COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

File Copy

Santa Barbara, California
January 8-9, 1998

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 8-9, 1998

1. Opening Remarks of the Chair — Report on Actions Taken by the Judicial Conference at its September 1997 session

   - Standing Committee Report to the Judicial Conference
   - Response to Executive Committee's request for comment on draft document compiling policies governing Judicial Conference committees' practices
   - Federal Courts Improvement Act
   - Announcement of orientation lunch and afternoon panel

2. **ACTION** — Approval of Minutes

3. Report of the Administrative Office

   A. Pending legislation affecting rules

   B. Administrative actions

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

   - Proposals on uniform plan for opinion publication, minutes, and other informational items under committee consideration

6. Report of the Advisory Committee on Bankruptcy Rules

   - Minutes and other informational items

7. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Proposed amendments to Admiralty Rules B, C, and E, and Rule 16 for "expedited" public comment

   B. Status of work on proposed amendments to Rule 23, "mass torts," discovery reform, other informational items, and minutes

8. **ACTION** — Proposed Rules Governing Attorney Conduct

9. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** — Recommend that the Standing Committee oppose pending legislation reducing grand jury size

   B. Report on positions concerning pending legislation, minutes, and other informational items

10. Report of the Advisory Committee on Evidence Rules

   A. **ACTION** — Proposed amendments to Rules 103(e), 404(a), 803(6), and 902 for public comment

   B. Editorial comment on "inaccurate historical" Advisory Committee Notes

   C. Minutes and other informational items

11. Report on Status of Local Rules, Uniform Numbering, and CJRA Sunset (Oral Report)

12. Report of the Style Subcommittee (Oral Report)

13. Report of the Technology Subcommittee

14. Bibliography of Rules-Related Articles

15. Committee Meeting on June 18-19, 1998, and Scheduling of December 1998 or January 1999 Meeting

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December 2, 1997
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Item 1

Agenda F-18 (Summary)
Rules
September 1997

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 1-48 and to Form 4 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-9

2. Approve the proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B ..... pp. 9-12

3. Promulgate the proposed revisions to the Official Bankruptcy Forms to take effect immediately, but permit the superseded forms to also be used until March 1, 1998 ..... pp. 12

4. Approve the proposed new Civil Rule 23(f) and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 16-20

5. Approve the proposed amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 21-23

6. Approve the proposed amendment to Evidence Rule 615 and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 26-27

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

- Study of rules governing attorney conduct ..... pp. 28
- Status report on uniform numbering systems for local rules of court ..... pp. 28-29
- Meeting of long-range planning liaisons ..... pp. 28
- Local rules and Official Bankruptcy Forms on Internet ..... pp. 30
- Report to the Chief Justice on proposed select new rules or rules amendments generating controversy ..... pp. 30
- Status of proposed rules amendments ..... pp. 30

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on June 19-20, 1997. All the members attended the meeting, except Alan C. Sundberg. Acting Deputy Attorney General Seth P. Waxman attended on June 19. The Department of Justice was represented on June 20 by Ian H. Gershengorn and Roger A. Pauley.

Representing the advisory committees were: Judge James K. Logan, chair, and Professor Carol Ann Mooney, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules. Judge Fern M. Smith, chair of the Evidence Rules Committee, was unable to be present.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro,

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attorney, of the Administrative Office's Rules Committee Support Office; Patricia S. Channon of the Bankruptcy Judges Division; James B. Eaglin of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules completed its style revision project to clarify and simplify the language of the appellate rules. It submitted revisions of all forty-eight Rules of Appellate Procedure and a revision of Form 4 (no changes were made in Forms 1, 2, 3, and 5), together with Committee Notes explaining their purpose and intent. The comprehensive style revision was published for public comment in April 1996 with an extended comment period expiring December 31, 1996. Public hearings were scheduled but canceled, because no witness requested to testify.

The style revision has taken up most of the advisory committee's work during the past four years. The style changes were designed to be nonsubstantive, except with respect to those rules outlined below, which were under study when the style project commenced. A few additional substantive changes have been made necessary by legislative enactments or other recent developments. Almost all comments received from the bench, bar, and law professors teaching procedure and legal writing were quite favorable to the restyled rules. Only one negative comment was received—that to the effect "why change a system that has worked?"

The advisory committee recommended, and the Standing Rules Committee agreed, that the submission to the Judicial Conference and its recommendation for submission to the Supreme Court, if the changes are approved, should be in a different format from the usual

submission. Instead of striking through language being eliminated and underlining proposed new language, the changes made by the restylization project can best be perceived by a side-by-side comparison of the existing rule (in the left-hand column) with the proposed rule (in the right-hand column). Commentary on changes that could be considered more than stylistic—generally resolving inherent ambiguities—are discussed in the Committee Notes. A major component of the restylization has been to reformat the rules with appropriate indentations. Your Committee concurs with the recommendation of the advisory committee that the physical layout of the rules should be an integral part of any official version—and of any published version that is intended to reflect the official version.

In connection with the restylization project, the advisory committee and the Standing Rules Committee bring to the attention of the Judicial Conference two changes in the restyled rules—the use of "en banc" instead of "in banc" and the use of "must" in place of "shall." Although 28 U.S.C. § 46 has used "in banc" since 1948, a later law, Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1633, used "en banc" when authorizing a court of appeals having more than fifteen active judges to perform its "en banc" functions with some subset of the court's members. Also the Supreme Court uses "en banc" in its own rules. *See* S. Ct. R. 13.3. The "en banc" spelling is overwhelmingly favored by courts, as demonstrated by a computer search conducted in 1996 that found that more than 40,000 circuit cases have used the term "en banc" and just under 5,000 cases (11%) have used the term "in banc." When the search was confined to cases decided after 1990, the pattern remained the same—12,600 cases using "en banc" compared to 1,600 (11%) using "in banc." The advisory committee decided to follow the most commonly used "en banc" spelling. This is a matter of choice, of course, but both committees recommend the more prevalent use to the Judicial Conference.

The advisory committee adopted the use of "must" to mean "is required to" instead of using the traditional "shall." This is in accord with Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* § 4.2 at 29 (1996). The advisory committee is aware that the Supreme Court changed the word "must" to "shall" in some of the amendments of individual rules previously submitted to the Court. In doing so, the Supreme Court indicated a desire not to have inconsistent usages in the rules, and concluded "that terminology changes in the Federal Rules be implemented in a thoroughgoing, rather than piecemeal, way." The instant submission is a comprehensive revision of all the appellate rules. Because of the potentially different constructions of "shall," *see* Garner, *A Dictionary of Modern Legal Usage* 939-42 (2d ed. 1995), the advisory committee eliminated all uses of "shall" in favor of "must" when "is required to" is meant. Both the advisory committee and the Standing Rules Committee recognized room for differences of opinion and do not want the restylization work rejected due to the use of this word.

Included in this submission are some rules that have substantive amendments, all of which have been published for public comment at least once except the proposed abrogation of Rule 3.1 and the proposed amendments to Rule 22. Both of the latter changes are responsive to recent legislation. The changes to Rules 26.1, 29, 35, and 41 were approved for circulation to the bench and bar for comment in September 1995. They were resubmitted for public comment in April 1996 as a part of the comprehensive style revision. After considering suggestions received during these two comment periods, they were approved with minor changes along with the restylized version of the rules. Revised Rules 27, 28, and 32 were approved for circulation for public comment in April 1996 along with the restylized rules—with special notations to the bench and bar that these three rules underwent substantive changes. Rules 5, 5.1 (the latter of which is proposed to be abrogated), and Form 4 were sent out for comment separately, after the

restylization package. Rules 5 and 5.1 were revised because of recent legislative changes and a proposed new Fed. R. Civ. P. 23(f); Form 4 was revised because of recent legislative changes and a request by the Supreme Court Clerk for a more comprehensive form. The substantive changes are summarized below, rule-by-rule in numerical order.

Rule 3.1 (Appeal from a Judgment of a Magistrate Judge in a Civil Case) would be abrogated under the proposed revision because it is no longer needed. The primary purpose for the existence of Rule 3.1 was to govern an appeal to the court of appeals following an appeal to the district court from a magistrate judge's decision. The Federal Courts Improvement Act of 1996, Pub. L. 104-317, repealed paragraphs (4) and (5) of 28 U.S.C. § 636(c) and eliminated the option to appeal to the district court. An appeal from a judgment by a magistrate judge now lies directly to the court of appeals.

The proposed consolidation of Rule 5 (Appeal by Permission Under 28 U.S.C. § 1292(b)) and Rule 5.1 (Appeal by Permission Under 28 U.S.C. § 636(c)(5)) would govern all discretionary appeals from a district or magistrate judge order, judgment, or decree. In 1992, Congress added subsection (e) to 28 U.S.C. § 1292 giving the Supreme Court power to prescribe rules that "provide for an appeal of an interlocutory decision to the Court of Appeals that is not otherwise provided for" in § 1292. The advisory committee believed the amendment of Rule 5 was desirable because of the possibility of new statutes or rules authorizing discretionary interlocutory appeals, and the desirability of having one rule that governs all such appeals. One possible new application appears contemporaneously in the proposed new Fed. R. Civ. P. 23(f) to allow the interlocutory appeal of a class certification order. Present Rule 5.1 applies only to appeals by leave from a district court's judgment entered after an appeal to the district court from

a magistrate judge's decision. The Federal Courts Improvement Act of 1996 abolished all appeals by permission that were covered by this rule, making Rule 5.1 obsolete.

The proposed amendments to Rule 22 (Habeas Corpus and Section 2255 Proceedings) conform to recent legislation. First, the rule is made applicable to 28 U.S.C. § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. Second, the amended rule states that a certificate of appealability may be issued by a "circuit justice or a circuit or district judge." Amended § 2253 requires a certificate of appealability issued by a "circuit justice or judge" in order to bring an appeal from denial of an application for the writ. The proposed amendment removes the ambiguity created by the statute and is consistent with the decisions in all circuits that have addressed the issue.

The proposed amendment of Rule 26.1 (Corporate Disclosure Statement) would eliminate the requirement that corporate subsidiaries and affiliates be listed in a corporate disclosure statement. Instead, the rule requires that a corporate party disclose all of its parent corporations and any publicly held company owning ten percent or more of its stock. The changes eliminate the ambiguity inherent in the word "affiliates" and identify all of those entities which might possibly result in a judge's recusal. The revised rule was submitted to the Committee on Codes of Conduct, which found it to be satisfactory in its revised form.

The proposed amendment of Rule 27 (Motions) would treat comprehensively, for the first time, motion practice in the courts of appeals. The rule is entirely rewritten to provide that any legal argument necessary to support a motion must be contained in the motion itself, not in a separate brief. It expands the time for responding to a motion from seven to ten days and permits a reply to a response—without prohibiting the court from shortening the time requirements or

deciding a motion before receiving a reply. It establishes length limitations for motions and responses, and states that a motion will be decided without oral argument unless the court orders otherwise.

The proposed amendment of Rule 28 (Briefs) is necessary to conform it to the proposed amendments to Rule 32. Page limitations for a brief are deleted from Rule 28(g), because they are treated in Rule 32.

Rule 29 (Brief of an Amicus Curiae) would be amended to establish limitations on the length of an amicus curiae brief. It adds the District of Columbia to those governments that may file without consent of the parties or leave of court. The amended rule generally makes the form and timing requirements more specific, and states that the amicus curiae may participate in oral argument only with the court's permission.

Rule 32 (Form of Briefs, Appendices, and Other Papers) would be rewritten comprehensively with a principal aim of curbing cheating on the traditional fifty-page limitation on the length of a principal brief. New computer software programs make it possible to use type styles and sizes, proportional spacing, and sometimes footnotes, to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief and are difficult for judges to read. The rule was amended in several significant ways. A brief may be on "light" paper, not just "white," making it acceptable to file a brief on recycled paper. Provisions for pamphlet-sized briefs and carbon copies have been deleted because of their very infrequent use. The amended rule permits use of either monospaced or proportional typeface. It establishes length limitations of 14,000 words or 1,300 lines of monospaced typeface (which equates roughly to the traditional fifty pages) and requires a certificate of compliance unless the brief utilizes the "safe harbor" limits of thirty pages for a principal brief and fifteen

pages for a reply brief. Requirements are included for double spacing and margins; type faces are to be fourteen-point or larger type if proportionally spaced and limited to 10½ characters per inch if monospaced. Treatment of the appendix is in its own subdivision. A brief that complies with the national rule must be accepted by every court; local rules may not impose form requirements that are not in the national rule. Local rules may, however, move in the other direction; they can authorize noncompliance with certain of the national norms. Thus, for example, a particular court may choose to accept pamphlet briefs or briefs with smaller typeface than those set forth in the national rules.

Rule 35 (En Banc Determination) would be amended to treat a request for rehearing en banc like a petition for panel rehearing, so that a request for rehearing en banc will suspend the finality of the district court's judgment and extend the period for filing a petition for a writ of certiorari. Therefore, a "request" for rehearing en banc is changed to a "petition" for rehearing en banc. The amendments also require each petition for en banc consideration to begin with a statement demonstrating that the cause meets the criteria for en banc consideration. An intercircuit conflict is cited as an example of a proceeding that might involve a question of "exceptional importance"—one of the traditional criteria for granting an en banc hearing.

Rule 41 (Mandate; Contents; Issuance and Effective Date; Stay) would be amended to provide that filing of a petition for rehearing en banc or a motion for stay of mandate pending petition to the Supreme Court for a writ of certiorari both delay the issuance of the mandate until disposition of the petition or motion. The amended rule also makes it clear that a mandate is effective when issued. The presumptive period of a stay of mandate pending petition for a writ of certiorari is extended to ninety days, to accord with the Supreme Court's time period.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis) would be substantially revised. The Clerk of the Supreme Court asked the advisory committee to devise a new, more comprehensive form of affidavit in support of an application to proceed in forma pauperis. A single form is used by both the Supreme Court and the courts of appeals. In addition, the Prison Litigation Reform Act of 1996 prescribed new requirements governing in forma pauperis proceedings by prisoners, including requiring submission of an affidavit that includes a statement of all assets the prisoner possesses. Form 4 was amended to require a great deal more information than specified in the current form, including all the information required by the recent enactment.

The Standing Rules Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your Committee, are in Appendix A with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 1-48 and to Form 4 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Bankruptcy Forms Submitted for Approval

The Advisory Committee on Bankruptcy Rules submitted proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B. The proposed revisions mainly clarify or simplify existing forms. Several of the most heavily used forms were redesigned by a graphics expert, and instructions contained in forms often used by petitioners in bankruptcy or creditors were rewritten using plain English.

Official Form 1 (Voluntary Petition) would be amended to simplify the form and make it easier to complete. In particular, the amendments reduce the amount of information requested, add new statistical ranges for reporting assets and liabilities, and delete the request for information regarding the filing of a plan.

Official Form 3 (Application and Order to Pay Filing Fee in Installments) would be amended to include an acknowledgment by the debtor that the case may be dismissed if the debtor fails to pay a filing fee installment. It would also clarify that a debtor is not disqualified under Rule 1006 from paying the fee in installments solely because the debtor paid a bankruptcy petition preparer.

Official Form 6 (Schedule F) would be amended by adding to the schedule (which lists creditors holding an unsecured nonpriority claim) a reference to community liability for claims.

Official Form 8 (Chapter 7 Individual Debtor's Statement of Intention) would be amended to make it more consistent with the language of the Bankruptcy Code. Language would also be deleted from the present form that may imply that a debtor is limited to options contained on the form.

Official Form 9 (Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors and Fixing of Dates) includes eleven alternatives. Each form is designed for a particular type of debtor (individual, partnership, or corporation), the particular chapter of the Bankruptcy Code in which the case is pending, and the nature of the estate (asset or no asset). The forms are used in virtually all bankruptcy cases.

Form 9 and its Alternatives would be expanded to two pages to make them easier to read, and the explanatory material is rewritten in plain English. Several clerks of court expressed concern that the existing forms' instructions were difficult to understand, which resulted in many

questions from the public that consumed considerable staff resources. The advisory committee agreed that the existing instructions were inadequate. At the same time, it recognized that there would be added printing expense incurred in expanding the instructions. The advisory committee believed that better instructions were essential, and the savings realized from the expected reduction in calls to the clerks' offices asking for assistance probably would offset some of the added printing expenses. In addition, the advisory committee noted that the $30 administrative fee assessed against a debtor filing a chapter 7 or chapter 13 bankruptcy case was intended to pay for the cost of noticing. The fee would easily cover the added expense in expanding the form to two pages. On balance, the advisory committee concluded that the benefits to the public substantially outweighed the added expense.

Official Form 10 (Proof of Claim) would be amended to provide instructions and definitions for completing the form. The form also is reformatted to eliminate redundancies in the information request. Creditors are advised not to submit original documents in support of the claim.

Official Form 14 (Ballot for Accepting or Rejecting the Plan) would be amended to simplify its format and make it easier to complete.

Official Form 17 (Notice of Appeal from a Judgment, Order, or Decree of a Bankruptcy Court) would be amended to direct the appellant to provide the addresses and telephone numbers of the attorneys for all parties to the judgment, order, or decree appealed from, as required by Bankruptcy Rule 8001(a). It also informs other parties—in addition to the appellant—that they may elect to have the appeal heard by the district court, rather than by a bankruptcy appellate panel.

Official Form 18 (Discharge of Debtor) would be amended to simplify the form and clarify the effects of a discharge. A comprehensive explanation, in plain English, is added to the back of the form to assist both debtors and creditors to understand bankruptcy discharge.

Official Form 20A (Notice of Motion or Objection) and Form 20B (Notice of Objection to Claim) would be added to provide uniform, simplified explanations on how to respond to motions and/or objections that are frequently filed in a bankruptcy case.

The proposed revisions and additions to the Official Bankruptcy Forms, as recommended by your Committee, are in Appendix B together with an excerpt from the advisory committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B.

Most debtors and creditors participating in bankruptcy rely on the private sector for copies of the Official Forms. There is usually a significant lag time between the promulgation of a form revision and the date when the private sector publishes the revised new forms. In addition, some of the amended forms are notices and orders generated by the courts' automated systems and the Bankruptcy Noticing Center. Court staff and the Noticing Center will need adequate time to implement the revisions to the forms. The advisory committee recommended that a reasonable transition of about five months be authorized during which continued use of superseded forms would be permitted.

> **Recommendation:** That the Judicial Conference promulgate the proposed revisions to the Official Bankruptcy Forms to take effect immediately, but permit the superseded forms to also be used until March 1, 1998.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted to your Committee proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 and recommended that they be published for public comment.

The proposed amendments to Rule 1017 (Dismissal or Conversion of Case; Suspension) would specify the parties who are entitled to a notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of creditors, schedules, or statement of financial affairs. Instead of sending a notice of a hearing in a chapter 7 case to all creditors, as presently required, the notice would only be sent to the debtor, the trustee, and any other person or entity specified by the court.

The proposed amendments to Rule 1019 (Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case) would: (1) clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time specified in the rule expires; (2) provide that the holder of a postpetition, preconversion administrative expense claim is required to file within a specified time period a request for payment under § 503(a) of the Code, rather than a proof of claim under § 501 of the Code or Rules 3001(a)-(d) and 3002; and (3) conform the rule to the 1994 amendments to § 502(b)(9) of the Code and to the 1996 amendments to Rule 3002(c)(1) regarding the 180-day period for filing a claim by a governmental unit.

Rule 2002(a)(4) (Notices to Creditors, Equity Security Holders, United States, and United States Trustee) would be amended to delete the requirement that notice of a hearing on dismissal

of a chapter 7 case based on the debtor's failure to file required lists, schedules, or statements must be sent to all creditors. The amendment conforms with the proposed amendment to Rule 1017, which requires that the notice be sent only to certain parties.

The proposed amendments to Rule 2003 (Meeting of Creditors or Equity Security Holders) would require the United States to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. The amendment gives a party in interest ten days from the filing of the report—rather than from the date of the meeting of creditors—to file a motion to resolve the dispute.

The proposed amendments to Rule 3020(e) (Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case) would automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

Rule 3021 (Distribution under Plan) would be amended to conform to the amendments to Rule 3020 regarding the 10-day stay of an order confirming a plan in a chapter 9 or chapter 11 case.

A new subdivision (a)(3) would be added to Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements) that would automatically stay for ten days an order granting relief from an automatic stay so that parties will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 4004(a) (Grant or Denial of Discharge) would clarify that the deadline for filing a complaint objecting to discharge under § 727(a) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for

filing a complaint objecting to a discharge must be filed before the time specified in the rule has expired.

Rule 4007 (Determination of Dischargeability of a Debt) would be amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The rule is also amended to clarify that a motion for an extension of time for filing a complaint must be filed before the time specified in the rule has expired.

Rule 6004(g) (Use, Sale, or Lease of Property) is added to automatically stay for ten days an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

A new subdivision (d) would be added to Rule 6006 (Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases) that would automatically stay for ten days an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) of the Code so that a party will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 7001 (Scope of Rules of Part VII) would recognize that an adversary proceeding is not necessary to obtain injunctive relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan.

The proposed amendments to Rule 7004(e) (Process; Service of Summons, Complaint) would provide that the 10-day time limit for service of a summons does not apply if the summons is served in a foreign country.

The proposed amendments to Rule 7062 (Stay of Proceedings to Enforce a Judgment) would delete the references to the additional exceptions to Rule 62(a) of the Federal Rules of Civil Procedure. The deletion of these exceptions, which are orders in a contested matter rather

than in an adversary proceeding, is consistent with amendments to Rule 9014 that render Rule 7062 inapplicable to a contested matter.

Rule 9006(c)(2) (Time) would be amended to prohibit the reduction of time fixed under Rule 1019(6) for filing a request for payment of an administrative expense incurred after the commencement of a case and before conversion of the case under chapter 7.

Rule 9014 (Contested Matters) would be amended to delete the reference to Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

The Committee voted to circulate the proposed amendments to the bench and bar for comment.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 23(c)(1) and Rule 23(f) on class actions, together with Committee Notes explaining their purpose and intent. The proposed amendments were part of a larger package of proposed revisions to Rule 23 circulated to the bench and bar for comment in August 1996. Public hearings on the proposed amendments were held in Philadelphia, Dallas, and San Francisco. The Standing Rules Committee approved new subdivision (f), but recommitted the proposed amendments to (c)(1) to the advisory committee.

The advisory committee's work on these proposed amendments began in 1991, when it was asked by the Judicial Conference to act on the recommendation of the Ad Hoc Committee on Asbestos Litigation to study whether Rule 23 should be amended to facilitate mass tort litigation. To understand the full scope and depth of the problems, the advisory committee sponsored or participated in a series of major conferences at the University of Pennsylvania, New York

University, Southern Methodist University, and the University of Alabama, as well as studied the issues at regularly scheduled meetings elsewhere. During these conferences, the advisory committee heard from experienced practitioners, judges, academics, and others. To shore up the minimal empirical data on current class action practices, the Federal Judicial Center, at the request of the advisory committee, completed a study of the use of class actions terminated within a two-year period in four large districts.

In the course of its six-year study, the advisory committee considered a wide array of procedural changes, including proposals to consolidate (b)(1), (b)(2), and (b)(3) class actions, to add opt-in and opt-out flexibility, to enhance notice, to define the fiduciary responsibility of class representativeness and counsel, and to regulate attorney fees. In the end, with the intent of stepping cautiously, the committee opted for what it believed were five modest changes which were published for comment in August 1996.

During the six-month commentary period, the advisory committee received hundreds of pages of written comments and testimony from some 90 witnesses at the public hearings. Comments and testimony were received from the entire spectrum of experienced users of Rule 23, including plaintiffs' class action lawyers, plaintiffs' lawyers who prefer not to use the class action device, defendants' lawyers, corporate counsel, judges, academics, journalists, and litigants who had been class members. The work of the advisory committee and the information considered by it, including all the written statements and comments and transcripts of witnesses' testimony, filled a four-volume, 3,000 page compendium of the committee's working papers published in May 1997.

Although five general changes were published for comment, the advisory committee decided to proceed with only the proposed amendments to Rule 23(c)(1) and (f) at this time. The

change to Rule 23(c)(1) would clarify the timing of the court's certification decision to reflect present practice. New subdivision (f) would authorize a permissive interlocutory appeal, in the sole discretion of the court of appeals, from an order granting or denying class certification. The remaining proposed changes either were abandoned or deferred by the advisory committee after further reflection, or set aside in anticipation of the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, No. 96-270 (decided June 25, 1997) — a Third Circuit case holding invalid a settlement of a class action that potentially consisted of tens of thousands of asbestos claimants. The advisory committee carefully considered whether to delay proceeding on the proposed amendments to Rule 23 (c)(1) and (f) and wait until action on the remaining proposed amendments to Rule 23 was completed. But it concluded unanimously that the changes to (c)(1) and (f) were important and distinct from the remaining proposed changes and needed to be acted on expeditiously. In particular, the proposed change to Rule 23(f) could have immediate and substantial beneficial impact on class action practice.

New subdivision (f) would create an opportunity for interlocutory appeal from an order granting or denying class action certification. The decision whether to permit appeal is in the sole discretion of the court of appeals. Application for appeal must be made within ten days after entry of the order. District court proceedings would be stayed only if the district judge or the court of appeals ordered a stay. Authority to adopt an interlocutory appeal provision was conferred by 28 U.S.C. § 1292(e).

The advisory committee concluded that the class action certification decision warranted special interlocutory appeal treatment. A certification decision is often decisive as a practical matter. Denial of certification can toll the death knell in actions that seek to vindicate large numbers of individual claims. Alternatively, certification can exert enormous pressure to settle.

Because of the difficulties and uncertainties that attend some certification decisions—those that do not fall within the boundaries of well-established practice—the need for immediate appellate review may be greater than the need for appellate review of many routine civil judgments. Under present appeal statutes, however, it is difficult to win interlocutory review of orders granting or denying certification that present important and difficult issues. Many such orders fail to win district court certification for interlocutory appeal under 28 U.S.C. § 1292(b), in part because some courts take strict views of the requirements for certification. Resort has been had to mandamus, with some success, but review may strain ordinary mandamus principles.

The lack of ready appellate review has made it difficult to develop a body of uniform national class-action principles. Many commentators and witnesses advised the advisory committee that district courts often give different answers to important class-action questions, and that these differences encourage forum shopping. The commentators and witnesses who testified on proposed Rule 23(f) provided strong, although not universal, support for its adoption.

The main ground for opposing the proposed amendment was that applications for permission to appeal would become a routine strategy of defendants to increase cost and delay. The advisory committee recognized that there might be strong temptations to seek permission to appeal, particularly during the early days of Rule 23(f). It hoped that lawyers would soon recognize that appeal would be granted only in cases that present truly important and difficult issues, and that the potential for many ill-founded appeal petitions would quickly dissipate. In any event, it relied on the advice of many circuit judges that applications for permission to appeal under 28 U.S.C. § 1292(b) are quickly processed, adding little to the costs and delay experienced by the parties and trial courts, and imposing little burden on the courts of appeals. The committee was confident that, as with § 1292(b) appeals, Rule 23(f) petitions would be quickly

resolved on motion. The advisory committee concluded that the benefits of the proposal greatly outweighed the small additional workload burden.

The Standing Rules Committee concurred with the advisory committee's recommendation to add a new Rule 23(f). The proposed amendments to the Federal Rules of Civil Procedure, as recommended by your Committee, are in Appendix C with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed new Civil Rule 23(f) and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

In many class action cases, the decision to certify is the single most important judicial event, which often sets into motion a series of actions inexorably leading to settlement. The advisory committee heard much testimony about the intense pressure placed on the defendant to settle once a class action had been certified, rather than risk any chance of losing. The proposed amendment of Rule 23(c)(1) would amend the requirement that the class action certification determination be made "as soon as practicable." The advisory committee's proposed change to "when practicable" was designed to confirm present practice, which permits a ruling on a motion to dismiss or for summary judgment before addressing certification questions.

The Standing Rules Committee recognized that in most class action cases a judge needs sufficient information, which often requires adequate time for discovery, before making the critical class action certification decision. But concern was expressed that a delay in the certification decision might as a practical matter eliminate any real relief to some injured parties under certain circumstances, particularly when their claims may become moot if not acted on expeditiously. In addition, the advisory committee continues to study proposed revisions to other parts of the rule and could further consider the change to (c)(1) at the same time. Accordingly,

your Committee voted to recommit the proposed amendments to Rule 23(c)(1) to the advisory committee for further consideration.

Scope and Nature of Discovery

With the goal of reducing cost and delay in litigation, the advisory committee has embarked on a major review of the general scope and nature of discovery. As part of this overall discovery project, the advisory committee will address the discovery-related recommendations contained in the Judicial Conference's report to Congress on RAND's Civil Justice Reform Act study, including the need to revisit the "opt-in" "opt-out" mandatory disclosure provisions.

A subcommittee was appointed to explore discovery issues. It convened a conference of about 30 prominent attorneys and academics to discuss discovery problems. Building on that meeting, the advisory committee, along with the Boston College School of Law, is sponsoring a symposium on discovery in September 1997. Academics will present papers that will later be published by the school's law review. Several panels of experienced practitioners and judges will also address distinct discovery issues at the conference. The advisory committee plans to meet in October to decide which specific discovery issues discussed at the symposium it will pursue.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Federal Rules of Criminal Procedure 5.1, 26.2, 31, 33, 35, and 43 together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in August 1996. A public hearing was scheduled for Oakland, California, but no witnesses requested to testify.

The proposed amendments to Rule 5.1 (Preliminary Examination) would require production of a witness statement after the witness has testified at a preliminary examination hearing. The proposal is similar to current provisions in other rules that require production of a witness statement at other pretrial proceedings.

Rule 26.2 (Production of Witness Statements) would be amended to include a cross-reference to the proposed amendment to Rule 5.1, extending the requirement to produce a witness statement to a preliminary examination.

The proposed amendment to Rule 31 (Verdict) would require individual polling of jurors when polling occurs after the verdict, either at a party's request or on the court's own motion. The amendment confirms the existing practice of most courts.

Rule 33 (New Trial) would be amended to require that a motion for a new trial based on newly discovered evidence be filed within three years after the date of the "verdict or finding of guilty." The current rule uses "final judgment" as the triggering event, but courts have reached different conclusions on when a final judgment is entered. As a result of the disparate practices, the time to file the motion has varied among the districts. The published version of the proposed amendment fixed a clear starting point to begin the time period and set two years as the outside limit. The advisory committee was persuaded by the public comment, however, that an additional year was necessary. Defense attorneys often concentrate their available time and resources prosecuting an appeal immediately after the verdict or finding of guilty and only begin considering filing a motion for a new trial when they have completed the appeal.

Rule 35 (Correction or Reduction of Sentence) would be amended to permit a court to aggregate a defendant's assistance in the prosecution or investigation of another offense rendered

before and after sentencing in determining whether a defendant's assistance is "substantial" as required under Rule 35(b). The proposed amendment is intended to recognize a defendant's significant assistance rendered before and after sentencing, either of which viewed alone would be insufficient to meet the "substantial" level.

The proposed amendment to Rule 43 (Presence of the Defendant) would clarify that a defendant need not be present: (1) at a Rule 35(b) reduction of sentence proceeding for substantial assistance rendered by the defendant; (2) at a Rule 35(c) correction of sentence proceeding for a technical, arithmetical, or other clear error; or (3) at a 18 U.S.C. § 3582(c) resentencing modifying an imposed term of imprisonment. In virtually all these proceedings, the modification of a sentence can only inure to the benefit of the defendant, and the defendant's attendance is not necessary. The court does, however, retain the power to require or permit a defendant to attend any of these proceedings in its discretion. A defendant's presence would still be required at a resentencing to correct an invalid sentence following a remand under Rule 35(a).

The Standing Rules Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, are in Appendix D with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 6, 11, 24, 30, and 54, abrogation of Rules 7(c)(2), 31(e), 32(d)(2), and 38(e), and a new Rule 32.2 with a recommendation that they be published for public comment.

