Federal Rules of Bankruptcy Procedure. This restriction is designed to prevent possible conflicting interpretations arising from minor

inconsistencies between the wording of national and local rules, and to lessen the risk that any significant local practices may be overlooked by inclusion in local rules that are unnecessarily long. The prohibitions contained in this rule apply to local rules that are inconsistent with, or duplicative of, the Federal Rules of Civil Procedure that are incorporated by reference or made applicable by these rules.

This rule is amended further to require that local rules be numbered or identified in conformity with any uniform numbering system that may be prescribed by the Judicial Conference. A uniform numbering or identification system would make it easier for the bar that is increasingly national in scope to locate a local rule that is applicable to a particular procedural issue.

The change in the phrase "not inconsistent with" to "consistent with" is stylistic and conforms to similar amendments to Rule 8018 and F.R.Civ.P. 83, and to the language in 28 U.S.C. § 2071.

Exhibit B

Rule 8018. Rules by Circuit Councils and District Courts

Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may by action of a majority of the judges of the council or district court make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court~~, not inconsistent~~ consistent with, but not duplicative of, the rules of this Part VIII. Rule 83 F.R.Civ.P. governs the procedure for making and amending rules to govern appeals. Local rules made pursuant to this rule shall be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States. In all cases not provided for by rule, the district court or the bankruptcy appellate panel may regulate its practice in any manner ~~not inconsistent~~ consistent with, but not duplicative of, these rules.

COMMITTEE NOTE

This rule is amended to prohibit local rules that are merely duplicative of, or a restatement of, Part VIII of the Federal Rules of Bankruptcy Procedure. This rule is amended further to require that local rules be numbered or identified in conformity with any uniform numbering system that may be prescribed by the Judicial Conference. See the Committee Note to Rule 9029.

The change in the phrase "not inconsistent with" to "consistent with" is stylistic and conforms to similar amendments to Rule 9029 and F.R.Civ.P. 83, and to the language in 28 U.S.C. § 2071.

Exhibit C

Rule 9037. Technical Amendments.

The Judicial Conference of the United States may amend these rules to make them consistent in form and style with statutory changes and to correct errors in grammar, spelling, cross-references, typography, and other similar technical matters of form and style.

COMMITTEE NOTE

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court or Congress with such changes. This delegation of authority will lessen the delay and administrative burdens that can encumber the rule-making process on minor non-controversial, non-substantive matters. For example, this authority would have been useful to make the change in the Rule 2005 that became necessary when the new title of "Magistrate Judge" replaced the title "Magistrate" as a result of a statutory change.

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BANKRUPTCY RULES

May 4, 1992

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Report of the Comments Received Subsequent to the Publication of the Preliminary Draft of Proposed Amendments to the Bankruptcy Rules

A preliminary draft of the proposed amendments to the Bankruptcy Rules was circulated to members of the bench and bar in August 1991. A public hearing was scheduled to be held in Raleigh, North Carolina, on January 24, 1992, but was cancelled because of the lack of witnesses requesting to testify. A public hearing was held in Pasadena, California, on February 28, 1992, at which five witnesses testified.

The Advisory Committee on Bankruptcy Rules received letters and/or received testimony from 34 commentators. A list of the names and addresses of the commentators is attached. Following the list is a rule-by-rule summary of the comments received.

The number of people who commented on each of the proposed rule amendments follows:

RULE	NUMBER OF COMMENTS
1010	none
1013	none
1017	none
2002	none

2003	5
2005	none
3002(a)	6
3002(c)(7)	8
3009	6
3015	5
3018	1
3019	none
3020	none
5005	17
6002	2
6006	2
6007	2
9019	3
9036	6

COMMENTATORS

Proposed Amendments to the Federal Rules of Bankruptcy Procedure Published in August 1991

NAME and ADDRESS and DATE of LETTER:	RULES:
Allsburg, Mark Van Clerk United States Bankruptcy Clerk Western District of Michigan Gerald R. Ford Federal Building P.O. Box 3310 Grand Rapids, Michigan 49501 (1/22/92)	5005
Apperson, Jeffrey A. Clerk United States Bankruptcy Court Western District of Kentucky 601 West Broadway Louisville, Kentucky 40202 (3/17/92)	3009
Bezanson, Dennis G., President National Association of Bankruptcy Trustees ("NABT") 49 Atlantic Place South Portland, Maine 04106 (12/19/91)	3009
Bodoff, Joseph S.U., Esq. Warner & Stackpole 75 State Street Boston, Mass. 02109 (1/17/92)	9036
Bolton, Bradford L. Clerk United States Bankruptcy Court District of Colorado 721 Nineteenth Street, First Floor Denver, Colorado 80202-2508 (1/22/92)	5005

Bufford, Hon. Samuel United States Bankruptcy Court Central District of California 312 North Spring Street Los Angeles, California 90012 (Testimony 2/28/92)	2003, 3002(a)
Burton, Dennis E. Clerk United States Bankruptcy Court Southern District of Indiana 123 United States Courthouse 46 East Ohio Street Indianapolis, Indiana 46204 (9/24/91)	9036
Cauthen, George B., Esq. Nelson, Mullins, Riley & Scarborough P.O. Box 11070 Columbia, South Carolina 29211 (1/15/92/)	5005
Craig, John W. L. II Clerk United States Bankruptcy Court Western District of Virginia Old Federal Building - Room 200 Second Street & Church Avenue, S.W. P.O. Box 2390 Roanoke, Virginia 24010 (12/12/91)	5005
Ericson, Rick Clerk's Office United States Bankruptcy Court Central District of California 312 North Spring Street Los Angeles, California 90012 (testimony 2/28/92)	5005
Fenning, Hon. Lisa Hill United States Bankruptcy Court 312 North Spring Street, Room 831 Los Angeles, California 90012 (2/12/92; 2/28/92 memorandum and testimony)	2003, 3002(a), 5005, 6002, 6006, 6007, 9019, 9036
Grant, Hon. Robert E. United States Bankruptcy Court Northern District of Indiana Fort Wayne, Indiana 46802 (1/15/92)	3002(a), 3002(c)(7)

Hess, Hon. Henry L. Hess United States Bankruptcy Court District of Oregon 1001 S.W. 5th Avenue #900 Portland, Oregon 97204 (6/21/91, 7/12/91, 11/21/91)	3002(c)(7)
Ippongi, Dorothy K. Clerk United States Bankruptcy Court P.O. Box 50121 Honolulu, Hawaii 96850 (9/19/91)	5005
Kay, Samuel L. Clerk United States Bankruptcy Court Southern District of West Virginia 500 Quarrier Street, Room 2201 Charlston, West Virginia 25301 (2/13/92)	5005, 9036
Kelly, Hon. Ralph H. United States Bankruptcy Court Eastern District of Tennessee Historic U.S. Courthouse 31 East 11th Street Chattanooga, Tennessee 37402-2722 (2/6/92)	3015
Kennedy, Hon. David S. United States Bankruptcy Court Western District of Tennessee 200 Jefferson, Suite 645 Memphis, Tennessee 38103 (2/10/92)	3009
Klein, Gary, Staff Attorney National Consumer Law Center Inc. Eleven Beacon Street Boston, MA. 02108 (2/24/92)	3002, 3015, 5005
Kohn, J. Christopher ("Justice Dept.") Director, Commercial Litigation Branch U.S. Department of Justice Washington, D.C. 20530 (2/24/92)	2003, 3002(a), 3002(c)(7), 3015, 3018 3020

Lewis, Elizabeth Assistant Circuit Executive United States Courts for the Ninth Circuit 121 Spear Street, Suite 204 P.O. Box 193846 San Francisco, California 94119-3846 (Testimony 2/28/92)	5005
Lundin, Hon. Keith M. United States Bankruptcy Court Middle District of Tennessee Customs House 701 Broadway Nashville, Tenn. 37203 (7/17/91)	3002(a), 3002(c)(7)
Martens, Patti Divisional Manager Clerk's Office in Santa Anna United States Bankruptcy Court Central District of California (Testimony 2/28/92)	5005
Mitsch, Robert F. Vice President, Director of Bankruptcy Control ITT Consumer Financial Corp. Waterford Park 605 Highway 169 North, Suite 1200 P.O. 9394 Minneapolis, Minnesota 55440 (12/4/91)	2003, 3002(c)(7), 3015, 9019
National Association of Bankruptcy Trustees 3008 Millwood Avenue Columbia, S. Car. 29205 (2/12/92)	3009
Northern Idaho Debtors' Counsel P.O. Box 974 Coeur d'Alene, Idaho 83814 (1/24/92)	3015
Pearson, Hon. H. Clyde United States Bankruptcy Court Western District of Virginia P.O. Box 2389 Roanoke, Virginia 24010 (1/14/92 and 1/17/92)	5005

Reitmeyer, Mary, Secretary National Association of Bankruptcy Trustees ("NABT") Suite 1310 Allegheny Building 429 Forbes Avenue Pittsburgh, PA 15219 (11/11/91)	3009
Schueler, Brenda A. Clerk United States Bankruptcy Court District of South Carolina Federal Building - 1100 Laurel Street P.O. Box 1448 Columbia, South Carolina 29202 (12/12/91)	5005, 9036
Sergent, Birg E., Esq. P.O. Box 426 Pennington, Virginia 24277 (3/11/92)	5005
Spector, Hon. Arthur J. United States Bankruptcy Court Eastern District of Michigan 311 Federal Building 1000 Washington Avenue P.O. Box X-911 Bay City, Michigan 48707 (9/27/91)	3002(c)(7)
Stone, Martin, Esq. 1743 Larkspur Drive Lindhurst, OH 44124-2813 (1/5/92)	2003, 3002(a), 5005, 6002, 6006, 6007, 9019, 9036
Weil, Diane C., Esq. L.A. Chapter of the Federal Bar Association Danning, Gill, Gould, Diamond & Spector 2029 Century Park East, 19th Floor Los Angeles, California 90067-3088 (2/27/92)	3009, 5005
Weisman, Hon. Michael J. Assistant Attorney General 900 Fourth Avenue #2000 Seattle, Washington 98164-1012 (1/23/92)	3002(c)(7)

Wroten, Joseph E.
Clerk
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(1/8/92)

5005

Rule 2003. Meeting of Creditors or Equity Security Holders

1. Mr. Mitsch. Opposes the change because (1) under the proposed Rule 3015(d) [probably means Rule 3015(f)], the meeting of creditors could be held after the date to file objections to confirmation of the plan; (2) it makes the meeting of creditors pointless because it would be too late to use the information discovered there to object to confirmation (the creditor would not have time to contact its lawyer, file the objection, etc.); (3) this shortness of time would deprive the creditor of due process.

2. Mr. Stone. Opposes condensing the time between the meeting of creditors and the confirmation hearing because the shortened time period does not give creditors a meaningful opportunity to make reasonable evaluations. He comments that "a mockery is made of procedural, if not substantive due process."

3. Judge Fenning. Supports the amendment as a "welcome measure of flexibility."

4. Justice Dept. Opposes the change as a "step in the wrong direction" because of its purpose in having the meeting of creditors and confirmation hearings together. Opposes early confirmation hearings and suggests that they should be held after the bar date. He is more opposed to the purpose of the change than to the change itself which, he says, provides flexibility in scheduling. He also says that the problems regarding the early confirmation hearing is made worse in view of proposed Rule 3015(f) which requires written objections to confirmation.

5. Judge Bufford. Testified in favor of the proposed amendment to Rule 2003 to provide flexibility in scheduling the meeting of creditors and the confirmation hearing in chapter 13 cases.

Rule 3002. Filing Proof of Claim or Interest

Subdivision (a):

1. Judge Lundin. Expresses the view that the proposed amendment to Rule 3002(a) is a "step in the right direction."

2. Judge Grant. Opposes the proposed amendment. An asset subject to a creditor's lien could be administered for the benefit of creditors by being sold by the trustee for an amount exceeding the balance owed to the secured creditor. Judge Grant says that under the proposed amendment, if the secured creditor does not file a timely proof of claim, a distribution of the proceeds could not be paid to it despite the fact that the lien would attach to the sale proceeds to the extent of the debt. He suggests that this may be overcome in a chapter 7 case by an abandonment of the proceeds to the secured creditor, but this would render the proposed amendment a nullity since it would be the equivalent of permitting a late filed claim.

Judge Grant says that the problem is more dramatic in chapter 11, 12 and 13 cases because secured creditors who do not file timely claims will be barred from participating in a distribution under a confirmed plan, even if the plan provides for payments to the secured creditor. This can cause the "anomalous situation of having a plan which is specifically premised upon making specific payments to a certain secured creditor, and yet, cannot be successfully implemented because of the lack of a timely claim." The proposed amendment "would also seem to potentially give secured creditors the opportunity to opt out of bankruptcy proceedings through the conscious decision not to file a claim."

3. Mr. Stone. Welcomes the change as "long overdue," but is concerned that it may not be consistent with sections 501(b) and (c) of the Code. He also asks whether this applies to proofs of interest, and whether a secured creditor must file a proof of claim regardless of how it is scheduled. He also suggests further changes that go beyond the scope of this amendment, such as requiring multiple copies of proofs of claim to be filed and additional information to go to creditors.

4. Judge Fenning. Supports the change and says that it should assist in the administration of chapter 13 cases.

5. Justice Dept. Opposed to the change. There is no mechanism that exists to force a secured creditor to file a proof of claim, or to punish a secured creditor who does not file. Thus, the requirement is unenforceable. Cites § 501 and 506(d) of the Code. Also, if some sanction were contemplated, it would unfairly discriminate against governmental units because waiver

of sovereign immunity under § 106(a) and (b) is based on the filing of a proof of claim. Also, secured creditors unschooled in bankruptcy may think that the lien is lost because of the failure to file a proof of claim.

6. Judge Bufford. Testified in favor of the proposed amendment so that secured creditors will be required to file proofs of claim.

Subdivision (c)(7):

1. Judge Spector. Questions why the proposed change is limited to chapter 13. Suggests that it be applicable in chapter 12 also, and perhaps in chapter 11 and "certain types of chapter 7 cases." By limiting this rule to chapter 13 cases, "you would presumably sound a deathknell to any possible argument that good cause is grounds for such relief in the other chapters."

Second, he observes that the Committee Note seems to equate excusable neglect with due process concerns. He states that it is his understanding that due process already "mandates allowance of that [unscheduled] claim," or at least an extension of time to file a proof of claim. "If that is already the law what purpose is served by writing a rule that goes no further than that?" In conclusion, he suggests that the Committee may want to abandon or broaden the proposed addition to the rule.

2. Judge Hess. Judge Hess sent in three letters commenting on Rule 3002(c)(7). He opposes the proposed amendment. It is interesting that Judge Hess (in contrast to Judge Spector, but consistent with several court decisions) is of the view that the current state of the law is that late filed claims may not be allowed, although such claims are not discharged if not scheduled in time to give the creditor sufficient notice.

Judge Hess opposes the proposed amendment for the following reasons:

> (1) If the purpose is to permit unlisted creditors to file late claims, the proposed amendment is too broad in that it would also allow courts to permit late filed claims by listed creditors based on "excusable neglect." Why should the listed creditor in chapter 13 be given greater rights than the listed creditor in a chapter 7 case?
>
> (2) The time for filing claims "has always been a matter for Congress to determine" and has been in the nature of a statute of limitations. "Some reason ought to be given before a rule is adopted that overrules years and years of case law about which any prior controversy has been long

settled."

(3) The amendment would give a creditor the right to file a late claim, which is now reserved for a debtor or trustee under § 501(c) of the Code. This should be done by Congress, not the Rules, as it would change substantive law.

(4) Ten cases are cited that hold that an unlisted creditor's claim is not discharged in chapter 13. Due process requirements would not permit the discharge of such claims. Therefore, the proposed amendment is not necessary to protect unlisted creditors.

(5) Rule 3002 does not give a court discretion to permit the late filing of a claim, whereas Rule 3003(c)(3) gives the court such discretion in chapter 11 cases. He prefers the certainty and predictability of the current rule over the uncertainty that now exists in chapter 11 cases which has spawned a great deal of litigation.

3. Judge Lundin. Supports the view of Judge Hess in opposing the proposed amendment to Rule 3002(c)(7).

4. Mr. Mitsch. Does not oppose the proposed change, but suggests that "excusable neglect" be defined. The term covers many categories, but the Committee Note only mentions the situation involving the unscheduled creditor. He seems to favor a broader interpretation. He also suggests that the rule specify that the allowed proof of claim controls over the chapter 13 plan.

5. Mr. Weisman. Opposes the proposed addition of Rule 3002(c)(7) because it would create a higher standard for creditors to meet than currently exists. He claims that courts now use a "good faith" standard for government units to file a late proof of claim, and that the good faith standard is better than an excusable neglect standard. Suggests that the proposed amendment be added, but end the sentence after the words "by the creditor." He cites several cases construing "excusable neglect" in a way that he thinks is too narrow.

6. Judge Grant. The goal of the proposed change (to give the unscheduled creditor the opportunity to participate in a distribution from the estate) "is laudable", but Judge Grant is concerned that the "excusable neglect" standard is broader than the Committee Note indicates. Either limit the text of the rule to the situation where the creditor is unscheduled and without knowledge of the case, or add to the Committee Note additional examples of "excusable neglect." Otherwise, litigation will

result because of the uncertainty as to what was intended.

7. Justice Dept. Suggests using the concept of "lack of knowledge" instead of "excusable neglect" since excusable neglect is based on neglect, not the lack of due process. However, the writer commends the effort for greater flexibility.

8. Mr. Klein. Opposes the change because it will hurt low-income debtors in two ways: the debtors cannot afford to litigate excusable neglect issues, and modifications of plans will be more common and expensive if filings past the deadline are permitted. Prefers the hard and fast deadline.

Rule 3009. Declaration and Payment of Dividends in Chapter 7 Liquidation Cases

1. Ms. Reitmeyer (NABT). Opposes the proposed change to Rule 3009. Thinks that the change will not improve the system and may act as a detriment to creditors and panel trustees. The present rule provides protection to the panel trustee which the NABT feels "is essential to the continued stability of the system and the operation by the private panel trustees of their obligations under the Code."

2. Mr. Bezanson (NABT). Opposes the proposed change. Proofs of claim can be misplaced or lost or otherwise not present in the court file when claims are reviewed by the trustee; there is potential exposure to liability of the panel trustee without the "qualified immunity" that a court order could provide. Trustees face other liability today (environmental, tax), and this proposed change could produce another disincentive to serving as a panel trustee. Review by the U.S. Trustee provides no protection to the panel trustee in circumstances where claims surface after distribution because the U.S. trustee review does not relieve a trustee of liability.

3. National Assoc. of Bankruptcy Trustees. Opposes the proposed change because a court order approving distributions protects trustees from liability.

4. Judge Kennedy. Opposes the change as it places the U.S. Trustee in a quasi-judicial role. This is an improper delegation of a traditional judicial role to an administrative overseer. This change is also not a good one because of Rule 2002(f)(8) which avoids the need to send the trustee's final report to creditors if the distributions are under $1500. In addition, this change makes the trustee's final report and account meaningless.

5. Ms. Weil. Opposes the change because it exposes the trustee to liability for errors beyond the trustee's control, such as those that occur from lost proofs of claim. This will discourage qualified individuals from serving as the trustee.

6. Mr. Apperson. Opposes the change: (1) It gives the executive branch (US Trustee) a "core matter" judicial function of approving distributions, (2) conflict of interest would result by having the US Trustee appoint and review trustees, (3) it works fine as is, (4) the process would be complicated administratively because of the combined orders used today, and (5) this would assist those who would want the bankruptcy system administered in the executive branch.

Rule 3015. Filing of Plan in Chapter 12 Family Farmer's Debt Adjustment and Chapter 13 Individual's Debt Adjustment Cases

1. Mr. Mitsch. Supports the amendment that requires the debtor to file a plan within 15 days after conversion of the case to chapter 13.

2. Judge Kelly. Points out a technical error in the amendment in that the sentence in Rule 3020(b)(2) (court need not hear evidence on the debtor's good faith in the absence of an objection) was not brought over to Rule 3015.

3. Mr. Klein. Opposes change regarding proposed Rule 3015(g); it would change current practice in many jurisdictions by eliminating hearings on modified plans unless a party in interest objects. The problem is that many low-income debtors do not understand the proposed modification, either because their lawyers ignore the notice or the debtors do not understand the notice. He suggests that the notice of the proposed modification be served on both the debtor and the debtor's lawyer, and that the motion to modify the plan have a clear notice informing the debtor of the nature of the changes in the amounts and timing of payments as well as the need for a formal objection.

4. N. Idaho Debtors' Counsel. Opposes Rule 3015(g) in that it requires notice of a proposed modification to be served on all creditors, whether or not the creditors are affected by the modification or have filed proofs of claim. This causes needless expense, and triggers telephone calls to the trustee's office or debtor's attorney's office. Suggests that the notice be sent only to those creditors who are or may be affected by the modification.

5. Justice Dept. Opposes the proposed change to the extent that it could be read to eliminate the need for a hearing on confirmation where no objection is filed. If so, it conflicts with §§ 1224 and 1324 of the Code. In a footnote, the writer notes that the language of Rule 3020 wrongly implies that the "after notice and hearing" doctrine applies to confirmation hearings, and then he notes that the language in the amended Rule 3015 may be an improvement.

Rule 3018. Acceptance or Rejection of Plans

1. Justice Dept. The proposed change would exclude chapter 12 and chapter 13 cases from the scope of Rule 3018(c) (requiring written acceptance by secured creditors). This change would encourage the "deemed acceptance" practice in which a secured creditor is deemed to have accepted the plan in the absence of an objection. The writer opposes the "deemed acceptance" approach.

Rule 5005. Filing and Transmittal of Papers

1. Ms. Ippongi. Comments that the proposed amendment to Rule 5005 is unclear. For example, if a petition is presented on forms no longer in use, is the clerk mandated to file it? If a pleading contains no original signature of the submitting party as is required by Rule 9011, is the clerk mandated to accept the pleading?

2. Mr. Craig. Opposes the proposed change to Rule 5005. There is sufficient justification for not treating bankruptcy clerks and district court clerks the same because bankruptcy is so "paper intensive." Because of the volume of paper that comes into the bankruptcy court, it is essential to have procedural conformity. Since a petition triggers the automatic stay, "an unscrupulous debtor can file a petition which he knows will eventually be dismissed, to cause the automatic stay to frustrate creditors." He suggests that the concern that a party may be prejudiced merely on a "procedural technicality" may be remedied by using one of several alternatives now being used by courts:

(a) "Lodging," which allows the clerk to retain (without docketing or filing) papers tendered to the court for the purpose of tolling the statute of limitations, and giving the filer a period in which to amend and preserve its rights;

(b) "Dated rejection," in which the clerk time stamps the paper as "tendered" and then returns them to the filer, giving the filer an opportunity to ask the judge for a reconsideration or determination that it may be filed using the "tendered" date as the filing date; or

(c) "Acceptance with drop dead procedure," in which the paper is accepted for filing, but (according to prior judicial authorization) an order is issued that the subject of the paper be dismissed without further notice or hearing if the deficiencies are not corrected within a certain time period.

3. Mr. Wroten. Opposes the proposed amendment to Rule 5005 because the enforcement thereof would "bring chaos" to the clerk's office. He believes that "no judge of the U.S. Bankruptcy Court would have the time to accord judicial remedies for the prolific errors that appear in mountains of ill prepared paperwork." He argues that the proposed amendment is inconsistent with the 1991 promulgation of new Official Forms with mandatory substantial compliance therewith. He suggests that the pre-filing screening procedure now in use in his district (using a system of pre-filing deficiency notices in which deficient paperwork is retained pending substitution of corrected paperwork) is a better alternative. He believes that

similar pre-screening filing systems are used in most districts.

4. Ms. Schueler. Opposes the proposed amendment for the same reasons as expressed by the other commentators. She explains why the proposed change would not be workable and encloses a local rule and form used to reject defective papers (approximately 150 of these rejection notices are used each week!).

5. Mr. Cauthen. A former law clerk, the writer opposes the proposed amendment and believes it would be unworkable unless Congress is willing to commit substantial resources needed to enforce it. In the his district in South Carolina, more bench time, a new pro se clerk, and at least two additional deputy clerks would be needed. He describes how this proposal would have an adverse impact on the bar, the public and the courts. He gives several examples of problems it could cause (if a joint petition is filed by an individual and a corporation, is there a stay in effect as to the creditors?). He points out serious practical problems, and says that the proposal would mean that the clerk will no longer be the gate keeper for inaccurate or incorrect pleadings, it will be the judge.

6. Judge Pearson. Strongly supports the proposed amendment. Says that clerks in his district have "unbridled discretion to accept or reject petitions filed by debtors" since the Chief Judge of the district vacated his order that prohibited clerks from rejecting petitions due to incorrect form. This creates automatic stay and foreclosure problems, etc. This is a special problem in rural areas where a clerk's rejection of a petition due to improper form could result in an 8 to 10 day delay, thereby causing the loss of property due to foreclosures.

Judge Pearson wrote again to clarify that he did not attend a meeting of judges in his district in August 1991 at which the Chief Judge issued an order that requires the clerk to reject all petitions that do not comply with the new Official Form. He enclosed a copy of the order and of a letter from the clerk in his district, Mr. Craig, expressing Mr. Craig's view that the clerk has no discretion in the rejection of petitions.

7. Mr. Bolton. Opposes the proposed change which would "not only severely restrain the Federal Judiciary in its further development of effective and expeditious administration and management of bankruptcy cases, but will also destroy many significant systems and procedures now in place which have saved thousands and thousands of hours in time and expense to the judges and their staffs." He emphasizes the time-intensive and paper-intensive practice in bankruptcy courts as contrasted to the practice in district courts. The concept of "notice and

hearing" is significant in moving cases by entering orders in the absence of objection. The "burden for driving this process has been shifted from the court to the practitioners," which has "increased the need for the Clerk to spend considerable time correcting improper work of the attorneys and their staffs."

Mr. Bolton describes different systems used over the years to deal with the increasing problem caused by defective papers. During a study done in 1988, it was discovered that 28% of the documents tendered for filing were defective and required special handling (they receive 2,000 documents each day). A bankruptcy judgeship study team visited the court for a determination of the need for additional judges and, at their suggestion, the current system was adopted. A standing order now requires the clerk to reject certain documents that do not conform to the Code or Rules. The court adopted a "Memorandum Returning Unfiled Document" form (copy attached to his letter), which lists the reasons for it being defective. He claims that this helped educate the bar and has resulted in a decrease in defective papers. The proposed rule change will prohibit use of this procedure and will result in an increase in defective papers.

Also, the rule will affect standing orders and local rules that prohibit the filing of certain unwanted documents, such as uncontested discovery documents.

If the rule is changed to prohibit the clerk from rejecting defective papers, Mr. Bolton suggests that the rule include exceptions for the following categories of documents: (1) initial petitions and accompanying documents which are so deficient or defective as to prevent initial notice to creditors; and (2) any other paper which contains so significant an error, omission, or defect in basic form or identification that it can not be processed as submitted. Also, any paper so rejected should be date-stamped and returned to permit the party to seek an order allowing the nunc pro tunc filing of a corrected paper. If the Committee feels that the authority to reject a paper rests only with the judge, he recommends that the Rule specifically authorize the court to sua sponte strike the paper without notice and hearing.

8. Mr. Allsburg. Speaking on behalf of himself and the judges in his district, Mr. Allsburg, a clerk, points out two ambiguities in the proposed language: (1) the proposed change could be read to mean that it applies only with respect to petitions or other papers that are intended as the functional equivalent of petitions (and not to any other papers), or could be read to refer to all papers that are presented for filing; and (2) the rule refers to rejection of papers solely because of form. What about unsigned papers, or papers signed by only one of two necessary parties? Copies without original signatures?

Objections to discharge that are written as letters to the judge? Are these matters of form? Substance?

His personal opinion is that the rule will do little if anything because of how different courts will interpret it (again, what is "form"?). He recognizes that the rule attempts to address "real problems that need to be addressed" regarding clerks who bounce papers that are in any way defective. The problem is aggravated by local rules which create all sorts of new forms and procedures unknown to practitioners from other districts. However, the proposed solution creates even greater problems for the courts and for bankruptcy administration: (1) ambiguity in the rule "begs judges to circumvent the obvious intent" and will result in many different interpretations; (2) the enormous amount of defective papers - if the clerk must accept them, they are passed along to judges, trustees, and opposing attorneys who have to use them, force corrections, or "live with the garbage;" (3) it is the clerk's responsibility to maintain the quality and integrity of the files - by removing the power to reject pleadings, clerks lose the most effective (perhaps only) tool to prevent rampant abuse; (4) the rule shifts the burden of quality control from the filing attorney to the court; and (5) the rule attempts to "dump this problem on the judges who are not inclined to think of this as their problem."

He suggests an alternative to the proposed rule that would permit the clerk to reject papers, but permitting very liberal judicial review of such actions and "deemed acceptance" of corrected pleadings on the date of receipt of the defective (and subsequently returned) pleadings. He recommends language for the proposed change.

9. Judge Fenning. Strongly opposes the change. It will cause significant administrative problems if clerks are required to accept all papers. At the hearing on February 28, 1992, Judge Fenning submitted a written report summarizing a study done in the Central District of California which shows the volume and type of deficiencies in papers presented for filing in the clerk's office.

Judge Fenning testified at the public hearing and emphasized the administrative problems that would be caused by the proposed change. She also submitted to the Committee a memorandum ("Analysis of Impact of Proposed Amendment to Rule 5005") on a study conducted in C.D. Cal. regarding defective papers that are presented for filing. Judge Fenning also described the problem that exists in the Central District involving "bankruptcy mills" who file petitions for debtor/tenants for the sole purpose of obtaining a certified copy of the filed petition so that it could implement the automatic stay against eviction of the debtor. She claims that these cases are often dismissed for nonpayment of the

unpaid installment filing fees or for the debtor's failure to file schedules or otherwise move the case forward. By giving the clerks the power to reject defective papers, many of these abusive cases will not succeed because the quality of the papers are usually poor.

10. Mr. Kay. Opposes the change. Suggests a "lodging" procedure which preserves the original date presented for filing if the defect is cured. If the defective paper is filed, then it requires docketing and other action. He also suggests that there is an ambiguity in the language of the proposed amendment in that the "other paper presented for that purpose" could be taken to mean "other paper presented for the purpose of commencing a case."

11. Mr. Klein. Favors the change as long overdue. This will relieve the clerks of the burden of reviewing the content of papers.

12. Mr. Stone. Wants the amendment broadened.

13. Ms. Weil. Opposes the change. Although there is a need to protect the public from rejection of papers for minor non-compliance, in large districts, such as C.D. Cal., this could cause problems because of the number of deficient papers. Suggests that the rule provide that the clerk may not "unreasonably" refuse to accept a paper for filing.

14. Mr. Sergent. In favor of the proposed amendment. It will be a substantial benefit to legal services corporations providing services to the poor, and is in accordance with the general practice in other courts.

15. Mr. Ericson. Informed the Committee of the results of a survey of pleading deficiencies during the period February 25th to 27th, 1992, conducted in the Central District of California. He testified as to the high number of deficiencies and the practical problems and increased expense that the proposed amendment to Rule 5005 would cause if the clerk is required to accept all papers for filing.

16. Ms. Martens. Discussed the practical problems that would be caused by the proposed Rule on the three automated systems now in use in the Central District of California (VANCAP, BANS, and ICF), which gather statistical information through the noticing function and automated docketing. The proposed amendment would impact severely on these systems because the needed information would be missing if not provided in the petition.

17. Ms. Lewis. Testified regarding the unlawful detainer and "bankruptcy mill" problem in the Ninth Circuit that is the subject of a task force study in the Circuit.

Rule 6002. Accounting by Prior Custodian of Property of the Estate

1. Judge Fenning. Supports the change.

2. Mr. Stone. This change, which eliminates the need for an actual hearing in the absence of an objection or request for a hearing, should include a requirement that the court make an independent finding that the proposed action benefits the estate.

Rule 6006. Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases

1. Judge Fenning. Supports the change.

2. Mr. Stone. This change, which eliminates the need for an actual hearing in the absence of an objection or request for a hearing, should include a requirement that the court make an independent finding that the proposed action benefits the estate.

Rule 6007. Abandonment or Disposition of Property

1. Judge Fenning. Supports the change.

2. Mr. Stone. This change, which eliminates the need for an actual hearing in the absence of an objection or request for a hearing, should include a requirement that the court make an independent finding that the proposed action benefits the estate.

Rule 9019. Compromise and Arbitration

1. Mr. Mitsch. Suggests that this rule be amended to encompass hearings on reaffirmations because they are often negotiated as a way to settle objections to discharge. Also, bankruptcy courts are "still confused" over the 1984 amendments that made reaffirmation hearings discretionary, instead of mandatory. He says that some courts still view them as mandatory even if the debtor's lawyer has stated that the reaffirmation was voluntary and not an undue hardship. He suggests that the rule could avoid unnecessary reaffirmation hearings that crowd court dockets.

2. Judge Fenning. Supports the change.

3. Mr. Stone. This change, which eliminates the need for an actual hearing in the absence of an objection or request for a hearing, should include a requirement that the court make an independent finding that the proposed action benefits the estate.

Rule 9036. Notice by Electronic Transmission

1. Mr. Burton. Opposes the proposed new rule because of the difficulty in implementing electronic noticing without large scale increases in automation and personal resources.

2. Ms. Schueler. Questions whether electronic noticing will be less costly or more efficient for the courts. The letter raises potential technological problems and the inability to delegate noticing functions to chapter 7 or chapter 13 trustees. Suggests additional funding prior to implementation.

3. Mr. Bodoff. Suggests a change in the language of the proposed amendment to make it clear in the rule that it applies only if the requesting entity "and the clerk or other person responsible for providing notice agree . . ." He also suggests language to make it clear that the requesting party could ask that it be used "in one or more cases pending before the court or in future cases."

4. Judge Fenning. Supports the proposed new rule.

5. Mr. Kay. Supports the idea of using electronic transmission, but is concerned that the reference to "electronic confirmation" of notice will create some new element or document that the clerk will have to track. Suggests that the rule or committee note clarify the clerk's duties.

6. Mr. Stone. The proposed rule could be read to allow fax transmissions. The rule should make it clear that it is, or is not, allowing fax transmissions.

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

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CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

May 7, 1992

TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendment Subject to Substantial Controversy

The proposed amendment to Bankruptcy Rule 5005(a) is the only proposed change that has been the subject of substantial controversy.[1] The amendment provides that the clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by the Bankruptcy Rules or local rules or practices. This amendment is substantially the same as the 1991 amendment to Rule 5(e) of the Federal Rules of Civil Procedure, which is currently applicable to adversary proceedings in bankruptcy courts pursuant to Bankruptcy Rule 7005.

Seventeen responses were received from the bench and bar regarding the proposed amendment to Rule 5005(a). Nine clerks and one former clerk opposed the proposal. Two bankruptcy judges responded, one in favor and one opposed to the amendment. Three practicing lawyers are in favor and one is opposed to the change. An assistant circuit executive testified regarding the high volume of bankruptcy petitions, often defective in form, that are filed by tenants for the sole purpose of delaying eviction proceedings.

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[1] Proposed amendments to Rule 3002 that were included in the Preliminary Draft of Proposed Amendments published for comment in August, 1991, also have been the subject of substantial controversy, but have been deleted from the proposed amendments that will be presented by the Advisory Committee to the Standing Committee in June, 1992.

Commentators in opposition to the proposed amendment have argued that it will cause significant administrative problems because clerks will be required to accept and process papers that are not in proper form, including those that do not conform to the official forms. Bankruptcy courts are more "paper intensive" than district courts in that bankruptcy practice involves a high volume of filed papers, and it is more difficult and expensive to administer bankruptcy cases if papers are not in proper form. Opponents have argued that it would not be practical to rely on judicial remedies administered by judges to deal with the high volume of defective papers.

A bankruptcy judge from the Central District of California also has argued that rejection of papers that are not in proper form is helpful in dealing with the many cases in that district in which tenants file petitions for the sole purpose of delaying eviction. Petitions filed to delay eviction in Los Angeles are often prepared by so-called "bankruptcy mills," and often are not in proper form. It has been argued that it is an abuse of the bankruptcy laws to file a petition for the sole purpose of delaying eviction, and that the clerk's power to reject defective papers helps to prevent some of this abuse.

A bankruptcy judge in favor of the proposed change has complained that clerks in his district now have unbridled discretion to accept or reject bankruptcy petitions. Attorneys in favor of the proposed amendment have argued that it will be beneficial, especially to legal services organizations providing services to the poor.

The Advisory Committee, after consideration of the comments received and extensive discussion at two meetings, voted (8 in favor, 2 opposed) to approve the proposed amendment to Rule 5005(a). The view of the Advisory Committee is that it is not desirable to permit clerks to refuse to accept a document for filing, especially when the act of filing the petition or other document has serious legal consequences. This view is consistent with the policy of the 1991 amendment to Rule 5(e) of the Federal Rules of Civil Procedure. It is the function of a judge, not a clerk, to decide that a paper is legally insufficient to constitute a valid petition or other document. Problems caused by "bankruptcy mills" who often file defective papers to delay evictions should be solved through legislation or otherwise, but not by permitting clerks to reject petitions that are not in proper form.

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EDWARD LEAVY
BANKRUPTCY RULES

May 22, 1992

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendments to the Official Bankruptcy Forms

On behalf of the Advisory Committee on Bankruptcy Rules, I submit proposals to amend the Official Bankruptcy Forms.

The proposed amendments consist of technical corrections, conforming amendments required by a recent statutory enactment, clarifications of instructions, and improvements designed to facilitate the handling of documents by court personnel. None of the amendments to the forms is tied to the proposed amendments to the Federal Rules of Bankruptcy Procedure that are being submitted to the Standing Committee at this time.

The complex format of the forms makes it impractical to show deletions and additions in the manner customarily used when presenting proposed amendments to the rules. Providing the attached hand-marked copies of the present forms showing the proposed changes, however, seems to be an effective way to indicate to the Standing Committee the proposed amendments. I also attach newly printed forms that include the proposed changes to show the Standing Committee how they will look upon approval.

The following proposed amendments are technical and, therefore, the Advisory Committee recommends that the changes be made without publication for comment by the bench and bar:

(1) Form 5 (Involuntary Petition) is amended to require that all signatures be dated.

(2) Form 9B (Notice of Commencement of Case Under Chapter 7 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates (Corporation/Partnership No Asset Case)), Form 9D (Notice of Commencement of Case Under Chapter 7 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates (Corporation/Partnership Asset Case)), Form 9F (Notice of Commencement of Case Under Chapter 11 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates (Corporation/Partnership Case)), and Form 9H (Notice of Commencement of Case Under Chapter 12 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates (Corporation/Partnership Family Farmer)), are amended to correct an error in the reference to Rule 9001(5). Form 9H also contains a technical correction removing the reference to a complaint objecting to discharge of the debtor in the box labeled "Discharge of Debts."

On behalf of the Advisory Committee, I request that the following forms, including the proposed amendments and the attached committee notes explaining the changes, be published and circulated to members of the bench and bar with a request that written comments be submitted within a comment period of approximately two months:

(1) Form 1 (Voluntary Petition). This form is amended to require that the debtor not represented by an attorney provide the debtor's telephone number so that court personnel can contact the debtor concerning matters in the case.

(2) Form 6E (Schedule E -- Creditors Holding Unsecured Priority Claims). This form is amended to conform to the recent statutory amendment to § 507(a) that added a new priority for claims arising from a commitment to maintain the capital of an insured depository institution.

(3) Form 7 (Statement of Financial Affairs). Administrative proceedings have been added to the types of legal actions to be disclosed in Question 4. In addition, the second paragraph of the instructions is amended to transpose sentences for clarification.

(4) The list of Official Bankruptcy Forms and the title page to Form 9 (Notice of Filing under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates). The list and title page are amended to conform to the headings used on the Forms 9A - 9E. In addition, the title page to Form 9 is amended to add references to two new alternative versions of Form 9E and Form 9F.

(5) Form 9E(Alt.) (Notice of Commencement of Case Under Chapter 11 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates (Individual or Joint Debtor Case)), and Form 9F(Alt.) (Notice of Commencement of Case Under Chapter 11 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates (Corporation/Partnership Case). These new alternative versions of

Form 9E and 9F have been added for use in courts that, prior to the time that the notice is mailed to creditors, fix the time for filing claims in a chapter 11 case. The alternative versions provide a box labeled "Filing Claims" so that the deadline for filing claims may be indicated.

(6) Form 10 (Proof of Claim). This form has been amended to include the chapter of the Code under which the case is proceeding, to conform to the recent statutory amendment to § 507(a) that added a new priority for claims based on a commitment to maintain the capital of an insured depository institution, and to clarify that only prepetition arrearages and charges are to be included in the amount of the claim.

(7) Form 14 (Ballot for Accepting or Rejecting Plan). This form has been amended to indicate the relevant class of claims or interests in which the vote is being cast.

TECHNICAL AMENDMENTS

Hand-marked copies indicating proposed amendments

FORM B5
(6/90)

FORM 5. INVOLUNTARY PETITION

United States Bankruptcy Court

District of

INVOLUNTARY PETITION

IN RE (Name of Debtor—If Individual Last, First, Middle)	ALL OTHER NAMES used by debtor in the last 6 years (Include married, maiden, and trade names.)
SOC. SEC./TAX I.D. NO. (If more than one, state all.)	
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code)	MAILING ADDRESS OF DEBTOR (If different from street address)
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS	

LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses)

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

☐ Chapter 7 ☐ Chapter 11

INFORMATION REGARDING DEBTOR (Check applicable boxes)

Petitioners believe:
☐ Debts are primarily consumer debts
☐ Debts are primarily business debts (complete sections A and B)

TYPE OF DEBTOR
☐ Individual ☐ Corporation Publicly Held
☐ Partnership ☐ Corporation Not Publicly Held
☐ Other: _____

A. TYPE OF BUSINESS (Check one)
☐ Professional ☐ Transportation ☐ Commodity Broker
☐ Retail/Wholesale ☐ Manufacturing/Mining ☐ Construction
☐ Railroad ☐ Stockbroker ☐ Real Estate
☐ Other

B. BRIEFLY DESCRIBE NATURE OF BUSINESS

VENUE

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.

PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)

Name of Debtor	Case Number	Date
Relationship	District	Judge

ALLEGATIONS (Check applicable boxes)

1. ☐ Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. § 303(b).
2. ☐ The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.
3.a. ☐ The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute;

or

b. ☐ Within 120 days preceding the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

COURT USE ONLY

Name of Debtor _____

FORM 5 Involuntary Petition
(10/89)

Case No. _____
(Court use only)

TRANSFER OF CLAIM

☐ Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents evidencing the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date signed

Name & Mailing ▶ Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney/Firm (If any)

_____
Address

_____
Telephone No.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date Signed

Name & Mailing ▶ Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney/Firm (If any)

_____
Address

_____
Telephone No.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date signed

Name & Mailing ▶ Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney/Firm (If any)

_____
Address

_____
Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, petitioner(s) signatures under the statement and the name(s) of attorney(s) and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

_____ continuation sheets attached

Form 5

COMMITTEE NOTE

The form has been amended to require the dating of signatures.

FORM B9B
6/90

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership No Asset Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

AT THIS TIME THERE APPEAR TO BE NO ASSETS AVAILABLE FROM WHICH PAYMENT MAY BE MADE TO UNSECURED CREDITORS. DO NOT FILE A PROOF OF CLAIM UNTIL YOU RECEIVE NOTICE TO DO SO.

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5)(A)(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property, if any, and turn it into money. At this time, however, it appears from the schedules of the debtor that there are no assets from which any distribution can be paid to the creditors. If at a later date it appears that there are assets from which a distribution may be paid, the creditors will be notified and given an opportunity to file claims.

DO NOT FILE A PROOF OF CLAIM UNLESS YOU RECEIVE A COURT NOTICE TO DO SO

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9D
6/90

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Asset Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

FILING CLAIMS

Deadline to File a Proof of Claim:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property, if any, and turn it into money. If the trustee can collect enough money and property from the debtor, creditors may be paid some or all of the debts owed to them.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9F
6/90

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the filing of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5)(5) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. If the court sets a deadline for filing a proof of claim, you will be notified. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

FORM B9H
6/90

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 12 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Family Farmer)

In re (Name of Debtor)	Address of Debtor Date Case Filed (or Converted)	Soc. Sec./Tax Id. Nos.

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

FILING CLAIMS

Deadline to file a proof of claim:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN

☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held:

_____ (Date) _____ (Time) _____ (Location)

☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.

☐ The debtor has not filed a plan as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

DISCHARGE OF DEBTS

Deadline to File a Complaint ~~Objecting to Discharge of the Debtor or~~ to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE. A family farmer's debt adjustment case under chapter 12 of the Bankruptcy Code has been filed in this court by the family farmer named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. Some protection is also given to certain codebtors of consumers debts. If unauthorized actions are taken by a creditor against a debtor or a protected codebtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor, the property of the debtor, or a codebtor, should review §§ 362 and 1201 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5)(A), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes a specific debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 12 FILING. Chapter 12 of the Bankruptcy Code enables family farmers to reorganize pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

Address of the Clerk of the Bankruptcy Court	For the Court: *Clerk of the Bankruptcy Court* *Date*

COMMITTEE NOTE

Forms 9B, 9D, 9F, and 9H are amended to make a technical correction in the reference to Rule 9001(5). Form 9H also contains a technical correction deleting the reference to a complaint objecting to discharge of the debtor.

TECHNICAL AMENDMENTS

Forms printed as amended

FORM B5
(6/90)

FORM 5. INVOLUNTARY PETITION

United States Bankruptcy Court

District of

INVOLUNTARY PETITION

IN RE (Name of Debtor—If Individual Last, First, Middle)	ALL OTHER NAMES used by debtor in the last 6 years (Include married, maiden, and trade names.)
SOC SEC./TAX I.D NO. (If more than one, state all.)	
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code)	MAILING ADDRESS OF DEBTOR (If different from street address)
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS	

LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses)

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

☐ Chapter 7 ☐ Chapter 11

INFORMATION REGARDING DEBTOR (Check applicable boxes)

Petitioners believe:
☐ Debts are primarily consumer debts
☐ Debts are primarily business debts (complete sections A and B)

TYPE OF DEBTOR
☐ Individual ☐ Corporation Publicly Held
☐ Partnership ☐ Corporation Not Publicly Held
☐ Other: _____

A. TYPE OF BUSINESS (Check one)
☐ Professional ☐ Transportation ☐ Commodity Broker
☐ Retail/Wholesale ☐ Manufacturing/Mining ☐ Construction
☐ Railroad ☐ Real Estate
☐ Stockbroker ☐ Other

B. BRIEFLY DESCRIBE NATURE OF BUSINESS

VENUE

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.

PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)

Name of Debtor	Case Number	Date
Relationship	District	Judge

ALLEGATIONS (Check applicable boxes)

1. ☐ Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. § 303(b).
2. ☐ The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.
3.a. ☐ The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute;

or

b. ☐ Within 120 days preceding the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

COURT USE ONLY

Name of Debtor _____

B5
(Rev. 5/92)

Case No. _____ (Court use only)

TRANSFER OF CLAIM

☐ Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents evidencing the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date Signed

Name & Mailing ► Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney/Firm (If any)

_____
Address

_____
Telephone No.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date Signed

Name & Mailing ► Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney/Firm (If any)

_____
Address

_____
Telephone No.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date Signed

Name & Mailing ► Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney/Firm (If any)

_____
Address

_____
Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, petitioner(s) signatures under the statement and the name(s) of attorney(s) and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

_____ continuation sheets attached

Form 5

COMMITTEE NOTE

The form has been amended to require the dating of signatures.

B9B (Official Form 9B)
(Rev. 5/92)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership No Asset Case)

In re (Name of Debtor)	Address of Debtor	Soc Sec./Tax Id Nos
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

AT THIS TIME THERE APPEAR TO BE NO ASSETS AVAILABLE FROM WHICH PAYMENT MAY BE MADE TO UNSECURED CREDITORS. DO NOT FILE A PROOF OF CLAIM UNTIL YOU RECEIVE NOTICE TO DO SO.

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property, if any, and turn it into money. At this time, however, it appears from the schedules of the debtor that there are no assets from which any distribution can be paid to the creditors. If at a later date it appears that there are assets from which a distribution may be paid, the creditors will be notified and given an opportunity to file claims.

DO NOT FILE A PROOF OF CLAIM UNLESS YOU RECEIVE A COURT NOTICE TO DO SO

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

B9D (Official Form 9D)
(Rev. 5/92)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Asset Case)

In re (Name of Debtor)	Address of Debtor	Soc Sec./Tax Id Nos
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Name and Address of Trustee
Telephone Number	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date)

FILING CLAIMS

Deadline to File a Proof of Claim:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property, if any, and turn it into money. If the trustee can collect enough money and property from the debtor, creditors may be paid some or all of the debts owed to them.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

B9F (Official Form 9F)
(Rev. 5/92)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date).

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the filing of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedules of creditors has the responsibility for determining that the claim is listed accurately. If the court sets a deadline for filing a proof of claim, you will be notified. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

B9H (Official Form 9H)
(Rev. 5/92)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 12 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Family Farmer)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id Nos
	Date Case Filed (or Converted)	

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

☐ This is a converted case originally filed under chapter _____ on _____ (date)

FILING CLAIMS

Deadline to file a proof of claim:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN

☐ The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held

_____ (Date) _____ (Time) _____ (Location)

☐ The debtor has filed a plan. The plan or a summary of the plan and notice of the confirmation hearing will be sent separately.

☐ The debtor has not filed a plan as of this date. Creditors will be given separate notice of the hearing on confirmation of the plan.

DISCHARGE OF DEBTS

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

COMMENCEMENT OF CASE. A family farmer's debt adjustment case under chapter 12 of the Bankruptcy Code has been filed in this court by the family farmer named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. Some protection is also given to certain codebtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor or a protected codebtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor, the property of the debtor, or a codebtor, should review §§ 362 and 1201 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the commencement of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes a specific debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth above in the box labeled "Filing Claims." The place to file the proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF A CHAPTER 12 FILING. Chapter 12 of the Bankruptcy Code enables family farmers to reorganize pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. Creditors will be given notice in the event the case is dismissed or converted to another chapter of the Bankruptcy Code.

Address of the Clerk of the Bankruptcy Court	For the Court:
	Clerk of the Bankruptcy Court
	Date

COMMITTEE NOTE

Forms 9B, 9D, 9F, and 9H are amended to make a technical correction in the reference to Rule 9001(5). Form 9H also contains a technical correction deleting the reference to a complaint objecting to discharge of the debtor.

AMENDMENTS TO BE PUBLISHED FOR COMMENT

Hand-marked copies indicating proposed amendments

OFFICIAL BANKRUPTCY FORMS

1. Voluntary Petition
2. Declaration under Penalty of Perjury on Behalf of a Corporation or Partnership
3. Application and Order to Pay Filing Fee in Installments
4. List of Creditors Holding 20 Largest Unsecured Claims
5. Involuntary Petition
6. Schedules
7. Statement of Financial Affairs
8. Chapter 7 Individual Debtor's Statement of Intention
9. Notice of ~~Filing~~ Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates
10. Proof of Claim

11A. General Power of Attorney

11B. Special Power of Attorney

12. Order and Notice for Hearing on Disclosure Statement
13. Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof
14. Ballot for Accepting or Rejecting Plan
15. Order Confirming Plan

16A. Caption

16B. Caption (Short Title)

16C. Caption of Adversary Proceeding

17. Notice of Appeal to a District Court or Bankruptcy Appellate Panel from a Judgment or Other Final Order of a Bankruptcy Court.
18. Discharge of Debtor

Official Forms

[*NOTE: These official forms should be observed and used with such alterations as may be appropriate to suit the circumstances. See Rule 9009.*]

COMMITTEE NOTE

The list of Official Bankruptcy Forms has been amended to conform the title of Form 9 to the headings used on Forms 9A - 9I.

FORM B1
(6/90)

FORM 1. VOLUNTARY PETITION

United States Bankruptcy Court

District of _____

VOLUNTARY PETITION

(Name of debtor—If individual enter: Last, First, Middle)	NAME OF JOINT DEBTOR (Spouse) (Last, First, Middle)
ALL OTHER NAMES used by the debtor in the last 6 years (Include married, maiden and trade names.)	ALL OTHER NAMES used by the joint debtor in the last 6 years (Include married, maiden, and trade names.)
SOC SEC./TAX I.D. NO. (If more than one, state all.)	SOC SEC./TAX I.D. NO. (If more than one, state all.)
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code)	STREET ADDRESS OF JOINT DEBTOR (No. and street, city, state, and zip code)
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS	COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS
MAILING ADDRESS OF DEBTOR (If different from street address)	MAILING ADDRESS OF JOINT DEBTOR (If different from street address)
LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from addresses listed above)	VENUE (Check one box) ☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District. ☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

INFORMATION REGARDING DEBTOR (Check applicable boxes)

TYPE OF DEBTOR
☐ Individual
☐ Joint (Husband & Wife)
☐ Partnership
☐ Other. _____
☐ Corporation Publicly Held
☐ Corporation Not Publicly Held
☐ Municipality

NATURE OF DEBT
☐ Non-Business/Consumer
☐ Business — Complete A & B below

A. TYPE OF BUSINESS (Check one box)
☐ Farming
☐ Professional
☐ Retail/Wholesale
☐ Railroad
☐ Transportation
☐ Manufacturing/Mining
☐ Stockbroker
☐ Commodity Broker
☐ Construction
☐ Real Estate
☐ Other Business

B. BRIEFLY DESCRIBE NATURE OF BUSINESS

CHAPTER OR SECTION OF BANKRUPTCY CODE UNDER WHICH THE PETITION IS FILED (Check one box)
☐ Chapter 7
☐ Chapter 9
☐ Chapter 11
☐ Chapter 12
☐ Chapter 13
☐ Sec. 304—Case Ancillary to Foreign Proceeding

FILING FEE (Check one box)
☐ Filing fee attached
☐ Filing fee to be paid in installments. (Applicable to individuals only.) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b); see Official Form No. 3

NAME AND ADDRESS OF LAW FIRM OR ATTORNEY

Telephone No.

NAME(S) OF ATTORNEY(S) DESIGNATED TO REPRESENT THE DEBTOR (Print or Type Names)

☐ Debtor is not represented by an attorney. Telephone No. of Debtor not represented by an attorney ( )

STATISTICAL/ADMINISTRATIVE INFORMATION (28 U.S.C. § 604) (Estimates only) (Check applicable boxes)

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.

☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE FOR COURT USE ONLY

ESTIMATED NUMBER OF CREDITORS

1-15	16-49	50-99	100-199	200-999	1000-over
☐	☐	☐	☐	☐	☐

ESTIMATED ASSETS (In thousands of dollars)

Under 50	50-99	100-499	500-999	1000-9999	10,000-99,000	100,000-over
☐	☐	☐	☐	☐	☐	☐

ESTIMATED LIABILITIES (In thousands of dollars)

Under 50	50-99	100-499	500-999	1000-9999	10,000-99,000	100,000-over
☐	☐	☐	☐	☐	☐	☐

EST. NO. OF EMPLOYEES—CH. 11 & 12 ONLY

0	1-19	20-99	100-999	1000-over
☐	☐	☐	☐	☐

EST. NO. OF EQUITY SECURITY HOLDERS—CH. 11 & 12 ONLY

0	1-19	20-99	100-499	500-Over
☐	☐	☐	☐	☐

Name of Debtor _____

Case No. _____
(Court use only)

FILING OF PLAN

For Chapter 9, 11, 12 and 13 cases only. Check appropriate box.

☐ A copy of debtor's proposed plan dated _____ is attached

☐ Debtor intends to file a plan within the time allowed by statute, rule, or order of the court.

PRIOR BANKRUPTCY CASE FILED WITHIN LAST 6 YEARS (If more than one, attach additional sheet)

Location Where Filed	Case Number	Date Filed

PENDING BANKRUPTCY CASE FILED BY ANY SPOUSE, PARTNER, OR AFFILIATE OF THIS DEBTOR (If more than one, attach additional sheet)

Name of Debtor	Case Number	Date
Relationship	**District**	**Judge**

REQUEST FOR RELIEF

Debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

SIGNATURES

ATTORNEY

X _____ _____
Signature Date

INDIVIDUAL/JOINT DEBTOR(S)

I declare under penalty of perjury that the information provided in this petition is true and correct.

X _____
Signature of Debtor

_____
Date

X _____
Signature of Joint Debtor

_____
Date

CORPORATE OR PARTNERSHIP DEBTOR

I declare under penalty of perjury that the information provided in this petition is true and correct, and that the filing of this petition on behalf of the debtor has been authorized.

X _____
Signature of Authorized Individual

_____
Print or Type Name of Authorized Individual

_____
Title of Individual Authorized by Debtor to File this Petition

_____
Date

EXHIBIT "A" (To be completed if debtor is a corporation requesting relief under chapter 11.)

☐ Exhibit "A" is attached and made a part of this petition.

TO BE COMPLETED BY INDIVIDUAL CHAPTER 7 DEBTOR WITH PRIMARILY CONSUMER DEBTS (See P.L. 98-353 § 322)

I am aware that I may proceed under chapter 7, 11, or 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7 of such title.

If I am represented by an attorney, exhibit 'B' has been completed.

X _____ _____
Signature of Debtor Date

X _____ _____
Signature of Joint Debtor Date

EXHIBIT "B" (To be completed by attorney for individual chapter 7 debtor(s) with primarily consumer debts.)

I, the attorney for the debtor(s) named in the foregoing petition, declare that I have informed the debtor(s) that (he, she, or they) may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

X _____ _____
Signature of Attorney Date

Form 1

COMMITTEE NOTE

The form has been amended to require a debtor not represented by an attorney to provide a telephone number so that court personnel can contact the debtor concerning matters in the case.

FORM B6E
(6/90)

In re _____, Debtor

Case No. _____ (If known)

SCHEDULE E—CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name and mailing address, including zip code, and account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H—Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotal" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Repeat this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ Extensions of credit in an involuntary case

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(2).

☐ Wages, salaries, and commissions

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees, up to a maximum of $2000 per employee, earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(3).

☐ Contributions to employee benefit plans

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ Certain farmers and fishermen

Claims of certain farmers and fishermen, up to a maximum of $2000 per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(5).

☐ Deposits by individuals

Claims of individuals up to a maximum of $900 for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(6).

☐ Taxes and Certain Other Debts Owed to Governmental Units

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(7).

☐ Commitments To Maintain the Capital of an Insured Depository Institution

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to _____ continuation sheets attached maintain the capital of an insured depository institution. 11 U.S.C. § 507 (a)(8).

Form 6

COMMITTEE NOTE

Schedule 6E (Creditors Holding Unsecured Priority Claims) has been changed to conform to the statutory amendment that added subsection (a)(8) to § 507 of the Bankruptcy Code. Pub. L. No. 101-647 (Crime Control Act of 1990). The Code amendment created a new priority for claims based on certain commitments to maintain the capital of an insured depository institution.

FORM 7
(6/90)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS

UNITED STATES BANKRUPTCY COURT
_____ District of _____

In Re: _____ Case No _____
(Name) (If Known)
Debtor

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1 - 15 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 16 - 21. Each question must be answered. If the answer to any question is "None," or the question is not applicable, mark the box labeled "None." If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the two years immediately preceding the filing of the this bankruptcy case, any of the following: an officer, director, managing executive, or person in control of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any person in control of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101(30).

---

1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT SOURCE (if more than one)

2. Income other than from employment or operation of business

None ☐ State the amount of income received by the debtor other than from employment, trade, profession, or operation of the debtor's business during the two years immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE

3. Payments to creditors

None ☐ a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within 90 days immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING

None ☐ b. List all payments made within one year immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING

4. Suits, executions, garnishments and attachments and administrative proceedings

None ☐ a. List all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT AND LOCATION	STATUS OR DISPOSITION

THERE ARE NO CHANGES TO THE

REMAINING 8 PAGES OF THIS FORM

COMMITTEE NOTE

The form has been amended in two ways. In the second paragraph of the instructions, sentences have been transposed to clarify that only a debtor that is or has been in business as defined in the form should answer Questions 16 - 21. In addition, administrative proceedings have been added to the types of legal actions to be disclosed in Question 4.a.

Form B9
6/90

Form 9. NOTICE OF ~~FILING~~ COMMENCEMENT OF CASE UNDER THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES

9A.....Chapter 7, Individual/Joint, No-Asset Case

9B.....Chapter 7, Corporation/Partnership, No-Asset Case

9C.....Chapter 7, Individual/Joint, Asset Case

9D.....Chapter 7, Corporation/Partnership, Asset

9E.....Chapter 11, Individual/Joint Case

9F.....Chapter 11, Corporation/Partnership Case

9G.....Chapter 12, Individual/Joint Case

9H.....Chapter 12, Corporation/Partnership Case

9I.....Chapter 13, Individual/Joint Case

← 9E (Alt.)... Chapter 11, Individual/Joint Ca

9F (Alt.)... Chapter 11, Corporation/Partnership Case

FORM B9E(Alt.) United States Bankruptcy Court
District of
Case Number:

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES (Individual or Joint Debtor Case)

re (Name of Debtor)

Address of Debtor

Soc. Sec./Tax ID Nos.

Date Filed (or Converted)

Addressees:

Address of the Clerk of the Bankruptcy Court

Name and Address of Attorney for Debtor

Telephone Number

Name and Address of Trustee

Telephone Number

This is a converted case originally filed under chapter __ on _____

FILING CLAIMS

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS

_____ is the Deadline to File a Complaint Objecting to the Discharge of the Debtor or to Determine Dischargeability of Certain Types of Debts.

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy , the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are acting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive a discharge under § 1141(d)(3)(C) of the Bankruptcy Code, timely action must be taken in the bankruptcy court in accordance with Bankruptcy Rule 4004(a). If a creditor believes that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedules of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____
Clerk of the Bankruptcy Court

_____
Date

FORM B9f (RH.) United States Bankruptcy Court District of Case Number:	NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES (Corporation/Partnership Case)
(Name of Debtor)	Address of Debtor Date Filed OR Converted Soc. Sec./Tax ID Nos.
Addressees:	Address of the Clerk of the Bankruptcy Court
[ ] Corporation [ ] Partnership	
Name and Address of Attorney for Debtor Telephone Number	Name and Address of Trustee Telephone Number
This is a converted case originally filed under chapter __ on _____	

FILING CLAIMS

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the filing of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

close space

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____ _____
Clerk of the Bankruptcy Court — Date

Form 9

COMMITTEE NOTE

The title of Form 9 has been amended to conform to the headings used on Forms 9A - 9I. Alternate versions of Form 9E and Form 9F have been added for use by those courts that, prior to the time that the notice is mailed to creditors, fix the time for filing claims in a chapter 11 case.

FORM B10
(6/90)

FORM 10. PROOF OF CLAIM

United States Bankruptcy Court _____ District of _____	PROOF OF CLAIM	CHAPTER OF BANKRUPTCY CODE UNDER WHICH CASE IS PROCEEDING: Chapter ____
In re (Name of Debtor)	Case Number	

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C.§ 503.

Name of Creditor *(The person or other entity to whom the debtor owes money or property)*	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars
Name and Address Where Notices Should be Sent	☐ Check box if you have never received any notices from the bankruptcy court in this case ☐ Check box if this address differs from the address on the envelope sent to you by the court.
Telephone No.	THIS SPACE IS FOR COURT USE ONLY

ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:	Check here if this claim ☐ replaces ☐ amends } a previously filed claim, dated: ___ _____

1. BASIS FOR CLAIM

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other (Describe briefly)

- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensations (Fill out below)
  Your social security number _____
  Unpaid compensation for services performed
  from _____ (date) to _____ (date)

2. DATE DEBT WAS INCURRED	3. IF COURT JUDGMENT, DATE OBTAINED:

4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following (1) Unsecured nonpriority, (2) Unsecured Priority, (3) Secured. It is possible for part of a claim to be in one category and part in another.
CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM AT TIME CASE FILED.

☐ SECURED CLAIM $ _____
Attach evidence of perfection of security interest
Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle ☐ Other (Describe briefly)

Amount of arrearage and other charges at time case filed included in secured claim above, if any $ _____

☐ UNSECURED NONPRIORITY CLAIM $ _____
A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

☐ UNSECURED PRIORITY CLAIM $ _____
Specify the priority of the claim.
- ☐ Wages, salaries, or commissions (up to $ 2000), earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier) - 11 U.S.C. § 507(a)(3)
- ☐ Contributions to an employee benefit plan - U.S.C. § 507(a)(4)
- ☐ Up to $ 900 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6)
- ☐ Taxes or penalties of governmental units - 11 U.S.C. § 507(a)(7)
- ☐ Other - 11 U.S.C. §§ 507(a)(2), (a)(5), (a)(6) - ~~(Describe briefly)~~ (Circle applicable §)

5. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED:

$ _____ (Unsecured)	$ _____ (Secured)	$ _____ (Priority)	$ _____ (Total)

☐ Check this box if claim includes ~~prepetition~~ charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

THIS SPACE IS FOR COURT USE ONLY

7. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. TIME-STAMPED COPY: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Form 10

COMMITTEE NOTE

This form has been amended to request that the creditor state the chapter of the Code under which the case is proceeding. Providing this information will facilitate sorting and docketing of the claim by the clerk. The form also has been amended to include the priority afforded in § 507(a)(8) of the Code that was added by Pub. L. No. 101-647 (Crime Control Act of 1990). In addition, sections 4 and 5 of the form have been amended to clarify that only prepetition arrearages and charges are to be included in the amount of the claim.

Form B14
6/90

Form 14. BALLOT FOR ACCEPTING OR REJECTING PLAN

[Caption as in Form 16A]

BALLOT FOR ACCEPTING OR REJECTING PLAN

Filed By _____
on *[date]* _____ .

The plan referred to in this ballot can be confirmed by the court and thereby made binding on you if it is accepted by the holders of two-thirds in amount and more than one-half in number of claims in each class and the holders of two-thirds in amount of equity security interests in each class voting on the plan. In the event the requisite acceptances are not obtained, the court may nevertheless confirm the plan if the court finds that the plan accords fair and equitable treatment to the class or classes rejecting it and otherwise satisfies the requirements of § 1129(b) of the Code. To have your vote count you must complete and return this ballot.

[If holder of general claim] The undersigned, a creditor of the above-named debtor in the unpaid principal amount of $ _____ ,

[If bondholder, debenture holder, or other debt security holder] The undersigned, the holder of *[state unpaid principal amount]* $ _____ of *[describe security]* _____
of the above-named debtor, with a stated maturity date of _____,
[if applicable] registered in the name of _____,
[if applicable] bearing serial number(s) _____,

[If equity security holder] The undersigned, the holder of *[state number]* _____ shares of *[describe type]* _____ stock of the above named debtor, represented by Certificate(s) No. _____, [*or* held in my/our brokerage Account No. _____ at *[name of broker-dealer]* _____],

[Check One Box]

[ ] Accepts

[ ] Rejects

the plan for the reorganization of the above-named debtor proposed by *[name of proponent]* _____, which classifies this claim under Class ____, or interest
and *[if more than one plan is to be voted on]*

[ ] Accepts

[ ] Rejects

the plan for the reorganization of the above-named debtor proposed by *[name of proponent]* _____, which classifies this claim under Class ____. or interest

[If more than one plan is accepted, the following may but need not be completed.] The undersigned prefers the plans accepted in the following order.

[Identify plans]

1. _____ .

2. _____ .

Dated: _____

Print or type name: _____

Signed: _____

[If appropriate] By: _____

as: _____

Address: _____

Return this ballot on or before _____ (date) to: _____ (name)

Address: _____

_____

Form 14

COMMITTEE NOTE

The form has been amended to provide for the specification of the class in which the claim or interest is classified under the plan.

AMENDMENTS TO BE PUBLISHED FOR COMMENT

Forms printed as amended

6/92

OFFICIAL BANKRUPTCY FORMS

1. Voluntary Petition
2. Declaration under Penalty of Perjury on Behalf of a Corporation or Partnership
3. Application and Order to Pay Filing Fee in Installments
4. List of Creditors Holding 20 Largest Unsecured Claims
5. Involuntary Petition
6. Schedules
7. Statement of Financial Affairs
8. Chapter 7 Individual Debtor's Statement of Intention
9. Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates
10. Proof of Claim

11A. General Power of Attorney

11B. Special Power of Attorney

12. Order and Notice of Hearing on Disclosure Statement
13. Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof
14. Ballot for accepting or Rejecting Plan
15. Order Confirming Plan

16A. Caption

16B. Caption (Short Title)

16C. Caption of Adversary Proceeding

17. Notice of Appeal to a District Court or Bankruptcy appelate Panel from a Judgment or Other Final Order of a Bankruptcy Court
18. Discharge

Official Forms

[NOTE: These official forms should be observed and used with such alterations as may be appropriate to suit the circumstances. See Rule 9009.]

Title Page

COMMITTEE NOTE

The list of Official Bankruptcy Forms has been amended to conform the title of Form 9 to the headings used on Forms 9A - 9I.

B1
(Rev. 5/92)

FORM 1. VOLUNTARY PETITION

United States Bankruptcy Court

_____ District of _____

VOLUNTARY PETITION

IN RE (Name of debtor—If individual, enter: Last, First, Middle)	NAME OF JOINT DEBTOR (Spouse) (Last, First, Middle)
ALL OTHER NAMES used by the debtor in the last 6 years (Include married, maiden, and trade names.)	ALL OTHER NAMES used by the joint debtor in the last 6 years (Include married, maiden, and trade names.)
SOC. SEC./TAX I.D. NO. (If more than one, state all.)	SOC. SEC./TAX I.D. NO. (If more than one, state all.)
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code)	STREET ADDRESS OF JOINT DEBTOR (No. and street, city, state, and zip code)
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS	COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS
MAILING ADDRESS OF DEBTOR (If different from street address)	MAILING ADDRESS OF JOINT DEBTOR (If different from street address)
LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from addresses listed above)	**VENUE (Check one box)** ☐ Debtor has been domiciled or has had a residence, principal place of business or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District. ☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District

INFORMATION REGARDING DEBTOR (Check applicable boxes)

TYPE OF DEBTOR
- ☐ Individual
- ☐ Joint (Husband & Wife)
- ☐ Partnership
- ☐ Other _____
- ☐ Corporation Publicly Held
- ☐ Corporation Not Publicly Held
- ☐ Municipality

NATURE OF DEBT
- ☐ Non-Business/Consumer
- ☐ Business—Complete A & B below

A TYPE OF BUSINESS (Check one box)
- ☐ Farming
- ☐ Professional
- ☐ Retail/Wholesale
- ☐ Railroad
- ☐ Transportation
- ☐ Manufacturing/ Mining
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Construction
- ☐ Real Estate
- ☐ Other Business

B BRIEFLY DESCRIBE NATURE OF BUSINESS

CHAPTER OR SECTION OF BANKRUPTCY CODE UNDER WHICH THE PETITION IS FILED (Check one box)
- ☐ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Sec. 304—Case Ancillary to Foreign Proceeding

FILING FEE (Check one box)
- ☐ Filing fee attached
- ☐ Filing fee to be paid in installments (Applicable to individuals only.) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b), see Official Form No. 3

NAME AND ADDRESS OF LAW FIRM OR ATTORNEY

Telephone No.

NAME(S) OF ATTORNEY(S) DESIGNATED TO REPRESENT THE DEBTOR (Print or Type Names)

☐ Debtor is not represented by an attorney. Telephone No. of Debtor not represented by an attorney: ( )

STATISTICAL/ADMINISTRATIVE INFORMATION (28 U.S.C. § 604) (Estimates only) (Check applicable boxes)

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.

☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE FOR COURT USE ONLY

ESTIMATED NUMBER OF CREDITORS

1-15	16-49	50-99	100-199	200-999	1000-over
☐	☐	☐	☐	☐	☐

ESTIMATED ASSETS (in thousands of dollars)

Under 50	50-99	100-499	500-999	1000-9999	10,000-99,000	100,000-over
☐	☐	☐	☐	☐	☐	☐

ESTIMATED LIABILITIES (in thousands of dollars)

Under 50	50-99	100-499	500-999	1000-9999	10,000-99,000	100,000-over
☐	☐	☐	☐	☐	☐	☐

EST. NO. OF EMPLOYEES—CH. 11 & 12 ONLY

0	1-19	20-99	100-999	1000-over
☐	☐	☐	☐	☐

EST. NO. OF EQUITY SECURITY HOLDERS—CH. 11 & 12 ONLY

0	1-19	20-99	100-499	500-Over
☐	☐	☐	☐	☐

Name of Debtor _____

Case No. _____
(Court use only)

FILING OF PLAN

For Chapter 9, 11, 12 and 13 cases only Check appropriate box.

☐ A copy of debtor's proposed plan dated _____ is attached.