Rule 6 (The Grand Jury) would be amended to permit the grand jury foreperson or deputy foreperson to return an indictment in open court without requiring the presence of the entire grand jury as mandated under present procedures. The amendment would be particularly helpful when the grand jury meets in places other than in the courthouse and needs to be transported to discharge a ministerial function. The second proposed amendment would allow the presence of an interpreter who is necessary to assist a juror in taking part in the grand jury deliberations. The advisory committee recommended that the exception be limited solely to interpreters assisting the hearing impaired. But the Standing Rules Committee concluded that it would be more helpful to obtain public comment on an expanded exception to the rule that would allow any interpreter found to be necessary to assist a grand juror.

The proposed amendment of Rule 11 (Pleas) would require the court to determine whether the defendant understands any provision in a plea agreement that waives the right to appeal or to collaterally attack the sentence. The advisory committee first considered the proposed amendment at the request of the Committee on Criminal Law. The amendment also conforms Rule 11 to current practices under sentencing guidelines and makes it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. It also distinguishes plea agreements made under Rule 11(e)(1)(B), which are not binding on the court, and agreements under Rule 11(e)(1)(C), which are binding.

Rule 24 (Alternate Jurors) would permit the court to retain alternate jurors during the deliberations if any other regular juror becomes incapacitated. The alternate jurors would remain insulated from the other jurors until required to replace a regular juror. The option would be particularly helpful in an extended trial when two or more original jurors could not participate in the deliberations because otherwise a new trial would be required.

The proposed amendments to Rule 30 (Instructions) would permit a court to require or permit the parties to file any requests for instructions before trial. Under the present rule, a court may direct the parties to file the requests only during trial or at the close of the evidence.

New Rule 32.2 (Forfeiture Procedures) consolidates several procedural rules governing the forfeiture of assets in a criminal case, including existing Rules 7(c)(2), 31(e), 32(d)(2), and 38(e). In *Libretti v. United States*, 116 S. Ct. 356 (1995), the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case, and that the defendant has no constitutional right to have the jury determine any part of the forfeiture. The proposed amendment was originally suggested by the Department of Justice and sets up a bifurcated post-guilt adjudication forfeiture procedure. At the first proceeding, the court determines what property is subject to forfeiture. At the second, the court rules on any petition filed by a third party claiming an interest in the forfeitable property and otherwise conducts ancillary proceedings. Parties are permitted to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent determined necessary by the court.

A technical amendment is proposed to Rule 54 removing the reference to the court in the Canal Zone, which no longer exists.

The Committee voted to circulate the proposed amendments to the bench and bar for comment.

Informational Items

The Standing Committee voted to reject the recommendation of the advisory committee to seek legislation amending 18 U.S.C. § 3060 to permit a magistrate judge to conduct a preliminary examination over the defendant's objection. Criminal Rule 5(c) tracks the statutory provision, and it would also need to be amended to conform to a statutory change. At the request

of the Committee, the Committee on the Administration of the Magistrate Judges System was asked to review the advisory committee's recommendation. It agreed with the substance of the proposal and endorsed the necessary legislative and rule changes. Your Committee concluded that the proposed change should be recommitted to the advisory committee to consider action under the rulemaking process. A parallel statutory change could be pursued at the appropriate time.

A bill was introduced in the House of Representatives (H.R. 1536) that would amend 18 U.S.C. § 3321 and reduce the number of grand jurors from a range of 16-23 to 9-13, with 7 jurors instead of 12 jurors necessary to concur in an indictment. Criminal Rule 6 tracks the language of the current statutory provision. The Advisory Committee on Criminal Rules has placed the matter on the agenda of its next meeting in October 1997, which is consistent with the recommendations of the Committee on Court Administration and Case Management and the Committee on Criminal Law.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Federal Rules of Evidence 615 (Exclusion of Witnesses). The amendment would expand the list of witnesses who may not be excluded from attending a trial to include any victim as defined in the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997. The amendment is intended to conform to the two Acts. These laws provide that: (1) a victim-witness is entitled to attend the trial unless the witness' testimony would be materially affected by the testimony at trial; and (2) a victim-witness who may testify at a later sentencing proceeding cannot be excluded from the trial for that reason.

The advisory committee's proposed amendment was limited to witnesses specifically defined by the two victim rights' statutes. The Standing Rules Committee concluded that a more expansive amendment was preferable to account for any other existing or future statutory exception. It revised the proposed amendment to extend to any "person authorized by statute to be present." The Committee also agreed with the request to forward the proposed amendments directly to the Judicial Conference without publishing them for public comment. Under the governing, *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* the "Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary." The Standing Rules Committee determined that the proposed amendment, as revised, was a conforming amendment.

The proposed amendment to the Federal Rules of Evidence, as recommended by your Committee, appears in Appendix E together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Evidence Rule 615 and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Informational Items

The Standing Rules Committee recommitted to the advisory committee for further study proposed amendments to Evidence Rule 103 (Rulings on Evidence) that would add a new subdivision governing *in limine* practice. The present rules do not address *in limine* practice, and this has resulted in some conflict in the courts and confusion in the practicing bar. Proposed amendments to Evidence Rule 103 were published for comment in 1995, but were eventually withdrawn. Although generally inclined to publish for comment another proposed *in limine* rule,

several members of the Standing Rules Committee expressed concern regarding certain technical issues that they believed needed first to be addressed by the advisory committee. The Committee agreed that further study by the advisory committee would be helpful before publishing another proposed change to Rule 103.

The advisory committee has refrained from considering amending Evidence Rule 702 to account for the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and later decisions generated by it, until a time when the district courts and courts of appeals have had an opportunity to explore some of the decision's far-reaching implications. Several years have now passed. *Daubert* case law has rapidly developed and involves many areas not considered nor in issue in the 1993 case. The advisory committee has concluded that the time is now right for a review of Evidence Rules 702 and 703 and has placed the matter on its agenda for its October meeting. In addition, both the Senate and the House of Representatives are considering bills to codify the Court's decision.

RULES GOVERNING ATTORNEY CONDUCT

A study by the Committee's reporter of appellate and bankruptcy cases involving rules of attorney conduct and a Federal Judicial Center empirical study on rules governing attorney conduct have now been completed. The Committee was also advised of the current status of meetings between the Department of Justice and the Conference of Chief Justices on contacting represented parties. The Committee's reporter was asked to prepare some specific proposals for the Committee's consideration at its next meeting in January.

UNIFORM NUMBERING SYSTEM FOR LOCAL RULES OF COURT

Amendments to the Federal Rules of Practice and Procedure took effect on December 1, 1995, which required that all local rules of court "must conform to any uniform numbering

system prescribed by the Judicial Conference." In March 1996, the Conference prescribed a numbering system for local rules of court to implement the 1995 rules amendments. The Conference set April 15, 1997, as the effective date of compliance with the uniform numbering system so that courts would have sufficient time to make necessary changes to their local rules.

Slightly less than half of the courts were able to renumber their local rules by April 15, 1997. Several additional courts completed their renumbering before the Standing Rules Committee met in June. Other courts have advised the Committee that they are nearing completion of their local rules renumbering. The Committee continues to encourage those courts that have not yet adopted a uniform numbering system to renumber their local rules. The Committee finds promising the recent increase in the number of courts adopting a uniform numbering system, and it will continue to offer to help the courts that are in the process of renumbering their local rules.

LONG RANGE PLANNING

The chairs of the Standing Rules Committee and the Advisory Committee on Civil Rules participated in the May 15, 1997, meeting of the Judicial Conference committee liaisons on the judiciary's *Long Range Plan.* During the discussion on mass torts, the advisory committee chair described the extensive work of the Advisory Committee on Civil Rules on the study of mass torts in the context of class actions during the past six years. As previously noted, the advisory committee garnered substantial information and data on class action and mass torts practice, which were compiled into a four-volume compendium of working papers. The rules committee chairs favored the consensus of the liaisons that the individual Conference committees should continue to coordinate their respective work with the other committees involved in the study of mass tort litigation.

LOCAL RULES AND OFFICIAL BANKRUPTCY FORMS ON INTERNET

The Committee was advised of ongoing efforts in the Administrative Office to place local rules of court and Official Bankruptcy Forms on the Internet. Rather than furnishing paper copies of local rules of court and any amendments to the Administrative Office—as presently required by 28 U.S.C.§ 2071(d)—courts could fulfill this statutory responsibility by placing and updating their local rules directly on the Internet. It is expected that Internet access to the rules would benefit lawyers researching local practices and relieve the clerks' offices of some of their burden in providing copies of local rules and otherwise responding to inquiries regarding them. Access to Official Bankruptcy Forms would benefit practitioners and pro se claimants in bankruptcy. Paper copies of most of these forms are not available from the courts, but must be obtained from private sector sources. The advantages of having public access to the forms on the Internet are clear.

REPORT TO THE CHIEF JUSTICE

In accordance with the standing request of the Chief Justice, a summary of issues concerning select new amendments and proposed amendments generating controversy is set forth in Appendix F.

STATUS OF PROPOSED AMENDMENTS

A chart prepared by the Administrative Office (reduced print) is attached as Appendix G, which shows the status of the proposed amendments to the rules.

Respectfully submitted,

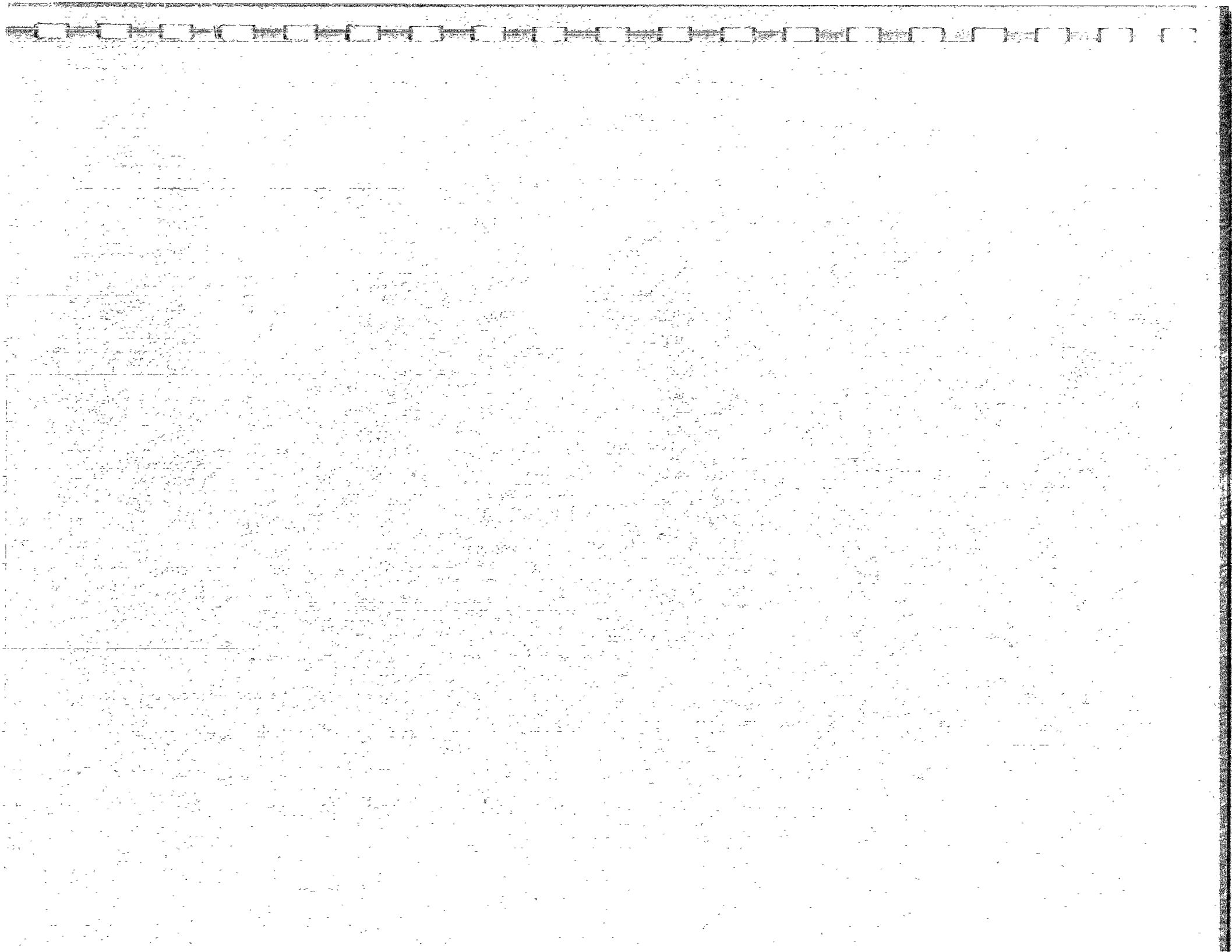


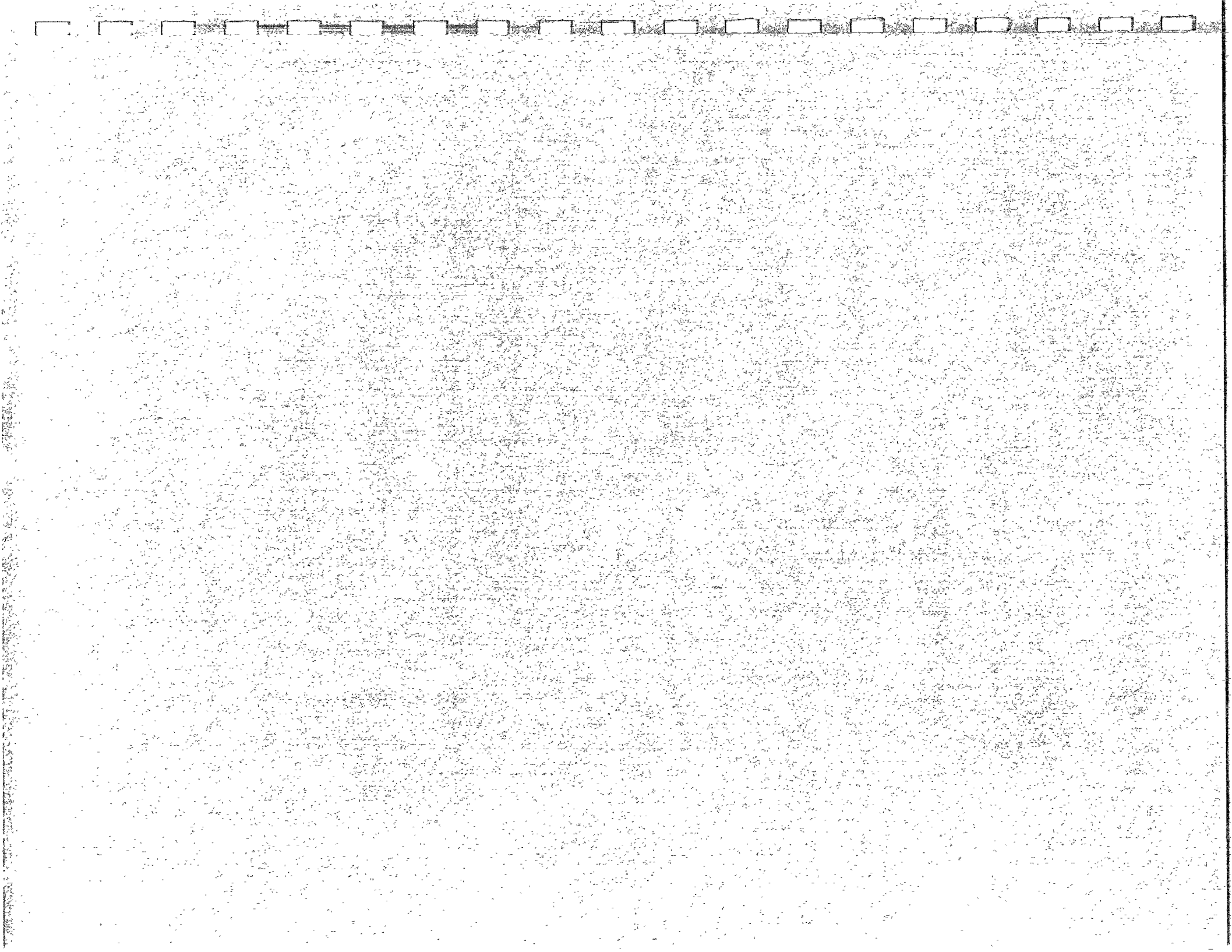
Alicemarie H. Stotler
Chair

Frank W. Bullock, Jr.	Alan W. Perry
Frank H. Easterbrook	Sol Schreiber
Seth P. Waxman	Morey L. Sear
Geoffrey C. Hazard, Jr.	James A. Parker
Phyllis A. Kravitch	E. Norman Veasey
Gene W. Lafitte	William R. Wilson, Jr.

APPENDICES

Appendix A —	Proposed Amendments to the Federal Rules of Appellate Procedure
Appendix B —	Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix C —	Proposed Amendments to the Federal Rules of Civil Procedure
Appendix D —	Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix E —	Proposed Amendments to the Federal Rules of Evidence
Appendix F —	Report to the Chief Justice on Proposed Select New Rules or Rules Amendments Generating Controversy
Appendix G —	Chart Summarizing Status of Rules Amendments





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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 26, 1997

MEMORANDUM TO CHAIRS AND REPORTERS OF THE ADVISORY RULES COMMITTEES

SUBJECT: *Federal Courts Improvement Act of 1997*

For your information, Judge Stotler requested that I send to you a copy of the Federal Courts Improvement Act of 1997 (H.R. 2294). A hearing is scheduled for October 9, 1997, before the House Judiciary Subcommittee on Courts and Intellectual Property. Judge Philip Pro, chairman of the Committee on the Administration of the Federal Magistrate Judges System, will testify on the provisions governing magistrate judges' contempt powers.

It is unlikely that further action on the bill will take place this year. In the past, the controversial provisions have been stripped from such "Court Improvements" bills at the end of the Congressional session and considerably scaled-down versions were eventually passed immediately before adjournment.

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

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

JUDGE WM. TERRELL HODGES
Chairman, Executive Committee

TELEPHONE:
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November 4, 1997

MEMORANDUM TO THE CHAIRS OF JUDICIAL CONFERENCE COMMITTEES

Each Congress, the Administrative Office compiles recommendations approved by the Judicial Conference for legislative action into a comprehensive "court improvements bill." Since the AO has no authority to pick and choose among recommendations to be promoted, legislative proposals may continue to be advanced for years, even though there is little or no likelihood of their enactment. An example is abolition of diversity of citizenship jurisdiction, which the Conference has long supported but which has virtually no chance of passing in the foreseeable future. Only when a committee acts affirmatively to request that a recommendation not be actively pursued -- as was the case some years ago when the Committee on Federal-State Jurisdiction recommended, and the Conference agreed, that the judiciary should hold in abeyance the effort to abolish diversity and focus instead on obtaining limitations to it -- may the AO discontinue pressing a particular provision.

At its last meeting, the Executive Committee addressed this issue. The Committee agreed that it would be appropriate for each Conference committee to review annually the text of the court improvements bill in the form in which it was last introduced with regard to items within its jurisdiction, and make recommendations to the Executive Committee regarding deletions for the next bill. The Executive Committee will consider any such recommendations at its winter meeting in odd-numbered years, i.e., at the beginning of the first session of a Congress, and forward the recommendations for Conference action where appropriate. In this way, the court improvements legislation that is transmitted for introduction at the commencement of each Congress will reflect the judiciary's current concerns.

Wm. Terrell Hodges

cc: Committee Staffers

105TH CONGRESS
1ST SESSION

H. R. 2294

To make improvements in the operation and administration of the Federal courts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 30, 1997

Mr. COBLE (by request) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To make improvements in the operation and administration of the Federal courts, and for other purposes.

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

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Courts Improvement Act of 1997."

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

TITLE I—FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

Sec. 101. Parties' consent to bankruptcy judge's findings and conclusions of law.

TITLE II—JUDICIAL FINANCIAL ADMINISTRATION

Sec. 201. Reimbursement of judiciary for civil and criminal forfeiture expenses.
Sec. 202. Transfer of retirement funds.
Sec. 203. Judicial Conference Foundation.
Sec. 204. Extension of the Judiciary Information Technology Fund.
Sec. 205. Bankruptcy Fees.
Sec. 206. Disposition of Miscellaneous Fees.

TITLE III—JUDICIAL PROCESS IMPROVEMENTS

Sec. 301. Removal of cases under the Employee Retirement Income Security Act.
Sec. 302. Elimination of in-state plaintiff diversity jurisdiction.
Sec. 303. Extension of statutory authority for magistrate judge positions to be established in the district courts of Guam and the Northern Mariana Islands.
Sec. 304. Bankruptcy administrator authority to appoint trustees, examiners and committee of creditors.
Sec. 305. Magistrate judge contempt authority.
Sec. 306. Consent to magistrate judge authority in petty offense cases and magistrate judge authority in misdemeanor cases involving juvenile defendants.
Sec. 307. Savings and loan data reporting requirements.
Sec. 308. Place of holding court in the eastern district of Texas.
Sec. 309. Federal substance abuse treatment program reauthorization.
Sec. 310. Reports concerning intercepted wire, oral, or electronic communications.
Sec. 311. Membership in circuit judicial councils.

TITLE IV—JUDICIARY PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

Sec. 401. Judicial retirement matters.
Sec. 402. Disability retirement and cost-of-living adjustments of annuities for territorial judges.
Sec. 403. Federal Judicial Center personnel matters.
Sec. 404. Judicial administrative officials retirement matters.
Sec. 405. Judges' firearms training.
Sec. 406. Exemption from jury service.
Sec. 407. Expanded workers' compensation coverage for jurors.
Sec. 408. Property damage, theft, and loss claims of jurors.
Sec. 409. Annual leave limit for court unit executives.

TITLE V—CRIMINAL JUSTICE ACT AMENDMENTS

Sec. 501. Maximum amounts of compensation for attorneys.
Sec. 502. Maximum amounts of compensation for services other than counsel.
Sec. 503. Tort Claims Act amendments relating to liability of federal public defenders.

TITLE I—FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

SEC. 101. PARTIES' CONSENT TO BANKRUPTCY JUDGE'S FINDINGS AND CONCLUSIONS OF LAW.

Section 157(c)(1) of title 28, United States Code, is amended to read as follows:

"(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected. A party shall be deemed to consent to the findings of fact and conclusions of law submitted by a bankruptcy judge unless the party files a timely objection. If a timely objection is not filed, the proposed findings of fact and conclusions of law submitted by the bankruptcy judge shall become final and the bankruptcy judge shall enter an appropriate order thereon.".

TITLE II—JUDICIAL FINANCIAL ADMINISTRATION

SEC. 201. REIMBURSEMENT OF JUDICIARY FOR CIVIL AND CRIMINAL FORFEITURE EXPENSES.

(a) Section 524(c) of title 28, United States Code, is amended—

(1) by inserting after paragraph (11) the following paragraph (12):

"(12)(A) In the fiscal year subsequent to the fiscal year in which this Act is enacted and each fiscal year thereafter, an amount as specified in subparagraph (9)(B) shall be transferred annually to the Judiciary into the fund established under section 1931 of this title, for expenses incurred in—

"(i) adjudication of civil and criminal forfeiture proceedings that result in deposits into the Fund (except the expense of salaries of judges);

"(ii) representation, pursuant to the provisions of 18 U.S.C. 3006A, or 21 U.S.C. 848(q) of offenders whose assets have been seized in such forfeiture proceedings, to the extent that such expenses of representation could have been recovered through an order for payment or for

reimbursement of the Defender Services appropriation pursuant to 18 U.S.C. 3006A(f); and

"(iii) supervision by United States probation officers of offenders under home detention or other forms of confinement outside of Bureau of Prison facilities.

"(B) The amount to be transferred—

"(i) shall be a portion of the total amount to be transferred from the combined fiscal year deposits into both the Fund and the Department of the Treasury Asset Forfeiture Fund established by section 9703 of title 31, United States Code (hereafter referred to as 'both Funds'), which total shall not exceed the statement of costs incurred by the Judiciary in providing the services identified in subparagraph (A), as set forth by the Director of the Administrative Office of the United States Courts in a report to the Attorney General and the Secretary of the Treasury no later than 90 days after the end of the fiscal year in which the expenses were incurred: *Provided,* That the total amount to be transferred from both Funds shall not exceed $50,000,000, or 10 percent of the total combined deposits into both Funds, which-

ever is less: *Provided further,* That the proportion of the amount transferred from the Fund to the total amount to be transferred shall be equal to the proportion of the fiscal year deposits into the Fund to the combined fiscal year deposits in both Funds: *Provided further,* That the total amount to be transferred from both Funds may exceed the limits set out in this subparagraph subject to the discretion of the Attorney General and the Secretary of the Treasury.

"(ii) shall be paid from revenues deposited into the Fund during the fiscal year in which the expenses were incurred and are not required to be specified in appropriations Acts.".

(b) Section 9703 of title 31, United States Code, is amended—

(1) by redesignating section (p) as section (q); and

(2) by inserting after section (o) the following new section (p):

"(p) TRANSFER TO THE FEDERAL JUDICIARY.—

"(1) In the fiscal year subsequent to the fiscal year in which this Act is enacted and each fiscal year thereafter, an amount necessary to meet the

transfer requirements of section 524(c)(9) of title 28, United States Code, shall be transferred to the Judiciary, and shall be subject to the same limitations, terms, and conditions specified in that section for transfers to the Judiciary from the Department of Justice Asset Forfeiture Fund.".

(c) Section 1931(a) of title 28 is amended by inserting "or other judicial services including services provided pursuant to 18 U.S.C. 3006A, or 21 U.S.C. 848(q)" after "courts of the United States".

SEC. 202. TRANSFER OF RETIREMENT FUNDS.

Section 377 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(p) Upon election by a bankruptcy judge or a magistrate judge under subsection (f) of this section, all of the accrued employer contributions and accrued interest on those contributions made on behalf of the bankruptcy judge or magistrate judge to the Civil Service Retirement and Disability Fund as defined under section 8348 of title 5, United States Code, shall be transferred to the fund established under section 1931 of title 28, United States Code: *Provided, however,* That if the bankruptcy judge or magistrate judge elects under section 2(c) of the Retirement and Survivor's Annuities for Bankruptcy Judges and

Magistrates Act of 1988, Public Law No. 100–659, to receive a retirement annuity under both this section and title 5, United States Code, only the accrued employer contributions and accrued interest on such contributions made on behalf of the bankruptcy judge or magistrate judge for service credited under this section may be transferred.".

SEC. 203. JUDICIAL CONFERENCE FOUNDATION.

(a) Chapter 15 of title 28 of the United States Code is amended by inserting at the end of the following new section:

"§ 336. Judicial Conference Foundation

"(a) There is established a private nonprofit corporation which shall be known as the Judicial Conference Foundation (hereafter referred to as the 'Foundation') and which shall be incorporated in the District of Columbia. The purpose of the Foundation shall be to have sole authority to accept and receive gifts or grants of real and personal property and services made for the purpose of aiding and facilitating the work of the Judicial Conference of the United States (the 'Conference'). The Foundation shall not accept conditional or otherwise restricted gifts or grants except gifts or grants that are designated for the support of specific projects previously approved by the Conference. The Foundation shall have no authority to ad-

minister or otherwise determine the use of gifts or grants accepted under this section.

"(b) The business of the Foundation shall be conducted by a Board that shall have seven members, including a chair. Three members, including the chair, shall be appointed by the Chief Justice of the United States, two by the President pro tempore of the Senate, and two by the Speaker of the House of Representatives. The term of office of each member of the Board shall be 5 years, except that the initial terms shall be 5 years for the chair, one member appointed by the President pro tempore and one member appointed by the Speaker, and 3 years for the other member appointed by the Speaker, and two years for the two other members appointed by the Chief Justice. No person who is a Federal or State judge in regular active service or otherwise eligible to perform judicial duties shall be eligible for membership on the Board. Members of the Board shall serve without compensation, but, upon authorization of the Director of the Administrative Office of the United States Courts (the 'Administrative Office'), shall be reimbursed for actual and necessary expenses incurred in the performance of their official duties from funds available to the judiciary for salaries and expenses or by the Foundation. The Administrative Office

may provide administrative support and facilities necessary for the operation of the Board.

"(c) The Conference is authorized to administer and use gifts or grants received by the Foundation under this section and shall adopt policies and procedures for that purpose. The gifts or grants shall be used to further the goals of the Foundation as determined by the Conference.

"(d) Gifts or grants of money and proceeds from sales of other property received as gifts or grants shall be deposited in a separate fund in the Treasury of the United States and disbursed on the order of the Board and shall remain available without appropriation until expended.

"(e) The Board of the Foundation shall, not later than October 1 of each year, submit to the Committee on the Judiciary of the United States Senate and House of Representatives a report with respect to gifts or grants received under this section during the preceding 12-month period, including the source of each gift or grant, the amount of each gift or grant of cash or cash equivalent, and a description of any other gift or grant. The Director of the Administrative Office shall include in the annual report of activities under section 604(a)(3) a description of the purposes for which gifts or grants were used during the year covered by the report.

"(f) For the purpose of Federal income, estate, and gift taxes, property accepted under this section shall be considered as a gift or bequest to or for the use of the United States.".

(b) The table of sections of chapter 15 of title 28 is amended by adding at the end thereof the following entry:

"336. Judicial Conference Foundation.".

SEC. 204. EXTENSION OF THE JUDICIARY INFORMATION TECHNOLOGY FUND.

Section 612 of title 28, United States Code, is amended—

(1) by striking out "equipment" and inserting in lieu thereof "resources" each place it appears;

(2) by striking out subsection (l)

(3) by striking out subsection (f), and redesignating each subsequent subsection accordingly; and

(4) in new subsection (g) by striking out subsection (3).

SEC. 205. BANKRUPTCY FEES.

Subsection (a) of section 1930 of title 28, United States Code, is amended by adding the following new subsection:

"(7) In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United

States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph 6 of this subsection. Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended.".

SEC. 206. DISPOSITION OF MISCELLANEOUS FEES.

For fiscal year 1997 and thereafter, any portion of miscellaneous fees collected as prescribed by the Judicial Conference of the United States pursuant to section 1913, 1914(b), 1926(a), 1930(b), and 1932 of title 28, United States Code, exceeding the amount of such fees established on the date of enactment of this provision shall be deposited into the special fund of the Treasury established under section 1931 of title 28, United States Code.

TITLE III—JUDICIAL PROCESS IMPROVEMENTS

SEC. 301. REMOVAL OF CASES UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT.

Section 1445 of title 28, United States Code, is amended by adding a new subsection:

"(e) A civil action in any State court may not be removed to any district court of the United States solely on the basis of concurrent jurisdiction over a claim under section 1132(a)(1)(B) of title 29.".

SEC. 302. ELIMINATION OF IN-STATE PLAINTIFF DIVERSITY JURISDICTION.

Section 1332 of title 28, United States Code, is amended by adding the following new subsection:

"(e) The original jurisdiction of the district courts otherwise conferred by this section may not be invoked if any plaintiff joined in the complaint is a citizen of the State in which is located the district court in which the suit is filed. For purposes of this subsection only, the District of Wyoming shall be deemed located solely within the State of Wyoming. This subsection does not apply to or limit the applicability of the right of removal under section 1441(a) of an action that would otherwise be within the original jurisdiction of the district courts.".

SEC. 303. EXTENSION OF STATUTORY AUTHORITY FOR MAGISTRATE JUDGE POSITIONS TO BE ESTABLISHED IN THE DISTRICT COURTS OF GUAM AND THE NORTHERN MARIANA ISLANDS.

Section 631 of title 28, United States Code, is amended—

(1) by striking the first two sentences of subsection (a) and inserting in lieu thereof the following: "The judges of each United States district court and the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands shall appoint

United States magistrate judges in such numbers and to serve at such locations within the judicial districts as the Conference may determine under this chapter. In the case of a magistrate judge appointed by the district court of the Virgin Islands, Guam, or the Northern Mariana Islands, this chapter shall apply as though the court appointing such a magistrate judge were a United States district court."; and

(2) by inserting in the first sentence of paragraph (1) of subsection (b) after "Commonwealth of Puerto Rico," the language "the Territory of Guam, the Commonwealth of the Northern Mariana Islands,".

SEC. 304. BANKRUPTCY ADMINISTRATOR AUTHORITY TO APPOINT TRUSTEES, EXAMINERS AND COMMITTEE OF CREDITORS.

(a) APPOINTMENT OF TRUSTEES.—Until the amendments made by subtitle A of title II of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (28 U.S.C. 581 note; Public Law 99–554; 100 Stat. 3123) become effective in a judicial district and apply to a case, a bankruptcy administrator appointed to serve in the district pursuant to section 302(d)(3)(I) of the Act, as amended by section 317(a) of

the Federal Courts Study Committee Implementation Act of 1990 (Public Law 101–650; 104 Stat. 5115) shall appoint the trustees, examiners, and standing trustees notwithstanding the references in those sections of title 11 to appointments by the court.

(b) STANDING TRUSTEES.—A bankruptcy administrator who has appointed a standing trustee pursuant to subsection (a) of this section shall fix the standing trustee's maximum annual compensation and percentage fee, subject to the limitations set out in sections 1202 and 1302 of title 11 as amended by section 110 of the Federal Employee Pay Comparability Act of 1990 (Public Law 101–509, 104 Stat. 1427, 1452). The bankruptcy administrator shall fix the maximum annual compensation and percentage fee notwithstanding the references in those sections of title 11 to the court's authority to fix them.

(c) SERVICE AS TRUSTEE.—A bankruptcy administrator may serve as and perform the duties of a trustee in a case under chapter 7 of title 11 if none of the members of the panel of private trustees is disinterested and willing to serve as trustee in the case. A bankruptcy administrator may serve as and perform the duties of a trustee or standing trustee in cases under chapter 12 or chapter 13 of title 11 if necessary.

(d) APPOINTMENT OF COMMITTEES.—Until the amendments made by subtitle A of title II of the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986 become effective in a judicial district and apply to a case, the bankruptcy administrator appointed to serve in the district shall appoint the committees of creditors and equity security holders provided in section 1102 of title 11. The bankruptcy administrator shall appoint the committees notwithstanding the references in those sections of title 11 to appointments by the court.

SEC. 305. MAGISTRATE JUDGE CONTEMPT AUTHORITY.

Section 636(e) of the Federal Magistrates Act (28 U.S.C. 636) is amended in its entirety as follows:

"(1) CONTEMPT AUTHORITY.—A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by his or her appointment the power to exercise contempt authority as set forth in this section.

"(2) SUMMARY CRIMINAL CONTEMPT AUTHORITY.—A magistrate judge shall have the power to punish summarily by fine or imprisonment such contempt of his or her authority constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of jus-

tice. The order of contempt shall be issued pursuant to the Federal Rules of Criminal Procedure.

"(3) ADDITIONAL CRIMINAL CONTEMPT AUTHORITY IN CIVIL CONSENT AND MISDEMEANOR CASES.—In any case in which a United States magistrate judge presides with the consent of the parties under 28 U.S.C. 636(c), and in any misdemeanor case proceeding before a magistrate judge under 18 U.S.C. 3401, the magistrate judge shall have the power to punish by fine or imprisonment such criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing pursuant to the Federal Rules of Criminal Procedure.

"(4) CIVIL CONTEMPT AUTHORITY IN CIVIL CONSENT AND MISDEMEANOR CASES.—In any case in which a United States magistrate judge presides with the consent of the parties under 28 U.S.C. 636(c), and in any misdemeanor case proceeding before a magistrate judge under 18 U.S.C. 3401, the magistrate judge may exercise the civil contempt authority of the district court. This subsection shall not be construed to limit the authority of a mag-

istrate judge to order sanctions pursuant to any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

"(5) CRIMINAL CONTEMPT PENALTIES.—The sentence imposed by a magistrate judge for any criminal contempt set forth in subsections (2) and (3) of this section shall not exceed the penalties for a Class C misdemeanor as set forth in 18 U.S.C. 3581(b)(8) and 3571(b)(6).

"(6) CERTIFICATION OF OTHER CONTEMPTS TO THE DISTRICT COURT.—Upon the commission of any such act—

"(A) in any case in which a United States magistrate judge presides with the consent of the parties under 28 U.S.C. 636(c), or in any misdemeanor case proceeding before a magistrate judge under 18 U.S.C. 3401, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in subsection (5) of this section, or

"(B) in any other case or proceeding under 28 U.S.C. 636(a) or (b), or any other statute, where—

"(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in subsection (5) of this section, or

"(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

"(iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served upon any person whose behavior is brought into question under this subparagraph an order requiring such person to appear before a district judge upon a day certain to show cause why he or she should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

"(7) APPEALS OF MAGISTRATE JUDGE CONTEMPT ORDERS.—The appeal of an order of contempt pursuant to this section shall be made to the court of appeals in cases proceeding under 28 U.S.C. 636(c). In any other proceeding in which a United States magistrate judge presides under 28 U.S.C. 636(a) or (b), 18 U.S.C. 3401 or any other statute, the appeal of a magistrate judge's summary contempt order shall be made to the district court.".

SEC. 306. CONSENT TO MAGISTRATE JUDGE AUTHORITY IN PETTY OFFENSE CASES AND MAGISTRATE JUDGE AUTHORITY IN MISDEMEANOR CASES INVOLVING JUVENILE DEFENDANTS.

(a) AMENDMENTS TO TITLE 18.—

(1) Section 3401(b) of title 18, United States Code, is amended by striking "that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction," after "petty offense".

(2) Section 3401(g) of title 18, United States Code, is amended—

(A) by striking the first sentence and inserting in lieu thereof the following: "The magistrate judge may, in a petty offense case involving a juvenile, exercise all powers granted to

the district court under chapter 403 of this title.";

(B) by striking in the second sentence the phrase "other class B or C misdemeanor case" and inserting in lieu thereof "misdemeanor, other than a petty offense,"; and

(C) by striking the last sentence.

(b) AMENDMENTS TO TITLE 28.—Section 636(a) of title 28, United States Code, is amended by striking out paragraphs (4) and (5) and inserting in lieu thereof the following:

"(4) the power to enter a sentence for a petty offense; and

"(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.".

SEC. 307. SAVINGS AND LOAN DATA REPORTING REQUIREMENTS.

Section 604 of title 28, United States Code, is amended in subsection (a) by striking out the second number paragraph (24).

SEC. 308. PLACE OF HOLDING COURT IN THE EASTERN DISTRICT OF TEXAS.

(a) The second sentence of section 124(c)(3) of title 28, United States Code, is amended by inserting "and Plano" after "held at Sherman".

(b) Sections 83(b)(1) and 124(c)(6) of title 28, United States Code, are amended by adding to the end of the last sentence: ", and may be held anywhere within the Federal courthouse in Texarkana that is located astride the state line between Texas and Arkansas".

SEC. 309. FEDERAL SUBSTANCE ABUSE TREATMENT PROGRAM REAUTHORIZATION.

Section 4(a) of the Contract Services for Drug Dependent Federal Offenders Treatment Act of 1978 (Public Law 95–537; 93 Stat. 2038), as amended, is amended by striking all after "there are authorized to be appropriated" and inserting in lieu thereof "for fiscal year 1998 and each fiscal year thereafter such sums as may be necessary to carry out this Act.".

SEC. 310. REPORTS CONCERNING INTERCEPTED WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS.

Section 2519 of title 18, United States Code, is amended—

(1) by striking "Administrative Office of the United States Courts" each place it appears and inserting "United States Department of Justice";

(2) by striking "Director of the Administrative Office of the United States Courts" each place it appears and inserting "Attorney General of the United States"; and

(3) by striking "Administrative Office" each place it appears and inserting "United States Department of Justice".

SEC. 311. MEMBERSHIP IN CIRCUIT JUDICIAL COUNCILS.

Section 332 of title 28, United States Code, is amended in subsection (a)—

(1) by striking out paragraph (1) and inserting in lieu thereof the following:

"(1) The chief judge of each judicial circuit shall call and preside at a meeting of the judicial council of the circuit at least twice in each year and at such places as he or she may designate. The council shall consist of an equal number of circuit judges (including the chief judge of the circuit) and district judges, as such number is determined by majority vote of all such judges of the circuit in regular active service.";

(2) by striking out paragraph (3) and inserting in lieu thereof the following:

"(3) Except for the chief judge of the circuit, either judges in regular active service or judges re-

tired from regular active service under section 371(b) of this title may serve as members of the council."; and

(3) by striking out "retirement," in paragraph (5) and inserting in lieu thereof "retirement pursuant to section 371(a) or section 372(a) of this title,".

TITLE IV—JUDICIAL PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

SEC. 401. JUDICIAL RETIREMENT MATTERS.

(a) Section 371 of title 28, United States Code, is amended—

(1) in subsection (a) by inserting "(1)" after "subsection (c)";

(2) in subsection (b)(1) by inserting "(2)" after "subsection (c)"; and

(3) in subsection (c)—

(A) by inserting "(1)" after "(c)";

(B) by striking out "this section" and inserting in lieu thereof "subsection (a)"; and

(C) by adding at the end of that subsection the following new paragraph:

"(2) The age and service requirements for retirement under subsection (b)(1) are as follows:

"Attained age:	Years of Service:
60	20
61	19
62	18
63	17
64	16
65	15
66	14
67	13
68	12
69	11
70	10".

SEC. 402. DISABILITY RETIREMENT AND COST-OF-LIVING ADJUSTMENTS OF ANNUITIES FOR TERRITORIAL JUDGES.

Section 373 of title 28, is amended—

(1) by amending subparagraph (c)(4) to read—

"(4) Any senior judge performing judicial duties pursuant to recall under paragraph (2) of this subsection shall be paid, while performing such duties, the same compensation (in lieu of the annuity payable under this section) and the same allowances for travel and other expenses as a judge on active duty with the court being served.";

(2) by amending subsection (e) to read—

"(e)(1) Any judge of the District Court of Guam, the District Court of the Northern Mariana Islands, or the District Court of the Virgin Islands who is not reappointed (as judge of such court) shall be entitled, upon attaining the age of sixty-five years or upon relinquishing office if the judge is then beyond the age of sixty-five years, (i) if the judicial service of such judge, continuous or other-

wise, aggregates fifteen years or more, to receive during the remainder of such judge's life an annuity equal to the salary received when the judge left office, or (ii) if such judicial service, continuous or otherwise, aggregated less than fifteen years, to receive during the remainder of such judge's life an annuity equal to that proportion of such salary which the aggregate number of such judge's years of service bears to fifteen.

"(2) Any judge of the District Court of Guam, the District Court of the Northern Mariana Islands, or the District Court of the Virgin Islands who has served at least five years, continuously or otherwise, and who retires or is removed upon the sole ground of mental or physical disability, shall be entitled to receive during the remainder of such judge's life an annuity equal to 40 percent of the salary received when the judge left office, or, in the case of a judge who has served at least ten years, continuously or otherwise, an annuity equal to that proportion of such salary which the aggregate number of such judge's years of judicial service bears to fifteen."; and

(3) amending subsection (g) to read—

"(g) Any retired judge who is entitled to receive an annuity under this section shall be entitled to a cost-of-living adjustment in the amount computed as specified in section 8340(b) of title 5, except that in no case may the

annuity payable to such retired judge, as increased under this subsection, exceed the salary of a judge in regular active service with the court on which the retired judge served before retiring.".

SEC. 403. FEDERAL JUDICIAL CENTER PERSONNEL MATTERS.

Section 625(b) of title 28 is amended—

(1) by inserting after "section 5316, title 5, United States Code" the following: ", except the Director may fix the compensation of no more than 5 percent of the positions of the Center at a level not to exceed the annual rate of basic pay of level IV of such pay rates".

(2) by deleting "Servive" and inserting in lieu thereof "Service."

SEC. 404. JUDICIAL ADMINISTRATIVE OFFICIALS RETIREMENT MATTERS.

(a) CREDITABLE SERVICE FOR CERTAIN JUDICIAL ADMINISTRATIVE OFFICIALS.—

(1) Sections 611(d) and 627(e) of title 28, United States Code, are each amended—

(A) by inserting "a congressional employee in the capacity of primary administrative assistant to a Member of Congress or in the capacity of staff director or chief counsel for the major-

ity or the minority of a committee or subcommittee of the Senate or House of Representative," after "Congress,";

(B) in paragraph (b), by striking out "who has served at least fifteen years and" and inserting in lieu thereof "who has at least fifteen years of service and has"; and

(C) in the first undesignated paragraph, by striking out "who has served at least ten years," and inserting in lieu thereof "who has at least ten years of service,".

(2) Sections 611(c) and 627(d) of such title are each amended—

(A) by striking out "served at least fifteen years," and inserting in lieu thereof "at least fifteen years of service,"; and

(B) by striking out "served less than fifteen years," and inserting in lieu thereof "less than fifteen years of service,".

SEC. 405. JUDGES' FIREARMS TRAINING.

(a) IN GENERAL.—Chapter 21 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 464. Carrying of firearms by judicial officers

"(a) A judicial officer of the United States is authorized to carry a firearm, whether concealed or not, under regulations promulgated by the Judicial Conference of the United States. The authority granted by this section shall extend only to (1) those States in which the carrying of firearms by judicial officers of the State is permitted by State law, or (2) regardless of State law, to any place where the judicial officer of the United States sits, resides, or is present on official travel status.

"(b)(1) The regulations promulgated by the Judicial Conference under subsection (a) shall—

"(A) require a demonstration of a judicial officer's proficiency in the use and safety of firearms as a prerequisite to the carrying of firearms under the authority of this section; and

"(B) ensure that the carrying of a firearm by a judicial officer under the protection of the United States Marshals Service while away from United States courthouses is consistent with Marshals Service policy on the carrying of firearms by persons receiving such protection.

"(2) At the request of the Judicial Conference, the Department of Justice and appropriate law enforcement components of the Department shall assist the Judicial Conference in developing and providing training to assist

judicial officers in security the proficiency referred to in subsection (b)(1).

"(c) For purposes of this section, the term, 'judicial officer of the United States' means—

"(1) a justice or judge of the United States as defined in section 451 of this title in regular active service or retired from regular active service;

"(2) a justice or judge of the United States who has retired from the judicial office under section 371(a) of this title for—

"(A) a 1-year period following such justice's or judge's retirement; or

"(B) a longer period of time if approved by the Judicial Conference of the United States when exceptional circumstances warrant;

"(3) a United States bankruptcy judge;

"(4) a full-time or part-time United States magistrate judge;

"(5) a judge of the United States Court of Federal Claims;

"(6) a judge of the United States District Court of Guam;

"(7) a judge of the United States District Court for the Northern Mariana Islands;

"(8) a judge of the United States District Court of the Virgin Islands; or

"(9) an individual who is retired from one of the judicial positions described under paragraphs (3) through (8) to the extent provided for in regulations of the Judicial Conference of the United States.

"(d) Notwithstanding section 46303(c)(1) of title 49, nothing in this section authorizes a judicial officer of the United States to carry a dangerous weapon on an aircraft or other common carrier.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 21 of title 28, United States Code, is amended by adding at the end thereof the following:

"464. Carrying of firearms by judicial officers.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect upon the earlier of the promulgation of regulations by the Judicial Conference under this section or one year after the date of the enactment of this Act.

SEC. 406. EXEMPTION FROM JURY SERVICE.

(a) MEMBERS OF THE ARMED FORCES.—Paragraph (6) of section 1863(b) of title 28, United States Code, is amended to read as follows:

"(6) specify that members of the Armed Forces of the United States serving on active duty are

barred from service on the ground that they are exempt.".

(b) CONFORMING AMENDMENT.—Section 1869 of title 28, United States Code, is amended by repealing subsection (i) and redesignating subsequent subsections accordingly.

SEC. 407. EXPANDED WORKERS' COMPENSATION COVERAGE FOR JURORS.

(a) WORKERS' COMPENSATION COVERAGE.—Paragraph (2) of section 1877(b) of title 28, United States Code, is amended—

(1) by striking "or" at the end of clause (C); and

(2) by inserting ", or (E) traveling to or from the courthouse pursuant to a jury summons or sequestration order, or as otherwise necessitated by order of the court" before the period at the end of clause (D).

SEC. 408. PROPERTY DAMAGE, THEFT, AND LOSS CLAIMS OF JURORS.

Section 604 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(i) The Director may pay a claim by a person summoned to serve or serving as a grand juror or petit juror

for loss of, or damage to, personal property that occurs incident to that person's performance of duties in response to the summons or at the direction of an officer of the court. With respect to claims, the Director shall have the authority granted to the head of an agency by section 3721 of title 31 for consideration of employees' personal property claims. The Director shall prescribe guidelines for the consideration of claims under this subsection.".

SEC. 409. ANNUAL LEAVE LIMIT FOR COURT UNIT EXECUTIVES.

Section 6304(f)(1) of title 5 is amended to add at the end thereof:

"(F) the Judicial Branch designated as a court unit executive position by the Judicial Conference of the United States.".

TITLE V—CRIMINAL JUSTICE ACT AMENDMENTS

SEC. 501. MAXIMUM AMOUNTS OF COMPENSATION FOR ATTORNEYS.

Paragraph (2) of subsection (d) of section 3006A of title 18, United States Code, is amended—

(1) in the first sentence—

(A) by striking out "3,500" and inserting "5,000";

(B) by striking out "1,000" and inserting "1,500";

(2) in the second sentence by striking out "2,500" and inserting "3,600";

(3) in the third sentence—

(A) by striking out "750" and inserting "1,100";

(B) by striking out "2,500" and inserting "3,600";

(4) inserting after the second sentence, a new sentence: "For representation of a petitioner in a non-capital habeas corpus proceeding, the compensation for each attorney shall not exceed the amount applicable to a felony in this paragraph for representation of a defendant before a United States magistrate or the district court, or both; for representation of such petitioner in an appellate court, the compensation for each attorney shall not exceed the amount applicable for representation of a defendant in an appellate court"; and

(5) in the final sentence by striking out "750" and inserting "1,100".

SEC. 502. MAXIMUM AMOUNTS OF COMPENSATION FOR SERVICES OTHER THAN COUNSEL.

(a) Paragraph (2) of subsection (e) of section 3006A of title 18, United States Code, is amended—

(1) in subparagraph (A) by striking out "300" and inserting "450"; and

(2) in subparagraph (B) by striking out "300" and inserting "450".

(b) Paragraph (3) of subsection (e) in the first sentence by striking out "1,000" and inserting "1,500".

SEC. 503. TORT CLAIMS ACT AMENDMENTS RELATING TO LIABILITY OF FEDERAL PUBLIC DEFENDERS

Section 2680 of title 28, United States Code, is amended by adding the following new subsection (o):

"(o) Any claim for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malpractice or negligence of an officer or employee of a Federal Public Defender Organization in furnishing representational services under section 3006A of title 18, United States Code.".

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A Self-Study of Federal Judicial Rulemaking

A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States

December 1995

Introduction

At the June 1993 meeting, the Standing Committee directed the Subcommittee on Long Range Planning to undertake a thorough study of the federal judicial rulemaking procedures, including: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.

The self-study was deferred in anticipation of the January 1994 executive session and related discussion. At that meeting, the Standing Committee decided to solicit public comments. Appendix A to this Report contains a summary of the comments received. In addition, the Subcommittee canvassed the secondary literature. Appendix B to this Report is an annotated bibliography. An interim report was circulated in anticipation of the June 1994 meeting of the Standing Committee. The interim report raised several issues for preliminary discussion at that meeting and solicited further written comments from those in attendance. Drafts were circulated to the Standing Committee in January and July of 1995. After receiving comments from the Advisory Committees, the Subcommittee lays before the Standing Committee this final report, for consideration at the January 1996 meeting.

The following sections organize this Self-Study Report on the federal judicial rulemaking procedures: a **History** of the origins of modern rulemaking; a description of **Current Procedures**; a discussion of **Evaluative Norms**; the **Issues and Recommendations** for reforms; and a brief **Conclusion**.

History[1]

Modern federal judicial rulemaking dates from 1958. A few paragraphs of history inform our understanding of current practice.

The Judiciary Act of 1789 first authorized federal courts to fashion necessary rules of practice.[2] A lesser known statute enacted a few days later provided that in actions at law the federal procedure should be the same as in the state courts.[3] This created a system that seems odd to us today: a distinctly national procedure for equity and admiralty, coupled with a static procedure, conforming to the procedure in each state as of September 1789, for actions at law. Procedure for actions at law in federal courts was frozen, while state courts altered their procedures. The system became more odd, or at least more uneven, in 1828, when a statute required federal courts in subsequently admitted states to conform to 1828 state procedures. The same statute provided that all federal courts were to follow 1828 state procedures, with some discretion, in proceedings for writs of execution and other enforcement procedures.[4] This unsatisfactory system prevented the federal courts from following state procedural reform such as the New York Code of 1848, which merged law and equity and simplified pleading.[5]

The next legislative change came in 1872 when Congress required all actions at law to follow the corresponding state forum's rules and procedures.[6] Under the Conformity Act there were as many different sets of federal rules and procedures as there were states.[7]

This Report is not the place to retell the history of the Federal Rules of Civil Procedure, a story "told in large part in terms of dedicated individuals who worked and campaigned to bring them into existence."[8] What bears emphasis is that until 1938, that is, for the Nation's first 150 years, things were very different from what they are today.

Before 1938, the federal courts followed state procedural law, state substantive statutes, and federal substantive common law, even in diversity cases. Of course, the substantive common law of the forum state was recognized to be controlling in the famous 1938 Supreme Court diversity

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1 This portion of this Report is adapted from Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedure, 22 Tex. Tech L. Rev. 323, 324-28 (1991). For a more detailed history, see Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1035–95 (1982). See also Peter G. McCabe, Renewal of the Federal Rulemaking Process, 44 Am. U. L. Rev. 1655 (1995), which provides a comprehensive statement of current practices and a summary of their history.

2 Act of Sept. 24, 1789, ch. 20, §17, 1 Stat. 73, 83.

3 Act of Sept. 29, 1789, ch. 21, §2, 1 Stat. 93.

4 Act of May 19, 1828, ch. 68, 4 Stat. 278.

5 Charles E. Clark, The Challenge of a New Federal Judicial Procedure, 20 Cornell L.Q. 443, 499-50 (1935).

6 Act of June 1, 1872, ch. 255, 17 Stat. 197.

7 "[T]he procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be 'as near as may be.' " Charles Alan Wright & Arthur R. Miller, 4 Federal Practice and Procedure §1002 at 14 (2d ed. 1987).

8 Id. §1004 at 21.

decision of *Erie Railroad Co. v. Tompkins*,[9] overruling *Swift v. Tyson*, which had stood since 1842.[10] And in the same year, after more than two decades of effort, national rules of procedure were adopted by the Supreme Court, which embraced the work of an ad hoc Advisory Committee it had appointed under the Rules Enabling Act of 1934.[11] Thus 1938 marked an inversion in diversity cases: henceforth there would be federal procedural law and state substantive law. Those 1938 rules—recognizable today despite numerous amendments—established a nationally-uniform set of federal procedures, abolished the distinction between law and equity, created one form of action, provided for liberal joinder of claims and parties, and authorized extensive discovery.

The Supreme Court's ad hoc Advisory Committee comprised distinguished lawyers and law professors. While the ad hoc Committee members have been lionized for their accomplishment of drafting the rules, their more subtle but equally lasting achievement was to establish the basic traditions of federal procedural reform.[12] Two features of that experience have characterized federal judicial rulemaking ever since. First, the ad hoc Committee took care to elicit the thinking and the experience of the bench and bar by widely distributing drafts and soliciting comments, evincing willingness to reconsider and redraft its recommendations. Second, "the work of the Committee was viewed as intellectual, rather than a mere exercise in counting noses."[13] The ad hoc Committee recommended to the Supreme Court what it considered the best rules rather than rules that might be supported most widely or might appease special interests. Although the rulemaking process has been revised over the years since, these traditions have endured.

This positive experience located rulemaking responsibility inside the judicial branch, but the modern rulemaking process continues to evolve. A year after the new rules went into effect, the Supreme Court called on the ad hoc Advisory Committee to submit amendments, which the Court accepted and sent to Congress, and which became effective in 1941.[14] The next year, the Supreme Court designated the ad hoc Committee as a continuing Advisory Committee, which thereafter periodically submitted rules amendments through the 1940s and early 1950s.[15] But rumblings of dissatisfaction were heard, attributable in part to a perception that the Supreme Court merely rubber-stamped the recommendations from the Advisory Committee. Several of the Justices agreed with that criticism, dissenting from orders to complain that the proposals were not actually the work of the Court.[16] Other observers had misgivings about the tenure and

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9 304 U.S. 64 (1938).

10 44 U.S. (16 Pet.) 11 (1842).

11 Act of June 19, 1934, ch. 651, §§1-2, 48 Stat. 1064; Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935).

12 Wright & Miller, supra note 7, §1005.

13 Ibid.

14 Order Requesting Amendments from the Advisory Committee, 308 U.S. 642 (1939).

15 Continuance of Advisory Committee, 314 U.S. 720 (1941); Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L. J. 241 (1953).

16 E.g., Order Amending the Rules of Civil Procedure, 329 U.S. 843 (1946) (noting Justice Frankfurter's reliance on the judgment of the Advisory Committee); Order Amending the Rules of Civil Procedure, 308 U.S. 643 (1939) (noting Justice Black's disapproval); Order Adopting the Rules of Procedure for the District Courts of the United States, 302 U.S. 783 (1937) (noting Justice Brandeis' disapproval).

influence of the members of the Advisory Committee, who served until resignation or death. In 1955 the Advisory Committee submitted an extensive report to the Supreme Court with numerous proposed amendments. The Court neither acted on the Report nor explained its inaction. Instead, the Justices ordered the Committee "discharged with thanks" and revoked its authority as a continuing body.[17]

The resulting void in rulemaking led the American Bar Association, the Judicial Conference, and other groups to express concern.[18] At the time, there was no small controversy over whether the Court should designate a new committee and how the members might be selected. A consensus emerged that some ongoing rulemaking process was desirable, but that the process had to be reformed. The replacement rulemaking procedures were designed by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge John J. Parker of the Fourth Circuit, during their cruise to attend the 1957 American Bar Association Convention. Justice Clark recalled: "On our daily walks around the deck of the Queen Mary, we thrashed out the problem thoroughly, finally agreeing that the Chief Justice, as the Chair of the Judicial Conference, should appoint the committees which would give them the tag of 'Chief Justice Committees.' "[19] This "Queen Mary Compromise" led to a statutory amendment by which Congress assigned responsibility to the Judicial Conference for advising the Supreme Court regarding changes in the various sets of federal rules—admiralty, appellate, bankruptcy, civil and criminal—which only the Court had formal statutory authority to amend.[20] The rulemaking process today follows the basic 1958 design.[21] Only two developments in rulemaking since then are sufficiently noteworthy to deserve brief mention in this history.

First, there was a showdown over the Federal Rules of Evidence. An Advisory Committee on Rules of Evidence was created in 1965. Following standard rulemaking procedures, after extensive study, the Advisory Committee promulgated a set of proposed rules in 1972. Those proposed rules were highly controversial, especially the rules dealing with evidentiary privileges. Congress postponed the rules of evidence pending further legislation. Then Congress made substantial revisions before enacting rules of evidence into law, effective in 1975.[22] The legislative veto provision attached to all rules of evidence has since been discarded, but the applicable statute still provides that any revision of the rules governing evidentiary privileges shall have no force unless approved by Congress.[23] The Chief Justice reestablished an Advisory Committee on the

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17 Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

18 The Rule-Making Function and the Judicial Conference of the United States, 44 A.B.A. J. 42 (1958) (panel discussion).

19 Tom C. Clark, Foreword to Wright & Miller, supra note 7, at ix.

20 Act of July 11, 1958, Pub. L. No. 93-12, 72 Stat. 356; Panel Discussion, The Rule-Making Function of the Judicial Conference of the United States, 44 A.B.A.J. 42 (1958).

21 The Justices continue to express their individual concerns about the Supreme Court's appropriate role in judicial rulemaking. Statement of Justice White, 113 S.Ct. 575 (Apr. 22, 1993); Dissenting Statement of Justice Scalia, joined by Justices Thomas and Souter, 113 S.Ct. 581 (Apr. 22, 1993); Order Amending the Rules of Civil Procedure, 374 U.S. 861 (1963) (opposing statements of Justices Black and Douglas).

22 Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926; Edward W. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908 (1978).

23 28 U.S.C. §2074(b).

Rules of Evidence in 1993, after a 20-year hiatus. This committee has embarked on a comprehensive review of the subject, but has decided not to reopen the privileges question.

Second, Congress amended the Rules Enabling Act in 1988 to require the rules committees to hold open meetings, maintain public minutes, and afford wider notice of proposals and longer periods for public commentary on proposed rules.[24] Rulemaking today is more accessible to interested parties than ever before. It is also slower, and the exchange is not an unmixed blessing. In the wake of the 1988 changes, only Congress can change rules with dispatch. This means that any group with a perceived pressing need seeks its forum in the legislature rather than the judiciary, and today Congress regularly demonstrates its interest in federal rules matters by holding committee hearings and amending the rules themselves.

Current Procedures[25]

Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence, subject to an expressly reserved legislative power to reject, modify, or defer any judicially-made rules. This statutory authorization is found in the Rules Enabling Act.[26] Pursuant to this statutory authorization and responsibility, the judicial branch has developed an elaborate committee structure with attendant rulemaking procedures. The *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* describe the current procedures for judicial rulemaking.[27] These rulemaking procedures were adopted by the Judicial Conference of the United States. They govern the operations of the Standing Committee and the various Advisory Committees in drafting and recommending new rules or amendments to the present sets of federal rules of practice and procedure.

The Judicial Conference of the United States consists of the Chief Justice of the United States, the chief judges of the 13 United States courts of appeals, the Chief Judge of the Court of International Trade, and 12 district judges chosen for a term of 3 years by the judges of each circuit. The Judicial Conference meets twice every year to consider administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system.[28] It also acts through an Executive Committee on some matters.

By statute, the Judicial Conference is charged with carrying on a "continuous study of the operation and effect of the general rules of practice and procedure."[29] The Conference is empowered to recommend changes and additions in the federal rules "from time to time" to the

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24 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified at 28 U.S.C. §2073(c)).

25 This portion of this Report is adapted from Baker, supra note 1, at 328-31, and Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure—A Summary for Bench and Bar (Oct. 1993) (hereinafter A Summary for Bench and Bar).

26 28 U.S.C. §§2071-2077.

27 Announcement, 54 Fed. Reg. 13,752 (Apr. 5, 1989) (publishing Procedures adopted by the Judicial Conference of the United States on Mar. 14, 1989).

28 28 U.S.C. §331.

29 Ibid.

Supreme Court, in order to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[30]

To perform these responsibilities of study and drafting, the Judicial Conference has created the Committee on Rules of Practice, Procedure, and Evidence (Standing Committee)[31] and various Advisory Committees (currently one each on Appellate Rules, Bankruptcy Rules, Civil Rules, Criminal Rules and Evidence Rules). All appointments are made by the Chief Justice of the United States, for a three-year, once-renewable term. Members are federal and state judges, practicing attorneys, and scholars. On recommendation of the Advisory Committee's chair, the Chief Justice appoints a reporter, usually from the academy, to serve the committee as an expert advisor. The reporter coordinates the committee's agenda and drafts the rules amendments and the explanatory committee notes.