☐ Debtor intends to file a plan within the time allowed by statute, rule, or order of the court.

PRIOR BANKRUPTCY CASE FILED WITHIN LAST 6 YEARS (If more than one, attach additional sheet)

Location Where Filed	Case Number	Date Filed

PENDING BANKRUPTCY CASE FILED BY ANY SPOUSE, PARTNER, OR AFFILIATE OF THIS DEBTOR (If more than one, attach additional sheet.)

Name of Debtor	Case Number	Date
Relationship	**District**	**Judge**

REQUEST FOR RELIEF

Debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

SIGNATURES

ATTORNEY

X _____ _____
Signature Date

INDIVIDUAL/JOINT DEBTOR(S)

I declare under penalty of perjury that the information provided in this petition is true and correct.

X _____
Signature of Debtor

_____
Date

X _____
Signature of Joint Debtor

_____
Date

CORPORATE OR PARTNERSHIP DEBTOR

I declare under penalty of perjury that the information provided in this petition is true and correct, and that the filing of this petition on behalf of the debtor has been authorized.

X _____
Signature of Authorized Individual

_____
Print or Type Name of Authorized Individual

_____
Title of Individual Authorized by Debtor to File this Petition

_____
Date

EXHIBIT "A" (To be completed if debtor is a corporation requesting relief under chapter 11.)

☐ Exhibit "A" is attached and made a part of this petition

TO BE COMPLETED BY INDIVIDUAL CHAPTER 7 DEBTOR WITH PRIMARILY CONSUMER DEBTS (See P.L. 98-353 § 322)

I am aware that I may proceed under chapter 7, 11, or 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7 of such title.

If I am represented by an attorney, exhibit 'B' has been completed.

X _____ _____
Signature of Debtor Date

X _____ _____
Signature of Joint Debtor Date

EXHIBIT "B" (To be completed by attorney for individual chapter 7 debtor(s) with primarily consumer debts.)

I, the attorney for the debtor(s) named in the foregoing petition, declare that I have informed the debtor(s) that (he, she, or they) may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

X _____ _____
Signature of Attorney Date

COMMITTEE NOTE

The form has been amended to require a debtor not represented by an attorney to provide a telephone number so that court personnel can contact the debtor concerning matters in the case.

B6E
(Rev. 5/92)

In re _____, Debtor

Case No. _____ (If known)

SCHEDULE E—CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name and mailing address, including zip code, and account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H—Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotal" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Repeat this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ **Extensions of credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(2).

☐ **Wages, salaries, and commissions**

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees, up to a maximum of $2000 per employee, earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occured first, to the extent provided in 11 U.S.C. § 507(a)(3).

☐ **Contributions to employee benefit plans**

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ **Certain farmers and fishermen**

Claims of certain farmers and fishermen, up to a maximum of $2000 per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(5).

☐ **Deposits by individuals**

Claims of individuals up to a maximum of $900 for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(6).

☐ **Taxes and Certain Other Debts Owed to Governmental Units**

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. §507(a)(7).

☐ **Commitments to Maintain the Capital of an Insured Depository Institution**

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507(a)(8).

_____ continuation sheets attached

Form 6

COMMITTEE NOTE

Schedule 6E (Creditors Holding Unsecured Priority Claims) has been changed to conform to the statutory amendment that added subsection (a)(8) to § 507 of the Bankruptcy Code. Pub. L. No. 101-647 (Crime Control Act of 1990). The Code amendment created a new priority for claims based on certain commitments to maintain the capital of an insured depository institution.

B7
(Rev. 5/92)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re _____ (Name), Debtor

Case No. _____ (If known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1–15 are to be completed by all debtors. **Each question must be answered. If the answer to any question is "None," or the question is not applicable, mark the box labeled "None."** Debtors that are or have been in business, as defined below, also must complete Questions 16–21. If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the two years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or person in control of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any person in control of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. §101(30).

---

1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE (if more than one)

2. Income other than from employment or operation of business

None ☐ State the amount of income received by the debtor other than from employment, trade, profession, or operation of the debtor's business during the **two years** immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE

---

3. Payments to creditors

None ☐ a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within **90 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING

None ☐ b. List all payments made within **one year** immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING

---

4. Suits and administrative proceedings, executions, garnishments and attachments

None ☐ a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT AND LOCATION	STATUS OR DISPOSITION

None ☐ b. Describe all property that has been attached, garnished or seized under any legal or equitable process within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY

---

5. Repossessions, foreclosures and returns

None ☐ List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY

---

6. Assignments and receiverships

None ☐ a. Describe any assignment of property for the benefit of creditors made within 120 days immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT

None ☐ b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE OF PROPERTY

7. Gifts

None ☐ List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT

---

8. Losses

None ☐ List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case **or since the commencement of this case.** (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS

---

9. **Payments related to debt counseling or bankruptcy**

None ☐ List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYOR IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

10. Other transfers

None ☐ a. List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED

11. Closed financial accounts

None ☐ List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within one year immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE AND NUMBER OF ACCOUNT AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING

12. Safe deposit boxes

None ☐ List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY

13. Setoffs

None ☐ List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within 90 days preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

---

14. Property held for another person

None ☐ List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

---

15. Prior address of debtor

None ☐ If the debtor has moved within the **two years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within the two years immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or otherwise self-employed.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within the two years immediately preceding the commencement of this case.)*

16. Nature, location and name of business

None ☐ a. If the debtor is an individual, list the names and addresses of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the two years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the two years immediately preceding the commencement of this case.

b. If the debtor is a partnership, list the names and addresses of all businesses in which the debtor was a partner or owned 5 percent or more of the voting securities, within the two years immediately preceding the commencement of this case.

c. If the debtor is a corporation, list the names and addresses of all businesses in which the debtor was a partner or owned 5 percent or more of the voting securities within the two years immediately preceding the commencement of this case.

NAME	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES OF OPERATION

---

17. Books, records and financial statements

None ☐ a. List all bookkeepers and accountants who within the six years immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS	DATES SERVICES RENDERED

None ☐ b. List all firms or individuals who within the two years immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME	ADDRESS	DATES SERVICES RENDERED

None ☐ c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS

None ☐ d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the two years immediately preceding the commencement of this case by the debtor.

NAME AND ADDRESS	DATE ISSUED

---

18. Inventories

None ☐ a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market or other basis)

None ☐ b. List the name and address of the person having possession of the records of each of the two inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS

---

19. **Current Partners, Officers, Directors and Shareholders**

None ☐ a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST

None ☐ b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP

---

20. Former partners, officers, directors and shareholders

None ☐ a. If the debtor is a partnership, list each member who withdrew from the partnership within one year immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL

None ☐ b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within one year immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION

---

21. Withdrawals from a partnership or distributions by a corporation

None ☐ If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during one year immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

* * * * * *

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date _____ Signature _____
of Debtor

Date _____ Signature _____
of Joint Debtor
(if any)

* * * * * *

[If completed on behalf of a partnership or corporation]

I, declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief.

Date _____ Signature _____

_____
Print Name and Title

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

____ continuation sheets attached

Penalty for making a false statement: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. § 152 and 3571

COMMITTEE NOTE

The form has been amended in two ways. In the second paragraph of the instructions, sentences have been transposed to clarify that only a debtor that is or has been in business as defined in the form should answer Questions 16 - 21. In addition, administrative proceedings have been added to the types of legal actions to be disclosed in Question 4.a.

Form B9
6/92

Form 9. NOTICE OF COMMENCEMENT OF CASE UNDER THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES

9A.....Chapter 7, Individual/Joint, No-Asset Case

9B.....Chapter 7, Corporation/Partnership, No-Asset Case

9C.....Chapter 7, Individual/Joint, Asset Case

9D.....Chapter 7, Corporation/Partnership, Asset Case

9E.....Chapter 11, Individual/Joint Case

9E (Alt.)..Chapter 11, Individual/Joint Case

9F.....Chapter 11, Corporation/Partnership Case

9F (Alt.)..Chapter 11, Corporation/Partnership Case

9G.....Chapter 12, Individual/Joint Case

9H.....Chapter 12, Corporation/Partnership Case

9I.....Chapter 13, Individual/Joint Case

FORM B9E (AB)
(Rev. 5/92)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Individual or Joint Debtor Case)

In re (Name of Debtor)	Address of Debtor Date Filed (or Converted)	Soc. Sec /Tax Id Nos
Addressee:	Address of the Clerk of the Bankruptcy Court	
Name and Address of Attorney for Debtor Telephone Number	Name and Address of Trustee Telephone Number	

This is a converted case originally filed under chapter _____ on _____

FILING CLAIMS

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS

_____ is the Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive a discharge under § 1141(d)(3)(C) of the Bankruptcy Code, timely action must be taken in the bankruptcy court in accordance with Bankruptcy Rule 4004(a). If a creditor believes that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedules of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____ _____
Clerk of the Bankruptcy Court — Date

FORM B9I (Alt.)
(Rev. 5/92)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Corporation/Partnership Case)

In re (Name of Debtor)	Address of Debtor	Soc. Sec./Tax Id. Nos.
	Date Filed or Converted	

Addressee	Address of the Clerk of the Bankruptcy Court

☐ Corporation ☐ Partnership

Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number

This is a converted case originally filed under chapter _____ on _____

FILING CLAIMS

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the filing of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____ _____
Clerk of the Bankruptcy Court Date

Form 9

COMMITTEE NOTE

The title of Form 9 has been amended to conform to the headings used on Forms 9A - 9I. Alternate versions of Form 9E and Form 9F have been added for use by those courts that, prior to the time that the notice is mailed to creditors, fix the time for filing claims in a chapter 11 case.

B10 (Official Form 10)
(Rev. 5/92)

United States Bankruptcy Court

_____ District of _____

PROOF OF CLAIM

In re (Name of Debtor)	Case Number

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor
(The person or other entity to whom the debtor owes money or property)

Name and Address Where Notices Should be Sent

Telephone No.

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

CHAPTER OF BANKRUPTCY CODE UNDER WHICH CASE IS PROCEEDING: Chapter _____

ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:

Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated. _____

1. BASIS FOR CLAIM

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other (Describe briefly)
- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensations (Fill out below)

  Your social security number _____

  Unpaid compensations for services performed

  from _____ (date) to _____ (date)

2. DATE DEBT WAS INCURRED

3. IF COURT JUDGMENT, DATE OBTAINED

4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following (1) Unsecured nonpriority, (2) Unsecured Priority, (3) Secured. It is possible for part of a claim to be in one category and part in another.
CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM AT TIME CASE FILED.

☐ SECURED CLAIM $ _____
Attach evidence of perfection of security interest
Brief Description of Collateral.
☐ Real Estate ☐ Motor Vehicle ☐ Other (Describe briefly)

Amount of arrearage and other charges at time case filed included in secured claim above, if any $ _____

☐ UNSECURED NONPRIORITY CLAIM $ _____
A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

☐ UNSECURED PRIORITY CLAIM $ _____
Specify the priority of the claim.

- ☐ Wages, salaries, or commissions (up to $2000), earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier—11 U.S.C. § 507(a)(3)
- ☐ Contributions to an employee benefit plan—U.S.C. § 507(a)(4)
- ☐ Up to $900 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use—11 U.S.C. § 507(a)(6)
- ☐ Taxes or penalties of governmental units—11 U.S.C. § 507(a)(7)
- ☐ Other—11 U.S.C. § 507(a)(2), (a)(5), (a)(8)—(Circle applicable §)

5. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED: $ _____ (Unsecured) $ _____ (Secured) $ _____ (Priority) $ _____ (Total)

☐ Check this box if claim includes charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

7. SUPPORTING DOCUMENTS: *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

THIS SPACE IS FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Form 10

COMMITTEE NOTE

This form has been amended to request that the creditor state the chapter of the Code under which the case is proceeding. Providing this information will facilitate sorting and docketing of the claim by the clerk. The form also has been amended to include the priority afforded in § 507(a)(8) of the Code that was added by Pub. L. No. 101-647 (Crime Control Act of 1990). In addition, sections 4 and 5 of the form have been amended to clarify that only prepetition arrearages and charges are to be included in the amount of the claim.

Form 14. BALLOT FOR ACCEPTING OR REJECTING PLAN

[Caption as in Form 16A]

BALLOT FOR ACCEPTING OR REJECTING PLAN

Filed By _____
on *[date]* _____.

The plan referred to in this ballot can be confirmed by the court and thereby made binding on you if it is accepted by the holders of two-thirds in amount and more than one-half in number of claims in each class and the holders of two-thirds in amount of equity security interests in each class voting on the plan. In the event the requisite acceptances are not obtained, the court may nevertheless confirm the plan if the court finds that the plan accords fair and equitable treatment to the class or classes rejecting it and otherwise satisfies the requirements of § 1129(b) of the Code. To have your vote count you must complete and return this ballot.

[If holder of general claim] The undersigned, a creditor of the above-named debtor in the unpaid principal amount of $ _____,

[If bondholder, debenture holder, or other debt security holder] The undersigned, the holder of *[state unpaid principal amount]* $ _____ of *[describe security]* _____ of the above-named debtor, with a stated maturity date of _____, *[if applicable]* registered in the name of _____, *[if applicable]* bearing serial number(s) _____,

[If equity security holder] The undersigned, the holder of *[state number]* _____ shares of *[describe type]* _____ stock of the above named debtor, represented by Certificate(s) No. _____, [*or* held in my/our brokerage Account No. _____ at *[name of broker-dealer]* _____],

[Check One Box]

[ ] Accepts

[ ] Rejects

the plan for the reorganization of the above-named debtor proposed by *[name of proponent]* _____, which classifies this claim or interest under Class _____,

and *[if more than one plan is to be voted on]*

[ ] Accepts

[ ] Rejects

the plan for the reorganization of the above-named debtor proposed by *[name of proponent]* _____, which classifies this claim or interest under Class _____.

[If more than one plan is accepted, the following may but need not be completed.] The undersigned prefers the plans accepted in the following order.

[Identify plans]

1. _____ .

2. _____ .

Dated: _____

Print or type name: _____

Signed: _____

[If appropriate] By: _____

as: _____

Address: _____

Return this ballot on or before _____ to: _____
(date) (name)

Address: _____

_____

Form 14

COMMITTEE NOTE

The form has been amended to provide for the specification of the class in which the claim or interest is classified under the plan.

CIVIL

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

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CHAIRMAN

JOSEPH F. SPANIOL, JR.
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CHAIRMEN OF ADVISORY COMMITTEES
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CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

May 1, 1992

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

Enclosed as Attachment A are proposed amendments to the Federal Rules of Civil Procedure and to the Federal Rules of Evidence. With the accompanying Committee Notes, these were approved by the Advisory Committee on Civil Rules on April 15, 1992, for submission to the Standing Committee under rule 5b of the governing procedures. It should be noted that the proposed amendments to Rule 43 have been withdrawn for further study.

Most of the proposed amendments were published in August 1991, accompanied by a solicitation for comments from the bench, bar, and public. Hundreds of written comments were received and reviewed by the Advisory Committee. Public hearings were held in Los Angeles, California, on November 21, 1991, and in Atlanta, Georgia, on February 19 and 20, 1992.

Several of the proposed amendments are ones that were returned by the Supreme Court in December 1991 for further study. These had been published for comment in October 1989; approved by the Advisory Committee, Standing Committee, and Judicial Conference in April, June, and September 1990; and submitted to the Supreme Court in November 1990. The Advisory Committee has reviewed these amendments and made a few changes in the text or Notes.

Finally, there are a few proposed amendments not previously published that, being technical in nature, are recommended for approval under the exception to the requirement for public comment and hearing provided in rule 4d of the governing procedures.

Attachment B is a report identifying and discussing the primary criticisms and suggestions, and explaining the changes made by the Advisory Committee after considering these comments. It also reflects particular aspects of the proposed changes on which there was disagreement among Committee members. There were, however, no requests to submit any "minority reports," and, with the exception of one proposed change (Rule 702 of the Federal Rules of Evidence), the Committee was unanimous in recommending that the proposed amendments be adopted. The report also indicates those proposed technical amendments that are recommended for adoption under rule 4d of the governing procedures without public notice and opportunity for comment.

Professor Carrington, Reporter for the Advisory Committee, will submit a separate report that summarizes the written comments received and the testimony presented at public hearings.

We request that the Standing Committee approve these proposals and transmit them to the Judicial Conference, together with those technical amendments (primarily involving the new title of "Magistrate Judge") that were approved by the Standing Committee in 1991.

In response to the call for self-appraisal under the "sunset" standards, we believe that the work of the Committee is on-going, is needed, and should be allowed to proceed through continuation of the Committee.

Sincerely,

Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules

cc: Secretary of Standing Committee (with copies for other members)
Style Committee, Standing Committee
Chairmen, other Advisory Committees
Members and Reporter, Advisory Committee on Civil Rules

Attachments:
A--Proposed Amendments
B--Report on Issues and Changes

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

AND THE

FEDERAL RULES OF EVIDENCE

SUBMITTED TO

STANDING COMMITTEE
ON
RULES OF PRACTICE AND PROCEDURE

BY

ADVISORY COMMITTEE
ON
CIVIL RULES

MAY 1992

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope *and Purpose* of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed *and administered* to secure the just, speedy, and inexpensive determination of every action.

COMMITTEE NOTES

The purpose of this revision, adding the words "and administered" to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

Rule 4. ~~Process~~ *Summons*

(a) ~~**Summons: Issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.~~

~~(b) Same:~~ **Form.** The summons shall be signed by the clerk, ~~be under~~ *bear* the seal of the court, ~~contain the name of~~ *identify* the court and ~~the names of~~ the parties, be directed to the defendant, *and* state the name and address of the plaintiff's attorney~~, if any, otherwise the plaintiff's address~~ *or, if unrepresented, of the plaintiff*~~;~~ ~~and~~ *It shall also state* the time within which ~~these rules require~~ the defendant ~~to~~ *must* appear and defend, and ~~shall~~ notify the defendant that ~~in case of the defendant's~~ failure to do so *will result in a* judgment by default ~~will be rendered~~ against the defendant for the relief demanded in the complaint. ~~When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.~~ *The court may allow a summons to be amended.*

(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

(c) **Service *with Complaint; by Whom Made.***

(1) ~~Process, other than a subpoena or a summons and complaint, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.~~ *A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.*

(2)~~(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served~~ *Service may be effected* by any person who is not a party and *who* is ~~not less than~~ *at least* 18 years of age. *At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is*

~~(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose, only~~

~~(i) on behalf of a party~~ authorized to proceed in forma pauperis pursuant to ~~Title~~ 28~~,~~ U.S.C. § 1915~~,~~ or ~~of a seaman~~ *is* authorized to proceed *as a seaman* under ~~Title~~ 28~~,~~ U.S.C. § 1916~~,~~

~~(ii) on behalf of the United States or an officer or agency of the United States, or~~

~~(iii) pursuant to an order issued by the court stating that a United~~

~~States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.~~

~~(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule~~

~~(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or~~

~~(ii) by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).~~

~~(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return with 20 days after mailing, the notice and acknowledgment of receipt of summons.~~

~~(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.~~

~~(3) The court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.~~

(d) ~~Summons and Complaint: Person to be Served.~~ *Waiver of Service; Duty to Save Costs of Service; Request to Waive.* ~~The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:~~

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If the defendant fails to comply with the request, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together

with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(~~e~~1) ***Service Upon Individuals Within a Judicial District of the United States.*** *Unless otherwise provided by federal law, service* ~~U~~upon an individual *from whom a waiver has not been obtained and filed,* other than an infant or an incompetent person, *may be effected in any judicial district of the United States:*

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable

international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court if the court finds that internationally agreed means or the law of the foreign country (A) will not provide a lawful means by which service can be effected or (B), in cases of urgency, will not permit service of process within the time required by the circumstances.

(~~g~~2) ***Service Upon Infants and Incompetent Persons.*** *Service u*~~U~~pon an infant or an incompetent person ~~by serving the summons and complaint~~ *in a judicial district of the United States shall be effected* in the manner prescribed by the law of the state in which the service is made for the service of summons or like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. *Service upon an infant or an incompetent person in a place not within any judicial district*

of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

(~~h~~3) *Service Upon Corporations and Associations. Unless otherwise provided by federal law, service u*~~U~~pon a domestic or foreign corporation or upon a partnership or other unincorporated association ~~which~~ *that* is subject to suit under a common name, *and from which a waiver of service has not been obtained and filed, shall be effected:*

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant~~,~~ *or*

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

(~~i~~4) *Service Upon the United States, and Its Agencies, Corporations, or Officers.*

(1) Service u~~U~~pon the United States~~,~~ *shall be effected*

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court *or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States*

attorney and

(B) by *also* sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to ~~such~~ *the* officer or agency.

(~~5~~*2) Service* ~~U~~*u*pon an officer, ~~or~~ agency, *or corporation* of the United States, *shall be effected* by serving the United States *in the manner prescribed by paragraph (1) of this subdivision* and by *also* sending a copy of the summons and of the complaint by registered or certified mail to ~~such~~ *the* officer, ~~or~~ agency, *or corporation*. ~~If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.~~

(3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

(~~j~~6) *Service Upon Foreign, State, or Local Governments.*

(1) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.

(2) Service u~~U~~pon a state, ~~or~~ municipal corporation, or other governmental organization ~~thereof~~ subject to suit, *shall be effected* by delivering a copy of the

summons and of the complaint to ~~the~~ *its* chief executive officer ~~thereof~~ or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

~~**(e) Summons: Service Upon Party Not Inhabitant of or Found Within State.** Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.~~

(~~f~~*k*) **Territorial Limits of Effective Service.** ~~All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1) (6) of subdivision (d) of this rule at all places outside the state~~

~~but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.~~

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or

(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or

(D) when authorized by a statute of the United States.

(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(~~g~~*l*) ~~**Return.** *Proof of Service. If service is not waived, t*~~The person ~~serving the process~~ *effecting service* shall make proof ~~of service~~ thereof to the court ~~promptly and in any event within the time during which the person served must respond to the~~

~~process~~. If service is made by a person other than a United States marshal or deputy United States marshal, ~~such~~ *the* person shall make affidavit thereof. *Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.* ~~If service is made under subdivision (e)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision.~~ Failure to make proof of service does not affect the validity of the service. *The court may allow proof of service to be amended.*

~~**(h) Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.~~

~~**(i) Alternative Provisions for Service in a Foreign Country.**~~

~~**(1) Manner.** When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual~~

~~notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.~~

~~(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.~~

(~~j~~*m*) ~~Summons:~~ **Time Limit for Service.** If ~~a~~ service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint ~~and the party on whose behalf such service was required cannot show good cause why such service was not made within that period~~, the *court* ~~action shall be dismissed as to that defendant without prejudice~~, upon ~~the court's~~ *motion or on its* own initiative ~~with~~ *after* notice to ~~such party or upon motion~~ *the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court*

shall extend the time for service for an appropriate period. This subdivision ~~shall~~ *does* not apply to service in a foreign country pursuant to subdivision (~~if~~) *or (j)(1)* ~~of this rule~~.

(n) Seizure of Property; Service of Summons Not Feasible.

(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule.

(2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of federal court jurisdiction be disapproved, the Committee nevertheless recommends adoption of the balance of the rule, with subdivision (k)(1) becoming simply subdivision (k). The Committee Notes would be revised to eliminate references to subdivision (k)(2).

Purposes of Revision. The general purpose of this revision is to facilitate the service of the summons and complaint. The revised rule explicitly authorizes a means for service of the summons and complaint on any defendant. While the methods of service so authorized always provide appropriate notice to persons against whom claims are made, effective service under this rule does not assure that personal jurisdiction has been established over the defendant served.

First, the revised rule authorizes the use of any means of service provided by the law

not only of the forum state, but also of the state in which a defendant is served, unless the defendant is a minor or incompetent.

Second, the revised rule clarifies and enhances the cost-saving practice of securing the assent of the defendant to dispense with actual service of the summons and complaint. This practice was introduced to the rule in 1983 by an act of Congress authorizing "service-by-mail," a procedure that effects economic service with cooperation of the defendant. Defendants that magnify costs of service by requiring expensive service not necessary to achieve full notice of an action brought against them are required to bear the wasteful costs. This provision is made available in actions against defendants who cannot be served in the districts in which the actions are brought.

Third, the revision reduces the hazard of commencing an action against the United States or its officers, agencies, and corporations. A party failing to effect service on all the offices of the United States as required by the rule is assured adequate time to cure defects in service.

Fourth, the revision calls attention to the important effect of the Hague Convention and other treaties bearing on service of documents in foreign countries and favors the use of internationally agreed means of service. In some respects, these treaties have facilitated service in foreign countries but are not fully known to the bar.

Finally, the revised rule extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States. The present territorial limits on the effectiveness of service to subject a defendant to the jurisdiction of the court over the defendant's person are retained for all actions in which there is a state in which personal jurisdiction can be asserted consistently with state law and the Fourteenth Amendment. A new provision enables district courts to exercise jurisdiction, if permissible under the Constitution and not precluded by statute, when a federal claim is made against a defendant not subject to the jurisdiction of any single state.

The revised rule is reorganized to make its provisions more accessible to those not familiar with all of them. Additional subdivisions in this rule allow for more captions; several overlaps among subdivisions are eliminated; and several disconnected provisions are removed, to be relocated in a new Rule 4.1.

The Caption of the Rule. Prior to this revision, Rule 4 was entitled "Process" and applied to the service of not only the summons but also other process as well, although these are not covered by the revised rule. Service of process in eminent domain proceedings is governed by Rule 71A. Service of a subpoena is governed by Rule 45, and service of papers such as orders, motions, notices, pleadings, and other documents is governed by Rule 5.

The revised rule is entitled "Summons" and applies only to that form of legal process. Unless service of the summons is waived, a summons must be served whenever a person is joined as a party against whom a claim is made. Those few provisions of the former rule

which relate specifically to service of process other than a summons are relocated in Rule 4.1 in order to simplify the text of this rule.

Subdivision (a). Revised subdivision (a) contains most of the language of the former subdivision (b). The second sentence of the former subdivision (b) has been stricken, so that the federal court summons will be the same in all cases. Few states now employ distinctive requirements of form for a summons and the applicability of such a requirement in federal court can only serve as a trap for an unwary party or attorney. A sentence is added to this subdivision authorizing an amendment of a summons. This sentence replaces the rarely used former subdivision 4(h). See 4A Wright & Miller, Federal Practice and Procedure § 1131 (2d ed. 1987).

Subdivision (b). Revised subdivision (b) replaces the former subdivision (a). The revised text makes clear that the responsibility for filling in the summons falls on the plaintiff, not the clerk of the court. If there are multiple defendants, the plaintiff may secure issuance of a summons for each defendant, or may serve copies of a single original bearing the names of multiple defendants if the addressee of the summons is effectively identified.

Subdivision (c). Paragraph (1) of revised subdivision (c) retains language from the former subdivision (d)(1). Paragraph (2) retains language from the former subdivision (a), and adds an appropriate caution regarding the time limit for service set forth in subdivision (m).

The 1983 revision of Rule 4 relieved the marshals' offices of much of the burden of serving the summons. Subdivision (c) eliminates the requirement for service by the marshal's office in actions in which the party seeking service is the United States. The United States, like other civil litigants, is now permitted to designate any person who is 18 years of age and not a party to serve its summons.

The court remains obligated to appoint a marshal, a deputy, or some other person to effect service of a summons in two classes of cases specified by statute: actions brought in forma pauperis or by a seaman. 28 U.S.C. §§ 1915, 1916. The court also retains discretion to appoint a process server on motion of a party. If a law enforcement presence appears to be necessary or advisable to keep the peace, the court should appoint a marshal or deputy or other official person to make the service. The Department of Justice may also call upon the Marshals Service to perform services in actions brought by the United States. 28 U.S.C. § 651.

Subdivision (d). This text is new, but is substantially derived from the former subdivisions (c)(2)(C) and (D), added to the rule by Congress in 1983. The aims of the provision are to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel. The rule operates to impose upon the defendant those costs that could have been avoided if the defendant had cooperated reasonably in the manner prescribed. This device is useful in dealing with defendants who are furtive, who reside in places not easily reached by process servers, or who are outside

the United States and can be served only at substantial and unnecessary expense. Illustratively, there is no useful purpose achieved by requiring a plaintiff to comply with all the formalities of service in a foreign country, including costs of translation, when suing a defendant manufacturer, fluent in English, whose products are widely distributed in the United States. See Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989).

The former text described this process as service-by-mail. This language misled some plaintiffs into thinking that service could be effected by mail without the affirmative cooperation of the defendant. E.g., Gulley v. Mayo Foundation, 886 F.2d 161 (8th Cir. 1989). It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service.

The request for waiver of service may be sent only to defendants subject to service under subdivision (e), (f), or (h). The United States is not expected to waive service for the reason that its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice. The same principle is applied to agencies, corporations, and officers of the United States and to other governments and entities subject to service under subdivision (j). Moreover, there are policy reasons why governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail. Infants or incompetent persons likewise are not called upon to waive service because, due to their presumed inability to understand the request and its consequences, they must generally be served through fiduciaries.

It was unclear whether the former rule authorized mailing of a request for "acknowledgement of service" to defendants outside the forum state. See 1 R. Casad, Jurisdiction in Civil Actions (2d Ed.) 5-29, 30 (1991) and cases cited. But, as Professor Casad observed, there was no reason not to e- his device in an effort to obtain service outside the state, and there are many instanc ch it was in fact so used, with respect both to defendants within the United States a defendants in other countries.

The opportunity for waiver has distinct advantages to a foreign defendant. By waiving service, the defendant can reduce the costs that may ultimately be taxed against it if unsuccessful in the lawsuit, including the sometimes substantial expense of translation that may be wholly unnecessary for defendants fluent in English. Moreover, a defendant that waives service is afforded substantially more time to defend against the action than if it had been formally served: under Rule 12, a defendant ordinarily only 20 days after service in which to file its answer or raise objections by motion, but b gning a waiver it is allowed 90 days after the date the request for waiver was mailed in which to submit its defenses. Because of the additional time needed for mailing and the unreliability of some foreign mail services, a period of 60 days (rather than the 30 days required for domestic transmissions) is provided for a return of a waiver sent to a foreign country.

It is hoped that, since transmission of the notice and waiver forms is a private nonjudicial act, does not purport to effect service, and is not accompanied by any summons or directive from a court, use of the procedure will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail or have objected to the

"service-by-mail" provisions of the former rule. Unless the addressee consents, receipt of the request under the revised rule does not give rise to any obligation to answer the lawsuit, does not provide a basis for default judgment, and does not suspend the statute of limitations in those states where the period continues to run until service. The only adverse consequence to the foreign defendant is one shared by domestic defendants; namely, the potential imposition of costs of service that, if successful in the litigation, it would not otherwise have to bear. However, this shifting of expense would not be proper under the rule if the foreign defendant's refusal to waive service was based upon a policy of its government prohibiting all waivers of service.

With respect to a defendant located in a foreign country like the United Kingdom, which accepts documents in English, whose Central Authority acts promptly in effecting service, and whose policies discourage its residents from waiving formal service, there will be little reason for a plaintiff to send the notice and request under subdivision (d) rather than use convention methods. On the other hand, the procedure offers significant potential benefits to a plaintiff when suing a defendant that, though fluent in English, is located in country where, as a condition to formal service under a convention, documents must be translated into another language or where formal service will be otherwise costly or time-consuming.

Paragraph (1) is explicit that a timely waiver of service of a summons does not prejudice the right of a defendant to object by means of a motion authorized by Rule 12(b)(2) to the absence of jurisdiction over the defendant's person, or to assert other defenses that may be available. The only issues eliminated are those involving the sufficiency of the summons or the sufficiency of the method by which it is served.

Paragraph (2) states what the present rule implies: the defendant has a duty to avoid costs associated with the service of a summons not needed to inform the defendant regarding the commencement of an action. The text of the rule also sets forth the requirements for a Notice and Request for Waiver sufficient to put the cost-shifting provision in place. These requirements are illustrated in Forms 1A and 1B, which replace the former Form 18-A.

Paragraph (2)(A) is explicit that a request for waiver of service by a corporate defendant must be addressed to a person qualified to receive service. The general mail rooms of large organizations cannot be required to identify the appropriate individual recipient for an institutional summons.

Paragraph (2)(B) permits the use of alternatives to the United States mails in sending the Notice and Request. While private messenger services or electronic communications may be more expensive than the mail, they may be equally reliable and on occasion more convenient to the parties. Especially with respect to transmissions to foreign countries, alternative means may be desirable, for in some countries facsimile transmission is the most efficient and economical means of communication. If electronic means such as facsimile transmission are employed, the sender should maintain a record of the transmission to assure proof of transmission if receipt is denied, but a party receiving such a transmission

has a duty to cooperate and cannot avoid liability for the resulting cost of formal service if the transmission is prevented at the point of receipt.

A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, but sufficient cause should be rare. It is not a good cause for failure to waive service that the claim is unjust or that the court lacks jurisdiction. Sufficient cause not to shift the cost of service would exist, however, if the defendant did not receive the request, was insufficiently literate in English to understand it, or was located in a foreign country whose laws or policies prohibited its residents from waiving service of formal judicial process even from its own courts.

Paragraph (3) extends the time for answer if, before being served with process, the defendant waives formal service. The extension is intended to serve as an inducement to waive service and to assure that a defendant will not gain any delay by declining to waive service and thereby causing the additional time needed to effect service. By waiving service, a defendant is not called upon to respond to the complaint until 60 days from the date the notice was sent to it--90 days if the notice was sent to a foreign country--rather than within the 20 day period from date of service specified in Rule 12.

Paragraph (4) clarifies the effective date of service when service is waived; the provision is needed to resolve an issue arising when applicable law requires service of process to toll the statute of limitations. E.g., Morse v. Elmira Country Club, 752 F.2d 35 (2d Cir. 1984). Cf. Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

The provisions in former subdivision (c)(2)(C)(ii) of this rule may have been misleading to some parties. Some plaintiffs, not reading the rule carefully, supposed that receipt by the defendant of the mailed complaint had the effect both of establishing the jurisdiction of the court over the defendant's person and of tolling the statute of limitations in actions in which service of the summons is required to toll the limitations period. The revised rule is clear that, if the waiver is not returned and filed, the limitations period under such a law is not tolled and the action will not otherwise proceed until formal service of process is effected.

Some state limitations laws may toll an otherwise applicable statute at the time when the defendant receives notice of the action. Nevertheless, the device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by filing the action. Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h).

The procedure of requesting waiver of service should also not be used if the time for service under subdivision (m) will expire before the date on which the waiver must be returned. While a plaintiff has been allowed additional time for service in that situation, e.g., Prather v. Raymond Constr. Co., 570 F. Supp. 278 (N.D. Ga. 1983), the court could refuse a request for additional time unless the defendant appears to have evaded service pursuant to subdivision (e) or (h). It may be noted that the presumptive time limit for service under subdivision (m) does not apply to service in a foreign country.

Paragraph (5) is a cost-shifting provision retained from the former rule. The costs that may be imposed on the defendant could include, for example, costs of unneeded translation or the cost of the time of a process server required to make contact with a defendant residing in guarded apartment houses or residential developments. The paragraph is explicit that the costs of enforcing the cost-shifting provision are themselves recoverable from a defendant who fails to return the waiver. In the absence of such a provision, the purpose of the rule would be frustrated by the cost of its enforcement, which is likely to be high in relation to the small benefit secured by the plaintiff.

Some plaintiffs may send a notice and request for waiver and, without waiting for return of the waiver, also proceed with efforts to effect formal service on the defendant. To discourage this practice, the cost-shifting provisions in paragraphs (2) and (5) are limited to costs of effecting service incurred after the time expires for the defendant to return the waiver. Moreover, by returning the waiver within the time allowed and before being served with process, a defendant receives the benefit of the longer period for responding to the complaint afforded for waivers under paragraph (3).

Subdivision (e). This subdivision replaces former subdivisions (c)(2)(C)(i) and (d)(1). It provides a means for service of summons on individuals within a judicial district of the United States. Together with subdivision (f), it provides for service on persons anywhere, subject to constitutional and statutory constraints.

Service of the summons under this subdivision does not conclusively establish the jurisdiction of the court over the person of the defendant. A defendant may assert the territorial limits of the court's reach set forth in subdivision (k), including the constitutional limitations that may be imposed by the Due Process Clause of the Fifth Amendment.

Paragraph (1) authorizes service in any judicial district in conformity with state law. This paragraph sets forth the language of former subdivision (c)(2)(C)(i), which authorized the use of the law of the state in which the district court sits, but adds as an alternative the use of the law of the state in which the service is effected.

Paragraph (2) retains the text of the former subdivision (d)(1) and authorizes the use of the familiar methods of personal or abode service or service on an authorized agent in any judicial district.

To conform to these provisions, the former subdivision (e) bearing on proceedings against parties not found within the state is stricken. Likewise stricken is the first sentence of the former subdivision (f), which had restricted the authority of the federal process server to the state in which the district court sits.

Subdivision (f). This subdivision provides for service on individuals who are in a foreign country, replacing the former subdivision (i) that was added to Rule 4 in 1963. Reflecting the pattern of Rule 4 in incorporating state law limitations on the exercise of jurisdiction over persons, the former subdivision (i) limited service outside the United States to cases in which extraterritorial service was authorized by state or federal law. The new

rule eliminates the requirement of explicit authorization. On occasion, service in a foreign country was held to be improper for lack of statutory authority. E.g., Martens v. Winder, 341 F.2d 197 (9th Cir.), cert. denied, 382 U.S. 937 (1965). This authority, however, was found to exist by implication. E.g., SEC v. VTR, Inc., 39 F.R.D. 19 (S.D.N.Y. 1966). Given the substantial increase in the number of international transactions and events that are the subject of litigation in federal courts, it is appropriate to infer a general legislative authority to effect service on defendants in a foreign country.

A secondary effect of this provision for foreign service of a federal summons is to facilitate the use of federal long-arm law in actions brought to enforce the federal law against defendants who cannot be served under any state law but who can be constitutionally subjected to the jurisdiction of the federal court. Such a provision is set forth in paragraph (2) of subdivision (k) of this rule, applicable only to persons not subject to the territorial jurisdiction of any particular state.

Paragraph (1) gives effect to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, which entered into force for the United States on February 10, 1969. See 28 U.S.C.A., Fed. R. Civ. P. 4 (Supp. 1986). This Convention is an important means of dealing with problems of service in a foreign country. See generally 1 B. Ristau, International Judicial Assistance §§ 4-1-1 to 4-5-2 (1990). Use of the Convention procedures, when available, is mandatory if documents must be transmitted abroad to effect service. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) (noting that voluntary use of these procedures may be desirable even when service could constitutionally be effected in another manner); J. Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U. Pitt. L. Rev. 903 (1989). Therefore, this paragraph provides that, when service is to be effected outside a judicial district of the United States, the methods of service appropriate under an applicable treaty shall be employed if available and if the treaty so requires.

The Hague Convention furnishes safeguards against the abridgment of rights of parties through inadequate notice. Article 15 provides for verification of actual notice or a demonstration that process was served by a method prescribed by the internal laws of the foreign state before a default judgment may be entered. Article 16 of the Convention also enables the judge to extend the time for appeal after judgment if the defendant shows a lack of adequate notice either to defend or to appeal the judgment, or has disclosed a prima facie case on the merits.

The Hague Convention does not specify a time within which a foreign country's Central Authority must effect service, but Article 15 does provide that alternate methods may be used if a Central Authority does not respond within six months. Generally, a Central Authority can be expected to respond much more quickly than that limit might permit, but there have been occasions when the signatory state was dilatory or refused to cooperate for substantive reasons. In such cases, resort may be had to the provision set forth in subdivision (f)(3).

Two minor changes in the text reflect the Hague Convention. First, the term "letter

of request" has been added. Although these words are synonymous with "letter rogatory," "letter of request" is preferred in modern usage. The provision should not be interpreted to authorize use of a letter of request when there is in fact no treaty obligation on the receiving country to honor such a request from this country or when the United States does not extend diplomatic recognition to the foreign nation. Second, the passage formerly found in subdivision (i)(1)(B), "when service in either case is reasonably calculated to give actual notice," has been relocated.

Paragraph (2) provides alternative methods for use when internationally agreed methods are not intended to be exclusive, or where there is no international agreement applicable. It contains most of the language formerly set forth in subdivision (i) of the rule. Service by methods that would violate foreign law is not generally authorized. Subparagraphs (A) and (B) prescribe the more appropriate methods for conforming to local practice or using a local authority. Subparagraph (C) prescribes other methods authorized by the former rule.

Paragraph (3) authorizes the court to approve other methods of service not prohibited by international agreements in specified circumstances. In approving exceptional service in urgent circumstances, the paragraph tracks the text of the Hague Convention. Other circumstances that might justify the use of additional methods include the failure of the foreign country's Central Authority to effect service within the six-month period provided by the Convention, or the refusal of the Central Authority to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States. In such cases, the court shall direct the method of service and may approve means that are not explicitly authorized by international agreement or indeed that are contrary to foreign law provided they are not prohibited by international agreement. Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law. A court may in some instances specially authorize use of ordinary mail. Cf. Levin v. Ruby Trading Corp., 248 F. Supp. 537 (S.D.N.Y. 1965).

Subdivision (g). This subdivision retains the text of former subdivision (d)(2). Provision is made for service upon an infant or incompetent person in a foreign country.

Subdivision (h). This subdivision retains the text of former subdivision (d)(3), with changes reflecting those made in subdivision (e). It also contains the provisions for service on a corporation or association in a foreign country, as formerly found in subdivision (i).

Frequent use should be made of the Notice and Request procedure set forth in subdivision (d) in actions against corporations. Care must be taken, however, to address the request to an individual officer or authorized agent of the corporation. It is not effective use of the Notice and Request procedure if the mail is sent undirected to the mail room of the organization.

Subdivision (i). This subdivision retains much of the text of former subdivisions (d)(4) and (d)(5). Paragraph (1) provides for service of a summons on the United States; it

amends former subdivision (d)(4) to permit the United States attorney to be served by registered or certified mail. The rule does not authorize the use of the Notice and Request procedure of revised subdivision (d) when the United States is the defendant. To assure proper handling of mail in the United States attorney's office, the authorized mail service must be specifically addressed to the civil process clerk of the office of the United States Attorney.

Paragraph (2) replaces former subdivision (d)(5). Paragraph (3) saves the plaintiff from the hazard of losing a substantive right because of failure to comply with the complex requirements of multiple service under this subdivision. That risk has proved to be more than nominal. E.g., Whale v. United States, 792 F.2d 951 (9th Cir. 1986). This provision should be read in connection with the provisions of subdivision (c) of Rule 15 to preclude the loss of substantive rights against the United States or its agencies, corporations, or officers resulting from a plaintiff's failure to correctly identify and serve all the persons who should be named or served.

Subdivision (j). This subdivision retains the text of former subdivision (d)(6) without material change. The waiver-of-service provision is also inapplicable to actions against governments subject to service pursuant to this subdivision.

The revision adds a new paragraph (1) referring to the statute governing service of a summons on a foreign state and its political subdivisions, agencies, and instrumentalities, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1608. The caption of the subdivision reflects that change.

Subdivision (k). This subdivision replaces the former subdivision (f), with no change in the title. Paragraph (1) retains the substance of the former rule in explicitly authorizing the exercise of personal jurisdiction over persons who can be reached under state long-arm law, the "100-mile bulge" provision added in 1963, or the federal interpleader act. Paragraph (1)(D) is new, but merely calls attention to federal legislation that may provide for nationwide or even world-wide service of process in cases arising under particular federal laws. Congress has provided for nationwide service of process and full exercise of territorial jurisdiction by all district courts with respect to specified federal actions. See 1 R. Casad, Jurisdiction in Civil Actions (2d Ed.) chap. 5 (1991).

Paragraph (2) is new. It authorizes the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under any federal law if that person is subject to personal jurisdiction in no state. This addition is a companion to the amendments made in revised subdivisions (e) and (f).

This paragraph corrects a gap in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction.

In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in Omni Capital Int'l v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 111 (1987).

There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. Cf. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977). There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See DeJames v. Magnificent Carriers, 654 F.2d 280, 286 n.3 (3rd Cir.), cert. denied, 454 U.S. 1085 (1981). Compare World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-294 (1980); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985); Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 108-13 (1987). See generally R. Lusardi, Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign, 33 Vill. L. Rev. 1 (1988).

This provision does not affect the operation of federal venue legislation. See generally 28 U.S.C. § 1391. Nor does it affect the operation of federal law providing for the change of venue. 28 U.S.C. §§ 1404, 1406. The availability of transfer for fairness and convenience under § 1404 should preclude most conflicts between the full exercise of territorial jurisdiction permitted by this rule and the Fifth Amendment requirement of "fair play and substantial justice."

The district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so onerous that injustice could result. "[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 115 (1987), quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

This narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country, even though there might be diversity or alienage subject matter jurisdiction as to such claims. If, however, personal jurisdiction is established under this paragraph with respect to a federal claim, then 28 U.S.C. § 1367(a) provides supplemental jurisdiction over related claims against that defendant, subject to the court's discretion to decline exercise of that jurisdiction under 28

U.S.C. § 1367(c).

Subdivision (l). This subdivision assembles in one place all the provisions of the present rule bearing on proof of service. No material change in the rule is effected. The provision that proof of service can be amended by leave of court is retained from the former subdivision (h). See generally 4A Wright & Miller, Federal Practice and Procedure § 1132 (2d ed. 1987).

Subdivision (m). This subdivision retains much of the language of the present subdivision (j).

The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. Such relief formerly was afforded in some cases, partly in reliance on Rule 6(b). Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service. E.g., Ditkof v. Owens-Illinois, Inc., 114 F.R.D. 104 (E.D. Mich. 1987). A specific instance of good cause is set forth in paragraph (3) of this rule, which provides for extensions if necessary to correct oversights in compliance with the requirements of multiple service in actions against the United States or its officers, agencies, and corporations. The district court should also take care to protect pro se plaintiffs from consequences of confusion or delay attending the resolution of an in forma pauperis petition. Robinson v. America's Best Contacts & Eyeglasses, 876 F.2d 596 (7th Cir. 1989).

The 1983 revision of this subdivision referred to the "party on whose behalf such service was required," rather than to the "plaintiff," a term used generically elsewhere in this rule to refer to any party initiating a claim against a person who is not a party to the action. To simplify the text, the revision returns to the usual practice in the rule of referring simply to the plaintiff even though its principles apply with equal force to defendants who may assert claims against non-parties under Rules 13(h), 14, 19, 20, or 21.

Subdivision (n). This subdivision provides for in rem and quasi-in-rem jurisdiction. Paragraph (1) incorporates any requirements of 28 U.S.C. § 1655 or similar provisions bearing on seizures or liens.

Paragraph (2) provides for other uses of quasi-in-rem jurisdiction but limits its use to exigent circumstances. Provisional remedies may be employed as a means to secure jurisdiction over the property of a defendant whose person is not within reach of the court, but occasions for the use of this provision should be rare, as where the defendant is a fugitive or assets are in imminent danger of disappearing. Until 1963, it was not possible under Rule 4 to assert jurisdiction in a federal court over the property of a defendant not personally served. The 1963 amendment to subdivision (e) authorized the use of state law procedures authorizing seizures of assets as a basis for jurisdiction. Given the liberal availability of long-arm jurisdiction, the exercise of power quasi-in-rem has become almost an anachronism. Circumstances too spare to affiliate the defendant to the forum state

sufficiently to support long-arm jurisdiction over the defendant's person are also inadequate to support seizure of the defendant's assets fortuitously found within the state. Shaffer v. Heitner, 433 U.S. 186 (1977).

Rule 4.1 Service of Other Process

(a) Generally. Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.

(b) Enforcement of Orders: Commitment for Civil Contempt. An order of civil commitment of a person held to be in contempt of a decree or injunction issued to enforce the laws of the United States may be served and enforced in any district. Other orders in civil contempt proceedings shall be served in the state in which the court issuing the order to be enforced is located or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued.

COMMITTEE NOTES

This is a new rule. Its purpose is to separate those few provisions of the former Rule 4 bearing on matters other than service of a summons to allow greater textual clarity in Rule 4. Subdivision (a) contains no new language.

Subdivision (b) replaces the final clause of the penultimate sentence of the former subdivision 4(f), a clause added to the rule in 1963. The new rule provides for nationwide service of orders of civil commitment enforcing decrees of injunctions issued to compel compliance with federal law. The rule makes no change in the practice with respect to the enforcement of injunctions or decrees not involving the enforcement of federally-created rights.

Service of process is not required to notify a party of a decree or injunction, or of an order that the party show cause why that party should not be held in contempt of such an order. With respect to a party who has once been served with a summons, the service of the decree or injunction itself or of an order to show cause can be made pursuant to Rule 5. Thus, for example, an injunction may be served on a party through that person's attorney.

Chagas v. United States, 369 F.2d 643 (5th Cir. 1966). The same is true for service of an order to show cause. Waffenschmidt v. Mackay, 763 F.2d 711 (5th Cir. 1985).

The new rule does not affect the reach of the court to impose criminal contempt sanctions. Nationwide enforcement of federal decrees and injunctions is already available with respect to criminal contempt: a federal court may effect the arrest of a criminal contemnor anywhere in the United States, 28 U.S.C. § 3041, and a contemnor when arrested may be subject to removal to the district in which punishment may be imposed. Fed. R. Crim. P. 40. Thus, the present law permits criminal contempt enforcement against a contemnor wherever that person may be found.

The effect of the revision is to provide a choice of civil or criminal contempt sanctions in those situations to which it applies. Contempt proceedings, whether civil or criminal, must be brought in the court that was allegedly defied by a contumacious act. Ex parte Bradley, 74 U.S. 366 (1869). This is so even if the offensive conduct or inaction occurred outside the district of the court in which the enforcement proceeding must be conducted. E.g., McCourtney v. United States, 291 Fed. 497 (8th Cir.), cert. denied, 263 U.S. 714 (1923). For this purpose, the rule as before does not distinguish between parties and other persons subject to contempt sanctions by reason of their relation or connection to parties.

Rule 5. Service and Filing of Pleadings and Other Papers.

* * * *

(e) **Filing with the Court Defined.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. ~~Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules~~ *A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means* are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

COMMITTEE NOTES

This is a technical amendment, using the broader language of Rule 25 of the Federal Rules of Appellate Procedure. The district court--and the bankruptcy court by virtue of a cross-reference in Bankruptcy Rule 7005--can, by local rule, permit filing not only by facsimile transmissions but also by other electronic means, subject to standards approved by the Judicial Conference.

Rule 11. Signing of Pleadings, Motions, and Other Papers; *Representations to Court;* Sanctions

(a) Signature. Every pleading, *written* motion, and other paper ~~of a party represented by an attorney~~ shall be signed by at least one attorney of record in the attorney's individual name, *or, if the party is not represented by an attorney, shall be signed by the party.* ~~whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.~~ *Each paper shall state the signer's address and telephone number, if any.* Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ~~The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other~~ *An unsigned* paper ~~is not signed, it~~ shall be stricken unless ~~it is signed promptly after the~~ omission *of the signature* is *corrected promptly after being* called to the attention of the ~~pleader or movant~~ *attorney or party*.

(b) Representations to Court. ~~If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose~~

~~upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.~~ *By signing, presenting, or pursuing a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--*

(1) it is not being presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

*(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court shall, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.*

*(1) **How Initiated.***

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

COMMITTEE NOTES

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); G. Solovy, The Federal Law of Sanctions (1991); G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures

on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. Subject to the provisions of revised Rule 83(d), a court may require by local rule that papers contain additional information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and mandating sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for pursuing positions after they are no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with the court, but include the continued advocacy of positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference continues to insist on a claim or defense should be viewed as "pursuing" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "pursuing"--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not

a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. While the pleadings can be amended to signify the abandonment of an allegation or claim, less formal means should suffice in most circumstances.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations based on lack of information obtained in their initial investigation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not persist in that denial. It can be corrected by an amended answer, by informal communications, or at a pretrial conference.

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. See Manual for Complex Litigation, Second, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to order a sanction or what sanctions would be

appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions to impose for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, there are occasions, particularly for (b)(1) violations, in which, for effective deterrence, the court should direct not only that the person violating the rule make a monetary payment, but also that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the expense of litigation to an opposing party, any award of expenses to the other party should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, presenting, or advocating a document has a nondelegable responsibility to the court, and in most situations will be the one who should be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the

former rule. Cf. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for violations of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See Willy v. Coastal Corp., ___ U.S. ___ (1992); Business Guides, Inc. v. Chromatic Communications Enter. Inc., ___ U.S. ___ (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential

violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to extract an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing some allegation or contention, the motion should not be presented to the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court

leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. See Chambers v. NASCO, ___ U.S. ___ (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(a) **When Presented.**–

(1) Unless a different time is prescribed in a statute of the United States, a ~~A~~ defendant shall serve an answer

(A) within 20 days after *being served with* ~~the service of~~ the summons and complaint ~~upon that defendant~~, *or*

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States ~~except when service is made under rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state~~.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after ~~the service upon that party~~ *being served*. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.–

(3) The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted.

(4) Unless a different time is fixed by court order, t ~~T~~he service of a motion

permitted under this rule alters these periods of time as follows~~, unless a different time is fixed by order of the court~~:

(~~1~~*A*) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; *or*

(~~2~~*B*) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

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COMMITTEE NOTES

Subdivision (a) is divided into paragraphs for greater clarity, and paragraph (1)(B) is added to reflect amendments to Rule 4. Consistent with Rule 4(d)(3), a defendant that timely waives service is allowed 60 days from the date the request was mailed in which to respond to the complaint, with an additional 30 days afforded if the request was sent out of the country. Service is timely waived if the waiver is returned within the time specified in the request (30 days after the request was mailed, or 60 days if mailed out of the country) and before being formally served with process. Sometimes a plaintiff may attempt to serve a defendant with process while also sending the defendant a request for waiver of service; if the defendant executes the waiver of service within the time specified and before being served with process, it should have the longer time to respond afforded by waiving service.

The date of sending the request is to be inserted by the plaintiff on the face of the request for waiver and on the waiver itself. This date is used to measure the return day for the waiver form, so that the plaintiff can know on a day certain whether formal service of process will be necessary; it is also a useful date to measure the time for answer when service is waived. The defendant who returns the waiver is given additional time for answer in order to assure that it loses nothing by waiving service of process.

Rule 15. Amended and Supplemental Pleadings

* * * *

(c) **Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(~~j~~m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

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COMMITTEE NOTES

The amendment conforms the cross reference to Rule 4 to the revision of that rule.

Rule 16. Pretrial Conferences; Scheduling; Management

* * * *

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the *district* judge, or a magistrate *judge* when authorized by district court rule, shall, *after receiving the report from the parties under Rule 26(f) or* after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file ~~and hear~~ motions; and

(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(45) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(56) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than ~~120~~*90* days after ~~filing of the complaint~~ *the appearance of a defendant or, if earlier, more than 120 days after the complaint has been served on a defendant*. A schedule shall not be modified except *upon a showing of good cause and* by leave of the *district* judge or, *when authorized by local rule, by* a magistrate *judge* ~~when authorized by district court rule upon a showing of good cause~~.

(c) **Subjects ~~to be Discussed~~ *for Consideration* at Pretrial Conferences.** ~~The participants at~~*At* any conference under this rule ~~may consider and take action~~ *consideration may be given, and the court may take appropriate action,* with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence*, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence*;

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(5*7*) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6*8*) the advisability of referring matters to a magistrate *judge* or master;

(7*9*) ~~the possibility of~~ settlement ~~or~~ *and* the use of ~~extrajudicial~~ *special* procedures to ~~resolve~~ *assist in resolving* the dispute *when authorized by statute or local rule*;

(8*10*) the form and substance of the pretrial order;

(9*11*) the disposition of pending motions;

(10*2*) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(11*6*) such other matters as may ~~aid in~~ *facilitate* the *just, speedy, and inexpensive* disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. *If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.*

* * * *

COMMITTEE NOTES

Subdivision (b). One purpose of this amendment is to provide a more appropriate deadline for the initial scheduling order required by the rule. The former rule directed that

the order be entered within 120 days from the filing of the complaint. This requirement has created problems because Rule 4(m) allows 120 days for service and ordinarily at least one defendant should be available to participate in the process of formulating the scheduling order. The revision provides that the order is to be entered within 90 days after the date a defendant first appears (whether by answer or by a motion under Rule 12) or, if earlier (as may occur in some actions against the United States), within 120 days after service of the complaint on a defendant. The longer time provided by the revision is not intended to encourage unnecessary delays in entering the scheduling order. Indeed, in most cases the order can and should be entered at a much earlier date. Rather, the additional time is intended to alleviate problems in multi-defendant cases and should ordinarily be adequate to enable participation by all defendants initially named in the action.

New paragraph (4) has been added to highlight that it will frequently be desirable for the scheduling order to include provisions relating to the timing of disclosures under Rule 26(a). While the initial disclosures required by Rule 26(a)(1) will ordinarily have been made before entry of the scheduling order, the timing and sequence for disclosure of expert testimony and of the witnesses and exhibits to be used at trial should be tailored to the circumstances of the case and is a matter that should be considered at the initial scheduling conference. Similarly, the scheduling order might contain provisions modifying the extent of discovery (e.g., number and length of depositions) otherwise permitted under these rules or by a local rule.

The report from the attorneys concerning their meeting and proposed discovery plan, as required by revised Rule 26(f), should be submitted to the court before the scheduling order is entered. Their proposals, particularly regarding matters on which they agree, should be of substantial value to the court in setting the timing and limitations on discovery and should reduce the time of the court needed to conduct a meaningful conference under Rule 16(b). As under the prior rule, while a scheduling order is mandated, a scheduling conference is not. However, in view of the benefits to be derived from the litigants and a judicial officer meeting in person, a Rule 16(b) conference should, to the extent practicable, be held in all cases that will involve discovery.

This subdivision, as well as subdivision (c)(8), also is revised to reflect the new title of United States Magistrate Judges pursuant to the Judicial Improvements Act of 1990.

Subdivision (c). The primary purposes of the changes in subdivision (c) are to call attention to the opportunities for structuring of trial under Rules 42, 50, and 52 and to eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to facilitate settlement or to provide for an efficient and economical trial. The prefatory language of this subdivision is revised to clarify the court's power to enter appropriate orders at a conference notwithstanding the objection of a party. Of course settlement is dependent upon agreement by the parties and, indeed, a conference is most effective and productive when the parties participate in a spirit of cooperation and mindful of their responsibilities under Rule 1.

Paragraph (4) is revised to clarify that in advance of trial the court may address the

need for, and possible limitations on, the use of expert testimony under Rule 702 of the Federal Rules of Evidence. Even when proposed expert testimony might be admissible under the standards of Rules 403 and 702 of the evidence rules, the court may preclude or limit such testimony if the cost to the litigants--which may include the cost to adversaries of securing testimony on the same subjects by other experts--would be unduly expensive given the needs of the case and the other evidence available at trial.

Paragraph (5) is added (and the remaining paragraphs renumbered) in recognition that use of Rule 56 to avoid or reduce the scope of trial is a topic that can, and often should, be considered at a pretrial conference. Renumbered paragraph (11) enables the court to rule on pending motions for summary adjudication that are ripe for decision at the time of the conference. Often, however, the potential use of Rule 56 is a matter that arises from discussions during a conference. The court may then call for motions to be filed or, under revised Rule 56(g)(3), enter a show cause order that initiates the process.

Paragraph (6) is added to emphasize that a major objective of pretrial conferences should be to consider appropriate controls on the extent and timing of discovery. In many cases the court should also specify the times and sequence for disclosure of written reports from experts under revised Rule 26(a)(2)(B) and perhaps direct changes in the types of experts from whom written reports are required. Consideration should also be given to possible changes in the timing or form of the disclosure of trial witnesses and documents under Rule 26(a)(3).

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. §§ 473(a)(6), 473(b)(4), 651-68; Section 104(b)(2), Pub.L. 101-650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

The amendment of paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c), authorizing the court to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case. The sentence refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel. Finally, it should be noted that the

unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

The explicit authorization in the rule to require personal participation in the manner stated is not intended to limit the reasonable exercise of the court's inherent powers, e.g., G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989), or its power to require party participation under the Civil Justice Reform Act of 1990. See 28 U.S.C. § 473(b)(5) (civil justice expense and delay reduction plans adopted by district courts may include requirement that representatives "with authority to bind [parties] in settlement discussions" be available during settlement conferences).

New paragraphs (13) and (14) are added to call attention to the opportunities for structuring of trial under Rule 42 and under revised Rules 50 and 52.

Paragraph (15) is also new. It supplements the power of the court to limit the extent of evidence under Rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the length of trial established at a conference in advance of trial can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.

Rule 26. General Provisions Governing Discovery; *Duty of Disclosure*

(a) ***Required Disclosures;*** ~~**Discovery**~~ **Methods** ***to Discover Additional Matter.***

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by the court, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made

at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by

the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures; Filing. Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property *under Rule 34 or 45(a)(1)(C),* for inspection and other purposes; physical and mental examinations; and requests for admission. *Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.*

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,

whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. ~~It is not a ground for objection that t~~The information sought *need not be* ~~will be in~~admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. ~~T~~ frequency or extent of use of the discovery methods ~~set forth in subdivision (a)~~ *otherwise permitted under these rules and by any local rule* shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) ~~the discovery is unduly burdensome or expensive~~ *the burden or expense of the proposed discovery outweighs its likely benefit*, taking into account the needs of the case, the amount in controversy, ~~limitations on~~ the parties' resources, ~~and~~ the importance of the issues at stake in the litigation, *and the importance of the proposed discovery in resolving the issues*. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

~~(2) Insurance Agreements. A party may obtain discovery of the existence~~

~~and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purpose of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.~~

* * * *

(4) **Trial Preparation: Experts.** ~~Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:~~

(A)~~(i)~~ A party may ~~through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.~~ *depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall*

not be conducted until after the report is provided.

(B) A party may, *through interrogatories or by deposition,* discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial~~,~~ only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under *this* subdivisions ~~(b)(4)(A)(ii) and (b)(4)(B) of this rule~~; and (ii) with respect to discovery obtained under ~~subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under~~ subdivision (b)(4)(B) of this rule the court shall require~~,~~ the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess

the applicability of the privilege or protection.

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, *accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action,* and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the *disclosure or* discovery not be had;

(2) that the *disclosure or* discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the *disclosure or* discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be ~~disclosed~~ *revealed* or be ~~disclosed~~ *revealed* only in a designated way; *and*

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or *other* person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) ~~Sequence and~~ Timing *and Sequence* of Discovery. *Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f).* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of *Disclosures and* Responses. A party who has *made a disclosure under subdivision (a) or* responded to a request for discovery with a *disclosure or* response ~~that was complete when made~~ is under ~~no~~ *a* duty to supplement *or correct* the *disclosure or* response to include information thereafter acquired, ~~except as follows~~ *if ordered by the court or in the following circumstances*:

(1) A party is under a duty ~~seasonably~~ to supplement ~~the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's~~

~~testimony.~~ *at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.*

(2) A party is under a duty seasonably to amend a prior response *to an interrogatory, request for production, or request for admission* if the party *learns* ~~obtains information upon the basis of which (A) the party knows~~ that the response ~~was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment~~ *is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing*.

~~(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.~~

(f) *Meeting of Parties; Planning for* **Discovery** ~~**Conference.** At any time after commencement of an action the court may direct the attorneys for the parties to~~

~~appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes~~ *Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:*

(1) ~~A statement of the issues as they then appear;~~ *what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;*

(2) ~~A proposed plan and schedule of discovery;~~ *the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;*

(3) ~~Any limitations proposed to be placed on discovery;~~ *what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and*

(4) ~~A~~any other ~~proposed~~ orders ~~with respect to discovery~~ *that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).*~~; and~~

~~(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters~~

~~set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.~~

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan. ~~Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.~~

~~Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.~~

(g) **Signing of *Disclosures,* Discovery Requests, Responses, and Objections.**

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and

belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every *discovery* request, ~~for discovery or~~ response, or objection ~~thereto~~ made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A*n unrepresented* party ~~who is not represented by an attorney~~ shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification ~~that the signer has read the request, response, or objection, and~~ that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, ~~it~~ *the request, response, or objection* is:

(~~1~~*A*) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(~~2~~*B*) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(~~3~~*C*) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to

take any action with respect to it until it is signed.

(3) If *without substantial justification* a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the *disclosure,* request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

COMMITTEE NOTES

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3), as the trial date approaches, to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1348 (1978), and Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 721-23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be

achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate to the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the

existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence "relevant to disputed facts alleged with particularity in the pleadings." There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product.

Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must be held within 75 days after a defendant has first appeared in the case.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make an inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another

party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness, 1986 U. Ill. L. Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) and revised Rule 702 of the Federal Rules of Evidence provide an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no 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.

Revised subdivision (b)(3)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--e.g., a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to

the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide "foundation" testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion "in limine" and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). Language is added to this paragraph to reflect a policy of balanced accommodation to international agreements bearing on methods of discovery. Cf. Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987). Although such treaties typically do not preclude the use of Rules 26-37 to secure information from persons in other countries, attorneys and judges should be cognizant of the adverse impact upon international relations of unduly intrusive discovery methods that offend the sensibilities of those governing other countries. See generally J. Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U. Pitt. L. Rev. 903 (1989); E. Alley & D. Prescott, Recent Developments in the United States under the Hague Evidence Convention, 2 Leiden J. Int'l Law 19 (1989). If certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that ordinarily other methods should not be employed in discovery at places in foreign countries, at least if the approved methods are adequate to meet the need of the litigant for timely access to the information.

The new provision applies only with respect to discovery sought to be conducted within a country that has an applicable convention or treaty with the United States. It does not cover discovery requests that a party subject to the power of the court provide in the United States (such as by answering interrogatories, appearing at a deposition, or producing documents for inspection in this country) information that may be located abroad or derived

from materials located abroad. Nevertheless, in such situations, although not governed by the amendment to Rule 26(a)(5), the court should consider, as part of its obligation to prevent discovery abuses involving foreign litigants, the availability and practicality of discovery through convention methods. See Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987). Likewise, the court should consider the general principles of comity in deciding what discovery to permit in countries not signatories to a convention or treaty with the United States.

The rule does not require resort to convention methods where such methods would be "inadequate." This provision allows the court to make a discreet determination on the particular facts as to the sufficiency of the internationally agreed discovery methods. For example, the court might excuse a party from having to resort to Hague Convention procedures if a country in which necessary information is located has imposed a blanket reservation that would prevent such discovery.

The rule also permits the court to authorize the use of non-convention discovery methods when needed to assure that discovery is not "inequitable." Foreign litigants should not be placed in a favored position when compared to domestic parties in the litigation, especially in commercial matters with respect to which the American litigants may be their economic competitors. Thus, an international litigant should not be permitted to obtain discovery from its American adversaries using the broader forms of discovery contained in Rules 26-37, while asserting constraints under a convention or the law of the party's own country to create obstacles to equivalent discovery initiated by its adversaries.

Indeed, the court is not precluded by the rule from authorizing use of discovery methods that may violate the laws of another country if necessary to assure that discovery is not inadequate or inequitable and if not prohibited by a treaty or convention with the United States. The court should, however, exercise caution in ordering such discovery, particularly if the impediment to the discovery is imposed at the instance of the foreign authority, not at the request of the litigant or non-party from whom information is sought. Moreover, in deciding upon an appropriate sanction for failure to comply with an order for such discovery, the court should take into account the fact that non-compliance was motivated by the party's need to conform to the law of a foreign country. See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958). In no circumstance can the court authorize discovery methods that are prohibited by a treaty that is the law of the United States, for the proscriptions of the treaty take precedence over these rules.

This paragraph is also revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging

discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection. The paragraph also applies

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are

withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items "otherwise discoverable." If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a "party," applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful

for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a "discovery conference" and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after an answer has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. The additional time is afforded in recognition that the discussion at the meeting of the claims and defenses may be useful in defining the issues with respect to which the initial disclosures should be made. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should

describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for a scheduling order under Rule 16(b), such as cases in which there will be no discovery (e.g., bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (e.g., government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (e.g., actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

Rule 28. Persons Before Whom Depositions May Be Taken

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(b) **In Foreign Countries.** *Subject to the provisions of Rule 26(a)(5)* ~~In a foreign country~~, depositions may be taken *in a foreign country* (1) *pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3)* on notice before a person authorized to administer oaths in the place ~~in which~~ *where* the examination is held, either by the law thereof or by the law of the United States, or (~~2~~*4*) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony~~, or (3) pursuant to a letter rogatory~~. A commission or a letter ~~rogatory~~ *of request* shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter ~~rogatory~~ *of request* that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter ~~rogatory~~ *of request* may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter ~~rogatory~~ *of request* may be addressed "To the Appropriate Authority in [here name the country]." *When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention.* Evidence obtained in response to a letter ~~rogatory~~ *of request* need not be excluded merely ~~for the reason that~~ *because* it is not a verbatim transcript, *because* ~~or that~~ the testimony was not taken under oath, or ~~for~~ *because of* any similar departure from the requirements for depositions taken within the United States under these

rules.

* * * *

COMMITTEE NOTES

This revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad. Pursuant to revised Rule 26(a)(5), the party taking the deposition is ordinarily obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means, even though a verbatim transcript is not available or testimony cannot be taken under oath.

The term "letter of request" has been substituted in the rule for the term "letter rogatory" because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of letter of request. There are several other minor changes that are designed merely to carry out the intent of the other alterations.

Rule 29. Stipulations Regarding Discovery Procedure

Unless ~~the court orders~~ otherwise *directed by the court*, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify ~~the procedures for other methods of~~ *other procedures governing or limitations placed upon* discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, *if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial,* be made only with the approval of the court.

COMMITTEE NOTES

This rule is revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery. Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc. Likewise, when more depositions or interrogatories are needed than allowed under these rules or when more time is needed to complete a deposition than allowed under a local rule, they can, by agreeing to the additional discovery, eliminate the need for a special motion addressed to the court.

Under the revised rule, the litigants ordinarily are not required to obtain the court's approval of these stipulations. By order or local rule, the court can, however, direct that its approval be obtained for particular types of stipulations; and, in any event, approval must be obtained if a stipulation to extend the 30-day period for responding to interrogatories, requests for production, or requests for admissions would interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial.

Rule 30. Depositions Upon Oral Examination

(a) **When Depositions May Be Taken;** *When Leave Required.*

(1) ~~After commencement of the action, any~~ party may take the testimony of any person, including a party, by deposition upon oral examination *without leave of court except as provided in paragraph (2).* ~~Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule.~~ The attendance of witnesses may be compelled by subpoena as provided in Rule 45. ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the

person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

(b) Notice of Examination: General Requirements; ~~Special Notice; Non-Stenographic~~ *Method of* Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.

~~(2) Leave of court is not required for the taking of a deposition by the plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless the person's deposition is taken before expiration of the 30 day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts~~

~~are true. The sanctions provided by Rule 11 are applicable to the certification.~~

~~If a party shows that when the party was served with notice under this subdivision (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.~~

The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) ~~The court may for cause shown enlarge or shorten the time for taking the deposition.~~ *With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.*

(4) ~~The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections~~

~~under subdivision (c), any changes made by the witness, the witness' signature identifying the deposition as the witness' own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (c), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non stenographic means.~~ *Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.*

* * * *

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone *or other remote electronic means*. For the purposes of this rule and Rules 28(a), 37(a)(1), *and* 37(b)(1)~~, and 45(d)~~, a deposition taken by ~~telephone~~ *such means* is taken in the district and at the place where the deponent is to answer questions ~~propounded to the deponent~~.

(c) **Examination and Cross-Examination; Record of Examination; Oath; Objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence *except Rules 103 and 615*. The officer before whom the deposition is to be taken shall put the witness on oath *or affirmation* and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other ~~means ordered in accordance with~~ *method authorized by* subdivision (b)(42) of this rule. ~~If requested by one of the parties the testimony shall be transcribed.~~ All objections made at the time of the examination to the qualifications of the officer taking the deposition, ~~or~~ to the manner of taking it, ~~or~~ to the evidence presented, ~~or~~ to the conduct of any party, ~~and any other objection to~~ *or to any other aspect of* the proceedings, shall be noted by the officer upon *the record of* the deposition. ~~Evidence objected to shall be~~ *; but the examination shall proceed, with the testimony being* taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) *Schedule and Duration;* **Motion to Terminate or Limit Examination.**

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph

(3).

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistently with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(3) At any time during ~~the taking of the~~ *a* deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) ~~Submission to~~ *Review by* **Witness; Changes; Signing.** ~~When the testimony~~

~~is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.~~ *If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.*

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.