The Standing Committee coordinates the rulemaking responsibilities of the Judicial Conference. The Standing Committee reviews the recommendations of the various Advisory Committees and makes recommendations to the Judicial Conference for proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interest of justice."[32] The Secretary to the Standing Committee, currently the Assistant Director for Judges Programs of the Administrative Office of the U.S. Courts, coordinates the operational aspects of the entire rulemaking process and maintains the official records of the rules committees. The Rules Committee Support Office of the Administrative Office provides day-to-day administrative and legal support for the Secretary and the various committees.[33] The Federal Judicial Center provides staff assistance, particularly with respect to research.[34]

Rulemaking procedures are elaborate:

> The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time-consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted.[35]

By delegation from the Judicial Conference, each Advisory Committee is charged to carry out a "continuous study of the operation and effect of the general rules of practice and procedure"

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30 Ibid.

31 28 U.S.C. §2073(b). The convention has been to refer to this Committee as the "Standing Committee on Rules of Practice and Procedure" or simply the "Standing Committee."

32 8 U.S.C. §2073(b).

33 "Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office." A Summary for Bench and Bar, supra note 25.

34 See 28 U.S.C. §620(b)(1), (4). See also Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law (1981).

35 A Summary for Bench and Bar, supra note 25.

in its particular field.[36] An Advisory Committee considers suggestions and recommendations received from any source, new statutes and judicial decisions affecting the rules, and other relevant legal commentary. "Proposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations."[37] Copies or summations of all written recommendations and suggestions that are received are first acknowledged in writing and then forwarded to each member. The Advisory Committees meet at the call of the chair. Each meeting is preceded by notice of the time and place, including publication in the *Federal Register*, and meetings are open to the public.[38] Upon considering a suggestion for a rules change, the Advisory Committee has several options, including: (1) accepting the suggestion, either completely or with modifications or limitations; (2) deferring action on the suggestion or seeking additional information regarding its operation and impact; (3) rejecting the suggestion because it does not have merit or would be inconsistent with other rules or a statute; or (4) rejecting the suggestion because, while it may have some merit, it is not really necessary or sufficiently important to warrant a formal amendment.[39]

The Reporter to the Advisory Committee, under the direction of the Advisory Committee or its Chair, prepares the initial drafts of rules changes and "Committee Notes" explaining their purpose or intent. The Advisory Committee then meets to consider and revise these drafts and submits them, along with an Advisory Committee Report which includes any minority or separate views, to the Standing Committee. The reporters of all the Advisory Committees are encouraged to work together, with the reporter to the Standing Committee, to promote clarity and consistency among the various sets of federal rules; the Standing Committee has created a Style Subcommittee, with its own Consultant, that works with the Advisory Committees to help achieve clear and consistent drafts of proposed amendments.

Once the Standing Committee approves the drafts for publication, the proposed rules changes are printed and circulated to the bench and bar, and to the public generally. Every effort is made to publish the proposed rules widely. More than 10,000 persons and organizations are on the mailing list, including: federal judges and other federal court officials; United States Attorneys; other federal government agencies and officials; state chief justices; state attorneys general; law schools; bar associations; and interested lawyers, individuals and organizations who request to be included on the distribution list.[40] A notice is published in the *Federal Register* and the proposed rules changes also are reproduced with explanatory committee notes and supporting documents in the West Publishing Company's advance sheets of *Supreme Court Reporter*, *Federal Reporter*, and *Federal Supplement*.[41] As a matter of routine, copies are provided to other legal publishing firms. Anyone who requests a copy of any particular set of proposed changes may obtain one.

The comment period runs six months from the *Federal Register* notice date. The Advisory Committee usually conducts public hearings on proposed rule changes, again preceded by

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36 See 28 U.S.C. §2073(b).

37 A Summary for Bench and Bar, supra note 25.

38 Notice of Public Meeting, 59 Fed. Reg. 59,793 (Nov. 18, 1994).

39 A Summary for Bench and Bar, supra note 25.

40 A Summary for Bench and Bar, supra note 25.

41 E.g., 115 S.Ct. No. 1, at cxvi (Nov. 1, 1994).

widely-published notice. The hearings typically are held in several geographically diverse cities to allow for regional comment. Transcripts of the hearings are generally available. The six-month time period may be abbreviated, and the public hearing cut out, only if the Standing Committee or its Chair determines that the administration of justice requires that the process be expedited.

At the conclusion of the comment period, the reporter prepares a summary of the written comments received and the testimony presented at public hearing for the Advisory Committee, which may make additional changes in the proposed rules. If there are substantial new changes, there may be an additional period for public notice and comment. The Advisory Committee then submits the proposed rule changes and Committee Notes to the Standing Committee. Each submission is accompanied by a separate report of the comments received which explains any changes made subsequent to the original publication. The report also includes the minority views of Advisory Committee members who chose to have their separate views recorded.

The Standing Committee coordinates the work of the several Advisory Committees, individually and jointly. Although on occasion the Standing Committee suggests actual proposals to be studied, its chief function is to review the proposed rules changes recommended by the Advisory Committees. Meetings of the Standing Committee are open to the public and are preceded by public notice in the *Federal Register*.[42] Minutes of all meetings are maintained as public records and made available to interested parties.

The Chair and Reporter of each Advisory Committee attend the meetings of the Standing Committee to present the proposed rules changes and Committee Notes. The Standing Committee may accept, reject, or modify a proposal. If a Standing Committee modification effects a substantial change, the proposal may be returned to the Advisory Committee with appropriate instructions, including the possibility of a second publication for another period of public comment and public hearings. The Standing Committee transmits the proposed rule changes and Committee Notes approved by it, together with the Advisory Committee report, to the Judicial Conference. The Standing Committee's report to the Judicial Conference includes its recommendations and explanations of any changes it has made, along with the minority views of any members who wish to record separate statements.

The Judicial Conference, in turn, transmits those recommendations it approves to the Supreme Court of the United States. Formally, the Supreme Court retains the ultimate responsibility for the adoption of changes in the rules, accomplished by an Order of the Court.[43] The Supreme Court has at times played an active part, refusing to adopt rules proposed to it and making changes in the text of rules.[44] In practice, however, the Advisory Committees and the Standing Committee are the main engines for procedural reform in the federal courts. Under the enabling statutes,[45] amendments to the rules may be reported by the Chief Justice to the

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42 Notice of Meeting, 55 Fed. Reg. 25,384 (1990).

43 Order Amending the Federal Rules of Civil Procedure (Apr. 22, 1993), H.R. Doc. 103-74, 103d Cong., 1st Sess., reprinted at 113 S.Ct. 478 (1993).

44 The Supreme Court actually made changes in the original adoption of the civil and criminal rules. Wright & Miller, supra note 7, §§2 n.8 & 1004 n.18. Charles E. Clark, The Role of the Supreme Court in Federal Rulemaking, 46 J. Am. Jud. Soc. 250 (1963). And the Court continues to do so. Order, 129 F.R.D. 559 (May 1, 1990); Order of April 27, 1995 (not yet reported).

45 28 U.S.C. §§2071-77.

Congress at or after the beginning of a regular session of Congress but not later than May 1st. The amendments become effective no earlier than December 1 of the year of transmittal, if Congress takes no action.[46]

Since 1958 this rulemaking procedure has been followed regularly.[47] Spirited debates have been generated, from time to time, over particular proposals and sets of amendments. Some of these controversies have been resolved within the Third Branch. In recent years, these rulemaking procedures have been followed with the result that particular proposals have been rejected at each level of consideration—at the Advisory Committees, at the Standing Committee, at the Judicial Conference, and at the Supreme Court—often with attendant public debate and occasionally with high controversy. Debate likewise has attended proposals that have been approved. For example, the thorough changes to the civil discovery provisions in 1993 drew a separate statement from one member of the Supreme Court and a dissenting statement from three others.

Other controversies have played out in the Congress. For example, the 1993 amendments were the subject of hearings in both the Senate and the House of Representatives. A bill to rescind some of the discovery rules changes in that package passed the House but did not reach the floor of the Senate. Most recently, Congress included three new rules of evidence in the Violent Crime Control and Law Enforcement Act of 1994.[48] But over the years judges and the judiciary regularly have been heard to urge that Congress should feel obliged to exercise greater self-restraint in this regard and defer to the Rules Enabling Act process.

Evaluative Norms[49]

It is worth a few pages to consider rulemaking procedures from a normative vantage, to ask what are the explicit and implicit norms that overlay the entire enterprise of federal judicial rulemaking, beyond the more familiar first level of abstraction that would consider the policy underlying some specific rule change. This vantage includes rulemaking norms as they are currently understood as well as how they might be "reimagined." If rulemaking procedures are a meta-procedure, in the sense they are the procedures followed to promulgate new court procedures, then this segment of this Report, for what it is worth, might be described as a meta-meta-procedure. To describe it this way is to admit that this part has the smell of the lamp about it.

Inadequacies. Some argue that the existing norms to be found in the federal rules are not adequate and do not contemplate all that must be taken into account in a meaningful assessment

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46 But see Act of March 30, 1973, Pub. L. 93-12, 87 Stat. 9 (providing that the proposed Rules of Evidence should have no effect until expressly approved by Act of Congress).

47 Order Amending the Rules of Civil Procedure, 480 U.S. 955 (1987); Order Amending the Rules of Civil Procedure, 471 U.S. 1155 (1985); Order Amending the Rules of Civil Procedure, 461 U.S. 1097 (1983).

48 Pub. L. No. 103-322, 108 Stat. 1796; H.R. Rep. No. 103-711, 103d Cong., 2nd Sess. (1994). On unanimous recommendation of the Advisory Committee on Evidence and of the Standing Committee, the Judicial Conference informed Congress that in its view this exercise was imprudent and had produced seriously flawed language. The Judicial Conference proposed an alternative text more in accord with the norms and drafting style of the other rules. See *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases* (Feb. 1995). Congress took no action, and the new rules went into force on July 9, 1995, as originally enacted.

49 This part of this Report is adapted, with permission, from a letter from Professor Oakley to the Chair of the Subcommittee. John B. Oakley, An Open Letter on Reforming the Process of Revising the Federal Rules, 55 Mont. L. Rev. 435 (1994).

of rulemaking as a process. Rule 1's goal for the federal civil rules is the "just, speedy, and inexpensive determination of every action." Although the three specified norms of justice, speed, and economy in civil litigation are rooted in common sense, they beg some of the most important questions that face rulemakers.

In a world in which time is money, speed and economy are two sides of the same figurative coin—and the sides are indistinguishable. Standing alone, they would argue for deciding every case by the quickest (and therefore cheapest) means possible—such as the flip of a more conventional coin on which the head does not mirror the tail. Of course a "heads or tails" system of resolving civil disputes would be intolerable, because it would be unjust. But the norm of justice lends itself more easily to condemnation of offered measures, rather than to a constructive way to sort proffered reforms, because it conceals at least two competing conceptions of what justice requires.

On the one hand, justice has something to do with fairness to individuals. Civil cases ought to reach the "right" result—the outcome that would follow if every relevant fact were known with absolute accuracy, if all uncertainty in meaning or application were wrung out of every relevant proposition of law, and if society itself could by some extraordinary plebiscite resolve whether the application of the general law to the unique circumstances of a particular case should be tempered by overriding concerns of the situational equity.

On the other hand, justice also has something to do with concerns of equality and aggregate social efficiency. If we were to allocate all of our resources to attaining the Nth degree of accuracy and absolute equity in our determinations of legal liability in a particular case, there would be far less, if any, resources left to adjudicate other deserving cases, let alone to accomplish all of the other functions government performs besides deciding civil disputes. Moreover, if equity were given a standing veto over pre-existing legal rules as applied to the actual facts of any given case, we would subvert the system of reliance on protected expectations that permits a society to function amid a welter of conflicting interests without every such conflict becoming a contested dispute brought into court.

The fact that Rule 1 speaks of a just determination in *every* case, not only the one before a judge at any given moment, is more a reminder of the inevitable tension between concerns of fairness and efficiency than a criterion for resolving that tension. It should therefore be no surprise that the history of federal civil procedure under the Federal Rules has featured a continuous but seldom explicitly elaborated struggle between what might be labeled the "primacy of fairness" versus the "primacy of efficiency." The "primacy of fairness" argues for subordination of procedural rules in favor of reaching the merits of the parties' dispute under the substantive law, and conditioning the finality of determination on liberal opportunities for amendment of pleadings, reconsideration by the trial court, and appellate review. The "primacy of efficiency" argues for rigorous enforcement of procedural rules to narrow the range of the parties' dispute and to expedite decision, and limiting the opportunity for, and scope of, appellate review.

Alternatives. What alternative or additional norms might be imagined for federal judicial rulemaking, beyond the norms that might be considered for the particular rules and procedures themselves? Federal rules of procedure should be adopted, construed, and administered to promote five related norms: efficiency, fairness, simplicity, consensus, and uniformity.

The application of the norm of efficiency to the rulemaking process requires an assessment of how costly it is to initiate consideration of a rule change and for that proposal to proceed to

implementation by the federal courts. That assessment is itself rather complicated, requiring, for instance, consideration of the social cost of the rulemaking process in terms of how much more time the rulemakers would have spent adjudicating cases, representing clients, or teaching students and conducting research, had they not been involved in the rulemaking process.

The assessment of the efficiency of the rulemaking process is further complicated by being interactive with assessment of the efficiency of the actual rules the rulemaking process produces. A conservative and time-consuming process of rulemaking may be less costly than fast-track rulemaking that taxes the litigation system with a constant need for retraining and a high rate of error attributable to unfamiliarity with as-yet unconstrued new rules, unless it can be shown that the long-run efficiency gains of new rules are consistently high. The inefficiency of frequently changing the rules might argue either for keeping the rulemaking process inefficient and thus resistant to proposals for change, or for adopting some form of staging process by which rule changes are limited, absent exceptional circumstances, to a prescribed schedule of once every so many years. Moreover, since the Judicial Conference does not have monopoly power in rulemaking, the relative efficiency of either an inert or a volatile judicial rulemaking process will be determined, in part, by the efficiency or inefficiency of the rules likely to be produced by direct Congressional action, or by Congressional delegation of local rulemaking power to individual district courts, should centralized rulemaking by the Judicial Conference committee structure be deemed unduly torpid.

As applied to the rulemaking process, the norm of fairness calls not only for receptivity to proposals for change by those not directly vested with rulemaking power, but also for access to the process of implementing a proposed rule change by those whose interests are most likely to be affected by any proposed change. How seriously is public comment encouraged and facilitated, and is this a pro forma gesture or is there evidence that adverse public comment makes a difference in the progression of a proposal into a rule change? As applied to the rules that the process produces, the norm of fairness requires evaluation of whether changes in the rules promote or retard the likelihood that individual cases will come to the right result, whether by adjudication or pro tanto by settlement, in relation to the efficiency gains or losses that result from such changes. Is the rulemaking system biased in favor of ratcheting up efficiency at the expense of fairness, or vice versa?

The norm of simplicity, specified in 28 U.S.C. §331, serves the related interests of both efficiency and fairness. Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and hence unfair application. Any rulemaking process that regularly produces unduly complex rules of procedure or unduly complicates existing simple rules threatens the systemic goals of efficiency and fairness.

As applied to the rulemaking process, the norm of consensus overlaps, but does not duplicate, the norm of fairness. The norm of consensus demands, first, that the rulemaking process be sufficiently open to public input to be fairly representative of, or at least sensitive to, the interests of those who will be most affected by the rules it produces. But this norm demands more than mere notice and the opportunity to be heard. There must be some sharing of, or at least constraint upon, the power to make new rules, so that a lack of consensus about the wisdom of problematic proposed rules will normally suffice to block the adoption of such rules. Consensus should not be too strong a norm, however, because it favors the status quo. At the same time, the expectation for consensus should render the rulemaking process sufficiently inert to resist utopian reform by policymakers who are so detached from the arena of litigation to which the rules are

directed that they are indifferent to the practical impact of rule changes upon those most affected by them.

The norm of uniformity is fundamental to the rulemaking process first set in place by the 1934 Rules Enabling Act. The Act was intended to promote a system of federal procedure that was not only trans-substantive but, with minor local variations, uniform in application in all federal district courts. Geographical uniformity is more important than trans-substantive application of the federal rules. Deviations from trans-substantive uniformity can, where necessary and appropriate, be expressly specified within the rules. Current examples are the special rules for class actions brought derivatively by shareholders, and the entire set of discrete rules of procedure for bankruptcy cases. But geographical disuniformity, even when expressly permitted by local opt-out provisions inserted into the national rules, operates insidiously and often covertly to impair the norms of both efficiency and fairness.

The norm of uniformity demands that the procedure for litigating actions in federal courts remain essentially similar nationwide. If each district court's rules of civil procedure are allowed to become sufficiently distinct that venue may affect outcome and that a special aptitude in local procedure becomes essential to competent representation in that court, forum-shopping would be encouraged. Moreover, litigants must either risk the unfairness of inadvertent mistake in conforming to localized rules of procedure or incur inefficient costs of insuring against the idiosyncrasies of local practice by ad hoc procedural research or the prophylactic retention of local counsel.

Issues and Recommendations

In this section of this Report, we turn to issues, analyses, and recommendations.[50] We take up issues related to the five entities in rulemaking: Advisory Committees; Standing Committee; Judicial Conference; Supreme Court; and Congress.The report concludes with a discussion of the time line of rulemaking.

A. Advisory Committees

Memberships: Criticisms have been leveled at the composition of the various rules committees. First, there have been allegations of an under-representation of the bar, particularly active practitioners, and of other identifiable interest groups within the bar, such as public interest lawyers. The often implied but sometimes explicit objection is that the Advisory Committees are dominated by federal judges. Second, there have been allegations of a lack of diversity of members. The argument is that the Advisory Committees ought to mirror the diversity of the federal bar, which includes more women and minorities than are currently found on the federal bench.

These are considerations for the attention of the appointing authority, the Chief Justice. In recent years, the Advisory Committees have been enlarged to include more non-judges. Whether they (and the Standing Committee) have already become too large for sustained exchanges and careful discussion is an interesting question; drafting by large committees is rarely successful. We doubt that they should be larger; perhaps they should be smaller. At all events, the rules committees are committees of the Judicial Conference of the United States, the policy-making entity of

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50 Professor Carl Tobias assisted in the compilation of issues for consideration in this part of this Report.

the Third Branch. They are not "bar" committees. "Representativeness"—seats on the Advisory Committee for major identifiable factions of the bar—is incompatible with the tradition of federal rulemaking based on a disinterested expertise, as opposed to interest-group politics. Rulemaking ought not follow public opinion or the ratio of specialties at the bar.

Federal judges ought to remain a majority of the members of the Advisory Committees. They have the knowledge and time to act in the best interest of the public those courts serve. They are of course lawyers too, with experience on both sides of the bench. The ability to compare these two experiences makes judges especially appropriate rulemakers. This is not to say that the appointing power ought to be exercised without regard to the concerns we have mentioned. It is enough to suggest that these considerations be given appropriate attention and that efforts be made to identify well-qualified candidates with diverse personal and professional experiences. Some recognition may appropriately be given to enduring divisions in the practice of law. For example, the Advisory Committee on the Criminal Rules includes a representative of the Department of Justice and a Federal Public Defender. Analogously, the Civil Justice Reform Act of 1990 required that advisory groups be "balanced and include attorneys and other persons who are representative of major categories of litigants" in each district.[51]

To help achieve these goals, the Chief Justice now solicits advice widely from within the federal judiciary and the Administrative Office of the U.S. Courts. The Chief Justice could consider seeking suggestions from the American Bar Association and similar other organizations as well.[52]

[1] Recommendation to the Chief Justice: Appointments to the Advisory Committees should reflect the personal and professional diversity in the federal bench and bar.

Length of terms: Members' terms on the Advisory Committee should be long enough to maintain continuity and to allow a member to see a proposal through to adoption, but not so long as to create inflexibility and to render rulemaking an "insider's game." The current practice is to appoint members for an initial three-year term followed by a second three-year term. On balance, this seems a reasonable normal term of years for members, but the Chief Justice should retain his existing discretion to make exceptions when appropriate to help committees follow through with extended rulemaking projects.

Members must master a potentially bewildering number of proposals within a complex process. The Chair, Reporter, and veteran members of the Advisory Committee can be of great assistance. The rotation on and off of the Advisory Committee affords new members a break-in period. This by-product is reason to maintain the staggered terms. Still, more formal assistance might be appropriate. This might take the form of an orientation meeting scheduled the day before the regular meeting of the Advisory Committee, attended by the new members, the Chair, and the Reporter, and perhaps others. Additionally, the Standing Committee and the Advisory

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51 28 U.S.C. §478(b).

52 See also Long Range Plan for the Federal Courts (May 1995) Recommendation 30, Implementation Strategy 30c: "In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches."

Committees should continue to invite members whose terms have expired to attend the meeting after their term ends, in order to promote continuity.

[2] Recommendation to the Advisory Committees: Chairs and Reporters of the Advisory Committees should schedule orientation meetings with new members.

Somewhat different considerations obtain for Chairs. Rulemaking projects take three years from beginning to end. A Chair with a three-year term therefore can see a project through only if it commences at the outset of his or her tenure. A leader ought to be granted some time to think through proposals, to make them, and still have time to see them through. Reporters now serve indefinitely. Making a non-member of the committee the only enduring voice is questionable. A Chair, too, ought to provide continuity within the Advisory Committee and the Standing Committee. It is not uncommon for the Chairs to represent the judicial branch before the Congress. The practice of elevating an experienced member to the Chair is appropriate. If a Chair is designated at the end of one three-year term, a term of five years as Chair would be appropriate, increasing total service to eight years. This duration is not out of line in a life time-tenured institution. The shorter terms of members preserve sufficient opportunity for widespread involvement in rulemaking.

[3] Recommendation to the Chief Justice: The term for Chairs of the Advisory Committees should be five years.

Resources and support: Members of the Advisory Committees need sufficient resources and support for their part-time but nonetheless important duties. The permanent staff from the Administrative Office provides necessary logistical support for attending meetings and related duties. The Reporters provide important expertise and drafting assistance. Members exchange information about new developments as a matter of routine. Liaison members of the Standing Committee also contribute to the smooth operation of the committee system. The paper-flow through the Advisory Committees is substantial. The relevant literature in each of these areas of the law is growing rapidly.

Because committee members are part-time rulemakers it might be useful to provide them with some regular entrée to the secondary literature, including law journals and social-science publications that have some bearing on their responsibilities. The Reporters are the most logical bibliographers.

Various Advisory Committees have planned in-house seminars, presentations by panels of experts in their field, to bring members up-to-date on recent developments. These "continuing education" events should be continued.

[4] Recommendation to the Advisory Committees: Each Advisory Committee ought to consider adding to the Reporter's duties two tasks: first, regularly circulating law journal articles, social-science publications, and other pertinent articles; second, arranging and organizing in-house seminars.

Outreach and intake: One frequently heard criticism of federal rulemaking is that it is a closed process dominated by insiders and elites. The twin complaints are that some worthy proposals go begging for lack of a sponsor and some equally unworthy proposals are pushed through the process by members with an agenda. In fact, anyone can suggest a rules amendment; the Committees' meetings are open to the public, periods for public comment and public hearings

are routine steps; proposed rules changes are widely published and distributed;[53] and the official records of the various rulemaking entities are public documents. Unless a flood of comments prevents it, the Advisory Committee (through its Secretary) acknowledges correspondence and later advises every correspondent of the action taken on his or her proposal. But even inaccurate perceptions have a way of overtaking reality, and they cannot go unchallenged. The Administrative Office's brochure entitled *The Federal Rules of Practice and Procedure—A Summary for Bench and Bar* is a good example of the ongoing effort to correct misconceptions about federal rulemaking. In August 1994 the Chair of the Standing Committee wrote the presidents of all state bar associations, requesting them to designate persons to receive drafts and make comments; so far 42 of the state bars have done this. Advisory Committees have established some independent points of contact.

To promote both the appearance and reality of openness, greater uses of technology should be explored. The extensive mailing list for requests for comments on proposed rules changes usually generates only a few dozen responses. Not infrequently, public hearings scheduled for proposals are canceled for lack of interest.

There are alternate ways to reach interested persons. For example, the public hearing before the April 1994 meeting of the Advisory Committee on the Criminal Rules was broadcast on C-SPAN. Other things might be tried. Public hearings might be conducted relying on closed-circuit television. Proposed rules changes, traditionally distributed in print media, can be made available on the Internet at low cost. Most universities and agencies of the federal government already have access to the Internet—although most federal judges do not. Law firms are increasingly likely to be connected to the Internet. The most recent set of proposed amendments published for comment has been made available via the Administrative Office's home page.[54] Persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee. The Advisory Committees and the Standing Committee could communicate by e-mail and other electronic means. Distribution of documents by fax can be discontinued and replaced by distribution of attachments to e-mail messages.

[5] Recommendation to the Administrative Office: Electronic technologies should be used to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees.

The need for research: It is frequently asserted, most often by academic critics,[55] that federal rulemaking today is too dependent on anecdotal information rather than empirical research. Rules changes more often than not depend on the legal research of the Reporters combined with the informed judgment of the members of the rules committees. To make this argument is not

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[53] The full mailing list contains more than 10,000 names. Most addressees receive them ex officio, but there is also a revolving list that eventually will number 2,500 scholars and members of the bar. Any recipient on the revolving list who does not respond over the course of three years will be replaced with a new name.

[54] At http://www.uscourts.gov. The Federal Judicial Center also has a home page, at http://www.fjc.gov, with its own publications and links to other legal sites on the Internet. The Cornell Legal Information Institute has made the rules themselves, and many other legal texts, available at http://www.law.cornell.edu. Other sites are blooming. For example, Villanova maintains what it calls "The Home Page for the Federal Courts on the Internet" at http://www.law.vill.edu/Fed-Ct/fedcourt.html.

[55] Baker, supra note 1, at 334-35. See particularly Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brooklyn L. Rev. 841 (1993).

necessarily to find fault with the model of disinterested experts as rulemakers. Nor does the argument deny the not-infrequent, well-documented instances when rulemakers have relied on empirical research.[56] Yet not enough has been done to incorporate empirical research into rulemaking on a regular basis. The major difficulties: research is expensive, it takes a long time, and the results are of doubtful utility when they come from survey research or from demonstration projects. Controlled experiments are rare indeed, and sophisticated econometric analysis of variation (the subject of the next section) is difficult to conduct.

We cannot expect members of the rules committees to be experts in empirical research techniques, although a few have been. We can expect the Reporters to be well-versed in the literature related to their expertise, including interdisciplinary writings and studies in other disciplines that have some bearing. Indeed, this ought to be a criterion for appointment of Reporters. It might also be prudent for the Reporters to recruit colleagues in other disciplines whose expertise complements their own, as a kind of informal group of advisors. Additionally, the Administrative Office and the Federal Judicial Center may be called on to gather, digest, and synthesize empirical work of other institutions. The Advisory Committees should notify these institutions about what data ought to be collected. The Federal Judicial Center, in particular, should engage in original rules-related empirical research to determine how procedures are working. Likewise, the Center is adept at field studies and pilot programs—although, as we have observed, data from such projects is problematic, if only because of selection effects in litigation. (Litigants settle when they agree on a probable outcome; samples of litigated cases then may reflect the degree of uncertainty rather than the anticipated operation of the system. Moreover, the amounts paid in settlement, which may be the best indicators of anticipated performance, are rarely available to researchers.) Advisory Committees must take advantage of available data. Finally, a program might be developed for commissioning independent studies to be performed by outside experts under contract with the Advisory Committee.

In sum: the Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.

[6] Recommendation to all the Advisory Committees: Each Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available, and should use these data to decide whether changes in existing rules should be proposed.

An empirical research project of national scope is taking place under the auspices of the Civil Justice Reform Act of 1990.[57] Indeed, some have suggested that the program of district-by-district plans for case management has effectively created a second track of federal rulemaking that threatens the policy goals of national uniformity and political neutrality behind the Rules Enabling Act process. The pilot programs and district plans present an unparalleled opportunity for empirical research into the effectiveness of reforms, within districts and comparing districts with other districts. The Judicial Conference delegated primary responsibility for oversight and evaluation under the Act to the Committee on Court Administration and Case Management. But, as members of the Standing Committee will recall, the Standing Committee has established

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56 Baker, supra note 1, at 335.

57 Pub. L. No. 101-650, 104 Stat. 5089 (1990).

a liaison with that Committee. Congress has extended the deadline for reporting to December 31, 1996.[58]

The Advisory Committee on the Civil Rules has the most direct interest in the evaluation of the delay and cost reduction plans. That Advisory Committee will be obliged to conduct its own assessment of the final report to Congress with the expectation that some local innovations in practice and procedure will deserve to be incorporated into the Federal Rules of Civil Procedure—and that less successful innovations will be abandoned, if necessary by being forbidden in the national rules. (We return below to the subject of uniformity.) The final report of the RAND study will provide the Advisory Committee with data for assessing future proposals for rules changes. In the long run, the Advisory Committees and the Standing Committee ought to be expected to learn to better utilize empirical research during the evaluation and reporting cycle. To this end, the Standing Committee should request that the Advisory Committee on Civil Rules provide a written report generalizing from the experience with the 1990 Act.

[7] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should report on and make suggestions about how data gathered from the experience under the Civil Justice Reform Act of 1990 might effectively be used in rulemaking.

Finally, the Standing Committee ought to go about gathering information about the experiences with the phenomenon of local options in the national rules. As part of the 1993 amendments to the Federal Rules of Civil Procedure, districts were afforded the discretion to opt-in or opt-out of various discovery rules changes. The resulting patchwork provides the equivalent of field experiments in the effectiveness of the optioned rules changes. The Federal Judicial Center has begun to collect data on the experience with opting in and out. The Standing Committee should recommend that the Advisory Committee on Civil Rules, in conjunction with the Federal Judicial Center and scholars, seek to evaluate and compare the experiences between districts that opted-in and those that opted-out. This study ought to assess the particular measures involved and offer guidance to the Standing Committee on the future appropriateness of writing local options into the national rules. There should be no bias in this inquiry: although it has long been a belief of the Standing Committee that uniform rules would facilitate a national practice, this belief should be investigated rather than treated as a shibboleth.

[8] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should assess the effects of creating local options in the national rules.

B. Standing Committee

Membership: The discussion about the composition of membership on the Advisory Committees will not be rehearsed here. Much of it applies to the Standing Committee.

It has been suggested that the Standing Committee should be reconstituted to consist only of an independent chair plus the chairs of the various Advisory Committees—or perhaps to have overlapping membership with the Advisory Committees, comprising the Chair plus one or two members of each Advisory Committee. Such a change would reduce the effectiveness of the Standing Committee as an independent voice (and a check), but it would increase continuity and

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58 Pub. L. No. 103-420, 103rd Cong., 2nd Sess. (Oct. 25, 1994).

ensure that each member is more thoroughly versed in the subject. The Chief Justice should consider each side of this balance in selecting the composition of the Standing Committee. One middle position between constituting the Standing Committee wholly from members of the Advisory Committees would be to make the Chairs full members of the Standing Committee, giving them *de jure* the roles that many have assumed *de facto* in recent years. We make no concrete suggestion here but again commend this possibility to the consideration of the Chief Justice.

The criticism that the committees do not "represent" the bar resonates more for the Advisory Committees, which have principal drafting responsibility, than for the Standing Committee. Therefore, we do not suggest enlarging the membership of the Standing Committee to include more attorneys. Nevertheless, it is proper to take into account goals of diversity in membership.

[9] Recommendation to the Chief Justice: Appointments to the Standing Committees should reflect the personal and professional diversity in the federal bench and bar.

Assuring uniformity. The Rules Enabling Act process is supposed to achieve and maintain a uniform national system of federal practice and procedure. National uniformity has been undermined by three factors. First, the ADR movement has created a menu of "nouveaux procedures"[59] that present choices of different resolution procedures for different kinds of disputes. Second, the Civil Justice Reform Act of 1990 balkanized rulemaking authority. Third, the Standing Committee has followed something of a reverse King James Version of rulemaking that "taketh away" and then "giveth": the Standing Committee's Local Rules Project has harmonized local rules with the national rules, but in recent rules amendments, e.g., Fed. R. Civ. P. 26(a), the Standing Committee has authorized district courts to strike off on their own paths, even to reject the national rule. But the new Fed. R. Civ. P. 83, effective on December 1, 1995, insists that local rules be consistent with, and not duplicate, national rules. To promote uniformity in other areas, the Standing Committee has circulated to all district courts a report of the Local Rules Project on criminal rules, and the Reporter has prepared a careful study that will serve as the basis of initiatives looking toward more uniform rules of ethics.

To identify these three developments is not to pass judgment on them, although the worry often heard is that the federal courts are reverting to the pre-1938 era of local procedure. It would not be appropriate for our Subcommittee to recommend a once-and-for-all solution—though we have already suggested taking a good hard look at the consequences. The Judicial Conference's own Long Range Planning Committee was unable to suggest a concrete solution.[60] Our exercise in taking the long-range view would not be complete if we did not at least draw attention to a worry expressed by many on the bench and in the bar. The worry is that the national rules and rulemaking are well on their way to becoming merely the lounge act and not the main room attraction in federal practice and procedure.

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59 Baker, supra note 1, at 334.

60 Proposed Long Range Plan for the Federal Courts (Mar. 1995) Recommendation 30, Implementation Strategy 30b: "The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures."

[10] Recommendation to the Standing Committee: The Standing Committee ought to keep the goal of national uniformity prominent in its expectations and decisionmaking. The Local Rules Project initiatives should be understood as a part of the continuing duty of the Standing Committee. There ought to be a strong but rebuttable presumption against local options in the national rules.

Redrafting proposals. The main task of drafting proposed rules belongs to the Advisory Committees. The Advisory Committees possess the requisite expertise and serve as the focal point for suggestions and public commentary on the present and proposed rules. Rulemaking procedures and tradition, however, recognize that the Standing Committee may revise drafts of proposed rules submitted by the Advisory Committees, before or after the public comment period. Those procedures and traditions likewise anticipate that the Standing Committee will exercise self-restraint. Members of the Standing Committee should communicate concerns about style and grammar to the Chairs and Reporters of the Advisory Committees before the meeting of the Standing Committee begins, to permit these matters to be rectified off the floor (it is easier to draft in small, peaceful groups) and presented to the Standing Committee in writing to facilitate careful reflection. Meetings of the Standing Committee then can focus on substance. We recognize, of course, that style and substance may be inseparable. If in the judgment of the Standing Committee a proposal requires substantial changes for either style or substance, the draft ought to be returned to the Advisory Committee. This division of the rulemaking labor obliges the Standing Committee to be aware of its function and respectful of the role of the Advisory Committees.

[11] Recommendation to the Standing Committee: The Standing Committee and its members must be mindful that the primary responsibility for drafting rules changes is assigned to the Advisory Committees. Members of the Standing Committee should facilitate careful changes in language. If in the judgment of the Standing Committee a proposal requires substantial changes, the Standing Committee should return the measure to the Advisory Committee for further consideration.

Reporter. The Reporter to the Standing Committee has duties different from the those of the Reporters to the Advisory Committees. The former serves as a drafter, but the limited drafting function of the Standing Committee likewise limits this responsibility of its Reporter. The Reporter facilitates communication between the Advisory Committees and the Standing Committee, especially between regular meetings of the Standing Committee, by attending the meetings of the Advisory Committees and by communicating with their Reporters. The Reporter advises the Chair, assists the Administrative Office rules committee staff, and cooperates with the Federal Judicial Center. The Reporter monitors Congressional activities that are related to rulemaking and rules proposals. The Reporter keeps the Standing Committee abreast of commentary and literature related to the rules and rulemaking. The Reporter performs outreach efforts such as appearing before bar groups to familiarize the profession and the public with the rulemaking process and particular proposals. The Reporter serves as a director for special projects, such as the Local Rules Project. The Reporter serves as an advisor to the Standing Committee, as for example with the pending challenge to the Ninth Circuit Rules jointly filed by several states' attorneys general. The Reporter, as the "scholar-in-residence" of the Standing Committee, pursues long range proposals for rulemaking.

If these duties continue to increase and become more time-consuming, the Standing Committee may eventually decide to appoint an Associate Reporter to assist the Reporter. The

sense of the Subcommittee is that things have not yet reached that point. If the Standing Committee accepts the recommendation below to allow the Subcommittee on Long Range Planning to lapse as well as other recommendations made here that would add to the duties of the Reporter, then an Associate Reporter might be needed sooner rather than later. Therefore, our recommendation is open-ended.

[12] Recommendation to the Standing Committee: The Standing Committee should take cognizance of the growing demands being placed on its Reporter and eventually should consider whether to appoint an Associate Reporter.

Liaison members. Liaison members from the Standing Committee attend and have the privilege of the floor at meetings of the Advisory Committees. This innovation ought to be continued with some attention to developing a more definite role for the liaison members.

[13] Recommendation to the Chair: The practice of appointing liaison members from the Standing Committee to the various Advisory Committees should be continued.

Subcommittee on Style. Judge Robert E. Keeton, the immediate past Chair of the Standing Committee, established a Subcommittee on Style and charged it with undertaking a restyling of the various sets of federal rules. That Subcommittee appointed a Consultant who has written a manual on rules drafting. The Subcommittee regularly has contributed to the efforts of the Advisory Committees and the Standing Committee to achieve greater consistency and clarity in the language of the federal rules.

The objective of this effort—uniform, readable, rules consistent with modern legal usage—is important not only to users of the rules but also to drafters, for clarity promotes understanding. The work of the Subcommittee, and particularly the Consultant's drafting manual, will be advantageous to the Standing Committee (and other legal drafters) in the years to come. But it remains an open question whether the plan to rewrite the body of existing rules will succeed. The principal question is whether it is possible to revise the rules without too many accidental change in meaning. A stated goal of preserving meaning invites readers to use the old rules to interpret the new ones, which may complicate interpretation for some time. (This has occurred with the 1948 amendments to Title 28 of the United States Code.) Discovery of ambiguities also leads to discovery of unwelcome substance; yet definitions of "unwelcome" differ, and the ensuing debate about substance may frustrate agreement on style changes.

The Supreme Court also has shown some unease with this process, which until the completion of the project produces differences in style across rules; the "restyled" rules use terminology in a different way from the older rules. When sending a package to Congress on April 27, 1995, the Supreme Court changed "must" to "shall" to preserve consistent usage. The Court may prefer an all-at-once project, of the kind now under way, but thoroughgoing restyling will be a long time coming for several sets of rules. The Advisory Committee on Appellate Rules has completed its initial review of a complete rewrite; the other advisory committees are mid-way in the process or have not yet begun it.

The Long Range Planning Subcommittee believes that the objects of the project are desirable, and that it should be continued. Better drafting for rules newly proposed, or revised for other reasons, should be pursued assiduously. Costs and benefits of revising whole sets of rules at once are more closely balanced: the gains are greater, but so too the costs. Experience with the

Appellate Rules will permit the Standing Committee to decide how to proceed with the other sets of rules.

[14] Recommendation to the Standing Committee: The Standing Committee should continue to improve the style of new and amended rules, and should use its experience to decide whether to revise each set of federal rules fully.

Subcommittee on Long Range Planning. The immediate past Chair of the Standing Committee established a Subcommittee for Long Range Planning. Since then, the Subcommittee has planned to find a role, without substantial long range success. The rulemaking process *is* a form of long-range planning, which suggests that there is no need for a separate long-range planning organ. The Subcommittee has filed reports with the Standing Committee about long range proposals already in the rulemaking pipeline and recommended the introduction of other such proposals. It has recommended that Advisory Committees study comprehensive packages of procedural reforms proposed by scholars, committees, and bar groups. (In the three years since the Standing Committee adopted this recommendation, no Advisory Committee has reported back to the Standing Committee on any of these proposals.) The Subcommittee has attempted to monitor the work of the Judicial Conference's Committee on Long Range Planning. It performed this self-study of rulemaking procedures.

The term of one member of the Subcommittee as a member of the Standing Committee expired before the preparation of this Report; his vacancy on the Subcommittee has not been filled. The term of Professor Baker, the original chair of the Subsommittee, expired at the end of September 1995. He too has not been replaced, but he has continued to participate in the preparation of this final version of the Report. The Subcommittee enthusiastically recommends that with the completion of this Report the Standing Committee disband the Subcommittee on Long Range Planning. (Similarly, in June 1995 the Chief Justice discharged the Judicial Conference's own Committee on Long Range Planning.) Another option is to assign long range planning in rulemaking to the reportorial function, perhaps on the occasion of creating the position of Associate Reporter, as is anticipated in a previous recommendation.

[15] Recommendation to the Chair of the Standing Committee: The Subcommittee on Long Range Planning should be abolished. Issues regarding long range planning in the rules process should be reassigned to the Reporter.

C. Judicial Conference

The Judicial Conference performs a function somewhere between the Standing Committee's and the Supreme Court's. For the most part, the Judicial Conference evaluates proposals on the basis of the paper record compiled by the Advisory Committees and the Standing Committee, and it gives thumbs up or thumbs down (the latter rarely) without making changes. We do not make any recommendations concerning the way the Judicial Conference deals with proposals from the Standing Committee—except for the obvious implication that a change in the role of the Supreme Court (discussed below) would alter the role of the Judicial Conference, and vice versa. The Judicial Conference is the largest body that participates in the process and hence is the least suited to technical drafting. It also has the least time for rulemaking; its agendas are crowded with other subjects, and rules are discussed briefly when they are discussed at all. This increases the chance of misunderstanding, which leads to error. As we mention below, therefore, if the Supreme Court retains its current role, it may be appropriate to remove the Judicial Conference as a separate step in the process.

D. Supreme Court

The main issue regarding the Supreme Court's participation in judicial rulemaking is whether the High Court should continue its role in the statutory scheme. Congress has designated the Supreme Court as the entity with power to promulgate rules for the federal courts, subject to the possibility of legislation during the seven months between proposal and effective date.

Historically, the Court's role has been justified on two levels. First, the Supreme Court, as the highest federal court, exercises supervisory powers over the lower federal courts. Second, the prestige of the Court lends authority to the rules.

Commentators and individual Justices have questioned these justifications and argued that the Court's role is, in the pejorative, to serve as a "rubber stamp." Others on and off the Court have answered that the historic rationales still apply. They draw attention to the occasions when the Supreme Court has disapproved or altered draft rules and to the dissenting statements from some of the Justices regarding particular rules. There is the further, but inevitable, complication that the Supreme Court frequently is called on to interpret the rules and to decide whether they are valid under the Rules Enabling Act and the Constitution.

Justice White's statement regarding the 1993 package of amendments summed up his 31 years of experience in judicial rulemaking.[61] He concluded that the Supreme Court's "promulgation" of rules functionally amounts to a certification to the Congress that the Rules Enabling Act procedures are operating properly and that the particular proposals before the Court are the products of a careful rulemaking process. The transmittal letters from the Chief Justice since then have made the same point.

Given the considerations on both sides, we leave to the Justices themselves the question whether there should be any change in their role—and, correspondingly, whether, if it is best to maintain the Court's current role, it would be appropriate to reduce the role of the Judicial Conference. Having *both* of these bodies pass on rules that have already been fully ventilated consumes much time for little purpose.

There is one other possible change worth mentioning. A few years ago, the British Embassy sent a diplomatic note to the Court concerning the implications of a proposal for service in foreign countries . The measure was returned to the Judicial Conference for further consideration. After the concerns of the foreign governments were addressed, the proposal went forward. In the aftermath of that round of rulemaking, the Justices informed the Standing Committee that they wanted to be alerted to any controversy or objections to particular proposals, as part of the written record forwarded with the rules packages. The Supreme Court may appropriately conclude that return of rules packages—rather than the revision of the proposals and promulgation of rules that the Advisory Committees and Standing Committee have not reviewed—is the best approach when the proposals it receives seem problematic to the Justices.

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61 Statement of Justice White, 113 S.Ct. at 575 (Apr. 22, 1993).

E. Congress

The separation of powers that is part of the structure of the Constitution is not designed for efficiency. By creating federal courts and defining their jurisdiction, Congress keeps the promise of the Preamble to "establish justice." Rulemaking is a power that is legislative in nature to the extent that rules affect the interests of litigants and regulate the conduct of officers of the Third Branch (including attorneys), but is nevertheless delegated partly to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights."[62] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts.[63] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules. Similarly with respect to legislation regulating the rulemaking process. In his year-end report for 1994, the Chief Justice wrote: "I believe that this [Rules Enabling Act] system has worked well, and that Congress should not seek to regulate the composition of the Rules Committees any more than it already has." The Judicial Conference has reached the same conclusion. See also Recommendation 1 above. And the Judicial Conference's Committee on Long Range Planning shares this understanding. See *Proposed Long Range Plan for the Federal Courts* (Mar. 1995) Recommendation 30, Implementation Strategy 30a ("Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.").

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

F. The Rulemaking Calendar

The rulemaking cycle: Three changes in the rulemaking environment have occurred at roughly the same time. (1) The period between initial proposal and ultimate rule was extended in 1988 by increased opportunities for comment and an increased length of report-and-wait periods, so that it is now difficult to see a proposal through in fewer than three years. (2) The national rulemaking process had become more frenetic, with multiple packages pending simultaneously. Instead of five or more years between amendment cycles (the old norm), it is now common to see multiple amendments to the same rule in different phases: one pending before Congress, another pending before the Judicial Conference, a third out for public comment, and a fourth under con-

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62 28 U.S.C. §2072 (a) & (b).

63 U.S. Const. art. III, §1.

sideration by an Advisory Committee. (3) Meanwhile local rulemaking has burgeoned, in part, but only in part, at the instance of Congress (the Civil Justice Reform Act of 1990).

On one thing most people agree: *all* of these developments are unfortunate. It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in. The former undermines the Rules Enabling Act process (and discards the benefits of expertise); the latter undermines national uniformity. If the Supreme Court cannot respond quickly to a problem, legislation or local rules must be the answer. That amendments to the Rules Enabling Act are themselves responsible for the extended rulemaking cycle—so that Congress is the source of the delay it bemoans—offers no succor to those who seek swift changes. At the same time, few people can be found to support the existence of multiple changes to the same rule. Professor Wright, an observer and long-time participant in the rulemaking process, has condemned the process of overlapping amendments in no uncertain terms.[64] His *cri de coeur* is one among many strong and fundamentally correct indictments. It also illustrates the intractable nature of the problem—for it is precisely the change in the length of the cycle that has made overlaps inevitable!

When rules could be amended after a year or so of effort, and when the Chairs of the Advisory Committees and Standing Committee had indefinite terms, it was easy to have discrete and well-separated packages of rules. The heads of the committees could plan a coherent program, confident that they could see it through, and that if new information called for prompt change, they could accomplish it by adding it to an existing package. No more. The increased length and formality of the rulemaking process makes it difficult for a bright idea or alteration required by legislation to "catch up" with an existing package. Meanwhile the members of the committees serve shorter terms, so that fresh blood brings fresh suggestions every year and the Chairs, to have any effect before their three-year terms expire, must act with dispatch. No wonder we see a drawn-out process in which amending cycles overlap while local rules sprout like weeds. And it is almost impossible to imagine a cure while the duration from proposal to effectiveness is longer than the terms of Chairs.

What is worse, a cure that entailed enforced separation of rules packages—say, a maximum of one package per three-year term of a Chair—would have large costs of its own. Would the package have to start life at the outset of the Chair's time? Too soon; the Chair needs time to settle in, do some deep thinking, review the data, collect the thoughts of the committee, and so on. Then would the package start late in the Chair's term? Too late; its architect would leave before shepherding the package through and accommodating the many demands for amendments that occur in the process. Meanwhile new things come up—new statutes, decisions that interpret a rule to create a trap for the unwary (the source of the overlapping proposals concerning Fed. R. App. P. 3 and 4 that Professor Wright bemoaned)—and the cost of tidiness may be that litigants forfeit their rights. Put to a choice between simplifying the life of judges and authors, and preserving the rights of litigants, the rules committees sensibly choose the latter. That seals the fate of proposals to simplify and separate amendment packages without any escape hatch. Once we allow the escape hatch, however, messiness is inevitable.

Several recommendations above aim at relieving the stresses that have led to the current problems. We have suggested longer terms for Chairs and slower turnover of committees. We

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[64] Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev. Litigation 1 (1994).

have ruminated about the possibility of abbreviating the rulemaking process by skipping one or another of the participants (either the Judicial Conference or the Supreme Court). What we now take up is the possibility of setting norms for our own work—norms rather than rules, for the reasons we have explained, but norms that if implemented will relieve some points of stress.

Let us establish biennial cycles as the norm. Rules would be issued for comment every other year—not every year, or every six months, as is possible now. Advisory Committees could be encouraged to make recommendations to the Standing Committee every year (to ease the problem of congestion for both the Advisory Committees and the Standing Committee), but proposals would be consolidated for biennial publication. All Advisory Committees could be on the same schedule, so unless some emergency intervened the bar could anticipate that, say, proposals would be sent out for public comment only in even-numbered years. Chairs with longer tenure could plan for these cycles, and it would be easier for late-occurring ideas to "catch up" without the need for separate publication.

A change in the publication cycle could be accompanied, to advantage, by a change in the Standing Committee's schedule. The summer meeting of the Standing Committee has been set by working backward from the May 1 deadline for promulgating rules and transmitting them to Congress (with a December 1 effective date). The Supreme Court can promulgate the rules by May 1 only if it receives a recommendation of the Judicial Conference the preceding fall (a recommendation at the Conference's spring meeting would leave the Court too little time). The Conference can make the necessary recommendation only if the Standing Committee acts by July, which leaves time to write and circulate the final recommendations. The summer meeting is therefore an enduring feature of the rulemaking landscape, so long as the Judicial Conference and the Court play their current roles and the statutory schedule is unchanged.

Not so the winter meeting—and not so the content of meetings. If all recommendations to the Judicial Conference are consolidated for action at the summer meeting, the second meeting of the year can be reserved for the discussion of drafts the Advisory Committees want to publish for comment. A meeting of the Standing Committee in the fall, rather than the winter, would create sufficient time to have a full comment period, a meeting of the Advisory Committee the next spring, and consideration of the final proposals at the ensuing summer meeting of the Standing Committee. This change could shave six months to a year off the rulemaking schedule, making a biennial cycle more attractive.[65]

As we have stressed, it will be essential to allow exceptions for true exigencies, as well as for off-year republication of proposals that deserve further comment. These should be few, however, as a longer cycle will permit more concentrated thought.

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[65] The following schedule would work. In spring or summer of Year One, the Advisory Committee makes a recommendation for publication. The Standing Committee would consider the recommendation at a meeting between September 15 and 30. Publication at the beginning of November (giving the AO a month for preparation) would produce a comment period closing at the end of April in Year Two. Advisory Committees would meet toward the end of April, in conjunction with any oral hearings, to consider comments and make recommendations for a meeting of the Standing Committee to be held at the end of June of beginning of July. The Standing Committee would transmit any approved drafts to the Judicial Conference for consideration in the fall of Year Two. If the Conference and Supreme Court approved, the rule would take effect on December 1 of Year Three, a total time of approximately 2½ years from initial proposal to effectiveness.

[16] Recommendation to the Standing Committee: The Standing Committee should establish a biennial cycle as the norm in rulemaking, should limit its summer meeting to the consideration of proposals to the Judicial Conference, and should hold a fall meeting for the consideration of recommendations that drafts by sent out for public comment.

Conclusion

The Subcommittee believes that the current rulemaking process is fundamentally sound, but improvement is both possible and desirable. Practices and procedures of the federal courts are admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self-Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

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APPENDIX A

Summary of Comments Received
for the Self-Study of Judicial Rulemaking

by

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Chair, Subcommittee on Long Range Planning
May 2, 1994

Notice: The following notice of the self-study was mailed to several thousand individuals and organizations on the mailing list the Administrative Office uses to announce proposed rules amendments. It also appeared in several legal newspapers and in some of the advance sheets of the West Publishing Company's federal courts reporters. It was signed by the Chairs of the Standing Committee and the Subcommittee. Interested persons were asked to send in comments and suggestions to the Chair of the Subcommittee. Also enclosed was a copy of the Administrative Office's brochure entitled, "The Federal Rules of Practice and Procedure—A Summary for Bench and Bar."

SELF-STUDY

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, through its Subcommittee on Long Range Planning, is conducting a self-study of judicial rulemaking procedures.

The self-study will consider:

What are the appropriate goals of federal judicial rulemaking?

How well do the existing rulemaking procedures accomplish those goals?

What are the criticisms of the way rules are made?

How might rulemaking procedures be improved?

What follows are summaries of the comments and suggestions received. The complete responses have been distributed to members of the Subcommittee and the Chair, Reporter, and Secretary of the Standing Committee. These summaries are in rough chronological order.

(1) Laurens Walker, Boyd Professor of Law, University of Virginia, Feb. 17, 1994: sends two articles, A Comprehensive Reform of Federal Civil Rulemaking, 61 Geo. L.J. 455 (1993) and Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments, 51 Law & Contemp. Prob. 67 (1988); proposes a synopic model from administrative law known as "comprehensive rationality"; advocates an empirical approach to rulemaking; suggests that the Supreme Court require that the Advisory Committees engage in social scientific cost/benefit analysis preliminary to any rules changes; as the title indicates, the earlier article advocates thinking of the present rules as a baseline for conducting restricted field experiments in order to gather empirical information on the likely impact of changes before implementing them in the national rules.

(2) Jonathan F. Lewis, Editor-in-Chief, George Washington Law Review, undated: forwards a copy of the 1993 article by Professor Walker, described in (1).

(3) Stephen B. Burbank, Robert G. Fuller, Jr., Professor of Law, University of Pennsylvania, Feb. 17, 1994: sends a forthcoming article from the Brooklyn Law Review; concludes there is a compelling need for a clearer, shared conception of the proper spheres respectively for judicial rulemaking and legislative initiatives; urges that more time and energy be devoted to collecting and analyzing empirical data before changes are made in the national rules; recommends a moratorium on further civil rules changes until such a study has been undertaken, with the cooperation of the bench and bar and Congress.

(4) Frank J. Remington, Professor of Law, University of Wisconsin-Madison Law School, Feb. 17, 1994: suggests that the reporters to the Advisory Committees ought to respond on the merits to public comments and suggestions, beyond a form acknowledgment, to achieve more substantive give-and-take that might benefit and inform rulemaking and would encourage more public participation; was sent a form letter of acknowledgment(!).

(5) John P. Frank, Esq., Lewis & Roca, Phoenix, AZ, Feb. 25, 1994: endorses the goals in FRCP 1; criticizes the civil rules for what they have become, unduly long and unnecessarily complex, compounded by turgid committee notes, chaotic when contemplated against the Civil Justice Reform Act, disuniform for all the local options; advocates the restoration of the balance of lawyer-members on the Advisory Committees; urges that reconstituted committees, each with a majority of lawyer-members, should reconsider the rules from beginning to end with the fundamental goal in mind to restore simplicity and to end the present insiders' game that federal procedure has become.

(6) Susan P. Graber, Associate Justice, Supreme Court of Oregon, Feb. 28, 1994: suggests a topic for possible rules changes in both the Civil and the Appellate Rules; recommends consideration of rules establishing standards and procedures for certifying questions of state law to state courts.

(7) Jeffrey A. Parness, Professor, Northern Illinois University College of Law, Mar. 1, 1994: recommends better record keeping and indexing of the public comments received by the Advisory Committees for researchers and scholars; the Rules Committees should hire outside consultants to conduct literature surveys and specified research to supplement the research support from the Administrative Office and the Federal Judicial Center; suggests that formal relations be established with relevant state governmental entities that may be impacted by rules changes, e.g., the 1993 amendments to Civil Rule 11 likely will increase the number of state bar disciplinary referrals made by federal judges.

(8) Alan B. Morrison, Public Citizen Litigation Group, Washington, DC, Mar. 11, 1994: complains that the memberships of the various Advisory Committees include too many (appellate) judges and too few practitioners; practitioner-members too often are prominent lawyers or high level government officials who do not work day-in and day-out with the rules; there are too many law professors without real-world, in-court experience; while geographic diversity is useful, more important representativeness is lacking for the variety of firms and lawyers that appear in federal court, such as civil rights attorneys or plaintiffs' attorneys; Advisory Committees almost never offer explanations for rejecting individual suggestions and comments on proposed changes; the current format for public hearings is unsatisfactory and ineffective, because so many persons want to be heard time is limited, thus it is hardly worth it for many groups to send representatives (closed circuit television might be an improvement); access to the public records of the committees should be improved, perhaps through more readily accessible print and electronic sources like Law Week or the Internet; recently, there has been a significant increase in the number and the complexity of rules changes, exacerbated by locally-optional provisions that greatly reduce uniformity; recommends more frequent meetings by reconstituted Advisory Committees, with larger, professional, full-time staff.

(9) Thomas Earl Patton, Schnader, Harrison, Segal & Lewis, Washington, DC, Mar. 11, 1994: suggests that the system is reverting to the pre-1938 stage of local procedures, with the loss of the two basic principles of uniformity and simplicity; criticizes the latest rules changes for including opt-out provisions; draws attention to the wide opposition from all portions of the bar to the 1993 discovery reforms; argues that the "case-management" philosophy of judging has taken over rulemaking and is being taken to the extreme; the views of the experienced trial bar are not being given adequate weight in rulemaking; urges that the Advisory Committees be more representative of the practicing bar and be protected from reformers on a mission; urges that Congress somehow be taken out of rulemaking.

(10) Marc Galanter, Institute for Legal Studies, University of Wisconsin-Madison Law School, Mar. 13, 1994: urges greater use and reliance on systematic, empirical research for rulemaking; identifies a system need for better data collection and the development of "civil justice indicators" to aid in the assessment of current and proposed rules; recommends that procedures be adopted to draw upon social science expertise, such as adding a social scientist to the membership or commissioning experts to conduct reviews of the relevant social science literature.

(11) A. Leo Levin, Professor, University of Pennsylvania Law School, Mar. 14, 1994: the rulemaking process is too long; the rules have become too long and too complex; the trend is away from national uniformity in procedures; differentiated procedures, common in case

processing, should be developed for rulemaking, so that less controversial amendments might proceed more expeditiously; endorses a rules amendments moratorium and the creation of a commission to study rulemaking procedures and make legislative recommendations to Congress.

(12) James F. Roman, Duxbury, MA, Mar. 15., 1994: an ex-convict and former pro se litigant accuses the federal court system of wrongdoing and fraud; argues that present rulemaking procedures are unduly cumbersome and duplicitous; at all levels, federal courts are not performing adequately; maintains that the Administrative Office and the courts are self-aggrandizing institutions.

(13) Ed Hendricks, Chairman, American Judicature Society Justice System Reform Committee, Mar. 15, 1994: concludes that judicial rulemaking has improved over the years through greater representativeness in the memberships of the committees and broader access and participation; advocates more systematic, affirmative efforts to gather information as a basis for rules changes; recommends expansion of list of organizations and individuals from whom comments are solicited; prior to consideration of rules changes, there should be a careful canvassing of the available literature, including relevant empirical data each time a proposal is considered; the committees should communicate with the research community and fund particular studies for possible rules changes; there is a need for systematically and longitudinally gathering and recording civil justice indicators (akin to criminal justice indicators) and data about caseloads and existing court procedures; the memberships of the committees should be more representative of the bar and other groups; questions whether the Supreme Court should continue to play a role in rulemaking.

(14) James A. Parker, U.S. District Judge, Dist. NM, member of the Standing Committee, Mar. 15, 1994: consider reducing the number of members of the Standing Committee to improve efficiency; the criminal defense bar may not be adequately represented on the Standing Committee; the self-study should evaluate the 6-month publication period, whether it is too long or too short, how often the Standing Committee has adjusted the period for particular rules changes, and whether the "substantial change" standard for republication needs better definition; the experience under the procedures for closed committee meetings and redacted public minutes should be examined.

(15) John C. Smith, Publisher, West Publishing Company, Mar. 16, 1994: publishes several "products" with multiple sets of federal rules and statutes; suggests that better coordination of publications could be achieved by making the amendments to the Bankruptcy Rules effective on the same date as the other federal rules; suggests that annual supplements and pocket parts could be published more timely if Congress were to approve or disapprove amendments by December 1 of the session to which the proposals are made, but the amendments would become effective on March 1 of the following calendar year.

(16) Robert D. Evans, Director, Governmental Affairs Office, American Bar Association, Mar. 23, 1994: statement from the ABA; urges that appointments to the rules committees reflect the demographic diversity of the legal community and that membership also more substantially represent the practicing bar, especially trial lawyers and criminal defense lawyers, and the academy; the membership of the Evidence Rules Advisory Committee needs this sort of attention; records should be kept and made public giving some accounting of the

diversity of memberships and appointments; if the Supreme Court does not and cannot participate actively in rulemaking, the rules enabling legislation should be amended to eliminate the Court's formal role that adds approximately six months to the already lengthy process; deadlines for public comments—illustrated by the deadline for responses in the present self-study—do not afford ample time for meaningful participation by institutions like the ABA; calendaring meetings twice a year results in a two or three year cycle for rules changes; a priority should be given to providing interested individuals and organizations timely notification of public meetings and hearings; publishing an agenda in advance of meetings, including proposals being considered for publication and approval, would encourage greater outside participation; any publication for comment of a rule that would delegate to the Judicial Conference the authority to issue guidelines or standards should include a draft of the actual guideline or standard for comment; the current provisions for republication of "substantial changes" in proposals after public comment are not adequate, as the recent changes in Civil Rule 26 illustrate; the Criminal Rules Advisory Committee is criticized for being unwilling to overturn case law and statutes and for not following the ABA standards in areas like defense discovery; the Civil Rules Advisory Committee is criticized for being too willing to take the initiative for reform and for not deferring to the Civil Justice Reform Act of 1990; provisions in the national rules that allow for local opting out compromise the goal of uniformity; there is a need for greater reliance on empirical data in rule making, including controlled experiments; coordination is needed among the various rules committees, especially among the committees dealing with the rules of evidence and the civil and criminal rules; the national rules ought to better address the development and implementation of ADR procedures; some thought ought to be given to making future rules changes substance-specific, so that different types of lawsuits would proceed on different procedural tracks; the rulemaking process needs to determine appropriate responses to the CJRA; overall, the self-study should attend to ways to improve and maintain the fairness and openness of the rulemaking process.

(17) Judith Resnik, Orrin B. Evans Professor, University of Southern California Law Center, Mar. 19 & 24, 1994: concludes that rulemaking goals vary over time; endorses the Rule 26 model of a national rule with local options, to accommodate the CJRA; the rulemaking committees should seek to structure and lead the conversation among local rulemakers; the CJRA is an opportunity for gathering empirical information; suggests specific ways the rules committees might develop background information for evaluating proposals; notes the untapped resource of procedure professors at the law schools; raises practical problems with the archives materials on rulemaking, how they are accessed and how they are maintained; From "Cases" to "Litigation", 54 Law & Contemp. Prob. 5 (1991); sent her Letter to Judge Becker of the Long Range Planning Committee of the Judicial Conference; advocates structural mechanisms to increase and improve understanding of federal courts; adequate and useful data still is lacking on such commonplace federal court practices as complex litigation, class actions, the pretrial process, and settlement practices; little is known about the demographics of litigants and their perceptions; decisionmaking personnel, such as magistrate judges and bankruptcy judges, have not been studied; the appellate process likewise is relatively unstudied; recommends a national meeting of researchers, academics, lawyers, and judges to consider the kind of information that is available and to contemplate what other information might be gathered; concludes some permanent structure, perhaps similar to the lawyers advisory committees under the CJRA, is needed to provide systemic information from those "outside" the judiciary.