(1) The officer shall certify ~~on the deposition~~ that the witness was duly sworn by the officer and that the deposition is a true record of the testimony

given by the witness. *This certificate shall be in writing and accompany the record of the deposition.* Unless otherwise ordered by the court, the officer shall ~~then~~ securely seal the deposition in an envelope *or package* indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending ~~or send it by registered or certified mail to the clerk thereof for filing~~ *or send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration*. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) *Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method.* Upon payment of

reasonable charges therefor, the officer shall furnish a copy of the *transcript or other recording of the* deposition to any party or to the deponent.

* * * *

* * * *

COMMITTEE NOTES

Subdivision (a). Paragraph (1) retains the first and third sentences from the former subdivision (a) without significant modification. The second and fourth sentences are relocated.

Paragraph (2) collects all provisions bearing on requirements of leave of court to take a deposition.

Paragraph (2)(A) is new. It provides a limit on the number of depositions the parties may take, absent leave of court or stipulation with the other parties. One aim of this revision is to assure judicial review under the standards stated in Rule 26(b)(2) before any side will be allowed to take more than ten depositions in a case without agreement of the other parties. A second objective is to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case. Leave to take additional depositions should be granted when consistent with the principles of Rule 26(b)(2), and in some cases the ten-per-side limit should be reduced in accordance with those same principles. Consideration should ordinarily be given at the planning meeting of the parties under Rule 26(f) and at the time of a scheduling conference under Rule 16(b) as to enlargements or reductions in the number of depositions, eliminating the need for special motions.

A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify.

In multi-party cases, the parties on any side are expected to confer and agree as to which depositions are most needed, given the presumptive limit on the number of depositions they can take without leave of court. If these disputes cannot be amicably resolved, the court can be requested to resolve the dispute or permit additional depositions.

Paragraph (2)(B) is new. It requires leave of court if any witness is to be deposed in the action more than once. This requirement does not apply when a deposition is temporarily recessed for convenience of counsel or the deponent or to enable additional materials to be gathered before resuming the deposition. If significant travel costs would be incurred to resume the deposition, the parties should consider the feasibility of conducting the balance of the examination by telephonic means.

Paragraph (2)(C) revises the second sentence of the former subdivision (a) as to when

depositions may be taken. Consistent with the changes made in Rule 26(d), providing that formal discovery ordinarily not commence until after the litigants have met and conferred as directed in revised Rule 26(f), the rule requires leave of court or agreement of the parties if a deposition is to be taken before that time (except when a witness is about to leave the country).

Subdivision (b). The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel.

Former subdivision (b)(2) is partly relocated in subdivision (a)(2)(C) of this rule. The latter two sentences of the first paragraph are deleted, in part because they are redundant to Rule 26(g) and in part because Rule 11 no longer applies to discovery requests. The second paragraph of the former subdivision (b)(2), relating to use of depositions at trial where a party was unable to obtain counsel in time for an accelerated deposition, is relocated in Rule 32.

New paragraph (2) confers on the party taking the deposition the choice of the method of recording, without the need to obtain prior court approval for one taken other than stenographically. A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial or on a dispositive motion under Rule 56. Objections to the nonstenographic recording of a deposition, when warranted by the circumstances, can be presented to the court under Rule 26(c).

Paragraph (3) provides that other parties may arrange, at their own expense, for the recording of a deposition by a means (stenographic, visual, or sound) in addition to the method designated by the person noticing the deposition. The former provisions of this paragraph, relating to the court's power to change the date of a deposition, have been eliminated as redundant in view of Rule 26(c)(2).

Revised paragraph (4) requires that all depositions be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically.

Paragraph (7) is revised to authorize the taking of a deposition not only by telephone but also by other remote electronic means, such as satellite television, when agreed to by the parties or authorized by the court.

Subdivision (c). Minor changes are made in this subdivision to reflect those made in subdivision (b) and to complement the new provisions of subdivision (d)(1), aimed at reducing the number of interruptions during depositions.

In addition, the revision addresses a recurring problem as to whether other potential deponents can attend a deposition. Courts have disagreed, some holding that witnesses

should be excluded through invocation of Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. The revision addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press.

Subdivision (d). The first sentence of new paragraph (1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, i.e., objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called "usual stipulation" preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition.

Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) prohibits such directions except in the three circumstances indicated: to claim a privilege or protection against disclosure (e.g., as work product), to enforce a court directive limiting the scope or length of permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph (3).

Paragraph (2) is added to this subdivision to dispel any doubts regarding the power of the court by order or local rule to establish limits on the length of depositions. The rule also explicitly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorney, but is otherwise congruent with Rule 26(g).

It is anticipated that limits on the length of depositions prescribed by local rules would be presumptive only, subject to modification by the court or by agreement of the parties. Such modifications typically should be discussed by the parties in their meeting under Rule 26(f) and included in the scheduling order required by Rule 16(b). Additional time, moreover, should be allowed under the revised rule when justified under the principles stated in Rule 26(b)(2). To reduce the number of special motions, local rules should ordinarily permit--and indeed encourage--the parties to agree to additional time, as when, during the taking of a deposition, it becomes clear that some additional examination is needed.

Paragraph (3) authorizes appropriate sanctions not only when a deposition is

unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1). In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct, as may the refusal of an attorney to agree with other counsel on a fair apportionment of the time allowed for examination of a deponent or a refusal to agree to a reasonable request for some additional time to complete a deposition, when that is permitted by the local rule or order.

Subdivision (e). Various changes are made in this subdivision to reduce problems sometimes encountered when depositions are taken stenographically. Reporters frequently have difficulties obtaining signatures--and the return of depositions--from deponents. Under the revision pre-filing review by the deponent is required only if requested before the deposition is completed. If review is requested, the deponent will be allowed 30 days to review the transcript or recording and to indicate any changes in form or substance. Signature of the deponent will be required only if review is requested and changes are made.

Subdivision (f). Minor changes are made in this subdivision to reflect those made in subdivision (b). In courts which direct that depositions not be automatically filed, the reporter can transmit the transcript or recording to the attorney taking the deposition (or ordering the transcript or record), who then becomes custodian for the court of the original record of the deposition. Pursuant to subdivision (f)(2), as under the prior rule, any other party is entitled to secure a copy of the deposition from the officer designated to take the deposition; accordingly, unless ordered or agreed, the officer must retain a copy of the recording or the stenographic notes.

Rule 31. Depositions Upon Written Questions

(a) Serving Questions; Notice.

(1) ~~After commencement of the action, any~~ party may take the testimony of any person, including a party, by deposition upon written questions *without leave of court except as provided in paragraph (2)*. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined has already been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d).

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and

address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

(4) Within ~~30~~*14* days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within ~~10~~*7* days after being served with cross questions, a party may serve redirect questions upon all other parties. Within ~~10~~*7* days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

* * * *

COMMITTEE NOTES

Subdivision (a). The first paragraph of subdivision (a) is divided into two subparagraphs, with provisions comparable to those made in the revision of Rule 30. Changes are made in the former third paragraph, numbered in the revision as paragraph (4), to reduce the total time for developing cross-examination, redirect, and recross questions from 50 days to 28 days.

Rule 32. Use of Depositions in Court Proceedings

(a) **Use of Depositions.**

* * * *

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly

upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

* * * *

(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

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COMMITTEE NOTES

Subdivision (a). The last sentence of revised subdivision (a) not only includes the substance of the provisions formerly contained in the second paragraph of Rule 30(b)(2), but adds a provision to deal with the situation when a party, receiving minimal notice of a proposed deposition, is unable to obtain a court ruling on its motion for a protective order seeking to delay or change the place of the deposition. Ordinarily a party does not obtain protection merely by the filing of a motion for a protective order under Rule 26(c); any protection is dependent upon the court's ruling. Under the revision, a party receiving less than 11 days notice of a deposition can, provided its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon. Although the revision of Rule 32(a) covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when the proposed deponent is the movant, the deponent would have "just cause" for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

Subdivision (c). This new subdivision, inserted at the location of a subdivision previously abrogated, is included in view of the increased opportunities for video-recording

and audio-recording of depositions under revised Rule 30(b). Under this rule a party may offer deposition testimony in any of the forms authorized under Rule 30(b) but, if offering it in a nonstenographic form, must provide the court with a transcript of the portions so offered. On request of any party in a jury trial, deposition testimony offered other than for impeachment purposes is to be presented in a nonstenographic form if available, unless the court directs otherwise. Note that under Rule 26(a)(3)(B) a party expecting to use nonstenographic deposition testimony as substantive evidence is required to provide other parties with a transcript in advance of trial.

Rule 33. Interrogatories to Parties

(a) **Availability~~; Procedures for Use~~.** *Without leave of court or written stipulation, a*~~A~~ny party may serve upon any other party written interrogatories, *not exceeding 25 in number including all discrete subparts,* to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. *Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, i*Interrogatories may~~, without leave of court,~~ *not* be served ~~upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party~~ *before the time specified in Rule 26(d)*.

(b) Answers and Objections.

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event *the objecting party shall state* the reasons for objection ~~shall be stated in lieu of an answer~~ *and shall answer to the extent the interrogatory is not objectionable*.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories~~, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant~~.

~~The court may allow a~~*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*.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(~~b~~c) **Scope; Use at Trial.** Interrogatories may relate to any matters which can be inquired into under Rule 26(b)*(1)*, and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(~~c~~d) **Option to Produce Business Records.** * * * *

COMMITTEE NOTES

Purpose of Revision. The purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice. The revision is based on experience with local rules. For ease of reference, subdivision (a) is divided into two subdivisions and the remaining subdivisions renumbered.

Subdivision (a). Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this

form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries.

Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.

As with the number of depositions authorized by Rule 30, leave to serve additional interrogatories is to be allowed when consistent with Rule 26(b)(2). The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device. In many cases it will be appropriate for the court to permit a larger number of interrogatories in the scheduling order entered under Rule 16(b).

Unless leave of court is obtained, interrogatories may not be served prior to the meeting of the parties under Rule 26(f).

When a case with outstanding interrogatories exceeding the number permitted by this rule is removed to federal court, the interrogating party must seek leave allowing the additional interrogatories, specify which twenty-five are to be answered, or resubmit interrogatories that comply with the rule. Moreover, under Rule 26(d), the time for response would be measured from the date of the parties' meeting under Rule 26(f). See Rule 81(c), providing that these rules govern procedures after removal.

Subdivision (b). A separate subdivision is made of the former second paragraph of subdivision (a). Language is added to paragraph (1) of this subdivision to emphasize the duty of the responding party to provide full answers to the extent not objectionable. If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products. Similarly, the fact that additional time may be needed to respond to some questions (or to some aspects of questions) should not justify a delay in responding to those questions (or other aspects of questions) that can be answered within the prescribed time.

Paragraph (4) is added to make clear that objections must be specifically justified, and that unstated or untimely grounds for objection ordinarily are waived. Note also the

provisions of revised Rule 26(b)(5), which require a responding party to indicate when it is withholding information under a claim of privilege or as trial preparation materials.

These provisions should be read in light of Rule 26(g), authorizing the court to impose sanctions on a party and attorney making an unfounded objection to an interrogatory.

Subdivisions (c) and (d). The provisions of former subdivisions (b) and (c) are renumbered.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

* * * *

(b) **Procedure.** ~~The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.~~ The request shall set forth, *either by individual item or by category,* the items to be inspected ~~either by individual item or by category~~, and describe each ~~item and category~~ 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, ~~except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a~~ *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.

* * * *

COMMITTEE NOTES

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery prior to the meeting of the parties required by Rule 26(f). Also, like a change made in Rule 33, the rule is modified to make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions.

When a case with outstanding requests for production is removed to federal court, the time for response would be measured from the date of the parties' meeting. See Rule 81(c), providing that these rules govern procedures after removal.

Rule 36. Requests for Admission

(a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)*(1)* set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. ~~The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.~~ *Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).*

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow *or as the parties may agree to in writing, subject to Rule 29*, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney~~, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant~~. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the

requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

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COMMITTEE NOTES

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery until after the meeting of the parties required by Rule 26(f).

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion For Order Compelling *Disclosure or* Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling *disclosure or* discovery as follows:

(1) Appropriate Court. An application for an order to a party ~~may~~ *shall* be made to the court in which the action is pending~~, or, on matters relating to a deposition, to the court in the district where the deposition is being taken~~. An application for an order to a ~~deponent~~ *person* who is not a party shall be made to the court in the district where the ~~deposition is being taken~~ *discovery is being, or is to be, taken*.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an

answer, or a designation, or an order compelling inspection in accordance with the request. *The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.* When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

~~If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).~~

(3) **Evasive or Incomplete** *Disclosure,* **Answer,** *or Response.* For purposes of this subdivision an evasive or incomplete *disclosure,* answer, *or response* is to be treated as a failure to *disclose,* answer, *or respond*.

(4) ~~Award of~~ Expenses ~~of Motion~~ *and Sanctions*.

(A) If the motion is granted *or if the disclosure or requested discovery is provided after the motion was filed*, the court shall, after *affording an* opportunity ~~for hearing,~~ *to be heard,* require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in ~~obtaining the order~~ *making the motion*, including attorney's fees, unless the court finds that the *motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the* ~~opposition to the motion~~ *opposing party's*

nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court *may enter any protective order authorized under Rule 26(c) and* shall, after *affording an* opportunity ~~for hearing,~~ *to be heard,* require the moving party or the attorney ~~advising~~ *filing* the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court *may enter any protective order authorized under Rule 26(c) and* may, *after affording an opportunity to be heard,* apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

* * * *

(c) ~~Expenses on~~ Failure to *Disclose; False or Misleading Disclosure; Refusal to* Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other

appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (~~1~~*A*) the request was held objectionable pursuant to Rule 36(a), or (~~2~~*B*) the admission sought was of no substantial importance, or (~~3~~*C*) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (~~4~~*D*) there was other good reason for the failure to admit.

(d) **Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and

among others it may take any action authorized under *sub*paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. *Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action.* In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has ~~applied a~~ *pending motion* for a protective order as provided by Rule 26(c).

* * * *

(g) **Failure to Participate in the Framing of a Discovery Plan.** If a party or a party's attorney fails to participate in the *development and submission* ~~framing of~~ a *proposed* discovery plan ~~by agreement~~ as ~~is~~ required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

COMMITTEE NOTES

Subdivision (a). This subdivision is revised to reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to answer particular interrogatories. Such a motion may be needed

when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

Language is included in the new paragraph and added to the subparagraph (B) that requires litigants to seek to resolve discovery disputes by informal means before filing a motion with the court. This requirement is based on successful experience with similar local rules of court promulgated pursuant to Rule 83.

The last sentence of paragraph (2) is moved into paragraph (4).

Under revised paragraph (3), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a).

Revised paragraph (4) is divided into three subparagraphs for ease of reference, and in each the phrase "after opportunity for hearing" is changed to "after affording an opportunity to be heard" to make clear that the court can consider such questions on written submissions as well as on oral hearings.

Subparagraph (A) is revised to cover the situation where information that should have been produced without a motion to compel is produced after the motion is filed but before it is brought on for hearing. The rule also is revised to provide that a party should not be awarded its expenses for filing a motion that could have been avoided by conferring with opposing counsel.

Subparagraph (C) is revised to include the provision that formerly was contained in subdivision (a)(2) and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Subdivision (c). The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).

Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.

Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions--such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure--that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

Subdivision (d). This subdivision is revised to require that, where a party fails to file any response to interrogatories or a Rule 34 request, the discovering party should informally seek to obtain such responses before filing a motion for sanctions.

The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d). If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing--the relief authorized under that rule depends on obtaining the court's order to that effect.

Subdivision (g). This subdivision is modified to conform to the revision of Rule 26(f).

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

(a) **Judgment as a Matter of Law.**

(1) If during a trial by jury a party has been fully heard *on* ~~with respect to~~ an issue and there is no legally sufficient evidentiary basis for a reasonable jury to ~~have found~~ *find* for that party *on* ~~with respect to~~ that issue, the court may *determine the issue against that party and may* grant a motion for judgment as a matter of law against that party ~~on any~~ *with respect to a* claim~~, counterclaim, cross-claim, or third-party claim~~ *or defense* that cannot under the controlling law be maintained *or defeated* without a favorable finding on that issue.

* * * *

* * * *

COMMITTEE NOTES

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, which, as indicated in the Notes, was not intended to change the existing standards under which "directed verdicts" could be granted. This amendment makes clear that judgments as a matter of law in jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

Rule 52. Findings by the Court; Judgment on Partial Findings

* * * *

(c) **Judgment on Partial Findings.** If during a trial without a jury a party has been fully heard *on* ~~with respect to~~ an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party ~~on any~~ *with respect to a* claim~~, counterclaim, cross-claim, or third-party claim~~ *or defense* that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

COMMITTEE NOTES

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, similar to the revision being made to Rule 50. This amendment makes clear that judgments as a matter of law in nonjury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

Rule 54. Judgments; Costs

* * * *

(d) Costs; *Attorneys' Fees*.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs *other than attorneys' fees* shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. *Such c*~~C~~osts may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance

with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document as provided in Rule 58.

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.

COMMITTEE NOTES

Subdivision (d). This revision adds paragraph (2) to this subdivision to provide for a frequently recurring form of litigation not initially contemplated by the rules--disputes over the amount of attorneys' fees to be awarded in the large number of actions in which prevailing parties may be entitled to such awards or in which the court must determine a fees to be paid from a common fund. This revision seeks to harmonize and clarify procedures that have been developed through case law and local rules.

Paragraph (1). Former subdivision (d), providing for taxation of costs by the clerk, is renumbered as paragraph (1) and revised to exclude applications for attorneys' fees.

Paragraph (2). This new paragraph establishes a procedure for presenting claims for attorneys' fees, whether or not denominated as "costs." It applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees. Cf. West Virginia Univ. Hosp. v. Casey, ___ U.S. ___ (1991), holding, prior to the Civil Rights Act of 1991, that expert witness fees were not recoverable

under 42 U.S.C. § 1988. As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Nor, as provided in subparagraph (E), does it apply to awards of fees as sanctions authorized or mandated under these rules or under 28 U.S.C. § 1927.

Subparagraph (B) provides a deadline for motions for attorneys' fees--14 days after final judgment unless the court or a statute specifies some other time. One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. Prior law did not prescribe any specific time limit on claims for attorneys' fees. White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982). In many nonjury cases the court will want to consider attorneys' fee issues immediately after rendering its judgment on the merits of the case. Note that the time for making claims is specifically stated in some legislation, such as the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B) (30-day filing period).

Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. It also enables the court in appropriate circumstances to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case.

Filing a motion for fees under this subdivision does not affect the finality or the appealability of a judgment, though revised Rule 58 provides a mechanism by which prior to appeal the court can suspend the finality to resolve a motion for fees. If an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court under subdivision (d)(2)(B) may effectively extend the period by permitting claims to be filed after resolution of the appeal. A new period for filing will automatically begin if a new judgment is entered following a reversal or remand by the appellate court or the granting of a motion under Rule 59.

The rule does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees. This material must of course be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees and the amount of such fees (or a fair estimate).

If directed by the court, the moving party is also required to disclose any fee agreement, including those between attorney and client, between attorneys sharing a fee to be awarded, and between adversaries made in partial settlement of a dispute where the settlement must be implemented by court action as may be required by Rules 23(e) and 23.1 or other like provisions. With respect to the fee arrangements requiring court approval, the court may also by local rule require disclosure immediately after such arrangements are

agreed to. E.g., Rule 5 of United States District Court for the Eastern District of New York; cf. In re "Agent Orange" Product Liability Litigation (MDL 381), 611 F. Supp. 1452, 1464 (E.D.N.Y. 1985).

In the settlement of class actions resulting in a common fund from which fees will be sought, courts frequently have required that claims for fees be presented in advance of hearings to consider approval of the proposed settlement. The rule does not affect this practice, as it permits the court to require submissions of fee claims in advance of entry of judgment.

Subparagraph (C) assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services. In some cases, an evidentiary hearing may be needed, but this is not required in every case. The amount of time to be allowed for the preparation of submissions both in support of and in opposition to awards should be tailored to the particular case.

The court is explicitly authorized to make a determination of the liability for fees before receiving submissions by the parties bearing on the amount of an award. This option may be appropriate in actions in which the liability issue is doubtful and the evaluation issues are numerous and complex.

The court may order disclosure of additional information, such as that bearing on prevailing local rates or on the appropriateness of particular services for which compensation is sought.

On rare occasion, the court may determine that discovery under Rules 26-37 would be useful to the parties. Compare Rules Governing Section 2254 Cases in the U.S. District Courts, Rule 6. See Note, Determining the Reasonableness of Attorneys' Fees--the Discoverability of Billing Records, 64 B.U.L. Rev. 241 (1984). In complex fee disputes, the court may use case management techniques to limit the scope of the dispute or to facilitate the settlement of fee award disputes.

Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to review in the court of appeals. To facilitate review, the paragraph provides that the court set forth its findings and conclusions as under Rule 52(a), though in most cases this explanation could be quite brief.

Subparagraph (D) explicitly authorizes the court to establish procedures facilitating the efficient and fair resolution of fee claims. A local rule, for example, might call for matters to be presented through affidavits, or might provide for issuance of proposed findings by the court, which would be treated as accepted by the parties unless objected to within a specified time. A court might also consider establishing a schedule reflecting customary fees or factors affecting fees within the community, as implicitly suggested by Justice O'Conner in Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 733 (1987) (O'Conner, J., concurring) (how particular markets compensate for contingency). Cf. Thompson v. Kennickell, 710 F. Supp. 1 (D.D.C. 1989) (use of findings in other cases to promote

consistency). The parties, of course, should be permitted to show that in the circumstances of the case such a schedule should not be applied or that different hourly rates would be appropriate.

The rule also explicitly permits, without need for a local rule, the court to refer issues regarding the amount of a fee award in a particular case to a master under Rule 53. The district judge may designate a magistrate judge to act as a master for this purpose or may refer a motion for attorneys' fees to a magistrate judge for proposed findings and recommendations under Rule 72(b). This authorization eliminates any controversy as to whether such references are permitted under Rule 53(b) as "matters of account and of difficult computation of damages" and whether motions for attorneys' fees can be treated as the equivalent of a dispositive pretrial matter that can be referred to a magistrate judge. For consistency and efficiency, all such matters might be referred to the same magistrate judge.

Subparagraph (E) excludes from this rule the award of fees as sanctions under these rules or under 28 U.S.C. § 1927.

Rule 56. Summary Judgment

(a) ~~For Claimant~~*Of Claims, Defenses, and Issues*. ~~A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.~~ *The court without a trial may enter summary judgment for or against a claimant with respect to a claim, counterclaim, cross-claim, or third-party claim, may summarily determine a defense, or may summarily determine an issue substantially affecting but not wholly dispositive of a claim or defense if summary adjudication as to the claim, defense, or issue is warranted as a matter of law because of facts not genuinely in dispute. In its order, or by separate opinion, the court shall recite the law and facts on which the summary adjudication is based.*

~~(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~

(b) Facts Not Genuinely in Dispute. A fact is not genuinely in dispute if it is stipulated or admitted by the parties who may be adversely affected thereby or if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50.

(c) Motion and Proceedings Thereon. ~~The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.~~ *A party may move for summary adjudication at any time after the parties to be affected have made an appearance in the case and have had a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control. Within 30 days after the motion is served, any other party may serve and file a response.*

(1) Without argument, the motion shall (A) describe the claims, defenses, or issues as to which summary adjudication is warranted, specifying the judgment or determination sought; and (B) recite in separately numbered paragraphs the specific facts asserted to be not genuinely in dispute and on the basis of which the judgment or determination should be granted, citing the particular pages or paragraphs of stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting those assertions.

(2) Without argument, a response shall (A) state the extent, if any, to which the party agrees that summary adjudication is warranted, specifying the judgment or determination that should be entered; (B) indicate the extent to which the asserted facts recited in the motion are claimed to be false or in genuine dispute, citing the

particular pages or paragraphs of any stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting that contention; and (C) recite in separately numbered paragraphs any additional facts that preclude summary adjudication, citing the materials evidencing those facts. To the extent a party does not timely comply with clause (B) in challenging an asserted fact, it may be treated as having admitted that fact.

(3) If a motion for summary adjudication or response is based to any extent on depositions, interrogatory answers, documents, affidavits, or other materials that have not been previously filed, the party shall append to its motion or response the pertinent portions of such materials. Only with leave of court may a party moving for summary adjudication supplement its supporting materials.

(4) Arguments supporting a party's contentions as to the controlling law or the evidence respecting asserted facts shall be submitted by a separate memorandum at the time the party files its motion or response or at such other times as the court may permit or direct.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court ~~at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon~~ *may enter* ~~make~~ an order specifying *the controlling law or the* facts that ~~appear without substantial controversy~~ *are not genuinely in dispute*, including the extent to which liability or the amount of damages

or other relief is not ~~in controversy~~ *a dispute for trial*, and directing such further proceedings in the action as are just. ~~Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.~~ *Unless the order is modified by the court for good cause, the trial shall be conducted in accordance with the law so specified and by treating the facts so specified as established. An order that does not adjudicate all claims with respect to all parties may be entered as a final judgment to the extent permitted by Rule 54(b).*

(e) ~~Form of Affidavits; Further Testimony; Defense Required~~*Matters to Be Considered*. ~~Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.~~

(1) Subject to paragraph (2), the court, in deciding whether an asserted fact is genuinely in dispute, shall consider stipulations, admissions, and, to the extent filed, the following: (A) depositions, interrogatory answers, and affidavits to the

extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it affirmatively shows that the affiant would be competent to testify to the matters stated therein; and (B) documentary evidence to the extent such evidence would, if authenticated and shown to be an accurate copy of original documents, be admissible at trial in the light of other evidence. A party may rely upon its own pleadings, even if verified, only to the extent of allegations therein that are admitted by other parties.

(2) The court is required to consider only those evidentiary materials called to its attention pursuant to subdivision (c)(1) or (c)(2).

(f) When *Evidence* ~~Affidavits are~~ Unavailable. Should it appear from the affidavits of a party opposing ~~the~~ *a* motion *for summary adjudication* that the party cannot for ~~reasons stated present by affidavit facts essential to justify the party's opposition~~ *good cause shown present materials needed to support that opposition*, the court may ~~refuse the application for judgment or~~ *deny the motion, may permit an offer of proof,* may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

(g) ~~Affidavits Made in Bad Faith~~*Conduct of Proceedings*. ~~Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be~~

~~adjudged guilty of contempt.~~ *The court (1) may specify the period for filing motions for summary adjudication with respect to particular claims, defenses, or issues; (2) may enlarge or shorten the time for responding to motions for summary adjudication, after considering the opportunity for discovery and the time reasonably needed to obtain or submit pertinent materials; (3) may on its own initiative direct the parties to show cause within a reasonable period why summary adjudication based on specified facts should not be entered; and (4) may conduct a hearing to consider further arguments, rule on the admissibility of evidence, or receive oral testimony to clarify whether an asserted fact is genuinely in dispute.*

COMMITTEE NOTES

Purpose of Revision. This revision is intended to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that, considering the evidence to be presented and received at trial, can have but one outcome--while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters.

The current caption, "Summary Judgment," is retained. However, the revised rule, like the former rule, also covers decisions that, by resolving only defenses or issues not dispositive of a claim, are more properly viewed as "summary determinations." The text of the revised rule adds language to clarify that it applies to both types of "summary adjudications."

In various parts, the revision (1) eliminates ambiguities and inconsistencies within the rule; (2) expresses a single and consistent standard, as has been developed through case law, for determining when summary adjudication is permitted; (3) establishes national procedures to facilitate fair consideration of motions for summary adjudication, with the purpose of eliminating the need for local rules on this subject; and (4) addresses various gaps in the rule that have sometimes frustrated its intended purposes.

Subdivision (a). This subdivision combines the provisions previously contained in subdivisions (a) and (b). It adds third-party claims to the list of claims subject to disposition by summary judgment, but deletes (as surplusage) the specific reference to declaratory judgments. The former provisions allowed motions for "summary judgment" as to "any part" of a claim; the revision permits summary determination of an "issue substantially affecting but not wholly dispositive" of a claim or defense--the point being that motions affecting only part of a claim or defense should not be filed unless summary adjudication would have some

significant impact on discovery, trial, or settlement.

The revised language makes clear at the outset of the rule that summary adjudication--whether as summary judgment or as a summary determination of a defense or issue--is permissible only when warranted as a matter of law, and not when it would involve deciding genuine factual disputes. When so warranted, the judgment or determination may be entered as to all affected parties, not just those who may have filed the motion or responses. When the court has concluded as the result of one motion that certain facts are not genuinely in dispute, there is no reason to require additional motions by or with respect to other parties who have had the opportunity to support or oppose that motion and whose rights depend on those same facts.

When these standards are met, the court should ordinarily enter the appropriate summary disposition. However, the court is not always required to enter a summary adjudication that would be permissible under the rule. Despite the apparently mandatory language of the former rule, case law has recognized a measure of discretion in the trial court to deny summary judgments in a variety of circumstances. See 10A Wright, Miller & Kane, Federal Practice and Procedure § 2728 (1983). The purpose of the revision is not to discourage summary judgment, but to bring the language of the rule into conformity with this practice.

The extent of this discretion to deny summary adjudication is affected by many factors and will vary from case to case. The court has broad discretion to reject summary resolution of non-dispositive issues or defenses that will not significantly affect the scope of discovery, the potential for settlement, or the length and complexity of trial. The court has less discretion when the requested summary judgment would resolve all claims made by or against a party. And there are some situations in which, typically because of substantive policies, the court may have little or no discretion to deny summary adjudication that satisfies the standards of this rule. For example, persons protected by official or qualified immunity are to be relieved from the burdens of trial and pretrial proceedings as soon as such defenses can be fairly established, and a denial of summary judgment in such cases is immediately appealable under current law. See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985) (denial of qualified immunity defense). Similar policies with respect to certain First Amendment issues may also effectively preclude the court from justifying its denial of summary judgment as an exercise of discretion.

The court is directed to indicate the factual and legal basis if it grants summary judgment or summarily determines a defense or issue. A lengthy recital is not required, but a brief explanation is needed to inform the parties (and potentially an appellate court) what are the critical facts not in genuine dispute, on the basis of which summary adjudication is appropriate. An opinion should also be prepared if the court's denial of summary judgment would be immediately appealable, as when denying the qualified immunity defense. The determination that a fact is or is not in genuine dispute is, when reviewed on appeal, treated as a question of law.

Subdivision (b). The standards stated in this subdivision for determining whether a

fact is genuinely in dispute are essentially those developed over time, culminating in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). While no change in these standards is intended by the revision, the rule clarifies that the obligation to consider only matters potentially admissible at trial applies not just to affidavits, but also to other evidentiary materials submitted in support of or opposition to summary adjudication. The rule adopts the standard prescribed in revised Rule 50 for judgments as a matter of law (formerly known as directed verdicts) in jury trials to emphasize that, even in nonjury cases, the court is not permitted under Rule 56 to make credibility choices among conflicting items of evidence about which reasonable persons might disagree.

Subdivision (c). Revised subdivision (c) provides a structure for presentation and consideration of motions for summary adjudication, and should displace in large part the numerous local rules spawned by deficiencies in the former rule. Adoption of this structure is not intended to create procedural pitfalls to deprive parties of trial with respect to facts in genuine dispute, but rather to provide a framework enabling the courts to discharge more effectively their responsibility in deciding whether such controversies exist.

A primary benefit of summary adjudication is elimination of ultimately wasteful discovery and other preparation for trial. For this reason, early filing of a motion for summary adjudication may be desirable in many cases. However, if a party will need evidence from other persons in order to show that a fact is in genuine dispute, it should have a reasonable opportunity for discovery respecting those matters before being confronted with a motion for summary judgment or summary determination. It should also have a sufficient time--ordinarily more than the 10 days specified in the prior rule--to marshal and present its evidentiary materials to the court. The times specified in the revised rule for filing motions for summary adjudication and responses to such motions incorporate these principles.

Paragraphs (1) and (2) prescribe a format for motions for summary adjudication and responses thereto. They are to be non-argumentative, for arguments are to be presented in separate memorandums under paragraph (4). They must be specific, particularly with respect to the facts asserted to be not in genuine dispute. They must provide a reference to the specific portions of any evidentiary materials relied upon to support a contention that a fact is or is not in genuine dispute; failure to do so will, under revised subdivision (e), relieve the court of the obligation to consider such materials.

Pertinent portions of evidentiary materials not previously filed or subject to judicial notice must be attached to the motion or response. As under the prior rule, a movant must obtain leave of court to supplement its supporting materials because late filing may prejudice other parties or merit an extension of time for responses. The requirement to obtain leave of court applies only to evidentiary materials, and not to supplemental or reply memorandums and arguments filed under paragraph (4).

The requirement that motions for summary adjudication contain cross-references to evidentiary materials and be accompanied by pertinent portions of such materials not

previously filed is not directly applicable when the movant contends that there is no admissible evidence to support a fact as to which another party has the burden of proof. In such situations the motion should recite and, to the extent feasible demonstrate, that there is no such evidentiary support for that fact, and the opposing parties will have the obligation to show in their responses the existence of such evidence.

A response to a motion for summary adjudication--formally recognized for the first time in this revision--can be filed by any party and can take several forms. In multiple-party cases a party similarly situated to the movant may merely wish to adopt the position of the movant in its response. The parties to be adversely affected by the judgment or determination sought in the motion may agree that the asserted facts, or some of them, are true but claim that, because of a different view regarding the controlling law, summary judgment or summary determination in their favor is warranted. Frequently, of course, the parties to be adversely affected by the judgment or determination sought in the motion will oppose the grant of any summary adjudication, either because of a different view of the law or because some of the asserted facts are believed to be false or at least in genuine dispute or because there are additional facts rendering the asserted facts not dispositive of the claim, defense, or issue. Subdivision (c)(2) is written to accommodate any of these possibilities. Of course, a party may also file a separate cross motion for summary adjudication if there are other facts asserted to be not in genuine dispute on the basis of which it is entitled to a favorable judgment or determination as a matter of law.

A party is not required to file a response to a summary adjudication motion. The failure to make a timely response, however, may be deemed an admission of the asserted facts specified in the motion (though not an admission as to the controlling law). If it contests an asserted fact specified in the motion either because it is false or at least in genuine dispute, the party must file a timely response that indicates the extent of disagreement with the movant's statement of the fact and provides reference to any evidentiary materials supporting its position not cited by the moving party. Failure to do so may result in the fact being deemed admitted for purposes of the pending action. As under Rule 36, if only a portion of an asserted fact (or the precise wording of the fact) is denied, the responding party must indicate the nature of the disagreement.

The substance of the last sentence of former subdivision (c), relating to partial summary judgments on issues of liability, has been incorporated into the revision of subdivision (d).

Subdivision (d). The revision provides that, when a court denies summary adjudication in the form sought by a movant, it may--but is no longer required to--enter an order specifying which facts are without genuine dispute and accordingly are thereafter to be treated as established. The revision also permits a court to enter rulings as to legal propositions to control further proceedings, subject to its power to modify the ruling for good cause. Finally, the revision makes explicit that "partial summary judgments" may be entered as final judgments to the extent permitted by Rule 54(b). Although not explicitly addressed in the rule, denial of summary adjudication (or granting of partial summary judgment) is ordinarily an interlocutory order not subject to the law-of-the-case doctrine;

and the court is not precluded from reconsidering its ruling or considering a new motion, as may be appropriate because of developments in the case or changes of law. The rule is not intended to alter case law that permits immediate appeal of the denial of summary judgment in limited circumstances. See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985) (denial of qualified immunity defense).

Confusion was caused by the reference in the former provisions to a "hearing on the motion." While oral argument on a motion for summary adjudication is often desirable--and is explicitly authorized in subdivision (g)(4)--the court is not precluded from considering such motions solely on the basis of written submissions.

Subdivision (e). Implementing the principle stated in subdivision (b) that the court should consider (in addition to facts stipulated or admitted) only matters that would be admissible at trial, this subdivision prescribes rules for determining the potential admissibility of materials submitted in support of or opposition to summary adjudication. Facts are admitted for purposes of Rule 56 not only as provided in Rule 36, but also if stated, acknowledged, or conceded by a party in pleadings, motions, or briefs, or in statements when appearing before the court, as during a conference under Rule 16.

The admissibility of depositions, answers to interrogatories, and affidavits should be determined as if the deponent, person answering interrogatories, or affiant were testifying in person, with the proviso that an affidavit must affirmatively show that the affiant would be competent (e.g., have personal knowledge) to testify. For purposes of Rule 56 a declaration under penalty of perjury signed in the manner authorized by 28 U.S.C. § 1746 should be treated the same as a notarized affidavit.

Independent authentication of documentary evidence is not required--submission of the materials under the rule should be treated as sufficient authentication. Similarly, independent evidence that the materials submitted are accurate copies of the originals is not required. However, if other evidence would be required at trial to establish admissibility--such as the foundation for business records--the party presenting such records should provide the supporting evidence through deposition, interrogatory answers, or affidavits. As permitted under Rule 1006 of the Federal Rules of Evidence, voluminous data should be submitted by means of an affidavit summarizing the data and offering, if not previously provided, access to the underlying data.

Subdivision (e)(2) provides that the court is required to consider only the materials called to its attention by the parties. Subdivisions (c)(1) and (c)(2) impose a duty on the litigants to identify support for their contentions regarding the evidence; this provision prevents a party from identifying a potential conflict in evidence for the first time on appeal. The failure of a movant to provide such references would justify denial of the motion.

Subdivision (f). Extensions of time to oppose summary adjudication should be less frequent than under the former rule because of new restrictions as to when such motions can be filed and the longer time allowed for the response. A request should be presented by an affidavit which, under the revised rule, must reflect good cause for the inability to

comply with the stated time requirements. The revised rule also permits the court to accept an offer of proof where a party shows in its affidavit that it is currently unable to procure supporting materials in a form that would satisfy the requirements of subdivision (e).

Subdivision (g). The new provisions of subdivision (g) give explicit recognition to powers of the court in conducting proceedings to resolve motions under Rule 56 that were probably implicit prior to the revision.

Subdivision (g)(1) recognizes the power of the court to fix schedules for the filing of motions for summary adjudication. At a scheduling conference the court may wish to consider establishing such a schedule to preclude premature or tardy motions and to focus early discovery on potentially dispositive matters.

Subdivision (g)(2) recognizes the court's power to change the time within which parties may respond to motions for summary judgment or summary determinations. Depending on the circumstances, particularly the extent to which discovery has or has not been afforded or available, the extent to which the facts have been stipulated or admitted, and the imminence of trial, the 30-day period prescribed in subdivision (c) may be lengthened or shortened.

Subdivision (g)(3) permits the court to initiate an inquiry into the appropriateness of summary adjudication. Such an inquiry may be initiated in an order setting a conference under Rule 16 or might arise as a result of discussions during such a conference. In any event, the parties must be afforded a reasonable opportunity to marshal and submit evidentiary materials if they assert facts are in genuine dispute and to present legal arguments bearing on the appropriateness of summary adjudication.

Subdivision (g)(4) addresses the power of the court to conduct hearings relating to summary adjudications. One such purpose would be to hear oral arguments supplementing the written submissions. Another would be to make determinations under Federal Rule of Evidence 104(a) regarding the admissibility of materials submitted on a Rule 56 motion. A third purpose would be to hear testimony, as under Rule 43(e), to clarify ambiguities in the submitted materials--for example, to clarify inconsistencies within a person's deposition or between an affidavit and the affiant's deposition testimony. In such circumstances, the evidentiary hearing is held not to allow credibility choices between conflicting evidence but simply to determine just what the person's testimony is. Explicit authorization for this type of evidentiary hearing is not intended to supplant the court's power to schedule separate trials under Rule 42(b) on issues that involve credibility and weight of evidence.

The former provisions of subdivision (g), providing sanctions when "affidavits . . . are presented in bad faith or solely for the purpose of delay," have been eliminated as unnecessary in view of the amendments to Rule 11. The provisions of revised Rule 11 apply not only to affidavits but also to motions, responses, briefs, and other supporting materials submitted under Rule 56. Motions for summary adjudication should not be filed merely to "educate" the court or as a discovery device intended to flush out the evidence of an opposing party.

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed ~~for the taxing of costs~~, *nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59*. Attorneys shall not submit forms of judgment except upon the direction of the court, and these directions shall not be given as a matter of course.

COMMITTEE NOTES

Ordinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment. See Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988). Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision permits, but does not require, the court to delay the finality of the judgment for appellate purposes until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal

becomes effective for appellate purposes. If the order is entered, the motion for attorney's fees is treated in the same manner as a timely motion under Rule 59.

Rule 71A. Condemnation Of Property

* * * *

(d) **Process.**

* * * *

(3) **Service of Notice.**

(~~i~~*A*) **Personal service.** Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4~~(e) and (d)~~ upon a defendant *whose residence is known and* who resides within the United States or ~~its territories or insular possessions and whose residence is known~~ *a territory subject to the administrative or judicial jurisdiction of the United States*.

(~~ii~~*B*) **Service by Publication.** * * * *

(4) **Return; Amendment.** Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4~~(g) and (h)~~.

* * * *

COMMITTEE NOTES

The references to the subdivisions of Rule 4 are deleted in light of the revision of that rule.

Rule 83. Rules by District Courts; *Orders*

(a) Local Rules. Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice ~~not in~~consistent with *Acts of Congress and consistent with, but not duplicative of,* ~~these~~ rules *adopted under 28 U.S.C. §§ 2072 and 2075*. A local rule so adopted shall *conform to any uniform numbering system prescribed by the Judicial Conference of the United States and shall* take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(b) Experimental Rules. With the approval of the Judicial Conference of the United States, a district court may adopt an experimental local rule inconsistent with rules adopted under 28 U.S.C. §§ 2072 and 2075 if it is otherwise consistent with Acts of Congress and is limited in its period of effectiveness to five years or less.

(c) Orders. In all cases not provided for by rule, the district judges and magistrates *judges* may regulate their practice in any manner ~~not in~~consistent with *Acts of Congress, with* ~~these~~ rules ~~or~~ *adopted under 28 U.S.C. §§ 2072 and 2075, and with local rules* ~~those~~ of the district in which they act.

(d) Enforcement. Rules and orders pursuant to this rule shall be enforced in a manner that protects all parties against forfeiture of rights as a result of negligent failure to comply with a requirement of form imposed by such a local rule or order.

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (b). Should this limited authorization for adoption of rules inconsistent with national rules without Supreme Court and Congressional approval be rejected, the Committee nevertheless recommends adoption of the balance of the rule, with subdivisions (c) and (d) being renumbered. The Committee Notes would be revised to eliminate references to experimental rules.

Purpose of Revision. A major goal of the Rules Enabling Act was to achieve national uniformity in the procedures employed in federal courts. The primary purpose of this revision is to encourage district courts to consider with special care the possibility of conflict between their local rules and practices and the nationally-promulgated rules. At various places within these rules (e.g., Rule 16), district courts are specifically authorized, if not encouraged, to adopt local rules to implement the purposes of Rule 1 in the light of local conditions. The omission of a similar explicit authorization in other rules should not be viewed as precluding by implication the adoption of other local rules subject to the constraints of this Rule 83.

Subdivision (a). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071 and also provides that local district court rules should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. Particularly in light of statutory and rules changes that may encourage experimentation through local rules as to such matters as disclosure requirements and limitations on discovery, it is important that, to facilitate awareness within a bar that is increasingly national in scope, these rules be numbered or identified in conformity with any uniform system for such rules that may be prescribed from time to time by the Judicial Conference. Revised Rule 83(a) prohibits local rules that are merely duplicative or a restatement of national rules; this restriction is designed to prevent possible conflicting interpretations arising from minor inconsistencies between the wording of national and local rules, as well as to lessen the risk that significant local practices may be overlooked by inclusion in local rules that are unnecessarily long.

Subdivision (b). This subdivision is new. Its aim is to enable experimentation by district courts with variants on these rules to better achieve the objectives expressed in Rule 1. District courts in recent years have experimented usefully with court-annexed arbitration and are now encouraged by the Judicial Improvements Act of 1990 to find new methods of resolving disputes with dispatch and reduced costs. These rules need not be an impediment to the search for new methods provided that the experimentation is suitably monitored as a learning opportunity.

Experimentation with local rules inconsistent with the national rules should be permitted only with approval of the Judicial Conference of the United States, and then only

for a limited period of time and if not contrary to applicable statutes. It is anticipated that any request would be accompanied by a plan for evaluation of the experiment and that the requests for approval of experimental rules would be reviewed by the Standing Committee on Rules of Practice and Procedure before submission to the Judicial Conference.

Subdivision (c). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071, and also provides that a judge's orders should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. The rule continues to authorize--without encouraging--individual judges to enter orders that establish standard procedures in cases assigned to them (e.g., through a "standing order") if the procedures are consistent with these rules and with any local rules. In such circumstances, however, it is important to assure that litigants are adequately informed about any such requirements or expectations, as by providing them with a copy of the procedures.

Subdivision (d). This provision is new. Its aim is to protect against loss of rights in the enforcement of local rules and standing orders against by who may be unfamiliar with their provisions.

Local rules and standing orders have become quite voluminous in some courts. Even diligent counsel can on occasion fail to learn of an applicable rule or order. In such circumstances, the court must be careful to protect the interests of the parties. Elaborate local rules enforced so rigorously as to sacrifice the merits of the claims and defenses of litigants may be unjust.

Moreover, the Federal Rules of Civil Procedure are often forgiving of inadvertent lapses of counsel. In part, this reflects the policy of the Rules Enabling Act, 28 U.S.C. § 2071, which aims to establish a uniform national procedure familiar to attorneys in all districts. That policy might be endangered by proliferation of local rules and standing orders enforced so rigorously that attorneys might be reluctant to hazard an appearance or parties might be reluctant to proceed without local counsel fully familiar with the intricacies of local practice. Cf. Kinder v. Carson, 127 F.R.D. 543 (S.D. Fla. 1989).

This constraint on the enforcement of local directives poses no problem for court administration, for useful and effective local rules and standing orders can be enforced with appropriate caution to counsel or by means that do not impair the rights of the parties.

Rule 84. Forms; *Technical Amendments*

(a) Forms. The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate. *The Judicial Conference of the United States may authorize additional forms and may revise or delete forms.*

(b) Technical Amendments. The Judicial Conference of the United States may amend these rules or the explanatory notes to correct errors in grammar, spelling, cross-references, or typography, and to make other similar technical changes of form or style.

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to these changes, which would eliminate the requirement of Supreme Court and Congressional approval in the limited circumstances indicated. The changes in subdivisions (a) and (b) are severable from each other, and from other proposed amendments to the rules.

The revision contained in subdivision (a) is intended to relieve the Supreme Court and Congress from the burden of reviewing changes in the forms prescribed for use in civil cases, which, by the terms of the rule, are merely illustrative and not mandatory. Rule 9009 of the Federal Rules of Bankruptcy Procedure similarly permits the adoption and revision of bankruptcy forms without need for review by the Supreme Court and Congress.

Similarly, the addition of subdivision (b) will enable the Judicial Conference, acting through its established procedures and after consideration by the appropriate Committees, to make technical amendments to these rules without having to burden the Supreme Court and Congress with such changes. This delegation of authority, not unlike that given to Code Commissions with respect to legislation, will lessen the delay and administrative burdens that can unnecessarily encumber the rule-making process on non-controversial non-substantive matters, at the risk of diverting attention from items meriting more detailed study and consideration. As examples of situations where this authority would have been useful, one might cite the numerous amendments that were required to make the rules "gender-neutral," section 11(a) of P.L. 102-198 (correcting a cross-reference contained in the 1991 revision of Rule 15), and the various changes contained in the current proposals in recognition of the new title of "Magistrate Judge" pursuant to a statutory change.

APPENDIX OF FORMS

Form 1A. Notice of Lawsuit and Request for Waiver of Service of Summons

TO: _____(A)_____
[as _____(B)_____ of _____(C)_____]

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the_____(D)_____ and has been assigned docket number _____(E)_____.

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within _(F)_ days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, as authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth on the reverse side (or at the foot) of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this ____ day of _____, _____.

_____
Signature of Plaintiff's Attorney or Unrepresented Plaintiff

Notes:
A--Name of individual defendant (or name of officer or agent of corporate defendant)
B--Title, or other relationship of individual to corporate defendant
C--Name of corporate defendant, if any
D--District
E--Docket number of action
F--Addressee must be given at least 30 days (60 days if located in foreign country) in which to return waiver

Form 1B. Waiver of Service of Summons

TO: _____(name of plaintiff's attorney or unrepresented plaintiff)_____

I acknowledge receipt of your request that I waive service of a summons in the action of _____(caption of action)_____, which is case number _(docket number)_ in the United States District Court for the _____(district)_____. I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after _(date request was sent)_, or within 90 days after that date if the request was sent outside the United States.

Date: _____

_____
Signature
Printed/typed name: _____
[as _____
of _____]

To be printed on reverse side of the waiver form or set forth at the foot of the form:

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant who, after being notified of an action and asked to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

COMMITTEE NOTES

Forms 1A and 1B reflect the revision of Rule 4. They replace Form 18-A.

Form 18-A. [Abrogated]

COMMITTEE NOTES

This form is superseded by Forms 1A and 1B in view of the revision of Rule 4.

Form 35. Report of Parties' Planning Meeting

[Caption and Names of Parties]

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on (date) at (place) and was attended by:
(name) on behalf of plaintiff(s)
(name) on behalf of defendant(s) (party name)
(name) on behalf of defendant(s) (party name)

2. **Pre-Discovery Disclosures.** The parties [have exchanged] [will exchange by (date)] the information required by [Fed. R. Civ. P. 26(a)(1)] [local rule ___].

3. **Discovery Plan.** The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed)
All discovery commenced in time to be completed by (date). [Discovery on (issue for early discovery) to be completed by (date).]
Maximum of ___ interrogatories by each party to any other party. [Responses due ___ days after service.]
Maximum of ___ requests for admission by each party to any other party. [Responses due ___ days after service.]
Maximum of ___ depositions by plaintiff(s) and ___ by defendant(s).
Each deposition [other than of _____] limited to maximum of ___ hours unless extended by agreement of parties.
Reports from retained experts under Rule 26(a)(2) due:
from plaintiff(s) by (date)
from defendant(s) by (date).
Supplementations under Rule 26(e) due [time(s) or interval(s)].

4. **Other Items.** [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

The parties [request] [do not request] a conference with the court before entry of the scheduling order.
The parties request a pretrial conference in (month and year).
Plaintiff(s) should be allowed until (date) to join additional parties and until (date) to amend the pleadings.
Defendant(s) should be allowed until (date) to join additional parties and until (date) to amend the pleadings.
All potentially dispositive motions should be filed by (date).
Settlement [is likely] [is unlikely] [cannot be evaluated prior to (date)] [may be enhanced by use of the following alternative dispute resolution

procedure: _____].

Final lists of witnesses and exhibits under Rule 26(a)(3) should be due
from plaintiff(s) by ____(date)____
from defendant(s) by ____(date)____

Parties should have ___ days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).

The case should be ready for trial by ___(date)___ [and at this time is expected to take approximately ___(length of time)___].

[Other matters.]

Date: _____

COMMITTEE NOTES

This form illustrates the type of report the parties are expected to submit to the court under revised Rule 26(f) and may be useful as a checklist of items to be discussed at the meeting.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 702. Testimony by Experts

~~If~~ *Testimony providing* scientific, technical, or other specialized ~~knowledge~~ *information, in the form of an opinion or otherwise, may be received if (1) it is reasonably reliable and* will *if credited, substantially* assist the trier of fact to understand the evidence or to determine a fact in issue~~,~~ *and (2) the* witness *is* qualified as an expert *with respect thereto* by knowledge, skill, experience, training, or education~~, may testify thereto in the form of an opinion or otherwise~~. *Except with leave of court for good cause shown, the witness shall not testify on direct examination in any civil action to any opinion or inference, or reason or basis therefor, that has not been disclosed as required by Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure.*

COMMITTEE NOTES

The use of opinion testimony on technical subjects has increased greatly since enactment of the Federal Rules of Evidence. This result was intended by the drafters of the rules, who were responding to concerns that the restraints previously imposed on expert testimony were artificial and an impediment to the illumination of technical issues in dispute. See, e.g., McCormick on Evidence § 203 (3d ed. 1984).

Nevertheless, while much expert testimony now presented is useful, much is not. Virtually all is expensive, if not to the proponent then to adversaries. Particularly in civil litigation with high financial stakes, large expenditures for marginally useful expert testimony have become commonplace, with the procurement of expert testimony occasionally used as a trial technique to wear down adversaries. Although testimony from experts may be desirable if not crucial in many cases, excesses can hardly be doubted and there are significant problems regarding the reliability of much of this evidence. See Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, 69 B. U. L. Rev. 487 (1989); Kreitling, Scientific Evidence: Toward Providing the Lay Trier with the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence, 32 Ariz. L. Rev. 915 (1990).

Concern about the quality and even integrity of hired testimony is not new. Winans v. New York & Erie R.R., 62 U.S. 88, 101 (1859); Hand, Historical and Practical

Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40 (1901). However, as the number of cases involving technical issues and the number of forensic experts seeking employment have increased, so has the potential for "junk science" and for other untrustworthy opinion testimony that is more likely to confuse or mislead a jury than to be of assistance. Some screening by the trial judge of this testimony--which involves more than merely the abstract "qualification" of the witness as an expert--will help to assure the continued vitality of the jury system in complex cases, civil and criminal.

The revision permits expert testimony that is "reasonably reliable" and will, if credited, "substantially" assist the fact-finder. These changes, deliberately worded as flexible standards, highlight the authority of the judge under Rule 104(a) when faced with an objection to expert testimony, particularly in jury trials. While admissibility of such evidence is, and remains, subject to the general principles of Rule 403, the revision can be viewed as a special formulation of some of those concerns when opinions on technical subjects are offered through witnesses with seemingly impressive credentials.

The insistence that expert opinions be reasonably reliable represents a special application of concerns expressed in Rule 403. Expert opinions that are not reasonably reliable present to a greater degree than lay testimony the danger of confusing or misleading the jury. The standard is a flexible one. Factors that may affect the reliability of an opinion to be expressed by an automotive mechanic about the functioning of a carburetor will differ markedly from those involving opinions of an epidemiologist based on experiments conducted by the witness. For the former, the inquiry likely will focus on the experience of the mechanic and whether an appropriate inspection of the carburetor occurred. For the latter, scrutiny may be appropriate regarding the specialized education and training of the witness, and perhaps the recognition and standing of the witness among other epidemiologists; whether recognized standards, protocols, techniques, procedures, and methods were followed in conducting the experiments and drawing conclusions therefrom; whether the study was conducted solely for use in litigation; whether the experiments have been replicated, verified, or subjected to peer review; and the extent to which the opinions and experiments would be viewed as acceptable by other experts in the field. In short, the same kinds of questions that may be asked under Rule 703 when an expert has relied on studies conducted by others may also be appropriate under revised Rule 702 with respect to studies conducted by the testifying expert, as well as with respect to the methodology followed by the expert in drawing conclusions from either type of study.

The concept that, when determining the admissibility of scientific studies or conclusions drawn therefrom, courts should look to the standards recognized and the degree of acceptance within the particular scientific field can be traced to Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923). The revision of Rule 702 does not attempt to resolve all conflicts that have arisen among the circuits in utilizing Frye-type standards either as an explicit requirement of Rule 703 or as an implicit requirement under former Rule 702. See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128 (9th Cir. 1991); Christophersen v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991) (en banc), cert. denied, ___ U.S. ___ (1992); DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990); Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir. 1988), cert. denied,

493 U.S. 882 (1989). The revision does not attempt to prescribe whether such opinions or studies must be "generally" or "widely" accepted, must have "some substantial" acceptance, or merely must not depart significantly from recognized standards and norms of the particular scientific community. A single bright-line test is not appropriate for all cases and in all circumstances; the more flexible standard of "reasonably reliable" is preferable. It is intended, however, that the degree of acceptability within the field should ordinarily be considered, together with other appropriate factors such as those listed in the preceding paragraph, in determining whether such evidence is sufficiently trustworthy to be submitted to the jurors for their assessment in resolving the case.

The determination whether proposed opinion testimony, if credited, will be of substantial assistance to the fact-finder involves more than merely that the witness possesses greater knowledge about some subject than the ordinary juror. Among the factors that may affect this determination are the following: whether the proposed opinion relates to a matter that is in substantial dispute and of major consequence to the outcome of the case; whether other evidence in the case, including testimony from other experts, will provide an adequate basis for the jury to reach an informed decision regarding the matter; whether the opinion involves a highly technical subject or one with which most persons will have had some experience and knowledge; whether, if the opinion testimony is received, rebuttal testimony will be offered through other experts; and whether the person will be called as a witness only to present such opinion testimony, or will be testifying to personal observations regarding the facts of the case, with the opinions offered primarily to explain such testimony. The rule does not limit forensic experts to those whose testimony is essential, but does call for elimination of those whose testimony would be only marginally helpful at most.

Of course, experts frequently disagree, even when drawing conclusions from the same data. In many cases there will be admissible opinions from different experts which are in direct or partial conflict, and it will be for the jury to decide questions of credibility and what weight to give to competing opinions. In determining admissibility under the revised rule, the trial judge is not to usurp these functions of the jury but, by weeding out testimony that could not be reasonably relied upon or would be only marginally helpful, is to assure that the jury is in a better position to perform its traditional responsibilities.

Whether proposed opinion testimony is reasonably reliable and will, if credited, be of substantial assistance is, like the inquiry into the expertise of the witness, a preliminary question that, when an objection is made, is determined under Rule 104(a). The court is not bound by the rules of evidence other than those involving privileges. When appropriate, consideration can be given to trustworthy hearsay, such as the findings made by judges in other cases in which the same testimony has been offered. This opportunity can ease the potential burden on a court when faced with an objection to expert testimony which has been carefully considered in earlier litigation.

The rule also is revised to complement changes in the Federal Rules of Civil Procedure requiring, unless otherwise ordered or stipulated, that forensic experts prepare detailed reports as to the testimony to be presented at trial. The second sentence of revised

Rule 702 precludes the offering on direct examination in civil actions of expert opinions, or the reasons or bases for opinions, that have not been disclosed in advance of trial. The restriction applies only to experts subject to the requirement of a written report under Fed. R. Civ. P. 26(a)(2)(B)--typically, those retained or specially employed to provide expert testimony at trial or whose duties as an employee of a party regularly involve the giving of such testimony.

It has not been unusual for testimony given at trial by an expert to vary substantially from that provided in answers to interrogatories under former Fed. R. Civ. P. 26(b)(4)(A)(i) or at a deposition of the expert. Any significant changes in an expert's expected testimony should, to the extent feasible, be disclosed before trial, and this revision of Rule 702 provides an appropriate incentive for such disclosure in addition to those contained in the Rules of Civil Procedure. Under revised Fed. R. Civ. P. 26(e)(1), material changes in the opinions of an expert from whom a written report is required are to be disclosed by the time the proponent is required to disclose the evidence it may use at trial. Unless the court has specified another time, these changes are to be disclosed at least 30 days before trial.

For good cause shown, the judge can permit the witness to testify with respect to matters not so disclosed. A significant study in the field may not have become available until after the cutoff date. The final report of another expert may contain new matters that were not previously considered. There may be testimony given during the trial that should be taken into account. The revision provides the court with discretion to deal with the variety of circumstances in which a timely pretrial disclosure could not have been made.

The situation may arise where the matters disclosed in the report or in a deposition no longer represent the expert's opinions at the time of trial and yet good cause cannot be shown for a failure to disclose these changes. Of course, a witness should not be required to testify contrary to the person's oath or affirmation. If the witness is unable to testify in a manner consistent with the earlier disclosure, then--unless the court grants leave to deviate from the earlier testimony--the witness should not testify.

By its terms the new sentence applies only in civil cases. The consequences of the failure to make disclosures of expert testimony which may be required under new Fed. R. Crim. P. 16(a)(1)(E) and 16(b)(1)(C) will be determined in accordance with the principles that govern enforcement of the requirements of Fed. R. Crim. P. 16.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without ~~prior disclosure of~~ *first testifying to* the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

COMMITTEE NOTES

This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised Rule 702 and with revised Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure or with revised Rule 16 of the Federal Rules of Criminal Procedure, which require disclosure in advance of trial of the facts and data on which an expert's opinions are based.

If a serious question is raised under Rule 702 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify. This rule does not preclude such an inquiry.

ISSUES AND CHANGES

Fed. R. Civ. P. 1. (Draft published August 1991)

Relatively non-controversial. A few expressed concern that the proposed amendment would increase judicial discretion and perhaps be misused by some judges. Some concern was also expressed that the Committee Notes, stating that attorneys share responsibility with the court for seeing that the rules are administered to secure the objectives stated in Rule 1, may infringe on the obligations of attorneys towards their clients.

The Advisory Committee is unanimous in recommending adoption of the rule, which is unchanged from the language published in August 1991.

Fed. R. Civ. P. 4. (Draft published October 1989)

Non-controversial except with respect to sending requests for waiver of service into foreign countries. This issue was presumably the reason why the proposed amendment was returned by the Supreme Court for further study.

While the rule was pending before the Supreme Court, the British Embassy had expressed two concerns: first, that extra-territorial mailing of requests under subdivision (d), coupled with the potential for cost-shifting if the request was declined, would contravene the letter or spirit of the Hague Convention; and second, that, at least by omission, the rule appeared to be inconsistent with 28 U.S.C. § 1608 with respect to service on agencies and instrumentalities of foreign states. The Department of Justice, which had expressed no comment when the rule was originally proposed, has subsequently taken the position, essentially echoing concerns of the Department of State, that, to avoid possible offense to other governments, it would be preferable for the rule to restrict the request-for-waiver procedure to defendants located within this country.

After further study, the Advisory Committee has concluded that the potential benefits to litigants--both plaintiffs and defendants--justify use of the request-for-waiver procedure in cases involving foreign defendants but has made changes to the text and Committee Notes, as well as in proposed new Forms 1A and 1B, in an attempt to ameliorate the types of concerns expressed by the British Embassy and the Department of Justice. The proposed revision makes clear that the request for waiver of service--which, in fact, affords significant potential benefits to a defendant residing in a foreign country, both through elimination of potential costs and additional time to respond--is a private, nonjudicial act that does not purport to effect service or constitute any directive from a court. The criticism that a declination, pursuant to foreign law, to waive service when requested by mail could result in unfair cost-shifting is dealt with in the Notes, which explain that cost-shifting would be inappropriate if a refusal is based upon a policy of the foreign government prohibiting all waivers of service.

A change in the language of subdivision (j)(1) corrects the other concern expressed by the British Embassy, relating to agencies and instrumentalities of foreign states. During its study the Committee discovered several other minor drafting errors contained in the text or Notes, such as the language used when making cross-references to other subdivisions, paragraphs, and subparagraphs of the rule. These corrections have been incorporated into the proposed amendment.

While one member would prefer to exclude foreign defendants from the request-for-waiver procedure, the Committee is unanimous in recommending that revised Rule 4 be adopted to replace current Rule 4. The changes in language from the text and Notes published in October 1989 prior to its earlier submission to the Supreme Court are not substantial, but are technical in nature; and, accordingly, the Advisory Committee believes that an additional period for public notice and comment is unnecessary.

Special Note: If the Committee's proposal to make the request-for-waiver procedure available

with respect to defendants located outside the United States is disapproved, Rule 4 need not be rejected in its entirety. Rather, one of two approaches could be adopted: (1) eliminate the cost-shifting feature that is the principal objection raised by the British Embassy (by adding a clause in the last sentence of Rule 4(d)(2) that excludes foreign defendants from the cost-shifting sanction), or (2) limit the Rule 4(d) procedure to domestic defendants (by eliminating the reference to subdivision (f) in the first sentence of Rule 4(d) and eliminating subdivision (a)(1)(B) of Rule 12). The Committee Notes and Forms 1A and 1B would also need to be revised to conform to these changes.

Fed. R. Civ. P. 4.1 (Draft published October 1989)

Non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4. There are no changes needed in language as previously submitted to the Supreme Court.

The Advisory Committee is unanimous in recommending adoption of Rule 4.1, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 5 (Not previously published)

Non-controversial. This is a technical amendment, using the broader language of recently revised Fed. R. App. P. 25 to make clear that district courts--and, more importantly at the present time, bankruptcy courts--may permit, to the extent authorized by the Judicial Conference, filing not only by facsimile transmission but also by other electronic means.

The Advisory Committee is unanimous in recommending adoption of Rule 5. Although this has not been published as a proposed change to the Fed. R. Civ. P., the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Civ. P. 11. (Draft published August 1991)

The proposed amendment of Rule 11 is controversial. It has provoked extensive comment from the bench, bar, and public.

It is appropriate to begin with a brief discussion of the special procedures followed by the Advisory Committee with respect to Rule 11. The Committee had received various requests, formal and informal, for further amendment or abrogation of Rule 11, which had been revised in 1983. The Committee was also aware of several studies of the rule undertaken by various individuals, bar associations, and courts. Whether to propose any change--and, if so, what type of change--was, however, far from clear. The Committee started by publishing a notice that solicited comments about the several aspects of the operation of Rule 11 and by requesting that the Federal Judicial Center conduct certain studies and surveys. The Committee then held a public meeting and heard from various judges, attorneys, and academics who were known to have strong views about Rule 11.

There was no consensus about whether--or how--the rule should be amended. Some urged that the 1983 revision be retained with little or no change. Some urged that any amendment was premature and should be deferred until more experience had been gained. Some suggested various changes to deal with specific problems that had arisen. Others urged that it be restored, in essence, to its pre-1983 form or, indeed, be eliminated altogether.

After considering these comments and the FJC studies and survey, the Committee concluded that the widespread criticisms of the 1983 version of the rule, though frequently exaggerated or premised on faulty assumptions, were not without some merit. The goal of the 1983 version remains a proper and legitimate one, and its insistence that litigants "stop-and-think" before filing pleadings, motions, and other papers should, in the opinion of the Committee, be retained. Many of the initial difficulties have been resolved through case law over the past nine years. Nevertheless, there was support for the following propositions: (1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel. In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.

The Committee then drafted a proposed amendment with the objective of increasing the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while also reducing the frequency of Rule 11 motions. The proposed amendment was published in August 1991 and has generated many comments, written and oral.

Summarized below are the principal criticisms and suggestions that the Committee has received. Several of these, it may be noted, are embodied in an alternative proposal for amendment of Rule 11 sponsored by Attorney John Frank and others, which has gained significant support from various judges, lawyers, and organizations.

Opposition to this revision as "weakening" the rule. It is correct that, given the "safe harbor" provisions and those affecting the type of sanction to be imposed, the amendment should reduce the number of Rule 11 motions and the severity of some sanctions. The Advisory Committee is unanimous that, to the extent these changes may be viewed as "weakening" the rule, they are nevertheless desirable.

Opposition to any amendment as "premature." While several problem areas encountered under the 1983 version of Rule 11 have been corrected by case law, others remain and cannot be cured by greater experience within the bench and bar. By the time the new amendments can become effective, a period of ten years will have elapsed since the prior revision. The Advisory Committee is unanimous that changes should not be deferred for additional time and study.

Application to discovery documents. Notes to the published draft asked for comments on whether Rule 11 should be made explicitly inapplicable to discovery documents, and indicated that the Advisory Committee would be considering such a change without additional publication. The comments received support this change. The Advisory Committee is unanimous that this change should be made and has done so through the addition of subdivision (d).

Continuing duty to withdraw unsupportable contentions. The published draft abandoned the "signer snapshot" approach of the current rule that imposes obligations solely on the persons signing a paper and measures those obligations solely as of the time the paper is filed. It provided that litigants have a duty not to maintain a contention that, though perhaps initially believed to be meritorious, is no longer supportable in fact or law. Several comments expressed concern that, at least as drafted, the revision might lead to disruptive and wasteful activities based on a mere failure to re-read and amend previously filed pleadings, motions, or briefs. The Advisory Committee believes that this latter criticism is well taken and has made several modifications to the published language of the text and limited the expansion to non-signers to persons who "pursues" a previously filed paper. These changes, coupled with the "safe harbor" provisions, should minimize these concerns.

Duty to conduct pre-filing investigation. Some critics express skepticism regarding the obligation to conduct an appropriate pre-filing investigation in view of the provisions allowing pleading on "information and belief" and affording a "safe harbor" against the filing of Rule 11 motions if unsupportable contentions are withdrawn. The basic requirement for pre-filing investigation is retained in the text of the rule, and, as the Committee Notes make clear, pleading on information and belief must be preceded by an inquiry reasonable under the circumstances. The revision is not a license to join parties, make claims, or present defenses without any factual basis or justification. However, it must be acknowledged that, with these changes, some litigants may be tempted to conduct less of a pre-filing investigation than under the current rule. The Advisory Committee believes that this risk is justified, on balance, by the benefits from the changes.

Pleading "as a whole." Several comments urged that the revision of Rule 11 incorporate the approach adopted in some decisions, permitting sanctions only if, taken "as a whole," the paper violated the standards of the rule. The Advisory Committee continues to believe that the "stop-and-think" obligations apply to all of the allegations and assertions, not just to a majority of them. Nevertheless, the language of the published draft might have inappropriately encouraged an excessive number of Rule 11 motions premised upon a detailed parsing of pleadings and motions. The Advisory Committee has changed the text of subdivision (b) to eliminate the specific reference to a "claim, defense, request, demand, objection, contention, or argument" and has also modified the accompanying Notes to emphasize that Rule 11 motions should not be prepared--or threatened--for minor, inconsequential violations or as a substitute for traditional motions specifically designed to enable parties to challenge the sufficiency of pleadings. These changes, coupled with the opportunity to correct allegations under the "safe harbor" provisions, should eliminate the need for court consideration of Rule 11 motions directed at insignificant aspects of a complaint or answer.

"Mandatory" sanctions. The most frequent criticism has been that the revision leaves in place the current mandate that some sanction be imposed if the court determines that the rule has been violated. The suggestion is that, even if a violation is found, the district court should have discretion not to impose any sanction. Two members of the Advisory Committee prefer this approach, though do not request that this view be expressed as a formal minority view in the Committee Notes. The other members of the Advisory Committee believe that, particularly given the opportunity through the "safe harbor" provisions to withdraw an unsupportable contention before a Rule 11 motion is even filed, some sanction should be imposed if the court is called upon to determine, and does determine, that the rule has been violated. As under the current rule, the court retains discretion as to the particular sanction to be imposed, subject however to the principle that it not be more severe than needed for effective deterrence, and the court's decision whether a violation has occurred is reviewed on appeal for abuse of discretion.

Payment of monetary sanctions to an adversary. Another frequent criticism is that the draft continues to permit a monetary award to be paid to an adversary for damages resulting from a Rule 11 violation, rather than limiting monetary awards to penalties paid into court. The Advisory Committee agrees with the premise that cost-shifting has created the incentive for many unnecessary Rule 11 motions, has too frequently been selected as the sanction, and, indeed, has led to the large awards most often cited by critics of the 1983 rule. Both in the text and the Committee Notes, the published draft contained language that, while continuing to permit cost-shifting awards, explicitly recited the deterrent purpose of Rule 11 sanctions and the potential for non-monetary sanctions. The Advisory Committee remains convinced that there are situations--particularly when unsupportable contentions are filed to harass or intimidate an adversary in some cases involving litigants with greatly disparate financial resources--in which cost-shifting may be needed for effective deterrence. The Committee has, however, made a further change in the text of subdivision (c)(2) to emphasize that cost-shifting awards should be the exception, rather than the norm, for sanctions. As to the expenses incurred in presenting or opposing a Rule 11 motion, the published draft provides the court with discretion to award fees to the prevailing party: this is needed to discourage non-meritorious Rule 11 motions without creating a disincentive to

the presentation of motions that should be filed.

Protection of represented parties (as distinguished from attorneys) from sanctions. The current rule permits the court to impose a sanction upon the person who signed the paper, "a represented party, or both." The published draft would have restricted the imposition of monetary sanctions upon a represented party to situations in which the party was responsible for a violation of Rule 11(b)(1) (papers filed to harass or for other improper purpose). Comments have been mixed: some opposing any such restriction; others opposing any monetary sanctions on represented parties; others suggesting variants on the language in the draft. Upon further reflection and consideration of the comments, the Advisory Committee believes that the prohibition of monetary sanctions against a represented party should be limited to violations of Rule 11(b)(2) (frivolous legal arguments), and has changed the language of subdivision (c)(2)(A) accordingly.

Sanctions against law firms. The published draft contained provisions designed to remove the restrictions of the current rule respecting sanctions upon law firms. See Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint). While many comments supported this change, others opposed it, urging that sanctions be imposed only on the individual attorney found to have violated the rule. The Advisory Committee believes that, consistent with general principles of agency, it is often appropriate for a law firm to be held jointly responsible for violations by its partners, associates, and employees. Given the opportunity under the "safe harbor" provisions to avoid sanctions imposed on a motion, coupled with the changes designed to reduce the frequency of "fee-shifting" sanctions that have produced the largest monetary sanctions, the Committee has added to the published draft in subdivision (c)(1)(A) language clarifying that a law firm should ordinarily be held jointly accountable in such circumstances.