(18) Larry A. Hammond, Chair, Criminal Justice Reform Committee of the American Judicature Society, Phoenix, AZ, Mar. 25, 1994: urges that rulemakers evaluating civil rule changes take into account the impact of those changes on the criminal justice system; so long as there are more cases than there are enough judges to handle them, any change on the civil side will affect the criminal docket; the system is a whole.

(19) Myrna Raeder, Professor of Law, Southwestern University, Mar. 28, 1994: serves as Vice Chairperson of the A.B.A. Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence; urges that the Judicial Conference attempt to achieve committee memberships that reflect the diversity of the federal bar, rather than the current level of diversity of the federal bench; greater diversity can be fostered by better record keeping and by obtaining wider input, from relevant groups, to identify potential members; expresses concern for the recent trend of proliferating rules changes effected outside the Rules Enabling Act process; suggests that short of a formal amendment to the authorizing legislation, there ought to be some informal understanding that Congressional initiatives will be referred to the appropriate Advisory Committee; comments on the uncertainty surrounding the Civil Justice Reform Act of 1990 and its implications for judicial rulemaking; recommends that the rules committees gather and evaluate data from the CJRA plans to seek to harmonize local experiments and to identify proposals worthy of national implementation; requests advanced notification and publication of proposed rules changes, agendas, and minutes of committee meetings.

(20) Alfred W. Cortese, Jr., Kirkland & Ellis, Washington, DC, Apr. 4, 1994: goals of rulemaking ought to include external neutrality from external politics, internal neutrality so far as litigants are concerned, responsiveness to those who use the federal courts, maintenance of the distinction between procedure and substantive or jurisdictional changes, efficiency measured against fairness; preserving the integrity of judicial rulemaking obliges both the Congress and rulemakers to be sensitive to the tensions in the Rules Enabling Act procedures and recent incidents suggest both sides have not always succeeded; the rules presently favor the initiation and maintenance of a lawsuit; responsiveness would be enhanced by greater public participation in rulemaking and by more bar participation as committee members; rulemaking procedures are working reasonably well and no significant changes are indicated; how to balance independence and responsiveness, insularity and participation, is rightly left to the professionalism of the members and staffs of the rules committees.

(21) William R. Slomanson, Professor, Western State University College of Law, San Diego, CA, Apr. 4, 1994: supports the self-study; proposes the appointment of one local subcommittee member in each district to be responsible for communication between the bar in that district and the Standing Committee; such a decentralized system would take more time, but would provide far greater participation than the present comment period and public hearings.

(22) Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure, Boston, MA, Apr. 5, 1994: describes the current duties of the Reporter to the Standing Committee, which have been greatly expanded over the years,; concludes that the Rules Enabling Act process is the only mechanism capable of restoring and maintaining procedural uniformity to the federal courts.

(23) Joseph F. Weis, Jr., U.S. Circuit Judge, Third Circuit, Pittsburgh, PA, Apr. 14, 1994: former Chair, Standing Committee; expresses twin concerns over delay in rulemaking and insufficient uniformity among the different sets of rules; suggests that two members from each Advisory Committee be selected to reconstitute the Standing Committee and the Chair of the Standing Committee be an ex officio member of each Advisory Committee; further efficiency would be obtained by scheduling all the meetings of all the advisory committees at the same time and place, to be followed immediately by a meeting of the Standing Committee; continued emphasis must be placed on the partnership between the judiciary and the Congress under the Rules Enabling Act process; renewed efforts should be made to keep Congressional staff informed about rulemaking initiatives.

APPENDIX B

FEDERAL JUDICIAL RULEMAKING: AN ANNOTATED BIBLIOGRAPHY

Prepared under the supervision

of

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by

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James E. Bailey III, *Legislating Procedure in the Bankruptcy System: A Level Playing Field or a Slippery Slope?*, 24 MEM. ST. U. L. REV. (1994): questions whether responsibility for amending and promulgating general rules of practice and procedure in federal bankruptcy courts should rest with Congress or with some other independent body; stresses the importance of a neutral and detached rulemaking process and expresses concern about legislation introduced by the 103d Congress proposing bankruptcy rules amendments.

Newton D. Baker, *Policies Involved in Federal Rule-Making*, 18 JUDICATURE 134 (1935): suggests that the predominant policy interests in rulemaking reform are uniformity of practice in all federal trial courts and conformity of state to federal practice.

Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323 (1991): provides a brief history of rulemaking; summarizes present procedures.

Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984): details the history of Congress' active role in procedural rulemaking; emphasizes the supervisory power doctrine.

Margaret A. Berger, Discussion Leader, *Civil Litigation in the Twenty-First Century: A Panel Discussion*, 59 BROOK. L. REV. 1199 (1993): participants discuss the future of procedure by tracing its history and attempting to predict its development in light of current trends; members include Judith Resnik, Kenneth R. Feinberg, Ralph K. Winter, Deborah R. Hensler, Stephen N. Subrin, Elizabeth M. Schneider and Jeffrey W. Stempel.

Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1 (1989): explores the normative framework underlying the rhetoric of procedural reform from the Field Code to the Federal Rules of Civil Procedure; concludes with some thoughts on current procedure "crisis."

Winifred R. Brown, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES (Fed. Jud. Ctr. 1981): a comprehensive account of rulemaking procedures; evaluates criticisms and proposed reforms.

Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012: criticizes Professor Carrington for misreading federal rules and misinterpreting their purpose(s).

Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1994): argues for the need for a clearer conception of the proper spheres of rulemaking responsibility; urges greater reliance on empirical data; recommends a moratorium on civil rules changes; advocates greater cooperation among bench and bar and Congress.

Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, (1988): describes the trend in modern procedural law away from rules that determine policy decisions and toward rules that confer a substantial amount of normative discretion on trial courts.

Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982): uses the Act to explore the tensions between Congress and the judiciary regarding the source of the authority to promulgate court rules.

Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982): provides extensive legislative history of Rules Enabling Act.

Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989): asserts that Rule 11 is part of a transformation away from rules which determine policy choices and toward more discretionary rules.

Warren E. Burger, *The State of the Federal Judiciary—1979*, 65 A.B.A. J. 358 (1979): calls for fresh look at entire federal rulemaking process; questions whether the Supreme Court should continue to be involved.

Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733 (1988): uses Rule 4 proposals to shed light on the contemporary process of federal rule revision.

Paul D. Carrington, *Learning From the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994): discusses the history of rulemaking; notes flaws remaining in the reformed rulemaking process; speculates about the future of the rulemaking politics in light of the 1993 amendment to Fed. R. Civ. P. 26(a)(1).

Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989): rejects the argument that judicially-made rules should direct courts to proceed differently according to the substantive nature of the rights sought to be enforced; provides a critical analysis of the rulemaking process.

Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012 (1989): examines the meanings of "substance" and "procedure" in evaluating the power of the supersession clause of the Rules Enabling Act; argues against the politicization of the rulemaking process.

Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991): opines that fractional politics is jeopardizing the federal rulemaking process; proposes the creation of an independent group to organize efforts to protect the rules in Congress and to provide a base constituency for the Supreme Court in the exercise of its authority under the Rules Enabling Act.

Henry P. Chandler, *Some Major Advances in the Federal Judicial System, 1922-1947*, 31 F.R.D. 307 (1963): an exhaustive 210-page look at four major advances during this time frame; includes 1938 adoption of Federal Rules of Civil Procedure.

Charles E. Clark, *"Clarifying" Amendments to the Federal Rules?*, 14 OHIO ST. L.J. 241 (1953): applauds the then-existing rulemaking process and emphasizes its importance in preventing procedures from becoming sterile; identifies amendments to overcome arbitrary interpretations as the major benefit of the on-going process.

Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144 (1948): summarizes the history of the civil procedure reform movement against the background which made it inevitable and the obstacles that had to be overcome; describes the experience of drafting and promulgating the rules and some of their more important characteristics; suggests lessons to be learned for future reformers.

Charles E. Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 HARV. L. REV. 1303 (1936): discusses the sources of the High Court's appellate rulemaking power; attempts to define its scope.

Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 JUDICATURE 250 (1963): Recalls the role the Supreme Court played in the original reform movement; focuses on the institutional leadership of the Court, as well as on the influence of individual justices.

Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 (1958): examines the impact of the Fed.R.Civ.P. during the 20 years following their adoption; analyzes the role of the Supreme Court; foresees a continuing role for an advisory committee, a permanent committee system as opposed to an ad hoc approach.

Comment, *Rules of Evidence and the Federal Practice: Limits on the Supreme Court's Rulemakng Power*, 1974 ARIZ. ST. L.J. 77 (1974): explores the validity of "substantiveness" as a curb on the Court's rulemaking power; concludes that Congressional involvement can be avoided by the realization that this power is administrative in character and exercisable pursuant to a delegation of legislative power; advocates the prescription of safeguards to ensure the consideration of all competing interests.

Comment, *Separation of Powers and the Federal Rules of Evidence*, 26 HASTINGS L.J. 1059 (1975): proposes an arrangement permitting the judiciary to promulgate procedural and evidentiary rules and the legislature to enact privilege rules, to avoid the substantive limitation on the judicial rulemaking power.

Cary H. Copeland, *Who's Making the Rules Around Here Anyway?*, 62 A.B.A. J. 663 (1976): criticizes the extent of Congressional review of the federal rules.

Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15 (1977): reviews the exercise of Supreme Court rulemaking authority in the context of Rule 9; raises serious constitutional, statutory, and policy questions regarding the appropriate exercise of the rulemaking authority by the Supreme Court.

Steven Flanders, *In Praise of Local Rules*, 62 JUDICATURE 28, 33 (1978): argues that local rules do not significantly undermine uniformity of national procedure; maintains that local rules are necessary and important.

John P. Frank, *The Rules of Civil Procedure—Agency for Reform*, 137 U. PA. L. REV. 1883 (1989): lauds the drafters of the original rules for their efforts in merging law and equity; bemoans the present state of the rules, decrying their nitpickiness and wordiness; articulates an agenda for reform; most of the recommendations involve individual rules.

Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806 (1981): urges the Supreme Court to devote more diligence to its review of proposed rules; insists that it is better to leave procedural reforms in the hands of Supreme Court and advisory committees than to elected politicians.

Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975): Discusses the unfettered role of judges in the rulemaking process and congressional response; bemoans the perils of Congress' reentering the judicial rulemaking realm.

Arthur J. Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 SETON HALL L. REV. 667 (1974): demarcates the authority of both Congress and the Judiciary to promulgate court rules as a function of both separation of powers and as an aspect of the substance/procedure dichotomy.

Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK L. REV. 351 (1987): discussion of genesis of rules, the affect of the 1983 amendments, and the intent of the original authors; emphasis is on impact of the rules themselves, not the process of rule-making.

Charles W. Grau, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY (AMERICAN JUDICATURE SOCIETY 1978): analyzes critical issues in judicial rulemaking; suggests ways to increase accountability and access to the rulemaking process.

Charles W. Grau, *Who Rules the Courts? The Issue of Access to the Rulemaking Process*, 62 JUDICATURE 428 (1979): notes the increasing public access to the rulemaking process; weighs the pros and cons of these developments.

Geoffrey C. Hazard, Jr., Reporter, *Report of the Conference on the Federal Rules of Civil Procedure*, Sponsored by the Southwestern Legal Foundation and the Southern Methodist University School of Law, Mar. 30-31, 1995: summarizes the proceedings of this invitational conference attended by lawyers, judges and academics; focusses on areas of jury trial, discovery, and aggregation; discussion ranged from the particular to the general, from possible procedural reforms to how to think about rulemaking as a process.

Geoffrey C. Hazard, Jr., *Undemocratic Legislation (Book Review)*, 87 YALE L.J. 1284 (1978): reviews Judge Weinstein's 1977 book on court rulemaking; critiques participatory civil rulemaking.

Peter C. Hoffer, *Text, Translation, Context, Conversation, Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure*, 37 AM. J. LEGAL HIST. 409 (1993): provides a historical account of the deliberation involved in the

drafting and amendment of the Federal Rules of Civil Procedure; focuses on the individual personal interplay involved in these deliberations.

Kenneth M. Holland, *The Federal Rules of Civil Procedure: A Policy Evaluation*, 3 LAW & POLICY Q. 209 (1981): evaluates the success of the FRCP; explores why they have only been partially successful.

Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057 (1955): examines the sources of the federal rules of procedure; describes the philosophy of the rules and their salient features.

Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993): asserts that judicial independence from legislative rulemaking is essential to preserving separation of powers; argues that additional court funding is necessary.

Vicki C. Jackson, *Empiricism, Gender, and Legal Pedagogy: An Experiment in a Federal Courts Seminar at Georgetown University Law Center*, 83 GEO. L. J. 461 (1994): discusses the effect of feminist legal theory and empiricism upon the court system, emphasizing the experiences of the various Task Forces on gender discrimination; other symposium articles focus on various other gender issues.

Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623 (1957): surveys and discusses the sources and scope of the rulemaking power and the extent to which it can and should be exercised.

Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1976): summarizes and comments on 1966 amendments to the Fed.R.Civ.P.; includes a section describing how amendments take shape.

Benjamin Kaplan, *The Federal Rulemaking Process—The Reporters Speak*, 137 U. PA. L. REV. 2125 (1989): critiques the address by then Reporter Professor Carrington at University of Pennsylvania's 50th Anniversary Symposium.

Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L. J., Aug. 17, 1992, at 15: complains about the lack of litigators on the Advisory Committees; asserts that the current rulesmakers—judges, academicians, procedural "wonks"—cannot appreciate how the changes in the Federal Rules will fundamentally change the attorney-client relationship.

Robert E. Keeton, *The Changing Nature of Legal Issues in State and Federal Courts*, 37 ARIZ. L. REV. 425 (1995): discusses author's personal perceptions of the rulemaking process gained from his service as chair of the Standing Committee; argues in favor of the Rules Enabling Act process as the optimum method to improve upon the federal rules of practice and procedure; imagines what the future will bring by way of workload and legal challenges for federal district courts.

Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT L. REV. 853 (1989): comments on the function of local rules and the tension between the policy of national uniformity and local flexibility.

Howard Lesnick, *The Federal Rule-Making Process, A Time for Re-examination*, 61 A.B.A. J. 579 (1975): based on the experience with the Fed.R.Evid., calls for a re-examination of the rulemaking process.

A. Leo Levin and Anthony G. Amsterdam, *Legislative Control Over Judicial Rulemaking: A Program in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958): advocates legislative review over rulemaking when "important decisions of public policy are necessarily involved."

Harold Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rule Revision*, 85 MICH. L. REV. 1507 (1987): using Fed.R.Civ.P. 15(c) as a case study, decries the rules amendment process; focuses on the process' caseload implications; describes how rulemaking has failed to stay abreast of litigation developments, etc.; suggests alternative procedures.

Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993): discusses the current state of civil litigation reform and the difficulties inherent to a neutralist reform position; evaluates current controversies and presents observations about potential areas for future progress towards improved court procedures.

LONG RANGE PLAN FOR THE FEDERAL COURTS, Submitted to the Judicial Conference of the U.S. (March 1995): endorses Rules Enabling Act process; encourages uniformity and flexibility; advocates wide participation in rulemaking.

Albert B. Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772 (1961): discusses the history of judicial rulemaking and the roles of the Judicial Conference and its advisory committees.

Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985): argues there is no separation of powers objection to federal courts adopting rules for internal operation or for control of litigation.

Arthur Miller, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (Fed. Jud. Ctr 1984): notes the explosion of federal court litigation and describes attempts by the Advisory Committee on Civil Rules to address the problem through federal rulemaking.

James W. Moore & Helen I. Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9 (1974): discourages Congress from intervening in rulemaking process for Fed.R.Evid.

Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991): uses the proposed informal discovery rule to examine the increasing politicization of civil rulemaking process; forecasts the decline of Advisory Committees and the rise of more political power brokers.

Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733 (1995): contributes to a symposium on the general topic of federal judicial independence; expressed concern for the erosion of Third Branch power and independence from Congressional intrusions

into federal procedural rulemaking; takes issue with Professor Redish's more traditional starting point of analysis that procedural rulemaking authority is a delegation from the legislative branch to the courts.

Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Powers*, 76 MICH. L. REV. (1978): examines constitutional division of rulemaking power; emphasizes the development of federal evidence law.

Note, *Separation of Powers and the Federal Rules of Evidence*, 26 HASTINGS L.J. 1059 (1975): analyzes the Supreme Court's historical rulemaking power to determine whether privilege rules are within that power.

James L. Oakes, *Book Review*, 78 COLUM. L. REV. 205 (1978): critiques Judge Weinstein's 1977 book on rulemaking.

John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 434 (1994): a letter to Professor Baker offering general advice on how the Long Range Planning Subcommittee should evaluate the federal court rulemaking procedures; notes many of the common criticisms of the process and outlines some possible reforms.

John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986): presents a new survey of the civil procedures of the 50 states and D.C.; identifies those jurisdictions that have systematically replicated the federal rules.

Gustavus Ohlinger, *Questions Raised by the 1937 Report of the Advisory Committee on Rules of Civil Procedure for the District Courts of the United States*, 11 U. CIN. L. REV. 445 (1957): answers two rhetorial questions, are the judicial systems which the Advisory Committee examined, and our federal system of constitutional courts, in all respects analogous? and what is the scope of rulemaking power delegated to the Supreme Court?

Jeffrey A. Parness, *Book Review*, 35 VAND. L. REV. 1453 (1982) (reviewing Winifred R. Brown, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES (1981)): outlines some of the perceived deficiencies in the report; suggests that state rulemaking processes can provide guidance for federal rulemaking; raises some possible constitutional problems with the current process.

Jeffrey A. Parness and Curtis B. Copeland, *Access to Judicial Rulemaking Procedures*, 1982 Ariz. St. L.J. 641: reviews the contemporary judicial rulemakers, judicial rules and rulemaking procedures, as well as recent criticisms; articulates the minimum requisites for an accessible rulemaking process.

Roscoe Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438 (1910): provides a summary of Deab Pound's ideas for procedural reform.

Roscoe Pound, *Principles of Practice Reform*, 71 CENT. L.J. 221 (1910): articulates a series of specific suggestions for procedural reform, some of which deal with the rulemaking process.

Proceedings, THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (West 1979): includes addresses and commentary from several notable authorities on issues pertaining to rulemaking.

Donna J. Pugh et al., JUDICIAL RULEMAKING, A COMPENDIUM (AMERICAN JUDICATURE SOCIETY 1984): provides an update of material in the Korbaker, Alfini, Grau book, JUDICIAL RULEMAKING IN THE STATE COURTS: A COMPENDIUM.

Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219 (1989): objects to relying too much on trying to determine the drafters' intent of the Fed.R.Civ.P.; cautions against ignoring the political content and consequences of procedural rules; expresses concern that 50 years from now the rules will preclude resolution of small cases.

Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986): traces the world view of the drafters of the federal rules in an effort to discover the influences that animated rules reform.

Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994): discusses the Civil Justice Reform Act and how it attempted to change and improve the rulemaking process; recognizes Congress' constitutional power over judicial rulemaking, but argues for caution and restraint; emphasizes the value of transubstantive and nationally-uniform rules of civil procedure; expresses some concern for the effects of local rulemaking.

David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537 (1985): demonstrates how the proliferation of local rules threatens the integrity and uniformity of federal procedure.

Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243 (1984): asserts that the stated goal of speedy and inexpensive achievement of justice is being impeded by the rules themselves; argues for diversified rules of procedure tailored to the varied needs of individual cases.

Panel, *The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117 (1957): distinguished panel discussion conducted about the then-proposed amendment to 28 U.S.C. §331 to authorize the Judicial Conference to carry on continuous study of federal procedure.

Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Court's Exercise of Local Rulemaking Powers: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 CONN. L. REV. 483 (1991): suggests a separation of powers test based on functionalism to determine the proper scope of judicial rulemaking authority.

Lawrence G. Sager, *Foreward: Constitutional Limitations on Congress Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981): asserts that the Constitution confers this rule-making authority not on Congress, but on the courts themselves, in the context of jurisdiction-stripping proposals.

David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989): focusing on one particular federal rule, the article analyzes the federal rulemaking process from drafting through promulgation and amendment; analyzes whether the current status of the Rule comports with the drafters' intent and whether the rule-making process skews the drafters' intent.

Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem"*, 46 FLA. L. REV. 57 (1994): considers ideas of Professors Dreyfuss and Subrin on 1993 Amendments to the Fed.R.Civ.P. and their general misgivings about the rulemaking process; argues that for effective reform the system needs a "renewed institutional focus" on the part of the litigation community of lawyers, judges and academics.

Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659 (1993): assesses litigation reform initiatives by evaluating recent activities and debates over direction of reform; proposes a more integrated and deliberate reform methodology; approves generally of the Rules Enabling Act process, but suggests refinements borrowing from legislative and administrative paradigms.

Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989): examines the goal of uniformity and the proliferation of local rules.

Stephen N. Subrin, *Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure*, 73 JUDICATURE 1 (1989): Discusses the six symposia held to commemorate 50th anniversary of Fed.R.Civ.P.; highlights their often controversial nature and the opposing viewpoints on their effectiveness.

Edson R. Sunderland, *The Grant of Rulemaking Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934): discusses the history of the procedural reform movement which culminated with passage of the Rules Enabling Act.

Edson R. Sunderland, *Implementing the Rule-Making Power*, 25 N.Y.U. L. REV. 27 (1950): weighs the pros and cons of legislative promulgation of federal court rules as opposed to the courts promulgating these rules.

Edson R. Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council*, 10 IND. L.J. 202 (1935): concludes that an independent body like the judicial council would be an appropriate body for development of rules of procedure.

Griffen Terry, Comment, *A Critical Analysis of the Formulation and Content of the 1993 Amendments to the Federal Rules of Civil Procedure*, 63 U. CIN. L. REV. 869: discusses the 1993 amendments to the Fed.R.Civ.P. and provides a general description of the federal rulemaking process commenting on its changing dynamics; argues generally that involvement by Congress adversely impacts the rulemaking process.

Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992): details recent developments which threaten the continued viability of a uniform, simple system of federal civil procedure.

Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507 (1992): charts recent developments in civil justice reform efforts among legislative, judicial and executive branches of the federal government.

Carl Tobias, *The Clinton Administration and Civil Justice Reform*, 144 F.R.D. 437 (1993): presents a general overview of substance and procedure of civil justice reform as of January 1994.

Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995): analyzes the proposed Common Sense Legal Reform Act and its potential impact upon other reform initiatives and the civil justice system; argues that Congress should reject or delay the act's passage as a means of preventing interference with ongoing reform initiatives.

Carl Tobias, *Improving the 1988 and 1990 Judicial Improvement Acts*, 46 STAN. L. REV. 1589 (1994): analyzes the differing approaches to procedural reform embodied in the Civil Justice Reform Act of 1990 and the Judicial Improvements and Access to Justice Act of 1988; argues that more procedural revisions through notice and comment rulemaking at the national level may be achieved by combining the best elements of each act.

Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989): criticizes the traditional rulemaking process and its underlying trans-substantive philosophy of the Fed.R.Civ.P.

Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855 (1992): examines the new federal rule-making procedure, which allows for more public comment, and its effect on the re-examination of Rule 11.

Carl Tobias, *Silver Linings in Federal Civil Justice Reform*, 59 BROOK. L. REV. 857 (1993): analyzes the impact of the Civil Justice Reform Act of 1990 and identifies some benefits it has conferred upon the court system.

Carl Tobias, *The Transmittal Letter Translated*, 46 FLA. L. REV. 127 (1994): examines the first test by the United States Supreme Court of the revised procedures instituted by Congress in 1988; analyzes changes to Rule 11 and Rule 26 and notes continued passivity in the judicial rulemaking process; urges a general Congressional self-restraint in rulemaking.

Janice Toran, *'Tis A Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352 (1990): hypothesizes that aesthetic considerations, simplicity, elegance, coherence, and the like, should and do play a role in the formulation of legal procedures and the procedural reform process.

George G. Tyler, *The Origin of the Rule-Making Power and its Exercise by Legislatures*, 22 A.B.A. J. 772 (1936): chronicles the history of the migrating locus of rulemaking power, from the legislature to the courts.

Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23 J. LEGAL STUDIES 569 (1994): considers the feasibility of applying economic analysis to the civil rules as a basis for policy making; proposes new criteria designed to make empirical predictions about rule changes.

Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 60 GEO. WASH. L. REV. 455 (1993): focusing on the changes to Rules 11 and 26, criticizes the whole rulemaking process; suggests that the controversy over recent amendments threatens judicial control of rulemaking and worries that the expertise of federal judges may be lost or unduly discounted.

Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (1988): theorizes that the process that guided the development of the Fed.R.Civ.P. through the first 50 years is not appropriate for the work that lies ahead; identifies as the chief deficiency the lack of a systematic official plan to collect valid information about the likely impact of changes to the rules before they are amended; proposes a series of field experiments as a solution.

Sam B. Warner, *The Role of Courts and Judicial Councils in Procedural Reform*, 85 U. PA. L. REV. 441 (1937): explores the extent of courts' rulemaking powers and who should exercise those powers.

Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901 (1989): discusses the first 50 years of the Fed.R.Civ.P. and poses and answers a series of rhetorical questions about the possibility that the rules in effect deny justice to certain classes of litigants.

Jack B. Weinstein, REFORM OF COURT RULEMAKING PROCEDURES 90 (1977): condensed version of book published as: Weinstein, Reform of Federal Court Rulemaking Procedures, 76 COLUM. L. REV. 905 (1976); recommends changes; also published as: Jack B. Weinstein, Reform of the Federal Rule-Making Process, 63 A.B.A. J. 47 (1977).

Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831 (1961): uses the bifurcation rule to demonstrate some problems that can arise when rules with substantive weight are appraised merely on their procedural characteristics.

Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1 (1988): describes the adoption of Fed.R.Civ.P. and the Erie decision; focuses on the relative indifference that surrounded these two events when they occurred in 1938 and the huge impact they have had in the 50 years since.

Russell R. Wheeler, *Broadening Participation in the Courts Through Rule-Making and Administration*, 62 JUDICATURE 281, 282-83 (1979): describes the federal rulemaking process; characterizes it as "relatively simple"; examines the tension between the judiciary working to govern itself by making its own rules and the "democratic" method of allowing substantial public involvement in the rulemaking process.

Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41 (1988): examines the permissible scope of supervisory rulemaking by the Supreme Court under the separation of powers doctrine.

Joseph A. Wickes, *The New Rulemaking Power of the United States Supreme Court*, 13 TEX. L. REV. 1 (1934): examines the historical background of the Rules Enabling Act.

John H. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928): editorial asserts that any time a legislature attempts to impose upon the judiciary any rules for the discharge of the judiciary's duties, the rules are constitutionally invalid.

Charles A. Wright, *Amendments to the Federal Rules: The Functioning of a Continuing Rules Committee*, 7 VAND. L. REV. 521 (1954): describes 1954 set of amendments to the Fed.R.Civ.P. and the rulemaking process used to make them.

Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1 (1994): characterizes the rulemaking process as being in great disorder and in need of revision; notes the tradition and prestige of the rulemaking process, but criticizes the senseless complexity that has developed due to the proliferation of local rulemaking; suggests that Congressional interference in the process merely adds to the existing disorder; other contributions to the Symposium deal with particular amendments in the 1993 package and larger issues of procedural reform.

Charles A. Wright, *Book Review*, 9 ST. MARY'S L. J. 652, 653-58 (1978): endorses many of Judge Weinstein's suggested improvements of the rulemaking process.

Charles A. Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563 (1967): describes the apparently smooth operation of "procedural reform" within the federal system.

21 Charles A. Wright and K. Graham, FEDERAL PRACTICE AND PROCEDURE §5006 (1977): chronicles the history of the drafting process for the Fed.R.Evid.

4 Charles A. Wright and Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE §§1001-1008 (1969 and Supp. 1993): chronicles the history of procedure in federal courts; discusses the drive for procedural reform which culminated in the Rules Enabling Act; examines the formation of the federal rules and the contributions of the advisory committees.

12 Charles A. Wright & Arthur Miller, FEDERAL PRACTICE AND PROCEDURE §3152 (1973): discusses the abuses of local rulemaking power.

Item 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Draft Minutes of the Meeting of June 19-20, 1997
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 19-20, 1997. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Judge Frank H. Easterbrook
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Judge Morey L. Sear
Chief Justice E. Norman Veasey
Acting Deputy Attorney General Seth P. Waxman
Judge William R. Wilson

Alan C. Sundberg, Esquire was unable to be present. Mr. Waxman was able to attend the meeting only on June 19. Ian H. Gershengorn, Esquire and Roger A. Pauley, Esquire represented the Department of Justice on June 20.

Supporting the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mark D. Shapiro, senior attorney in that office; and Patricia S. Channon, senior attorney in the Bankruptcy Judges Division of the Administrative Office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Mary P. Squiers, project director of the local rules project; and James B. Eaglin, acting director of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Stotler reported that the Judicial Conference had submitted its final report to the Congress on the Civil Justice Reform Act. She stated that the committee at its January 1997 meeting had been presented with a proposed draft of the Conference's report, prepared by a subcommittee of the Court Administration and Case Management Committee (CACM). The members had expressed a number of serious concerns with the document, which were later conveyed informally to the Administrative Office and CACM. As a result, the final Judicial Conference report was adjusted in several respects. Judge Stotler pointed out that the report included a number of specific recommendations concerning the Federal Rules of Civil Procedure.

Judge Stotler reported that the Judicial Conference at its March 1997 session had approved the committee's recommended changes in the civil and criminal rules to conform them to recent statutory amendments to the Federal Magistrates Act. The changes had been sent to the Supreme Court for action on an expedited basis.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 9-10, 1997.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej presented the report of the Administrative Office (AO), which consisted of: (1) a description of recent legislative activity; and (2) an update on various administrative steps that had been taken to enhance support services to the rules committees. (Agenda Item 3)

He reported that many bills had been introduced in the Congress that would amend the federal rules directly or have a substantial impact on them. He described several of the bills,

covering such diverse matters as grand jury size, scientific evidence, composition of the rules committees, offers of judgment, protective orders, cameras in the courtroom, forfeiture proceedings, and interlocutory appeals of class certification decisions.

Judge Stotler pointed out that Mr. Rabiej and the rules office had prepared written responses to the Congress setting forth the Judiciary's positions on these various legislative initiatives. She emphasized that the AO had prepared the responses in close coordination with the chairs and reporters of the Standing Committee and advisory committees. All the letters had been carefully written and approved, and the judiciary's positions had been formulated under very tight deadlines.

One of the members suggested that it might be productive for individual members of the rules committees to contact their congressional representatives on some of the legislative proposals. Judge Stotler responded that she would be pleased to take advantage of the services of the members.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Eaglin presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) Among other things, he reported that the Center was in the process of updating the manual on scientific evidence and hoped to have a new edition ready by the middle of 1998. He also pointed out that the Center was in the process of conducting a detailed survey of 2,000 attorneys to elicit their experiences with discovery practices in the federal courts. The results would be presented to the Advisory Committee on Civil Rules at the committee's September 1997 meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum and attachments of May 27, 1997, and his memorandum of June 10, 1997 (Agenda Item 8).

He reported that the advisory committee had completed its style revision project to clarify and improve the language of the entire body of Federal Rules of Appellate Procedure. It now sought Judicial Conference approval of a package of proposed style and format revisions embracing all 48 appellate rules and Form 4. The comprehensive package had been developed by the committee in accordance with the *Guidelines for Drafting and Editing Court Rules* and with the assistance of the Standing Committee's Style Subcommittee and its style consultant, Bryan A. Garner.

Judge Logan stated that the public comments received in response to the package had not been very numerous, but they were very favorable to the revisions. He noted that judges and legal writing teachers had expressed great praise for the results of the project, and many judges had also commented orally that the revised rules were outstanding. Only one negative comment had been received during the publication period.

Rules With Substantive Changes

FED. R. APP. P. 5 and 5.1

Judge Logan reported that the Standing Committee had tentatively approved proposed consolidation of Rule 5 and Rule 5.1 and revisions to Form 4 at its June 1996 meeting, after the package of rules revisions had been published. Accordingly, these additional changes were published separately in August 1996.

Judge Logan pointed out that Rule 5 governs interlocutory appeals under 28 U.S.C. § 1292(b), while Rule 5.1 governs discretionary appeals from decisions of magistrate judges under authority of 28 U.S.C. § 636(c). The advisory committee had not contemplated making substantive changes in either of these two rules. But when the Advisory Committee on Civil Rules proposed publication of a new Civil Rule 23(f), authorizing discretionary appeals of class certification decisions, the appellate committee concluded that a conforming change needed to be made in the appellate rules. It decided that the best way to amend the rules was to consolidate rules 5 and 5.1 into a single, generic Rule 5 that would govern all present, and all future, categories of discretionary appeals. In late 1996, the Congress enacted the Federal Courts Improvements Act of 1996, which eliminated appeals from magistrate judges to district judges in § 636(c) cases and made Rule 5.1 obsolete.

Judge Logan said that following publication the advisory committee added language to paragraph (a)(3) to specify that the district court may amend its order to permit an appeal "either on its own or in response to a party's motion." It also added the term "oral argument" to the caption of subdivision (b), made other language changes, and included a reference in the committee note to the Federal Court Improvements Act of 1996.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 22

Judge Logan reported that the Anti-Terrorism and Effective Death Penalty Act of 1996 had amended Rule 22 directly. It also created two statutory inconsistencies. First, it extended the statutory habeas corpus requirements, including the requirement of a certificate of appealability, to proceedings under 28 U.S.C. § 2255. Accordingly, the caption to Rule 22, as

enacted by the statute, was amended to refer to 28 U.S.C. § 2255 proceedings. But the text of the rule made no reference to 28 U.S.C. § 2255. Second, the statute created an inconsistency between 28 U.S.C. § 2253, which provides that a certificate of appealability may be issued by "a circuit justice or judge," and Rule 22(b), which provides that the certificate may be issued by "a district or circuit judge." It was therefore unclear whether the statute authorizes a district judge to issue a certificate of appealability.

Judge Logan said that he had made telephone calls and had sent letters to the Congress when the legislation was pending, pointing to these drafting problems and offering assistance in correcting them. The Congress, however, had not shown interest in correcting the inconsistencies. Following enactment of the statute, additional attempts had been made to ascertain how the Congress would like to have the ambiguities resolved. Again, no direction was received, other than a suggestion that the problem should be resolved by the courts. Through case law development, three circuits have construed the reference in 28 U.S.C. § 2253 to a "circuit justice or judge" to include a district judge. The advisory committee followed that case law in revising the rule.

Judge Logan stated that the advisory committee had worked from the text of Rule 22, as enacted by the Congress, and had made several style improvements in it. It also recommended three substantive changes in subdivision (b) to eliminate the statutory inconsistencies.

1. The rule would be made explicitly applicable to 28 U.S.C. § 2255 proceedings.

2. The rule would allow a certificate of appealability to be issued by "a circuit justice or a circuit or district judge."

3. Since the rule would now govern 28 U.S.C. § 2255 proceedings, the waiver of the need for a certificate of appealability would apply not only when a state or its representative appeals, but also when the United States or its representative appeals.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 26.1

Judge Logan said that Rule 26.1, governing corporate disclosure statements, had been amended only slightly after publication. The advisory committee, for example, substituted the Arabic number "3" for the word "three." The proposal had been coordinated with the Committee on Codes of Conduct.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 27

Judge Logan stated that after publication the advisory committee had made a substantive change in Rule 27, dealing with motion practice. In paragraph (a)(3)(A), the committee provided that "[a] motion authorized by rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner." The committee was of the view that if a court acts on these motions, it should so notify the parties.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 28

Judge Logan stated that the advisory committee had made no changes in the rule, dealing with briefs, after publication.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 29

Judge Logan reported that the only significant change made in Rule 29 (brief of an amicus curiae) following publication was to add the requirement that an amicus brief must include the source of authority for filing the brief.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 32

Judge Logan said that following publication the advisory committee had made a few changes in Rule 32, governing the form of briefs.

The decided to retain 14-point typeface as the minimum national standard for briefs that are proportionally spaced. It had received many comments from appellate judges that the rule should require the largest typeface possible. But it then ameliorated the rule by giving individual courts the option of accepting briefs with smaller type fonts.

One of the members pointed out that the object of the advisory committee was to have a rule that governed all courts, making it clear that a brief meeting national standards must be accepted in every court of appeals. There was, however, substantial disagreement as to what the specific national standards should be. The compromise selected by the advisory committee was to set forth the minimum standard of 14-point typeface—meeting the needs of judges who want large type—but allowing individual courts to permit the filing of briefs with smaller type if they so chose.

Judge Logan pointed out that the advisory committee had eliminated the typeface distinction between text and footnotes and the specific limitation on the use of boldface. He added that the rule as published had included a limit of 90,000 characters for a brief. The advisory committee discovered, however, that some word processing programs counted spaces as characters, while others did not. Accordingly, the committee eliminated character count in favor of a limit of 14,000 words or 1,300 monofaced lines of text. He pointed out that a 50-page brief would include about 14,000 words.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 35

Judge Logan reported that the advisory committee had made post-publication changes in subdivision (f), dealing with a court's vote to hear a case en banc. He explained that the advisory committee had considered adopting a uniform national rule on voting, but the chief judges of the courts of appeals expressed opposition. There are different local rules in the courts of appeals on such issues as quorum requirements and whether senior judges may vote. The advisory committee decided, accordingly, to let the individual courts of appeals handle their own voting procedures.

Judge Stotler expressed concern about the special committee note to the rule. It would "urge" the Supreme Court to delete the last sentence of the Court's Rule 13.3 (which provides that a suggestion made to a court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of that rule unless so treated by the court of appeals). She said that the note was designed to help practitioners avoid a trap in the rules, but suggested that it might be phrased simply to point out that the last sentence of the Supreme Court's rule might not be needed. Judge Logan responded that it would be better simply to delete the special note.

Judge Stotler also expressed concern that there might be debate or controversy in the Judicial Conference or the Supreme Court over the change in terminology from "in banc" to "en banc." Judge Logan replied that the advisory committee proposed including a special paragraph in the cover letters or memoranda to the Conference and the Court explaining the reasons for the change. He noted, for example, that the committee's research had shown that the Supreme Court

itself had used the term "en banc" 12 times as often in its opinions as it had used "in banc." Similarly, a review of the decisions of the courts of appeals also showed an overwhelming preference for "en banc." He added that the committee believed strongly that the rules revision package should not be held up over this usage and would urge that the package of revisions be approved, regardless of whether the Conference and the Court preferred "en banc" or "in banc."

Judge Logan added that a similar explanation was needed in the cover letters to explain the committee's use of "must," rather than "shall." The advisory committee would elaborate in the letters why it was preferable to follow that style convention, but it would also advise the Conference and the Court not to hold up the package of revisions over this particular usage.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 41

The amended rule provides that the filing of either a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court will delay the issuance of the mandate until the court disposes of the petition or motion. Judge Logan reported that the only change made by the advisory committee after publication was to provide that a stay may not exceed 90 days unless the party who obtained the stay files a petition for a writ of certiorari and notifies the clerk of the court of appeals in writing of the filing of the petition.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FORM 4

Judge Logan reported that the proposed revision of Form 4 (in forma pauperis affidavit) had been initiated at the request of the clerk of the Supreme Court, who had commented that the current form did not contain sufficient financial information to meet the needs of the Court. Shortly thereafter, the Congress enacted the Prison Litigation Reform Act of 1996, requiring prisoners filing civil appeals to provide more detailed information for the court to assess their eligibility to proceed in forma pauperis.

Judge Logan stated that the revised form was based in large part on the form used in the in forma pauperis pilot program in the bankruptcy courts. After publication, the advisory committee made two changes: (1) requiring the petitioner to provide employment history only for the last two years; and (2) making the form applicable to appeals of judgments in civil cases.

The committee voted without objection to approve the revised form and send it to the Judicial Conference.

Rules With Style Changes Only

Judge Logan reported that the advisory committee had made no post-publication changes in FED. R. APP. P. 1, 7, 12, 13, 14, 15.1, 16, 17, 19, 20, 33, 37, 38, 42, and 44.

He said that tiny grammatical changes had been made post-publication in FED. R. APP. P. 2, 6, 8, 10, 11, 15, 18, 23, 24, 36, 40, 43, 45, and 48. He also directed the committee's attention to minor changes made in FED. R. APP. P. 3, 4, 9, 21, 25, 26, 30, 31, 34, 39, 46, and 47, and to rule 3.1, which would be abrogated because of recent legislation..

Professor Mooney presented a number of minor style changes suggested by Mr. Spaniol to FED. R. APP. P. 3, 4, 10, 25, and the caption to title IV of the appellate rules.

Mr. Spaniol added that Form 4 was the only form being revised. He suggested that the committee might wish to state expressly in its report that no changes were being made in the other appellate forms (1, 2, 3, and 5). Alternatively, the committee might include the text of these unchanged forms in the package of revisions in the interest of having a complete package of all 48 rules and all five forms. Judge Logan agreed to the latter suggestion. He also agreed with Mr. Spaniol's suggestion that a table of contents be included in the package.

The committee voted without objection to approve the proposed amendments above and send them to the Judicial Conference.

Cover Memorandum

Judge Logan volunteered to prepare a draft communication for the Standing Committee to submit to the Judicial Conference explaining the style revision project and the style conventions followed by the advisory committee. He said that he would include in the communication a discussion of the committee's decisions to use:

1. "en banc" rather than "in banc";

2. "must" rather than "shall";

3. indentations and other format techniques to improve readability; and

4. a side-by-side format to compare the existing rules with the revised rules.

Judge Stotler inquired whether it would be advisable to send an advance copy of the style revision package to the Executive Committee of the Judicial Conference. One of the members responded that the Executive Committee might be asked to place the package on the consent calendar of the Conference.

Judge Stotler also stated that it was important to present the package of revisions to the Supreme Court and the Congress in the side-by-side format. She pointed out that the physical layout of the rules, including indentations, was an integral part of the package. She asked whether the Government Printing Office would print the material in that format. Mr. Rabiej replied that GPO would print the rules in whatever format the Supreme Court approved.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of May 12, 1997. (Agenda Item 10)

Revised Official Forms for Judicial Conference Approval

Judge Duplantier reported that the advisory committee's project to revise the official bankruptcy forms had been initiated in large part in response to comments from bankruptcy clerks of court that some of the existing forms were difficult for the public to understand and had generated numerous inquiries and requests for assistance. The advisory committee's subcommittee on forms worked on the revisions for about two years, and the package of revised forms attracted more than 200 comments during the publication period. The subcommittee and the full advisory committee made a number of additional changes in the forms as a result of the comments.

Judge Duplantier explained that the main purposes of the advisory committee were to make the forms clearer for the general public and to provide more complete and accurate descriptions of parties' rights and responsibilities. To that end, he said, the committee had to enlarge the typeface and expand the text of certain forms. As a result, some of the forms—such as the various versions of Form 9—will now have to be printed on both back and front sides, adding some cost for processing. The advisory committee, however, was satisfied that the marginal cost resulting from expansion of the forms would be more than offset by reductions in the number of inquiries made to clerks' offices and reductions in the number of documents that must be rejected by the courts.

Judge Duplantier said that it would be advisable to specify a date for the revised forms to take effect. He pointed out that the revisions in bankruptcy forms normally take effect upon approval by the Judicial Conference. Several persons, however, had suggested to the committee that additional time was needed to phase in the new forms, to print them, to stock them, and to make needed changes in computer programs. Therefore, the advisory committee recommended that the revised forms take effect immediately on approval by the Judicial Conference in September 1997, but that use of them be mandated only on or after March 1, 1998.

FORM 1

Professor Resnick reported that Form 1 (voluntary petition) had been reformatted based on suggestions received during the public comment period. No substantive changes had been made by the advisory committee following publication.

FORM 3

Professor Resnick pointed out that the advisory committee had to make a policy decision with regard to Form 3 (application and order to pay a filing fee in installments). The current form, and rule 1006(b), on which it is based, provide that a debtor who has paid a fee to a lawyer is not eligible to pay the filing fee in installments. Neither the form nor the rule, however, prohibits the debtor from applying for installment payments if fees have been paid to a non-attorney bankruptcy petition preparer.

The advisory committee had received comments during the publication period that the disqualification from paying the filing fee in installments should apply if a debtor has made payments either to an attorney or to a bankruptcy petition preparer. Professor Resnick pointed out, though, that most debtors who apply for installment payments proceed pro se and may be unaware of the disqualification rule. The fiduciary responsibility that an attorney has to advise a debtor about the right to pay the filing fee in installments is not present when a non-attorney preparer assists the debtor.

Therefore, the advisory committee concluded that payment of a fee to a non-attorney bankruptcy petition preparer before commencement of the case should not disqualify a debtor from paying the filing fee in installments. Nevertheless, the bankruptcy petition preparer may not accept any fee *after* the petition is filed until the filing fee is paid in full.

FORM 6

Professor Resnick stated that the advisory committee had made only a technical change in Form 6, Schedule F (creditors holding unsecured nonpriority claims).

FORM 8

Professor Resnick said that no substantive changes had been made after publication in Form 8, the chapter 7 individual debtor's statement of intention regarding the disposition of secured property. He noted that the form had been revised to track the language of the Bankruptcy Code more closely and to clarify that debtors may not be limited to the options listed on the form.

FORM 9

Professor Resnick explained that Form 9 (notice of commencement of case under the Bankruptcy Code, meeting of creditors, and fixing of dates) was used in great numbers in the bankruptcy courts. He pointed out that the advisory committee made a number of changes following publication to refine and clarify the instructions for creditors and to conform them more closely to the provisions of the Bankruptcy Code. He added that the form had been redesigned by a graphics expert and expanded to two pages to make it easier to read.

FORM 10

Professor Resnick said that Form 10 (proof of claim) had been reformatted by a graphics expert. The advisory committee had made additional changes after publication to make the form clearer and more accurate. The revisions make it easier for a claimant to specify the total amount of a claim, the amount of the claim secured by collateral, and the amount entitled to statutory priority.

FORM 14

Professor Resnick said that no substantive changes had been made following publication in Form 14 (ballot for accepting or rejecting [a chapter 11] plan).

FORM 17

Professor Resnick pointed out that revised Form 17 (notice of appeal under § 158(a) or (b) from a judgment, order, or decree of a bankruptcy judge) took account of a 1994 statutory change providing that appeals from rulings by bankruptcy judges are heard by a bankruptcy appellate panel, if one has been established, unless a party elects to have the appeal heard by the district court. He noted that revised Form 17, as published, had included a statement informing the appellant how to exercise the right to have the case heard by a district judge, rather than a bankruptcy appellate panel. Following publication, the advisory committee expanded the statement to inform other parties that they also had the right to have the appeal heard by the district court.

FORM 18

Professor Resnick said that Form 18 (discharge of debtor) had been revised after publication to provide greater clarity. He noted that the instructions, which consist of a plain English explanation of the discharge and its effect, had been moved to the reverse side of the form.

FORMS 20A and 20B

Professor Resnick said that Forms 20A (notice of motion or objection) and 20B (notice of objection to claim) were new. He explained that many parties in bankruptcy cases do not have lawyers. They do not readily understand the nature of the legal documents they receive, such as motion papers and objections to claims. Thus, they do not know what they have to do to protect their property rights. The new forms provide plain-English, user-friendly explanations to parties regarding the procedures they must follow to respond to certain motions and objections.

One of the members inquired as to the significance of the dates printed at the top of the forms. Judge Duplantier recommended that the date shown on each forth should be the date on which it is approved by the Judicial Conference.

The committee voted without objection to approve all the proposed revisions in the forms and send them to the Judicial Conference, with a recommendation that use of the amended forms become mandatory only on March 1, 1988.

Rules Amendments for Publication

Judge Duplantier reported that the advisory committee had deferred going forward with minor changes in the rules in order to present the Standing Committee with a single package of proposed amendments. He pointed out that the package included amendments to 16 rules, seven of which dealt with a single situation (FED. R. BANKR. P. 7062, 9014, 3020, 3021, 4001, 6004, and 6006).

FED. R. BANKR. P. 7062, 9014, 3020, 3021, 4001, 6004, and 6006

FED. R. BANKR. P. 7062 incorporates FED. R. CIV. P. 62, which provides that no execution may issue on a judgment until 10 days after its entry. Rule 7062 applies on its face to adversary proceedings, but it is also made applicable to contested matters through Rule 9014.

Professor Resnick explained that Rule 7062 had been amended over the years to make exceptions to the 10-day stay rule for certain categories of contested matters, i.e., those involving time-sensitive situations when prevailing parties have a need for prompt execution of judgments. The advisory committee had pending before it requests for additional exceptions.

The committee decided that it was not appropriate to have a long, and expanding, laundry list of exceptions for contested matters in a rule designed to address adversary proceedings. It decided, instead, to conduct a comprehensive review of all types of contested matters and determine which should be subject to the 10-day stay, taking into account such factors as the need for speed and whether appeals would be effectively mooted by a stay. As a result of the

review, the advisory committee concluded as a matter of policy that the 10-day stay should *not* apply to contested matters generally, unless a court rules otherwise in a specific case.

Accordingly, the advisory committee decided: (1) to delete the language in Rule 9014 that makes Rule 7062 applicable to contested matters; and (2) to delete the list of specific categories of contested matters in Rule 7062. Thus, as amended, Rule 7062 would apply in adversary proceedings, but not in contested matters.

Professor Resnick added that the advisory committee had decided that there should be four specific exceptions to the general rule against stay of judgments in contested matters. The exceptions should be set forth, not in Rules 7062 or 9014, but in the substantive rules that govern each pertinent category of contested matter. Accordingly, the advisory committee recommended that the following categories of orders be stayed for a 10-day period, unless a court orders otherwise:

1. FED. R. BANKR. P. 3020(e) and 3021 - an order confirming a plan;

2. FED. R. BANKR. P. 4001 - an order granting a motion for relief from the automatic stay under Rule 4001(a)(1);

3. FED. R. BANKR. P. 6004 - an order authorizing the use, sale, or lease of property other than cash collateral; and

4. FED. R. BANKR. P. 6006 - an order authorizing a trustee to assign an executory contract or unexpired lease under 11 U.S.C. § 365(f).

The committee voted without objection to approve the proposed amendments for publication.

FED. R. BANKR. P. 1017

Professor Resnick stated that Rule 1017, governing dismissal or conversion of a case, currently provides that all parties are entitled to notice of a motion by a United States trustee to dismiss a chapter 7 case for substantial abuse. The advisory committee would revise the rule to provide that only the debtor, the trustee, and other parties specified by the court are entitled to notice. He pointed out that the revision would avoid the expense of sending notices to all creditors.

FED .R. BANKR. P. 1019

Professor Resnick reported that several changes were being proposed in Rule 1019, governing conversion of a case to chapter 7. He said that the revised rule would clarify that a

motion for an extension of time to file a statement of intention regarding secured property must be filed or made orally before the time expires. The amendments would also clarify ambiguities in the rule regarding the method of obtaining payment of claims for administrative expenses. The rule would specify that a holder of such claims must file a timely request for payment under § 503(a) of the Code, rather than a proof of claim, and would set a deadline for doing so. The committee would conform the rule to recent statutory amendments and provide the government a period of 180 days to file a claim.

FED. R. BANKR. P. 2002

Professor Resnick stated that the proposed revisions to Rule 2002(a)(4) would save noticing costs. Under the current rule, notice of a hearing on dismissal of a case for failure of the debtor to file schedules must be sent to every creditor. The rule would be amended to conform with the revised Rule 1017 requiring that notice be sent only to certain parties. The same revision would be made with regard to providing notice of dismissal of a case because of the debtor's failure to pay the prescribed filing fee.

FED. R. BANKR. P. 2003

Professor Resnick noted that Rule 2003(d)(3) governed the election of a chapter 7 trustee. It requires the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested it. The revised rule would give a party 10 days from the date the United States trustee files the report—rather than 10 days from the date of the meeting of creditors—to file a motion to resolve the dispute.

Professor Resnick pointed out that the Congress had amended the Bankruptcy Code in 1994 to authorize creditors to elect a trustee in a chapter 11 case. The advisory committee then amended Rule 2007.1 to provide procedures for electing and appointing a trustee. The revised rule—scheduled to take effect on December 1, 1997—provides that the election of a chapter 11 trustee is to be conducted in the manner provided in Rule 2003(b)(3) for electing a chapter 7 trustee. The proposed revisions to Rule 2003(d), governing the report of a trustee's election and the resolution of a disputed election, are patterned after newly-revised Rule 2007.1(b)(3).

FED. R. BANKR. P. 4004 and 4007

Professor Resnick said that the advisory committee made companion changes in Rule 4004, governing objections to discharge of the debtor, and Rule 4007, governing complaints to determine the dischargeability of a particular debt. The advisory committee proposed amending these rules to clarify that the deadline for filing a complaint objecting to discharge or dischargeability is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The committee would also revise both rules to provide that a motion for an extension of time to file a complaint must be filed before the time has expired.

FED. R. BANKR. P. 7001

Professor Resnick explained that Rule 7001, which defines adversary proceedings, would be amended to provide that an adversary proceeding is not necessary to obtain injunctive or other equitable relief if that relief is provided for in a reorganization plan.

FED. R. BANKR. P. 7004

Professor Resnick noted that Rule 7004(e), governing service, provides that service of a summons (which may be by mail) must be made within 10 days of issuance. The proposed revision would carve out an exception by providing that the 10-day limit does not apply if the summons is served in a foreign country.

FED. R. BANKR. P. 9006

Professor Resnick noted that Rule 9006(c)((2), as amended, would prohibit any reduction of the time fixed for filing a request for payment of an administrative expense incurred after commencement of a case and before conversion of the case to chapter 7.

The committee voted without objection to approve all the proposed amendments above for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum of May 21, 1997 (Agenda Item 5).

Amendments for Judicial Conference Approval

FED. R. CIV. P. 23

Judge Niemeyer reported that the advisory committee had studied class actions and mass tort litigation in depth for nearly six years. During the course of that study, it had actively solicited the views of lawyers, judges, and others on every aspect of class litigation. The advisory committee, he said, had concluded that most of the perceived problems affecting class litigation and mass torts simply could not be resolved through the federal rulemaking process. After intense investigation and discussion, the advisory committee published the following five, relatively modest proposals to amend Rule 23:

1. Expanding the list of factors that a judge must consider in determining whether common questions of law or fact predominate over questions affecting only

individual class members and whether a class action is superior to other available methods for adjudicating the controversy;

2. Providing explicit authorization for a judge to certify a settlement class;

3. Requiring a judge to conduct a hearing before approving a settlement;

4. Requiring a judge to make a determination as to class certification "when practicable," rather than "as soon as practicable"; and

5. Authorizing a discretionary, interlocutory appeal of a class certification decision.

Judge Niemeyer stated that the advisory committee had received an enormous volume of responses on the proposed changes to Rule 23 and had conducted three public hearings . He stated that the comments had been very thoughtful and informative, and the debate had been conducted on the highest intellectual and practical level. Following the publication period and the hearings, the committee asked the Administrative Office to collect and publish the statements of lawyers, academics, and others for consideration by the Standing Committee and the advisory committees.

Judge Niemeyer reported that excellent points had been made by commentators on each side of each proposal. In the end, however, it was clear to the advisory committee that there are deep philosophical divisions of opinion on many of the issues. Moreover, the advisory committee had decided that it would have to defer further consideration of settlement class issues until the Supreme Court rendered a decision in *Amchem Products, Inc. v. Windsor.*

He stated that the advisory committee at this time was only seeking Judicial Conference approval of two proposed changes in Rule 23:

1. a new subdivision (f) that would authorize interlocutory appeals, and

2. an amendment to paragraph (c)(1) that would require a court to make a class certification decision "when practicable."

He added that the other proposed changes in the rule had either been withdrawn by the advisory committee or were being deferred for further study.

Rule 23(f) - Interlocutory Appeal

Judge Niemeyer stated that there was a strong consensus within the advisory committee and among the commentators in favor of permitting a court of appeals—in its sole discretion—to take an appeal from a district court order granting or denying class action certification. The

proposal would enable the courts of appeals to develop the law. This change alone, he said, might well prove to be the most effective solution to many of the problems with class actions. He emphasized that the advisory committee believed that appellate review of class action determinations was very beneficial and should not be impeded by the restraints imposed by mandamus and 28 U.S.C. § 1292(b). He added that the appellate review provision was not philosophically connected to any of the other proposed changes in Rule 23. Therefore, it should be separated from the other proposed changes and approved by the Judicial Conference immediately.

Several members pointed out that it was generally not appropriate to proceed with piecemeal changes in a rule, especially when additional changes in a rule are anticipated in the next year or two. But the consensus of the committee was that the proposed interlocutory appeal provision of Rule 23(f) was sufficiently distinct from the other changes in the rule under consideration and of sufficient benefit that it justified an exception to the normal rule.

One of the members said that the change might result in thousands of additional cases in the courts of appeals and add substantial costs to litigants, especially in civil rights cases. But many of the members of the committee, including its appellate judges, stated that the courts of appeals make prompt decisions—usually within a matter of days—on whether to accept an interlocutory appeal. And once they accept an interlocutory appeal, they normally decide it on the merits with dispatch. Several members emphasized that the courts of appeals simply will not take cases that do not appear to have merits. Some judges added that class action decisions were an important area of their jurisprudence that could be helped by having more appellate decisions, especially at early stages of litigation before the parties incur great costs and delays.

The committee voted without objection to approve the proposed new Rule 23(f) and send it to the Judicial Conference.

Rule 23(c)(1) - "When practicable"

Some members observed that changing the time frame for the court to make a class action determination from "as soon as practicable" to "when practicable" merely conforms the rule to current practice in the federal courts. They argued that the amendment provides a district judge with needed flexibility to deal with the various categories and conditions of class actions in the district courts. Judge Niemeyer pointed out that district judges already exercise that flexibility without negative consequence, and no adverse comments had been received on the proposal during the public comment period.

Others argued, though, that the proposed amendment was substantive in nature because it could result in district judges delaying their certification decisions. They pointed out that in 1966 the drafters of Rule 23 had made a conscious decision to require the court to make a prompt class certification decision, leaving substantive decisions to be made later in the case when they would

be binding on all parties. It was suggested, too, that the impact of the class certification decision on absentees was a very serious question that needed to be addressed further.

Some members suggested that the proposed amendment be deferred for further consideration by the advisory committee and included eventually with the package of other proposed amendments to Rule 23.

The motion to approve the amendment to Rule 23(c)(1) and send it to the Judicial Conference failed by a voice vote.

Other proposed amendments to Rule 23

Judge Niemeyer reported that the advisory committee had decided not to proceed with proposed new subparagraph (b)(3)(A). It would have added as an additional matter pertinent to the court's findings of commonality and superiority "the practical ability of individual class members to pursue their claims without class certification." He explained that the advisory committee had decided that the benefits to be derived from the change were outweighed by the risk of introducing changes in the rule. The committee also abandoned further action on the proposed amendment to subparagraph (b)(3)(B), which slightly clarified the existing subparagraph (A).

Judge Niemeyer said that the advisory committee had decided to conduct further study on the proposed amendment to subparagraph (b)(3)(C). It would authorize the court to consider the maturity of related litigation involving class members in making its commonality and superiority findings. He pointed out that as a result of public comments, the committee had improved the language of the amendment to read as follows: "the extent and nature of any related litigation and the maturity of the issues involved in the controversy."

Judge Niemeyer advised that the proposed subparagraph (b)(3)(F) would add to the list of matters pertinent to the court's findings "whether the probable relief to individual class members justifies the costs and burdens of class litigation." He said that it had attracted an enormous amount of public comment, and articulate views had been expressed both in favor of and against the proposed amendment. He pointed out that the debate over the amendment had disclosed competing economic interests and basic philosophical differences as to the very purposes of Rule 23 and class actions.

He reported that the advisory committee had not made a final decision as to whether to proceed with the amended Rule 23(b)(3)(F). It would continue to study the matter further and consider five possible options at its next meeting.

He added that the advisory committee had also deferred action on the proposed new paragraph (b)(4), regarding settlement classes, until after Supreme Court action in *Amchem Products, Inc. v. Windsor.*

Judge Niemeyer reported that the advisory committee would consider all remaining class action proposals as part of a package at its October 1997 meeting. He reemphasized that the class action debate had evoked substantial public interest and had disclosed deep philosophical divisions. On the one hand, there had been a great deal of support for amending the rule to eliminate cited abuses in current practices, particularly class actions resulting in insignificant awards for individual, largely uninterested, class members and large fees for attorneys. On the other hand, many commentators argued that class actions, regardless of the monetary value of individual awards, serve vital social purposes.

He added that sentiment had also been expressed in favor of making no additional changes in the rule because: (1) resolution of the perceived problems may well lie beyond the jurisdiction of the rules committees to correct; and (2) the courts of appeals may resolve many of the problems through the development of case law.

Informational Items

Judge Niemeyer reported that the advisory committee was making good progress in its comprehensive study of discovery. It was evaluating the role of discovery in civil litigation, its cost, and its relation to the dispute-resolution process. As part of the review, the committee would consider whether any changes could be made to lessen the cost of discovery while retaining the value of the information obtained.

In addition, he pointed out that both the Civil Justice Reform Act of 1990 and the 1993 amendments to the Federal Rules of Civil Procedure had authorized substantial local court variations in pretrial procedures. He stated that the advisory committee would like to return to greater national uniformity in civil practice as a matter of policy, but it realized the difficulty of gaining acceptance of uniform national rules after several years of local variations.

Judge Niemeyer stated that the advisory committee had planned a major symposium on discovery, to be held in September 1997 at Boston College Law School. Knowledgeable members of the bar and the academic community had been invited to identify and explore issues and make recommendations to the committee. He invited the members of the Standing Committee to attend and participate in the conference.

He reported that the advisory committee had appointed an ad hoc subcommittee to review the admiralty rules. The subcommittee was working closely with the admiralty bar and the Department of Justice. He pointed out that the provisions in the admiralty rules dealing with forfeiture of assets were particularly important since the admiralty rules govern, by reference,

many categories of non-admiralty forfeiture proceedings As part of its drafting process, the subcommittee had concluded that the time limits set forth in the rules for regular admiralty cases should be different from those for other categories of forfeiture cases.

Judge Niemeyer expressed concern that several bills had been introduced in the Congress to legislate forfeiture proceedings. The drafters had not had the benefit of the broad input that the advisory committee and its subcommittee had received from the bar and others. As a result, the bills, among other things, overlooked important distinctions between admiralty proceedings and other types of forfeiture proceedings.

Judge Niemeyer reported that the Civil Rules Committee was studying the inconsistent and misleading provisions governing the timing of the answer to a writ of habeas corpus under Civil Rule 81(a)(2) and Rule 4 of the § 2254 Rules, which was adopted after Rule 81(a)(2) was last amended. The revision of Rule 81 will be directly affected by any change in the rules governing § 2254 proceedings involving the timing of the habeas corpus answer. Accordingly, Judge Niemeyer recommended that this topic should be initially addressed by the Criminal Rules Committee. Judge Jensen and Professor Schlueter, chair and reporter, respectively of the Criminal Rules committee agreed to have their committee study the issue.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of May 21, 1997 (Agenda Item 6).

Amendments for Judicial Conference Approval

FED. R. CRIM. P. 5.1 AND 26.2

Judge Jensen pointed out that the amendments to Rules 5.1 and 26.2 were companion amendments. Rule 26.2 governs the production of prior statements of a witness once the witness has testified on direct examination. It has been amended several times in recent years to expand its scope to other categories of criminal proceedings besides trials, such as sentencing hearings, detention hearings, and probation revocation hearings. The proposed amendments would extend the rule's application to preliminary examinations conducted under Rule 5.1.