Court-initiated sanctions after case dismissed. Several groups have suggested that the safe harbor provisions, which under the published draft apply only to motions filed by other litigants, should apply also to show cause orders issued at the court's own initiative. The Advisory Committee continues to believe that court-initiated show cause orders--which typically relate to matters that are akin to contempt of court--are properly treated somewhat differently from party-initiated motions. The published draft does, however, contain provisions in subdivision (c)(2)(B) protecting a litigant from monetary sanctions imposed under a show cause order not issued until after the claims made by or against it have been voluntarily dismissed or settled.

Standards for appellate review. Some of the comments have urged that the revision contain language modifying the standard for appellate review announced in Cooter & Gell v. Hartmarx Corp., ___ U.S. ___ (1990). The Advisory Committee concludes that the arguments are not sufficiently compelling to justify a deviation from the principle that ordinarily the rules should not attempt to prescribe standards for appellate review.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. Ultimately the only disagreement within the Committee related, as noted above, to whether imposition of sanctions should be mandatory or discretionary. The two members who favored the discretionary standard nevertheless believe that proposed amendment is preferable to the current rule, and accordingly the Committee is unanimous in recommending adoption of the proposed amendment of Rule 11. As noted above, several changes have been made to the language of the amendment as published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 11 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 12. (Draft published in October 1989)

Relatively non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4. The only changes from the language previously submitted to the Supreme Court are technical, stylistic improvements.

The Advisory Committee is unanimous in recommending adoption of Rule 12, which, except for stylistic improvements, is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 15. (Draft published in October 1989)

Non-controversial. This rule was actually adopted by the Supreme Court on April 30, 1991, and forwarded to Congress. It contained, however, a cross-reference to Rule 4 that, with the Court's deferral of action on Rule 4, was in error. The error was corrected in P.L 102-198. This proposed amendment will restate the cross-reference to conform to the proposed amendment of Rule 4 that is to be resubmitted.

The Advisory Committee is unanimous in recommending adoption of Rule 15, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 16. (Draft published in August 1991)

Controversial in part. Most of the proposed amendments involve technical or clarifying changes that were generally supported as desirable. A few questioned the need for the amendments and were concerned about the increasing length and potential complexity of the rule. A few expressed opposition to "managerial judging," while some others preferred that the rule mandate more personal involvement by a judicial officer.

A few of the changes, however, provoked strong criticisms and are discussed below.

Compulsory attendance and participation by parties in settlement procedures. The published draft would have authorized the court to require that parties, or their insurers, attend a settlement conference and participate in special procedures (ADR) designed to foster settlement. Several of the comments opposed any form of mandatory (albeit non-binding) ADR and were fearful that explicit authority to require party attendance at settlement conferences would be misused by some judges to coerce settlements. The Advisory Committee is also aware of the strong feelings of many that this authority is needed and, indeed, already within the court's inherent powers. On review, the Committee concluded that, given the mandate for local experimentation under the Civil Justice Reform Act, the explicit authorization provided in the published draft for mandatory attendance and participation should be deleted. The changes made in the last sentence of proposed subdivision (c) do, however, contain a provision, comparable to 28 U.S.C. § 473(b)(5), with respect to party representatives being accessible by telephone during settlement conferences with the court. The rule does not attempt to address the extent to which a court by exercise of its inherent powers can compel parties to attend conferences or participate in alternative dispute resolution procedures and does not limit the powers of court to compel participation when authorized to do so by statute.

Potential for summary judgment at Rule 16 conferences. Several comments opposed the language in proposed subdivision (c)(5) that would permit a court at a pretrial conference to enter summary judgments. This opposition was based upon fears that courts might precipitously grant summary judgments at a conference without affording the procedural safeguards built into Rule 56. On reflection, the Advisory Committee has concluded that subdivision (c)(5) should be modified to eliminate those concerns. However, a court can still under subdivision (c)(11) act at a pretrial conference on a motion for summary judgment that is ripe for decision at that time and is also empowered to enter a show cause order under Rule 56(g)(3).

Pretrial limitations on extent of evidence. Several opposed the proposed amendment of subdivision (c)(15) authorizing the court, after meeting with counsel, to enter "an order establishing a reasonable limit on the length of time allowed for the presentation of evidence or on the number of witnesses or documents that may be presented." The opposition reflects, in part, a concern about managerial judging or about infringing on counsels' ability to control the trial process, and in part a fear that many judges will misuse this discretion. The Advisory Committee has modified the language of this subdivision, but remains convinced that a reasonable limit on the length of trial is desirable in some cases, that such a limitation can be fairer to the parties when determined in advance of trial than when imposed during trial, and that abuses can be corrected through appellate review.

Timing of scheduling orders. The published draft changed the date by which a scheduling order should be entered from 120 days after the complaint is filed to 60 days after a defendant has appeared. Several suggest that this deadline may come too early, particularly in multi-party cases. The Advisory Committee concludes that the language from the published draft should be changed to provide that the order be entered within 90 days after a defendant has appeared or within 120 days after the complaint has been served on a defendant. Of course, courts can and frequently should enter scheduling orders before such deadlines.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 16. As noted above, several changes have been made to the language of the amendment as originally published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 16 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 26. (Drafts published October 1989 and August 1991)

Controversial. The last sentence in subdivision (a)(5) was contained in the draft published in October 1989. The other proposed changes were contained in the draft published in August 1991 and, particularly with respect to proposed subdivision (a)(1), have provoked the most intense division within the bench and bar of any of the proposed amendments. However, as discussed below, the Advisory Committee has made changes to the language contained in the published drafts which should eliminate many of the concerns expressed. The principal criticisms and suggestions are as follows:

Mandatory early pre-discovery disclosures. Subdivision (a)(1) of the August 1991 published draft required litigants to disclose specified core information about the case; namely, potential witnesses, documentary evidence, damage claims, and insurance. The objectives were to eliminate the time and expense of preparing formal discovery requests with respect to that information and to enable the parties to plan more effectively for the discovery that would be needed. Critics attacked the timing and scope of the disclosure requirements, as well as the related penalty provisions for noncompliance, viewing them as both impractical, counterproductive, and disruptive of the attorney-client relationship. On further consideration, the Advisory Committee has made certain changes with respect to the scope of the disclosures and provisions for sanctions that, coupled with the provisions mandating an early meeting of the parties, should alleviate some of these concerns. One Committee member preferred, as suggested by many critics, that initial disclosures be limited to potential witnesses and documents supporting the party's contentions; the other members, however, remained of the view that the obligation should relate to all such witnesses and documents. Many critics also urged that early disclosure requirements not be adopted until after the studies of the experience of courts under the Civil Justice Reform Act. To delay consideration of rules changes until completion of those studies would effectively postpone the effective date of any national standards until December 1998, a delay the Advisory Committee believed unwise. However, the proposed rule is written in a manner that permits district courts during the period of experimentation to depart from the national standards and determine whether and to what extent pre-discovery disclosures should be required.

Pre-discovery planning meeting of parties. The August 1991 published draft contemplated that the exchange of pre-discovery disclosures under subdivision (a)(1) should preferably occur at a meeting of the parties, but did not require that such a meeting take place. The most severe critics of the disclosure requirement supported the concept of an early meeting of the parties to explore and clarify the issues in the case as a prelude to conduct of discovery and, indeed, generally urged that such a meeting be mandatory, whether or not early disclosures were required. Complementing the changes made in subdivision (a)(1), the Advisory Committee has changed the published draft so that subdivision (f), rather than being deleted, is modified to require that the parties meet and attempt to agree on a proposed discovery plan for incorporation in the scheduling order and to facilitate the exchange of required disclosures.

"Notice pleading" and scope of discovery. Many comments suggested that reductions in the time and expense of discovery and other pretrial proceedings require a reconsideration of "notice pleading" and discovery relevant to the "subject matter" or "reasonably calculated to lead to the discovery of admissible evidence." While these suggestions may have merit, they could not, in the opinion of the Advisory Committee, be effected incident to the present publication notice and are ones that should be given careful study and consideration in the future.

Expert reports. The August 1991 published draft required that detailed written reports of parties' experts be exchanged during the discovery period and generally limits the direct testimony of such experts to the matters contained in those reports as may have been seasonably supplemented prior to trial. Several comments argued that this requirement would cause unnecessary additional expenses, discourage "real" experts from agreeing to testify, and create problems at trial. Requirements such as these have, however, been beneficially used in several courts for many years, and the Advisory Committee remains convinced that the concept is sound. However, the Committee has changed the language in subdivision (a)(2) to make clear that it applies only to specially retained or employed experts--and not, for example, to treating physicians. It has also made changes in the text of subdivision (e) to lessen the burden of supplementation and in the Notes to proposed FRE Rule 702 in recognition that intervening events may sometimes justify a change in expert testimony.

Discovery in a foreign country. The last sentence in proposed subdivision (a)(5) is drawn from language published in October 1989 and later submitted to the Supreme Court, which, like Rule 4, was subsequently returned by the Supreme Court for further consideration. While the amendment was pending before the Court, the British Embassy had expressed its concern that, particularly with respect to the Committee Notes, the provisions relating to discovery in foreign countries were inconsistent with the Hague Convention. A similar concern was more recently expressed by Switzerland. On the other hand, the Department of Justice believes the change unnecessarily restricts discovery from foreign litigants and has urged that the Rule not contain any language relating to foreign discovery. The Committee has made minor changes in the text of the rule and more significant changes in the Notes that, in the Committee's view, represent an appropriate balance between the competing considerations that affect foreign discovery. The proposed revision does not, however, attempt to overturn Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987), which, no doubt, is what some foreign litigants would prefer.

> Special Note: If the Committee's proposal regarding foreign discovery is disapproved, the remainder of Rule 26 need not be rejected. The last sentence of proposed Rule 26(a)(5) could be deleted, together with introductory clause to Rule 28(b). The Committee Notes would be modified for conformity with those changes.

Claims of privilege. The August 1991 published draft contains, like Rule 45 as became effective in December 1991, provisions requiring that notice be given when information is withheld on a claim of privilege or work product. Based upon suggestions made in several comments, the Advisory Committee has changed the language of the draft to make clear that the obligation to describe items withheld does not require disclosure of matters that are themselves privileged and only relates to items that are otherwise discoverable (and hence not when unreasonably burdensome requests are made).

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those

comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 26. As noted above, several changes have been made to the language of the amendment as originally published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 26 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 28. (Draft published October 1989)

Non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4. There are no changes needed in language as previously submitted to the Supreme Court.

The Advisory Committee is unanimous in recommending adoption of Rule 28, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 29. (Draft published August 1991)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 29, which, except for stylistic improvements, is unchanged from the language published in August 1991.

Fed. R. Civ. P. 30. (Draft published August 1991)

Controversial. The aspects of the proposed amendment receiving the most attention in the comments received are discussed below.

Limits on number and length of depositions. As published, the draft imposed presumptive limits on the number (10 per side, including depositions under Rule 31) and on the length (6 hours per deposition). While many of the comments supported these limits, many opposed any limits, many opposed any presumptive limits (asserting that limits should be imposed only by the court on a case-by-case analysis), and many opposed either or both of the limits as too restrictive, particularly in certain types of cases. The Advisory Committee continues to believe that the presumptive limit on the number of depositions--which can, and in many case should, be changed by the court in the scheduling order or by written stipulation of the parties--is workable and desirable as a means for forcing litigants to be more selective in their deposition practice. A majority of the Committee, however, concluded that any presumptive limit on the length of depositions is a matter more properly left at this time for experimentation under the Civil Justice Reform Act, and the draft has been changed to effect this result.

Non-stenographic depositions. None of the published amendments has received a larger number of objections than the proposal relieving parties from the necessity of obtaining court approval or agreement of other parties as a condition to taking depositions by non-stenographic means. Many of these comments came from court reporters, but many members of the bar made similar comments. This opposition urges that video and audio recordings are unreliable and difficult to use at trial. The Advisory Committee is, however, unanimous that these concerns are adequately dealt with in the proposed amendments, which permit other parties to arrange for a stenographic transcription if they choose to do so and which require a party proposing to use video or audio recordings at trial to prepare and furnish to adversaries and the court a transcript of the portions to be offered.

Objections and directions not to answer. The text of the published draft authorized sanctions upon a finding that an attorney had impeded, delayed, or engaged in other conduct frustrating the fair examination of

the deponent. As illustrations of conduct subject to such sanctions, the Notes referred to "speaking" objections or otherwise coaching the deponent, and improper directions not to answer. There has been no substantial disagreement with this concept, but several suggested that it would be preferable to move some of the language from the Notes into the text of the rule, where it would be more obvious. The Advisory Committee believes that this suggestion has merit and has modified the language of subdivision (d)(1) accordingly.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 30. As noted above, several changes have been made to the language of the amendment as originally published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 30 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 31. (Draft published August 1991)

Moderately controversial.

The only aspect of this proposed amendment that has received any substantial criticism is the provision, paralleling the provision in Rule 30, that places a presumptive limit on the number of persons who may be deposed on written questions (10 per side, including depositions under Rule 30). The Advisory Committee continues to believe that this limitation--which can be modified by the court or by stipulation of the parties--is workable and desirable.

The Advisory Committee is unanimous in recommending adoption of the rule, which is essentially unchanged from the language published in August 1991.

Fed. R. Civ. P. 32. (Draft published August 1991)

Relatively non-controversial.

The only aspect of this proposed amendment that received any substantial opposition was the proposal to permit use at trial of depositions of expert witnesses without having to establish their unavailability. On further consideration, the Committee has decided to eliminate this proposed change.

The Advisory Committee is unanimous in recommending adoption of the rule as modified.

Fed. R. Civ. P. 33. (Draft published August 1991)

Moderately controversial.

As published, the draft set a presumptive limit on interrogatories--"15 in number including all subparts" propounded by any party to another. Many oppose any limitation other than on a special case-by-case analysis, while others say that the number is too low or that the language relating to subparts will generate controversy. After considering the comments, the Advisory Committee has concluded that the presumptive limit--which can be changed by court directive or stipulation--should be raised to 25 and has made minor changes in the text and Notes to address the problems presented by subparts.

The Advisory Committee is unanimous in recommending adoption of the rule, which, except for minor changes in the text and Notes, is the same as contained in the published draft.

Fed. R. Civ. P. 34. (Draft published August 1991)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 34, which, except for stylistic improvements, is essentially unchanged from the language published in August 1991.

Fed. R. Civ. P. 36. (Draft published August 1991)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 36, which, except for stylistic improvements, is essentially unchanged from the language published in August 1991.

Fed. R. Civ. P. 37. (Draft published August 1991)

Moderately controversial.

Several of those opposed to mandatory pre-discovery disclosures under Rule 26(a)(1) echoed their position by expressing opposition to the nature and severity of sanctions under Rule 37 for failure to comply with these requirements. In part these objections are muted by the Committee's action in eliminating any national requirements for such disclosures. In addition, the Advisory Committee has made some minor changes in the published text and Notes to Rule 37(c)(1) and has revised (rather than abrogated) the provisions of Rule 37(g) for conformity with revised Rule 26(f).

The Advisory Committee is unanimous in recommending adoption of Rule 37, which, except for the changes noted above and a few stylistic improvements, is the same language published in August 1991.

Fed. R. Civ. P. 50. (Not previously published)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 50. Although this has not been published, the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Civ. P. 52. (Not previously published)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 52. Although this has not been published, the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Civ. P. 54. (Draft published August 1991)

Relatively non-controversial.

The principal criticism of this proposed amendment involved subdivision (d)(2)(D)(i), authorizing adoption of schedules by which the value of legal services in a district will ordinarily be measured. After further consideration, the Advisory Committee has deleted this language, concluding that inclusion of this explicit authorization may result in more problems than benefits. The Committee's action, however, should not be viewed as implying that district courts lack the authority to adopt such schedules as local rules.

The Advisory Committee is unanimous in recommending adoption of Rule 54, which, except for deletion of subdivision (d)(2)(D)(i), is essentially unchanged from the published draft.

Fed. R. Civ. P. 56. (Draft published August 1991)

Moderately controversial.

While there is substantial support for this revision, many question say that it is unnecessary or unduly complex, and are apprehensive that any change in the rule might diminish the utility of summary judgment procedures. Some oppose the amendment because it incorporates into the rule the principles enunciated in Supreme Court decisions that they believe were wrongly decided.

Timing; offers of proof. The Advisory Committee continues to believe that summary judgment should not be granted against a party before it has had a reasonable opportunity to obtain discovery on matters not within its control and possession which are needed to oppose the motion. The current rule provides that, upon a showing that a party cannot within the prescribed time obtain affidavits justifying its opposition to summary judgment, the court may deny the motion or may allow additional time; the Committee believes that, in such circumstances, the court should also have the option to receive an offer of proof.

Discretion; preclusion of motions. Some object to the language affording the trial court with some discretion not to enter a summary adjudication that might be permitted under the rule. The revision, however, merely brings the language of the rule (currently worded as mandatory) into conformity with court decisions. These decisions recognize the need for some discretion, particularly with respect to issues that are not wholly dispositive of the claims made by or against a party. The Committee Notes have been changed to explain the reasons for, and limitations on, this discretion. The published draft provided in subdivision (g)(1) that the court could preclude Rule 56 motions on particular issues; on further consideration, the Committee has concluded that this language should be deleted.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. While one member would have preferred that the text of the rule indicate that summary judgment is mandatory when warranted, the Committee is unanimous in recommending adoption of the proposed amendment of Rule 56, which, with the exception of the minor change in subdivision (g)(1) explained above, is the same as the published draft. Various clarifying changes have been made in the Committee Notes.

Fed. R. Civ. P. 58. (Draft published August 1991)

Relatively non-controversial.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 58, which is essentially unchanged from the language in the published draft.

Fed. R. Civ. P. 71A. (Draft published October 1989)

Non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4.

The Advisory Committee is unanimous in recommending adoption of Rule 71A, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 83. (Draft published August 1991)

Moderately controversial.

Several of the comments expressed concern over the proliferation of local rules, a concern shared by the Advisory Committee. The Committee believes, however, that the proposed amendments of Rule 83--with the exception of subdivision (b)--will serve to reduce, rather than aggravate, the problems associated with local rules and standing orders. At the suggestion of the Standing Committee, moreover, the Advisory Committee has revised the text of the published draft to require that local rules be consistent with, but not duplicative of, the various national rules and conform to any uniform numbering system prescribed by the Judicial Conference.

The primary criticisms were directed to subdivision (b), which authorizes experimental local rules inconsistent with the national rules. The Committee believes, however, that with the limitations written into the text--(1) they must be approved by the Judicial Conference and (2) they must be limited in duration to a period of five years--the revision provides a sound basis for potentially useful experimentation.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 83, which incorporates into the published draft minor stylistic changes and the changes recommended by the Standing Committee.

Fed. R. Civ. P. 84. (Draft published August 1991)

Non-controversial.

No criticism was expressed to the published draft, which contained only the provisions found in subdivision (a).

Subdivision (b), similarly delegating to the Judicial Conference the authority to make technical changes, has been added at the suggestion of the Standing Committee and has not been published for comment.

The Advisory Committee is unanimous in recommending adoption of Rule 84. Although subdivision (b) has not been published, the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Forms 1A and 1B; Abrogation of Form 18-A. (Draft published October 1989)

Non-controversial.

Forms 1A and 1B, with minor stylistic improvements, that were previously approved and submitted to complement the proposed changes in Rule 4. The Advisory Committee is unanimous in recommending

(contingent upon adoption of Rule 4) adoption of these forms and abrogation of Form 18-A.

Form 35. (Not previously published.)

Non-controversial.

This is a new form designed to illustrate the type of report contemplated under Rule 26(f) and to serve as a checklist for litigants conducting the pre-discovery planning meeting. It complements the change in Rule 26(f). Although it has not been published, the Advisory Committee believes that, as a technical amendment which is merely illustrative, public notice and comment can and should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Evid. 702. (Draft published August 1991)

Controversial.

Many support the proposed amendment; many do not. The primary criticisms can be summarized as follows: (1) reliability and usefulness of expert testimony should be left to the jury; (2) increased judicial scrutiny respecting expert testimony should apply only in civil cases; (3) the Notes mischaracterize the Frye test and fail to give sufficient guidance with respect to the new standards; and (4) a separate advisory committee should be formed to consider amendments to the evidence rules in a more comprehensive manner.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. With one member dissenting, the Committee recommends adoption of the proposed amendment of Rule 702, which incorporates into the published draft minor stylistic changes. The Committee Notes have, however, been significantly expanded and clarified. The Committee expresses no view as to whether a separate advisory committee on evidence rules should be established, but believes that adoption of the proposed revision of Rule 702 should not be deferred.

Fed. R. Evid. 705. (Draft published August 1991)

Relatively non-controversial.

The Advisory Committee is unanimous in recommending adoption of the rule, which is essentially unchanged from the language published in August 1991.

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May 20, 1992

COMMENTS RECEIVED ON PROPOSED AMENDMENTS PUBLISHED FOR COMMENT IN AUGUST, 1991 AS OF MAY 15, 1992

The following notes summarize reactions of citizens commenting on the drafts published in August, 1991. The purpose of this memorandum is to provide members of the Standing Committee on Rules or others who may be interested with manageable access to the communications received by the Civil Rules Committee, which in total suffice to fill a whole file drawer of standard dimensions.

This is a scan, not a summary, of the contents of that file drawer. Thus, the notes are not comprehensive and do not include many details and arguments set forth in the written comments. With respect to those comments received late in the comment period, and especially those comments received after the period was closed, they are notably cryptic. Much of what is omitted is redundant, but no warranty is provided that all is.

Readers interested in the views of a particular individual or organization should consult the actual communication of the individual or organization in question. Those communications are on file with the Secretary of the Civil Rules Committee at the Administrative Office of the United States Courts.

The proposed drafts that were the subject of the following comments were the subject of revision by the Civil Rules Committee at its April meeting. In a number of instances, changes were made in the proposals that were responsive to some of the following comments.

Not covered by this memorandum are the few comments received on those provisions of Rules 4 and 26 that were published in 1989. Those rules are also before the Standing Committee in 1992, in slightly revised form. Changes were made in light of late comments received from the British and Swiss Embassies and from the Department of Justice.

RULE 1

The American Civil Liberties Union supports this revision.

ATLA opposes this revision as incompatible with the aims of the Rules by increasing judicial discretion.

The Assn of the Bar of the City of New York (ABCNY) committee approves this change.

The Beverly Hills Bar Association supports this revision.

The California Bar supports this revision.

The Los Angeles County Bar favors the proposed revision.

The Philadelphia Bar regards this as a fitting amendment.

The Washington TLA opposes this revision as intended to deny justice to the poor and powerless.

RULE 4

Eric Rothschild of Philadelphia supports the position of the British Embassy.

RULE 11

Alliance for Justice opposes any revision of the rule and would restore the 1982 text. In the alternative, they prefer the Frank draft.

The Admiralty and Maritime Litigation Committee of the ABA opposes this revision, expressing support for the present rule.

The ABA Section on Antitrust favors this revision, especially the safe harbor provision.

Theodore R. Tetzlaff, Chair of the Section of Litigation has submitted extensive comments said to "endeavor to reflect a consensus of the deliberations of the Council." His positions are generally consistent with the ABA Blueprint for Improving the Civil Justice System and are offered as representative of the Section. They may be compared to the views expressed by his predecessors, Loren Kieve and Michael Tigar. The Tetzlaff paper is hereinafter referred to as the position of Theodore Tetzlaff, Chair, and should be understood to be more than a personal statement by him. With respect to Rule 11, Chairman Tetzlaff is generally supportive of the proposed revision. He would extend the frivolousness standard to cover all aspects of the rule. He also urges that the moving party be required to move "at the earliest practicable opportunity" upon pain of waiver, and that the safe harbor apply to sua sponte proceedings. He would also make it clear that a withdrawal is not an admission, and favors the "paper taken as a whole" notion of the Frank draft. And he reports the Section's view that liability should be personal to the signer and should not be extended to the firm. Appended to his paper are comments of other Section members on Rule 11, and the results of a survey of member opinions on the rule.

The Torts and Insurance Section of ABA reports that its members by a small margin prefer the proposed draft to the Frank draft.

The American Civil Liberties Union prefers the proposed revision to the 1983 draft, but urges that it does not go far enough. It opposes the extension of the certification period beyond the occasion of signing the pleading, and opposes "argument identification" requirements that would re-establish the rule of the famous district court decision in *Golden Eagle*. It also notes that the safe-harbor will not protect litigants who in good faith believe that their positions are not unfounded. For these reasons, the ACLU favors the John Frank proposal.

The American College of Trial Lawyers continues to prefer its draft revision of Rule 11, finding the published proposal "will not get the job done." They regard Rule 11 as a disaster area requiring radical relief. They praise the safe harbor provision and the procedural requirements, but would continue to prefer that sanctions be paid to the court, that they be supported by clear and convincing evidence, and be discretionary with the trial court.

American Corporate Counsel Assn opposes any weakening of this rule and therefore opposes the revision.

The American Council of Life Insurance favors the proposed revision, but suggests that (b)(3) needs further clarification. They emphasize support for law firm liability and to the safe harbor provision.

American Insurance Association opposes this revision; it favors the present rule. It opposes the safe harbor. It urges also that the rule should be applicable to discovery practice as well as other pleadings and motions.

The American Judicature Society has published its latest study of Rule 11. It reports the following data of particular interest:

(a) 45% of the sanctions imposed were for less that $1500. 68% were less than $5000.

(b) Discovery abuse is a prominent cause of Rule 11 activity.

(c) Civil rights cases are particularly prominent among cases in which these activities occur. These data appear to include §1983 cases where, as was known, activity is relatively high.

(d) More than half of the reported Rule 11 activity occurred outside litigation in the form of threats, but the level of activity "does not seem to rise to the level of a cottage industry as sometimes alleged."

(e) Of lawyers reporting activity, 60% represented defendants, and they reported more sanctions on adversaries than on themselves.

(f) 60% of the lawyers reported changing their behavior in response to the 1983 amendment, almost 40% reporting that they are more careful in reviewing what they file. This was most common among commercial litigators. Lawyers do sometimes use Rule 11 to "cool out" their clients; this is more likely to happen among plaintiffs lawyers and big firm lawyers. Almost no lawyer reported that he or she had not asserted a claim or defense because of Rule 11, but some cases may have been declined.

(g) The responses are not very different from one circuit to another among the four circuits examined.

While generally applauding the proposed revision, the ABCNY committee is troubled by the continuing duty imposed by the draft revision. They urge that lawyers cannot keep looking over their shoulders to avoid sanctions, and that the proposed rule offers an incentive to blunderbuss pleadings. They resist an obligation to amend formal pleadings that may have been abandoned in the course of discovery. They also question the clarity of the "argument identification" requirement as it would be imposed by the draft. They favor, along with the 1988 ABA report, an imposition of sanctions for pleadings filed with an improper purpose even though not objectively defective. They especially applaud the replacement of the term "good faith argument" with "nonfrivolous" and the recognition that discovery may be needed for the establishment of many claims. They continue to favor discretionary rather than a mandatory rule. They approve of the safe harbor and of the provisions of subdivision (c), but with the modification that outrageous conduct should be sanctionable even if the pleading is withdrawn. They also point to the need to impose procedural requirements for sanctions imposed in the exercise of inherent powers, e.g. *Chambers v. Nasco*. They disagree that sanctions on a party should be limited to improper purpose cases. Acknowledging that this limits the conflict of interest problem, they urge that it provides inadequate incentive to clients not to mislead their lawyers. They urge a subjective bad faith test for client liability, the test rejected by the Court in *Business Guides*. They favor a requirement of written findings and conclusions in sanctions cases, as a "stop and think" requirement for the court. They approve the linkage of Rule 11 to Rule 56 in the proposed committee Notes.

ATLA favors the Frank draft.

The Professional Responsibility Committee of ABCNY endorses most of this revision. It opposes the continuing duty feature, favors making the provision permissive rather than mandatory, urges adoption of a more stringent frivolousness standard, and urges that the procedural protections be extended to all sanctions powers, including inherent powers are those imposed pursuant to §1927.

The Arkansas Bar Association favors the safe-harbor, but would otherwise prefer the Frank draft.

The Committee has received a "Bench-Bar Proposal" from certain lawyers and judges. Its major feature is that sanctions would be paid into court, not to the opposing side. Advocates of this proposal are John Frank, Pat Higginbotham, Leon Higginbotham, Mary Schroeder, Jerold Solovy, Laura Kaster, Bill Wagner, Francis Fox, and Hugh Jones. It is hereafter referred to as the Frank draft, which has drawn noticeable support as an alternative to that published by the Committee.

The California Bar is concerned that the revision eliminates the need for prefiling inquiry; it opposes the safe harbor. It also expresses concern that consideration of the financial resources of offenders will lead to inequitable results and encourage impecunious litigants to violate the rule. It supports the other features of the revision, particularly the requirement of findings.

The California Trials Lawyers Association opposes this revision.

A committee of the bar of C.D.Cal. oppose this revision. They do not believe that it will solve problems with the present rule and will give rise to more new litigation. A substantial minority favors the safe harbor idea.

The Chicago Bar Association favors this revision, but urges that the certification should not be continuing, that the party should not be required to designate those allegations for which there is evidentiary support, that local counsel aiding counsel from elsewhere should not be subject to sanctions except in extraordinary circumstances, that the conclusion of the case should not bar a Rule 11 filing, that the safe harbor should apply to sua sponte sanction proceedings, and that sanctions should be imposed upon parties for allegations lacking evidentiary support.

The Colorado Bar Association prefers "may" to "shall."

The Connecticut Bar Association prefers the Frank draft, but would add the safe harbor provision to it.

The Delaware Bar favors the Frank proposal.

The Department of Justice favors the revision, but opposes the continuing duty feature, urges that it be made more clear that rule applies to allegations, etc. and not merely to the paper as a whole, suggests that a sanction for government lawyers might be a reference to the AG or department head, and makes numerous suggestions with respect to the Committee Notes.

The Federal Bar Association endorses this revision with two qualifications - that the safe harbor should apply in sua sponte proceedings and that (c) should limit sanctions to those who are knowingly responsible for violations.

The Federal Judicial Center Study made at the request of the Committee has been circulated. This study was a close examination of Rule 11 disputes in five district courts and a survey of district judges.

> In the 5 districts, fewer than 3% of cases filed resulted in Rule 11 activity; only a small fraction of the more than 1000 Rule 11 matters discovered had resulted in a published opinion. Opposition papers were filed in a substantial majority of the cases. Dispositions may be postponed to the end of the case when the ruling on the issue is often subsumed in the disposition of the case. 72% of judges responded that the time taken to rule on motions was outweighed by the benefits of the rule.
>
> There was substantial variation among individual judges in the use of the rule. 27% of the judges responding had not used the rule at all in the period studied, and 3% had used it eleven or more times. 1 judge per 100 had proceeded with sanctions sua sponte on six or more occasions, while 70% had never proceeded sua sponte. The sample of cases from the five districts generated 85 appeals in which Rule 11 rulings were challenged; almost half were still pending; no case denying sanctions had been reversed, but four sanctions orders had been.
>
> While there was generally an opportunity to file opposition papers, there may have been inadequate opportunity to respond in some cases in which the court was action sua sponte.
>
> Most sanctions were monetary, the medians varying in the districts between $1000 and $3776; the largest sanction in the sample was $50,000. 76% of the judges had never employed a non-monetary sanction. More plaintiff lawyers than defense lawyers were sanctioned, but in four of the five districts, the difference was not great. Across the five districts, between 34% and 54% of the Rule 11 matters targeted complaints, and only 4% involved answers, but the post-pleading sanctions may have been more frequently imposed in defendants. More than half the judges warned lawyers about the possibility of sanctions being imposed on particular filings in at least a few cases.
>
> The sanctions activity was concentrated in contract, tort, and civil rights cases. There were more motions in civil rights cases. In four of the five districts, the imposition rate was in line with that for other types of cases, but in N.D.Ga., the rate was slightly higher in civil rights cases than in contract or tort cases.
>
> In civil rights cases, the most common reason for imposition of a sanction was inadequate legal inquiry. Willging, after reading all the civil rights cases in which sanctions were imposed, concluded that there was not a reasonable basis in that data for an attorney to

fear sanctions. Nevertheless, 25 of the 503 judges thought that the rule has impeded the development of the law.

65% of the judges responding thought that groundless litigation was a small problem, 22 % rated it as moderate, and only 10% said that it is not a problem. Only 4% thought that it was a large problem. 41% thought the problem to have been alleviated somewhat by the 1983 rule.

Most judges find that some or many Rule 11 motions are groundless. Two thirds of the judges regarded the conflict of interest issue arising when a sanctions motion is filed as a significant problem. Half the judges responding thought that Rule 11 motions elevate hard feelings. Feelings were mixed among judges as to whether Rule 11 makes it harder or easier to settle a case. The data is quite inconclusive on the reality.

"The findings presented so far do not suggest a strong judicial endorsement for amended Rule 11. Although only a minority of judges see a negative impact on the conduct of litigation, it is a sizeable minority and suggests that at least some problem exists. In addition, .. our study of case files in five districts documented significant costs and burdens associated with ruling on Rule 11 matters. On the positive side, judges have found the rule moderately effective as a deterrent to groundless litigation. ... Despite the misgivings many judges have about Rule 11's costs and its impact on litigation, a great majority believe the rule has had a positive impact overall and should be retained in its present form." This opinion was expressed before publication of the present proposal.

A Committee of the DC Bar suggests that the kind of notice required by the safe harbor provision needs to be more specific. They believe that a requirement of a detailed memorandum of law would have too great a deterrent effect on the use of the rule. They assert that the proposal is ambiguous as to whether a party receiving a show cause order under (c)(1)(B) may withdraw. They also express concern that the frequent amendments of pleadings could be very onerous.

Fisher & Phillips of Atlanta generally favors the present rule and specifically disapproves of the safe harbor.

The Georgia Bar supports the Frank draft.

The Georgia Trial Lawyers Association prefers the Frank draft or the present rule to the proposed revision.

Hunton & Williams of Richmond favor the Frank draft with respect to treatment of the paper "as a whole", but approve the safe harbor. It favors the elimination of overlap of Rule 11 with discovery.

The Illinois Bar favors the Frank draft.

The Kentucky Bar favors the Frank draft.

Kincaid Gianunzio Caudle & Hubert of Oakland CA favor the 1983 revision of the rule and seem to disfavor any revision at this time.

Lawyers for Civil Justice approves the retention of the overlap between Rules 11 and 37 as a means of providing courts with greater flexibility. They also favor determination before trial of the issue of expert qualifications and need for expert testimony.

The Los Angeles County Bar favors the proposed revision.

The Los Angeles Chapter of the Federal Bar Association generally favors this revision. They oppose any overlap with the discovery sanctions provision. They suggest that any continuing certification should be limited to claims or defenses presented by a party in its pleadings. They suggest non-deletion of the certification that the signer has read the paper.

The Michigan Bar opposes any revision of the present rule.

The Mississippi Defense Lawyers Assn prefers a subjective good faith standard for this rule.

The Montana Bar opposes the safe harbor.

The NAACP Legal Defense Fund favors the 1982 version of the rule, or the Frank draft. It urges the committee to limit the certification to the pleading or motion signed, and that it be judged as a whole for sanctions purposes. It also opposes the argument identification provision. It favors the safe harbor.

National Assn of Securities and Commercial Law Attorneys prefers the Frank draft.

The Nevada Bar favors the Frank proposal.

The New Jersey Bar opposes the extension of the rule to create a continuing duty with respect to all papers. It applauds the safe harbor and agrees with the revision regarding responsibility of partners and parties.

A committee of the New York County Bar favors the extension of the rule to law firms, but opposes imposition of monetary fines on represented parties. It favors the safe harbor provision, but would add that withdrawal should not be used against a party in any way, and would not require that a full motion be prepared to institute the 21-day period. They would also preclude filing the motion until the court has ruled on the underlying contention. It also favors the "paper as a whole" approach.

The New York State Bar Committee would prefer the "Bench-Bar Proposal" and specifically urge that the triggering event should be a signature of counsel, that each paper should be viewed as a whole, and that the sanction be made discretionary. They oppose the duty of candor provision and find the safe harbor procedure unduly complex, but otherwise favor changes proposed.

Ogletree Deakins Nash Smoak & Stewart of Greenville SC oppose any weakening of Rule 11 as proposed.

A Committee of the Orange County (Cal) bar urges that sanctions be discretionary with the court. They find the safe harbor provision too cumbersome and possibly an inducement to file harassing papers that can be safely withdrawn. They suggest a meet-and-confer requirement. They also favor a requirement that the demand set forth any cases or documents that would be used in support of the Rule 11 motion. They also favor a right to oral argument on the motion.

The Pacific Legal Foundation opposes this revision, particularly those provisions that extend the availability of sanctions and the provision for fees on the motion for sanction. They especially oppose law firm liability as the "most radical change."

The Philadelphia Bar favors that Rule 11 be eliminated.

The Public Citizen Litigation Group opposes any overlap use of Rule 11 in discovery matters. It generally favors the revision as an improvement on the present rule. They commend the safe harbor, but urge that it should not be necessary to prepare the motion as long as adequate notice of the defect is provided. They also question the clarity of the timing provisions in the safe harbor. They suggest that

"either on motion or on the court's initiative" can be stricken from lines 65-66. They oppose the requirement that a party identify allegations lacking evidentiary support. They generally oppose sua sponte sanctions and urge that the Notes emphasize that this course should be pursued only in instances of serious misconduct. They also question the need of a request for reasons.

Rowan Companies, Inc. opposes this revision as a weakening of the rule.

The Southern District of Iowa supports this revision.

Trial Lawyers for Public Justice favor the Frank draft.

Victoria E. Ullmann of Columbus OH writes an account of her experience with Rule 11; she urges that its use should be precluded in cases in which the court attempts to mediate the dispute.

The Washington Legal Foundation opposes revision of the present rule, and especially opposes the safe harbor provision as one that would impair the effectiveness of the rule.

The Washington State Bar favors a return to the 1982 version of this rule.

The Washington TLA opposes this revision as an instrument to increase the level of Rule 11 activity.

The Wichita Bar Assn. supports the proposed revision.

The Wisconsin Bar opposes revision of Rule 11.

J. Francis Allain, Esq., of New Orleans, offers comments congruent with the current proposal.

Hon. Francis J. Boyle suggests that Rule 11 require the disclosure of FAX numbers as well as telephone numbers.

T. Mack Brabham and fourteen other lawyers in McComb MS oppose Rule 11 as a weapon used only against plaintiffs.

James E. Carbine, Esq., of Baltimore, endorses all the recommendations of Frank, Napolitano and Resnik.

Prof. Margaret Chon of Syracuse suggests that the safe harbor provision does not mesh with Rule 41(a). She also expresses concern about sanctions being imposed long after the event, as in *Cooter & Gell*; she urges that this is likely to happen sua sponte if it happens at all.

Lawrence B. Clark, Esq., of Birmingham AL argues that the limitation on sanctions against a represented party to improper purpose cases is too restrictive. Clients who lie to their lawyers, he contends, should be sanctioned.

Professor George Cochran of the University of Mississippi published an article critical of the existing Rule 11. He argues that the draft revision does not go far enough in limiting the use of fee-shifting and should require findings of fact in order to support closer appellate review of sanctions. 61 MISS. L. REV. 5.

Mary Coffey of Saint Louis finds the safe harbor provision an improvement but urges the use of a subjective standard.

Roy B. Dalton, Esq. of Orlando opposes the provision entitling the party resisting sanctions to

attorneys' fees for success. He argues that this will chill Rule 11 motions.

Winslow Drummond, Esq. of Little Rock regards the revision as an improvement.

Ms. Rita Fellers of Chapel Hill NC urges that the nature of a frivolous suit be made explicit. "The selective use of this rule against lawyers who represent disenfranchised people in their attempts to obtain legal remedies is a threat to the civil rights of all citizens."

In addition to supporting the Bench-Bar Proposal, John Frank, Janet Napolitano and Professor Judith Resnik urge that Rule 11 should be made explicitly applicable only to sanctions for pleadings and writings in support of or in opposition to them, and that Rules 16, 26, and 37 should control pretrial and discovery.

William C. Fuerste, Esq, of Dubuque, expresses opposition to Rule 11 as a means of making lawyer sanctions part of everyday life at the bar.

Keith Gerrard, Esq., of Seattle opposes the loosening of the standard imposed by the present rule. He finds the reasons stated in the Notes unpersuasive. He opposes a safe harbor, but would allow the court to consider a withdrawal in mitigation of the sanction.

Hugh Q. Gottschalk, Esq., of Denver, opposes the provision that permits a party identify allegations not supported by evidence but may be supported by discovery. He disfavors any weakening of the rule.

Hon John F Grady, ND Ill, expresses discomfort about "likely to bear." He doubts the need for the word "direct" as a restriction on fees. He argues that the signer should be responsible always; he is not sure its worth the candle to impose sanctions on represented parties who don't sign. If client is to be covered, then the standard should be the same, he urges. He points to a particular example suggesting that the existence of "improper purpose" may be difficult to distinguish from mere groundlessness. Judge Grady He suggests that sanctions should be explained without need of a request for an explanation. He is also unclear as to the utility of the phrase "similarly situated." He also expresses concern that the "race to the courthouse" created by the timing of the voluntary dismissal or settlement, fearing that this will produce factual disputes as to whether timely action was taken to avoid sanctions.

Harold A. Haddon of New York, Loren Kieve of Washington, and Prof. Michael Tigar of the University of Texas, former officers of the ABA Litigation Section, jointly endorse the "bench-bar" proposal authored by John P. Frank.

Leland F. Hagen, Esq. of Fargo opposes those aspects of the revision that make the rule more onerous.

Jon L. Heberling, Esq., of Kalispell MT approves this revision "reluctantly."

Prof. Gerald P. Hess of Gonzaga University has published an article on Rule 11 in volume 75 of the Marquette Law Review. He generally finds the revision supported by his data, gathered in the two districts in Washington, but questions the wisdom of expanding the certification.

Laurence R. Jensen, Esq. of San Jose CA believes that this rule should be scrapped.

Greg Joseph, Esq, New York, urges that an insertion be made in the proposed draft to make the rule explicitly applicable to a motion for sanctions under this or any other rule or under any inherent power of the court. He expresses alarm at the opinion of the Court in *Chambers v. Nasco.*

M. J. Keefe, Esq., of Albuquerque, opposes this revision as an undesirable weakening of the rule.

Ernest Lane Esq of Greenville MS favors a subjective test for the imposition of sanctions.

Professor Martin Louis, University of North Carolina, finds in proposed 11(b)(3) an implication that a denial on information and belief avers that acquisition of evidence to disprove the fact is likely. "Otherwise, a defendant who cannot now or in the future disprove an allegation made by plaintiff cannot put plaintiff to her proof, even though plaintiff's proof is not overwhelming." He notes that this would be a material change. Professor Louis also notes the change in extending sanctions to represented parties and suggests that this will multiply the occasions for considering Rule 11 sanctions. And he notes that the safe harbor provision has no safeguard, that an unscrupulous attorney can keep filing and withdrawing without sanction. He also notes that, as under the present rule, the court is not likely to rule on a sanctions motion until it disposes of the merits of the paper challenged by that motion. This "recognizes and formalizes the poker game into which many attorneys have attempted to turn Rule 11." Because litigants with more resources are likely to be better poker players, the safe harbor provision "which appears to the Committee's only concession to critics of Rule 11, in fact may be only an occasional aid to those who are threatened with sanctions, but of substantial use to those who seek sanctions."

Paul A. Manion, Esq. of Pittsburgh generally favors this revision, but opposes that part of (b)(3) requiring a party to identify those allegations for which no evidence is presently available.

Robert Meyer, Esq., of Las Cruces NM favors the return of Rule 11 to its 1982 form.

Hon. J. Frederick Motz, D.Md., on behalf of the Local Rules Committee of his court, expresses the fear that "information and belief" standards in Rule 11 will eviscerate the rule.

Eugene J. Murret, Circuit Executive of 10th cir., suggests that the safe harbor should be available even when court proceeds sua sponte.

Robert W. Powell of Detroit, for the firm of Dickinson, Wright et al favors this revision.

Edward Ronwin, Esq. of Urbandale IA, urges that Rule 11 be restored to its pre-1983 text. If the rule must be kept, he favors a $1000 cap, that there should be no sanction for a mistake of law, and makes ten additional suggestions that have been considered by the Committee.

Robert S. Rosemurgy, Esq., of Escanaba MI expresses support for this revision.

Professor Maurice Rosenberg of Columbia University favors this revision. He questions, however, the provision for continuing certification.

William A. Rossbach, Esq., of Missoula MT supports the Frank draft.

Edwin A. Rothschild, Esq. of Chicago, commends the revision of Rule 11, but takes exception to the substitution of the term "non-frivolous. He perceives that sanctions are now only imposed on parties who have misrepresented the law, and that this is the way it should be. He regrets the deletion of the clause "identified as such" to describe novel legal arguments that are not sanctionable.

Richard T. Ruth, Esq. of Erie urges that Rule 11 be amended simply by replacing "shall" with "may." He asserts that the purpose of the rule was to prevent civil rights litigation and has and will be used for that purpose, and his aim would be to allow judges not to impose sanctions on others.

Donna S. Sears of Lander, WY favors this revision, especially the provision for fees to the prevailing party and the safe harbor provision.

Curtis E. Shirley Esq. of Indianapolis, writes in criticism of the safe harbor provision. He argues that it weakens the message of Rule 11 and will allow lawyers to file sanctionable papers and rely on their adversaries to do the research and investigation. He also contends that 21 days is too long in relation to the shorter period allowed for responses to summary judgment motions.

Christopher C. Skambis, Esq., of Orlando suggests mandatory assessment of costs against a party unsuccessfully moving for sanctions.

Laura D. Stith of Kansas City applauds this revision.

Paul L. Stritmatter, Esq., of Hoquiam WA believes that the proposed amendments make a bad rule worse. He is not specific in his statement of reasons.

Professor Carl Tobias, University of Montana, has published an article reviewing sanctions in civil rights cases. He finds a trend in the appellate cases toward the protection of civil rights plaintiffs, but is uncertain that the improvement is felt in all districts, or beneath the visible surface. 36 VILLANOVA L. REV. 105 (1991). Professor Tobias has also published a substantial article on the proposed revision; it appears in the March, 1992 issue of the Univ of Miami Law Review. He urges that the revision still leaves the district courts with too much discretion, that the continuing duty be stricken, and that good faith not be replaced by "non-friviolous." He regards the safe harbor and other aspects of the proposal as improvements.

Prof. Georgene M. Vairo has published an article in Volume 60 of the Fordham Law Review on Rule 11. It is descriptive of recent cases and proposals.

Hon. H. David Young, E.D. Ark. fears that this revision will produce still more Rule 11 litigation. He does not specify the reasons for that fear.

RULE 16

Theodore Tetzlaff, Chair, expresses concern that the agenda at pretrial conference is becoming overlong; he suggests that the commentary should disapprove truncation of discovery or trials in the absence of compelling reasons. He is also concerned that the parties be provided with flexibility to work out their own discovery schedules.

The American Board of Trial Advocates opposes mandatory ADR and limits on the length of trials as denials of Seventh Amendment rights.

The American Civil Liberties Union favors the revision toward case management, but questions whether an early conference can deal with expert witness and summary judgment questions. It urges that scheduling conferences should not be mandatory for the court. It opposes mandatory ADR. It suggests that Rule 16 conferences should be on the record if any party so requests.

American Insurance Association favors this revision except that it opposes coerced settlement and fears that the Note is not strong enough to prevent that evil. It is also concerned that the scheduling order be made before all parties have been joined.

The American Intellectual Property Assn favors this revision but would require the scheduling conference.

The Arkansas Assn of Defense Counsel oppose mandatory ADR and limits on the length of trials.

The Arkansas Bar Association opposes this revision; it disapproves of managerial judging and "judge-driven" litigation.

The ABCNY Committee generally approves this revision and finds it consistent with the Judicial Reform Act. On the whole, they favor hands-on case management. They suggest extending the time for the initial conference, especially in light of the state of most federal dockets.

The Beverly Hills Bar Assn generally supports this revision. It suggests that show cause order should be served before summary judgment is entered sua sponte. It questions the utility of a scheduling order entered before all parties have been served. It suggests that the Notes reflect that limits on experts should be imposed on a case-by-case basis.

The California Bar opposes mandatory ADR at the expense of the parties, and urge a show cause order before summary judgment is entered sua sponte. It also questions the utility of a scheduling order entered before all parties have been served. It suggests that the Notes reflect that limits on experts should be imposed on a case-by-case basis.

A committee of the bar of C.D.Cal. favors this revision.

The Chicago Bar Assn favors the revision except that it disfavors summary judgment at pretrial without special notice.

The Chicago Council of Lawyers approves the idea of an early scheduling conference that should follow informal exchange of information by the parties.

The Department of Justice expresses concern about (b)(5), noting that it operates on a slower schedule than other parties. The Department opposes mandatory ADR, and expresses concern that the standard for summary judgment stated in this rule is different from that stated in Rule 56.

The Federal Bar Association favors this revision except (b)(4). They suggest further clarification of (b)(6) and the establishment of a timetable for (b)(5).

Hunton & Williams of Richmond favors this revision.

Lawyers for Civil Justice oppose authorizing the court to compel attendance of parties at a settlement conference. They suggest authorizing the court to set a firm trial date, as suggested by the Civil Justice Act. They favor the language suggested by the Brookings group authorizing the court to require attendance by "authorized representatives of the parties, including counsel, with decisionmaking authority." Lawyers for Civil Justice would require a scheduling conference in every case and a requirement that counsel meet and confer prior to the conference.

The Los Angeles Chapter of the Federal Bar Association urge that the scheduling conference should not occur until the case is at issue. They express concern that the trial judge might foreclose expertise that is deemed too expensive. They ask that the Notes be clear that this rule in no way supplants the requirements of Rule 56. They question the Committee Notes regarding mandatory ADR, which they oppose if conducted with costs to the parties.

The Local Rules Committee of D.Md. is concerned that the present rule 16 implies a scheduling conference prior to a scheduling order, an event that generally occurs only in complex cases.

The Los Angeles County Bar favors the revision as proposed.

Kevin F. Maloney Esq of Boston opposes this revision; he reports that there is no problem to which it is addressed.

The Montana Chapter of ABOTA opposes (c)(15) and urges that the length of presentations should be under the control of counsel.

The NAACP Legal Defense Fund urges that the Notes should caution against using powers under this rule to force premature dispositions; their concerns derive from the frequency of their need to conduct extensive discovery.

The New Jersey Bar is concerned that summary judgments may be granted pursuant to (b)(5) without adequate notice.

The New York State Bar Committee favors the additions to Rule 16, urging that they are warranted as clarifications of powers already available to the court.

The Philadelphia Bar favors this revision, except that it opposes (b)(4) and the last sentence of (c)(16).

The Public Citizen Litigation Group opposes (b)(5) as a source of difficulty in multi-defendant cases. The problem is most likely to arise where the US is a defendant because it has longer time to answer than other defendants. Their suggestion is "The order shall enter as soon as practicable but in no event more than 120 days after filing of the complaint, or 60 days after the appearance of a defendant, whichever is later." The Group commends the additions calling attention to the possible rulings at such a conference, including summary judgment, but they question enlargements of the power of the court, particularly compelling parties to participate in extrajudicial proceedings. They oppose pretrial determinations of admissibility of opinion evidence. They do not believe that there is a problem of parties feeling obliged to rebut expert evidence amassed by resourceful adversaries.

The Southern District of Iowa supports this revision.

Trial Lawyers for Public Justice oppose the provision authorizing the court to control the presentation of expert testimony.

The Washington State Bar opposes bifurcation of liability and damage issues in separate trials.

Washington TLA opposes this revision as an increase in the discretion of the court.

S. Paul Battaglia, Esq., of Syracuse, approves of this revision except for mandatory ADR, which he opposes.

T. Mack Brabham and fourteen other lawyers in McComb MS oppose this revision as the most mischievous of all because it grants too much power to the judge.

Mary Coffey of Saint Louis urges that this proposal gives too much control to the court over the conduct of the trial.

Steven J. Cologne, Esq., of San Diego opposes the provision allowing judges to control the length of trials.

Roy Dalton, Esq., of Orlando urges that it is inappropriate for the court to rule on experts at the pretrial stage.

Professor Kim Dayton of the University of Kansas opposes (c)(9) and argues that the Civil Justice Reform Act implicitly rejected its premise. He enclosed his article on *The Myth of Alternative Dispute Resolution in the Federal Courts* published in the Iowa Law Review.

Winslow Drummond Esq of Little Rock opposes mandatory ADR.

Frank, Napolitano & Resnik are troubled by Rule 16. They suggest a sharper distinction be made between scheduling conferences, conferences after discovery, and settlement conferences. They are also concerned that the Committee has shortened the time to the scheduling conference. Many of the matters now suggested as proper agenda items for a pretrial conference cannot be managed until after discovery, such as limitations on evidence to be presented at trial. They also suggest that the rule should be explicit that "An order providing for summary adjudication pursuant to Rule 56, of any claim, defense, or issue may not occur at a Rule 16 conference without prior written notice to the parties and an adequate opportunity to discover an present material pertinent to the adjudication." They regard the endorsement of bifurcation of trial to be overbroad. They note concern about compulsory ADR. They argue that *In re Novak*, 932 F. 2d 1397 (11th cir 1991) goes too far and propose language limiting the power of the court to compel attendance at settlement conferences. They urge the need to require a record of proceedings under Rule 16, and to clarify sanctions, pointing to a number of cases said to demonstrate abuse of Rule 16.

Lee Hagen, Esq. of Fargo opposes any increases in the power of the court to control the extent and content of the trial.

Patrick E. Hollingsworth, Esq., of Little Rock argues that a Rule 16 conference is too late to begin discussions of ADR.

Jack E. Horsley, Esq., of Mt. Vernon, IL, commends the proposed revision of Rule 16.

Paul A. Manion, Esq., of Pittsburgh, favors this revision.

Ms. Paula J. Nelson of Victorville CA opposes limitations on the length of trial or the number of witnesses.

Marc A. Nerenstone, Esq., of Washington DC finds (c)(5) to be unnecessary - the court can schedule a hearing on a Rule 56 motion at the time of pretrial whenever it chooses.

William A. Rossbach, Esq., of Missoula MT argues that some of the items on the agenda for a scheduling conference, such as the limits on expert testimony, cannot be resolved early in the proceeding. He is also troubled about summary judgments being entered without warning. And he opposes mandatory ADR. He suggests that sanctions under 16(f) should be imposed only when necessary and should be the least severe required to effect the purpose of the rule.

Susan Vogel Saladoff of Rockville MD opposes judicial control of the use of experts or on the length of trials.

Samuel M. Shapiro, Esq of Rockville MD opposes pretrial limitation on expert testimony or on the length of trials.

Hon. Donald J. Tobin of San Diego supports the views of Gail Friend.

Thomas A. Tozer, Esq., of Chicago opposes the power to compel attendance of parties at pretrial. His reasons are stated fully in his article in 66 Indiana L. J. 977 He calls attention to the fact that the parties may have interests that conflict with those of the judge desiring settlement to clear the docket. He favors authorizing the judge to communicate directly to clients regarding settlement offers as the means of preventing lawyers from failing to disclose them.

H. Woodruff Turner, David G. Klaber, Robert B. Sommer, and Thomas A. Donavan of Pittsburgh urge that Rule 16 require the trial judge to meet with the parties early in the life of each case.

Hon. Henry Woods, E.D.Ark., opposes mandatory ADR.

Hon. H. David Young, E.D. Ark., opposes mandatory ADR.

RULE 26

The Administrative Office of the United States Courts reports that many districts have adopted "tracking" plans pursuant to CJRA, and that 21 of the plans have adopted some version of (a)(1).

The Alliance of American Insurers opposes (a)(1) as vague and compromising of lawyer-client relations. It argues that it will prolong litigation and increase its expense.

Alliance for Justice opposes the revision of (b)(4) allowing the court to preclude discovery disproportionate to the stakes. It opposes (a)(2) as undercutting the ability of plaintiffs to prove their cases.

The American Association of Railroads opposes (a)(1).

The American Bar Association has resolved that appropriate limitations should be imposed on pre-trial discovery, that discovery beyond limits established by the court should not be permitted, and that protective orders should in appropriate circumstances require the discovering party to bear the costs, including the time of non-legal personnel.

The Admiralty and Maritime Litigation Committee of the ABA is concerned about these proposed revisions. They urge that exigent litigation should be exempt. Their concerns are addressed to (a)(1).

Theodore Tetzlaff, Chair, opposes (a)(1) and supports (a)(2) with the suggestions that (a)(2)(A) should not exclude discovery of earlier testimony of the expert and that the disclosure should be keyed to the discovery period rather than the date set for trial. He recommends abolition of (b)(4)(B) pertaining to nontestifying experts. He also supports other disclosure provisions but questions the term "if the need arises." With respect to (b)(5), he suggests a presumptive cutoff date and an exception for the disclosure of manes of parties to a communication where such disclosure would reveal counsel's mental impressions. Mr. Tetzlaff also noted that many Delay Reduction Plans provide for disclosure; he provided the committee with an overview of the provisions of such plans.

The Torts and Insurance Section of ABA questions (a)(1) and (a)(2).

The Advisory Group for E.D.N.Y. urges a three-year moratorium on national rules affecting the Judicial Reform Act local rules.

The American Board of Trial Advocates generally favors disclosure, but fears the present proposal will increase motion practice especially by lawyers required to bill many hours a year.

The American Civil Liberties Union is concerned about mandatory disclosure as an interference with attorney-client relations. It is also concerned about reliance upon local options; it urges adherence to national standards that should be the same in all districts. It favors the revisions extending the duty to supplement. It is especially concerned about the requirement of expert reports in civil rights cases, especially since the fees of the expert are not taxable. It opposes flexibility through local rules. It suggests that the report should be prepared at the expense of the opposing party. It also opposes the revision of (b)(2) to permit limitations on discovery, arguing that the present language is satisfactory.

The Federal Courts Committee of the American College of Trial Lawyers supports the disclosure requirements. They suggest that disclosure of expert testimony should be staggered, the plaintiff disclosing first. They also disfavor the sanctions provision of Rule 26(g).

ACCA opposes voluntary disclosure as unworkable. Indeed, it opposes continued availability of discovery unless it is amended to provide sharper focus.

American Insurance Association supports the position of Lawyers for Civil Justice.

The American Institute of Certified Public Accountants opposes (a)(1).

The American Intellectual Property Assn opposes (a)(1), but supports (a)(2).

ATLA opposes all provisions for voluntary disclosure as disadvantageous to personal injury plaintiffs. They emphasize the burden of preparing exhibits 90 days in advance of trial. They also specifically object to the failure of (g) to require a party as well as counsel to certify that disclosures are complete.

Arkansas Association of Defense Counsel opposes the changes in the discovery process. They note that the defendant does not know in the first 30 days what its own defenses are. They also note that typically they do not retain an expert until the plaintiff does so; hence they will be burdened by a requirement of simultaneous disclosure.

The Association of the Bar of the City of New York Committee on Federal Courts (ABCNY) commented on the spring draft of Rule 26, but the comments were not received in time to be considered carefully at the May meeting. ABCNY urges postponement of discovery revision pending assimilation of Biden Committee revisions. They argue that there may be no one best system of discovery and that local experimentation and adaptation to local culture may be best. Dissenting members urge that there should be no local rules bearing on discovery, that any one system is better than many. This contention was not renewed in their November comment on the published proposal.

ABCNY does not object to the idea of disclosure if it can be accomplished efficiently. They do not believe, however that "baseline discovery" is much of a problem, or that this reform will effect much economy. They note the difficulty of the phrase "bear significantly." They are concerned that counsel should not be required to identify in advance of a request documents that undercut the client's contentions. They question whether the party must disclose hostile witnesses, stating that the proposed draft is not clear on this point. They urge clarification of the entitlement of a party to a stay of disclosure where the demand has been made by a party having a disclosure burden that is slight. They also wish it to be made clear that a party using an interrogatory redundantly to disclosure is merely wasting an interrogatory and is not exposed to sanctions.

ABCNY endorses the idea of 26(a)(2). They urge that it should be made clear that the opposing party may of right examine the retained expert after receiving the required report. They suggest that

the 30-day rebuttal period is too short where the issue is complex. And they urge that the rule requiring the report should not be subject to local variation.

ABCNY has no objection to 26(a)(3), but urges that the result could be achieved more effectively by requiring a pretrial order and mandating that it be completed 21 days prior to trial. A purpose achieved would be to focus the parties attention on the trial agenda in time to settle earlier than on the courthouse steps.

ABCNY favors the meet-and-confer requirement. ABCNY is divided on the duty to supplement as proposed in 26(e), a majority favoring the proposal.

ABCNY favors retention of part of 26(f) by requiring courts to consider discovery rulings as part of the scheduling conference or order permitted by 16(c)(6). While it is admitted that this may be premature and that the order may need to be amended later in light of unfolding discovery, this would get the court involved at an early point.

The Beverly Hills Bar Association opposes both (a)(1) and (a)(2) and (e)(1).

The California Bar opposes this revision, except for (a)(3). They perceive a conflict between 26(g) and 11. They opposes a due diligence obligation on counsel as an excuse for some firms to bill for independent audits of clients' records.

The California Trials Lawyers Association opposes this revision.

A committee of the bar of C.D.Cal. opposes (a)(1), but favors (a)(2). It opposes (a)(3) on the ground that it is redundant to local rules already in place. They also oppose the revision of (b) to authorize cost-benefit appraisal by the court of proposed discovery.

The Chicago Bar Association favors the revision except that document disclosure should be limited to those documents favoring the disclosing party's contention, and 60-90 days should be allowed

The Chicago Council of Lawyers recommends that the timing for disclosures pursuant to (a)(1) and (a)(2) be set at the scheduling conference. The organization apparently otherwise approves the idea of mutual disclosures.

The Colorado Bar Association recommends a less detailed expert disclosure such as that required by their local rule. It also suggests that the (a)(3) disclosure should be made 80 days before trial.

The Connecticut Bar committee finds it hard to imagine why radical change would be proposed for a discovery system that has worked so effectively. It fears that the revision would require more judicial involvement. It favors retention of (f).

Defense Counsel of Delaware oppose (a)(1).

Defense Research Institute opposes (a)(1).

The Department of Justice favors disclosure requirements, but questions the standard provided in (a)(1). It opposes the accelerated disclosure provision, especially as applied to government litigation. It suggests that (a)(2) should require disclosure of the expert's compensation. It also supports (a)(3), the certification requirement, and the extension of the duty to supplement. And it makes two other suggestions based on the Civil Justice Reform report that are not embraced by the present proposals: requiring parties to connect discovery requests to allegations and precluding discovery pertinent only to an admitted fact.

Dilworth Paxson Kalish & Kauffman of Philadelphia opposes (a); its reasons seem to be addressed to (a)(1).

A Committee of the DC Bar believes that (a)(1) would accomplish little. They find the standard of disclosure vague, the sanctions severe and the potential benefit slight. As to (a)(3), they question the wisdom of distinguishing between witnesses and exhibits that a party expects to present and those whom it may present. They support the requirement of informal resolution of discovery disputes. They support (a)(2) and believe that it will reduce the need for expert depositions, but urge that the rule should specify whether drafts of the reports are discoverable.

The Federal Bar Association opposes (a)(1) and (a)(2).

The Federal Judicial Center, per Joe S. Cecil and Molly Treadway Johnson, surveyed federal judges regarding this revision. 298 district judges, being 96% of those responding, favored the proposed revision of (a)(2).

Fisher & Phillips of Atlanta contends that (a)(1) will increase the cost of litigation; they especially point to the undesirability of allowing a plaintiff to accelerate discovery while a Rule 12 motion is pending. Plaintiffs, they contend, should disclose first.

The Georgia Bar opposes this revision as an aggravation of the problem. It favors narrowing the compass of discovery.

The Hawaii Defense Lawyers Assn oppose (a)(1).

Hunton & Williams of Richmond favors the idea of early disclosure but finds the present draft "a leviathan." They oppose the proposed timing of the exchanges of expert reports, expressing particular concern about the relation to the fast-track scheduling done in E.D.Va.

The Idaho Association of Defense Counsel oppose this revision; their comments seem to be addressed to (a)(1).

The Illinois Association of Defense Counsel oppose (a)(1) as creating ethical problems for attorneys. It urges that (a)(2) should be limited to retained experts. It supports (a)(3) as proposed.

The International Association of Defense Counsel supports the position of the Lawyers for Civil Justice and recommends experimentation with disclosure provisions.

The Iowa Defense Counsel Association opposes (a)(1).

Kincaid Gianunzio Caudle & Hubert of Oakland CA disfavor the extension of Rule 11 into the sphere of discovery. They have no doubt that there is discovery abuse, but find the revision naive. If retained, there should be a staggered time for disclosure.

The Lawyers for Civil Justice oppose pre-discovery disclosures. This group also speaks for the Products Liability Advisory Council. They argue that disclosure will produce more, not less, contention, and would undermine the adversary system. They suggest that the number of 12(e) motions will greatly increase. They prefer Judge Schwarzer's proposal in that it would require disclosure by the plaintiff at the time of filing the complaint, giving defendants a better basis for knowing how to respond.

The Los Angeles County Bar opposes the revisions of both (a)(1) and (a)(2). The former it finds vague and disturbing to attorney-client relations; the latter to be unnecessary and productive of repetitive work.

The Los Angeles Chapter of the Federal Bar Association opposes (a)(1). With respect to (a)(2), they question the term "ready for trial."

The Maritime Law Association urges that the time limits applied to disclosure are unrealistic in many maritime cases. They fear that judges will not have time to hear motions for extensions. They urge that 60 days be substituted for 30.

The Local Rules Committee of D.Md. opposes the restriction of local rules on disclosure required by Rule 26 to "categories of cases."

Mehaffy & Weber of Houston oppose (a)(1).

The Michigan Association of Defense Counsel opposes the proposed revision of (a)(1).

The Montana Bar opposes the requirement of expert reports as applied to unretained experts.

The Montana Chapter of ABOTA objects to (a)(1) as unreasonably vague. They would require experts to provide more information pursuant to (a)(2). They suggest that the 4-year period should explicitly run back from the date of the report, and that the file numbers of the cases should be disclosed. With respect to (a)(3), they object to the concept of "witnesses to be called if the need arises." They are also concerned that a party should not be prevented from disproving evidence offered on an unanticipated issue. They fear that the rule operates to require a party objecting to an impeachment purpose of evidence admissible for non-impeachment purposes to make all possible objections against the chance that evidence will be used for impeachment. They also note that there is a change in language between 26(a)(2) and the supplementation provisions, one speaking of experts who may be presented and the other of experts the party expects to present.

The NAACP Legal Defense Fund urges that civil rights cases should be recognized as special in regard to the duty to disclose, plaintiffs rarely having information other than that regarding their own personal situations. They question the phrase "bears significantly" and fear that the expert witness report will be burdensome to civil rights plaintiffs. They also oppose the cost-benefit language proposed in (b)(2).

The National Association of Independent Insurers opposes (a)(1) as inconsistent with notice pleading.

The National Association of Railroad Trial Counsel fear the disclosure requirements will be difficult to meet in FELA cases and oppose 26(a)(1).

National Assn of Securities and Commercial Law Attorneys suggest that (a)(1) disclosures should be made 30 days after any response is made to the complaint.

The New Jersey Bar opposes what it perceives to be micro-management by rule of the discovery process. It fears that (a)(1) will not work. It supports (a)(2) provided that it is clear that the court can order that such disclosure be made at an earlier time.

New Jersey Defense Association opposes (a)(1).

A committee of the New York County Bar opposes (a)(1).

A section of the New York State Bar oppose the revision of this rule, and offer an alternative draft that restricts the scope of discovery. Their draft does adopt the cost-benefit language of the published proposal and would require a pre-discovery conference of counsel.

A different committee of the New York State Bar opposes (a)(1) and (a)(3).

Ogletree Deakins Nash Smoak & Stewart of Greenville SC favor disclosure and believe that the discovery process will be shortened by the proposed revision.

The Orange County Bar Committee regards the initial disclosure requirements as unrealistic; they would support the CD Cal rule as limited to materials that the party expects to use. They are concerned that 26(a)(2) may be too expensive in smaller cases.

The Philadelphia Bar opposes this change and favors experimentation under the CJRA.

The Product Liability Advisory Council opposes (a)(1), but would support a meet-and-confer rule.

The Public Citizen Litigation Group opposes (a)(1). It is not convinced that excessive discovery is a problem and feels that the 1983 amendments may have been sufficient to deal with any problem that existed. It especially opposes (b)(2). The Group endorses (a)(2), but question the meaning of "the date the case has been directed to be ready for trial." It also endorses (a)(3). It calls attention to a question whether the exclusion of evidence to be used for impeachment only means that such evidence can be excluded under 37(c)(1) if it is offered for multiple purposes. It favors the enlargement of the duty to supplement.

Robinson & Cole of Hartford CT opposes (a)(1).

Rowan Companies, Inc., suggests that (a)(1)(A) conflicts with proposed (a)(3)(A).

The South Carolina Defense Trial Attorneys' Assn opposes (a)(1).

The Southern District of Iowa supports disclosure, but urges that 120 days should be allowed for the early disclosure.

Sutherland Asbill & Brennan of Atlanta opposes (a)(1).

The Embassy of Switzerland urges that the proposed revision bearing on the Hague Convention is not consistent with some of the language in the *Aerospatiale* opinion to the effect that the Convention draws no distinction between evidence obtained from parties subject to the jurisdiction of the court and those that are not. It also objects to any use of discovery to secure information protected from disclosure by Swiss law.

Trial Lawyers for Public Justice oppose voluntary disclosure as an impediment to plaintiffs. They also urge that the changes are premature and preempt the Civil Justice Act.

The Virginia Assn of Defense Attorneys (per Thomas C. Palmer, Esq. of Richmond, opposes (a)(1) as an unreasonable imposition on defendants.

The Washington Defense Trial Lawyers oppose (a)(1) as another layer to a system already burdened with too much discovery.

The Washington State Bar lauds the aim of this revision but expresses concern about the adversary tradition.

Washington TLA opposes voluntary disclosure.

The Wichita Bar Association opposes disclosure requirements that would apply to the opposing party's claims or defenses because such disclosures blur the concept of an adversarial system.

Williams & Ranney of Missoula MT oppose (a)(1).

Wisconsin ATLA opposes 26(a)(1) as creating more problems than it solves.

Robert J. Albair, Esq. of Clayton MO,, opposes the revision of Rule 26. He perceives that (a)(1) will merely produce more paper, and that (a)(2) is ridiculous because most experts do not keep records or put anything in writing, because to do so provides more fodder for cross-examination and thereby weakens their cases.

Robert H. Alexander, Esq. of Oklahoma City opposes (a)(1) and suggests the local rule of WDOkla as an alternative to (a)(2)

Mr. Allain of New Orleans thinks that self-executing discovery is a good idea. He is, however, concerned about the handling of material that comes to light after the disclosure event. He especially applauds the provision on expert disclosure.

Mr. James R. Averitt of Birmingham AL, on behalf of Vulcan Materials Company is "alarmed" at proposed (a)(1) on account of the generality of complaints filed against his company and the resulting burden that would be placed upon it.

Dan H. Ball, Esq., of St. Louis, regards proposed (a)(1) as mischievous. He is also concerned about simultaneous exchange of expert reports and argues that plaintiffs should offer expert reports first.

S. Paul Battaglia, Esq., of Syracuse opposes (a)(1) because it introduces a vague new standard and because party-initiated discovery is satisfactory. He favors (a)(2), but questions the timing of the requirement

William C. Beatty, Esq. of Huntington WV opposes the requirement proposed in Rule 26(a)(1) as a needless burden. The rules should provide lawyers with tools and leave it up to the advocates to use them.

Sheilah L. Birnbaum of New York opposes voluntary disclosure provisions as likely to increase the cost of litigation.

Peter K. Bleakley Esq, Peter T. Grossi Esq. and Robert N. Weiner Esq of Washington DC oppose (a)(1).

Fred L. Borchard and John W. McGraw of Saginaw MI urge that (a)(1) will do nothing but increase incivility among lawyers.

T. Mack Brabham and fourteen other lawyers in McComb MS do not object to mandatory disclosure, but fear that it will be abused by defendants. They question the cost of providing both a report and an expert deposition.

Jason G. Brent Esq. of Tehachapi CA supports the views of Ms. Gail Friend.

Harold N. Bynum, Esq., of Greensboro NC finds the expressing "likely to bear significantly" too opaque, and leaves the defendant to do too much guessing. He urges that the changes are more likely to impede than to speed the process. He also opposes arbitrary limits on the amount of discovery.

John C. Cahalan Esq of Portland OR opposes (a)(1).

J. Richard Caldwell, Esq., of Tampa, urges that proposed 26(a)(1) is prejudicial to manufacturing concerns in the costs it imposes and in the threat to confidential information.

Gordon M. Carver, Esq. of Houston favors the position of the Products Liability Advisory Council.

J. P. Causey Esq of Richmond VA opposes (a)(1).

Gerard Cedrone, Esq., of Philadelphia urges that this proposal creates "a number of practical problems" not enumerated.

Walter Cheifetz, Esq.of Phoenix urges that these changes be the subject of experimentation in pilot districts before being promulgated as national rules.

Douglas C. Chumbley, Esq., of Minneapolis favors the views of the Lawyers for Civil Justice.

Steven J. Cologne, Esq., of San Diego opposes the proposed revision of (a)(1).

Clarence R. Constantakis, Esq., of Dearborn MI favors this revision.

Prof. Laura Cooper of the University of Minnesota is concerned that the draft of subdivision (e) may in some respects narrow the duty to supplement by relieving parties of the duty to make sure that previous responses remain complete and correct, particularly as regards persons having knowledge of events in dispute and expert witnesses. She urges that 26(e) continue, as in the present rule, to require that parties supplement information given with respect to experts if the information previously provided is incorrect, whether or not "the party learns that the information disclosed is not complete and correct."

Philip R. Cosgrove, Esq., of Los Angeles argues that the empirical basis for 26 is inadequate, that it is inconsistent with notice pleading, will lead to overdisclosure, one size does not fit all, is inappropriate to the adversary system, and recommends that the Committee embrace the successful disclosure rule in CD Cal.

Ms. Mary Coffey of St. Louis, urges that (a)(1) is too vague, but she favors (a)(2), but questions the redundant deposition.

Clarence R. Consantakis, Esq. of Dearborn MI supports this revision.

Donald C. Cramer, Esq., of Edmonds WA opposes (a)(1).

James T. Crowley, Esq, of Cleveland, argues that (a)(1) is a trap for the unwary and will result in much disputation over the admission of evidence at trial.

Frank J. Daily, Esq., of Milwaukee, urges that (a)(1) will increase the cost of litigation. He urges with respect to (a)(2) that the party with the burden of proof make first disclosure of expert testimony. He favors the revision of (b)(2).

D. Michael Dale, Esq., of Portland OR urges that disclosure of witnesses should not be required where the witnesses may be subject to intimidation.

Roy B. Dalton, Esq., opposes the disclosure provisions as defeating the rights of parties to prepare their own cases and use experts as they see fit.

Michael J. Danner, Esq., of Long Beach opposes 26(a)(1) as requiring too much of defendants.

Craig M. Daugherty, Esq., of Tyler TX, doubts that Rule 26 will cause defense lawyers to become sheep being led to slaughter, or that opposing counsel will develop their adversaries' cases as the adversaries would.

Ronald M.Davids, Esq. of Cambridge MA opposes the proposed (a)(1) as likely to produce heavy motion practice and injustice to those who guess wrong.

Jeffrey S. Davidson Esq. of Los Angeles reports that CDCal Rule 6 works well in simple cases, but not at all in complex cases. He urges that early meetings are needed to facilitate disclosure. But in complex cases, even this will not prevent multiple disputes, accusations and motion practice.

Donald H. Dawson, Esq., of Detroit opposes (a)(1) but favors (a)(2), but would sequence the exchange of reports, the plaintiff being required to disclose first.

Paul R. Devin, Esq., of Boston, urges that the revision of Rule 26(a) should await experimentation with disclosure rules in sample districts.

John B. Donohue, Esq., of Richmond VA opposes (a)(1). He supports (a)(2) but would require disclosure earlier than 90 days.

Donald K. Dieterly, Esq., of South Bend, opposes (a)(1) as contrary to notice pleading and unjust to products liability defendants.

William L. Dorr Esq of Rochester NY opposes this revision.

John T. Driscoll of Waltco Truck Equipment Co. of Gardena CA opposes Rule 26 as ruinously favorable to plaintiffs.

Winslow Drummond, Esq. of Little Rock opposes disclosure requirements. He urges that the requirement of an expert report will limit expert testimony to hired guns.

Carroll E. Dubac of Los Angeles opposes (a)(1), urging that it is vague, that the timing is not as it should be, and that plaintiffs should disclose first. He urges that disclosure of insurance is not necessary. He also urges that (a)(2) is unfair to defendants who should be informed of their adversaries expert information before disclosing theirs.

M. Richard Dunalp, Esq. of Pittsburgh opposes (a)(1).

Charles R. Dunn, Esq., of Houston, opposes this revision as overbroad and harmful to corporate defendants.

Kevin J. Dunne, Esq., argues that 26(a)(1) is unfair to defendants and will encourage the drafting of broad, vague complaints leading to more discovery, not less.

Richard L. Edwards, Esq. of Cambridge MA opposes (a)(1). He also is critical of (b)(5) as likely to enhance opportunities for discovery abuse.

Dale Ellis, Esq, of Tulsa, opposes Rule 26(a)(1). He fears that it will lead to half-hearted discovery.

John R. Fanone Esq of Chicago opposes (a)(1).

Gennaro A. Filice, Esq. of Oakland CA supports the position of Lawyers for Civil Justice.

David F. Fitzgerald, Esq. of Minneapolis opposes (a)(1).

J. Edward Fowler, Esq., of Fairfax VA, on behalf of Mobil, argues that these revisions do not strike at the heart of the beast but will increase the cost of litigation, especially (a)(1).

Frank, Napolitano & Resnik approve of 26(a)(1) in principle. They share concern about the meaning of "likely to bear significantly." They would limit the disclosure to material known at the time of the disclosure and manifest serious concern about the provision for continuing duties to disclose. They oppose the blanket requirement of 26(a)(2) as too burdensome; they think it would be sufficient to disclose only the identities and opinions. They also suggest that the time limits provided may not be workable. They see no need to authorize local variation on disclosure of experts. They are also concerned that the preclusion of pre-disclosure discovery excessively interferes with autonomy of counsel. They oppose the subordination of discovery sanctions to Rule 11.

Charles F. Freiberger, Esq. of Columbus OH finds that the changes to Rule 26 will lead to more not less litigation.

Gail N. Friend, Esq. of Houston TX finds that the disclosure provisions will increase costs, and that being required to disclose damages and insurance provisions "impinges upon due process rights of discovery."

Eugene O. Gehl, Esq., of Madison WI fears that 26(a)(1) would create more problems than it resolves.

Keith Gerrard, Esq., of Seattle believes that 26(a)(1) will increase the cost of litigation. He urges consideration of the Canadian-UK system which imposes on parties a duty to prepare an affidavit of documents in their possession that are relevant to the lawsuit. It is his experience that it does not work well because of the guesswork entailed. He finds the expert's report unnecessary where a deposition is provided. He recommends that the list required by (a)(3) should be specific, not generic, as " all documents regarding plaintiff's damages." He also suggests that there should be sanction for overlisting. He also opposes expansion of the duty to supplement.

Steven Glickstein, Esq., of New York City, reminds the Committee of the New York State Bar recommendations considered by it in the early stages of its deliberation on the disclosure rule; that report appears at 127 FRD 625 (1989). He urges that the duty to identify known witnesses be extended to persons having knowledge of transactions or occurrences alleged. He finds "bears significantly" too elusive a term. He opposes document exchange in the absence of a request as impossible to police. He supports the other disclosure provisions.

Arthur M. Glover, Esq, of Houston opposes (a)(1).

Catherine A. Gofrank Esq of Southfield MI opposes (a)(1); she supports the views expressed by Brian Johnson Esq in his article in the Product and Safety Law Reporter.

John D. Golden, Esq., of Miami echoes the views of the Lawyers for Civil Justice.

Hugh Q. Gottschalk, Esq. of Denver opposes mutual disclosure. He approves expert information exchange, but urges that it should be earlier. He opposes an enlarged duty to supplement.

Arthur P. Greenfield, Esq. of Phoenix fears that the sanctions proposed in Rule 37 are not adequate to secure compliance with the disclosure requirement. He also questions the meaning of "bear significantly on the claim or defense," and fears that this will produce much litigation.

Jack E. Greer, Esq. of Norfolk opposes voluntary disclosure.

Joseph P. Griffin and Mark N. Bravin of Washington have published an article favoring the revision of this rule with respect to its relation to the Hague Evidence Convention. The article was published in *The International Lawyer.*

Joseph E. Grinnan Esq. of Southfield MI opposes (a)(1) as unfair to defendants who do not know what the dispute is about. He also argues that (a)(2) should distinguish between plaintiffs and defendants.

Gregory A. Gross Esq of Pittsburgh opposes (a)(1).

William D. Grubbs, Esq., of Louisville regards (a)(1) as unrealistic and likely to increase the cost of litigation.

Prof. Stuart Gullickson, University of Wisconsin, favors the proposed changes in Rule 26.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Harold A. Haddon of New York, Loren Kieve of Washington, and Prof. Michael Tigar of the University of Texas, former officers of the ABA Litigation Section, opposes disclosure of communications from attorneys to experts that reflect attorney work-product, supporting the position of the 3rd circuit in *Bogosian*. They argue that the proposals otherwise do not go far enough in restricting the scope of discovery; they continue to support the 1978 proposals. They also argue that an auto mechanic should be able to give expert opinion without preparing a written report.

George N. Hayes, Esq., of Anchorage opposes Rule 26(a)(1), giving an example of a products liability case in which the defendant knows nothing of the events about which there may be a dispute. He notes that plaintiffs in Alaska have a fast-track option based on their full disclosures, and that it does not work well. He urges that plaintiffs' experts can reasonably be expected to prepare reports, but not so for defendants' experts.

Thomas M. Hayes, Esq., of Monroe LA finds it unreasonable that plaintiffs and defendants get the same amount of time to prepare their disclosures, because the plaintiff should be prepared at the time of filing the complaint.

Dennis L. Hays, Esq., Beloit WI, opposes (a)(1).

Jon L. Heberling, Esq. of Kalispell MT approves disclosure as long as it is simultaneous for both parties. He is concerned that (a)(2) may increase the burdens on treating physicians. He urges that the disclosure in (a)(3) should be made at an earlier time, before the pretrial conference. He applauds the enlarged duty to supplement.

John T. Hickey, Jr., Esq, of Chicago opposes the disclosure requirement. He asserts that the present system "works well." The changes will encourage spurious litigation and make discovery more expensive. They would also discourage quick settlements, and would reward lazy lawyers while penalizing smart ones.

Thomas B. High, Esq., Twin Falls ID, opposes disclosure as unfair to defendants.

Jonathan M. Hoffman, Esq. of Portland OR argues that disclosure as proposed is unjust to defendants who must respond to muddled and unclear complaints. He finds 26(a)(1) to be inconsistent with notice pleading.

Raymond L. Hogge, Esq. of Norfolk VA opposes all features of the proposed revision of this rule.

Hon. H. Russell Holland, D. Alaska, supports the views of Judge Panner. He finds the proposals inconsistent with the Civil Justice Reform Act.

Patrick E. Hollingsworth, Esq., of Little Rock believes that lawyers cannot be expected to conform to the expectations expressed in (a)(1).

Charles W. Hosack, Esq. of Couer d'Alene regards (a)(1) as "ridiculously impractical," making it malpractice to file an answer.

Allen W, Howell, Esq., of Montgomery AL, approves most of the changes but is concerned that 26(a)(2) will not work in simple cases. Most "experts" do not keep lists of previous appearances.

David E. Hudson Esq of Augusta GA opposes (a)(1).

Charles A. Janiak Esq of Boston opposes (a)(1).

James H. Jarvis, EDTenn, supports the views of Judge Panner. He favors individual scheduling orders for each case.

Laurence R. Jensen Esq, of San Jose believes that self-executing discovery will be expensive to plaintiffs and a deprivation of privacy to defendants.

Brian N. Johnson, Esq. of Minneapolis has published an article in BNA Toxics Law Reporter criticizing this proposal.

Frank G. Jones, Esq., of Houston argues that the problem with discovery is overbreadth and that this proposal does not address that problem. He urges that experimentation is needed before promulgation of the present proposals.

Gregory P. Joseph Esq., New York City, suggests that "responsive pleading" rather than "answer" should be the triggering event so that the rule covers counterclaims, cross-claims, etc.

M. J. Keefe, Esq. of Albuquerque opposes voluntary disclosure requirements.

Ann Kelly Esq of Santa Monica opposes this revision.

Richard A. Kitch, Esq., of Detroit, opposes the revision of Rule 26, until the problem of notice pleading has been addressed. He notes that in products liability cases, the burden imposed on defendants by the disclosure proposal would be unbearable because of the absence on specificity in the complaints.

Walter G. Knack, Esq., of Grand Rapids supports the position of the Lawyers for Civil Justice and finds the committee draft unfair to both sides.

Harold E. Kohn, Esq. of Philadelphia believes that (a)(2) will engender many requests for exceptions and is not worth the cost.

Kenneth A. Kraus, Esq, of Cleveland, opposes the revision of Rule 26 as unfair to products liability defendants.

Prof. Kenneth R. Kreiling of Vermont Law School supports (a)(2).

Edward M. Kronk, Esq., of Detroit, opposes pre-discovery disclosures.

Ms. Patricia R. Kruger, on behalf of American Standard, Inc, opposes Rule 26(a)(1) as imposing an unmanageable burden on products liability defendants.

Philip A. Lacovara, Esq., of New York urges that (a)(1)(B) be modified to eliminate the description option and require production of documents that "tend significantly to support or undermine any claim or defense. He also urged that there should be a presumption of non-disclosure during the pendency of a Rule 12 motion. He supports the 1978 proposed revision of (b). He urges that the broadened duty to supplement should be limited to material subject to the disclosure requirement.

Ernest Lane Esq finds the disclosure proposals to completely disregard the attorney's need to conduct orderly and concise discovery.

J. D. Ledbetter Esq of Southfield MI opposes (a)(1) and (a)(2). He recommends a local rule for EDMich.

Paul R. Leitner, Esq., of Chatanooga urges that (a)(1) is unjust to products liability defendants.

Lawrence J. Lepidi, Esq., of Pittsburgh, argues that 26(a)(1) would be unfair to defendants and may lead to defense counsel suggesting to plaintiff theories that the plaintiff has not thought of.

Thomas M. Loeb, Esq. of Southfield MI opposes (a)(2) as a burden and expense.

Edwin L. Lowther of Little Rock opposes (a)(1); he supports the views expressed in the article submitted by Brian Johnson Esq.

Jack B. McCowan, Esq. of San Francisco, fears the uncertainty of proposed (a)(1) and believes that it will not work in cases of any size but will produce a lot of gamesmanship. He opposes (a)(2) as an unnecessary expense, although he sees the related revision of 702 as needed.

Hon. Neil P. McCurn, NDNY, supports the views of his colleague, Hon. Owen Panner.

Richard McMillan, Esq., of Washington, favors local experimentation with the disclosure proposals, especially (a)(1). He suggests also a presumptive limit on the period of time allowed for discovery.

Arthur T. McKinney, Esq. of Houston opposes (a)(1); he also disfavors the keeping of score on judges who hustle their cases through the process.

Kevin F. Maloney Esq of Boston opposes this revision; he reports that there is no problem to which it is addressed.

Paul A. Manion, Esq. of Pittsburgh, opposes (a)(1) as unrealistic, but favors (a)(2)

James S. Maxwell, Esq., of Dallas, endorses the views of Ford Motor Company regarding Rule 26(a) as expressed by Joseph Valentine.

Professor Thomas Mengler of the University of Illinois urges the Committee to pull back from 26(a)(1). While supporting the rest of the discovery revision, he urged that games played in interrogatory practice will merely be relocated in the disclosure. He is also concerned that the continuing duty to add to that disclosure will lead to blindsiding and useless contention. And he fears that disclosure by plaintiffs may encourage courts to depart from the philosophy of notice pleading.

Francis Morrison, Esq., of Hartford finds the draft of 26(a)(1) to be "unrealistic, unreasonable, and unfair" to defendants. He predicts a lot of litigation to enforce the rule.

Ronald G. Morrison, Esq., of Spokane urges that (a)(1) requires too much of defense counsel reading notice complaints.

William T. Murphy Esq of Missoula MT opposes (a)(1).

Joseph G. Nassif Esq of St. Louis favors voluntary disclosure.

Ms. Paula J. Nelson of Victorville CA opposes (a)(1) as likely to increase the cost of litigation.

Marc Nerenstone, Esq. of Washington favors the proposal generally, but would also require disclosure of the names of custodians of documents, and of computerized data bases. He suggests with respect to (d) that information not subject to disclosure requirements should be discoverable without delay.

Jack L. Nettles, Esq. of Florence SC reports that the mandatory interrogatories employed in D.SC works well, but acknowledges that the South Carolina state courts employ a pure Field Code and are accustomed to fact pleading.

Richard L. Neumeier, Esq. of Boston opposes (a)(1).

Colvin G. Norwood Esq of New Orleans opposes (a)(1).

Henry J. Oechler, Esq., of New York, expresses the fear that disclosure as required by Rule 26 will "turn the adversary system on its head" and repeal *Hickman*, thereby producing more litigation, not less. If the Committee is to stick with this idea, he urges that something more be required in the pleadings than a short, plain statement. He also urges that the limitation on the number of depositions be by party rather than by side.

Michael E. Oldham, Esq. of Denver, argues that 26(a)(1) will generate much additional disputation at the enforcement stage, and that 180 days after the last pleading is the earliest time at which any disclosure should be required.

Godfrey P. Padberg, Esq. of St. Louis opposes (a)(2) as an increase in the cost of litigation.

Hon. Own Panner, NDNY, argues that the revision of Rule 26(a) and the limits on discovery will increase the cost of litigation, by involving the court more frequently in discovery disputes. The rule will not help in simple cases and will be an impediment in complex ones. He is especially concerned that the increased duty to supplement will be a burden in many cases.

Robert L. Parlette, Esq., of Wenatchee WA is not sure how this reform will play out, but regards it as necessary and worth a try.

Hon. Alexander L. Paskay, M.D.Fla, supports the position of Judge Panner.

Deana Peck of Phoenix opposes the requirement of an expert report as an unnecessary cost. She also objects to the timing of the requirement, for a defendant may have an expert who guesses wrong as to the plaintiff's expert's theory. And she objects to the delay in discovery until disclosure has been completed. She favors broadening 26(e) to cover disclosures, but not as proposed.

Thomas M. Peters Esq of Detroit opposes (a)(1).

G. Keith Phoenix, Esq. of St. Louis, reports that lawyers there are astounded by this proposal. He urges an experimentation in a few districts.

Richard C. Polley Esq of Pittsburgh opposes (a)(1).

Robert W. Powell of Detroit, for the firm of Dickinson, Wright et al opposes all of this revision as unduly expensive and injurious to attorney-client relations.

Clifford A. Rieders, Esq., of Williamsport PA opposes most of this revision. He urges that (a)(1) will give rise to new levels of dispute. He does not regard depositions of experts as often necessary or desirable. He argues that it is unfair to plaintiffs to require disclosure prior to discovery. He finds proposed (e)(2) too vague, and (g)(3) subject to all the objections made to Rule 11.

Robert S. Rosemurgy, Esq., of Escanaba MI finds "it impossible to believe that anyone who is engaged in civil litigation would think that these changes are reasonable." He anticipates difficulty in knowing what information bears significantly on notice pleadings, and he regards the 30-day response period as inadequate. He argues that the exchange required by proposed (a)(3) should occur at least 90 days before trial in order to allow for discovery.

Professor Maurice Rosenberg of Columbia University favors voluntary disclosure but urges that it should be the subject of experiment before a national rule is established. He regards the validity of local rules as doubtful in the absence of some authority in the national rules.

William A. Rossbach, Esq., of Missoula MT urges that the present language of Rule 26 be employed to describe the disclosures required. He finds (a)(2) to be onerous and costly.

Steven J. Rothman, Esq., of West Palm Beach opposes (a)(1) on account of its "patent ambiguity" placing litigators in difficult positions.

Charles Rubendall, Esq. of Harrisburg, urges that the rules are too radical to be adopted before experimentation. He also urges that it is unfair to defendants in light of notice pleading.

Susan Vogel Saladoff of Rockville MD opposes the disclosure provisions.

Hon. Barefoot Sanders, NDTex, supports the views of Judge Panner. He acknowledges that some lawyers seek to overwhelm opponents with discovery, but believes that the revised rule will simply open other avenues of abuse without closing those now in use. He fears much motion practice arising from the limits on discovery.

Walter W. Sapp, Esq., of Houston, on behalf of Tenneco, objects to (a)(1) as incompatible with Rule 8 and unjust to corporate defendants.

Joseph Schleppi, Esq., of Columbus OH urges that (a)(1) would be unjust to corporate defendants, but suggests that it would be acceptable if notice pleading were modified to require specificity in complaints.

Edward C. Schmidt, Esq. of Pittsburgh, on behalf of the firm of Jones Day Reavis & Pogue, finds the revision of (a)(1) inconsistent with the 1938 Rules, which he says, were based on the principle of an inseparable bond between attorney and client. He opposes (a)(2) as a return to trial by ambush and to more trials because summary judgments will be difficult to secure on the basis of expert reports.

Victor E. Schwartz, Esq. and Fred S. Souk, Esq. of Washington DC oppose (a)(1).

Hon. William W. Schwarzer commends the discovery proposals. In a substantial memorandum, he argues inter alia that the cheating likely to be associated with 26(a)(1) now exists in interrogatory responses, and contends that disclosure will make the process more efficient and less costly for all.

Karl E. Seib, Esq. of New York City, opposes (a)(1) and also opposes the revision of (b)(5) as an incitement to unnecessary fishing expeditions. Together these provisions will seriously compromise the role of corporate defense counsel.

William D. Serritella, Esq. of Chicago opposes (a)(1). He also opposes simultaneous exchange of expert reports as provided in proposed (a)(2).

Samuel M. Shapiro, Esq of Rockville MD opposes this revision.

Joseph A. Sherman and E. Wayne Taff of Kansas City MO favor the position of Lawyers for Civil Justice.

Jack N. Sibley Esq of Atlanta opposes (a)(1) as applied to complex cases.

J. Walter Sinclair, Esq. of Twin Falls ID urges that although this rule needs revision, the proposed reform is too weighted against defendants.

Alan C. Stephens, Esq., sees no need for these revisions. In any event, he urges, the 30-day period in (a)(1) is too short.

John D. Stephenson, Esq. of Great Falls MT opposes (a)(1) and is concerned about (a)(2) which he acknowledges to be more workable.

Laura D. Stith of Kansas City believes that (a)(1) would lead to revelation of work product and impair the adversary tradition. She is also concerned that the revision does not assure temporary protection to one who has filed a motion under (c) and failed to secure a ruling on it.

Paul L. Stritmatter, Esq., of Hoquiam WA opposes this revision as not practical.

William H. Sutton Esq. of Little Rock opposes (a)(1).

Richard D. Teeple, Esq., of Findlay OH, on behalf of Cooper Tire opposes (a)(1) as unworkable in light of the vagueness of pleadings in produces liability cases. He urges that (a)(2) be extended to require disclosure of a complete resume, including a list of publications.

Mack L. Thomas, Esq., of Fargo regards (a)(1) as inconsistent with notice pleading.

Robert W. Thomas, Esq. of Lake Charles LA opposes (a)(1); he is particularly concerned about parties' abilities to determine significance of evidence.

Hon. David L. Thompson of Independence KS, a state court judge, urges that discovery abuse is a grave problem, that the proposed changes are salutary, but do not go far enough.

Hon. Donald J. Tobin of San Diego supports the views of Gail Friend.

Thomas F. Tobin, Esq. of Chicago opposes the disclosure provisions; his objections seem to be directed to (a)(1).

Jay H. Tressler, Esq. of Chicago opposes (a)(1).

Harry P. Trueheart III, Esq., of Rochester, on behalf of Bausch & Lomb, Inc., Corning, Inc., and Eastman Kodak Inc., opposes (a)(1) as inconsistent with Rule 8 and unjust to corporate defendants. He also argues that the revision will produce more costly litigation.

Scott J. Tucker, Esq. of Boston opposes this revision.

H. Woodruff Turner, David G. Klaber, Robert B. Sommer, and Thomas A. Donavan of Pittsburgh assert that here is no problem of discovery abuse. They find the proposal for (a)(1) incompatible with notice pleading and with the adversary process, unjust to defendants, and likely to increase legal costs. They support (a)(2) and (a)(3).

Joseph Valentine, Esq. Roslyn NY, on behalf of Ford Motor Company, favors 26(a)(2), but opposes 26(a)(1) in its present form as requiring too much guesswork and subject defendants to second-guessing.

George Vernon, Esq., of Chicago regards (a)(1) as a "disaster" requiring judgment calls that cannot be made.

James D. Vogt, Esq. of Los Angeles opposes the use of electronic recording as likely to create confusion.

Ben L. Weinberg, Esq., of Atlanta, is uncertain of the meaning of "reasonably likely .. to bear significantly" and finds the new text too vague. He is also concerned about the shortness of the time allowed for disclosure.

Hon Jack B. Weinstein, EDNY approves the disclosure proposals bearing on experts, but suggests that 26(b)(3)(A) and (B) should include data bases and records of tests.

Ronald E. Westen Esq., of Troy MI argues that disclosure rules will lead to overproduction, unnecessary expense, and diminished prospects for settlement. He also argues that arbitrary limits on discovery will unduly restrict parties in their investigations, and that the scheme is unfair to defendants.

Robert T. White, Esq. of St. Paul opposes (a)(1).

Stephen M. Wiles, Esq. of New Orleans, an admiralty lawyer opposes pre-discovery disclosure as "absolutely unworkable."

Tybo A. Wilhelms, Esq., fears that (a)(1) will encourage parties to bury their opponents in overdisclosure and may otherwise be unfair to defendants.

Anthony J. Williott, Esq. of Pittsburgh opposes (a)(1).

Stanley P. Wilson Esq of Abilene TX opposes this revision; he favors stronger limitations on the scope of discovery.

Ms. Holly Winger of Hartford CT urges that (a)(1) will not work in large toxic tort cases.

Hon. Henry Woods, E.D.Ark., opposes mandatory disclosure.

Thomas D. Yanucci, Esq., of Washington urges that disclosure is antithetical to the adversary tradition and likely to produce much satellite litigation.

Hon. H. David Young, E.D. Ark., believes that (a)(1) may produce unscrupulous efforts at enforcement under Rule 37, and hence be counterproductive.

Andrew S. Zettle Esq of Huntington WV opposes (a)(1).

The following business corporations have expressed opposition to (a)(1):

Amoco Corp
ARCO
Bethlehem Steel Corp.
Bridgestone-Firestone, Inc.
Caterpillar Inc
The Clorox Company
Coca-Cola Company
Control Datas
Deere & Company
Dow Chemical Company
Duquesne Light Company
E. I. PuPont de Nemours & Co.
Emerson Electric Co.
E-Systems Inc of Dallas
FINA, Inc.
Gates Energy Products, Inc.
Gencorp.
General Motors
Georgia-Pacific Corp.
Harley-Davidson Inc.
Hershey Foods Corp.
Honda North America
Hughes Aircraft Company
International Paper Co.
LTV Steel Co.
McDermott Inc.
McGraw-Hill, Inc.
Mazda Motor of America
Mead
Michelin Tire Corp.
Morton International
Murphy Oil Co., El Dorado AK
Nalco Chemical Company
Nissan North America
Olin Corp.
Oryx Energy Company
Phelps Dodge Corp.
Piper Aircraft Corp.
Ralston Purina Company
Raytheon Company
Rowan Companies,Inc.
Sears Roebuck & Co.
Shell Oil Co
Snap-on Tools Corp.
Sunstrand Corp.
The Timken Company
TRW Inc
Union Carbide Corp.
Uniroyal Goodrich Tire Co
United Technologies

USX
Zurn Industries, Erie PA

RULE 28

Joseph P. Griffin and Mark N. Bravin of Washington have published an article favoring the revision of this rule with respect to its relation to the Hague Evidence Convention. The article was published in *The International Lawyer.*

RULE 29

The American Civil Liberties Union supports this revision.

The Chicago Bar Association suggests that the word "stipulation" be replaced by "agreement."

The Department of Justice supports this revision.

The Los Angeles County Bar favors this revision.

The Philadelphia Bar favors this revision.

The Public Citizen Litigation Group approves this revision.

Roy B. Dalton, Esq., approves the revision of this rule.

Frank, Napolitano & Resnik question whether one can stipulate out of mandatory disclosure. They do not see why one would be sanctioned for conduct that has been stipulated.

Hugh Q. Gottschalk, Esq., of Denver approves this revision and suggests that it apply as well to Rule 12 extensions of time.

RULE 30

The Alliance of American Insurers favors limitations on the length of depositions in cases that are not too complex.

Alliance for Justice finds the limit on the duration of depositions to be reasonable for most cases. It opposes the limit on the number of depositions.

The Admiralty and Maritime Litigation Committee of the ABA opposes the limitation on the number and length of depositions.

The ABA Section on Antitrust favors limitations on discovery, but fears these proposals are too rigid.

Chairman Teztlaff opposes numerical limits on the number and length of depositions. He favors continuing the requirement of a stenographic record of testimony.

The Torts and Insurance Section of ABA opposes numerical limits on depositions.

The American Board of Trial Advocates expresses concern that the limitations on depositions will be productive of motion practice.

The American Civil Liberties Union is opposed to arbitrary limits on the scope of discovery. If the limits are to be retained, it urges that they be raised.

The American College of Trial Lawyers urges that the sentence added to (d)(1) be divided in two.

ACCA favors limits on deposition practice.

The American Institute of Certified Public Accountants opposes limits on deposition practice.

American Insurance Association favors limits on the length of depositions.

The American Intellectual Property Assn opposes limitations on deposition practice.

ATLA opposes this revision, arguing that any limitations on discovery depend on defendants' compliance with Rule 26 which they do not expect to occur.

The Arkansas Association of Defense Counsel opposes arbitrary limits on discovery.

ABCNY supports the alternative methods of recording depositions. With respect to subdivision (c), it urges that Rule 615 should apply to depositions intended for use at trial, and that experts should be permitted to attend depositions of opposing experts. ABCNY opposes the presumptive limits on the length and number of depositions. A minority favor limits, but regard those proposed as too low. They urge that there should be no limit on party-affiliated deponents or on any number of agents or employees who may be significantly involved in the dispute. On the length of depositions, ABCNY predicts that counsel will be tempted to resist discovery to wait and see whether the court will be liberal in allowing more. They are especially concerned that local rules may impose still lower limits on discovery than those provided in the proposed rules and urge that this be precluded. ABCNY favors judicial management and urges that every case should receive tailor-made discovery limits rather than presumptive ones.

The Beverly Hills Bar Assn opposes limits on the number and length of depositions. They also urge that a stenographic record be made of all depositions.

The California Bar opposes this revision. It favors stenographic transcripts of depositions.

A committee of the bar of C.D.Cal. opposes limitation on the number and length of depositions.

The Chicago Bar Association recommends elimination of the limit on the length of depositions. It favors the language in the comments on instructions to deponents not to answer and suggests that this language be placed in the rule.

The Chicago Council of Lawyers does not believe that the number of depositions or their length can be fixed with one size to fit all. They should be fixed at a scheduling conference.

The Connecticut Bar committee offers its view that the six-hour rule is "unfounded." It also finds the ten deposition rule to be unrealistic.

The Delaware Bar Assn favors continued requirement of stenographic recording of depositions.

The Department of Justice favors this revision. It suggests that more discovery should be permitted to a party willing to bear the full cost, and questions the wisdom of limits on the duration of depositions.

A Committee of the DC Bar supports the limitations on the number and length of depositions.

Dilworth Paxson Kalish & Kauffman of Philadelphia oppose limitations on the number and length of depositions.

Duquesne Light Company opposes limitations on the number and length of depositions.

The Federal Bar Association is divided on the wisdom of presumptive limits on depositions.

Fisher & Phillips of Atlanta opposes limits on the number and length of depositions.

Foothill Bar Association, El Monte CA favors the requirement of stenographic transcripts of depositions.

Senator Wyche Fowler urges the committee to study a communication from a constituent who disfavors the use of audio and video recording.

The Georgia Bar opposes the limitations on the number and length of depositions as too rigid.

Georgia Certified Court Reporters Assn favors continued requirement of stenographic recording of depositions.

Georgia Stenomask Reporters Assn favors continued requirement of stenographic recording of depositions.

The Hawaii Shorthand Reporters Assn favors continued requirement of stenographic recording of depositions.

Hunton & Williams of Richmond questions the exclusion of Evidence Rule 615 and opposes limitations on the length of depositions.

The Illinois Assn of Defense Counsel argues that the limits on the number and length of depositions will operate in favor of abusers of the system

The Illinois Shorthand Reporters Assn favors continued requirement of stenographic recording of depositions.

The Iowa Defense Counsel Association oppose limits on depositions.

Kincaid Gianunzio Caudle & Hubert of Oakland CA find the limitations on deposition practice to be undesirable.

Lawyers for Civil Justice find the limit on the number and length of depositions to be too arbitrary.

The Los Angeles County Bar favors this revision except for the limits on the number and length of depositions.

The Los Angeles Chapter of the Federal Bar Association opposes limits on depositions. They suggest that (a)(2)(C) does not adequately provide for situations in which a witness's testimony must be postponed for medical reasons. They also object to the Note stating that anyone can attend a deposition unless the court otherwise orders. They are not convinced that the change in (e) is justified.

The NAACP Legal Defense Fund opposes low limits on depositions.

The National Assn of Independent Insurers opposes rigid limits on deposition practice.

National Assn of Securities and Commercial Law Attorneys opposes limits on depositions except ad hoc.

The National Court Reporters Association favors the availability of videotape but argues for the requirement of a court reporter to make an official transcript. They are especially concerned about the independence of the officer making the transcript. They also suggest that (a)(3) should require identification of those witnesses whose testimony will be presented by deposition. The Association has also submitted to the Committee a review of the NCSC work William E. Hewitt, VIDEOTAPED TRIAL RECORDS: EVALUATION AND GUIDE (1991). The review was prepared by George A. Fulton, Ph.D. of Ann Arbor MI.

National Stenomask Verbatim Reporters Assn favors continued requirement of stenographic recording of depositions.

Nevada Shorthand Reporters Association opposes electronic recording of depositions.

The New Jersey Bar opposes transcripts made without a court reporter present.

A committee of the New York County Bar opposes limits on the number and length of depositions.

The New York State Bar Committee favors the provision for videotape depositions and endorses the other changes proposed for this rule.

Ogletree Deakins Nash Smoak & Stewart of Greenville SC oppose numerical limits on deposition practice.

The Orange County Bar Committee prefers a limit of 14 hours on a deposition. They favor a case-by-case setting of limits.

The Philadelphia Bar opposes limitations on the number of depositions. It expresses concern about the deletion of the first sentence of the present (b). It recommends that the revision not be adopted.

The Public Citizen Litigation Group opposes procrustean limits on depositions.

Rust Armenis & Schwartz, a law firm in Sacramento favors continued requirement of stenographic recording of depositions.

Sands Narwitz Forgie and Leonard of Los Angeles opposes permitting use of audio recording of depositions.

Shell Oil opposes limits on the number and length of depositions.

South Carolina Certified Reporters Assn favors continued requirement of stenographic recording of depositions.

The South Carolina Defense Trial Attorneys' Assn opposes limitations on discovery.

Sutherland Asbill & Brennan of Atlanta reports that the limitation on duration of depositions works well enough in their district, but urge that it should be understood that the limit is no more than presumptive.

Trial Lawyers for Public Justice oppose limitations on deposition practice.

Tri-State Verbatim Reporters Assn (MD, VA, DC) favors continued requirement of stenographic recording of depositions.

The United States Court Reporters Association opposes revision pertaining to the method by which depositions are to be recorded.

The Washington Defense Trial Lawyers opposes limits on the number and length of depositions as arbitrary and unnecessary.

Washington Shorthand Reporters Association opposes electronic recording of depositions.

The Washington State Bar opposes arbitrary limits on discovery.

Washington TLA opposes limitations on discovery as favoring defendants.

The Wichita Bar Association opposes the limitations on the number and length of depositions. It also favors a requirement of stenographic transcripts for depositions.

Wilson & Ranney of Missoula Montana oppose limits on the number and length of depositions.

Dan H. Ball, Esq. of St. Louis urges that the limits on number and length of depositions are too rigid and are in any case inappropriate.

James S. Bianchi, Esq., of Los Angeles doubts that the disclosure rules will save expense, and expects that it would result in massive document control problems.

Sheilah L. Birnbaum of New York opposes limits on the number and length of depositions.

T. Mack Brabham and fourteen other lawyers in McComb MS oppose limitations on depositions as impractical.

John Britton, Esq. of Fort Lauderdale, opposes the limitation on the number of depositions.

Mary Coffey of St. Louis favors the limits on depositions.

Steven J. Cologne, Esq., of San Diego argues that it is a denial of due process to limit the number and length of depositions. He also regards the use of electronic recording as "extremely dangerous." It undermines the fundamental basis of litigation.

Philip R. Cosgrove, Esq., of Los Angeles opposes the changes in deposition practice, finding the limits to be a "one size fits all" approach.

Donald C. Cramer Esq of Edmonds WA opposes limits on the number and length of depositions: "any deponent can lie for six hours."

Richard E. Crow Esq of Sacramento opposes any changes in deposition practice.

James T. Crowley, Esq, of Cleveland, argues that the limits on the number and length of depositions will result in much motion practice, especially in complex cases.

F. Bailey Crowther, Esq., of Palmyra VA opposes limitations on discovery as yet another means of giving advantages to defendants.

Frank J. Daily, Esq., of Milwaukee, opposes the numerical limitations on deposition practice.

Roy B. Dalton, Esq of Orlando approves the limitation on the length of depositions, and also favors the use of videotape depositions.

Jeffrey Davidson, Esq., of Los Angeles opposes presumptive limits on the number and length of depositions; both, he fears, will result in much motion practice.

William L. Dorr Esq of Rochester NY opposes this revision.

Carroll E. Dubac opposes quantitative limits on discovery.

Richard L. Edwards, Esq. of Cambridge MA opposes limits on the number and length of depositions.

John R. Fanone Esq of Chicago opposes limits on the number and length of depositions. He expresses concern for the absence of an allocation of time among lawyers.

David F. Fitzgerald, Esq. of Minneapolis opposes limits on depositions.

Frank, Napolitano and Resnik are concerned that it will require too much involvement of the court to limit deposition practice so severely. They also suggest some possible difficulties with 30(d), finding the term "exclusive of Rule 615 thereof" awkward, oblique and possibly misleading.

Gail N. Friend, Esq, of Houston TX states that limits on discovery violate due process. He also holds that the use of electronic recording as a basis for transcripts is "very dangerous and violative of due process rights." He argues that such methods produce many bad records.

Charles F. Freiberger, Esq. of Columbus OH opposes the limits on discovery except by the court ad hoc.

Keith Gerrard, Esq., of Seattle, fears that the six-hour rule will encourage dilatory tactics by reluctant deponents.

Guy T. Gillespie III, Esq of Oxford MS opposes the six-hour limit on depositions, as likely to encourage dilatory objections.

Arthur M. Glover, Esq, of Houston opposes limits on the number and length of depositions.

Stephen L. Goff Esq of Sacramento opposes this revision.

Hugh Q. Gottschalk, Esq., of Denver favors the revisions of (d)(1).

Jack E. Greer, Esq. of Norfolk opposes limits on depositions.

Joseph E. Grinnan, Esq. of Southfield MI urges that the limits on depositions cannot work in multi-party cases.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Lee Hagen, Esq. of Fargo opposes limitations on deposition practice.

George N. Hayes, Esq. of Anchorage, approves the presumptive limitation on the number and length of depositions.

Jonathan M. Hoffman, Esq. of Portland OR opposes limits on deposition practice.

Raymond L. Hogge of Norfolk VA opposes limits on the number and length of depositions.

Patrick E. Hollingsworth, Esq., of Little Rock believes that the limits on number and length of depositions will spawn more litigation than they will prevent.

John I. Hulse, Esq. of New Orleans, opposes arbitrary limits on the amount of discovery permitted.

Laurence R. Jensen of San Jose CA believes that the cost of depositions is generally a sufficient deterrent to overuse. The revision is hence not necessary.

M. J. Keefe Esq of Albuquerque commends the provision limiting coaching during depositions.

Ann Kelly Esq of Santa Monica opposes this revision.

Harold E. Kohn, Esq. of Philadelphia opposes limitations on deposition practice.

John Koslov, Esq of Los Angeles opposes this revision.

Philip A. Lacovara of New York favors the presumptive limits on depositions.

J. D. Ledbetter, Esq. of Southfield MI opposes limits on depositions.

Jeffrey V. Lusich, Esq. of Stockton CA opposes all aspects of this revision.

Jack B. McCowan, Esq., of San Francisco opposes limits on the number and length of depositions.

Richard A. McMillan, Esq, of Washington opposes numerical limits on the number and length of depositions.

Kevin F. Maloney Esq of Boston opposes this revision; he reports that there is no problem to which it is addressed.

Paul A. Manion, Esq. of Pittsburgh opposes limitations on the number and length of depositions.

Kenneth S. Meyers, Esq., of Los Angeles opposes this revision.

Joseph G. Nassif Esq of St. Louis opposes limitations on the number and length of depositions.

Godfrey P. Padberg, Esq. of St. Louis favors the use of electronic recording.

David B. Parker of Los Angeles CA opposes all aspects of this revision.

Deana Peck of Phoenix opposes the limits on the number and length of depositions; she notes that the need for depositions is never balanced equally between the parties. She also protests that limitations should be by parties rather than sides.

O. Grady Query, Esq., of Charleston SC opposes any revision of this rule.

Clifford A. Rieders, Esq., of Williamsport PA finds the limits on the number and length of depositions to be arbitrary.

William A. Rossbach, Esq., of Missoula MT finds the discovery limits to be unfair to plaintiffs, who generally have so little information that all can be discovered within those limits.

Susan Vogel Saladoff of Rockville MD opposes limitations on depositions.

Sol Schreiber, Esq. of New York, suggests that parties should be required to provide deponents with advance copies of documents they are expected to comment on at deposition, so no time is lost while deponent is reading. He also observes that 186 of 200 depositions taken in Agent Orange were taken in less than one day.

Victor E. Schwartz, Esq. and Fred S. Souk, Esq. of Washington DC oppose limitation on the number and length of depositions.

Karl E. Seib, Esq., of New York City opposes limits on the number and length of depositions.

Samuel M. Shapiro, Esq of Rockville MD opposes limits on the number and length of depositions.

Thomas G. Shapiro Esq. of Boston opposes any revision of this rule.

Jack N. Sibley Esq. of Atlanta opposes limits on the number and length of depositions.

Christopher C. Skambis, Esq., of Orlando suggests that the rule should limit "defending" depositions to (1) objections to form of question; (2) instructions not to answer based on privilege; or (3) termination of deposition that is abusive, and that mandatory sanctions should be imposed on lawyers delaying depositions by other activities. Mr. Skambis also notes that less time should be needed to transcribe a 6-hour deposition, and that the read-and-sign requirement is often used to delay or prevent use of deposition transcripts at hearings.

Dennis R. Smeal, Esq., of Pasadena, opposes limitations on the number and length of depositions.

Alan H. Stanfill, Esq, of Pasadena CA opposes limitations on the number and length of depositions.

Hon. Correale F. Stevens of Wilkes-Barre opposes the amendment of Rule 30(b); he holds that a stenographic record of depositions is indispensable and should be made by an independent professional reporter.

Laura D. Stith of Kansas City asserts that the limitations on deposition practice are unprecedented and she urges that they be the subject of experiment.

Lawrence A. Strid, Esq. of Irvine CA opposes the revision of Rule 30(b), urging that ER will not provide satisfactory transcripts.

Governor Mike Sullivan of Wyoming supports the provision for electronic recording of depositions.

Thomas F. Tobin, Esq. of Chicago opposes the limitations on the number and length of depositions.

Harry P. Trueheart III, Esq., of Rochester, on behalf of Bausch & Lomb, Inc., Corning Inc., and Eastman Kodak, Inc. opposes the limits on number and length of depositions because one size will not fit all.

Bowen H. Tucker, Esq. of Chicago opposes (a)(1).

Scott J. Tucker Esq of Boston opposes limits on deposition practice.

Windle Turley Esq. of Dallas opposes limits on the number of depositions as unjust to plaintiffs.

Tybo A. Wilhelms, Esq., of Toledo, opposes the limitations on the length of depositions.

James D. Wing, Esq., of Miami, opposes the limitation on the number of depositions.

Ms. Holly Winger of Hartford CT, finds the limits on number and length of depositions not suitable to large toxic tort cases.

The following individuals wrote only to oppose electronic recording of depositions:

Richard J. Abrams, Esq, North Hollywood CA
Michael L. Alderson Esq, Richmond CA
Samuel H. Altman Esq, Charleston SC
Ms. Evelyn Anderson. Charleston WV
Ms. Laura Anderson, Fond du Lac WI
David W. Andreas, Esq., Winfield KS
Laurence L. Angelo Esq. Sacramento
Mr. Robert D. Arconti, Los Angeles
Ms. Terri L. Arp, Dallas
Ms. Alison Ash-Heyman, Felton CA
Ms. Diane M. Baker, Honolulu
G. Lant Barney Esq, Auburn CA
Ms. Donna K. Barr, Dallas
Donald E. Barrows Esq, Stockton CA
Joseph A. Bartholomew, Esq., Belleville IL
Ms. Jeri Beasley, Dallas
Ms. Tamara Blakely, Dallas
Tom Blakeley Esq, Dallas
Sonja E. Blomquist, Esq, San Francisco
Ms. Tamala L. Bohannon, Dallas
Hon. William B. Boone, Santa Rosa CA
Ms. Lonna K. Bougher, Yakima WA
Mr. Andrew T. Bradshaw, Fort Worth
Rickey J. Brantley, Esq., Fort Worth
Michael J. Brickman Esq, Charleston SC

Ms. Jan Brockley, San Diego
Kim R. Brogan, Esq., San Diego
Peggy S. Brooks, Esq, Stockton CA
Paul L. Brown, Esq., Dallas
Hon. Volney V. Brown, Jr., Los Angeles
Jeanne M. Browne, Esq., Santa Rosa CA
Mr. Michael J. Bryant, Fresno
Giacomo Bucci, Esq., Vista CA
Pamela Bunch, Santa Ana CA
Ms. Deobrah M. Buntyn, San Antonio TX
Harland L. Burge, Esq, Irvine CA
Ms. Tierney Burgett, Dallas
Ms. Tina Terrell Burney, Dallas TX
Ms. Jane W. Byrd, Dallas
Hon. A. Dennis Caeton, Fresno
Ms. Michele D. Callian-Boyle, Honolulu
Ms. Veronica E. Cherry, Dallas
Ms. Marian Christensen, Pasadena CA
Ms. Jane H. Clark, Dallas
Robert G. Clawson Esq, Charleston SC
Hon. Thomas L. Clinton, Lubbock TX
Hon. Gordon Cologne, Rancho Sante Fe CA
Paul R. J. Connolly, Esq., Salem OR
Mr. Robert Cook, Cache OK
Hon. Dyson W. Cox, Upland CA
Georgia Bates Creel, Esq., San Francisco
Hon. Sam R. Cummings, N. D. Tex., Lubbock
Charles W. Dahlquist, Esq., Salt Lake City
Richard G. Danner, Esq, Dallas
Mr. Leon R. Dardas, Sarasota FL
Joan Davenport Esq, Boston
Stephen F. De Antonio, Esq. Charleston SC
Allen D. Decker Esq, N. Charleston SC
Dr. Robert Denes, Los Angeles CA
Mr. R. Michael Devitt, San Luis Obispo
Richard C. Detwiler Esq, Columbia SC
Ms. Ann J. Dickey, Dallas
Ms. Kim J. Dickman, Cedar Hill TX
Mr. G. O. Dohn, Yakima WA
Dale A. Drozd, Esq., Sacramento CA
Mr. James M. Duenow, San Luis Obispo
Ms. Pam J. Durrant, Dallas
Mr. Marc Eppler, Cleveland OH
Don A. Ernst Esq, San Luis Obispo
Ms. Dallas Ann Erwood, Palm Desert CA
Ms. Amanda M. Essner, Eugene OR
Barry H. Fanning Esq, Dallas
Brien J. Farrell, Esq., Santa Rosa CA
Mr. Robert H. Faust, Commissioner, Monrovia CA
Hon. John Fitch, Fresno
Mr. Patrick Fitch, Hamet CA
Steven F. Fitzer, Esq. Tacoma WA
Ms. Rita D. Fitzpatrick, Vista CA
Hon. Thomas B. Fletcher, Bass Lake CA

Ms. Carol J. Franklin, San Diego
Mr. Thomas J. Frasik, San Diego CA
Ms. Marie Fuller, Dallas
Mr. Terry Gardner, Fort Worth
Ms. Missy Giamfortone, Dallas
Mr. Robert Gilbreath, Dallas TX
Hon. Stephen G. Gildner, Bakersfield
Kathi Gilmour-Benner, Esq., Sacramento
Ms. Elizabeth F. Goodenough, Dallas
George W. Granger Esq, Bakersfield CA
P. Barron Grier III, Esq., Columbia SC
Claud A. Grinch, Esq., Spokane
Mr. Robert H. Grove, Fresno
Ms. Jacqueline Guido, West Covina CA
John R. Haluck, Esq., Sacramento
Hon. James E. Hammerstone, Stockton CA
Ms. Deborah K. Hamon, Seagoville TX
Vernon W. Harkins Esq, Tacoma WA
Ms. Susan J. Harriman, San Francisco
Ms. Debbie Harris, San Angelo TX
Mr. C. Vernon Hartline, Dallas
Mr. Gary C. Harvey, Fresno
Hon. Charles W. Haydon, San Jose CA
Ms. Cornelia L. Heather, Pacific Palisades
Mr. Daniel E. Henderson Jr, Santa Barbara
Mr. Daniel E. Henderson III, Santa Barbara
Michael J. Henry Esq, Fort Worth
Ms. Donna Heuman, Menlo Park CA
Ms. Rosanna Heywood, Vista CA
Lloyd Hinkelman Esq, Sacramento
Mr. Lynard C. Hinojosa, Los Angeles
Robin L. Hitchcock, Esq., Charleston SC
Ms. Judy Hobart, Bedford TX
Mr. William K. Hokr, San Diego
Ms. Sally A. Hornung, Chino Hills CA
Robert D. Huber, Esq. San Francisco CA
Edward W. Hunt, Esq., Fresno
Ms. Christine Jackson, Flintridge CA
Mr. Bruce B. Johnson, Jr., Fresno
David B. Johnson Esq, Sacramento
John S. Jose, Esq., Fort Worth
Hon. Bernard J. Kamins, Los Angeles
W. Douglas Kari Esq, Los Angeles
Ms. Charlene Keinhofer, Dallas
Ms. Cheryl M. Kingrey, Dallas
Ms. Christine Kleifgen, Madison WI
Ms. Janice M. Knetzger, Middletown CA
Peter J. Koenig Esq, San Francisco
Ms. Claudia L. Kreigenhofer, Chatsworth CA
Ms. Rene T. LaCoursiere, Yakima WA
Ms. Dona M. LaFrance, Indio CA
Ernest Lane, Esq., Greenville MS
Ms. Cathy S. Langford, Dallas
Mr. Patrick A. Lanius, Rancho Cordova CA

Hon. Jerald M. Lasarow , South Lake Tahoe CA
Dennis D. Law, Esq., San Luis Obispo
Ms. Susanne Lazovic, San Diego
Ms. Nancy Lee, San Diego
Carl B. Leverenz, Esq., Chico CA
Stuart L. Levison, Esq., Rochester
Thomas D. Lininger, Esq., Sacramento
Mr. Paul K. Litt, Los Angeles
Mr. Charles T. Locke, New York City
Ms. Judy Lorenz, Madison WI
Hon. Anthony P. Lucaccini, Stockton CA
Ms. Kathleen Lyons, San Diego
Ms. Roberta L. McBride, Kapaa, HI
David P. McCann Esq., Charleston SC
Mr. Francis T. McCann, Charleston SC
Mr. Denver G. McCarty, Carrollton TX
Ann McHugh Esq., Princeton NJ
Ms. Aubrey McIlveene, Dallas
Mr. John McIlveene, Dallas
Hon. Rolleen Kent McIlwrath, Stockton CA
Ms. Kathleen Ann McKee, San Diego
J. William McLafferty Esq, Santa Barbara CA
Ms. Marilyn S. McMartin, Yakima WA
Mr. Richard E. McQueary, San Luis Obispo
Hon. Runston Maino, Vista CA
Hon. Richard M. Mallett, Stockton
Ms. Angela Mancuso, Dallas
Hon. Mark A. Mangerson, Rhinelander WI
Ms. Deborah Marshall, Dallas
Ms. Lisa B. Martin, Dallas
Hon. Edward F. Masters, Joliet IL
Mr. Roger D. May, Los Angeles CA
Ms. Julie A. Meeks, Dallas
Joseph M. Melchers Esq, Columbia SC
Joseph S. Mendelsohn Esq, Charleston SC
Christine R. Miller Esq., Santa Rosa CA
Mr. Jeffrey L. Miller, Encino CA
Ms. Kris Miller, Janesville WI
Ms. Joyce S, Mizutani, Solana Beach CA
Wendy Mohammed-Derzaph, Esq., Pasadena CA
Richard H. Monge, Esq, Fresno
John S. Moore, Esq., Yakima
Hon. S. Clark Moore, Monrovia CA
Mike K. Nakagawa, Esq., Sacramento
Joshua C. Needle Esq, Santa Monica CA
Ms. Paula J. Nelson, Victorville CA
Phillip R. Newell Esq, San Luis Obispo
Ms. Frances L. Newman, San Francisco
Ms Rita Norcross, Federal Way WA
Hon. Ralph Nunez, Fresno
James V. O'Brien, Esq., Clayton MO
Ms. Mary E. Olden, Sacramento
Mr. Daniel J. O'Neill, San Luis Obispo
Hon. Lawrence J. O'Neill, Fresno

Mr. David Orr, Alpharetta GA
Mr. Michael D. Ott, Fresno
Allan J. Owen Esq, Sacramento
Hon. Jerry Pacht, Los Angeles CA
Samuel C. Palmer Esq, Fresno
Ms. Reesa Parker, Dallas
Ms. Leanne C. Pastene, Vista CA
Ms. Ruth Persky, Los Angeles
Jonathan C. Peters, Esq., of Atlanta
G. Mark Phillips, Esq., Charleston SC
Ms. Kimberly K. Pope, Fort Worth
Ashley D. Posner Esq, Los Angeles
Ms. Jennifer Prazak, Ridgeway WI
Ms. April C. Presley, Dallas
Mr. William J. Quilty, Cayucos CA
Ms. Marguerite A. Quinn, Middlebury VT
Ms. Marcy Railsback, Beverly Hills CA
Ms. Vickie Rainwater, Fort Worth
Ms. Tammy L. Rampone, San Diego
Hon Roger D. Randall, Bakersfield
Calvin L. Raup, Esq, Phoenix
Mr. John M. Reece, Stockton CA
Ms. Rose Rhodes, Jacksboro TX
Hon. Roosevelt Robinson Jr., Inglewood CA
Hon. Arnold D. Rosenfield, Santa Rosa CA
Ms. Kelly Rowe, Alpharetta GA
Ms. Laura L. Runyon, El Cajon CA
William R. Sampson Esq, Overland Park KS
Thomas C. Sanford Esq, North Hollywood CA
Sheryl Saylor, Alta Loma CA
Mr. Ronald D. Secrest, Houston TX
Ms. Elizabeth Joy Sell, Madison WI
Roger S. Shafer Esq, Huntington Park CA
Hon Betty Jo Sheldon, San Marino CA
Brian R. Shumake, Esq., South Pasadena CA
Alan D. Sibarium Esq., Dallas
Mr. Wayne E. Silberman, Fort Worth TX
Hon. Shari Kreisler Silver, Los Angeles
Ms. Laurie Small, Downey CA
Ms. Laura L. Smith, Sacramento
Robert Smith, Esq., Los Angeles
Betsy Smyzer Esq., Yreka CA
Mr. Leonard Sparks III, Houston
Ms. Bridget Stallcup, DeSoto TX
Mr. Albert M. Stark, Princeton NJ
Jeffrey S. Stern, Esq., Boston
Ms. Janice L. Stoner, Chicago
Hon. Chris Stromsness, Dunsmuir CA
Mr. Philip J. Sugar, Los Angeles
Hon. Taketsugu Takei, San Jose
Martin J. Tangeman Esq, San Luis Obispo
Lauren E. Tate Esq, Santa Rosa CA
Ms. Michelle A. Taylor, Dallas
Ms. Debra Theine, Oconomowoc WI

Ms. Cindy Thomas, Fort Worth TX
Ms. Elisabeth Thomas, Dallas
George N. Tompkins Jr, Esq., New York City
James S. Thomson Esq, Sacramento CA
Ms. Truenea Teasley, Norcross GA
Ms. Laura D. Tubbs, Dallas
Mr. Harry Ungersohn, New York City
Ms. Julie I. Upton, Dallas
Ms. Tanya Verhoven, Madison WI
Nancy Vitale Esq, Sacramento
Ms. Kelly J. Vujnovich, Beaver Dam WI
Hon Lloyd von Der Mehden, Santa Rosa CA
Ms. Ann Walding, Dallas
Ms. Christy L. Walley, Dallas
Ms. Debra Walter, San Francisco
Ms. Gloria Ware, South Lake Tahoe CA
Mr. Harold E. Warren, Poughkeepsie NY
Ms. Jane E. Wassel, San Diego
Mr. Michael T. Watson, Fort Worth
Ms. Joan M. Weatherell, Pleasanton CA
D. J. Weis, Esq., Rhinelander WI
Ms. Carol Whitney, Federal Way WA
Robert D. Wilkinson Esq, Fresno
Ms. Ruth Ann Williams, Santa Rosa CA
Mr. Clay Williamson, Arlington TX
Ms. Joan Wilson, Manor TX
Ms. Caryl R. Wolff, Los Angeles
Mr. Robert C. Wood, San Diego
Ms. Marilyn J. Woodard, Dallas
Ms. Kate F. Worth, Fond du Lac WI
Ms. Brenda J. Wright, Austin TX
William B. Wyllie, Esq., Salem OR
Ms. Sharon E. Yackey, Granada Hills CA
Ms. Verna L. Young, Del Mar CA
Mr. Donald A. Ziskin, Santa Rosa CA

The foregoing list is less than complete. All but a few of those persons on this list signed one of a half dozen form letters distributed by the professional association. As the volume of mail increased, the Administrative Office ceased to distribute all the copies of every form letter, so that several dozen other individuals did sign such letters but are not listed. In addition, the Committee received 268 post cards indicating that the signers supported the position of the professional association.

The following individuals wrote only to support electronic recording of depositions as permitted by this revision:

Mr. Kent Andrews, Oakland CA
Ms. Dorothy N. Baer, Newport Beach CA
Ms. Judy Barrett, Laguna Niguel CA
Ms. Mindy Belcher, Sterling VA
Mr. Rex M. Blair, Council Bluffs
Hon. Rudi M. Brewster, S.D.Cal.
Mr. Horace W. Briggs, Los Angeles
Mr. Seth D. Bykofsky, Mineola NY

David N. Chandler, Esq., Santa Rosa CA
Ms. Donna K. Chertkow, Anchorage
Mr. R. Douglas Collins, West Hills CA
Ms. Karin Dains, Lathrup Village MI (a court reporter)
Ms. Carol Davis, Monrovia CA
Mr. Dennis Davis, Los Angeles
Ms. Margaret Devers, Vacaville CA
Ms. Wendy Dippold, Orangevale CA
Mr. Warren Doget, Rancho Cucamonga CA
Ms. Marijke Elder, San Rafael CA
Ms. Nancy Farley, Sacramento
Ms. Dolly F. Feigel, Tempe AZ
Ms. Carol C. Fitzgerald, Clerk of Court, D.Nev.
Thomas J. Fleming Esq, New York NY
Mr. L. L. Francisco, San Diego
Ms. Judith M. Garcia, Rockport TX
Ms. Lois Garrett, DeWitt MI
Mr. Robert C. Glustron, Decatur GA
Elwyn S. Goldweber, Esq, New York City
Hon. Charles A. Gonzalez, San Antonio TX
Ms. Myrtle M. Hamilton, South Floral Park NY
Ms. Joyce A. Hasselbalch, Lincoln NE
Mr. Charles J. Hecht, New York City
Mr. Jeffrey W. Herrmann, New York NY
Ms. Linda Kay Isom, Las Vegas NV
Hon. Alan Jaroslovsky, NDCal, Santa Rosa CA
David A. Joffe, Esq., Phoenix
Mr. Jeff Joseph, Milwaukee WI
Mr. Deno Kannes, San Francisco
Hon. John M. Klobucher, E. D. Wash.
Ms. Judy A. Lam Fong, San Bruno CA
Ms. Marie Lancaster, Dallas
Michael P. Lane, Esq. Phoenix
Josephine Lauriello, Esq., New York City
Mr. Randall L. Leshin, Fort Lauderdale
Mr. M. Byron Lewis, Esq., Phoenix
Mr. Franklin A. Luna, San Mateo
Ms. Mary Ann Lutz, Monrovia CA
Mr. Jeffrey T. McDonagh, San Francisco
Ms. Amy L. Mallory, Peoria AZ
David L. Mandell Esq, Madison WI
Mei Ying Manseau, NDCal, Oakland
Ms. Joyce Mitchell, Overland Park KS
Ms. Pam Nelson, Dallas
Bryan A. Nix, Las Vegas NV
David L. O'Daniel Esq, Phoenix
Ray H. Olmstead Esq, Santa Rosa CA
Ms. Carol M. Quintanar, Las Vegas NV
Mr. Sunny L. Pear, Austin TX
Mr. Dominic S. Polimeni, Court Admin, Alhambra CA
Kenneth R. Ross, Chicago
Paul W. Rothschild Esq, Oceanside CA
Hon. Michael B. Rutberg, West Covina CA
Mr. Joe Schafer, San Antonio TX

Ms. Denise Schuster, Spokane
Ms. Edna Segal, Washington DC
Ms. Beverly Sigurnik, Nampa ID
Ms. Cynthia Soltes, Chicago
Mr. V. Terry Sousek, Mineola NY
Ms. Barbara Stacy, San Anselmo CA
Ms. Terry Sublette, Spokane
Ms. Edythe L. Tanner, Citrus Heights CA (50 years as a stenographer)
Hon. Donald J. Tobin, San Diego
Mr. Michael Tortorelli, New York City
Mr. Steve Townsend, Phoenix AZ
Mr. William E. Wagner, Seattle
Elaine W. Wallace, Esq, Oakland CA
Ms. Kelly Ann Weiner, Columbia SC
Roberta Westdal, Deputy Clerk of Court for S.D.Cal.
William D. White Esq, Dallas
Robert M. Wilson Esq., Sacramento
Ms. Myrna Yabs, DeWitt MI

For what it is worth, none of the persons on this list appear to have signed a form letter. Inasmuch as there is no professional organization of transcribers from electronic recordings, it is perhaps unsurprising that their communications appear to be more spontaneous.

RULE 31

ATLA opposes this revision for the same reason that it opposes the revision of Rule 30, that it supposes defendants will comply with Rule 26.

The Chicago Bar Assn favors this revision.

The Federal Bar Association approves this revision.

The Los Angeles County Bar approves this revision.

The Philadelphia Bar opposes this revision.

Randall W. Wilson, Esq., of Houston opposes this change; he asserts that there is no problem of abuse of depositions on written questions.

RULE 32

Theodore Tetzlaff, Chair, opposes trial use of expert depositions because this would turn the expert deposition into a trial examination. He also fears that contentions will occur over edited versions of tapes and suggests that videotapes used at trial should be previewed with opposing parties.

The American Civil Liberties Union opposes the use of expert depositions at trial, urging that two depositions are needed - the first to prepare the cross-examination.

The Chicago Bar Assn favors this revision.

The Department of Justice favors this revision, but would add that when the deposition has been scheduled on insufficient notice that a party need not attend.

Fisher & Phillips of Atlanta argue that the increased role of experts assured by the proposed revision of Rule 702 makes it needful that experts appear in person at trial. They approve the proposal regarding nonappearance at a deposition but urge that it should go further.

Lawyers for Civil Justice oppose the more liberal use of expert depositions, which they fear will undermine live testimony.

A committee of the bar of C.D.Cal. opposes this change, arguing that it will result in videotaping of all expert depositions.

A Committee of the DC Bar favors this revision if the party using the deposition of an expert gives advance notice of that intent, and there should be an opportunity for a discovery deposition before the one to be used at trial.

The Los Angeles County Bar approves this revision.

The Montana Chapter of ABOTA objects to a requirement that the determination of availability of a deponent at trial be made at the time of the deposition.

The New Jersey Bar opposes authorizing use of a deposition by a party of its witness taken by an adversary.

The New York State Bar Committee approves this proposal.

Ogletree Deakins Nash Smoak & Stewart of Greenville SC oppose this revision, arguing that there is no reason to elevate expert witnesses over others.

The Philadelphia Bar favors (a)(3) except for the notice requirement, but it recommends against adoption of the revision.

Shell Oil opposes the use of expert depositions at trial as an increase in the number of depositions.

The South Carolina Defense Trial Attorneys' Assn opposes the admission of expert depositions at trial.

S. Paul Battaglia, of Syracuse, opposes any requirement that would result in a duty to cross-examine experts on deposition.

Gregory J. Digel Esq of Atlanta opposes the use of expert depositions at trial.

Carroll E. Dubac Esq of Los Angeles opposes the use of expert depositions at trial.

Charles F. Freiberger, Esq., of Columbus OH opposes the revision of Rule 32 that would allow experts to be presented in absentia.

Keith Gerrard, Esq., of Seattle expresses concern over the right of cross-examination, which may not be fully exercised in expert depositions.

Lee Hagen, Esq. of Fargo opposes the use of depositions unless the opposing party had a previous opportunity to cross-examine.

Raymond L. Hogge of Norfolk VA opposes the use of expert depositions.

Laurence R. Jensen of San Jose CA will result in the additional expense of videotaping every expert deposition.

Gregory P. Joseph of New York urges that depositions of experts should be usable at trial only if the opposing party has notice and opportunity to prepare a cross-examination after hearing the direct testimony.

M. J. Keefe Esq. of Albuquerque opposes this revision as placing an excessive burden to prepare prior to expert depositions.

Jack L. Nettles, Esq. of Florence SC opposes the use of doctor's depositions in the absence of a prior discovery deposition.

Victor E. Schwartz, Esq. and Fred S. Souk, Esq. of Washington DC oppose the use of expert depositions at trial.

Christopher Skambis, Esq., of Orlando suggests that the sanction of nonuse of a deposition taken on inadequate notice may be an inadequate deterrent. He questions whether a deposition that cannot be used at trial counts as one of the ten, and whether a deponent may in such circumstances be redeposed.

RULE 33

Alliance for Justice regards 15 as too small a number of interrogatories for many cases.

Theodore Tetzlaff, Chair, opposes limits on the number of interrogatories and in any case regards 15 as too low a number.

ATLA opposes limitations on the number of interrogatories.

The Beverly Hills Bar Association urges that 15 is too few; they favor 35.

The California Bar favors a limit of 35 depositions.

A committee of the bar of C.D.Cal. favors this revision.

The Chicago Council of Lawyers regards 15 as too small a limit on the number of depositions.

The Colorado Bar Association urges that 15 is too low a number.

The Connecticut Bar Committee finds 15 entirely too low a number.

A Committee of the DC Bar favors a limit on interrogatories, but proposes 40 as the right number.

The Department of Justice supports this revision.

Hunton & Williams of Richmond argues that the number of interrogatories should be raised to 30.

The Iowa Defense Counsel Association oppose limits on the number of interrogatories.

The Lawyers for Civil Justice oppose a limit on the number of interrogatories. They are especially concerned about the low number of interrogatories and note that the proposed limit is lower than any imposed by the local rules that the Notes cite. They urged SDNY Rule 46 as a workable alternative. That rule allows early interrogatories limited to the subjects identified in 26(a)(1), forbids the use of interrogatories during the discovery stage, and then allows contention interrogatories at the close.

The Los Angeles County Bar finds the provision "including all subparts" to be in need of clarification.

The Los Angeles Chapter of the Federal Bar Association favors a national limit on the number of interrogatories, but urges 30-35 as the right number.

The Montana Bar opposes limits on the number of interrogatories.

Ogletree Deakins Nash Smoak & Stewart of Greenville SC oppose this revision as dilatory.

The Philadelphia Bar favors (b)(1) and (b)(4), but opposes t he changes in (a) and (b)(3).

The Public Citizen Litigation Group endorses the revisions bearing on objections but disapproves of 15 as a limit on the number of interrogatories.

The South Carolina Defense Trial Attorneys' Assn opposes limitations on the number of interrogatories.

Trial Lawyers for Public Justice oppose limits on the number of interrogatories.

Williams & Ranney of Missoula MT opposes limits on the number of interrogatories.

Robert J. Albair, Esq. of Clayton MO opposes the limitations on interrogatories, leading as it will to motion practice in almost every case.

William L. Dorr Esq of Rochester NY opposes this revision.

T. Mack Brabham and fourteen other lawyers in McComb MS favor limitations on interrogatories, but on a case-specific basis.

David F. Fitzgerald, Esq. of Minneapolis urges that 15 is too low a number of interrogatories.

Keith Gerrard,Esq. of Seattle favors limits on the number of interrogatories and requests for production, but thinks the proposed limit too low.

Hugh Q. Gottschalk, Esq., of Denver favors this revision.

Joseph E. Grinnan, Esq., of Southfield MI finds the limit on interrogatories too low.

Lee Hagen, Esq. of Fargo opposes limits on the number of interrogatories.

Jon L. Heberling of Kalispell MT argues that more interrogatories are needed, especially in light of the limitations on depositions.

Raymond L. Hogge of Norfolk VA opposes limits on interrogatories.

Philip A. Lacovara, Esq, of New York favors the limits on interrogatories.

J. D. Ledbetter of Southfield MI opposes limits on the number of interrogatories.

John O. Miller, Esq. of Corpus Christi urges that 30 is the proper limit on the number of interrogatories, and that 120 days are needed for answer.

Marc Nerenstone, Esq., of Washington, argues that there should be no limits on interrogatories, that these should be the discovery method of choice, and one should be encouraged to follow up on evasive responses.

Godfrey P. Padberg, Esq. of St. Louis urges that even 20 interrogatories is often insufficient.

Deana Peck of Phoenix urges that the limit on the number of interrogatories is too low.

Clifford A. Rieders, Esq., of Williamsport PA regards 15 as too low a limit.

Robert S. Rosemurgy, Esq., of Escanaba MI regards the limit of 15 as unreasonably low.

Stephen J. Rothman, Esq., of West Palm Beach finds the limit of 15 interrogatories too low.

Susan Vogel Saladoff of Rockville MD opposes this revision.

Thomas F. Tobin, Esq., urges that 15 is too low a limit on interrogatories.

Windle Turley Esq of Dallas opposes limits on interrogatories as unjust to plaintiffs.

RULE 34

The Chicago Bar Assn favors this revision.

The Connecticut Bar committee finds this provision to be in conflict with the proposed revision of Rule 26; "since the disclosures will not be filed, the court will be at a loss to determine culpability."

The Los Angeles County Bar approves this revision, subject to its comments on Rule 26.

The Philadelphia Bar favors the proposed second paragraph of (b).

Philip A. Lacovara of New York suggests a presumptive limit on the number of documents that a party may be required to produce. The limit he proposes is 500 documents or 5000 pages. He argues that document discovery was never intended to be as broad as questioning on depositions and should be narrowed.

RULE 36

The Chicago Bar Assn favors this revision.

Lawyers for Civil Justice urge elimination of the requirement that requests not be served until after mandatory disclosure.

The Los Angeles County Bar approves this revision, subject to its comments on Rule 26.

The Philadelphia Bar opposes this revision.

RULE 37

Theodore Tetzlaff, Chair, opposes the sanctions imposed on non-disclosures, at least until experimentation has been conducted in some districts.

The American Civil Liberties Union urges that sanctions under this rule should be permissive.

The Chicago Bar Assn favors this revision except that there should be no sanction for failing voluntarily to disclose documents harmful to a party's contention.

The Chicago Council of Lawyers is concerned that the requirement of good faith effort has no time limit. It observes that some litigants of obstructive bent will not commit themselves to either impasse or resolution.

The Connecticut Bar committee fears that this revision will place counsel on the witness stand to justify failures to disclose.

The Department of Justice supports this revision. It also recommends an English rule on fees with respect to discovery motions.

Except insofar as it reflects 26(a), the Federal Bar Association supports the revision of this rule.

Kincaid Gianunzio Caudle & Hubert of Oakland CA oppose the meet and confer requirement as an increasing cost. They assert that the revisions would result in substantial litigation on sanctions.

The Los Angeles County Bar approves this revision, subject to its comments on Rule 26.

The Los Angeles Chapter of the Federal Bar Association favors this revision except that they question the meaning of "after affording an opportunity to be heard" in (a)(4) and the provisions of (c)(1) as they relate to 26(a)(1).

The Montana Bar opposes the sanction of revelation to the jury of non-disclosure; it finds this sanction excessive.

The Montana Chapter of ABOTA questions whether evidence not yet required to be disclosed (e.g. expert opinions) can be offered at the summary judgment stage. They also suggest that the modifier "substantive" is not needed to describe evidence that may be excluded under this rule, and that its use causes uncertainty.

The Philadelphia Bar favors the revisions in (a)(1), (a)(2), (a)(4)(A), (a)(4)(B), (a)(4)(C), and (d), but opposes this in (a)(3), (c) and (g).

T. Mack Brabham and fourteen other lawyers in McComb MS favor the evidence-excluding sanction, but fear that it is insufficient.

Roy B. Dalton of Orlando, urges that it is a toothless sanction to preclude a nondisclosing party from offering undisclosed evidence because the evidence will always be harmful to the non-discloser.

Keith Gerrard, Esq. of Seattle thinks the sanctions proposed for non-disclosure too severe.

The Local Rules Committee of D.Md. questions the routine disclosure to the jury of the contentions involved in discovery disputes as provided in Rule 37(c). They urge that disclosure of the withholding should be in the discretion of the court.

The Public Citizen Litigation Group favors the revision of (a)(4) and the requirement of an effort to confer, but in the latter connection that sometimes the dispute is so clear that conferring is useless and good faith has no meaning.

Mssrs. Turner, Klaber, Sommer & Donovan of Pittsburgh find the sanctions in (c) excessive for the vague provisions of (a)(1).

RULE 43

Not a comment on this proposal, the ABA at its 1991 meeting called on the Committee to take action to correct "megatrials" in criminal cases.

Theodore Tetzlaff, Chair, opposes this revision; he notes that some busy judges will not read the written statement prior to the cross-examination.

The American Board of Trial Advocates opposes this revision as an impediment to cross-examination.

The American Civil Liberties Union opposes this revision.

American Insurance Association urges that this revision be brought more in line with the committee's notes.

The American Intellectual Property Assn urges that this revision be qualified or forsaken.

The Chicago Bar Assn favors this change, so long as no issue of credibility is at stake.

The Federal Bar Association endorses this revision.

The Federal Courts Committee of the American College of Trial Lawyers opposes the amendment to Rule 43. They hold that an affidavit is not a substitute for oral testimony, and questions whether the adopted written report must be under oath. They are concerned about the right of counsel to expose the credibility of a witness to the perception of the judge, and also fear that the affidavit evidence will be more accessible to the judge than oral testimony in those cases taken under advice for substantial periods.

ABCNY opposes this proposal as extremely unwise and most unlikely to lead to any discernible benefit.

The Connecticut Bar committee opposes this revision.

Fisher & Phillips of Atlanta finds this revision acceptable.

Laurence R. Jensen of San Jose CA opposes this revision.

Lawyers for Civil Justice oppose the use of written evidence where live testimony is available.

The Los Angeles County Bar disapproves this revision. It would approve if "in appropriate circumstances" were added.

The Montana Chapter of ABOTA contends that the rule should permit the court to authorize the presentation of routine testimony in the manner provided by the revision, but should not permit the court to require it.

The Philadelphia Bar opposes this revision

The Public Citizen Litigation Group endorses this revision, but suggest that the Note encourage the court to secure consent for this practice.

The South Carolina Defense Trial Attorneys' Assn opposes this revision.

Trial Lawyers for Public Justice oppose this revision.

The Washington State Bar opposes this revision.

The Wichita Bar Association opposes this revision.

Frank, Napolitano & Resnik generally oppose a move away from orality. They also oppose increased use of deposition testimony at trial, urging that this will require two depositions.

Roy B. Dalton, Esq., of Orlando, opposes this revision, urging that the demeanor evidence is important.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Lee Hagen, Esq. of Fargo opposes this revision.

Godfrey P. Padberg, Esq. of St. Louis does not think that this revision will result in much time saved.

Susan Vogel Saladoff of Rockville MD opposes this revision.

Victor E. Schwartz, Esq. and Fred S. Souk, Esq. of Washington DC oppose this revision.

Samuel M. Shapiro, Esq of Rockville MD opposes this revision.

Thomas F. Tobin, Esq., of Chicago opposes this revision.

RULE 50

Professor Michael J. Waggoner of the University of Colorado calls the attention of the Committee to a possible unintended inference from the 1991 revision of this rule.

RULE 54

Alliance for Justice does not oppose fee schedules or references to masters: fee litigation is so distasteful and often so protracted that any chance of prompt resolution seems agreeable. They urge that there should be that there should be a possibility of out-of-town rates where local lawyers in the fiel strenuously object to the 14-day period for filing as not allowing sufficient time for documentation.

Theodore Tetzlaff, Chair, perceives that this revision would overrule *Budinich v. Becton Dickinson* with respect to the timing of an appeal on the merits when a fees issue remains unresolved. He finds a clear bright line in Budinich that it is unhelpful to blur. He also opposes local fee schedules and references to masters.

The American Civil Liberties Union favors most of this revision. It questions the requirement of a filing in 14 days and suggests a second deadline of 30 or 45 days for completing the application for fees. The ACLU supports the idea of local rate schedules, but urges an exception where it is necessary to bring in special counsel from outside the area. It suggests that there should be a local advisory committee in each district to consider the schedule. It also urges that the Rule address interim fees, post-judgment fees, and common fund fees. It also questions the use of special masters.

The Federal Courts Committee of the American College of Trial Lawyers supports the revisions of Rules 54.

ABCNY urges that these reforms do not go far enough. They urge that a motion for fees should render an otherwise final judgment non-appealable unless the district court enters a separate judgment under 54(b) or certifies under 1292(b) or mandamus lies. This would effect economy and eliminate issue of when to file notice of appeal. They suggest a 21-day time limit for filing fees motions; if the 14-day limit is maintained, then billing data should be permitted for another week or two. ABCNY endorses the concept of a local fee schedule based on a wide spectrum of information. It is uneasy about the use of special masters, and would like to see a provision on interim awards.

The Beverly Hills Bar Assn disfavors the local fee schedule as unfair to transient lawyers. It favors the 14-day rule.

The California Bar favors this revision except for the local fee schedule.

A committee of the bar of C.D.Cal. opposes the establishment of local fee schedules.

The Chicago Bar Assn favors this revision, but cautions that a local fee schedule could be too rigid, and a special master too costly.

The Chicago Council of Lawyers is concerned that rate schedules tend to lag behind the market and that the court is not suited to determine proper rates. They recommend that fees should be fixed on a basis that takes more account of the sanction's impact on the violator. They are especially concerned about the use of such a standard in §1988 cases.

A committee of the Colorado Bar supports this proposal.

Fisher & Phillips of Atlanta favor this revision.

The advisory committee to the Fourth Circuit favors this revision but argues that the 14-day period is too short.

The Los Angeles County Bar opposes local standards applied to work performed elsewhere. It otherwise approves.

The Los Angeles Chapter of the Federal Bar Association urges that this rule should also apply to situations in which fees are recovered as part of damages. They also suggest that "related nontaxable expenses" is unclear, that the fees claimed should be specified and not estimated, that the last sentence of (d)(2)(B) is unnecessary; that (d)(2)(C) would be clearer if "in accordance" were replaced by "subject to;" and that (d)(2)(D) is not well-advised.

Frank, Napolitano & Resnik argue that these revisions should await a more comprehensive review of the judgments rule, including a provision for the method of entering a consent decree. They are concerned about the use of special masters or magistrates and suggest a possible conflicts with 28 USC §636 since these are not pretrial matters. They suggest language for using Judicial Reform Act committees to establish fee schedules. They renew the suggestion that the rule should provide for interim awards. They would prefer that the provision on finality of fee awards be located in Rule 54 rather 58. They recommend that a request for fees render the case unappealable unless certified by the district court; this would have the effect of making it clear that the time for filing a notice of appeal is after the fee award has been made. They suggest that the words "before a notice of appeal has been filed and become effective" at line 13 of Rule 58 be dropped.

Gregory P. Joseph Esq. of New York suggests that the rule should also apply to fees imposed as an exercise of inherent power.

Paul A. Manion, Esq., of Pittsburgh favors this revision.

National Assn of Securities and Commercial Law Attorneys urge that it be made clear that rule does not apply to common fund cases.

A committee of the New York County Bar favors this revision.

The Philadelphia Bar is uncertain which claims for fees would be subject to this procedure; it is troubled that (d)(2)(A) is non-exclusive.

The Public Citizen Litigation Group opposes this revision and prefers the local rule in DDC. They suggest that 14 days is not long enough to negotiate fees. They believe that local fee schedules are not needed and they disfavor delegation to a magistrate or master.

The Southern District of Iowa supports this revision, but urges that 14 days be extended to 30.

Trial Lawyers for Public Justice oppose this revision as an impediment to the recovery of fees.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Harold E. Kohn, Esq. of Philadelphia argues that (d)(2) is unnecessary and that (b)(2)(C) requires clarification. He questions the need for this rule.

RULE 56

Alliance for Justice favors summary adjudication of defenses but fears that the revision of (f) may encourage premature summary adjudication. They also oppose (g)(3).

The Admiralty and Maritime Litigation Committee of the ABA opposes the provision guaranteeing an opportunity for discovery on grounds that it will result in costly delays. They compliment the provision authorizing partial dispositions.

The ABA Section on Antitrust opposes making summary judgment discretionary. It favors the requirement that summary judgments be explicated and favors the provisions bearing on partial summary judgment. It would require the district court to explain denials of summary judgments.

Theodore Tetzlaff, Chair, finds this revision unnecessary, especially the assurance of an opportunity for discovery. He also opposes the specificity requirements imposed on moving and responding papers, and urges that the grant of summary judgment should not be permissive.

ABCNY regards this proposal as long and unnecessarily burdensome. It approves the change to 30 days as a response period, but finds the proposal unduly favoring those parties wishing to prolong wasteful discovery. By incorporating some of the case law in the rule, ABCNY fears that courts may infer that other court-made law has been altered, e.g., Anderson v. Liberty Lobby and Matsushita. They are also concerned about the deletion of 56(g) in light of changes made in Rule 11.

The American Civil Liberties Union opposes this revision as unnecessary. It supports the extension of the time for the motion and the repeal of (g).

American Insurance Association favors this revision, but urges that the rule should be strengthened, as by requiring findings and conclusions when a motion is denied. It urges that the burden on the moving party be more narrowly defined and disapproves the expanded definition of admissions set forth in (b). It also opposes offers of proof as a means of opposing summary judgment, and the enlargement in (c) of the time before which a party can move for summary adjudication.

ATLA finds this revision to be unnecessary and likely to create occasions for litigation. They do approve the language of (c), but are especially concerned by (g)(4) as an invitation to misuse.

The Arkansas Bar Association favors this revision.

The Beverly Hills Bar Association supports this revision, but urges that evidence should not be required to be admissible. They suggest a rewording of (f) to correct what it sees an unfair advantage to the party opposing Rule 56 motions.

The California Bar generally supports this revision with qualifications. It opposes an admissibility requirement for evidence consider on the motion and it opposes the revision of (f); it urges the following language:

> Should it appear from the affidavits of a party opposing a motion for summary judgment that the party cannot for good cause shown present materials needed to support that opposition, the court may deny the motion or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

The California Trials Lawyers Association opposes this revision.

A committee of the bar of C.D.Cal. favors this revision as proposed.

The Chicago Bar Association generally supports this revision. It suggests that the comment to (a) should be explicit that what is intended is no change from the present (a) and (b). It suggests that (e) should be clear that "admissions" includes concessions made in pleadings, motions or briefs.

The Chicago Council of Lawyers supports this revision, except insofar as it codifies *Anderson v. Liberty Lobby*, which it believes to have been wrongly decided.

A committee of the Colorado Bar supports this proposal.

The Connecticut Bar committee opposes this revision as an effort to take summary judgment away from the parties to give to the court. It deplores the apparent removal of argument. It opposes the partial summary disposition of issues as excessively vague.

The Department of Justice does not believe that the rewriting of Rule 56 is necessary, but it supports some changes. It is concerned that the rule does not require the court to render summary judgment when appropriate. It argues that the proposed draft is not clear that only disputes on material issues can forestall judgment. It opposes the revision of the timing requirements, particularly to assure opportunity for discovery

A Committee of the DC Bar favors this revision as generally reassuring to present practice. They question whether the factual recitation should be required as part of the motion rather than in a separate instrument. They are also concerned that (g) is not adequately distinguished from a Rule 42 proceeding to determine credibility.

The Federal Bar Association endorses this revision, but suggest that the moving party should have a right of reply.

Fisher & Phillips of Atlanta favor this revision, but question the term "without argument." They also urge that (f) be rewritten.

Kincaid Gianunzio Caudle & Hubert of Oakland CA suggest that Rule 56 should speak to the use of disclosures in Rule 56 proceedings.

The Los Angeles County Bar approves this revision.

The Los Angeles Chapter of the Federal Bar Association generally favors this revision. They express anxiety that (e) may imply that the moving party must have supporting material; they fear that this might be thought to overrule *Catrett*; they express regret that a paragraph in the 1990 Notes affirming this aspect of *Catrett* was deleted. They also urge that the admissibility requirement is not necessary are helpful. They also question the provision in (f) for offers of proof.

The Mississippi Defense Lawyers Assn opposes the revision insofar as it guarantees an opportunity for discovery.

The National Assn of Independent Insurers favors this revision, but fears that it will not induce judges to use summary judgment more often, as they assert the judges should.

National Assn of Securities and Commercial Law Attorneys opposes this revision.

The New Jersey Bar opposes any effort to restate the trilogy. It also holds that the "reasonable opportunity to discover" is vague and may give rise to delay. It does not believe that the rule needs to be amended.

A committee of the New York County Bar favors this revision, but opposes the provision authorizing the court to preclude motions.

The Orange County Bar Committee singles this revision out as the one having the most desirable effects.

The Philadelphia Bar favors this revision.

The Public Citizen Litigation Group generally approves this revision. They express concern that the Committee Notes may overly qualify the assurance given in the text of an opportunity to use discovery. They suggest that the movant be required to certify that the opposing party has been afforded a reasonable opportunity to discover relevant evidence pertinent to the motion. One purpose would to forestall premature motions which, they suggest, may be fostered by the revision. They suggest a need for more explicit provisions on cross-motions. They also suggest that all the required information should not be in the moving party's motion, which they would keep short. They also suggest that the Notes should be clear that an admission does not go to relevance or materiality. And they suggest that the limitation imposed in (c)(3) may in some cases be improvident. With respect to (c)(2), they suggest retention of the existing requirement that a motion can be defeated by identifying need for further discovery and also suggest that the party resisting the motion be required to identify the triable issues. Perhaps, (c)(4) could be amplified thus: if the party is opposing summary adjudication, it shall identify those issues that need to be tried and explain their relevance to the ultimate determination of the case. Finally, they express concern that the court may become entangled making rulings on admissibility in order to determine a Rule 56 motion, an activity they think premature.

Trial Lawyers for Public Justice oppose this revision as unjust to plaintiffs and unnecessary. They perceive the revision to effect material change in the standard for the grant of summary judgment and to threaten the right to trial by jury.

Washington Trial Lawyers Assn opposes this revision.

Hon. Albert V. Bryan, EDVa, sees no benefit in the change of nomenclature of a partial summary judgment to summary adjudication.

Roy B. Dalton, Esq., of Orlando, regards this revision as unnecessary.

S. Paul Battaglia, Esq. of Syracuse, supports this revision.

Frank, Napolitano & Resnik oppose this revision as too long, and unnecessary.

Keith Gerrard, Esq., Seattle, supports this proposal.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Lee Hagen, Esq. of Fargo opposes this revision as increasing the power and discretion of the court.

Laurence R. Jensen of San Jose approves of this revision.

Ernest Lane Esq of Greenville MS opposes this revision as unnecessary.

Hugh Q. Gottschalk, Esq., of Denver favors this revision.

Paul A. Manion, Esq., of Pittsburgh favors this revision.

Robert W. Powell of Detroit, for the firm of Dickinson, Wright et al favors this revision as a material improvement.

Robert S. Rosemurgy, Esq., of Escanaba MI expresses support for this revision.

Professor Maurice Rosenberg finds this revision not necessary and not likely to be significant. He would leave this rule alone.

Christopher C. Skambis, Esq., of Orlando commends this revision.

Paul L. Stritmatter, Esq. of Hoquiam WA opposes this revision as broadly expanding the power of the court to grant summary judgment.

Mssrs. Turner, Klaber, Sommer & Donovan of Pittsburgh find the provisions for partial summary judgment "a very positive change." They are troubled, however, by the provision assuring a reasonable opportunity for discovery. They assert that there are cases in which summary judgment should be considered before the initial disclosures are made.

RULE 58

Alliance for Justice urges that there is no reason to litigate fees while a judgment for the defendant is being appealed. They also question whether the tolling provision can work except by agreement of the parties.

Theodore Tetzlaff, Chair, opposes this revision. He suggests additional revisions of the Appellate Rules.

The American Civil Liberties Union favors the purpose of this revision, but suggests that the time for appeal should normally be stayed, subject to exceptions by certificate under 54(b) or Section 1292(b). Where the fees decision is postponed pending the appeal, they urge the need for an initial fee award, citing 9th circuit decisions.

The Federal Courts Committee of the American College of Trial Lawyers supports the revisions of Rule 58.

The Beverly Hills Bar Association supports this revision.

The California Bar supports this revision.

The Los Angeles County Bar approves this revision.

The Philadelphia Bar opposes this revision.

The Public Citizen Litigation Group fears that this revision will encourage piecemeal fees litigation.

RULE 83

The Admiralty and Maritime Litigation Committee of the ABA expresses concern that (d) may be compromised by the 1991 revision of Rule 5 which they fear may authorize the court to refuse to accept for filing papers that are defective only in form.

Theodore Tetzlaff, Chair, opposes this revision as an invitation to further localization of the rules.

American Board of Trial Advocates suggests that disclosure rules should be tried in demonstration districts.

The American Civil Liberties Union strongly supports (d), but opposes authorization for experimental rules.

American Insurance Association supports this revision.

ABCNY would prefer to postpone discovery reform until the Civil Justice Reform Act has been implemented, which will entail some experimentation. It is puzzled that the Civil Rules Committee should go forward with a national experiment with disclosure and at the same time authorize local experimentation. ABCNY endorses subdivision (d).

The Beverly Hills Bar Association supports this revision.

The California Bar supports this revision.

The Chicago Bar Assn favors this revision.

The Connecticut Bar committee favors experimental rules so that its district can experiment with its present rules for five years, there being no reason to change.

The Federal Bar Association approves this revision.

Fisher & Phillips of Atlanta express concern that (d) will defeat the efficacy of local rules.

Hunton & Williams of Richmond urges that experimental rules should be subject to the notice and comment requirements of (a).

Kincaid Gianunzio Caudle & Hubert of Oakland CA oppose the provision for experimental rules; they believe the rules should be uniform.

The Judicial Conference of the United States favors uniform numbering of local rules. Judge Keeton informs the Civil Rules Committee that the Standing Committee has offered to assist courts in achieving uniformity in numbering.

The Los Angeles County Bar approves this revision.

The Los Angeles Chapter of the Federal Bar Association favors this revision.

The Philadelphia Bar opposes this revision as unnecessary.

The Public Citizen Litigation Group is skeptical of new authority to make local rules.

Professor Kim Dayton of the University of Kansas is horrified that the Committee would favor experimental rules. This he finds inconsistent with the CJRA of 1990.

Professor Leo Levin, University of Pennsylvania, strongly approves of the content of Rule 83, but urges that it should be enacted by Congress in order to avoid any possible supersession of 28 USC §2071(a). His views are published at 139 U PA L REV 1567.

Frank, Napolitano & Resnik oppose localism in the rules. They argue that too much local discretion is authorized in proposed rules 26 and 54. They would delete 83(b), and also the words "of form imposed" in 83(d).

RULE 84

The Los Angeles County Bar approves this revision.

The Philadelphia Bar favors this revision.

EVIDENCE RULE 702

Alliance for Justice opposes this revision.

The Alliance of American Insurers urges that the presentation of expert opinion should be a matter of right to the parties and not for the discretion of the court.

The ABA Section on Antitrust favors this revision.

Theodore Tetzlaff, Chair, believes that further study of this revision is desirable.

The American Board of Trial Advocates opposes this change as an affront to the Seventh Amendment. They resolved on February 18, 1992 that this revision was of such consequence that further hearings should be conducted.

The American Civil Liberties Union urges that the committee notes should make it clear that an expert opinion need not be "generally accepted" in order to be reliable. It opposes a requirement that such testimony be substantially helpful; such decisions should be left to counsel. If expert reports are to be required, it favors the requirement that the experts stick to those reports.

The American College of Trial Lawyers favors this revision.

The Arkansas Bar Association opposes this revision.

ACCA expresses the opinion that this revision does not go far enough to prevent the use of opinion testimony not rooted in good science.

American Insurance Association supports this revision.

ATLA opposes this revision for the reasons stated by Judge Weinstein.

ABCNY supports this revision.

The Beverly Hills Bar Association supports this revision.

The California Bar supports this revision.

The California Trials Lawyers Association opposes this revision.

A committee of the bar of C.D.Cal. opposes this revision as expert testimony is often needed in new and emerging areas and may be impeded by the court.

The Department of Justice supports this revision, but fears that it is insufficiently stringent in excluding "junk science."

A Committee of the DC Bar favors this revision.

The Federal Bar Association supports this revision.

The Federal Judicial Center, per Joe S. Cecil and Molly Treadway Johnson, surveyed federal judges regarding this revision. 141 favor the proposed revision of the first sentence of the rule; 33 favor the revision if limited to civil cases; 113 oppose the change. 194 of those responding favored the requirement that expert opinion be "reasonably reliable," with an additional 17 favoring that change if limited to civil cases.

Fisher & Phillips of Atlanta favor this revision but urge that committee notes should caution the court against disallowing expression of scientific opinions that are minority views.

Hunton & Williams of Richmond supports this revision.

Lawyers for Civil Justice support this revision.

The Los Angeles Chapter of the Federal Bar Association reports that it is deeply divided on the wisdom of this revision.

The Montana Bar opposes this revision.

Murphy Oil Co., El Dorado AK, favors this revision.

The NAACP Legal Defense Fund opposes this revision, which, it suggests would have excluded the expert testimony in *Brown v. Board of Education*.

The New York State Bar Committee opposes the revision of the first sentence of this rule, but favors the addition of the second sentence. They argue that the proposed change in the first sentence will not accomplish much because the issues of reliability and substantiality are appropriately issues to be decided by the trier of fact.

Ogletree Deakins Nash Smoak & Stewart of Greenville SC favor this revision.

The Public Citizen Litigation Group approves the provision freezing the expert's testimony but disapproves the enlarged duty of the court to exclude opinion evidence. They assert that the Note's language requiring "significant support or acceptance within the scientific community" is subject to the same problems that plague *Frye*. They also question the meaning of "substantially assist."

The Southern District of Iowa supports this revision.

Trial Lawyers for Public Justice oppose this revision.

The Washington State Bar opposes this revision.

Washington TLA opposes this revision.

Robert J. Albair, Esq., of Clayton MO, opposes the revision of Rule 702 as giving too much power to the district judge.

Hank Anderson, Esq., of Wichita Falls TX opposes the revision of Rule 702 as imposing an impossible burden on judges to foretell what will be substantially helpful and reliable.

S. Paul Battaglia, Esq., of Syracuse, supports this revision.

Raymond I. Booth, Esq. of Jacksonville FL opposes this revision.

T. Mack Brabham and fourteen other lawyers in McComb MS oppose this revision as conferring too much power on the judge.

Mary Coffey of Saint Louis urges that juries are capable of evaluating experts and that no change is needed.

Thomas J. Conlin, Esq., of Minneapolis, opposes the revision of the first sentence as offensive to jurors and to effectiveness of cross-examination.

John B. Donohue, Esq., of Richmond VA favors this revision.

Winslow Drummond Esq of Little Rock opposes this revision.

Carroll E. Dubac of Los Angeles favors this revision.

David H. Dunaway, Esq. of LaFollette TN opposes this revision.

Richard Duncan, Esq. of Knoxville opposes the amendment of Rule 702 as an unwarranted intrusion on the jury, leading federal courts to define scientific orthodoxy.

Hon. J. Owen Forrester (ND Ga) urges that the Committee go further in its revision of Rule 702. He proposes language designed to separate the expert opinion from background information. He argues that it is the former that is a problem, while background data is often a substantial help. He also urges that "reasonably reliable" is not strong enough with respect to opinions - such should be "reasonably certain" to help.

Charles F. Freiberger, Esq., of Columbus OH, finds the change in Rule 702 to be either inappropriate or ineffective.

Gail N. Friend, Esq, of Houston, urges that the authority of someone other than the trier of fact to determine whether expert opinion shall be admitted is "a glaring impingement of due process."

Eugene O. Gehl, Esq., Madison WI, urges that the revision does not go far enough to assure that opinions be based on science or technical knowledge.

Keith Gerrard, Esq., Seattle, regards this proposal as long overdue.

Professor Paul C. Giannelli of Case Western Reserve questions why this revision is not equally applicable to criminal cases. He also notes that *Frye* is still good in most circuits. He asks whether the committee means to require "wide acceptance," the term employed in a recent Executive Order. He also questions the meaning of "substantial" in this context.

Hugh Q. Gottschalk, Esq., of Denver favors this revision.

Professor Michael Graham of the University of Miami regards this amendment as being on the right track, but questions the phrase "reasonably reliable." He suggests that it fails to deal with several enumerated problems, and favors the use of "substantial acceptance" in the relevant expert community as the proper test. That phrase is drawn from the case law. Specifically, his proposal is:

> Testimony providing scientific, medical, technical, or other specialized information in the form of an opinion, inference, or otherwise, may be permitted only if (1) the information is based upon adequate underlying facts, data or opinions, (2) the information conforms to an explanative theory that has received substantial acceptance by the relevant expert community, (3) the witness is qualified as an expert by knowledge, skill, experience, training or education to provide such information and (4) the information will substantially assist the trier of fact to understand the evidence or to determine a fact or issue.

Richard W. Groner, Esq. of Venice Florida opposes the change in Rule 702. In construction litigation, he has found testimony of workmen on industry custom to be very valuable and fears that it will be excluded pursuant to the revised rule.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Lee Hagen, Esq. of Fargo opposes this revision.

Jon L. Heberling, Esq. of Kalispell MT finds this proposal not well thought out. He asks: how does the court appraise evidence that it has not heard?

John C. Holme, Esq. of Chester VT opposes this revision.

Laurence R. Jensen of San Jose CA opposes that part of this revision that would require advance disclosure of expert testimony.

Leonard S. Katkowsky, Esq. of Southfield MI opposes the requirement of "reasonable reliability" as unnecessary.

M. J. Keefe, Esq of Albuquerque finds this proposal alarming because it may result in experts being more valuable to well-financed litigants.

Ann Kelly Esq of Santa Monica opposes this revision.

Prof. Kenneth R. Kreiling of Vermont Law School favors raising the threshold for expert testimony but questions the use of the term "reliable," which he finds problematic.

J. D. Ledbetter, Esq. of Southfield MI opposes this revision.

Thomas M. Loeb, Esq. of Southfield MI opposes this revision.

Keith A. McIntyre, Esq. of Statesboro GA opposes the revision of Rule 702, asserting that the overwhelming majority of expert opinion is reliable and useful.

Henry Oechler, Esq., New York, expresses concern that the Committee Notes to Rule 702 may discourage use of new science.

James F. O'Neill, Esq. of Burlington VT opposes this revision as conferring too much discretion on judges,

Godfrey P. Padberg, Esq. of St. Louis suggests that this revision will prevent Columbus from testifying that the earth is round.

Mitchell I. Pearl, Esq. of Middlebury VT opposes this revision.

Anthony Z. Roisman, Esq. of Washington DC opposes this revision.

Susan Vogel Saladoff of Rockville MD opposes this revision.

Professor Michael J. Saks of the University of Iowa supports the revision and argues especially for its application in criminal cases, where, he observes, the worst abuses of opinion testimony are those of prosecutors. Very few criminal defendants, he notes, can afford expert testimony of any kind.

Samuel M. Shapiro, Esq of Rockville MD opposes this revision.

Professor Daniel Shuman of Southern Methodist, writes to call attention to an empirical study in which he participated: Champagne, Shuman & Whitaker, An Empirical Examination of the Use of Expert Witnesses in American Courts, JURIMETRICS, Summer 1991 at 375. The study shows that experts testify in about half of civil cases, often for only one side. They report a shared perception of those participating in the study regarding the ways in which lawyers recruit and coach experts.

David A. Stjern of Springfield IL opposes this revision as giving too much power to the court.

Laura D. Stith of Kansas City favors this revision.

William R. Wilson, Esq. of Little Rock (a member of the Standing Committee) fears that the amendment will operate to the disadvantage of less resourceful lawyers and clients who cannot afford the best-qualified experts.

Martha K. Wivell, Esq. of Minneapolis opposes this revision.

Hon. H. David Young, E.D. Ark., fears that this revision will disfavor the infrequent independent expert and favor the hired guns who will be able to comply with the requirements imposed.

EVIDENCE RULE 705

Theodore Tetzlaff, Chair, believes that further study of this revision is desirable.

The Department of Justice favors this revision.

The New York State Bar Committee favors this proposal.

The Philadelphia Bar opposes this revision.

UNIVERSAL COMMENTS

The Arkansas Bar requests further time for study. Professor Robert R. Wright, University of Arkansas, requests further time specifically to study the revisions of Rules 16, 26 and 702.

The Maryland Trial Lawyers Association opposes the entire package of amendments "for reasons stated by TLPJ."

The Philadelphia Bar recommends that no changes be made to the Rules at this time. It sees Rule 26(a) as the centerpiece of these revisions and sees that rule as better subject to experimentation through the Civil Justice Reform Act of 1990. It has however commented on the rules individually, and its comments are recorded here subject to this general qualification.

The Washington State Bar Association requests an extension until July 1 for comment on these proposals.

Lance J. Stevens, Esq. of Jackson MS opposes all changes in the Rules, because the present rules provide the proper balance.

PAUL D. CARRINGTON

REPORTER

COMMENTS

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

June 1, 1992

MEMORANDUM TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

At the request of Judge Keeton, I am sending you herewith a copy of a letter to him from Judge Robert M. Parker, Chairman of the Judicial Conference Committee on Court Administration, regarding proposed amendment to Rule 26 of the Federal Rules of Civil Procedure mandating pretrial disclosure.

Judith W. Krivit
for

Joseph F. Spaniol, Jr.
Secretary

Attachment

cc: Advisory Committee on Civil Rules
Chairmen & Reporters of
Advisory Committees
Dean Daniel R. Coquillette
Professor Mary P. Squiers

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
FEDERAL BUILDING
221 WEST FERGUSON STREET
TYLER, TEXAS 75702

CHAMBERS OF
ROBERT M. PARKER
CHIEF JUDGE

May 21, 1992

Honorable Robert E. Keeton
Chairman, Standing Committee on Civil Rules
John W. McCormack Post Office &
Courthouse, Room 306
Boston, MA 02109

Dear Bob:

The following comments and observations are made in my capacity as Chairman of Court Administration and Case Management Committee and as Chief Judge of the Eastern District of Texas. I would appreciate it if you could provide this letter to the Committee for their consideration prior to your June meeting.

These comments are restricted to the proposed new rules relative to mandatory disclosure versus discovery. We have now completed Judicial Conference review of the 34 plans adopted by Demonstration, Pilot and Early Implementation Districts. Twenty-one of the 34 districts have incorporated into their Civil Justice Reform Act Plans some form of mandatory disclosure in lieu of traditional discovery. The vast majority of the 21 courts have adopted the proposed new Rule 26 verbatim. These courts reached the conclusion that the proposed rule was meritorious and held good promise of reducing costs and delays in civil litigation. The adoptions resulted from extensive effort by of Advisory Groups as well as the courts and represent a commitment to the change of direction embodied in Rule 26. Specifically, the notion that only information that "bears significantly on" a claim or defense should be exchanged or disclosed between the parties has been intensively debated and found to be worthy of adoption. The merits of disclosing only significant information are apparent and the cost savings compared to the dumping of voluminous documents has the potential to be substantial.

I am confident that I speak for our entire committee when I take the position that to abandon the proposed Rule change that incorporates the selective process of focusing on information that bears significantly on a claim or defense would be a step backwards and would ignore the substantial investment of time, energy, and thought that has gone into the process both at the Advisory Group and District Court level.

On behalf of the Eastern District of Texas, I can report to you that we incorporated into our Civil Justice Reform Act Plan the proposed new Rule 26. I am attaching a copy of that part of our plan. You will note in the introductory language, we state that we fully expect there to be developed a body of common law that addresses the notion of information that bears significantly on a claim or defense. You will further note that relying on the advisory notes and hopefully common sense, we set out to define "bears significantly on" on page 3. We have found definition (v) to be the most helpful.

I can report that we have held Management Conferences in over 150 cases that have completed disclosure. I personally have held management conferences in over 40 of those cases. I have been called upon to make a ruling concerning whether certain particular information is subject to disclosure in only one case. In addition to the 150 Management Conferences where disclosure has been completed, we have had approximately an equal number of cases in which disclosure has either been completed or is in the process of being completed. We have received inquiries by way of our Discovery Hotline in approximately 3% of the cases.

The bar has reported no difficulty with the concept or its implementation. Instead, the bar has reported to us that it is working extremely well, it is saving their clients money and is providing them with information that they really need.

From a personal standpoint, I find it curious that the complaints you are apparently receiving from insurance companies and corporate litigators about disclosing significant information comes from the same entities that petitioned so vigorously for enactment of the Civil Justice Reform Act as an economical measure. I, further based upon our experience, am absolutely persuaded that this concept works, is needed and will benefit litigants.

I urge your adoption of the proposed new Rule 26.

Kindest regards,

Robert M. Parker

RMP/vs

Enclosure

cc: All Members of the Court Administration and
Case Management Committee

INTRODUCTION

For two hundred years the citizens of the United States have cherished their system of civil justice as one of the cornerstones of a free and democratic society. The civil justice system protects individual rights by providing all Americans an opportunity to be heard in an impartial court of law.

In recent years, however, all three branches of government and the private sector have decried the fact that the civil legal system has become burdened with excessive costs and delays. Overuse and abuse of the system threaten the ability of the courts to provide equal justice for all. Essentially unrestrained civil litigation exacts an ever increasing toll on the domestic economy and on American companies attempting to compete in a world market.

The expense of civil litigation today as a practical matter results in denial of access to the courts for a significant segment of our society. Also, many cases of marginal merit settle in order to avoid oppressive costs of litigation. A principal cause for the escalation of cost is the overuse and abuse of discovery.

In most cases one or more parties are represented by counsel whose fee practice is to charge for legal services by the hour without regard to results obtained. The fee practice of charging for "billable hours" creates an economic conflict between lawyer and client. Another significant factor that contributes to excessive discovery is the concern lawyers have that they may be criticized or held legally accountable if they fail to exhaust every means at their disposal.

We are presented with the challenge of bringing costs under control so that our society may enjoy the benefits of a civil justice system that is affordable, timely, and fair.

Congress has responded to the challenge by enacting **THE CIVIL JUSTICE REFORM ACT OF 1990**, 28 U.S.C. §471 *et seq.*, ("the Act"). The Act requires each United States district court to implement a civil justice expense and delay reduction plan to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy and inexpensive resolution of civil disputes.

The courts have responded by proposing changes to the Federal Rules of Civil Procedure and the Executive has responded by recommending fifty specific changes to our current legal system. See **PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM (1991).**

This court has appointed an advisory group in accordance with 28 U.S.C. §478. After consideration of the advisory group's recommendations, and after independent consideration, this court has concluded that the congressionally

mandated goals of reducing expense and delay in civil cases necessitates the elimination of some hearings and procedures, imposition of limits and standardization of others, and the creation of a multi-door courthouse to permit the parties to have access to several different methods for resolving their disputes.

The court recognizes that provisions of this plan may ultimately be the subject of judicial review in the Courts of Appeal. The section relating to attorney's fees and the relationship between the Rules Enabling Act and the Civil Justice Reform Act of 1990 are examples of such provisions. It is further anticipated that "bears significantly on" will provide new grist for the common law mill.

The United States District Court for the Eastern District of Texas adopts the following **CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN.** This plan shall apply to all civil cases filed on or after December 31, 1991, and may, at the discretion of the individual judicial officer, apply to cases then pending.

Part One of the Plan will be printed for distribution to the bar.

PART ONE

ARTICLE ONE: DIFFERENTIAL CASE MANAGEMENT - TRACKING AND PRESUMPTIVE DISCOVERY LIMITS

Upon the filing of each case, the Court will assign the case to one of six tracks. Each track will carry presumptive discovery limits as set forth below. These limits shall govern the case and may not be changed by the parties or their attorneys by agreement or otherwise. The judicial officer to whom the case is assigned may, upon good cause shown, expand or limit the discovery.

TRACK ONE: No discovery

TRACK TWO: Disclosure only

TRACK THREE: Disclosure plus 15 interrogatories, 15 requests for admission, depositions of the parties, and depositions on written questions of custodians of business records for third parties.

TRACK FOUR: Disclosure plus 15 interrogatories, 15 requests for admissions, depositions of the parties, depositions on written questions of custodians of business records for third parties, and three other depositions per side (i.e., per party or per group of parties with a common interest.)

TRACK FIVE: A discovery plan tailored by the judicial officer to fit the special management needs of the case.

TRACK SIX: Specialized treatment and program as determined by the judicial officers.

ARTICLE TWO: DUTY OF DISCLOSURE

When required by this Plan, the duty of disclosure means the following:

(1) Initial Disclosure:

(a) Each party shall, without awaiting a discovery request, provide to every other party:

(i) The name and, if known, the address and telephone number of each person likely to have information that bears significantly on any claim or defense, identifying the subjects of the information, and a brief, fair summary of the substance of the information known by the person;

(ii) A copy of, or a description by category and location, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense;

(iii) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34, the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) For inspection and copying as under Rule 34, any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(v) There is no duty to disclose privileged documents. Privileged documents or information shall be identified and the basis for the claimed privilege shall be disclosed.

(b) Timing of Disclosure

Unless the judicial officer directs otherwise, or the parties otherwise stipulate with the judicial officer's approval, these disclosures shall be made as follows:

(i) by a plaintiff within 30 days after service of an answer to its complaint or removal of the action from state court, whichever occurs last;

(ii) by a defendant within 30 days after serving its answer to the complaint or removal of the action from state court, whichever occurs last; and, in any event

(iii) by any party that has appeared in the case within 30 days after receiving from another party a written demand for accelerated disclosure accompanied by the demanding party's disclosures.

(c) bears significantly on

The following observations are provided for counsels' guidance in evaluating whether a particular piece of information "bears significantly on" a claim or defense.

(i) It includes information that would not support the disclosing parties' contentions;

(ii) It includes those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties;

(iii) It is information that is likely to have an influence on or affect the outcome of a claim or defense;

(iv) It is information that deserves to be considered in the preparation, evaluation or trial of a claim or defense;

(v) It is information that reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense;

(vi) All information that bears significantly on a claim or defense is relevant but all relevant information does not necessarily bear significantly on a claim or defense.

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

May 26, 1992

MEMORANDUM TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

At the request of Judge Keeton, I am sending you herewith a copy of a letter and memorandum sent to him by Mr. John P. Frank, regarding the proposed amendment to Rule 11 of the Federal Rules of Civil Procedure.

Joseph F. Spaniol, Jr.
Secretary

2 Attachments

cc: Chairmen and Reporters of
Advisory Committees
Dean Daniel R. Coquillette
Professor Mary P. Squiers
Mr. John P. Frank

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A Partnership
Including
Professional
Corporations
ABA NET 2856

John P. Frank
(602) 262-5354

Our File Number
96468-004
Rule 11

May 19, 1992

The Honorable Robert Keeton
United States District Court
Post Office and Courthouse, Room 510
Boston, MA 02109

Dear Bob:

Thanks very much to take the time for the visit the other day, as well as for your call, and for your conscientious desire to have all points of view before you make up your mind. That was going the extra mile.

When we spoke I had not seen the notes for the proposed new rule and I have revised the material I gave you at breakfast. I, therefore, enclose a copy of my file memo of May 19, which you had suggested I send to Joe Spaniol for distribution to your committee.

Yours very truly,

John P. Frank

JPF:ccb
Enclosure
cc: Joseph F. Spaniol, Jr. (w/enclosure)

APP09F6F

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Our File Number
96468-004
Rule 11

MEMORANDUM

DATE: May 19, 1992

TO: File

FROM: John P. Frank

RE: Rule 11 Before the Standing Committee

1. We have now had experience with Rule 11 since 1983. Due to large-scale concern at its operation, the Advisory Committee has now made extensive revisions. While the goals are good and the heart is pure, the fact of the matter is that the revision makes the rule far worse and more onerous than it was before.

2. A group of lawyers and judges presented an alternative to Rule 11 known as the Bench-Bar proposal. This proposal is sponsored by several circuit judges and representatives of each of the major bar organizations in America (the Litigation Section, ATLA, the American College of Trial Lawyers, to name three). The Bench-Bar proposal is fundamentally based on the American College proposal. The Litigation Section has not spoken as a unit; two of its former chairmen have endorsed the Bench-Bar proposal. Its present chairman endorses particularly a key element of the Bench-Bar proposal. The ATLA endorsement is official for the group. Other proposals have been endorsed by other bar groups; we do not know whether they were aware of the Bench-Bar proposal. Direct endorsement of the Bench-Bar proposal has been filed with the Committee by the state bars of Arizona, Arkansas, Connecticut, Delaware, Georgia, Illinois, Kentucky, Nevada, and the New York State Bar. The civil liberties aspect of the problems of Rule 11 is substantial and we therefore note that the Bench-Bar proposal has been endorsed by the Alliance for Justice, the American Civil Liberties Union, the NAACP, the Trial Lawyers for Public Justice and, quite unrelated to civil liberties matters, the National Association of Securities and Commercial Law Attorneys.

3. The Advisory Committee has been unpersuaded by the arguments advanced in behalf of the Bench-Bar proposal, including its various ingredients, and has largely rejected them all. Two specific ways in which the matter has been made worse are:

a. Under the new proposal, the panoply of sanctions takes effect not merely with the filing but with any failure after the filing to alter the filing on the basis of some later acquired knowledge. This opens the door for a new Rule 11 wrangle every time some development in discovery casts doubt on some earlier pleading. The capacity of lawyers to believe that some subsequent discovery event explodes the other side's case is infinite.

b. A key factor in the making of the Bench-Bar proposal is the enormous load it has placed -- thousands of cases -- on to the courts. The notes for the new rule require the court to consider "whether the improper conduct was willful or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading or only one particular count or defense; whether the person is engaged in similar conduct in other litigation;[1] whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations."

The effort to make the Rule 11 process more responsible is a good purpose; but the burden added to the legal system is destructive.

4. Recognizing that of course the proposal of the Advisory Committee has momentum, I turn to it. Proposed Rule 11(b) at line 11 in the attached copy should be amended by adding after the word "circumstances" the phrase "the paper taken as a whole." All persons in all bar groups with which we are acquainted agree.

5. Paragraph (b)4(4) should be deleted. This is the provision providing that denials "are warranted on the evidence or, if specifically so identified" are reasonably based on a lack of information or belief. So far as this deals expressly with denials, it is superfluous; the rule covers, without this clause, all pleadings, motions and other papers and there is no utility in singling out denials. However, the phrase "if specifically so identified" is a great misfortune. There are now something like 800,000 lawyers in America. The number which will be filing denials is unknown but is certainly very, very large. Of those persons, the

[1]The Bench-Bar proposal had regretted the whole Rule 11 business of first trying the case and then trying the lawyer. With this addition, we shall try not merely the lawyer in this case, but also in all his other cases.

number who will in fact be aware of this little fragment of this rule is extremely small. The clauses is, thus, not merely superfluous, but it is a trap for the enormous number of lawyers who cannot reasonably be expected to know that it is there.

6. The provision for fee shifting for violation of Rule 11 should be stricken and the provision for payment into court should be substituted. If the object is deterrence, that should be enough.

7. The euphoniously named "safe harbor" provision should be eliminated. We recognize that it has been approved by Mr. Tetzlaff, a respected figure. It is condemned by everyone else who has spoken to the subject for the interrelated reasons that it puts an incentive on aimless nitpicking as to past pleadings and, when accompanied by the fee shifting, forces lawyers to make claims in order to avoid possible malpractice problems with their own clients.

8. A requirement that the court "describe the conduct" complained of and "explain the basis for the sanction" is not enough. We have findings of fact and conclusions of law for endless purposes of the practice and believe that this should be the mandate here. The Bench-Bar proposal that "any sanctions shall be based on written findings of fact and conclusions of law, which shall consider the duty violated; the actual injury caused; and the existence of aggravating or mitigating circumstances" gives a more substantial definition of just what is to be done if this rule is to be invoked.

9. The Bench-Bar proposal, I believe, has the largest bar support of any rules revision proposal since the inauguration of the rules. The Standing Committee should give this topic further thought before the proposed new rule becomes final.

John P. Frank

JPF:ccb

ADVISORY COMMITTEE RECOMMENDATION

Rule 11. Signing of Pleadings, Motions, and Other Papers;

Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By signing, presenting, or pursuing a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances--

(1) it is not being presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court shall, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties which have violated subdivision (b) or are responsible therefor.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has

not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other costs incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court's order to show cause is issued before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

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

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CHAIRMAN

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CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

May 29, 1992

Philip A. Lacovara
Managing Director
& General Counsel
Morgan Stanley & Co.
Incorporated
1251 Avenue of the Americas
New York, New York 10020

Dear Mr. Lacovara:

On behalf of Judge Keeton, thank you for your letter dated May 28, 1992, commenting on the latest draft of the proposed amendments to the Federal Rules of Civil Procedure. Your letter is being sent to the members of the Standing Committee on Rules of Practice and Procedure for their consideration.

Sincerely,

Judith W. Krivit
for

Joseph F. Spaniol, Jr.
Secretary

cc: Standing Committee on Rules
of Practice and Procedure
Honorable Sam C. Pointer, Jr.
Professor Paul D. Carrington
Dean Daniel R. Coquillette
Professor Mary P. Squiers

MORGAN STANLEY

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May 28, 1992

Honorable Robert E. Keeton, Chairman
Standing Committee on
Rules of Practice and Procedure
Administrative Office of the
United States Courts
1120 Vermont Avenue, N.W., Suite 626
Washington, D.C. 20544

Re: **Proposed Amendments to the Federal Rules of Civil Procedure (Disclosure and Discovery)**

Dear Judge Keeton:

I am writing to offer comments on the discovery features of the May 1992 Proposed Amendments to the Federal Rules of Civil Procedure.

I. Personal Litigation Experience

Since I am submitting these comments in my personal capacity, it may be appropriate to outline the range of professional experience on which I draw in formulating them. During the past twenty-five years, I have been involved in federal litigation in a variety of settings. Since 1990, I have been Managing Director and General Counsel of Morgan Stanley & Co. Incorporated, a diversified financial services company. Before joining Morgan Stanley, I held the following litigation-related positions: Vice President and Senior Counsel for Litigation and Legal Policy at General Electric Company, supervising all litigation for one of the world's largest companies; litigation partner at the law firm Hughes Hubbard & Reed and resident partner in charge of the firm's Washington, D.C. office; Counsel to the Watergate Special Prosecutor; Deputy Solicitor General of the United States; Special Counsel to the New York City Police Commissioner; Special Assistant to the United States Attorney General; and Assistant to the Solicitor General of the United States.

At various times in recent years, I also served as President, General Counsel and Member of the Board of Governors of the District of Columbia Bar, as a Member of the Judicial Conferences of the District of Columbia and the District of Columbia Circuit, and as Chairman of the Advisory Committee on Procedures and of the Committee on Admissions and Grievances, of the United States Court of Appeals for the District of Columbia Circuit. I am currently the Chair of the American Bar Association Section of Individual Rights and Responsibilities and served for several years as Chair of the ABA's Special Committee on Amicus Curiae Briefs. I have also served on numerous other committees, provided congressional testimony on more than a dozen occasions addressing law reform issues, and lectured and written articles on a variety of legal issues.

II. Nature of the Problems with Discovery

From these various vantage points -- as litigator, as client, and as commentator -- I have observed many litigation tactics that need to be curtailed, particularly in the area of discovery. The costs associated with discovery abuses, and even the costs flowing from expansive discovery that falls within current standards, are astounding. At both General Electric and Morgan Stanley, I have had to consider settling meritless litigation for millions of dollars in order to avoid incurring both the legal expense and the disruption of business that result from "scorched earth" discovery, which unfortunately is rarely halted by court intervention. Although I have tried to avoid paying what amounts to extortion in these circumstances, there is something obviously wrong with a discovery process the avoidance of which must be weighed heavily in determining whether to settle an action.

Moreover, the problem is more fundamental than abuse of current discovery standards and judicial unwillingness to intervene. The underlying problem is with the sweeping discovery that is technically permissible under the current rules. Rather than facilitating the informed search for truth as part of the litigation process, the current standards for discovery distort the process and obstruct that goal.

III. Summary of Comments

This letter focuses primarily on Federal Rules 26 and 34. I believe that the Advisory Committee on Civil Rules has done a commendable job in identifying certain discovery abuses that need to be redressed, and in proposing

common sense solutions for consideration by the Standing Committee. For example, the Advisory Committee recommends setting presumptive limits on the number of interrogatories that may be served, and on the number of depositions that may be taken. These rule changes, if adopted, should cause litigants to cast their discovery nets with more care and precision, rather than continuing to allow them to throw out a massive drift net.

In the area of document discovery, however, the Advisory Committee's proposed amendments may well aggravate the problem rather than help solve it. The concept of "disclosure" is good, but needs refinement. More fundamentally, I recommend that, once the "disclosure" process is properly adjusted, the scope of permissible follow-up discovery should be narrowed substantially by revising the scope of routinely discoverable information.

One cannot assess the changes that should be made without understanding that the problems are, in large part, the product of prior revisions in the discovery rules. Section IV summarizes the various discovery rule changes that have been considered and adopted since the Federal Rules of Civil Procedure were adopted in 1938. The original Rule 34 explicitly provided for a narrower scope of document discovery than did original Rule 26 for deposition discovery. Both rules were amended in 1946 to be consistent and broad, and in 1970 they were essentially merged.

In 1978, the Advisory Committee recommended narrowing the scope of permissible discovery, but the 1980 amendments made no such change, despite the dissent of three Supreme Court Justices. In 1983, further amendments were made in an unsuccessful attempt to get the district courts more involved in limiting abusive discovery techniques that the breadth of the rules themselves stimulates.

Section V briefly summarizes the scope of document discovery that is currently allowed in the leading industrial states, and demonstrates how the Federal Rules have been used as a model by the states; this federal leadership in the "wrong" direction makes it especially important to change course now.

Section VI analyzes the proposed amendments to the discovery rules, and recommends that the Standing Committee consider extending the reforms in some respects and narrowing other proposed changes. The most significant extension that I propose is to require the actual "disclosure" of important documents, rather than allowing parties simply to describe categories of documents that are relevant to disputed facts alleged with particularity in the pleadings. This proposal serves

two objectives: it gets the actual important documents into the parties' hands at an earlier point in time, and it forecloses litigants (and their counsel) from having to draft another layer of uninformative or argumentative material.

Concomitant with an expansion of the document "disclosure" obligation should be a narrowing of the scope of permissible follow-up discovery, either as a general rule applicable to all forms of discovery or at least with regard to document requests. The Standing Committee should propose limiting the scope of discovery to matters that "tend to support or undermine facts, events or circumstances relevant to the claims or defenses," rather than to matters that are merely relevant in some way "to the subject matter involved in the pending action." Moreover, in drafting document discovery requests, litigants should be required to articulate the specific facts, events or circumstances to which each request directly relates in this way.

In addition, the Standing Committee should not recommend permitting parties to obtain disclosure during the pendency of a Rule 12 motion to dismiss, at least in the absence of a showing of good cause or reasonable necessity. Permitting disclosure at that stage in the proceedings is, in most cases, unfair to defendants and an unnecessary waste of time and resources.

Finally, the Standing Committee should not recommend creation of a duty to supplement "discovery" responses. The proposed imposition of such a continuing duty with regard to centrally important "disclosures" would be burdensome enough, and should adequately promote the desired objective.

IV. Evolution of Scope of Discovery Under Rules 26 and 34

Rule 26 currently provides the general framework for each of the discovery methods set forth in Rules 27 through 36. Rule 34, relating to document discovery, currently provides in subsection (a) that its scope is identical to that set forth in Rule 26(b). These parallel scope provisions were not, however, part of the original Federal Rules.

Therein lies the problem. It is the expansiveness of document discovery that is the principal problem with discovery today. The source of the mischief has come from maintaining an extremely broad standard for inquiry at depositions and then making that same standard apply to requests for documents as well. The result has been to make it routine in civil litigation to have to conduct nationwide or world-wide searches through millions of pages of documents and to have to

produce rooms full of paper, only a tiny fraction of which has anything to do with resolving the issues being litigated.

As originally adopted in 1938, Rule 26 related solely to depositions. Rule 26(b) provided in pertinent part that

> the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party....(emphasis added.)

The original Rule 34, by contrast, explicitly set forth a much narrower scope for document discovery and only permitted such discovery upon a showing of good cause. If the requesting party could establish cause, the court was empowered to

> order any party to produce ... any designated documents, ... not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control....(emphasis added.)

The Advisory Committee had originally recommended, in May 1936, that the scope of document discovery (Proposed Rule 38) be as broad as the scope of deposition discovery (Proposed Rule 31). See Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, pp. 68-69 (1936) (recommending that the courts be empowered to order the production of "any designated documents ... relevant to any matter involved in the action"). This proposal was rejected, however, in favor of the much narrower "material evidence" standard.

Between 1938 and 1946, many courts accordingly limited discovery under Rule 34 to documents admissible in evidence at trial. See Marzo v. Moore-McCormack Lines, Inc., 7 F.R.D. 378, 380 (E.D.N.Y. 1945) ("it is obvious that the framers did not intend that the production of documents under Rule 34 should be as unrestrained as examination of persons under Rule 26"); Condry v. Buckeye S.S. Co., 4 F.R.D. 310, 311 (W.D. Pa. 1945) ("the plaintiff must ... show facts from which the court may conclude the documents constitute or contain evidence material to the matters involved in the suit"); Stewart-Warner Corp. v. Staley, 4 F.R.D. 333, 335 (W.D. Pa. 1945) ("the rule was never intended to permit a party to engage in a 'fishing expedition' among the books and papers of the adverse

party"); Heiner v. North American Coal Corp., 3 F.R.D. 63, 63 (W.D. Pa. 1942); Archer v. Cornillaud, 41 F. Supp. 435, 436 (W.D. Ky. 1941); Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp., 4 F.R.D. 328, 329 (W.D. Pa. 1940); Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc., 30 F. Supp. 903, 905 (E.D.N.Y. 1939); Sonken-Galamba Corp. v. Atchison, T. & S. F. Ry. Co., 30 F. Supp. 936, 937 (W.D. Mo. 1939); Kenealy v. Texas Co., 29 F. Supp. 502, 503-04 (S.D.N.Y. 1939).

Nevertheless, other courts noted that Rule 34 had to be construed more narrowly than Rule 26, but allowed the production of documents that might "be the source of other information which would be admissible at the trial." See Hickman v. Taylor, 153 F.2d 212, 216, 218-19 (3d Cir. 1945), aff'd, 326 U.S. 495 (1947).

In 1946, the Federal Rules were amended to make clear that a broader scope of examination was favored. Rule 26(b) added the following sentence:

> It is not ground for objection that the [deposition] testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

The first step along the road to the current problems we confront came when the Advisory Committee proposed amending Rule 34 to drop the requirement that documents subject to discovery had to have some evidentiary significance. The amended Rule authorized discovery of any documents

> which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b)....

The 1946 Advisory Committee Note explained that the harmonization of Rule 34 with Rule 26(b) "remove[s] any ambiguity created by the former differences in language." See Advisory Committee Note of 1946 to Amended Rule 34. Significantly, however, the 1946 revision of Rule 34 did continue to require a showing of "good cause" in order to obtain leave for discovery of documents.

In 1970, the discovery rules were amended and rearranged so that Rule 26 became generally applicable to all types of discovery. Rule 26(b)(1) was amended to provide that

> [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.... It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (emphasis added.)

Rule 34 was amended to eliminate the "good cause" requirement and to allow parties to demand all documents "which constitute or contain matters within the scope of Rule 26(b)." Thus, the 1970 amendments completed the enlargement of the scope of document discovery, making broad-scale access to whole categories of an opponent's records a matter of right.

In Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978), the Supreme Court explained how Rule 26(b)(1) now must be interpreted:

> The key phrase in this definition - "relevant to the subject matter involved in the pending action" - has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. See Hickman v. Taylor, 329 U.S. 495, 501 (1947).

437 U.S. at 351 (emphasis added).

Not surprisingly, the virtually unbounded definition of relevance -- relevant to the subject matter of the action, not necessarily to the claims and defenses at issue -- has resulted in numerous discovery abuses over the years. See Herbert v. Lando, 441 U.S. 153, 179 (1979) (Powell, J., concurring) ("discovery techniques and tactics have become a highly developed litigation art -- one not infrequently exploited to the disadvantage of justice"); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740-41 (1975) ("[I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.").

The first significant consideration given to narrowing the scope of allowable discovery occurred in 1977. The Special Committee for the Study of

Discovery Abuse of the American Bar Association's Section of Litigation issued a report in October 1977 recommending that Rule 26(b)(1) be amended to limit discovery to matters relevant "to the issues raised by the claims or defenses of any party" instead of "to the subject matter involved in the pending action." Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation, American Bar Association (October 1977), p.2. The Special Committee's Comment concluded that

> sweeping and abusive discovery is encouraged by permitting discovery confined only by the "subject matter" of a case (existing Rule 26 language) rather than limiting it to the "issues" presented. For example, the present Rule may allow inquiry into the practices of an entire business or industry upon the ground that the business or industry is the "subject matter" of an action, even though only specified industry practices raise the "issues" in the case. The Committee believes that discovery should be limited to the specific practices or acts that are in issue.
>
> Determining when discovery spills beyond "issues" and into "subject matter" will not always be easy. Nonetheless, the Committee recommends the change if only to direct courts not to continue the present practice of erring on the side of expansive discovery.

Id. at p.3.

After reviewing the Special Committee's October 1977 Report, the Advisory Committee proposed in March 1978 to recommend that the phrase "subject matter involved in the pending action" be deleted but without substituting "issues raised," thus allowing discovery only

> regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party....

Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 623-24 (1978) (emphasis added). The Advisory Committee Note explained that since "issues raised" is as general a term as "subject matter," it made more sense simply to delete "subject matter" without replacement. Id. at 627-28.

In February 1979, however, the Advisory Committee published a revised preliminary draft, which dropped the proposal to amend Rule 26(b). See Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323, 330, 332 (1979). This omission was most unfortunate.

When the Federal Rules were ultimately amended in 1980, Rule 26(b) was left intact. Instead, at the Advisory Committee's suggestion, Rule 26(f) was added in order to encourage discovery conferences with the court; that mechanism has proved to be a totally inadequate alternative to reforming the scope of discovery that the Rules entitle parties to obtain.*

The 1980 Advisory Committee Note acknowledged that the Committee had

> considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.

Advisory Committee Note of 1980 to Amended Rule 26(f). Nevertheless, the Committee concluded that timely court intervention was preferable to wholesale rule changes at that time.

In a letter explaining the Advisory Committee's ultimate decision not to recommend limiting Rule 26(b), Judge Walter R. Mansfield, the Committee Chairman, assured that this decision

> does not close the door on continued consideration of whether some change in the rule may be devised that will be useful in minimizing discovery abuse. It simply means that we are not satisfied on the present record, including such empirical studies as have been made, that changes suggested so far would be of any substantial benefit. We propose to seek a firmer basis for

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* In addition, Rule 34(b) was amended to provide for documents to be produced either "as they are kept in the ordinary course of business" or else organized to correspond to specific requests. The Rule 34 amendment was designed to curtail the practice of mixing documents in such a way that critical documents would not likely be found by the requesting party. See Advisory Committee Note of 1980 to Amended Rule 34(b).

> identifying and defining discovery abuse problems so that effective methods of treatment can be found.

Letter of Judge Walter R. Mansfield to Judge Roszel C. Thomsen (June 14, 1979), reprinted at 85 F.R.D. 538, 542 (1979).

Recognizing their inadequacy but giving deference to the Advisory Committee's recommendations, the Supreme Court adopted the 1980 discovery rule amendments by a 6-3 margin. In dissent, Justice Powell, joined by Justice Stewart and then Associate Justice Rehnquist, argued that the 1980 amendments to Rules 26, 33, 34 and 37 "fall short of those needed to accomplish reforms in civil litigation that are long overdue." Amendments to Rules, 85 F.R.D. 521, 521 (Powell, J., dissenting). After expressing doubt that the amendments "will have an appreciable effect on the acute problems associated with discovery," Justice Powell observed prophetically that "[t]he Court's adoption of these inadequate changes could postpone effective reform for another decade." Id. at 522. The dissent urged the Judicial Conference to undertake "a thorough re-examination of the discovery Rules that have become so central to the conduct of modern civil litigation." Id. at 523.

As the dissenting Justices anticipated, the 1980 amendments did not prove to be particularly effective, and, in 1983, Rule 26 was again amended to try to curb discovery abuses. Among other changes, a second paragraph was added to Rule 26(b)(1), providing for court-imposed limits on the frequency and use of the various discovery methods in appropriate instances:

> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

In explaining the decision "to encourage judges to be more aggressive in identifying and discouraging discovery abuse," the Advisory Committee observed that

> the spirit of the [discovery] rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Advisory Committee Note of 1983 to Amended Rule 26.

The fundamental flaw with these efforts to tinker with the discovery process now is clear: It is unreasonable to begin with a discovery standard that presumptively confers a right to broad discovery, and then to hope that a combination of restraint by lawyers and intervention by judges will keep discovery within reasonable bounds. Several decades of experience have shown that lawyers (and some clients) have every incentive to press these "rights" to their almost unbounded limits, and the last thing federal judges (or magistrate judges) want to spend their time doing is deciding how to cut back on the assertion of these "rights."

The current system, thus, has it backwards: The Rules should instead provide for tight restrictions on the scope of presumptively permissible discovery, with the burden on the party demanding more than is presumptively reasonable to establish why broader access is necessary in a specific case. In this way the inevitable inertia that characterizes the system will work to keep discovery demands in check, rather than work to leave excessive or abusive demands in force.

The continued existence of discovery abuses, as well as the courts' reluctance to curtail these so-called "fishing expeditions," has resulted in the May 1992 Proposed Amendments to the Federal Rules. These proposals are a useful beginning, but it would be a shame not to take this opportunity -- at last -- to make truly meaningful reform.

V. Federal Discovery Standards Set the Model -- Good or Bad -- for the States

The costly and disruptive discovery standards set by the Federal Rules have infected the entire American litigation process. This pattern of federal leadership makes it even more vital for the Standing Committee to initiate real reform now, since it will take years for meaningful changes to work their way through the entire system.

A review of the discovery rules currently in effect in thirteen of the leading industrial states demonstrates that, as a result of either legislative action or judicial interpretation, the scope of permissible discovery at the state level simply tracks Federal Rules 26 and 34. In nine of the states surveyed, the discovery rules contain "scope of discovery" language that is identical to that contained in Federal Rules 26 and 34. See Rules 26 and 34 of the Delaware Chancery Court Rules; Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure; Articles 1422 and 1461 of the Louisiana Code of Civil Procedure; Rules 26 and 34 of the Massachusetts Rules of Civil Procedure; Rules 2.302 and 2.310 of the Michigan Court Rules; Rules 4:10-2 and 4:18-1 of the New Jersey Practice Rules; Rules 4003.1 and 4009 of the Pennsylvania Rules of Civil Procedure; Rule 166b(2) of the Texas Rules of Civil Procedure; Sections 804.01(2) and 804.09(1) of the Wisconsin Rules of Civil Procedure.

Similarly, in three other states, the discovery rules contain "scope of discovery" language that is reformulated, but substantively identical to Federal Rules 26 and 34. See Sections 2017(a) and 2031(a) of the California Code of Civil Procedure; Sections 218 and 227 of the Connecticut Rules of Court; Rules 201(b) and 214 of the Illinois Supreme Court Rules.

In New York, the applicable discovery rule is facially different from Federal Rule 26. Section 3101(a) of the New York Civil Practice Law and Rules provides for "full disclosure of all evidence material and necessary in the prosecution or defense of an action...." Despite the seemingly narrow language adopted by the Legislature, however, the New York Court of Appeals has held that the phrase "material and necessary" has essentially the same content as the Federal Rules and must be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." Allen v. Crowell-Collier Pbg. Co., 21 N.Y.2d 403, 406 (1968). Thus, by judicial interpretation, the scope of permissible discovery in New York is roughly equivalent to Federal Rule 26.

The rules referenced above demonstrate the uniformity that exists in the federal and state systems concerning the scope of permissible discovery. As a result, these states, like the federal courts, are clogged with civil cases that are more complex and more costly than they need to be. Given their history, the leading states can be expected to follow whatever constructive amendments are made to the discovery provisions of the Federal Rules.

VI. Comments on the Proposed Amendments

Now let me turn to the Advisory Committee's May 1992 proposals. The stated goal of the proposed amendments is

> to change current practices to achieve more effectively the objective stated in Rule 1 -- the 'just, speedy, and inexpensive determination of every [civil] action.' Amendments in the rules can and should be made to reduce, if not totally eliminate, the excessive delays and expense involved in many civil cases, particularly in the conduct of discovery....

Attachment to revised June 13, 1991, letter from Sam C. Pointer, Jr. to the Hon. Robert E. Keeton, p.1.

While the proposed discovery amendments are a step in the right direction on some issues (e.g., presumptively limiting the number of interrogatories that may be propounded and depositions that may be taken), the proposed amendments may well lead to collateral litigation on other issues (e.g., whether a party has adequately described the categories of documents that are relevant to disputed facts alleged with particularity in the pleadings). The preferable approach is to broaden certain of the proposed amendments, while narrowing others, in order to provide more guidance to litigants concerning their disclosure and discovery obligations.

A. Proposed Rule 26(a) - "Disclosure"

The creation of an affirmative "disclosure" obligation is certainly the most dramatic of the various proposed rule changes. The different formulations of Rule 26 that have existed since 1938 were all premised on the adversarial nature of litigation in the United States. Since parties were not required to exchange information voluntarily as part of the civil discovery process, it was deemed

necessary to allow "fishing expeditions" as a matter of course. See Hickman v. Taylor, 329 U.S. 495, 507 (1947).

The proposed "disclosure" obligation would convert litigation from a completely adversarial process to a "trust, but verify" process. Under Proposed Rule 26(a), parties would affirmatively disclose certain information, but adversaries would then be allowed to test the adequacy of the disclosures received by requesting other information that relates to the subject matter of the action. Unfortunately, rather than facilitating the discovery process, the duty of disclosure, as currently proposed, may simply add another layer to the process, particularly in the area of document discovery.

Proposed Rule 26(a)(1)(B) would require each party to provide other parties with either "a copy of, or a description by category and location of, all documents ... that are relevant to disputed facts alleged with particularity in the pleadings...." If this rule is adopted, most parties will probably just identify general categories of documents and the location of those documents. Of course, the descriptions will probably not be much more informative than the standard answer to a complaint, or the standard response to discovery requests. Adversaries will then certainly request the identified categories of documents and, most likely, others as well. In addition, parties who receive very general descriptions of categories of documents may find it tactically advantageous to seek sanctions under Proposed Rule 37 for incomplete or evasive descriptions. Thus, there may be more, rather than less, paper for the courts to review.

In addition, since this is intended to be a self-generated process that must be completed promptly, it is important to be as precise as possible in defining the scope of the centrally important documents that must be "disclosed." Rather than focusing on the term "relevant," it would be more instructive to direct disclosure of documents that "tend significantly to support or undermine" disputed facts alleged with particularity in the pleadings.

> **Recommendation: The Standing Committee should modify proposed Rule 26(a)(1)(B) to eliminate the description option, and simply require the actual production of documents that "tend significantly to support or undermine disputed facts alleged with particularity in the pleadings."**

This approach would serve to put most, if not all, significant documents in the opposing parties' hands early in the litigation. It should also help focus the

first wave of follow-up discovery requests, and obviate the need for judicial involvement at this relatively early stage in the proceedings.

Other comments on the disclosure process contemplated by Proposed Rule 26(a)(1) relate to timing. As a general rule, the initial "disclosures" are expected to take place at or soon after the meet and confer session required by Proposed Rule 26(f). The proposed rule also contemplates that disclosures will be made even when a Rule 12 motion has been made to dismiss the complaint.

While the general rule for timing of disclosures seems fair, the caveat on Rule 12 motions is not. For example, the typical fact pattern in securities class actions demonstrates the fundamental unfairness of the proposed rule. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740-41 (1975) (noting the great potential for discovery abuse that exists in federal securities litigation). In that type of case, the named plaintiffs typically have very few documents that are relevant to disputed facts alleged in the complaint. They may have a securities purchase confirmation ticket, some monthly account statements, and perhaps a prospectus, written research and/or news articles.

The defendants, on the other hand, may well have hundreds, if not thousands, of documents that may be relevant to disputed facts alleged in the complaint. Thus, there really is no equivalence in burden by requiring mutual disclosure that may become irrelevant, if the pending Rule 12 motion is granted in whole or in part.

> Recommendation: **If a defendant has made a potentially dispositive Rule 12 motion, the movant should not be compelled to incur disclosure obligations until such time as the court has ruled on the motion. Alternatively, there should be a presumption of non-disclosure during the pendency of a Rule 12 motion, with any party having the right to ask the court to require disclosure to proceed upon a showing of good cause or reasonable need for the documents and information.**

B. Proposed Rule 26(b) - Discovery Scope and Limits

1. The Advisory Committee has determined not to recommend narrowing the scope of permissible discovery under Rule 26(b)(1), despite the disclosure obligations mandated by Proposed Rule 26(a). The creation of a "disclosure" obligation without a corresponding constriction in the scope of permissible "discovery" would do more harm than good.

Without clear and direct reform of the underlying discovery test, the courts will still have to permit wide-ranging fishing expeditions, even in situations where the parties have truly focused the issues by complying fully with all of their disclosure obligations. This result does not properly meet the objectives sought by the Proposed Amendments. All this bifurcated process would do would be to create an additional round of information production and another predicate for tactical skirmishing.

The Standing Committee should assume that litigants will take seriously any clearly defined "disclosure" obligations, particularly given the proposed changes to Rule 26(e)(1) -- making the duty to supplement disclosures a continuing duty -- and Rule 37 -- imposing severe sanctions for failures to disclose or cooperate in discovery. Accordingly, the scope of permissible follow-up discovery under Rule 26(b) should be narrowed, either as a general rule or at least insofar as it relates to document discovery under Rule 34.

> **Recommendation: The Standing Committee should limit discovery to matters "that tend to support or undermine facts, events or circumstances relevant to the claims or defenses" instead of "relevant to the subject matter involved in the pending action."**

It is logical to make the scope of disclosure and discovery consistent, with the difference being that "disclosure" allows the producing party to determine in the first instance what information and documents are likely to have the most important bearing on the facts at issue in the action, while limited follow-up "discovery" would allow the other side an opportunity to seek a somewhat broader range of material that tends to support or undermine relevant facts, events and circumstances. In light of the significant disclosure obligation under Proposed Rule 26(a), there is no reason to continue to permit subsequent discovery to be as broad as it currently is, sweeping in anything in any way relevant to the "subject matter" involved in the case.

I recognize that the effect of this change would be to shrink substantially the extent of pretrial discovery that occurs in federal civil litigation. Since there is widespread -- indeed virtually unanimous -- agreement that the current system is out of control, that is the desired effect. The central point that I want to emphasize, though, is that the existing system does not, in practice, advance the search for truth as part of the litigation process. At best, most discovery is simply irrelevant to accurate resolution of contested issues; at worst, the current discovery process obscures the search for truth and distorts the ends of justice by

frustrating pursuit of legitimate claims and giving unwarranted leverage to unwarranted ones.

I commend to the Standing Committee's attention a recent article by Loren Kieve of the Debevoise & Plimpton firm, "Discovery Reform," in the December 1991 ABA Journal. Mr. Kieve contrasts the very limited discovery allowed in other civilized legal systems, including the English, as well as in our own criminal process, and soundly observes:

> I know of no empirical study or scientific proof that suggests that this [process] produces a result that is less than fair. Nor do I know of any study or proof to indicate that our unique, over-burdened system is better.

2. Even if the Standing Committee decides not to recommend narrowing all forms of discovery by substituting the "relevant facts, events or circumstances" test for the "subject matter" test, the Committee should at least impose this kind of limit for document discovery. There would be several reasons to treat document requests more carefully. First, the Proposed Amendments should at least partially curb deposition and interrogatory abuses by limiting the number of such requests that may be made, but there is no corresponding amendment to curtail document request abuses. Unlike depositions and interrogatories, document requests are not susceptible to meaningful limitation by restricting the number of requests formulated. A "skilled" lawyer can seek vast quantities of documents in just a few requests, if those requests are broadly crafted. This difference presumably led the Advisory Committee to recommend numerical limitations in Proposed Rules 30, 31 and 33, but not in Proposed Rule 34.

A second reason to limit the scope of document discovery and thereby treat it differently is that, at depositions or in interrogatories, a party may explore tangential avenues of inquiry without imposing unreasonable burdens on other parties. The additional time and expense consumed by allowing the inquiring party to wander are ordinarily more manageable than having to deal with an expansive demand for documents. In addition, the burden of this expansiveness at a deposition falls equally on all parties present, but the burden of responding to document requests -- file searches, screening, organization and reproduction -- is orders-of-magnitude greater than simply composing the demand.

A third reason has to do with the use of documents at depositions. Many counsel simply gather every piece of paper with a deponent's name on it turned up through "subject matter" discovery, and then proceed chronologically through

the deposition marking every such document regardless of its significance to the action, and inquiring about it. A limitation on the scope of underlying document discovery would serve to shorten and simplify depositions.

Finally, it is worth recalling the historic distinction that was drawn in the original Federal Rules between document discovery and other types of discovery. While it may not be appropriate at this late date to limit document discovery to the 1938 standard of admissible evidence, or to require leave of court for all document discovery, the time has certainly come to adopt some meaningful scope limitation in this area.

3. Whether the Standing Committee agrees to impose some limits on the scope of permissible document discovery, it should at least formulate an appropriate presumptive limit on the amount of this form of discovery. As I have suggested earlier, a limit on the number of requests, paralleling the proposed limits on the number of depositions and interrogatories, is not likely to be as effective, because requests for categories of documents may sweep in thousands of items.

A somewhat similar approach, though, is feasible. Although many cases now involve requests that require production of tens of thousands of pages of records, it is the rare case where that costly and disruptive rummaging is really necessary to the informed litigation of the disputed facts. A presumptive limit on the volume of material that may be demanded would enforce desirable discipline on the process of formulating requests for pertinent material.

> **Recommendation: In the absence of a showing of good cause, no party should be able to require another party to produce for inspection and copying more than [500 distinct documents] [5,000 pages of documents].**

4. Another straight-forward mechanism to assure that discovery requests are focused on the issues is to link the request to the factual questions it is intended to probe. This would involve a requirement that mirrors the obligation under Rule 34(b), as amended in 1980, to organize documents produced to correspond with the specified request.

> **Recommendation: To make the "facts, events or circumstances" standard meaningful, a party requesting discovery should be required to articulate, in a discovery**

request, the specific facts, events or circumstances to which each discovery request relates.

This requirement would truly clarify the distinction between discovery addressing the actual facts, events or circumstances at issue in the case and indiscriminate demands for information about the "subject matter" involved. The change would force parties to think about, and to state with reasonable particularity, how the information sought relates to relevant facts, events or circumstances that have been explicitly asserted in the action. Compliance with this requirement will be difficult when it ought to be -- in situations where a litigant is simply using discovery as a tactical weapon -- and easy in situations where the discovery sought can be related to specific matters that have been raised in the action.

C. Proposed Rule 26(e) - Supplementation

The Advisory Committee has also proposed another important expansion in discovery without appreciating the burden it would impose and without weighing the probable absence of any useful information to be derived from the exercise.

Recommendation: As a matter of reasonableness and prudence, the Standing Committee should limit the new supplementation duty only to information subject to "disclosure", but not to information covered by the broader "discovery" standard.

This proposed distinction reflects a practical approach to the litigation process. The individuals responsible for a litigation matter will usually know when a particular piece of newly acquired information tends significantly to support or undermine disputed facts alleged with particularity in the pleadings, and thus falls within the test for "disclosure" of centrally important information. Because of the threat of severe sanctions under Proposed Rule 37, a party will most likely err on the side of disclosing such newly acquired information.

By contrast, institutional parties such as business corporations are constantly generating documents that may fall within the contours of prior discovery requests, especially if the "subject matter" test is retained. Thus, it is probable that, even if the original discovery response was complete when submitted, the mere passage of time is likely to see the generation of more documents relating to the "subject matter" of the suit, thus rendering the original

response "in some material respect incomplete or incorrect." See Committee Notes, p. 74. It would be enormously burdensome to have to conduct continuing file searches, often at multiple locations, to amass more material that is quite unlikely to affect the merits of the dispute. This latter point deserves special emphasis: It is exceedingly unlikely that any documents generated after the litigation began and indeed after an earlier round of discovery will really have an important bearing on proving or disproving facts at issue in the litigation. Nevertheless, if the Advisory Committee's proposal is adopted, many employees of the party will need to keep close at hand all of the discovery requests that have been propounded in the course of discovery, in order to review every new piece of information for responsiveness to any prior request. The alternative would be a continuing cycle of expensive and disruptive file searches for newly generated information -- information that has come into existence years after the events giving rise to the litigation.

Anything that is important will be picked up by the proposed duty to supplement "disclosures"; there is no need for even more overkill under broader "discovery" tests.

D. Proposed Rule 26(f) - Meeting of Parties

I support the requirement that parties meet and confer to arrange for disclosures, and to develop a proposed discovery plan (Proposed Rule 26(f)). As suggested earlier, however this meeting should be postponed if the defendant has made a potentially dispositive Rule 12 motion to dismiss the complaint.

E. Proposed Rules 30 and 31 - Depositions

I support the presumptive limitations on the number of oral and written depositions that may be taken (Proposed Rules 30(a)(2)(A) and 31(a)(2)(A), respectively). Although there is no magic to a ten deposition limit, it is a reasonable norm. These alterations, even without more fundamental reform, should substantially reduce the likelihood of discovery abuse in this area. In addition, the Standing Committee should consider a presumptive limitation on the duration of any oral deposition. At some duration -- in the eight to twelve hour range, for example -- the burden should shift to the deposing party to explain why further examination is truly justified.

F. Proposed Rule 33 - Interrogatories

I support the presumptive limitation on the number of interrogatories that may be served (Proposed Rule 33(a)).

G. Proposed Rule 34 - Document Requests

For the reasons I have already discussed, Rule 34(a) should be amended so that the scope of permissible document discovery is limited to non-privileged matters that "tend to support or undermine facts, events or circumstances relevant to the claims or defenses." Of course, if this proposal is adopted for all Rule 26(b) discovery, then the language of Rule 34(a) (relating back to Rule 26(b)) need not be changed. In addition, as suggested earlier, the Rule should be modified to impose a presumptive limit on the volume of material that may be demanded without leave of court or stipulation.

VII. Conclusion

The various permutations of Rules 26 and 34 that have existed since 1938 demonstrate that the Federal Rules of Civil Procedure can never be viewed as static. As important as it was forty-five years ago to expand the discovery rules to prevent litigants from shielding pertinent information, it is equally important today to focus discovery on significant information and to deter the use of discovery requests as a weapon to exact settlements.

The proposed creation of a "disclosure" obligation is a watershed event in the history of the Federal Rules. This obligation, however, should be balanced by a complementary reduction in the scope of discovery that will be permissible once "disclosure" puts the most pertinent information in the hands of opposing parties.

I appreciate the opportunity to submit these comments and ask that they be circulated to all members of the Standing Committee.

Sincerely,

Philip A. Lacovara
Managing Director &
General Counsel

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

June 2, 1992

MEMORANDUM TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

I am enclosing a copy of a letter from Mr. Alan B. Morrison to Judge Keeton setting forth additional comments on the proposed amendments to the Federal Rules of Civil Procedure.

Joseph F. Spaniol, Jr.
Secretary

Attachment

cc: Chairmen & Reporters of
Advisory Committees
Dean Daniel R. Coquillette
Professor Mary P. Squiers

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June 2, 1992

By Hand

The Honorable Robert Keeton
Chairman, Standing Committee on Rules of
Practice and Procedure
Judicial Conference of the United States
811 Vermont Avenue, N.W.
Room 626
Washington, D.C. 20544

Re: Proposed Changes to Federal Rules of Civil Procedure

Dear Judge Keeton:

We recently received a copy of the proposed changes to the Federal Rules of Civil Procedure that were forwarded by the Civil Rules Committee to the Standing Committee for consideration at its forthcoming meeting. Pursuant to the Civil Rules Committee's earlier notice, we submitted extensive comments on many of the Rules that are being submitted for your Committee's consideration. What we did not do, and it is the purpose of this letter to do, is to take a step back and examine the rule changes as a whole. When that is done, as we explain more fully below, it is apparent that, in a variety of different ways, the amendments consistently make changes in the present Rules that will significantly disadvantage plaintiffs because they generally have much more limited access to the information bearing on the case. Thus, while the proposed amendments are written neutrally, their impact will fall disproportionately on less well-heeled litigants, thereby making it far more difficult to obtain justice in the federal courts. Therefore, the Public Citizen Litigation Group urges that you recommit these changes to the Civil Advisory Committee, with instructions to address this imbalance.

Public Citizen Litigation Group is a non-profit organization that litigates widely in federal and state courts throughout the country, generally, but not always, on behalf of plaintiffs. In most cases, our adversaries are large institutions, such as federal or state governments, corporations, or labor unions. In most of our cases, there is very little pre-complaint discovery, in large part because our clients have no leverage with the adversary and very little real opportunity to gather information in advance of filing, unlike parties to an automobile accident case or a breach of contract claim. Most of our cases involve principally disputes

of law, rather than of fact, but even then it is essential to develop the underlying factual background which forms the basis of the legal arguments. And generally, the relevant evidence is largely, if not exclusively, under the defendants' control.

In assessing the impact of these proposed changes, we begin with what has not changed: Rule 8(a) still requires no more than a "short and plain statement of the claim showing that the pleader is entitled to relief." Under the present approach to litigation, a party may begin a lawsuit with good faith allegations and then obtain the proof necessary during discovery. As we understand it, the requirements of notice pleading continue, and nothing in the revisions directly purports to require the pleading of evidence or even the specific facts underlying the claim.

The first change in this approach is found in new Rule 11(b)(3), under which the attorney must certify that "the allegations and other factual contentions have evidentiary support, or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for reasonable investigation or discovery; ..." (emphasis added). This change is a radical departure from the previous requirements of notice pleading and requires that a responsible attorney have "evidentiary support" -- whatever that may mean -- before even filing a complaint. While the comments to the rules (p. 35) suggest a lesser standard -- "sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal" -- that is quite a difference from the text of the Rule which suggests that a plaintiff must have something that approaches admissible evidence before a complaint can be filed.

The Rule does have a fallback if the attorney believes that he or she is "likely to have evidentiary support after a reasonable opportunity investigation or discovery," but may only use that for those allegations that are "specifically so identified" in the pleading. In other words, an attorney must advertise to the opposing party which of the allegations are weakest so that the opponent can zero in on the . Stated another way, this proposal would effectively reintroduce the information and belief pleading requirement that has been generally abandoned by most lawyers, save in those few cases where a verified complaint is required or a more specific pleading is mandated by Rule 9(b).

The drafters of the Rule apparently believe that they have imposed a comparable obligation on defendants in Rule 11(b)(4), which requires that denials of factual contentions be "warranted on the evidence" and then allows identifiable factual contentions to be contested if they are "reasonably based on a lack of information or belief." The difficulty is that denials in an answer are hardly comparable to allegations in a complaint since in most situations defendants will not have the burden of proof, and therefore they will be able to deny or claim lack of information without

encountering any difficulties. While in theory the plaintiffs could seek sanctions for unreasonable denials by defendants, that generally slows matters down and is found by most plaintiffs to be unproductive except in the most extreme cases. Accordingly, while the Rules appear to be written in neutral terms, the real impact will surely be to impede plaintiffs in bringing claims to court. It is for this reason that these requirements in Rule 11(b)(3) relating to factual contentions should be amended, and the standard changed from "evidentiary support" to "reasonable basis to believe." Any stricter standard, such as the one in the current proposal, seriously handicaps plaintiffs and unjustifiably advantages defendants.*

The next Rule which causes similar difficulties for plaintiffs is the required disclosure in Rule 26(a). Preliminarily, we wish to restate our serious doubts, expressed to the Civil Rules Committee, about the need for mandatory disclosure and its effectiveness. As we see it, mandatory disclosure is principally of use in simple negligence or contract actions where there is the least problem with discovery now. We also doubt that the disclosure requirement will eliminate the need for most discovery, nor will it cut down significantly on discovery disputes. We do, however, support the Civil Rules Committee's recent addition of a mandatory discovery conference, with a direction to attempt to reach agreement on a discovery plan. That could be a helpful addition, so long as the court insists that the parties cooperate and not allow one side or the other to stonewall.

Our principal problem with the disclosure requirement is the standard under which disclosure must be made. Under Rules 26(a)(1)(A) and (B) a party must disclose documents and the identity of witnesses likely to have information "relevant to disputed facts alleged with particularity in the pleadings." Thus, in order to obtain significant disclosure from the opposing party, the plaintiff's complaint must be quite specific. The problem is that that is often impossible because the opposing party will not give any pre-complaint discovery at all. As a result, plaintiffs will have to plead generally (keeping an eye on the requirements of Rule 11), and thus they will get very little information from mandatory disclosure. Accordingly, if this disclosure requirement is retained, we strongly suggest that the committee substitute the standard in the earlier draft, which requires the production of

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*Other than this change, we support the other significant amendments to Rule 11 because we believe that they will help restore the balance that some courts have destroyed in their inappropriate interpretation of the 1983 amendment to Rule 11. While the changes are not all that we would have wanted, they are a major step forward and should be made effective as soon as possible to limit the damage now being done by some courts under the present Rule.

"information that bears significantly on any claim or defense." That standard will produce more materials and fewer disputes, not to mention being more compatible with the notice pleading requirements of Rule 8.

The relatively modest amount of information that a plaintiff can obtain under mandatory disclosure is compounded by the restrictions on other means of discovery, principally interrogatories. For many plaintiffs, interrogatories are a preferred means of discovery because they inexpensive, can be done rapidly, and can assure that an institution on the other side must produce the relevant information, instead of producing a series of witnesses, each of whom will claim to know very little about the matter. Interrogatories are also essential because they can bind a party in a way that virtually no individual witness can do. It is for these reasons that plaintiffs often prefer interrogatories, and it is why we are concerned about the limitations on them.

We recognize that the Committee increased the number of interrogatories from 15 to 25 and that it has made it clear that the limitation on subparts does not apply when information such as name, address, telephone number, job description, etc., are all sought and can and should be treated as a single question. Nonetheless, the numerical limitation is still far too low, especially given the limited information that will be produced through mandatory disclosure. For most plaintiffs, and for all impecunious parties, regardless of whether they are plaintiffs or defendants, restricting interrogatories is a very serious curtailment of their ability to litigate. While we have no objection to a presumptive limit of 10 depositions, this limitation in Rule 33(a) on interrogatories is a serious error that should be corrected by removing the limitation, or at the least by substantially increasing the present number.

We also believe that interrogatories are the form of discovery that is <u>least</u> susceptible to abuse through overdiscovery. Litigants presented with numerous or overbroad interrogatories can and do avoid any excessive expense by simpl objecting to the discovery instead of providing answers, requiring the party making the request to move to compel. Under the current Rules, parties have not been hesitant to use this option to avoid responding to interrogatories. Indeed, if anything, it is used too often to evade responding.

The next difficulty we have is with the standards for summary judgment which we interpret to be a relaxation of the present requirements. Under Rule 56(f) it will be possible to oppose summary judgment on the grounds that there are material facts in dispute for which the non-moving party needs discovery, only if there is "good cause shown why additional materials are needed to support the opposition. ..." That requirement alone will be a significant handicap, but when coupled with the relatively modest

amounts of information that would come through affirmative disclosure requirements and the inability to get any additional discovery until after the disclosure is made, by which time the other party can move for summary judgment, it appears that the ability to defeat summary judgment under present Rule 56(f) by filing an affidavit that discovery of the moving party is needed, will no longer suffice because of the heightened "good cause" standard. Nor do we believe that allowing a party opposing summary judgment to make "an offer of proof" is any help since the problem will generally be that the opposing party will not know what kind of evidence is in the possession of the moving party and, hence, will be able to say nothing more than that discovery is needed. While the stricter standards of Rule 56(f) are themselves a serious problem, their combination with the other rule changes will substantially increase the burdens of many plaintiffs.

Finally, even if a plaintiff is able to win a judgment, new Rule 54(d)(2)(B) sets a trap by requiring that a motion for attorneys' fees must be filed within fourteen days after the entry of judgment unless otherwise provided by statute or order of the court. That time is extremely short, especially since judgments generally come down at unknowable times, when the principal, or often sole, attorney on the case may be away or otherwise occupied. Most plaintiffs' lawyers do not have fully automated time records that would permit an immediate printout necessary to make the motion. Thus, unless extensions are routinely granted, or can be granted after the fact (a matter on which the Rule is not clear), there is a significant chance that plaintiffs (which may mean their lawyers or themselves depending on the circumstances) will be simply be out of time in filing their fee application. Moreover, the filing of a fee motion within such a short time will make settlement virtually impossible, thereby burdening the courts with unnecessary motions.

Most importantly, there is no objective evidence that there is any problem that would justify imposing such a short time period. Even the Equal Access to Justice Act, which has produced an inordinate amount of litigation over the proper timing of fee applications, allows thirty days, and now a committee of the Administrative Conference of the United States is recommending that all time limits under the Act be abolished as serving no useful purpose. There is already more than enough incentive for lawyers to file their fee applications immediately, and there is surely no need to penalize those who wait longer, for whatever reason they have.

The Advisory Committee Notes suggest that the question of whether to appeal may depend on whether a fee application is being made (p. 116), but in our experience there is never any question about whether fees will be sought, and if there is, a simple telephone call will provide the answer, generally with a good faith estimate of the fees at stake, if that is a consideration. At

most, such considerations would suggest that a simple notice of intent to request fees be filed, but even that need be done only a few days before the time for filing an appeal expires. We also note that subparagraph D allows fee issues on the value of services to be referred to a special master, which will rarely be necessary, and more significantly the entire motion for fees may be referred to a magistrate judge as if it were a dispositive pre-trial matter. That latter requirement is guaranteed to produce nothing but duplication of effort, especially where the magistrate judge has no familiarity with the underlying merits. Whichever party loses will almost inevitably take an appeal to the district judge, thereby further delaying the entry of judgment. Since no prejudgment interest or factor for delay can be added in cases against the United States, this built-in delay further benefits the government and handicaps the private plaintiff. Accordingly, while we have no objection to much of the change in Rule 54, we strongly oppose the fourteen day statute of limitations and the reference to a magistrate judge on fee matters.

* * *

The bottom line, as we see it, is that the vast majority of these changes are pro-defendant. They will have the specific effect of aiding those with greater control over access to the facts and with more financial resources at their disposal. Moreover, far from encouraging disclosure, the effect of the new discovery Rules will be to enhance the ability of those with the information to hide it, hoping that their adversaries will run out of time, money, and interrogatories, and that they will not be able to oppose the inevitable motion for summary judgment made under the new standard that appears to make summary judgments easier to obtain.

In our view, the allegations of excessive discovery and litigation abuse are vastly overstated. The great majority of cases are handled with little or no need for court supervision and modest rather than excessive amounts of discovery. To the extent that there are problems with discovery, they can be effectively handled by judicial control over the process and prompt rulings on disputes when they arise, whether those disputes are over legitimate issues of privilege, relevance, burden, etc., or whether they are the result of intransigence or other improper conduct. Because most of these Rule changes are based upon a theory of need that is not borne out by the facts, we oppose the thrust of them for the reasons specified above.

Finally, we have submitted as an addendum to this letter a series of drafting suggestions which are largely technical in nature. Even then, we have not included all of the suggestions previously made, recognizing the limited time that this Committee will have to devote to the Civil Rules.

We appreciate the opportunity to make this submission, and we stand ready to assist the Committee in any way possible.

Respectfully submitted,

Alan B. Morrison, Director

Technical Changes to Civil Rules:
Suggestions of Public Citizen Litigation Group

Rule 11(c)(1)(A) Sanctions Motions.

We support the safe harbor provision allowing corrections or withdrawals within twenty-one days, but are concerned about certain of the time limitations and other issues. The court is allowed to change the twenty-one days, but there is no indication in either the text or the notes as to what reasons might justify it and whether the time can be shortened as well as lengthened. It is also unclear whether a court may act only its own or whether there must be a motion, and if so by whom can it be made. We cannot envision a case in which shortening the time would be necessary, and we believe that there should not have to be a grant of explicit permission to lengthen the time. The committee notes should simply make clear that the motion must be filed within a reasonable period of time after the twenty-one days expires, which would allow a party to await the outcome of an allegedly frivolous motion before filing the sanctions motion, if that were appropriate.

The Rule also allows the court to award attorneys' fees to the prevailing party in presenting or opposing its sanctions motion but only "[i]f warranted." There is no explanation of what that phrase means, and indeed its presence suggests a different standard from the normal discretionary fee standard, but without giving any clue as to the meaning. It would probably be most effective and clearest simply to eliminate the phrase, with an indication that the question of fees is a matter within the discretion of the district judge based on all of the usual circumstances.

Rule 56(c) Motion for Summary Adjudication.

This Rule allows such a motion to filed "at any time after the parties to be affected have made an appearance in the case and have had reasonable opportunity to discover relevant evidence pertaining [to the motion] that is not in their possession or under their control." The prior timing provision was in Rule 56(a) and required a party to wait until twenty days after the commencement of the action. That would generally be before the time allowed under the new Rule, since in many cases an appearance will not be filed until a motion is filed or an answer is due, which in the case of the government might be as long as sixty days from service. In contrast to both the present Rule and the proposed revision, we recommend that there be no express time limit before a motion for summary judgment may be filed. We do, however, believe that the party filing the motion must give the opposition the "reasonable opportunity to discover relevant evidence" set forth in Rule 56(c). Accordingly, we recommend that the requirement be strengthened by adding a certification requirement that would accompany any motion for summary judgment, which could then be filed at any time that the attorney could certify the following:

> I hereby certify that, based on the facts and circumstances of this case, the party or parties to be affected by this motion have been afforded a reasonable opportunity to discover relevant evidence pertaining to the motion.

Certification would discourage premature filings and would force the moving party to make an objective assessment about whether adverse parties have, in fact, been afforded a reasonable opportunity for discovery. As a document signed by an attorney, the certification would be subject to the strictures of Rule 11.

With respect to the issue of timing, we also note that the Advisory Committee (p. 124) suggests that the revision will eliminate the need for local rules on the subject. We agree that the basic topics ought not to be the subject of local rules, but matters such as allowing time for reply briefs and schedules for cross-motions for summary judgment ought to be subject to local rules and/or court orders. We recommend that the Advisory Committee Notes be amended to make it clear that such scheduling matters are permitted, provided they are consistent with the basic structure of Rule 56.

The final sentence of subparagraph 3 of Rule 56(c) provides that a party moving for summary adjudication may supplement its supporting materials only with leave of court. At the very least, this provision should be amplified in the notes on the last full paragraph on page 126, to make it clear that additional evidentiary materials may be submitted without leave of court when necessary to respond to additional statements of facts made by the opposing party.

Finally, we urge the Committee to add to the notes a clear statement that admitting a fact does not constitute an admission of its materiality. This will enable many facts to be admitted and disputes about relevance to appear in the legal memoranda, where they belong.

Rule 56(e) Matters To Be Considered.

This provision, along with Rule 56(b), may do no more than state the unexceptional proposition that, in resolving motions for summary adjudication, the courts may not rely on evidence that would be plainly inadmissable at trial. We are concerned, however, by the prospect that based on phrases in Rule 56(b) such as "evidence shown to be available for use at trial" or "admissible at trial" in Rule 56(e), the courts will be enmeshed in difficult questions of admissability at the summary adjudication stage where the full context of the question is not presented.

For example, there are times when evidence may be relevant, but excludable at trial under Rule 403, where "its probative value

is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Plainly, those kind of determinations cannot be made at the summary adjudication stage, yet this Rule seems to require them. Similarly, it is often difficult to tell on the face of the document authored by a corporate employee whether it constitutes an admission because testimony may be needed to determine whether the statements were made within the scope of the employee's official duties.

It seems a serious misallocation of judicial resources to compel a judge to hold a "mini-trial" to determine the admissability of such evidence in the course of evaluating a motion for summary adjudication, particularly in a case that will be tried to the jury, where the entire testimony might have to be repeated. Accordingly, we urge the Committee to adopt a less exacting standard, such as one requiring the trial judge to consider evidence where there is "a reasonable basis to believe that it may be admissible at trial." This seems to us a preferable balance between full evidentiary rulings in the context of summary adjudication and allowing anything labeled "evidence" to defeat summary judgment, even if it would be plainly inadmissable at trial.

Rule 58 Entry of Judgment.

The proposed revision allows a district court, when a timely motion for attorneys' fees is made under Rule 54(d)(2), to stay the appeal on the merits while the fee matter is decided. As noted in our principal comments, we oppose such a 14 day time limit; therefore, if that time limit is removed, there would be no reason to have this provision.

But even on its own merits, this provision interjects unnecessary complications in the handling of appeals on the merits and attorneys' fees. We engage in substantial amounts of attorneys' fees litigation and have never found a practical problem with handling fee issues. If, as is the expectation of this proposal, fee applications move quickly, the cases can be combined in the court of appeals. If, as is more usually the case, fee applications either are postponed pending the outcome of the merits (in order to avoid unnecessary work) or are delayed substantially, the two matters proceed on separate tracks. This is also an area where the parties are generally able to discern their own mutual best interests, and if they are not, the courts are able to decide how to handle these on a case by case basis with no great difficulty. For these reasons we believe that this proposed revision to Rule 58 is unnecessary and should be deleted.

Rule 83 Local Rules.

We are very concerned about the proliferation of local rules, especially those in conflict with the Federal Rules. If the Committee is going to permit experimental rules of the kind described in Rule 83(b), it should at least assure that there is notice and an opportunity for public comment both at the district court and the standing committee level. That requirement should be explicit in the Rule itself and not left to the Advisory Committee Notes.

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June 9, 1992

By Federal Express

Hon. Robert E. Keeton
Chairman, Standing Committee on
Rules of Practice and Procedure
Room 306
John W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

Re: Proposed Changes to Federal
Rules of Civil Procedure

Dear Judge Keeton:

As your Honor may recall, I testified before the Advisory Committee in Atlanta on behalf of the National Association of Securities and Commercial Law Attorneys ("NASCAT") regarding several of the proposed changes to the Federal Rules of Civil Procedure. I am writing at this time to comment briefly on three aspects of the current draft of the amendments.

I would like to emphasize that the goal of reducing the cost of litigation is a salutary one with which everyone can agree. However, there are ways in which the amendments to the rules may hinder that goal.

Rule 30 - The ten deposition limit in Rule 30 is unworkable in practice and will result in an increase in the number of discovery motions. In the vast majority of cases in the federal courts, ten depositions are more than adequate. However, in the relative handful of cases in which NASCAT members practice, ten depositions per side is often not adequate. For example, in many cases there are several parties, each of which may have employed five to ten individuals with relevant knowledge. In those cases, ten depositions are clearly not adequate.

While one may argue that, in those cases, the parties and/or the court may readily agree that more depositions are needed, often such agreement among the parties will not be forthcoming. That is especially true in cases in which, for example, one side has most of the information to be discovered. In those cases, there is no incentive for that side to agree to an expansion of the limit when the worst that will happen is that the court will imposes upon the party what the adversary is requesting. As a result, courts will be put in the position of having to decide whether a particular witness is important, which would require the court to become much more familiar with the facts of the case than would ordinarily be required.

A logical solution would be either to delete the ten deposition limit, or specifically exempt (either in the Rule or the Notes) complex cases.

Rule 26 - We applaud the effort and consideration that has entered into the amendments to Rule 26. There is one aspect that still troubles us, however. The current framework would allow for no disclosure for approximately four months after a case is commenced. That is time that should not be lost, especially since important documents may innocently be destroyed during that period by, for example, non-parties. We respectfully suggest that the timing of initial disclosure be reduced in half to the earlier of (1) 45 days after an appearance by a defendant or (2) 60 days after service of the complaint.

Rule 56 - The Supreme Court trilogy is well understood by litigants. Despite the effort merely to codify the trilogy, the new rule introduces new terms and procedures that will inevitably lead to new jurisprudence with the possibility of diverse rulings from the courts interpreting new Rule 56. We respectfully suggest that Rule 56 not be changed.

Thank you for your consideration of these suggestions.

Respectfully,

David J. Bershad

cc: Joseph F. Spaniol, Jr.

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June 5, 1992

The Honorable Robert E. Keeton
United States District Judge
Room 306 - John W. McCormack
Post Office & Courthouse
Boston, MA 02109

RE: Proposed Amendments to the Civil Rules

Dear Bob:

I hope that our service on Dean Stein's committee accords me the privilege of addressing you directly on the proposed rules which the Standing Committee will consider later this month. The earlier draft was the subject of a great deal of furor and extensive comments to the Advisory Committee. I had a hand in drafting the comments by the Trial Lawyers for Public Justice, and I commend those comments to you as an explanation at greater length of some of the less desirable features of the proposals.

Some of the earlier proposals have been changed, but I believe that the main thrust of the amendments remains intact and that it is unwise. I do not propose to duplicate what TLPJ did in its longer submission but merely to highlight several areas that concern me greatly.

Discovery

Most of the proposed changes address problems which have not been revealed to be problems in my 21 years of litigation practice. They would add layers of meetings, disclosures, filings and court conferences to an already event-laden pretrial process without regard to the nature or size of the case. I believe the proposed rules also overlap with and conflict with the experiments that are going on right now under the Civil Justice Reform Act of 1990. I chaired an ABA task force on Costs

and Delays in Federal Civil Litigation which worked closely with the Senate Judiciary Committee during the drafting of that Act.

The end result of the process now ongoing under the Act will be funded studies of the effect of a variety of local procedural innovations. Those studies will provide infinitely more information on which to base necessary changes than underlies the present proposals.

In my judgment, the proposed changes to the rules are tilted far over towards civil defendants, to the detriment of plaintiffs and to the detriment of the Seventh Amendment. In my experience, defendants, who are almost uniformly in possession of needed information, expend considerable ingenuity, energy and expense in order to keep the information from plaintiffs, who uniformly need it. Although the present proposal is superior to that initially considered by the Advisory Committee, I foresee endless satellite litigation over the meaning of whether or not a fact or claim was "alleged with particularity" in the words of Rule 26(a)(1)(B). By the self-definition which that language invites, a defendant may simply relieve itself of the burdens of initial disclosure.

The requirement that every testifying expert prepare a report is going to dramatically increase the cost of litigation to the parties. For individual parties, who will mostly be plaintiffs, this will be an enormous burden. For example, there is hardly a need at all for treating physicians, nurses and other health care professionals to draft a report. The reports themselves are almost certainly going to be drafted by counsel on both sides, and they will be crafted to be as neutral and vague as answers to interrogatories are today, with the end result being no advance in the litigation process except for the expense which attends the preparation of these reports and the inevitable motion practice which will follow.

Summary Judgment

Rule 56 was the subject of substantial judicial expansion in 1986 in the familiar triumvirate of cases. The effect of those

cases was substantially to rewrite the burdens which apply to summary judgment and to make it much more available. It was, prior to 1986, and has been to an even greater degree since 1986, a tool for defendants to eliminate cases that could have been heard by a jury. The changes proposed to Rule 56 will make it even easier for defendants to eliminate or limit jury trials by unnaturally "parsing" claims, portions of claims, questions of law and even paragraphs out of complaints. The "summary adjudication" for each claim/defense, fact, application of law, etc. will vastly multiply the number of motions based on testimony, documents and affidavits and will undoubtedly increase the motion workload of the federal courts.

Over 95% of civil cases settle. The invariable habit of federal judges is to close discovery well in advance of the scheduled trial. Under the proposed expansion of summary disposition, the numerous motions that will follow the end of discovery in each case will require the judge to address each of them before the scope of the trial is known, thus delaying the point in the process when both sides know enough about the possible outcome to effect a settlement. In the 95% that then go on to settle, little will have been gained by the increased burden on the court.

The complementary way in which the discovery proposals and the summary disposition proposal will work together deserves a comment. Under the limitations imposed by the self-defined "disclosure," parties will be shortchanged in access to information and it will be on the basis of this truncated factual record that motions for summary disposition will be made and decided. The net effect will be to significantly hamper plaintiffs in pursuit of civil justice because, as I mentioned above, in the vast majority of cases plaintiffs need information and defendants have information. It is, of course, the party <u>with</u> information that has the advantage in motion practice.

<u>Expert Evidence</u>

The proposed changes to Rule 702 are unnecessary. To a large degree they align the Committee with the President's

Council on Competitiveness, Agenda For Civil Justice Reform in America (Aug. 1991) and Galileo's Revenge: Junk Science In The Courtroom (1990) by Peter W. Huber. Neither of those sources provides a reliable and sensible resource for assessing scientific evidence. The obvious (indeed stated) goal of the changes to Rule 702 is to reduce the use of expert testimony in both civil and criminal cases. It does this by introducing two new standards into the Rules, both of which will take many years to flesh out. First, it mandates that expert testimony be "reasonably reliable" and second it requires the trial court to determine whether or not the proffered expert testimony will "substantially assist" the trier of fact.

The Committee Note states that the proposed changes do not "attempt to resolve" the currently raging question of whether the restrictions of Frye v. The United States, 283 Fed. 1013 (D.C. Cir. 1923) are a secret part of the Federal Rules of Evidence. A number of courts have found that Frye still lives within Rules 702 and 703, despite my own belief that that is a completely erroneous conclusion. Notwithstanding my views on that subject, the proposed changes, while denying the effect, clearly invite the trial courts to interpose themselves between the jury and the credibility of scientific witnesses and between factions of the scientific community, resolving issues that clearly should be for the jury's determination under the Seventh Amendment.

I find it impossible to articulate a basis upon which the trial court is supposed to glean whether expert testimony will "substantially" assist the trier of fact as distinct from the present test. The acid test, of course, as to whether expert testimony assists the jury is really whether the side that proffers the expert testimony wins the case. If the expert's opinion was a complementary, or perhaps a necessary, component of the victor's claim or defense, then the opinion assisted the trier of fact. Whether that assistance was "substantial" or not is, even in retrospect, a somewhat ethereal question. To pose the question prospectively, as the proposed Rule does, raises the issue to one of almost theological abstraction.

As you might guess, I tend to the belief that cases such as In re: Paoli Railroad Yard PCB Litigation, 916 F.2d 829 (3rd Cir. 1990), Rubanick v. Witco Chemical Corp., 593 A.2d 733, 125 N.J. 421 (1991) and Ferrebee v. Chevron Oil Company, 736 F.2d 1529 (D.C. Cir. 1984), cert. denied, 459 U.S. 1062 (1984) have correctly identified the proper burden for the introduction of scientific evidence and the proper role for the trial court. I am utterly convinced by the analysis of the dissent in Christopherson v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991), cert. denied, __ U.S. __ (1992).

Judges have no special competence to resolve complex conflicting scientific theories. I believe it is dangerous for judges to assume the role of a scientist and attempt to assess the validity of a complex scientific methodology or the reliability of underlying scientific data. If by some accident the trial judge is a competent and eminent scientist who is able independently to evaluate the scientific principles under discussion, he or she should be a witness or otherwise unconnected to the case.

I am not talking about marginal witnesses for I believe that under Rule 403, the courts have ample authority to keep out astrologers or mystics. I merely point out that it is not the role of the court to resolve for the scientific community whether the "big bang" theory of the origin of the universe is correct, whether cold fusion is possible, or whether mountains are created by colliding continents or magma upthrust. The responsibility of the court is to do individual justice for the parties before it, based upon evidence properly introduced. Today's "mainstream science" was once merely a theory, which became a hypothesis, which initially was pressed by a minority. The courts should not become so hidebound that they are forced, by rule, to await the blessings of the overwhelming majority within science.

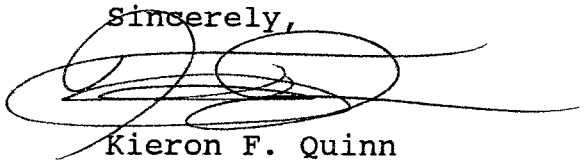
The Rule 702 debate also ties in to the proposal discussed above requiring expert reports. The effect of Christopherson, and Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128, 1130 (9th Cir. 1991) and similar cases is that a cottage industry has grown up employing "retained" experts whose job it is, not to testify at trial, but to provide affidavits and testimony for Rule 403 hearings attacking plaintiff's experts or the data underlying plaintiff's expert opinions. Thus FRE 702 and FRCP 26 would work together to increase the cost of litigation far beyond the means of most individual parties and to remove from the jury questions that are undoubtedly factual disputes.

Conclusion

I am afraid that this letter is a little longer than I intended. If the Standing Committee reviews the many comments made to the Advisory Committee, plus those additional comments which attend the current phase, you have a great deal to do and I did not intend that this letter would add significantly to that burden. I do, however, commend to you the comments of TLPJ and I hope that you will take this letter into account in your deliberations.

Best wishes.

Sincerely,



Kieron F. Quinn

Enclosure

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

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June 15, 1992

Edward W. Mullins, Jr.
President, Lawyers for
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1225 Nineteenth Street, N.W.
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Dear Mr. Mullins:

For Judge Keeton I acknowledge receipt of your letter to him of June 13, 1992, commenting on the proposed amendments to the Federal Rules of Civil Procedure and Evidence. We are sending copies to each member of the Standing Committee on Rules of Practice and Procedure.

Sincerely,

Joseph F. Spaniol, Jr.
Secretary

Enclosure

cc: Committee on Rules
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June 12, 1992

The Honorable Robert E. Keeton
Chairman, Standing Committee on Rules
of Practice and Procedure
Judicial Conference of the United States
Room 306, John W. McCormack Post Office
& Courthouse
Boston, Massachusetts 02109

Re: Advisory Committee's Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, May 1992

Dear Judge Keeton:

The more than 18,000 members of the undersigned associations are involved extensively in civil litigation in the federal courts of the United States. We have a vital interest in the fair and efficient functioning of the federal civil justice process. Because of that interest, many of us submitted written comments and provided testimony to the Advisory Committee on Civil Rules concerning the proposals for amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence that the Advisory Committee published for comment in August 1991.

In our comments and testimony to the Advisory Committee, we pointed out a number of problems, and made a number of suggestions, concerning various portions of the Advisory Committee's proposed amendments. We expressed particular concern about the proposed amendment to Rule 26 which would add (as Rule 26 (a)(1)) a new automatic disclosure process at the beginning of all federal civil litigation. We urged that the proposal for early automatic disclosure be withdrawn.

After the public hearing in Atlanta in February 1992, the Advisory Committee met and decided to revise many of the proposed amendments in light of the many comments and suggestions that had been submitted. Most notably, the Advisory Committee decided at that time to withdraw the proposal for an early automatic disclosure provision in Rule 26.

In making the determination to withdraw the early automatic disclosure proposal, the Advisory Committee appeared to respond to the wide-ranging opposition to the proposal which had come from virtually every quarter of the legal community. Numerous commenters -- plaintiffs' attorneys, defense attorneys, bar associations, law professors, corporations, public interest groups, and six of the seven federal district judges who submitted comments -- had pointed to a myriad of conceptual and practical flaws in the proposal and had urged that the proposal be withdrawn or, at least, dramatically revised.

When the Advisory Committee met again in April to finalize revision of the proposals to be submitted to the Standing Committee, a surprising turnaround occurred with regard to the early automatic disclosure proposal. The Committee decided to re-propose an early automatic disclosure provision with some changes from the August 1991 version.

We are writing to you to express our dismay at the Advisory Committee's return to an early automatic disclosure proposal and to urge that the Standing Committee not adopt that proposal. In our view, despite some improvement in the proposal over what had been proposed in August 1991, the proposal remains fundamentally flawed and, if implemented, will make the federal civil litigation process less efficient, more costly, and less equitable.

We urge the Standing Committee to consider the following problems with the May 1991 early automatic disclosure proposal:

1. <u>Misdirected Discovery Reform Effort</u>. The proposal fails to resolve the single biggest problem with the present system of discovery -- the allowance in Rule 26 for overly broad discovery of all information that is relevant to the "subject matter" of the action or which is "calculated to lead to" admissible evidence. Instead, the proposal makes that problem worse by adding another expensive layer of overbroad discovery (through disclosure) in virtually every case.

2. <u>Ethical Quandary</u>. The proposal creates an unresolvable ethical dilemma for attorneys -- how to balance their professional obligations to pursue zealously the interests of their clients while at the same time guiding their clients through a disclosure process requiring them to try to help their opponents. The proposal can only result in conflicts, distrust, and uneasy relations between clients and their attorneys.[A]

[A] One of the Advisory Committee members, Magistrate Judge Brazil, long ago highlighted this problem. In proposing that the discovery system be changed to create a less adversarial, disclosure-oriented system, he pointed out that such changes would have to be accompanied by changes to the Code of

3. Unwarranted Expense. The proposal will increase the expense of litigation (in some cases, to a considerable degree) without providing any offsetting benefits. A costly disclosure effort will be required in virtually every case, even though many cases would be resolved (by settlement, dismissal on motion, voluntary withdrawal, or otherwise) with little or no discovery under the present system. Adding to the expense will be an inevitable upsurge of preliminary motions aimed at postponing or forestalling the disclosure process in cases in which compliance with the disclosure requirements would be impractical. Even more distressing from a cost perspective is the specter of the development of a cottage industry of Rule 37 motions practice to resolve potentially boundless numbers of disputes about the adequacy of disclosures in light of the vague standard for disclosure ("relevant to disputed facts alleged with particularity"[B]) in Rule 26 and the vague standard for judging such disclosure ("without substantial justification") in Rule 37(c). The proposed rule also will promote wasteful and expensive overdisclosure of information by defendants attempting to avoid harsh sanctions. Often, opposing parties do not request and do not want such information. Now,

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Professional Responsibility "to distinguish between the different requirements of the investigative and discovery stages, on the one hand, and the trial and post-trial stages on the other." Brazil, "The Adversary Character of Civil Discovery: A Critique and Proposals for Change," 31 Vand. L.R. 1295, 1348-50 (Nov. 1978).

B This revised language represents an effort by the Advisory Committee to respond to assertions by commenters that the proposal will not work in a notice pleading system. Rather than solve the problem by eliminating, or substantially revamping, the antiquated system of notice pleading, the Advisory Committee chose to try to marry disclosure and notice pleading. We believe that this marriage will fail due to the uncertainty over whether facts are "disputed" or are alleged with "particularity." It is disheartening to note that the motivation for the Advisory Committee's approach to the notice pleading problem, according to the report accompanying the proposals to the Standing Committee, apparently is more a matter of expediency than substance: "While these suggestions [to reconsider the notice pleading system and the scope of discovery] may have merit, they could not . . . be effected incident to the present publication notice and are ones that should be given careful study and consideration in the future." Letter of Honorable Sam C. Pointer, Jr. to Honorable Robert E. Keeton (May 1, 1992), Attachment B, p. 3.

however, they will have to bear the added expense of examining and analyzing it.

4. Premature, Unproven Proposal. At present, there exists essentially no empirical evidence to support a conclusion that the Advisory Committee's proposal would work. Experimentation with various forms of disclosure is now taking place under the Civil Justice Reform Act ("CJRA"). This experimentation will provide an excellent opportunity for the Advisory Committee to make a proper evaluation of disclosure variations. To add to the civil litigation process a new procedure of nationwide application which is fraught with potential for harm without first testing that procedure on a limited and controlled basis is both unwise and unnecessary.

5. Unfair Effect. In many types of cases -- antitrust, civil rights, commercial and government contracts, environmental, ERISA, labor, patents, product liability, RICO, securities, and any other kind of case involving factual or legal complexity -- the proposal will treat defendants unfairly because the plaintiffs will have had an extensive period to prepare for disclosure and defendants will have had a maximum of 86 days, and in most instances from 45 to 50 days, to locate, review, analyze, and disclose.

We recognize fully that the Advisory Committee's early automatic disclosure proposal is well-intentioned and reflects considerable effort by the Committee. Nevertheless, in our view, the proposal will harm rather than improve the civil litigation process.

We suggest that the Standing Committee return the proposal to the Advisory Committee for further consideration. The Advisory Committee's further consideration, at a minimum, should include:

(1) the gathering and assessment of hard data about how disclosure variations are working under the CJRA process;

(2) the solicitation of the opinion a broader spectrum of federal district judges regarding the advisability of disclosure; and

(3) the implementation of an additional public comment process to allow all segments of the legal community to provide specific views on the revised disclosure process reflected in the May 1991 Advisory Committee proposals, as well as assessment of the possibility of major revisions to the system of notice pleading and to the standard for discovery.

We stand ready to work further with the Advisory Committee to improve the civil litigation process. Thank you for considering our views.

Respectfully yours,

ASSOCIATION OF DEFENSE TRIAL ATTORNEYS
DEFENSE RESEARCH INSTITUTE
FEDERATION OF INSURANCE & CORPORATE COUNSEL
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
LAWYERS FOR CIVIL JUSTICE

by: 
Edward W. Mullins, Jr.
President, Lawyers for Civil Justice

cc: Members of the Standing Committee
Members of the Advisory Committee
Joseph Spaniol, Esq.

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

June 15, 1992

Mr. Stephen A. Bokat
The National Chamber
Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

Re: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Mr. Bokat:

For Judge Keeton, I acknowledge receipt of your letter of June 11, 1992, commenting on the latest draft of the proposed amendments to Rule 26 of the Federal Rules of Civil Procedure. Your letter and the attached comments are being sent to the members of the Judicial Conference Standing Committee on Rules of Practice and Procedure.

Sincerely,

Joseph F. Spaniol, Jr.
Secretary

cc: Standing Committee
Chairmen & Reporters of
Advisory Committees
Dean Daniel R. Coquillette
Professor Mary P. Squiers

THE NATIONAL CHAMBER LITIGATION CENTER

STEPHEN A. BOKAT
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June 11, 1992

The Honorable Robert E. Keeton,
Chairman, Committee on Rules of Practice
and Procedure
Judicial Conference of the United States
811 Vermont Avenue, N.W., Suite 713
Washington, D.C. 20544

Dear Mr. Chairman:

The Product Liability Advisory Council, the Lawyers Advisory Committee of the Business Roundtable Tort Policy Task Force, and the National Chamber Litigation Center, an affiliate of the U.S. Chamber of Commerce, respectfully submit the attached comments for your Committee's consideration in connection with proposed amendments to Rule 26 of the Federal Rules of Civil Procedure. These amendments would require automatic pre-discovery disclosure of certain information in all cases. As the attached comments discuss in detail, we believe that disclosure is not a readily workable concept and that the costs and practical difficulties that the proposed disclosure process is likely to cause in the federal courts cannot be overstated, particularly in complex cases.

The views expressed herein represent those held by a broad spectrum of the business community. For example, yesterday, the Board of Directors of the U.S. Chamber of Commerce voted unanimously to oppose adoption of the proposed disclosure amendments. It is striking, moreover, that academics, federal judges, and organizations representing the organized plaintiffs' bar also have expressed serious concerns about the proposed disclosure amendment. Indeed, roughly 95 percent of the written comments and oral testimony presented on Rule 26 disclosure opposed it.

We respectfully request that the Standing Committee return the disclosure proposal to the Advisory Committee for reconsideration and republication with the suggestion that the Advisory Committee develop a comprehensive discovery reform plan. As our comments indicate, we believe that a number of other discovery reform measures are likely to achieve more meaningful reform.

We appreciate the efforts of your Committee and the Advisory Committee and would be pleased to work with you in any way to help improve the efficiency and fairness of the civil justice process.

Sincerely,

Stephen A. Bokat

Attachment

cc: The Honorable Robert E. Keeton (Boston Chambers)
Prof. Thomas E. Baker
The Honorable William O. Bertelsman
The Honorable Frank H. Easterbrook
The Honorable T.S. Ellis, III
Alan W. Perry, Esquire
The Honorable Edwin J. Peterson
The Honorable George C. Pratt
The Honorable Dolores K. Sloviter
The Honorable Alicemarie H. Stotler
The Honorable George J. Terwilliger, III
William R. Wilson, Esquire
Prof. Charles Alan Wright
Dean Daniel Coquillette
Joseph F. Spaniol, Jr., Esquire

COMMENTS ON PROPOSED DISCLOSURE AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 26

Submitted To The Standing Committee
On Rules of Practice & Procedure
In Response To The Proposed May 1992 Draft Amendments
To The Federal Rules of Civil Procedure and
The Federal Rules of Evidence

by

Product Liability Advisory Council, Inc.
The Business Roundtable Tort Policy Task Force Lawyers' Advisory Committee
The National Chamber Litigation Center

June 11, 1992

I. INTRODUCTION.

Few disagree about the need for discovery reform. The shape that reform should take, however, is highly controversial. The Advisory Committee observed the extent of the discovery reform controversy first hand after being deluged with over two hundred letters and memoranda, and hearing 76 witnesses in four days of hearings. Almost all of those comments opposed a controversial August 1992 Draft amendment to Rule 26 that would require automatic, pre-discovery disclosure of certain information. Although the Advisory Committee carefully considered the objections to disclosure, and attempted to be responsive to the comments, the changes incorporated in the May 1992 Draft do not ameliorate its most fundamental problems.

Consequently, we urge the Standing Committee to stay its hand and return the Rule 26 disclosure proposal to the Advisory Committee for additional study and public comment. In particular, the Standing Committee should request the Advisory Committee to seek public comments on the revised disclosure proposal, and to examine the disclosure process in the context of other possible discovery reforms likely to produce more meaningful results. As discussed below, it is our position that a variety of other reform measures would be more fruitful and should be implemented either in place of, or in conjunction with improved disclosure.

It is difficult to overstate the strength and depth of opposition to the disclosure proposal. Many judges, corporations, consumer groups, bar and trade associations, academics and plaintiff and defense attorneys were critical of the original proposal and have

not been afforded a meaningful opportunity to consider the May 1992 revisions. Failure to permit sufficient maturation and ventilation of such important concepts could tend to erode litigants' confidence in the fairness and efficacy of the rules. If, however, action on the disclosure proposal is deferred, all will benefit from the increased time for deliberation. A number of federal district courts are implementing disparate discovery reform plans on an experimental basis as part of the Civil Justice Reform Act. The results of these experiments will continue to shed some empirical light on whether disclosure actually can work. A fresh round of public comments on the revised version of the disclosure standard will help identify unanticipated effects and generate additional suggestions for improvement. Going forward with the disclosure process now, however, will create more confusion, increase discovery inefficiencies system-wide due to the conflicting disclosure plans in effect, and ultimately exacerbate the discovery havoc that the Advisory Committee sincerely intended to eliminate.

Discovery reforms abound these days.[1] Discovery reform is a central goal of the Civil Justice Reform Act plans being developed by many different federal district courts. The President's Council on Competitiveness has recommended fifty civil justice reform measures, many of them dealing with discovery. Some have been implemented by executive order for litigation involving the government, and others are contained in pending legislation. The American Bar Association has put forth its own counter proposals for reform.

In this rush to reform discovery, some of the most fundamental values at the core of the Federal Rules of Civil Procedure are being overlooked. The most obvious is the Federal Rules' commitment to uniformity and consistency of procedure within the federal courts. The Standing Committee, as the guardian of the Federal Rules, should moderate the cacophony of reform being thrust on litigants in federal court and should exercise extreme caution in promulgating significant amendments to the Rules in the face of overwhelmingly critical comment regarding their wisdom and effectiveness.

II. THE ADVISORY COMMITTEE'S PROPOSAL SHOULD BE RETURNED FOR PUBLIC COMMENT AND FOR RECONSIDERATION IN THE CONTEXT OF COMPREHENSIVE DISCOVERY REFORM.

The Advisory Committee's commitment to meaningful discovery reform, and its diligence in developing amendments to the Federal Rules that ultimately should improve the quality of civil justice, is obvious. Nonetheless, the desire to improve discovery must be tempered with more assurance that the recommended improvements can work. The concept of pre-discovery disclosure is little more than a theory. It has had little use in practice. Because there is no empirical data supporting the disclosure concept, the significant opposition to disclosure that came from all segments of the legal community should be carefully considered. Of all the proposed rule amendments contained in the August 1991 Draft Proposals the Advisory Committee circulated for public comment, the proposed

[1] *See* Tetzlaff, *Federal Courts, Their Rules and Their Roles*, 19 Litigation 1 (1992).

disclosure requirement proved to be by far the most controversial. More than 208 parties, representing almost all of the users of the civil justice system, filed written comments opposing the disclosure provision in some respect. Likewise, at public hearings, the vast majority of witnesses voiced some form of opposition to the disclosure requirement. Indeed, virtually every segment of society -- to which the Committee is ultimately responsible -- opposed the Committee's proposal.

In response to the numerous concerns advanced by bench, bar, and business alike, the Advisory Committee appropriately decided at its February meeting to withdraw the proposal pending additional study and experimentation. Then, at the Committee's April 13-15 meeting, it reversed itself and developed a substitute disclosure proposal. This new proposal was drafted over night, and was not circulated for public comment. Thus, none of the individuals, associations, or businesses that commented on the original proposal has had any meaningful opportunity to comment on the new one.

Regardless of whether an additional public comment period is required pursuant to the procedures of the Judicial Conference, additional public comment would be highly desirable. We respectfully suggest that reconsideration and republication of the proposal would be more consistent with the Congressional goal of injecting more public participation into the rules amendment process. Several reasons support the call for public comments on the new proposal, which, even as modified, represents a very significant departure from Rule 26 as it currently stands.

First, the disclosure proposal addresses a phantom problem. The Committee Notes indicate that the disclosure provisions are intended as a form of "court-approved standard interrogatories" to "accelerate the exchange of basic information about the case" and to "eliminate the paper work involved in requesting such information." Yet, there is no indication that the fundamental problems with discovery are caused by the relatively simple task of preparing interrogatories. Instead of substituting vague, "standard interrogatories" for all civil cases, requiring more focused interrogatories geared to the specific claims and defenses of a particular case would better accelerate the exchange of basic information.

Second, while the Advisory Committee has attempted to address some of the concerns raised about the proposal as originally drafted, the modified disclosure provision has not been tested in the crucible of public comment. Indeed, while some of the changes made by the Committee (particularly the requirement for an early meeting of counsel before any disclosure) are improvements over the original proposal, those changes do not address most of the fundamental issues raised in the 208 comments and several days of hearings as we point out in section III.

Most important, the new proposal does not address the critical issue of comprehensive discovery reform. The Committee itself conceded that to achieve "reductions in the time and expense of discovery and other pretrial proceedings" would "require reconsideration of 'notice pleading' and [the scope of discovery]." (Attachment B to Report to Standing Committee.) But the Committee has not solicited public comment on what

would best achieve such comprehensive reform. Nor has it had the opportunity to consider how the disclosure provision would fit -- if at all -- within a comprehensive reform scheme.

For example, the original theory behind mandatory disclosure viewed it as a substitute for, not supplement to, the current discovery provisions.[2] In fact, the Advisory Committee refers to the writings of early proponents of disclosure, but the Committee's notes fail to mention that those early proponents (who admittedly now support the Advisory Committee's proposal) advocated wholesale replacement of the present discovery system with a system based on a duty of disclosure.[3] The Advisory Committee's proposal does not address these issues.

In short, the proposed disclosure requirement -- which would mark one of the most significant rule changes in years -- has not been fully evaluated in its present form, nor in conjunction with other ideas for discovery reform. Disclosure of certain well-defined types of core information may be a desirable part of comprehensive discovery reform. However, vaguely defined disclosure of "relevant" information, which the Committee has recommended, simply expands the scope of discovery by adding a new layer of discovery obligations -- and new opportunities for controversy -- on top of the discovery obligations which are already generating expense, delay, and satellite litigation.

We commend the Advisory Committee for its many positive recommendations and for stimulating debate on the critical issue of discovery reform. However, we urge this Committee to ensure that the debate is not curtailed. We are confident that with continued public input over the next year, the Advisory Committee can develop the type of comprehensive discovery reform plan that is desperately needed.

III. THE NEW PROPOSAL DOES NOT ADEQUATELY RESPOND TO THE OVERWHELMING BODY OF CRITICISM EXPRESSED TO THE ADVISORY COMMITTEE.

A summary of the most frequent criticisms of the Advisory Committee's original proposal is attached as Appendix A. For purposes of the present discussion, the principle criticisms fall into four categories: (1) the disclosure proposal is too vague to provide meaningful guidance; (2) the disclosure proposal will mandate unnecessary and unduly burdensome discovery; (3) the vague and burdensome nature of the disclosure proposal will promote satellite litigation, particularly over the imposition of severe

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[2] *See, e.g.*, Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 721-23 (1989).

[3] Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposal for Change*, 31 Vand L. Rev. 1348 (1978); Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 721-23 (1989).

Rule 37(b) sanctions; and (4) the disclosure proposal undermines the adversary process and compels the disclosure of the attorney's work product -- mental impressions. Although the Advisory Committee attempted to be responsive to these concerns, as demonstrated below, each of these significant problems continues to infect the new proposal.

A. The Proposal Is Too Vague to Provide Meaningful Guidance.

As originally drafted, the proposal would have required identification of witnesses and a description "by category" of documents "likely to bear significantly" on any "claim or defense." Many comments pointed out that all three critical terms were too vague and uncertain to give parties reasonable guidance on the scope of their obligations under the rule. In an apparent response to this criticism, the new proposal requires identification of witnesses and a description "by category" of documents "relevant" to "disputed facts alleged with particularity in the pleadings." While this reformulation attempts to inject some definiteness into the disclosure obligation, it still falls short of giving litigants the basic, objective guidance they need. As a result, the standard for making disclosure is still rife with uncertainty.

First, the new proposal retains the ambiguous requirement of a description of documents "by category." Even this seemingly innocuous term creates significant problems. "Categories" can range from the very broad (e.g., "engineering drawings") to the very specific (e.g., "engineering layout drawings showing the location of one part of a product manufactured in a specific year.") The rules and the comments do not provide sufficient practical guidance on which of these responses, if either, would be acceptable. In practice, the advocate is likely to choose something in between -- a category broad enough to minimize the burden on the client and to protect his views of the strengths and weaknesses of his client's case, but narrow enough to avoid sanctions if the disclosure is challenged. This juggling act -- necessitated and even encouraged by the imprecise language of the rule -- is virtually certain to breed satellite litigation -- including requests for sanctions on the theory that the attorney or the client struck the wrong balance.

Second, one can readily imagine disputes over which allegations are "particular" enough to require disclosure between defense counsel, intent on zealously protecting the client's interests by limiting the disclosure obligation, and plaintiffs' counsel, intent on maximizing the plaintiffs' advantage by expanding the defendant's obligations and seeking sanctions for any of the defendant's questionable decisions. For example, there has been substantial dispute over the interpretation of the Rule 9(b) "particularity" requirement for allegations of fraud, even though that requirement is limited to only one small class of cases. See e.g., Ross v. Bolton, 904 F.2d 819 (2d Cir. 1990).

Another potentially troublesome aspect of the rule is the requirement that the parties identify all witnesses and documents that are "relevant" to the disputed facts alleged with particularity. Disputes over what is "relevant" for purposes of discovery are probably the most common disputes of all, with no objective way to predict how such disputes will be resolved. See, e.g., R.W. International Corp. v. Welch Foods, Inc., 937 F.2d 11 (1st Cir.

1991) (plaintiff viewed discovery related to subsidiary as not relevant; trial court disagreed, awarding sanctions; appellate court reversed).

Although "relevance" may be an improvement over "significantly bears" because it is at least a more familiar term, it may present as many opportunities for dispute between counsel concerning the extent of the obligation to disclose. In short, relevance is often in the eye of the beholder -- or, more accurately, the advocate. Thus, the proposed rule forces each attorney to guess what the opponent, or the court, will decide is "relevant" for purposes of the litigation -- with the potential for Rule 37(b) sanctions if the guess is wrong.

B. The Proposal Will Create Unnecessary and Unwarranted Discovery Burdens.

Ironically, the proposal, intended to reduce the expense and delay caused by protracted discovery battles, may actually increase that expense and burden.

Existing Rule 26 presumes that discovery of relevant information will occur only if the burden and expense is justified by the facts of the particular case. The proposed disclosure obligation is not tied to this cost-benefit formulation. Absent court order or stipulation, it requires all parties in all cases to search for and identify all witnesses with any relevant knowledge, regardless of the expense, regardless of the burden, regardless of the needs of the case, the amount in controversy, or the importance of the issues. The notes to the proposed rule -- but not the rule itself -- observe that an "exhaustive investigation" is not necessary -- only a reasonable one. The elusive nature of a "reasonable" investigation provides more fruitful issues for satellite litigation; one party's non-exhaustive search will inevitably fail to uncover the very information that the other party will claim was critical to the case. In short, disclosure could represent a step backwards to the time when all discovery of relevant information was presumed to be proper, regardless of the legitimate needs of the parties in the particular case.

C. The Proposed Rule Will Encourage Satellite Litigation, Particularly Over Severe Rule 37(b) Sanctions.

Because of the uncertainty surrounding the scope of the disclosure obligation, satellite litigation is almost certain to increase, even before disclosures are made. Conscientious parties, uncertain about the particularity of the complaint, the appropriate categories, and the meaning of "relevant" in the context of their cases, are likely to move for protective orders defining their obligations with reasonable particularity. Even more troubling, however, are the inevitable motions for Rule 37(b) sanctions against parties who have attempted in good faith, but perhaps unsuccessfully, to meet their vaguely defined obligations.

In fact, the availability of Rule 37(b) sanctions may be the most disturbing aspect of the proposal. The available sanctions are so severe (and therefore so attractive

to the party least at risk), and the rule is so replete with ambiguities and uncertainties, that advocates zealously pursuing their clients interests are certain to take advantage of both.

Existing Rule 37 establishes a framework under which the severity of the available sanction is directly proportionate to the clarity of the discovery obligation. Thus, severe Rule 37(b) sanctions -- including default judgment -- are available only where the obligation is clearly defined -- i.e., where the party completely fails to respond to a request for production, completely fails to answer or object to interrogatories, completely fails to appear for a deposition -- or violates a direct court order allowing discovery. *See R.W. International Corp. v. Welch Foods, Inc.*, 937 F.2d 11 (1st Cir. 1991). On the other hand, where the parties simply disagree on the scope of the duty to provide information or the propriety of objections, the proponent of the discovery cannot seek Rule 37(b) sanctions; rather, he must bring the dispute to the attention of the court pursuant to Rule 37(a), where sanctions are limited to the prevailing party's expenses, including attorney's fees.

Under the Advisory Committee's proposal, a default judgment or other severe sanction may be entered against a party who has failed to meet his or her vaguely defined disclosure obligation under the rule, even though there has been no discovery request and no court order defining the information or documents to be produced or identified. The only safeguard provided is that sanctions may not be imposed unless the failure to disclose be "without substantial justification" -- another standard which exists largely or exclusively in the eyes of the beholder. The salutary protection afforded under current law which requires violation of a court order before Rule 37(b) sanctions can be imposed, would be lost under the proposed rule. Instead, litigants will face a much greater risk for failing to fulfill a much less certain obligation.

D. The Proposal Distorts the Adversary Process and Compels Disclosure of Attorney Mental Impressions and Work Product.

The disclosure requirement will also adversely impact the attorney-client relationship. As the Committee Notes make clear, "Before making its disclosures, a party has the obligation under subdivision (g)(1) to make an inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings." Presumably, competent counsel *presently* undertake an investigation of the allegations of a complaint. That, of course, is the traditional work of an attorney, protected by the attorney-client privilege, which encourages the client to fully disclose the facts to its attorney. The disclosure requirement, however, invades the privilege by requiring the attorney to disclose to his adversary much of what he has learned, good or bad. The likely result is to chill attorney-client relations and hinder the initial investigation by the attorney.

Moreover, the proposed disclosure process is inconsistent with the policies underlying the work product doctrine. The process of deciding what is "relevant" to disputed facts in the pleadings necessarily incorporates counsel's judgements and mental impressions

based on his investigations, stragegies, and decisions regarding his theory of the case. Thus, requiring counsel to make disclosure is the same as requiring counsel to disclose work product. In some instances, disclosure may cause a party to unavoidably reveal to an opponent a line of factual inquiry or legal reasoning that the opponent would have never considered on his own. The work product doctrine was intended to protect and promote inventiveness, diligence and excellence among attorneys. The disclosure process, which would force an attorney to tip his hand very early in the game, is antithetical to these goals.

The adversary nature of civil litigation in this country pervades all aspects of the civil justice system. Importation of a starkly non-adversarial procedure, such as disclosure, into this process has the potential to create systemic disturbances far beyond those already anticipated.

IV. DISCOVERY REQUIRES COMPREHENSIVE MULTI-FACETED REFORMS.

For many years scholars and leading jurists have questioned the utility of making incremental changes to procedural rules once the need for comprehensive changes has been recognized.[4] The Advisory Committee's disclosure proposal raises the same question today. Indeed, the proposed disclosure process attempts to circumvent the real discovery problems with an aggressive new practice that leaves the major problems untouched, while at the same time creating problems of its own.

Discovery is a complex, multi-faceted process. Its utility and efficiency as a process are inevitably linked to the balance of the procedural rules. Changing only one part of the process, by requiring pre-discovery disclosure for example, cannot effectively resolve problems that arise because of the interaction of numerous rules. Indeed, changing only one part of the process without concomitant changes to other parts is likely to create problems that did not exist before the change was made. Many of the problems identified with the proposed disclosure process arise for precisely that reason -- disclosure does not "fit" well with other parts of the rules. The broad scope of discovery, which has not been amended, may lead to overdisclosure. Notice pleading will make it difficult to define the disclosure obligation with any degree of certainty. The reluctance to dismiss even the most marginal claims under Rule 12 may allow intrusive disclosure for no legitimate purpose.

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[4] Dean Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Aug. 26, 1906, St. Paul, Minnesota, *reprinted in* Proceedings in Commemoration of the Address, 35 F.R.D. 241, 279 (1976).

Discovery reform has been on the agenda of this Committee for several decades now.[5] Nonetheless, no substantive changes to core issues, such as the scope of discovery, notice pleading, or more favorable consideration of dispositive Rule 12 motions have been made. It is now abundantly clear, however, that incremental changes and by-pass operations will not solve the problems. Reforms of a more substantial nature are needed. Meaningful reform can only occur if the Committee dedicates itself to a multifaceted, comprehensive discovery reform plan.

A. The Scope of Discovery Should Be Limited.

In litigation, more information is not necessarily better information. Litigants do not need more information, they need better information. They are getting lost in the massive amount of information available to them through discovery. Allowing access to everything "relevant to the subject matter" detracts from obtaining access to information relevant to the real issues. Indeed, studies of the discovery system and its abuses have consistently shown that the larger the litigation and the more discovery that occurs, the more likely it is that discovery disputes will erupt.[6] Restricting the scope of discovery, to tie it more closely to the actual claims and defenses, must be considered as part of any meaningful reform plan.

B. Greater Specificity In The Pleadings Should Be Required.

Another means of providing effective relief from burgeoning discovery problems is to require greater certainty from the start that a legitimate claim exists. In recent years, some courts have tried this approach, requiring more specificity in the initial pleadings.[7] In most cases the initial claims and defenses can be presented in greater factual detail with little or no extra hardship on the parties, particularly since Rule 11 requires a party to investigate and develop such facts before filing a complaint. Indeed, deliberately filing vague claims and defenses is just another tactic to harass an opponent and keep him off guard. More importantly, however, vague claims are often a device used to support the

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[5] *See* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access To The Courts*, 105 Harv. L. Rev. 427, 445-63 (1991); Philip A. Lacovara, Comments on Proposed Amendments to the Federal Rules of Civil Procedure (Disclosure and Discovery), at 4-11, January 17, 1992.

[6] *See generally* ; Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 4 A.B. Found. Res. J. 787 (1980); Connelly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery*, 9, Federal Judicial Center (1978).

[7] *See* Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433 (1986); *see also* Millner, *Notice Pleading Today*, 18 Litigation 33 (1992).

broadest possible scope of discovery. Greater specificity in the pleadings need not signal a return to fact pleading. Consequently, the Committee should consider a reform measure that would require parties to include more information in their initial pleadings.

C. More Effective Case Management Is Needed.

One of the more meaningful changes that has been made in the course of the reforms that have been adopted over the last decade has been giving courts greater authority to control discovery.[8] Members of the bench have responded admirably to this managerial function in most cases, although some judges still are reluctant to delve too deeply into the discovery process. While discovery was meant to be self-executing, in reality the sure hand of a judge or magistrate is often required, particularly in complex or highly contentious cases. The new "meet and confer" requirement in Rule 26(f), which should promote cooperation among counsel, will also promote more and earlier involvement in discovery by the court. As such, it is a step in the right direction. The Committee should give serious consideration to identifying additional means for improving judicial control over discovery. For example, the civil justice systems in England and the European Community provide a variety of models for the managerial judge that might prove helpful to the inquiry.[9]

D. Increased Use Of Rule 12 Motions Should Be Encouraged.

Rule 12 provides a number of mechanisms for ridding the system of unfounded claims and thereby preventing unwarranted discovery expeditions. The courts, however, are overly reluctant to use these devices, particularly without providing discovery. Yet, some claims can and should be dismissed before any discovery at all takes place. The undue emphasis on fairness to the claimant often results in much unfairness to the Rule 12 movant. It keeps unfounded cases in the system longer, causing delays and increased costs to litigants in entirely unrelated cases. The Committee should evaluate ways in which to increase the early disposition of cases through Rule 12 motions, without discovery, as another means of cutting back on unnecessary and burdensome discovery.

---

[8] Rule changes over the last two decades have given judges authority to hold discovery conferences, *see* Fed. R. Civ. P. 16; to impose sanctions for discovery abuse, *see* Fed. R. Civ. P. 26(g); and to limit discovery on a case-by-case basis as the court finds appropriate, *see* Fed. R. Civ. P. 26(f). This has resulted in what has been referred to as the "managerial judge." *See generally* Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

[9] *See* Cortese & Blaner, *Civil Justice Reform In America: A Question Of Parity With Our International Rivals*, 13 U. Pa. J. Int'l Bus. L. 1 (1992).

V. CONCLUSION.

Most of the amendments proposed by the Advisory Committee will promote increased efficiency and fairness in the federal civil justice system. Unfortunately, the amendments fail to address rampant discovery in any comprehensive, meaningful way. The Advisory Committee's proposal to engraft a mandatory prediscovery disclosure requirement onto the existing discovery provisions will only exacerbate the current discovery problems. Accordingly, this Committee should return the Rule 26(a) disclosure requirement to the Advisory Committee with directions to the Committee to republish the revised disclosure proposal for public comment and to undertake a more comprehensive effort to achieve true discovery reform.

APPENDIX A

SUMMARY OF COMMENTS ON RULE 26 DISCLOSURE

(comments received as of June 1, 1992)

A total of 208 comments were reviewed addressing the proposed amendment to Federal Rule of Civil Procedure 26 that would require disclosure of information in advance of discovery. Over ninety-five percent of the comments were in opposition to the proposed disclosure process. Ten federal district court judges commented, and eight out of the ten were opposed to disclosure. The following is a summary of the primary objections against the proposal and a tally of the percentage of commenters who raised these objections.

Specific Objections	Percent Commenting
The standard for making disclosure, "likely to bear significantly" is too vague.	59
A disclosure process will spawn more satellite litigation and disputes.	52
The disclosure process will be unworkable under the notice pleading system.	51
The 30 day time limit for making disclosures after the answer is filed is too short.	45
Empirical data on disclosure is needed from the Biden bill districts before nationwide implementation.	38
Disclosure will result in much unnecessary and burdensome production of documents and information.	25
The disclosure process is inconsistent with the attorney-client relationship and will undermine the work product doctrine.	18
The disclosure process is inconsistent with the adversary system.	17
Simultaneous disclosure places an unfair burden on the defendant.	13

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

SEE PAGE 70 OF APPELLATE RULES GAP REPORT

May 21, 1992

To: Members of the Advisory Committee on the Federal Appellate Rules

Re: Item No. 90-4; (Revision of Rules 3 and 15 for Torres)

Dear Colleagues:

As you know, there has been a division of opinion among the members of the Committee on how to resolve "the Torres problem." A rule change is important because of the current disarray among the courts of appeals. The Standing Committee therefore decided to publish the Advisory Committee's draft on a short comment period and also asked that we consider alternatives.

There is no perfect solution to this problem and the competing concerns expressed by various members of our group are all important. As chair, I have a responsibility in such a situation to attempt to find a common ground that maximizes the merit of each perspective and minimizes its drawbacks. Please allow me to share my thoughts with you.

The Concerns at Stake

We can focus on the competing concerns most expeditiously by examining the merits and demerits of the drafts that incorporate the principal perspectives of our members.

1.

The Committee's present proposed draft provides a great deal of definitiveness. It therefore allows both the court and all parties to know precisely who is taking the appeal. Consequently, it is easy to administer. It also requires each litigant to make an explicit choice about taking an appeal. Arguably, it resolves the ambiguity of the present rule by telling lawyers and litigants that shorthand methods will not suffice.

The Committee's draft accomplishes these goals by incurring costs, costs that some of our group consider unacceptable. The greatest is the possibility that the right of appeal will be lost

because of the inadvertent omission of a party's name. For instance, a word processor glitch may drop a name from a list and deprive one litigant of an appeal. One can also argue that the listing of all names rather than the use a term such as "all the plaintiffs" is somewhat "counter-intuitive" for a practicing lawyer.

2.

The alternative, suggested by Judge Easterbrook and refined for our consideration by Professor Mooney, attempts to resolve the problem of the lost appellant by providing, in essence, that, once any party brings an appeal, all other litigants are parties to the appeal as appellees. It leaves to the court of appeals the task of sorting out those who actually have an interest in being active parties in the appellate proceeding. It also requires that the court of appeals realign the parties for purposes of briefing schedules, etc. The clerks of the court of appeals tell us that, given the volume in the courts of appeals, this task would be a formidable one. It is this volume problem that may make the analogy to the Supreme Court's practice limp. Because most petitions for certiorari are denied, the Supreme Court needs to deal with the realignment problem in only a relatively few of the cases that make the argument calendar. Nevertheless, we would probably all agree that some administrative cost to save an appeal is salutary. Indeed, in our work on Rule 4(a)(4), we settled on an approach that creates some administrative costs in order to ensure the appeals are not lost through inadvertence.

A Possible Reconciliation

In attempting to reconcile these approaches, the task is to balance sensibly the very real concerns of definiteness, certainly, easy of administration with the possibility of inadvertent and excusable loss of appellate rights. In attempting this task, I have reviewed the comments we have received and our reporter's earlier alternate drafts and have borrowed from all these sources.

May I invite your attention to the attached draft.

1. At the outset, lines 3-6 state the general rule.

2. The following lines 6-13 describe how that general rule may be fulfilled and acknowledge that counsel can be expected to proceed somewhat differently than a pro se litigant. This allows more leeway than the Committee draft but still requires sufficient certainty to afford the court and other parties adequate notice. Any ambiguity caused by the attorney's use of a shorthand would be rectified by the new requirement in Rule 12

that a docketing statement naming each party be filed in the court of appeals after the notice of appeal has been filed in the district court.

3. Line 13-16 incorporate Judge Ginsburg's suggestion with respect to class actions.

4. Finally, the rule makes clear (lines 20-22) that dismissal of an appeal should not occur when it is "otherwise clear from the notice" that the party intended to appeal. If a court determines that it is objectively clear that a party intended to appeal, neither administrative concerns nor fairness concerns with respect to the other litigants ought to prevent the appeal from going forward.

I hope you find this helpful. After you have had a chance to read it, please do not hesitate to call if you have some thoughts.

Lastly, thanks for being so understanding during this "crunch" time.

The best,

Kenneth F. Ripple

KFR:tw
Enclosure

cc: Honorable Robert E. Keeton
Chief Judge Dolores Sloviter
Professor Carol Ann Mooney
Joseph F. Spaniol, Jr., Esquire

Rule 3. Appeal as of Right--How Taken

* * *

(c) Content of the Notice of Appeal.--~~The~~ A notice of appeal ~~shall~~ must specify the party or parties taking the appeal by naming each appellant either in the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In class actions, whether or not the class has been certified, it is sufficient for the notice to name one peron qualified to bring the appeal as representative of the class. A notice of appeal also must ~~shall~~ designate the judgment, order, or part thereof appealed from, and ~~shall~~ must name the court to which the appeal is taken. An appeal ~~shall~~ will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing ~~of~~ the Record

* * *

(b) Filing a Representation Statement.--Within 10 days after filing a notice of appeal, the attorney who filed the notice must file with the clerk of the court of appeals a statement naming each party represented by that attorney.

~~(b)~~ (c) Filing ...

or at such other time
designated by the CA,

REPORT OF SUBCOMMITTEE ON STYLE

We have reached a common understanding on many points of style. We follow a meticulous practice on the use of "shall", "may", "must", and "is". We insist on the serial comma and observance of the rules about "that" and "which". We have agreed-on rules (in large measure taken from what the Civil Rules Committee has always done) on capitalization of the titles of rules and of subdivisions of rules and on the names used to refer to parts of rules. We hyphenate phrasal adjectives but otherwise are stingy with hyphens. We hope soon to have prepared a short list of rules that we will give to the Reporters so that they may know in advance the style that the Subcommittee regards as desirable.

In its work, the Subcommittee is operating under guidelines concerning when we do or do not propose a change. These are described in the Preliminary Note that we intend to append to each set of rules as we send it forward to the Judicial Conference.

Preliminary Note on Style

It is important that rules adopted by the Supreme Court, and having the force of law, be grammatically and stylistically correct, but it is even more important that they be stated with as much clarity as the subject matter permits. Accordingly in 1992 the Standing Committee on Rules of Practice and Procedure created a Subcommittee on Style to review proposed amendments with these goals in mind. As the Notes to particular rules indicate, a number of changes have been made for reasons of style.

The Subcommittee has reviewed only those rules for which other amendments are submitted for substantive or technical reasons. This means that stylistic changes are here proposed even though the original form of words remains unchanged in other rules. So that this will not itself lead to unclarity in the rules, the Subcommittee has used the following guidelines in determining when to propose changes.

1. Clarity of meaning. Where it will clarify the meaning of a rule, style changes have been made in a proposed amendment of an existing rule, even if this places the style of the amended rule at odds with the style of other rules that are not being amended.

For example, the word "shall" is used in several different ways in the rules. It is sometimes used in a permissive rather than a mandatory sense, it sometimes purports to impose an obligation on the wrong actor, and it is sometimes used as a future-tense modal verb rather than as a mandatory verb. In those rules now being amended, the following principles have been followed: (1) "shall" is used only to denote that the subject of the clause has a duty to act (*the court shall*, but not *the judgment*

shall); (2) "must" is used if the duty lies elsewhere than in the subject of the sentence (*the judgment must*); (3) "is entitled to" is used to denote a right; (4) "may" is used to denote permission; and (5) "may not" is used to denote a prohibition.

2. Substantive changes. Stylistic changes do not change the substance. If it is unclear whether a change in the interest of clarity would alter the substantive meaning of a rule, this has been reviewed with the Advisory Committee to be sure that there is no substantive change.

3. Departure from prevalent style in other rules. Changes that are purely stylistic and that also depart from the prevalent style in other rules have been avoided. The stylistic improvement that might be made is outweighed by the cost in reader uncertainty on why one form of words is used in one rule and a different form in many other rules.

4. Style changes without cost. If a change improves style, even though not essential to clarity, the change has been made if there is no significant likelihood that anyone will be confused by it.

For example, there is great variation among the various sets of rules promulgated by the Supreme Court, and even within a particular set, on whether and how to capitalize words in the titles of rules or subdivisions of rules. If the capitalization in the titles in a rule to be amended for other reasons departs from the prevalent usage, a change is here proposed.

5. Debatable matters of style. On points of style that are quite debatable even among experts in English usage, a change has been proposed only if one view seems clearly preferable.

Charles Alan Wright
Chairman

June 16, 1992

THE FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005

RESEARCH DIVISION

Writer's Direct Dial Number:
FTS/202 633-6341

April 2, 1992

Honorable Robert E. Keeton
Chairman, Standing Committee on Rules of
Practice and Procedure
United States District Court for the
District of Massachusetts
John W. McCormack Post Office and Courthouse
Room 306
Boston, Massachusetts 02109

Dear Judge Keeton:

The enclosed report presents preliminary findings of the Federal Judicial Center's survey on the characteristics of expert testimony in recent civil trials. This report focuses on the judges' perceptions of the problems with expert testimony, and their reactions to proposed changes to Rule 702 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure.

The survey also addresses the types of experts presenting testimony in recent civil trials, the issues addressed by expert testimony, and procedures for managing expert testimony. Information on responses concerning these topics is available at your request, and will be included in our final report of the results.

Copies of this report have been sent to Judge Pointer and Judge Hodges. Please let us know if you would like us to distribute this report to members of your committee.

Sincerely,

Joe S. Cecil

Molly Treadway Johnson

cc: Dean Daniel R. Coquillette, Reporter
Joseph F. Spaniol, Jr., Secretary

THE FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005

RESEARCH DIVISION

Writer's Direct Dial Number:
FTS/202 633-6341

April 27, 1992

Honorable Robert E. Keeton
Chairman, Standing Committee on Rules of
Practice and Procedure
United States District Court for the
District of Massachusetts
John W. McCormack Post Office and Courthouse
Room 306
Boston, Massachusetts 02109

Dear Judge Keeton:

I enjoyed speaking with you at the meeting of the Advisory Committee on Criminal Rules. I am writing to clarify two issues that arose at the meeting regarding our preliminary report on expert testimony, which you received earlier this month.

First, in discussing judges' reactions to proposed changes to Rule 702 of the Federal Rules of Evidence, Magistrate Judge Crigler asked if the findings of the survey that indicate support for the amendments are not contradicted by a majority of the comments included in the appendix. As you noted at the meeting, the comments in the appendix are not representative of the view of most judges. These written comments were volunteered by some judges after they responded to the survey question regarding views on the proposed amendments. Most judges indicated their views on the amendments without comment. Many of those who offered comments sought to explain their opposition to the amendments. We included these comments in an appendix to aid the rules committees in considering the various positions. The survey findings, rather than the comments in the appendix, better represent judges' views on the proposed amendments.

Second, we want to call your attention to the fact that the context of the survey may have hindered judges in considering the consequences of the proposed amendments in criminal proceedings. Although judges were given an opportunity to distinguish between civil and criminal cases in providing their opinions on the proposed amendments, all survey questions up to that point focused on civil trials. The otherwise exclusive focus in the survey on

civil trials may have made it difficult to give full consideration to the consequences of extending these amendments to criminal proceedings.

Molly Johnson and I will be available during the Standing Committee's discussion of the proposed amendments to Rule 702 to respond to questions that arise. I also will be available throughout the meeting, attending on behalf of Bill Eldridge as a representative of the Federal Judicial Center.

Please let me know if you or your committee require additional information regarding this study.

Sincerely,

Joe S. Cecil
Project Director

cc: Hon. William Terrell Hodges
Dean Daniel R. Coquillette
Joseph F. Spaniol, Jr.

PROBLEMS OF EXPERT TESTIMONY IN CIVIL TRIALS: PRELIMINARY FINDINGS

Joe S. Cecil

and

Molly Treadway Johnson

Division of Research

Federal Judicial Center

March 31, 1992

This report describes preliminary results of the Federal Judicial Center's survey on the characteristics of expert testimony in recent civil trials. First, we briefly describe the survey. Second, we report on the judges' perceptions of the problems with expert testimony. Third, we report on judges' reactions to proposed changes to Rule 702 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure. Finally, we include in an appendix judges' comments on the proposed amendments.

Survey of Federal District Court Judges

On November 25, 1991 a questionnaire was sent to all 518 active federal district court judges (other than rules committee members), seeking their views on expert testimony in civil trials. A postcard reminder was sent two weeks later, and a second letter with a replacement copy of the questionnaire was sent on January 17, 1992. To date, 64% have returned completed questionnaires to us. The analyses presented below are based on the first 318 responses we received.

In addition to the topics discussed below, the survey also addresses the types of experts presenting testimony in recent civil trials, the issues addressed by expert testimony, and procedures for managing expert testimony. Information on responses concerning these topics is available upon request, and will be included in our final report of the results.

Assessment of Problems with Expert Testimony.

Judges were presented with a list of problems that are often attributed to expert testimony and asked to indicate, on a 5-point scale, the frequency with which each occurs in civil cases involving expert testimony. Table 1 presents the list of problems ranked according to the mean frequency ratings assigned to them by respondents.

The most frequent problem is "Experts abandon objectivity and become advocates for the side that hired them." A number of judges chose to elaborate on this concern in responding to the open-ended questions. One judge noted, "The biggest problem is . . . that both sides can hire well-qualified experts who will say whatever is needed and thereby become advocates." Another judge criticized the "willingness of academics to sell their credentials to the highest bidder -- or at least for a high bid -- and testify in support of questionable propositions." A third judge mentioned the use of "'professional witness expert[s]' who will give any opinion the lawyer wants, especially in product liability cases."

The second most frequent problem is the "Excessive expense of party-hired experts." In comments, some judges merely noted that the cost of retaining experts appears to be exorbitant. One judge focused on pretrial problems, mentioning the "refusal of experts to write a report or to give a deposition without being paid a substantial fee." Other judges noted that experts often offer redundant testimony, thereby increasing both the expense and duration of trials.

The third and fourth most frequent problems -- "Conflict among experts that defies reasoned assessment" and "Expert testimony appears to be of questionable validity or reliability" -- relate to difficulty in making an informed assessment of expert testimony. Several judges reported that expert testimony is often in direct opposition, making it difficult to assess the basis of the disagreement. These judges usually noted the obligation of the attorney to make the evidence comprehensible. Other judges focused on testimony that goes beyond the foundation that has been prepared. Several judges objected to experts basing their testimony on facts or assumptions that are inconsistent with the case, and suggested that some attorneys rely on experts to introduce testimony that is otherwise inadmissible.

Table 1: Frequency of Problems with Expert Testimony in Civil Trials.

1. Experts abandon objectivity and become advocates for the side that hired them. (3.98)*
2. Excessive expense of party-hired experts. (3.48)
3. Conflict among experts that defies reasoned assessment. (3.08)
4. Expert testimony appears to be of questionable validity or reliability. (3.01)
5. Disparity in level of competence of opposing experts. (2.74)
6. Attorney(s) unable adequately to cross-examine expert(s). (2.72)
7. Failure of party(ies) to provide discoverable information concerning retained experts. (2.60)
8. Expert testimony comprehensible but does not assist the trier of fact. (2.50)
9. Expert testimony not comprehensible to the trier of fact. (2.42)
10. Delays in trial schedule caused by unavailability of expert(s). (2.29)
11. Indigent party unable to retain expert to testify. (2.13)
12. Expert(s) poorly prepared to testify. (2.05)

* The number in parentheses is the mean rating on a scale of 1 ("Very Infrequent") to 5 ("Very Frequent") of the frequency with which the judges observed this problem in civil cases involving expert testimony.

Opinions on Proposed Amendments

The final section of the survey asked judges to indicate their opinions on proposed amendments to the rules governing expert testimony in civil and criminal cases. Three of the amendments have been proposed by the Advisory Committee on Civil Rules, while the fourth has been proposed by the President's Council on Competitiveness. In particular, the survey asked about opinions on:

- an amendment to Rule 702 of the Federal Rules of Evidence that would require expert testimony to "substantially assist" (rather than merely assist) the trier of fact;

- an amendment to Rule 702 of the Federal Rules of Evidence that would require expert testimony to be "reasonably reliable";

- an amendment to Rule 702 of the Federal Rules of Evidence that would require expert testimony to be based on "widely accepted" theories, as proposed by the President's Council on Competitiveness; and,

- an amendment to Rule 26 of the Federal Rules of Civil Procedure that would require a party presenting expert testimony to provide other parties, in advance of trial, with a report describing the nature of the expected testimony and the qualifications of the proposed testifying expert.

In responding to each of the first three amendments, judges were given an opportunity to indicate whether they favored it for both civil and criminal cases, favored it for one type of case but not the other, opposed it for both types of cases, or were unsure of their preference (for the fourth amendment, they were asked if they favored or opposed it for civil cases, or were unsure). Many judges offered written comments about the proposed amendments, often providing an explanation for their opposition to the amendments. Summaries of the comments are presented here; the full text of the comments is set forth in Appendix A.

Table 2 shows the percentage and number of judges selecting each response option for the four proposed amendments. Both proposed amendments to Rule 702 presently before the Advisory Committee on Civil Rules were favored by a majority of judges, at least for civil cases. The proposal to require that expert testimony must be "reasonably reliable" received the most support; 62% of judges favored this amendment for both civil and criminal cases, while an additional 5% favored it for civil cases but opposed it for criminal cases. The comments were evenly distributed

between those favoring the amendment and those opposing it. Two judges indicated that they thought expert testimony is already required to be "reasonably reliable."

Slightly less support exists for the "substantially assist" amendment; 45% of judges favor of it for both civil and criminal cases, with an additional 11% favoring it for civil cases while opposing it for criminal cases. Over one-third of the judges (36%) opposed this amendment for both civil and criminal cases. Several judges who opposed this amendment expressed concern that this language would lead to arguments over the meaning of the word "substantially."

The proposed amendment to Rule 702 put forth by the President's Council on Competitiveness failed to attract the support of most judges. Those judges expressing a preference were almost evenly divided between those favoring the amendment (39% for civil and criminal cases) and those opposing the amendment (42%). An unusually high proportion of judges (14%) indicated that they were "not sure" of their opinion on this amendment, perhaps because they were less familiar with this proposal. Most of the comments expressed general opposition without raising specific problems. Several judges, however, expressed concern that the amendment would hamper the development and presentation of new scientific theories.

The Advisory Committee's proposed change to Rule 26(a)(2) of the Federal Rules of Civil Procedure, requiring early exchange of reports on anticipated expert testimony, received overwhelming support; 96% favored this amendment, while only 3% opposed it. The vast majority of judges who commented merely indicated that the practice of exchanging reports about testifying experts was already in effect in their courts, either by local rule or court orders.

Table 2. Opinions on Proposed Amendments

Proposed Change

a. Amend F.R.E. 702 to increase the threshold for admitting expert testimony by requiring that it "substantially assist" the trier of fact.

45% (141)	11% (33)	1% (2)	36% (113)	8% (24)
Favor for both civil & criminal cases	Favor for civil cases but oppose for criminal cases	Favor for criminal cases but oppose for civil cases	Oppose for both civil & criminal cases	Not sure

b. Amend F.R.E. 702 to add a requirement that expert evidence must be "reasonably reliable" in order to be admitted.

62% (194)	5% (17)	1% (2)	26% (80)	6% (19)
Favor for both civil & criminal cases	Favor for civil cases but oppose for criminal cases	Favor for criminal cases but oppose for civil cases	Oppose for both civil & criminal cases	Not sure

c. Amend F.R.E. 702 to require that expert testimony be based on "widely accepted" theories. A party would have to prove that its expert's opinion is based on an established theory that is supported by a significant portion of experts in the relevant field.

39% (121)	4% (13)	0.3% (1)	42% (132)	14% (45)
Favor for both civil & criminal cases	Favor for civil cases but oppose for criminal cases	Favor for criminal cases but oppose for civil cases	Oppose for both civil & criminal cases	Not sure

d. Amend Rule 26(a)(2) of the Federal Rules of Civil Procedure to require a party presenting expert testimony to provide other parties, in advance of trial, with a report describing the expert testimony to be presented, including the nature of the expected testimony and the qualifications of the person(s) who will testify.

96% (298)	3% (8)	2% (5)
Favor for civil cases	Oppose for civil cases	Not sure

Appendix A : Text of Comments on Proposed Amendments to Rules Governing Expert Testimony

General Comments on Proposed Amendments

"It is vital to adopt the proposed changes to the Federal Rules of Evidence."

"Experts are overutilized, but I do not believe the proposed amendments to Rule 702 are the answer to the problem. District Judges need to exercise their discretion to exclude expert testimony that is not sufficiently reliable or will not sufficiently assist the trier of fact, and the Courts of Appeals need to give the trial courts that discretion."

"[Expert testimony] is much abused. Many so-called experts are accepted when they should not be. Rules need amending as soon as possible."

"...the Rules need modification. The principal expert problem is confusion by jury when experts on opposite sides, within the same discipline, testify to opposite conclusions."

"I oppose the suggested amendments to Rule 702 because I think the rule should remain flexible with full discretion for the trial judge to apply in a particular case."

"We are rule-plagued - we do not need national rules to address every minor problem."

"I believe FRE 702 should remain as it is -- this gives the court flexibility in handling such matters. I have had very few problems in the area of experts. One change, however, Rule 26(b) statements should be required automatically for any expert, including a treating doctor."

"The tendency of experts to become advocates is worrisome, as is the lack of a solid scientific base for many of the opinions expressed by experts in court. But the rule changes suggested herein will not eliminate these problems without collateral proceedings."

"I believe the current text of Federal Rule of Evidence 702 is adequate and does not need to be changed."

"Refrain from changing current rules! They work extremely well if the presiding judge has the experience to apply them to fact-specific cases. Theories of yesterday become accepted facts today [Aerodynamics -- TV -- Micro-Imagery]."

"I believe the case law as written makes R. 702 fairly clear. Amendments should be carefully considered."

"The new proposals would simply create new definitional problems and new decision points in litigation, resulting in increased lawyer fees as motions are brought, and delays in the litigation as evidence of these new issues is taken, and the issues resolved and appealed."

"I would hesitate to make changes in the rules. Such changes as suggested are going to be applied with a cleaver and not a scalpel. More attention to the problem by court of appeals will cure any problems currently present."

"I have opposed most of the changes to FRE 702 because they seem to run contrary to the existing jurisprudence and from the judge's standpoint will not ease the burden of presiding at trial."

"I do not think any rules change will assist. Difficult and complicated cases are still going to be that way and will require judicial management."

"No changes in the Rules are necessary. Judges already have discretion to deal with experts."

"Leave the present rule alone."

"No need for new or more rules. Use of present rules and common sense - plus a thorough knowledge of the case allows the judge to assure that this type of evidence is properly used - or excluded. The 3rd. Circuit has recently announced new standards replacing the Frye standards which give additional guidance."

"Present rules and procedures - have been adequate."

"I believe the changes suggested...would be positive and helpful."

Comments on "Substantially Assist" Amendment

"Adding 'substantially assist' language will be helpful but not critical in my view; the present language 'assist' is workable."

"To add 'substantially' as a modifier to the word 'assist' appears problematical and at the very least 'subjective.' Everybody understands the term 'assist.' To add 'substantially' as an additional requirement may dissolve (?) the litigation process."

"Instead of arguing over 'may' we would have to argue over 'substantially.'"

"This criteria is too uncertain (in either form) to enforce universally."

"Not needed."

"...the distinction between 'substantially assist' and 'will assist' seems perilously close to a semantical argument, and one sure to produce raucous disagreement among counsel. So we take evidence to determine that the testimony will assist 'substantially' as opposed to 'will assist'?"

"A playground for appellate courts."

Comments on "Reasonably Reliable" Amendment

"Adding 'reasonably reliable' language is an excellent idea and would permit the court to examine the proposed expert subject matter in advance of trial -- I see no difference between civil and criminal cases."

"How would a jurist gauge whether given expert evidence is 'reasonably reliable' or not?"

"Weight and value of expert testimony should be left to the jurors. I am uncomfortable, on 7th Amendment grounds, about rejecting an expert witness simply because I regard (or find) theories are not 'widely accepted,' or 'reasonably reliable.' That should be for the jury."

"I believe this is in fact the law."

"I thought this was the requirement."

"Let's avoid a mini-trial before the court prior to trial."

"[would favor this amendment] if "c" [requiring 'widely accepted' theories] not adopted."

"Not necessary."

"A playground for appellate courts."

Comment on Amendment Requiring "Widely accepted" Theories

"Adding the 'widely accepted' language is opposed as it would prevent any new theories being presented in court."

"I don't know if there is a discernible difference between 'widely accepted' and 'generally accepted' but thought that the latter is already required for such expert testimony."

"Weight and value of expert testimony should be left to the jurors. I am uncomfortable, on 7th Amendment grounds, about rejecting an expert witness simply because I regard (or find) theories are not 'widely accepted,' or 'reasonably reliable.' That should be for the jury."

"Need more info."

"More certification garbage -- polls of other 'experts.'"

"Inclined to oppose."

"Too hard to get a handle on how widely accepted a theory is without a wasteful mini-trial on that issue!!!"

"Could limit new scientific breakthroughs."

"Not necessary - Court can control."

"Would require collateral trials."

"This proposal is a return to the Frye rule. While that rule is much to be preferred to the present standardless chaos, it is perhaps too restrictive to accommodate advances in science and other fields. The challenge is to impose standards flexible enough to advance reasonably with exploding new technologies."

Comments on Amendment Requiring Early Exchange of Expert Reports

"Already covered in Rule 26(b)(4).

"I already do this."

"This is now required under our delay and expense reduction plan."

"The present availability of expert depositions and interrogatories (?) appears to be adequate."

"I do so -- don't think we should amend the rules."

"Much of this proposal, but not all, is already covered by Rule 26(b)(4) statements. This proposal is more explicit."

"I already do this by local rule."

"I now require this in all cases. In fact, [our] district court local rules require this."

"I do this by court order."

"I've used this in all civil trials for 8 years -- with some success."

"Usually required in our district."

"Proposed amendment requiring exchange of experts' theories in advance would help substantially."

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

ROBERT E KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR
SECRETARY

DRAFT

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

SAM C POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

June 15, 1992

Honorable John F. Gerry
Judicial Conference Secretariat
Administrative Office of the
United States Courts
Washington, D.C. 20544

Re: Judicial Conference Committees Self-Evaluation

Dear Judge Gerry:

In response to your memorandum of May 6, 1992, I am sending you herewith completed questionnaires recommending the continuation of the Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) and the four Advisory Committees on Appellate, Civil, Criminal and Bankruptcy Rules.

As you may know, the existence of the Standing Committee is mandated by law, 28 U.S.C. 2073(b). In addition the Judicial Conference "may authorize the appointment of Committees to assist the Conference by recommending rules to be prescribed under Section 2072 of this title." See 28 U.S.C. 2073(a).

The Advisory Committees have been very busy of late with new rules proposals being recommended for adoption and each Advisory Committee has an agenda of items to be considered in the future. These Committees should be continued.

Sincerely,

Robert E. Keeton
Chairman

Enclosure

cc: Standing Committee
Chairmen & Reporters of
Advisory Committees
Dean Daniel R. Coquillette
Professor Mary P. Squiers

1992 Judicial Conference Committees' Self-Evaluation Form

Committee Name: Rules of Practice and Procedure

Should the Committee __X__ continue to exist?

____ be abolished?

Please explain why:

The existence of the Committee is required by statute, 28U.S.C. 2073(b).

Amount of work: Does the Committee have

____ too much to do? ____ too little to do? __X__ the appropriate amount of work?

If too much or too little, please explain:

Size/Composition: Is the size of the Committee

____ too big? ____ too small? __X__ appropriate?

If too big or too small, please explain:

Is the committee membership appropriately representative (e.g., of court entities with an interest in the areas within the Committee's jurisdiction; of the geographic circuits; etc.)? ____ yes __X__ no

If no, please explain:

The Committee need not be enlarged, but there should be a better representation of the practicing bar. Of the 13 Committee members now serving, only 2 are lawyers in private practice.

Functions:

Is the work of the Committee appropriate to its jurisdictional statement? __X__ yes ____ no

If no, please explain:

Has the Committee been working in any areas which overlap with other committees? ____ yes __X__ no

If yes, please explain:

Are there areas within the jurisdiction of this Committee which might be handled by another committee?
____ yes __X__ no

If yes, please explain:

Are there areas within the jurisdictions of other committees which might go to this Committee? ____ yes __X__ no

If yes, please explain:

Meetings:

How often does the Committee meet each year (either face-to-face or by teleconference)? Please specify.

The Committee usually meets twice each year.

What percentage of Committee meetings are held in Washington, D.C.?

In the future, as in the recent past, the Committee plans to have one meeting each year in Washington and one outside Washington.

Would you suggest any other changes related to this Committee?

No suggested changes.

Would you suggest any changes related to the committee structure as a whole? For example, should the number of committees be enlarged or reduced? Should committees be combined, eliminated or divided?

The Committee is recommending to the Judicial Conference the reactivation of an Advisory Committee on the Federal Rules of Evidence.

* * * * *

Please return to: Judicial Conference Secretariat
Administrative Office of the U.S. Courts
Washington, D.C. 20544

CHARLES ALAN WRIGHT

WILLIAM B. BATES CHAIR FOR THE ADMINISTRATION OF JUSTICE

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

May 26, 1992

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Sir:

Attached is a photocopy of a clipping from yesterday's New York Times. The notion that every federal judge is free to establish his or her own rule on the length of motions and briefs is mind-boggling.

It is outrages like this that cause me to think that the proposed amendment to Civil Rule 83, which would allow district courts to adopt so-called "experimental" local rules inconsistent with the Civil Rules, is profoundly unwise. Rule 83 ought to be amended in exactly the opposite direction. Local rules should be confined to the hours of holding court, the designation of motion day, and other purely housekeeping matters of that kind.

Very truly yours,

Charles Alan Wright

Telephone (512) 471-7188 -- Telecopier (512) 477-8149
727 East 26th Street, Austin, Texas 78705

A Judge Holds a Brief for Briefs to Be Briefer

BISMARCK, N.D., May 21 (AP) — A Federal judge in North Dakota has announced that from now on he will read only the first 15 pages of any motion or legal brief.

The judge, Bruce Van Sickle of Federal District Court, said in a letter published recently in a North Dakota Bar Association magazine that lawyers must first get permission before filing longer briefs.

"Please recall an observation credited to Winston Churchill: 'The length of this document defends it well against the risk of being read,'" the judge wrote in the letter.

James Hill, president of the state bar, said he would have preferred that the judge set a 25-page limit.

But he said: "I can see his point. If you don't capture the judge's attention within the first limited number of pages, you've probably lost him."

Judge Van Sickle noted that some Federal district courts already impose limits on paperwork that lawyers are allowed to file.

And Patrick Durick, a lawyer who is chairman of a Federal court advisory panel, said that a brevity rule was being prepared for consideration in North Dakota's Federal courts.

Judge Van Sickle said he wrote his declaration in exasperation over a voluminous brief filed in connection with "some minor motion" in a civil case.

"Let's call it a building of lawyers' work," the judge said last Monday. "My hackles rise when I see work that I don't think is necessary, and yet is billable."

North Dakota's chief Federal judge, Patrick Conmy, said he sympathized with Judge Van Sickle's complaint.

"Sometimes lawyers ship the entire warehouse, instead of the one box we care about," he said.

5-24-92

DOW

The Dow Chemical Company

2030 DOW CENTER
Midland, Michigan 48674

June 17, 1992

Via Facsimile (202) 633-8699

Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure
Administrative Conference of the United States Courts
1120 Vermont Avenue, N.W., Suite 626
Washington, D.C. 20544

PROPOSED AMENDMENT - -
RULE 26(a)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Dear Judge Keeton:

I previously submitted comments on proposed amendments to Rule 26 to Mr. Joseph Spaniol, Jr., which I attach to this letter and respectfully request the Committee to consider along with my comments in this letter.

I applaud the Committee for its responsiveness to certain concerns voiced about the original proposal. I support the idea that certain district courts be authorized to experiment with various methods of disclosure. Information developed in those experiments can be utilized to develop a comprehensive discovery reform proposal.

However, in my view, the current proposal will place greater burdens on already crowded court dockets as a result of increased motion practice arising out of ambiguities in the Rule and the parties contentions. It is for these reasons that I am compelled to suggest that the Committee return the proposed amendments to Rule 26(a)(1) to the Advisory Committee for republication and reconsideration.

Some of the problems with the proposed Rule that will present to a typical manufacturer are as follows:

1. The proposal contains ambiguous phraseology that will result in a manufacturer's good faith efforts at compliance being caught in the accusatory cross-fire of interpretative differences. I envision situations where a manufacturer could face serious sanctions, despite the fact that the sanctioned behavior was inadvertent and/or the result of a failure to interpret the rule in the same way a plaintiff would advocate. Examples of the minefield of interpretative difficulties still extant in the proposal lie in the terms: "reasonably available", "discoverable information" and "...documents... that are relevant". Such phrases cause great consternation in the context of a toxic tort pleading, for example, involving a global company.

2. The time restriction set-forth in the proposal for initial disclosure would likely be a significant problem in most lawsuits. One of the problems of fully disclosing all information "relevant to particularized claims" arises from the nature of a large company, composed of thousands of individuals who assume various responsibilities to the company during their tenure. The difficulty of identifying scores of people who might have relevant knowledge about a particular product, is compounded by exposure periods in toxic tort

cases that might be thirty or more years. Locating documents presents similarly impossible roadblocks to compliance with proposed Rule 26(a)(1).

3. Even with the new revisions pertaining to disclosure obligations attaching to pleadings made with particularity, a manufacture will face circumstances where it will need information from other sources, such as its customers or the plaintiff's employer, before it is able to make appropriate disclosures. The Rule 26(a)(1) proposal that is before the Standing Committee should not be adopted in its present form since the Rule does not accommodate adequately the obscurities that are an inherent part of both plaintiff's and defendant's product liability litigation practices.

4. The likelihood of motion practice occurring about the adequacy of the initial disclosure and/or the timeliness of any necessary supplementation is a virtual certainty.

An injustice on all litigants and the courts will be cast through: notice pleading juxtapositioned with the proposed Rule(a)(1); the adversarial nature of litigants who will be forced into a maelstrom of interpretation skirmishes; and the fear of the severe consequences facing a litigant who has made a good faith effort to comply with the proposed Rule, but is later found in non-compliance because of a difference of opinion in interpretation. I therefore respectfully ask that Rule 26(a)(1) be republished and reconsidered.

Thank you for the opportunity to comment.

Respectfully submitted,

Ronald L. Davis
Assistant General Counsel
The Dow Chemical Company
(517) 636-8255

cc: Mr. Joseph Spaniol, Jr. (via facsimile)

The Dow Chemical Company

2030 DOW CENTER
February 12, 1992

VIA AIRBORNE DELIVERY

Mr. Joseph F. Spaniol, Jr.
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
1120 Vermont Avenue, NW, Room 626
Washington, D.C. 20544

PROPOSED AMENDMENT --
RULE 26 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Dear Mr. Spaniol:

The Dow Chemical Company ("Dow") respectfully submits these comments concerning the Proposed Amendments to Rule 26 of the Federal Rules of Civil Procedure. As a litigant in federal courts, Dow is affected by discovery practices which can become expensive, protracted and fundamentally unfair. Accordingly, we agree that changes are needed in current practices to achieve the goal of "...just, speedy, and inexpensive determination of every [civil] action." Fed.R.Civ.P. 1.

Although we commend the Committee's efforts and the conceptual intent underlying the proposed amendment to Rule 26 requiring pre-discovery disclosure, Dow believes this proposal is more likely to harm the administration of justice and litigants than it is to accomplish any meaningful improvement of the current discovery process.

Comments submitted by other similarly situated corporate coalitions and litigants fully address the substantive concerns of Dow relating to the pre-discovery disclosure proposal and, therefore, we will not repeat all of those

comments here.[1] As specified in those submissions, Dow agrees that the proposed disclosure amendment will produce more, not fewer, pretrial disputes and further shift the focus away from determination of cases on the merits. Additionally, given the incompatibility between the pre-discovery disclosure requirements and notice pleading under Rule 8 of the Federal Rules of Civil Procedure, the practical application of the pre-discovery disclosure requirement would place an onerous, if not impossible, burden on Dow. This is particularly true in the context of litigation alleging injury due to chemical exposure.

Notice pleading under Rule 8 does not result in focused initial claims. A typical chemical exposure lawsuit will name dozens or even hundreds of defendants; will only identify a generic category of products (e.g., "herbicides"); will involve decades of claimed exposure and injuries or diseases with decade long latency periods; and, will seek damages under a variety of theories of recovery ranging from design and manufacturing defects to warning inadequacies. Because the typical claim has no focus, analysis as to what disclosures might be required under the "bears significantly" standard of proposed Rule 26 would be fruitless. Yet, this would be the defendant's obligation thirty days after filing its answer.

When faced with the typical unfocused chemical exposure lawsuit, a large global company would be required to perform worldwide searches to identify and describe decades of documents, data compilations and persons under the vague "bears significantly" standard, and all within 30 days after serving its answer to the complaint. How can any large organization be expected to comply?

Because of the plethora of "real life" practical problems that the proposed disclosure rules would cause for the

---

1 See, Preliminary Comments by Lawyers for Civil Justice and the Product Liability Advisory Council on Proposed Amendments to the Federal Rules of Civil Procedure (May 21, 1991); Comments on Proposed Amendments to Rule 26 to the Standing Committee on Civil Rules on Behalf of Lawyers For Civil Justice and the Product Liability Advisory Council (July 12, 1991); Lawyers For Civil Justice - Comments on Proposed Amendments to the Federal Rules of Civil Procedure and Evidence (November 7, 1991); General Motors Corporation's Statement Regarding Proposed Amendments to Rule 26 of the Federal Rules of Civil Procedure (November 7, 1991).

federal judiciary and the parties, Dow respectfully urges withdrawal of subparagraphs (A) and (B) of the proposed amendment to Rule 26. Alternatively, we respectfully urge more study of the timing and concept of a voluntary disclosure process in relation to Rule 8 of the Federal Rules of Civil Procedure.

Thank you for the opportunity to comment.

Respectfully submitted,

Ronald L. Davis
Assistant General Counsel
The Dow Chemical Company
(517) 636-8255

vla

THE NATIONAL CHAMBER LITIGATION CENTER

STEPHEN A. BOKAT
Executive Vice President

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5337
FAX (202) 463-5836

June 15, 1992

Mr. Joseph F. Spaniol, Esquire
Secretary, Committee on Rules of Practice
and Procedure
Administrative Office of the United States Courts
1120 Vermont Avenue, N.W.
Suite 626
Washington, D.C. 20544

Dear Mr. Spaniol:

I am writing on behalf of the Product Liability Advisory Council, the Lawyers Committee of the Business Roundtable Tort Policy Task Force and the National Chamber Litigation Center to inquire whether you have received a sufficent number of copies of our comments on the proposed amendments to Rule 26 of the Federal Rules of Civil Procedure to distribute at Thursday's meeting. I would be happy to supply you with additional copies if you so desire.

In the cover letter to our comments, I noted that our three groups represent a broad cross-section of the American business community. I thought you and the committee would be interested in a more detailed description of scope of our representation, which I am providing to you today.

The National Chamber Litigation Center, Inc. is the public policy law firm of the Chamber of Commerce of the United States. As the nation's largest federation of business and professional organizations, the Chamber represents over 200,000 companies, partnerships and proprietorships on issues of national concern to the business community, including civil justice reform. The Chamber supports a comprehensive restructuring of the discovery process, but opposes mandatory pretrial disclosure.

The Product Liability Advisory Council is a nonprofit corporation formed under the sponsorship of the Motor Vehicle Manufacturers Association of the United States. It represents over 250 sustaining members in a wide range of industries ranging from electronics, to automobiles, to aerospace, on issues that affect product liability law.

The Lawyers Committee of the Business Roundtable Tort Policy Task Force is composed of 83 corporate counsel designated by the chief executive officers of the some 200 companies that form the Business Roundtable to advise the Task Force on legal matters.

Each of our groups has a substantial interest in improving the efficiency and fairness of the civil justice system. We look forward to working with you and the Committee towards these ends.

Sincerely,

Stephen A. Bokat

cc: The Honorable Robert E. Keeton

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

MEMORANDUM

TO: Joseph F. Spaniol, Jr., Secretary

FROM: Robert E. Keeton

DATE: June 16, 1992

I am faxing herewith the following letters which I would like reproduced for distribution to the members of the Standing Committee at our meeting on Thursday.

(1) Letter of June 10, 1992 from Victor E. Schwartz (2 pages)

(2) Letter of June 11, 1992 from Frances K. Zemens (5 pages)

(3) Letter of June 9, 1992 from David R. Bossart (1 page)

Thank you.

6/16 fixed up attachments

CROWELL & MORING
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2595
(202) 624-2500
CABLE: CROMOR
FACSIMILE (RAPICOM): 202-628-5116
W. U. I. (INTERNATIONAL) 64344
W. U. (DOMESTIC) 89-2448

15 JUN RECD

VICTOR E. SCHWARTZ
(202) 624-2540

June 10, 1992

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4675 MACARTHUR COURT
NEWPORT BEACH, CALIFORNIA 92660-1851
(714) 263-8400
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1 SERJEANTS' INN
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44-71-936-3036
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095:rmg
99280.011

The Honorable Robert E. Keeton
United States District Judge
Room 36, John W. McCormack Post Office
& Courthouse
Boston, Massachusetts 02109

Dear Bob:

It was good to see you again in Atlanta and at the A.L.I. meeting. I look forward to the opportunity of working with you on the Restatement (Third) Products Liability project. Geoff has assembled a very balanced and talented group of "tortsters."

Over the years, I have refrained from writing you in your professional capacity, sometimes such "missives" compromise friendships. I have long valued your continued kindness. I hope you will understand my brief break with this good tradition. It stems from my concern about the proposed addition of an early automatic disclosure provision to Rule 26 of the Federal Rules of Civil Procedure. That proposal was sent to you as Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States by Sam Pointer, Chairman of the Advisory Committee on Civil Rules.

The Advisory Committee published the proposal last August and held public hearings in Los Angeles in November and in Atlanta in February. At the Atlanta hearing, as you may recall, I expressed opposition to the proposal. My written statement shows the particularly troublesome implications of the early automatic disclosure proposal for product liability cases. (Copy enclosed).

Immediately following the Atlanta hearing in February, the Advisory Committee met and decided to withdraw the early automatic disclosure proposal, apparently in response to the broad spectrum opposition to it. It came from both the plaintiffs' and defense sides of the bar and almost all federal trial judges who commented. As you know, much of my professional time is dedicated to legislative and other legal reform proposals. I have never seen such a broad consensus on any other issue. For that reason,

CROWELL & MORING

I was very surprised last April when the Advisory Committee reversed its decision and re-proposed the early automatic disclosure provision with some modifications.

The Advisory Committee's modifications tried earnestly to meet some criticisms; unfortunately, the proposal remains seriously flawed. It will increase the expense of litigation by provoking unnecessary disclosure and increased motions practice. My practice years strongly suggest that it will cause ethical problems for attorneys who will find it extraordinarily difficult to balance interests of their clients against the mandates of the disclosure rule. In cases involving any factual complexity, including virtually every product liability case, the proposal places an impossible burden on defendants to determine the relevance of massive numbers of documents in a very short time or face the sting of severe sanctions. Ultimately, the proposal is destined to provoke endless squabbles between plaintiffs and defendants over the adequacy of disclosures. We need proposals that will help bring opposite sides of the bar together, not ones that will foster further discord.

I appreciate that there are intelligent persons who feel that my concerns might be misplaced. If your Committee feels uncertain about which view is correct in this instance, it would seem prudent to try a limited experiment to test the efficacy and practicality of the procedure. This approach would be in harmony with the adoption of various forms of early automatic disclosure by some districts under the Civil Justice Reform Act.

Bob, if you would like to chat in more detail about this proposal, I would be delighted to hear form you (202) 624-2540. In any case, I appreciate your time and thought in considering my views about the Rule 26 proposal. (I suppose you can tell that I do not like it).

Sincerely yours,

Victor E. Schwartz

Enclosure

American Judicature Society

ajs

to promote the effective administration of justice

15 JUN RECD

June 11, 1992

Honorable Robert Keeton
United States District Court
306 McCormack Post Office
& Courthouse Building
Boston, Massachusetts 02109

Dear Bob:

Enclosed is a copy of the conclusion of the forthcoming article (Northwestern Law Review, Volume 86, No. 4) that reports on the bulk of the findings of our study of Rule 11. Since we have sent you so much paper previously, it seemed reasonable to be somewhat more limited at this point.

As you know, the data still have potential for further analysis that we hope to pursue at a later date. However, we just did a little analysis that I thought you might find of interest. Having read the May 25th National Law Journal article quoting John Frank on Rule 11, we thought it would be interesting to directly examine his assertions to the extent our data allow.

As you may recall our research focused on lawyers' experiences with Rule 11, not on their opinions about it. We did, however, ask an open-ended question by which we encouraged respondents "to share with us any comments on or experiences with Rule 11 that you would like us to be aware of that are not captured [elsewhere in the questionnaire]." Most of those who returned questionnaires did not respond to this question and we would not have been surprised if only those most negative about the Rule took the opportunity to tell us their views. Such was not the case. While close to 55% of those who responded did present purely negative views, the other 45% were either completely positive (24.4%) or had a mix of positive and negative comments (20.6%). Again, plaintiffs' lawyers are significantly more likely to be negative than those who typically represent defendants. In short, the data do not support Mr. Frank's assertion that "In the overwhelming view of the bar of the country, it [Rule 11] has become a disaster."

After the Committee has completed its work on the proposed amendments that has kept you so busy, we would be pleased to receive any other ideas you may have for further analysis of the data.

Sincerely,

Frances

Frances K. Zemans
Executive Vice President

FKZ:pay
Enclosures

VIII. Conclusion

We have sought to bring systematic evidence to bear on a controversial topic - Rule 11 of the Federal Rules of Civil Procedure. What we have provided is broad based information on the actual experiences of a random sample of federal litigators. Opinions on Rule 11 have not been our focus. Instead we have learned about the actual frequency and nature of use of Rule 11, including formal and informal activity, as well as its influence on the practice of law. The approximately 75% response rate gives us confidence that the data provides an accurate picture of Rule 11 in practice.

Several general conclusions are worth reiterating. First, is the striking importance of geographic setting to Rule 11 activity of all varieties - those in metropolitan districts simply use Rule 11 significantly more frequently than their counterparts in less urbanized districts. Second, while the plaintiffs' side is more frequently the target of Rule 11 activity than the defendants', those who typically represent plaintiffs are quite similar to those who typically represent defendants in the extent to which they have altered their law practices in response to Rule 11. There is, however, an important exception to this among those who specialize in civil rights litigation. Here we find that those who represent plaintiffs and those who represent defendants report significant

differences. Finally, if we consider all the aspects of Rule 11 related behavior that was examined - formal activity, direct informal activity in and out of the courtroom, effects on how cases are handled and general effects on the practice of law - a remarkable 82% of the respondents report having been affected by the Rule.

This examination of the experiences of randomly selected federal litigators in three circuits strongly suggests that much of the portrayal of the effects of Rule 11 has been significantly skewed. While the effects of Rule 11 have been broadly felt in the bar as a whole, the imposition of sanctions has been limited. In addition, stories of mammoth Rule 11 sanctions stand in contrast to the typically modest sanctions respondents reported. Furthermore, assertions that large blocks of lawyers' time are being devoted to Rule 11 activities are not substantiated by the data. Thus, as is often the case when systematic evidence is examined, the reality of Rule 11 is different and more complex than has been argued by either side in the Rule 11 debate and the effects of the Rule have not always been in the direction anticipated.

We do not purport to answer the more difficult and no doubt ultimately more important question: have the benefits of amended Rule 11 been worth the costs? While the data reported here provide

important information, they do not answer the ultimate normative question about the value of the Rule. What we do provide is systematic evidence of the reality of Rule 11 in operation. As scholars and law makers consider whether Rule 11 should be retained in its current form or how it should be modified, we believe it is imperative that they try, to the extent possible, to base their conclusions on evidence - not conjecture or anecdotes - about Rule 11's use and impact. For policy-making must be based on empirical reality if it is to be effective and if we are to avoid the unintended effects that inevitably result from reforms made in the absence of information.

15 JUN Rec'd

LAW OFFICES
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ESTABLISHED 1879

TELEPHONE
(701) 293-9911
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*ALSO LICENSED IN MINNESOTA

June 9, 1992

Honorable Robert E. Keeton
Unites States District Judge
Room 306, John W. McCormack
Post Office & Courthouse
Boston, MA 02109

Dear Judge Keeton:

I am a trial lawyer who has practiced personal injury law for over 25 years representing both plaintiffs and defendants. Approximately 95% of my practice is plaintiffs personal injury/wrongful death litigation. I have practiced in state courts in a number of states, including federal court. I am on the Board of Governors of the Association of Trial Lawyers of America (ATLA) and Trial Lawyers for Public Justice (TLPJ). I write to urge you to study carefully the comments to the proposed amendments which have been submitted by TLPJ and ATLA. I understand copies those proposed amendments will be sent to you, however, if you do not receive them, please let me know and I will provide copies to you. I urge you most strenuously to eliminate those proposed changes in the rules which adversely affect plaintiffs, or in the alternative, to provide for more public hearings and debate on these highly controversial changes. I seriously believe that more debate is necessary before these rules become effective.

I believe a close review of TLPJ's position on these rules will bring to light reasons why they should not be adopted as amended in May, 1992.

Your serious attention to this request will be most appreciated.

Sincerely,

David R. Bossart

DRB:lji

lji\ltrs\Keeton.ltr

Bruce J. Brennan
SENIOR VICE PRESIDENT AND
GENERAL COUNSEL

Pharmaceutical Manufacturers Association

VIA FEDERAL EXPRESS

June 15, 1992

The Honorable Robert E. Keeton
Chairman, Standing Committee on Rules
of Practice and Procedure
Judicial Conference of the United States
Room 306, John W. McCormack Post Office
and Courthouse
Boston, Massachusetts 02109

Re: Advisory Committee's Proposed Amendments to Rule 26 of the Federal Rules of Civil Procedure, May 1992

Dear Judge Keeton:

The Pharmaceutical Manufacturers Association ("PMA") is a national voluntary trade association representing approximately 100 research-intensive pharmaceutical manufacturers. PMA members develop the majority of the prescription drugs marketed in the United States. PMA is writing to express its concern with the Advisory Committee's most recent pre-discovery disclosure proposal, and to urge the Standing Committee to return the proposal to the Advisory Committee for reconsideration.

In its comments submitted to the Advisory Committee on January 13, 1992, PMA attempted to communicate two principal concerns that PMA had with the Advisory Committee's August 1991 pre-discovery disclosure proposal. PMA's first concern was that the proposal failed to make clear distinctions between complex and simple litigation. PMA's second principal concern was the incongruity between the pre-discovery proposal and the present day notice pleading system. PMA provided actual examples from its members' litigation experiences to illustrate its point.

While PMA acknowledges the Advisory Committee's attempt to address the concerns set forth above, PMA believes the Committee's attempt, as reflected in its May 1992 proposal, does not solve these problems, and may actually create more confusion. PMA continues to believe that the pre-discovery disclosure proposal will impose unfair burdens upon PMA's members. In this regard, PMA supports the June 12, 1992, comments submitted by the Lawyers for Civil Justice. These comments are attached for your convenience.

Respectfully submitted,

Bruce J. Brennan

Enclosure
cc: Standing Committee Members

LAWYERS FOR CIVIL JUSTICE

1225 Nineteenth Street, N.W. • Suite 470
Washington, D.C. 20036 • (202) 429-0045 • Fax (202) 429-6982

June 12, 1992

The Honorable Robert E. Keeton
Chairman, Standing Committee on Rules
of Practice and Procedure
Judicial Conference of the United States
Room 306, John W. McCormack Post Office
& Courthouse
Boston, Massachusetts 02109

Re: Advisory Committee's Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, May 1992

Dear Judge Keeton:

The more than 18,000 members of the undersigned associations are involved extensively in civil litigation in the federal courts of the United States. We have a vital interest in the fair and efficient functioning of the federal civil justice process. Because of that interest, many of us submitted written comments and provided testimony to the Advisory Committee on Civil Rules concerning the proposals for amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence that the Advisory Committee published for comment in August 1991.

In our comments and testimony to the Advisory Committee, we pointed out a number of problems, and made a number of suggestions, concerning various portions of the Advisory Committee's proposed amendments. We expressed particular concern about the proposed amendment to Rule 26 which would add (as Rule 26 (a)(1)) a new automatic disclosure process at the beginning of all federal civil litigation. We urged that the proposal for early automatic disclosure be withdrawn.

After the public hearing in Atlanta in February 1992, the Advisory Committee met and decided to revise many of the proposed amendments in light of the many comments and suggestions that had been submitted. Most notably, the Advisory Committee decided at that time to withdraw the proposal for an early automatic disclosure provision in Rule 26.

In making the determination to withdraw the early automatic disclosure proposal, the Advisory Committee appeared to respond to the wide-ranging opposition to the proposal which had come from virtually every quarter of the legal community. Numerous commenters -- plaintiffs' attorneys, defense attorneys, bar associations, law professors, corporations, public interest groups, and six of the seven federal district judges who submitted comments -- had pointed to a myriad of conceptual and practical flaws in the proposal and had urged that the proposal be withdrawn or, at least, dramatically revised.

When the Advisory Committee met again in April to finalize revision of the proposals to be submitted to the Standing Committee, a surprising turnaround occurred with regard to the early automatic disclosure proposal. The Committee decided to re-propose an early automatic disclosure provision with some changes from the August 1991 version.

We are writing to you to express our dismay at the Advisory Committee's return to an early automatic disclosure proposal and to urge that the Standing Committee not adopt that proposal. In our view, despite some improvement in the proposal over what had been proposed in August 1991, the proposal remains fundamentally flawed and, if implemented, will make the federal civil litigation process less efficient, more costly, and less equitable.

We urge the Standing Committee to consider the following problems with the May 1991 early automatic disclosure proposal:

1. **Misdirected Discovery Reform Effort**. The proposal fails to resolve the single biggest problem with the present system of discovery -- the allowance in Rule 26 for overly broad discovery of all information that is relevant to the "subject matter" of the action or which is "calculated to lead to" admissible evidence. Instead, the proposal makes that problem worse by adding another expensive layer of overbroad discovery (through disclosure) in virtually every case.

2. **Ethical Quandary**. The proposal creates an unresolvable ethical dilemma for attorneys -- how to balance their professional obligations to pursue zealously the interests of their clients while at the same time guiding their clients through a disclosure process requiring them to try to help their opponents. The proposal can only result in conflicts, distrust, and uneasy relations between clients and their attorneys.[A]

[A] One of the Advisory Committee members, Magistrate Judge Brazil, long ago highlighted this problem. In proposing that the discovery system be changed to create a less adversarial, disclosure-oriented system, he pointed out that such changes would have to be accompanied by changes to the Code of

3. Unwarranted Expense. The proposal will increase the expense of litigation (in some cases, to a considerable degree) without providing any offsetting benefits. A costly disclosure effort will be required in virtually every case, even though many cases would be resolved (by settlement, dismissal on motion, voluntary withdrawal, or otherwise) with little or no discovery under the present system. Adding to the expense will be an inevitable upsurge of preliminary motions aimed at postponing or forestalling the disclosure process in cases in which compliance with the disclosure requirements would be impractical. Even more distressing from a cost perspective is the specter of the development of a cottage industry of Rule 37 motions practice to resolve potentially boundless numbers of disputes about the adequacy of disclosures in light of the vague standard for disclosure ("relevant to disputed facts alleged with particularity"[B]) in Rule 26 and the vague standard for judging such disclosure ("without substantial justification") in Rule 37(c). The proposed rule also will promote wasteful and expensive overdisclosure of information by defendants attempting to avoid harsh sanctions. Often, opposing parties do not request and do not want such information. Now,

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Professional Responsibility "to distinguish between the different requirements of the investigative and discovery stages, on the one hand, and the trial and post-trial stages on the other." Brazil, "The Adversary Character of Civil Discovery: A Critique and Proposals for Change," 31 Vand. L.R. 1295, 1348-50 (Nov. 1978).

B This revised language represents an effort by the Advisory Committee to respond to assertions by commenters that the proposal will not work in a notice pleading system. Rather than solve the problem by eliminating, or substantially revamping, the antiquated system of notice pleading, the Advisory Committee chose to try to marry disclosure and notice pleading. We believe that this marriage will fail due to the uncertainty over whether facts are "disputed" or are alleged with "particularity." It is disheartening to note that the motivation for the Advisory Committee's approach to the notice pleading problem, according to the report accompanying the proposals to the Standing Committee, apparently is more a matter of expediency than substance: "While these suggestions [to reconsider the notice pleading system and the scope of discovery] may have merit, they could not . . . be effected incident to the present publication notice and are ones that should be given careful study and consideration in the future." Letter of Honorable Sam C. Pointer, Jr. to Honorable Robert E. Keeton (May 1, 1992), Attachment B, p. 3.

however, they will have to bear the added expense of examining and analyzing it.

4. Premature, Unproven Proposal. At present, there exists essentially no empirical evidence to support a conclusion that the Advisory Committee's proposal would work. Experimentation with various forms of disclosure is now taking place under the Civil Justice Reform Act ("CJRA"). This experimentation will provide an excellent opportunity for the Advisory Committee to make a proper evaluation of disclosure variations. To add to the civil litigation process a new procedure of nationwide application which is fraught with potential for harm without first testing that procedure on a limited and controlled basis is both unwise and unnecessary.

5. Unfair Effect. In many types of cases -- antitrust, civil rights, commercial and government contracts, environmental, ERISA, labor, patents, product liability, RICO, securities, and any other kind of case involving factual or legal complexity -- the proposal will treat defendants unfairly because the plaintiffs will have had an extensive period to prepare for disclosure and defendants will have had a maximum of 86 days, and in most instances from 45 to 50 days, to locate, review, analyze, and disclose.

We recognize fully that the Advisory Committee's early automatic disclosure proposal is well-intentioned and reflects considerable effort by the Committee. Nevertheless, in our view, the proposal will harm rather than improve the civil litigation process.

We suggest that the Standing Committee return the proposal to the Advisory Committee for further consideration. The Advisory Committee's further consideration, at a minimum, should include:

(1) the gathering and assessment of hard data about how disclosure variations are working under the CJRA process;

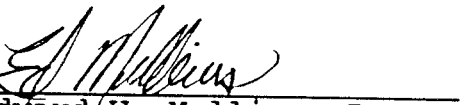
(2) the solicitation of the opinion a broader spectrum of federal district judges regarding the advisability of disclosure; and

(3) the implementation of an additional public comment process to allow all segments of the legal community to provide specific views on the revised disclosure process reflected in the May 1991 Advisory Committee proposals, as well as assessment of the possibility of major revisions to the system of notice pleading and to the standard for discovery.

We stand ready to work further with the Advisory Committee to improve the civil litigation process. Thank you for considering our views.

Respectfully yours,

ASSOCIATION OF DEFENSE TRIAL ATTORNEYS
DEFENSE RESEARCH INSTITUTE
FEDERATION OF INSURANCE & CORPORATE COUNSEL
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
LAWYERS FOR CIVIL JUSTICE

by: 

Edward W. Mullins, Jr.
President, Lawyers for Civil Justice

cc: Members of the Standing Committee
Members of the Advisory Committee
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June 16, 1992

By Overnight Mail

Honorable Robert E. Keeton
United States District Judge
Room 306, John W. McCormack
Post Office & Courthouse
Boston, Massachusetts 02109

Re: Proposed Changes to Federal Rules

Dear Judge Keeton:

I am writing on behalf of Trial Lawyers for Public Justice ("TLPJ") and The TLPJ Foundation to express our strong opposition to several of the proposed changes to the Federal Rules of Civil Procedure and Evidence. We believe that these changes will make it far more difficult for individual plaintiffs and public interest groups to prosecute and win cases in the federal courts.

TLPJ is a national public interest law firm that specializes in precedent-setting and socially significant tort and trial litigation. The TLPJ Foundation is a non-profit charitable and educational membership organization that supports TLPJ's activities and educates the public about the critical social issues in which TLPJ is involved. It currently has over 1,200 members, primarily plaintiffs' trial lawyers and law firms.

As advocates for individuals who find themselves victimized in this country, as well as public interest groups representing those victims' interests, we are deeply concerned that the proposed changes to the Federal Rules of Civil Procedure and the Federal Rules of Evidence will operate to grossly disadvantage such individuals and groups. While we trust that these changes were intended to be even-handed and to further "the just, speedy, and inexpensive" determinations of disputes, their practical effect will be extremely one-sided. Simply put, the major changes will severely limit the ability of individual plaintiffs and public interest groups to litigate effectively in the federal courts.

TLPJ and The TLPJ Foundation submitted detailed comments opposing the key rule changes to the Advisory Committee on February 14, 1992. Some of these comments are no longer applicable because of changes that were made subsequently by the Advisory Committee. The intent of this letter is to summarize the major dangers of the most recent version of the proposed changes.

1. The Proposed Amendments to Rule 11

According to reported studies, 75% of the sanctions imposed under the current Rule 11 are imposed against plaintiffs, especially civil rights plaintiffs. This disproportionate impact is attributable, at least in part, to the vague standard established by Rule 11 and the fact that plaintiffs' lawyers, who get paid a contingency fee, have little incentive to sidetrack the case by seeking sanctions, while defendants' counsel, who get paid by the hour and are trying to avoid their client's day of reckoning, have a strong incentive to follow such a course.

Given the reality of Rule 11 practice, there is a clear need to decrease the circumstances in which sanctions can be sought and to clarify the standard that must be met before sanctions can be imposed. The proposed amendments, however, take precisely the opposite approach. They vastly expand the circumstances under which sanctions can be sought and create even greater confusion about the legal standard to be applied.

As we suggested in our February Comments, if Rule 11 is going to be retained, we endorse the Bench-Bar Proposal. See Bench-Bar Proposal to Revise Civil Procedure Rule 11, 137 F.R.D. 159, 162 (1991). In our view, the Bench Bar proposal would improve Rule 11. The Advisory Committee's changes would make it worse.

2. The Proposed Amendments to the "Discovery Rules"

Equally problematic are the proposed revisions to Rules 26, 30, 31 and 33 ("the discovery rules"), which seek to radically change existing practices by establishing new, automatic disclosure requirements and placing narrow limits on how much information parties can request. While automatic disclosure is appealing in theory, the proposed revisions fundamentally conflict with the "notice pleading" requirements of the federal rules. Moreover, the numerical limits on discovery unnecessarily hamstring the parties and eliminate the one ingredient essential to making any automatic disclosure process work: the realistic likelihood that the relevant information (and improper failures to disclose it) will be discovered if it is not voluntarily disclosed.

The Committee initially proposed automatic disclosure of information which was "likely to bear significantly" on a claim or defense. TLPJ opposed this proposed standard because it ignored that "notice pleading" is still the basis of the federal rules and because it unrealistically expected each party to fairly evaluate what was "likely to bear significantly" on its adversary's case. The revised proposal for automatic disclosure employs a new standard: parties will be required to disclose all that is "relevant to disputed facts alleged with particularity in the pleadings". Respectfully, the Committee has taken a bad proposal and made it worse.

The revised amendments suffer from two major problems. First, the proposed changes still fail to take into account the fundamental reality of the discovery process: plaintiffs lack information and need it, while defendants have information and do not want to give it up. Second, the revised standard for automatic disclosure makes it even more difficult for disclosure to take place in conjunction with notice pleading.

As the Comments accompanying the newest proposal acknowledge, defendants faced with "notice pleading" complaints that do not go into detail need not provide plaintiffs with any specific information. See Comments accompanying Proposed Rule 26, at 66. Given plaintiffs' limited access to information at the start of the case, however, plaintiffs often cannot provide detail in their complaint until they conduct discovery. This "Catch-22" in the operation of the proposed automatic disclosure provision is exacerbated by the proposed limitations on permissive discovery. Twenty-five interrogatories and ten depositions are simply not enough to enable plaintiffs to both flesh out their claims and force production of all relevant information.

Ironically, the Committee justifies the severe limits on permissive discovery by asserting that extensive permissive discovery is unnecessary in light of the new automatic disclosure provisions. In fact, as we argued in our Comments, the key to successful automatic disclosure is to leave unchanged the existing rights to conduct permissive discovery. Given the reluctance of parties to voluntarily share information, automatic disclosure has the best chance of working when parties are convinced that they will ultimately be forced to disclose the information anyway. The Committee has ignored this reality and set up a situation where plaintiffs clearly will not have sufficient tools to probe disclosures and force production.

While we realize that the presumptive limits on discovery can, in theory, be overcome by filing a motion with the district court judge, the reality is that trial lawyers throughout the federal courts are already encountering serious problems getting discovery motions heard. It is unreasonable and unfair to force plaintiffs to attempt to overcome this additional hurdle in order to obtain basic information. The changes to the discovery rules, as a whole, will make it far less likely that plaintiffs will be able to discover and utilize

information in their opponents' possession that is critical to the successful prosecution of their claims.

3. The Proposed Limitations On Expert Testimony

The proposed amendments to Federal Rule of Civil Procedure 16(c)(4) and Federal Rule of Evidence 702 will have an extremely adverse impact on the ability of individual plaintiffs and public interest groups to utilize and introduce expert testimony and, ultimately, to win meritorious cases. Whatever their intended purpose, their effect is to provide extraordinary assistance to defendants, particularly in toxic tort cases.

The proposed change to Rule 16(c)(4) will permit judges at pretrial conferences to limit or restrict the use of expert testimony, beyond what is permitted by the Federal Rules of Evidence, if the court considers the testimony "unduly expensive". Oddly, the Committee's proposal would apply a "cost" limitation on the only area in which plaintiffs, who carry the burden of proof, regularly expend their relatively meager resources: the presentation of expert testimony. The proposed change unfairly interferes with a plaintiff's right to make decisions about the best way to present his or her case.

The proposed changes to Federal Rule of Evidence 702, which would require judges to assess in advance of trial whether proffered testimony is "reasonably reliable" and would "substantially assist" the jury, also harm plaintiffs much more harshly than defendants. While the Comments claim otherwise, the proposed changes essentially take the side of corporate defendants and other "tort reform" proponents in the so-called "junk science" debate. The Committee's action is premature and ill-conceived.

As the Comments acknowledge, the "junk science" debate is far from settled. Preliminary reports from a survey of federal district court judges indicate that a significant number of judges oppose the changes proposed by the Committee. See J. Cecil and Molly Treadway Johnson, Problems of Expert Testimony in Civil Trials: Preliminary Findings (March 31, 1992). It is simply too soon for the Committee to choose sides on this issue.

Whatever position one takes on the "junk science" debate, however, the proposal to make judges assess the reliability and value of expert testimony prior to trial is plainly not very well thought out. Deciding whether testimony is "reasonably reliable" and of "substantial assistance" will necessarily involve evaluating the credibility and persuasiveness of the testimony. These tasks unquestionably depart from our traditional reliance on the jury to resolve factual questions, raising serious questions about the constitutional validity of the proposed changes. See, e.g., Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 345-46, 348-49 (1978) (to limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment)(J. Rehnquist dissenting). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Tennant v. Peoria & Peking Union Ry., 321 U.S. 29, 35 (1944).

Moreover, the Committee's decision to propose these changes ignores that our current system provides numerous protections against "junk science", including the right of the parties to conduct complete cross-examinations and the power of the courts to appoint independent experts. In light of the existing checks on expert testimony, we see no reason to wrest fact-finding responsibilities from the jury and hand them to a judge who, in most instances, has little or no scientific training.

The proposed changes to Rule 702 also threaten the ability of our legal system to keep pace with new scientific developments. The implied preference for viewpoints that have widespread support in the scientific community ignores that history is replete with examples of major scientific breakthroughs that initially suffered ridicule at the hands of the mainstream scientific community. The proposed changes would not only permit judges to suppress valid expert testimony on an immaterial basis, they also threaten to freeze the search for truth in areas where new scientific theories are emerging.

Finally, the Committee's effective adoption of the "tort reform" advocates' position disregards the extraordinary difficulties that individual and public interest plaintiffs currently experience in attempting to meet their burden of proof in toxic tort cases. In our view, if the rules are to be changed, they should be altered to make that burden easier to meet. The proposed amendments, however, will make that burden even harder to meet by preventing "cutting-edge" scientists from testifying.

4. The Proposed Amendments to Rule 56

The proposed changes to Rule 56 will harm individual and public interest plaintiffs by making it even easier for defendants to eliminate jury trials by unnaturally parsing out "claims", questions of law, and even paragraphs of the complaint. Because of these changes, motions for summary adjudication of each claim, defense, fact, application of law, etc., will vastly multiply the number of motions based on testimony, documents, and affidavits and will increase incredibly the motion workload of the federal courts.

The proposed amendments would also permit the summary disposition of one party's claims or defenses on the basis of another party's pleadings. This proposal clearly places a higher priority on disposing cases than on doing justice. The fact that one party does not believe that a fact is in dispute should not preclude another party from having the opportunity to present evidence that there truly is a genuine issue.

Furthermore, the proposed change in section (f) to require a party opposing a motion for summary adjudication to demonstrate "good cause" for its inability to present evidentiary support for its opposition is a source of great concern. Although the Comments do not explain this change, the requirement of "good cause" is presumably more stringent than the current requirement, which allows consideration of summary judgment motions to be postponed if a party can show relevant information has not yet been obtained or presented "for reasons stated". We are at a loss to understand why the Committee perceives a need to make this standard more stringent. Given the finality of a summary judgment determination, a party should be given every opportunity to present its best arguments before the motion is decided. The more stringent "good cause" standard will work as a hammer to destroy unfairly a party's claim or defense.

Because the proposed changes to the discovery rules make it more difficult for plaintiffs to obtain the information that they need, the hammer will fall especially hard on plaintiffs. By making it harder for plaintiffs to defend against motions for summary judgment, the proposed changes present yet another way for defendants to avoid accountability.

5. The Proposed Amendments to Rule 54

The vast majority of requests for attorneys' fees are filed on behalf of plaintiffs and public interest litigants. Moreover, many public interest plaintiffs and their counsel rely primarily on fee awards to fund their activities, including their other litigation. Any increased burdens in seeking such fees will therefore fall heavily on plaintiffs, public interest litigants, and their lawyers.

Two aspects of proposed Rule 54 will increase the burdens on these groups by fostering expensive and protracted litigation over attorneys' fee awards. First, proposed Rule 54(d)(2)(B) requires fee requests to be filed within 14 days after entry of judgment. Since this is far too short a time for meaningful settlement discussions, every fee applicant will have to bear the expense of beginning litigation over fees, whether or not such litigation would actually be necessary. Second, proposed Rule 54(d)(2)(D) allows, and presumably encourages, judges to refer fee disputes to magistrates, thereby generating an additional round of litigation if the parties appeal the magistrate's decision to the district judge.

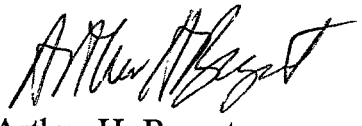
6. The Proposed Amendments to Rule 83

Numerous individual plaintiffs, public interest litigants, and their lawyers, including TLPJ and many TLPJ Foundation members, benefit from the conduct of coordinated nationwide litigation, with similar cases raising related issues in many different district courts. Proposed Rule 83 encourages the proliferation of confusing and inconsistent local rules, increasing the expense and difficulty of prosecuting similar cases in different district courts.

* * *

We are submitting these comments to explain the disastrous consequences that the proposed changes will have on individual plaintiffs, public interest litigants, and the federal judicial process. We sincerely hope and expect that, if these consequences are understood, the proposed changes discussed above will be improved or withdrawn. We urge the Standing Committee to withdraw these proposed changes or send them back to the Advisory Committee for further hearings and re-drafting. Thank you very much.

Respectfully submitted,



Arthur H. Bryant

cc: Honorable Robert E. Keeton (by hand, Judicial Conference)
Honorable Dolores K. Sloviter
Honorable George C. Pratt
Honorable Frank H. Easterbrook
Honorable William O. Bertelsman
Honorable Thomas S. Ellis, III
Honorable Alicemarie H. Stotler
Honorable Edwin J. Peterson

Professor Charles Alan Wright
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Alan W. Perry, Esquire
Honorable George J. Terwilliger, III
Daniel R. Coquillette
Honorable Wilfred Feinberg
Mary P. Squiers
Bryan A. Garner
Joseph F. Spaniol, Jr.

RULE 26.

(g) Scope of Rule. This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified:

(1) in Rule 32 (f) at sentencing;

(2) in Rule 32.1 (c) at a hearing to revoke or modify probation or supervised release;

(3) in Rule 46 (i) at a detention hearing; and

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