One member raised the possibility that the rule might be read as encompassing a witness at a preliminary examination who has testified previously at a grand jury proceeding. Some members responded that the situation was at most a theoretical possibility, since preliminary examinations are not conducted once a grand jury returns an indictment.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. CRIM. P. 31

Judge Jensen explained that the proposed amendments to Rule 31 would require that polling of a jury be conducted individually. He added, though, that the rule did not require individual polling as to each count.

The chair noticed that the text of the amended rule used "must," rather than "shall." She suggested that the use of "shall" might be more prudent in light of the Supreme Court's concern over making style changes in the rules on a piecemeal basis. Judge Jensen and Professor Schlueter concurred and said that the advisory committee would continue to use "shall" until it was ready to send forward a complete style revision of the entire body of criminal rules.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 33

Judge Jensen stated that under the current rule, a motion for a new trial based on newly-discovered evidence must be made within two years after the "final judgment." The proposed amendment, as published, would have established a time period of two years from "the verdict or finding of guilty." During the public comment period, the committee received comments that the proposal would seriously reduce the amount of time available to file a motion for a new trial under some circumstances. Accordingly, the advisory committee decided that an additional year was appropriate, and it set the deadline at three years from the verdict of finding of guilty.

One of the members questioned the use of the word "must" on lines 9 and 12. Following discussion, the consensus of the committee was that the use of "may" in the text of the existing rule should be retained.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 35

Judge Jensen pointed out that the proposed amendments to Rule 35(b) would allow a court to aggregate a defendant's pre-sentencing and post-sentencing assistance in determining whether to reduce a sentence to reflect the defendant's "substantial assistance" to the government.

Judge Jensen agreed to a suggestion to delete the comma in line of the text. He did not agree to change the words "subsequent assistance" to "later assistance," because the words "subsequent assistance" are contained in the pertinent statute and have been used in the case law.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 43

Judge Jensen explained that the proposed amendment to the rule was intended to provide consistency in the situations when the defendant's presence is required at a resentencing proceeding.

Judge Jensen noted that Rule 35(a) deals with a situation when the sentence has been reversed on appeal and the case remanded for resentencing. This involves a "correction" of the sentence, and the defendant should be present for the resentencing. But a court should be permitted to reduce or correct a sentence under Rule 35(b) or (c) without the defendant being present. Rule 35(b) deals with reduction of a sentence for substantial assistance. Rule 35(c) gives the trial court seven days to correct a sentence for arithmetical, technical, or other clear error. There was also no need to require the presence of the defendant at resentencing hearings conducted under 18 U.S.C. § 3582(c). That statute governs resentencing conducted as a result of retroactive changes in the sentencing guidelines or a motion by the Bureau of Prisons to reduce a sentence based on "extraordinary and compelling reasons." Judge Jensen emphasized, however, that the court retains discretion to require or permit a defendant to attend any of these resentencing proceedings.

The committee voted without objection to approve the proposed amendment and send it to the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 6

Judge Jensen reported that the proposed amendments to the rule addressed two issues. First, under the present rule, necessary interpreters are authorized to be present during grand jury sessions, but not during grand jury deliberations. The proposed amendment would allow an interpreter for a deaf juror to be present while the grand jury is deliberating or voting.

Second, under the present rule, the entire grand jury must be present in the courtroom when an indictment is returned. The proposed amendment would authorize the foreperson or deputy foreperson to return the indictment in open court on behalf of the jury. The amendment

would save time, expense, and inconvenience by not requiring the whole grand jury to be transported to the courtroom.

In addition, Judge Jensen reported that legislation had just been introduced in the Congress by Representative Goodlatte, H.R. 1536, that would reduce the size of a grand jury to nine persons, with a minimum of seven needed to return an indictment. He pointed out that the advisory committee had not had the legislation on the agenda of its last meeting. Accordingly, it had not taken a position on its merits. Historically, however, the advisory committee from 1974 to 1977 favored a reduction in the size of the grand jury.

Judge Jensen said that the current legislation had been referred for response to the Judicial Conference's Court Administration and Case Management Committee and Criminal Law Committee. Both committees had considered the measure at their recent meetings and decided to recommend referring the matter to the Advisory Committee on Criminal Rules.

The members agreed that the proposal to reduce the size of grand juries should proceed through the normal Rules Enabling Act process, even though the process takes considerable time and the Congress might resolve the matter sooner by legislation. One member suggested, however, that the issue was potentially controversial and might not be enacted by the Congress. Judge Jensen stated that the advisory committee would consider the matter at its October 1997 meeting, and any proposed amendments to Rule 6 would proceed through the normal public comment process.

Judge Jensen argued that the two changes in Rule 6 recommended by the advisory committee should proceed to immediate publication without awaiting action regarding the size of grand juries. Several members concurred and urged publication of the current amendments.

Some members, however, questioned why the proposed amendment should be limited to interpreters for deaf jurors. And one member questioned the use of the word "deaf," favoring "hearing impaired" as the more appropriate characterization.

Judge Easterbrook moved to strike the word "deaf" from the amendment. The committee approved the motion on a voice vote, with four members opposed.

Judge Jensen and Professor Schlueter responded that the advisory committee was very reluctant to open up the exception by allowing all potential types of interpreters into the grand jury deliberations. Accordingly, it had specifically limited the amendment to interpreters for deaf jurors. One participant suggested that the advisory committee explicitly solicit public comments on whether the proposal should be broadened to cover other groups.

Judge Sear moved for reconsideration of Judge Easterbrook's amendment to strike the word "deaf" from the amendment. The committee approved the motion by voice vote.

On reconsideration, the committee approved Judge Easterbrook's motion by a 6-5 vote. Then it approved without objection the amendments to Rule 5 for publication.

One of the members suggested that the committee note to the rule was inconsistent with the text. He recommended that the advisory committee rewrite the note to Rule 6(d) to notify the public that it was seeking input on the issue of how broad the exception for interpreters should be.

FED. R. CRIM. P. 11

Judge Jensen reported that the first proposed amendment in Rule 11 would merely update the rule by changing the term "defendant corporation" to "defendant organization, as defined in 18 U.S.C. § 18."

The committee voted without objection to approve the proposed amendment for publication.

The second amendment, referred to the advisory committee by the Criminal Law Committee, would add to the Rule 11(c) colloquy a requirement that the court inform the defendant of the terms of any provision in a plea agreement waiving the defendant's right to appeal or collaterally attack the sentence. He said that it was increasingly common for plea agreements to include an agreement by the defendant not to appeal. But the current rule does not require the court to inquire into the waiver of appeal. He suggested that the amendment would provide greater certainty as to the plea the defendant enters.

The committee voted without objection to approve the proposed amendment for publication.

Judge Jensen said that the final proposed changes to the rule govern plea agreements and plea agreement procedures under Rule 11(e). They had been coordinated with the United States Sentencing Commission and the Criminal Law Committee.

He explained that the rule had never been modified to take into account the impact of the sentencing guidelines, which have enlarged the very concept of a sentence and the procedures for reaching a sentence. A court, for example, now must determine whether a particular provision of the guidelines, a policy statement of the commission, or a sentencing factor is applicable in a case. Accordingly, the amendments to Rule 11(e) would recognize that a plea agreement may address not only a particular sentence but also the applicability of a specific sentencing guideline, sentencing factor, or Commission policy statement.

A member suggested that the proposed style change in lines 18-19—from "engage in discussions with a view toward reaching an agreement" to "discuss an agreement"—was inappropriate. He recommended that the language be amended to read "agree that."

Several members expressed concern that the proposed amendment to Rule 11(e)(1)(C) would authorize the defendant and the United States attorney to agree to "facts" that are not established facts. They argued that it would further remove the judge as a check on the integrity of the sentencing process and as a guardian in assuring equal treatment for all defendants. Judge Jensen acknowledged the concern and said that the Sentencing Commission also was aware of potential problems with inappropriate agreements. Nevertheless, the advisory committee and the Commission urged publication and public comment on the matter. Mr. Pauley added that Department of Justice's internal guidelines prohibit prosecutors from agreeing to unestablished facts. It was also pointed out by several members that the ultimate bulwark against abuse is the district judge's authority to reject the plea agreement.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 24

Judge Jensen explained that under the present rule, alternate jurors must be discharged when the jury retires to deliberate. The proposed amendments would eliminate this requirement, thereby giving the trial court discretion either to retain or discharge the alternate jurors.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 30

Judge Jensen stated that the proposed amendments would permit the trial court, in its discretion, to require or permit the parties to file any proposed instructions before trial.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 32.2

Judge Jensen reported that the proposed new Rule 32.2 would consolidate several procedural rules governing the forfeiture of assets in a criminal case. The changes had been motivated in large measure by the Supreme Court's decision in *Libretti v. United States*, 116 S. Ct. 356 (1995), which made it clear that forfeiture is a part of the sentence. The proposed new rule, accordingly, would incorporate forfeiture into the sentencing process. He pointed out that

the rule addressed the problem of third parties whose property rights needed to be protected. It also recognized that forfeiture proceedings are akin to a civil case and, therefore, provided for appropriate discovery.

Judge Jensen said that competing bills had been introduced in the Congress dealing with forfeiture of assets. Judge Stotler added that the bills were replete with references to the federal rules. She said that she had been struck by the fact that the Congress apparently wanted to move quickly on forfeiture legislation, but the subject matter was very complex and not well understood by lawyers and judges. There were already more than 100 forfeiture statutes on the books, and the outcome of the various forfeiture bills in the Congress was uncertain. Judge Stotler pointed out that the rules committees had attempted to deal only with a small part of the forfeiture problem, and she suggested that it would be preferable if the Congress enacted a uniform forfeiture code or simply referred all procedural issues to the rules process.

Judge Jensen responded that the advisory committee's proposal dealt only with criminal forfeiture as a part of sentencing. Mr. Waxman added that it would be desirable to have a concordance between the various statutes and rules and between civil and criminal forfeiture. Nevertheless, he urged that the proposed new Rule 32.2 be published for comment. He stated that forfeiture was a controversial subject, and the Department of Justice preferred to have criminal forfeiture procedures enacted carefully through the Rules Enabling Act process, rather than by legislative happenstance in the Congress.

Some of the members expressed concern over the complexity of the proposed rule and its blending of civil and criminal concepts. They suggested that consideration might be given to drafting a simple rule declaring that the pertinent property was forfeited to the government. Interested third parties, accordingly, would have to file a civil suit to assert their property rights.

The committee voted without objection to approve the proposed new rule for publication.

FED. R. CRIM. P. 54

Judge Jensen explained that the proposed amendment to the rule was technical. It would merely eliminate the reference to the United States District Court for the District of the Canal Zone, which no longer exists.

The committee voted without objection to approve the proposed amendment for publication.

Informational Items

Judge Jensen reported that the advisory committee had received a recommendation from the Federal Magistrate Judges Association that Rule 5(c) be amended to delete its restriction on a magistrate judge continuing a preliminary examination. He said that the advisory committee had concurred with the association on the merits of the proposal, but it concluded that the restriction emanated from the underlying statute, 18 U.S.C. § 3060, on which the rule is based. Therefore, the committee recommended that the Standing Committee ask the Judicial Conference to seek legislation to amend the statute.

Mr. McCabe added that the recommendation of the advisory committee had just been endorsed by the Magistrate Judges Committee of the Judicial Conference

Judge Easterbrook moved to reject the recommendation seeking amendment of 18 U.S.C. § 3060(c) on the grounds that the proposed change should be enacted through the Rules Enabling Act process, relying eventually on operation of the supersession clause. He pointed out that the Supreme Court recently had voided the service provisions in the Suits in Admiralty Act on supersession clause grounds. *Henderson v. United States,* 116 S. Ct. 1638 (1996)

The committee voted without objection to approve the motion.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Capra presented the report of the advisory committee, as set forth in Judge Fern M. Smith's memorandum of May 1, 1997 (Agenda Item 9).

Amendments for Judicial Conference Approval

FED. R. EVID. 615

Professor Capra stated that the proposed amendment to the rule took account of recent statutory changes giving crime victims the right not to be excluded from criminal trials.

Judge Easterbrook expressed concern over incorporating references to specific statutes in the rules. He pointed out that statutes are frequently amended or superseded. Therefore, he argued for a generic reference to categories of persons who may not be excluded from proceedings. **He moved that the following language be added to the end of Rule 615: "(4) a person authorized by statute to be present."** Professor Capra responded that the advisory committee had included a specific statutory reference because it believed that a generic reference

might not be strong enough in light of the Congress' express interest and recent actions regarding victims' rights.

The motion was approved by voice vote without objection.

Professor Capra requested that the amendment be approved without publishing for public comment, since it was merely a conforming amendment. One of the members concurred and emphasized that it was very important to move quickly on the proposal because of congressional interest and policy in expanding victims' rights.

The committee voted by voice vote without objection that the proposed amendment was conforming and approved the rule without publication for public comment.

Amendments for Publication

FED. R. EVID. 103

Professor Capra explained that proposed new subdivision (e) addressed the issue of when a party must renew at trial an in limine objection decided adversely to the party. He noted that a version of the proposal had been published once before, but later withdrawn by the advisory committee after public comments had revealed the text to be unclear. The advisory committee then redrafted the rule, patterning it in large part on a Kentucky state court rule. He pointed out that the third sentence of the new subdivision was intended to codify *Luce v. United States,* 469 U.S. 38 (1984), which held that a criminal defendant must testify at trial in order to preserve an objection to the trial court's decision admitting the defendant's prior convictions for purposes of impeachment.

In response to a question from one of the members, Professor Capra stated that the advisory committee had deliberately limited the sentence's application to criminal cases, believing that its extension to civil cases might cause problems.

Judge Easterbrook expressed several objections to the new subdivision and moved to send it back to the advisory committee for further drafting. He argued that, as formulated, the third sentence of the proposed text would apply only when the court's ruling is conditioned on "the testimony of a witness," rather than on the introduction of evidence. He pointed out that, although the *Luce* case involved testimony, the principle on which it rested is not limited to testimony. In other words, there is no logical distinction between testimony and documentary evidence. Therefore, the court's ruling should be conditioned on admissibility, rather than on testimony. In addition, the text of the third sentence implied that the court's ruling itself was conditional. In reality, it is merely dependent on a party's decision to introduce evidence.

He also questioned the formulation of the second sentence of the subdivision, which states that a motion for an advance ruling, when definitively resolved on the record, is sufficient to "preserve error" for appellate review. The implication of the text, he said, was that the movant may preserve the claim for review, but not the opponent. He added that use of the words "preserve error" was inappropriate, since there is no intent to preserve error. Rather, the language should be recast to state that a party need not make an exception to a particular ruling in order to preserve the right to appeal. Moreover, it is the court's definitive ruling against a party that preserves the right to appeal, not "a motion for an advance ruling."

Several members expressed support for the substance of the proposal. One lawyer-member emphasized that it represented a significant improvement over the earlier draft. **The consensus of the committee, however, was that the subdivision should be returned to the advisory committee for redrafting in light of the comments made during the discussion.**

Informational Items

Professor Capra pointed out that the committee notes to several of the Federal Rules of Evidence contained inaccuracies. The notes had been prepared to support and explain the advisory committee's draft of the rules. But the rules ultimately enacted by the Congress differed in several respects from the committee's version.

He reported, for example, that the advisory committee had reviewed the notes recently and had discovered that references in 21 notes to rules that were not in fact approved by the Congress. In some instances the committee notes were directly contrary to the positions eventually taken by the Congress. Accordingly, the committee notes were a potential trap for unwary attorneys.

He stated that the advisory committee was considering preparing a short list of editorial comments pointing out the discrepancies between the notes and the rules and asking law book publishers to include the comments in their publications of the rules. He explained that the proposed comments would consist of short bullets set forth at each troublesome section of the rules. The members were asked for their initial views of this proposed course of action.

A couple of participants suggested that it might be preferable to inform law book publishers that the committee notes are not meaningful and should no longer be included in their publications. Other participants, however, responded that the notes were a part of the legislative history of the rules and should continue to be made available. Some members suggested that any action that would help clarify the matter for users should be encouraged. Professor Coquillette added that the reporters had agreed to discuss the matter at their working luncheon.

STATUS REPORT ON THE ATTORNEY CONDUCT STUDY

Professor Coquillette reported that he had completed work on the several background studies of attorney conduct that the committee had requested of him. He pointed out that the last two studies—analyzing the case law under FED. R. APP. P. 46 and bankruptcy cases involving attorney conduct rules—were set forth as Agenda Item 7. He thanked the Federal Judicial Center in general, and Marie Leary in particular, for invaluable assistance in conducting the studies, especially the survey of existing district court practices and preferences. He also thanked Judge Logan and Professor Mooney for their help in compiling the appellate court study and Patricia Channon for her help on the bankruptcy study. He concluded that the committee had now studied attorney conduct in the federal courts in every meaningful way.

Potential Courses of Action

Professor Coquillette suggested that the committee might wish to consider four possible courses of action regarding attorney conduct:

1. Do nothing.

2. Draft a model local rule on attorney conduct that could be adopted voluntarily by the district courts, and possibly by the courts of appeals.

3. Draft a small number of national rules to govern attorney conduct in the areas of primary concern to bench and bar.

4. Draft both a model local rule and uniform national rules.

He stated that the committee had conducted two special conferences on attorney conduct with knowledgeable lawyers, professors, and state bar officials. At the conferences, the participants had expressed a wide range of diverging views on how best to address attorney conduct issues. There was no clear consensus among the participants as to whether conduct matters should be governed by uniform national rules or by local court rules. Nevertheless, the one thing that all the participants agreed upon was that the present system was deficient in several respects and that the rules committees should take some kind of action.

He pointed out that the principal advantage of national rules is that they would set forth a uniform, national standard applicable in all federal courts. National rules, moreover, would have the benefit of public comment and national debate under the Rules Enabling Act process. On the other hand, a model local rule could be adopted more expeditiously and would not have to be submitted to the Congress. He noted that the recent Federal Judicial Center survey had shown that 30% of the courts favored national rules on attorney conduct, while 62% favored a local-rule approach. He added that, to guide the committee's deliberations, he had included in the agenda

materials samples of: (1) a model local rule for the courts of appeals; (2) an amended version of FED. R. APP. P. 46; and (3) uniform federal rules of attorney conduct.

The members discussed generally the advantages and disadvantages of each approach. Several members emphasized that all attorneys as a matter of policy should be governed by the conduct rules of the states in which they are licensed to practice. They added, however, that it might be appropriate to carve out a very limited number of exceptions for federal lawyers that would govern areas where there were overriding federal interests.

Concerns of Federal Lawyers

Mr. Waxman pointed out that federal lawyers face uncertainty in their practice and need, as a minimum, a clear federal law to govern conflicts between jurisdictions. He added that federal law was needed in certain limited situations that impacted on the work of federal attorneys. Chief Justice Veasey responded that the Department of Justice's interest in uniformity was understandable. Nevertheless, state bars also want uniformity for all lawyers in the state. There should not be one set of conduct standards in the state courts and a different standard for the federal courts of that state.

Mr. Waxman was asked which conduct issues were of particular concern to the Department of Justice and federal lawyers. He responded that there were no problems with the rules governing attorney conduct within a court setting. Rather, the Department's concern was limited to areas where state ethical rules reach, or purport to reach, conduct by federal prosecutors and other attorneys conducting investigations outside the court. These include such matters as contacts with represented parties, subpoenas directed to attorneys, and the presentation of exculpatory evidence to grand juries.

Concerns in Bankruptcy Cases

Professor Coquillette explained that attorney conduct in the bankruptcy courts raised certain unique problems. The local rules of the bankruptcy courts generally adopt the rules of the district courts. Nevertheless, actual practice in the bankruptcy courts is very different from that in the district courts. Bankruptcy judges usually look for guidance on matters of attorney conduct to the Bankruptcy Code and to the common law of bankruptcy. There are, he said, serious differences among the bankruptcy courts in applying these laws and a lack of clear and specific conduct case law and guidelines. He recommended that further research be conducted on attorney conduct issues and practices in the bankruptcy courts.

Judge Duplantier reported that the Advisory Committee on Bankruptcy Rules had a subcommittee in place that was considering attorney conduct issues in bankruptcy cases. Professor Resnick stated that contemporary bankruptcy practice—with thousands of creditors and claimants in an individual case—raises a number of specialized conduct issues that may not be

addressed adequately by existing state rules or by model local court rules. He pointed out, for example, that the Bankruptcy Code itself defines a "disinterested person," and it requires court approval of certain appointments. The statutory definition, he said, was troublesome and had been interpreted in different ways by the various courts of appeals. He also noted that the advisory committee was considering potential amendments to FED. R. BANKR. P. 2014, which requires an attorney, or other professional person, to disclose certain information to the court as part of the appointment process.

Committee Action

Professor Hazard moved that the committee begin drafting rules, identifying the problems, and eliciting discussion.

Judge Stotler concluded that there was a consensus among the committee members that work should begin on drafting a set of national rules providing that state law governs attorney conduct in the federal courts except in a few limited areas, such as certain investigatory functions and certain aspects of bankruptcy practice. She asked Professor Coquillette to continue with the work of drafting potential rules and making presentations on attorney conduct issues to the advisory committees.

POSTING LOCAL RULES AND OFFICIAL BANKRUPTCY FORMS ON THE INTERNET

Mr. Rabiej reported that courts are required by statute and rule to send copies of their local rules to the Administrative Office. The AO maintains the rules in loose-leaf binders in its library. They are not readily available to the public.

He stated that the rules office intends to begin posting the local rules on the Internet as a service to public. He added that the office had also proposed posting the official bankruptcy forms on the Internet.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker, chair of the subcommittee, reported that the subcommittee had met with Professor Coquillette and had drafted a short set of proposed guidelines designed to expedite the process of reviewing proposed amendments for style. He pointed out that the advisory committees and their reporters faced extremely short deadlines for completing drafts of proposed amendments and committee notes.

Judge Parker said that the guidelines recommended that drafts be submitted by the respective reporters to the rules office in the AO at least 30 days in advance of an advisory

committee meeting. The rules office immediately would send copies to the advisory committee, the style subcommittee, and Mr. Garner, the style consultant. Mr. Garner would then coordinate and consolidate the comments of the style subcommittee within 10 days and return them to the advisory committee reporter.

The reporter would then have 10 days to consider the comments of the style subcommittee, incorporate those he or she deemed appropriate, and return a revised draft to the rules office for transmission to the advisory committee members. Accordingly, the advisory committee members would have the original draft and the suggested style changes at least one week before the committee meeting. After the advisory committee meeting, the reporter would have one week to send a copy of the text and note, as approved by the committee, to the rules office. This would allow the style subcommittee sufficient time before the Standing Committee meeting to make any necessary last-minute changes.

COMMITTEE PRACTICES AND PROCEDURES

Judge Stotler reported that the Executive Committee of the Judicial Conference had requested the committee's views on certain Conference committee practices and procedures. She said that she had responded to an earlier inquiry by stating that there was no need for the rules committees to have liaison members to each of the circuits. Members of the rules committees should represent the system nationally, rather than circuit interests. She added that she proposed to have the committee stand on its previous position.

On the other hand, she emphasized that the use of liaisons between committees of the Judicial Conference had been very useful. She pointed out, for example, that members of the Court Administration and Case Management Committee and the Federal-State Jurisdiction Committee had been invited to attend rules committee meetings and that Judge Easterbrook had been in contact with the chair of the Court Administration and Case Management Committee on matters involving the Civil Justice Reform Act. She stated that the use of liaisons had opened up communications with other committees, and she asked for the committee's endorsement of the increased use of liaisons with other committees.

Mr. Rabiej added that the Executive Committee had asked for the committee's views on the use of subcommittees and the need for face-to-face subcommittee meetings. He pointed out that there was an attempt to reduce the number of subcommittees generally and to restrict their meetings to telephone conferences. He reported that it was the view of the advisory committees that the use of subcommittees was very beneficial and that there was a need for certain in-person subcommittee meetings. Other participants noted that much of the subcommittees' work is conducted by telephone, correspondence, and telefax. They argued strongly, however, that it was essential for the committees to have the flexibility to conduct face-to-face meetings when needed.

REPORT ON MEETING OF LONG RANGE PLANNING LIAISONS

Judge Niemeyer reported that he and Judge Stotler had participated in the meeting of long-range planning liaisons from 13 Judicial Conference committees on May 15, 1997. He pointed out, among other things, that the liaisons had been asked to consider whether an ad hoc committee of the Conference should be appointed to consider mass tort litigation. Judge Stotler stated that Judge Niemeyer had made an impressive presentation on the extensive work of the Advisory Committee on Civil Rules over the past six years in studying mass torts in the context of class actions. Judges Stotler and Niemeyer added that the liaisons concluded that no new committee was needed, and that if any committee of the Conference were to consider mass torts, it should be the Advisory Committee on Civil Rules.

REPORT ON UNIFORM NUMBERING OF LOCAL RULES OF COURT

Professor Squiers reported that the Judicial Conference had approved the requirement that courts renumber their local rules of court by April 15, 1997, to conform with the numbering of the national rules. She stated that half the district courts had completed their renumbering, and the remaining courts were in the process of fulfilling the requirement.

FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the winter meeting of the committee would be held on January 8-9, 1998. She invited the members to select the location for the meeting, and they expressed a preference for Marina del Rey, California, if hotel space were available at a reasonable rate.

Judge Stotler reported further that the mid-year 1998 meeting would be held on either June 11-12, 1998, or June 18-19, 1998.

Respectfully submitted,

Peter G. McCabe,
Secretary

Item 3A

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K RABIEJ
Chief
Rules Committee Support Office

December 2, 1997

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Legislative Report*

We are monitoring seventeen bills and one joint resolution, which were introduced in the First Session of the 105th Congress, that affect the Federal Rules of Practice and Procedure. These bills include six new bills that have been introduced since the committee's June 1997 meeting. On behalf of the rules committees, Judge Stotler sent letters to the Senate and House Judiciary Committees expressing concern on two of these bills. (See attachments.)

Judge Fern Smith was requested to testify on pending legislation amending Evidence Rule 702 before the House Judiciary's Subcommittee on Courts on October 9, 1997. But her appearance was canceled a few days before the scheduled hearing. We understand that the legislative attempt to codify the decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), may be carried over into Congress' second session in another bill.

Congressman Howard Coble, chair of the House Judiciary's Subcommittee on Courts and Intellectual Property, wrote to Judge Niemeyer to express his concern over the advisory committee's consideration of proposed amendments affecting the copyright rules. He noted that legislation is currently pending before his subcommittee on the enforcement of copyright protections. Judge Niemeyer responded that the committee plans to delay publishing any proposed amendments to the copyright rules until later next year so that the committee could review the proposed amendments in light of interim legislative developments. (Copies of both letters are attached.)

A list of the pending legislation affecting the rules is attached. Brief summaries prepared by our Legislative Affairs Office of some of the rules-related bills are also attached.

John K. Rabiej

Attachments



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Chambers of
PAUL V. NIEMEYER
United States Circuit Judge

(410) 962-4210
Fax (410) 962-2277

September 22, 1997

Honorable Howard Coble
Chairman, Subcommittee on Courts
and Intellectual Property
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Congressman Coble:

Thank you for your September 12, 1997 letter advising the Civil Rules Advisory Committee of legislative activity in copyright enforcement.

I can assure you that the Committee's efforts to conform the civil rules to existing practice are not designed to effect any substantive change in copyright enforcement. The matter is on our agenda only because of the observation that the Federal Rules of Civil Procedure were being used in copyright enforcement and that Rule 81 seems to be at odds.

We are delaying our consideration of any change in this area, however, and intend to work with you closely so that whatever we do procedurally will facilitate enforcement of the substantive rights intended by Congress. We will schedule the subject again for our Spring 1998 meeting and can review it then in light of interim legislative development.

In the meantime, please let me know if we can do anything further in our coordinating efforts.

Sincerely,

Paul V. Niemeyer
Chair, Civil Rules Advisory
Committee

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette
Professor Edward H. Cooper
Mr. John K. Rabiej

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ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

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JULIAN EPSTEIN
MINORITY STAFF DIRECTOR

September 12, 1997

The Honorable Paul V. Niemeyer
Chair
Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedures
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Niemeyer:

I understand the Advisory Committee on Civil Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is meeting in October to discuss three proposed amendments to the Federal Rules of Civil Procedure, that relate to copyright cases (repealing the Rules of Practice, and amending Rules 65 and 81). These proposals are of considerable interest to me in my capacity as chair of the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary in the House of Representatives. Pending copyright legislation which is currently the subject of vigorous debate before the Congress, and recent developments abroad, including new U.S. treaty obligations, suggest to the Subcommittee, that the time is not ripe for any rules changes in this area. In order to allow the need for change in substantive law to be considered prior to altering the procedural Rules, I hope that the Advisory Committee will reach the same conclusion, and will delay consideration of these Rules changes.

I am concerned that these changes may alter the existing procedures of the adjudication of copyright cases before Congress has had an adequate opportunity to consider what changes in substantive law may be necessary to meet new challenges presented by the electronic dissemination of copyrighted works, as well as the use of other new formats. These Rules may alter the only effective relief

(copyright impoundment) provided for piracy, especially as new formats (VCDs and DVDs for instance) make it easier to conceal, transport and make high quality duplicate copies. Practice has shown that delay in impounding alleged infringing works results in the disappearance of these items and precludes any effective remedy, especially in light of the exclusive federal jurisdiction for copyright cases. Current legislation is pending that will add additional remedies for copyright enforcement on the Internet and in other digital fora. I do not think that this is the time to amend the Rules designed in and for the analog age, without careful consideration of the consequences for effective enforcement and implementation of remedies.

Further, in the intervening years since these Rules modifications were first considered, the United States has adhered to two multilateral copyright and trade treaties that require specific enforcement provisions in United States copyright law, and is in the process of considering adherence to two more. While the Subcommittee is aware that the debate on the Rules changes is only preliminary at this time, these significant domestic and international developments suggest, at the very least, caution before moving ahead. I hope you would agree, and would delay consideration of these changes. While the Subcommittee appreciates the important and independent role of the Judicial Conference in federal Rules development, the Subcommittee would be remiss if it did not inform you about these legitimate concerns, and share these views on these proposals at this critical time in the development of United States copyright law for the digital age. I look forward to working with you on this matter.

Sincerely,

HOWARD COBLE
Chairman
Subcommittee on Courts
and Intellectual Property

HC:mgv

cc: The Honorable Alicemarie Stotler, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States

Ralph Meacham, Secretary
Judicial Conference of the United States

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
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CHAIRS OF ADVISORY COMMITTEES

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PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

September 16, 1997

Honorable Bill McCollum
Chairman, Subcommittee on Crime
Committee on the Judiciary
United States House of Representatives
207 Cannon House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I write on behalf of the Judicial Conference's Committee on Practice and Procedure (Standing Committee) to express concern regarding a new Rule 32.2 of the Federal Rules of Criminal Procedure proposed in § 103 of a draft bill entitled the "Criminal Asset Forfeiture Act of 1997." I understand that a hearing on the bill before the Subcommittee on Crime has been scheduled for September 18, 1997. I urge you and your colleagues on the subcommittee to defer action on the forfeiture provision in the bill until the Rules Enabling Act rulemaking process has been completed and the bench, bar, and the public have had an opportunity to review and comment on a virtually identical rule proposed and published by the Advisory Committee on Criminal Rules on August 15, 1997.

In April 1996, the Department of Justice proposed changes to the Criminal Rules that would: (1) streamline the forfeiture procedure in light of the Supreme Court decision in *Libretti v. United States,* 116 S. Ct. 356 (1995), by eliminating the jury's role in ruling on the rights of a third-party claimant in forfeitable property; and (2) consolidate several forfeiture provisions in the federal rules. The committee raised several problems with the original proposal, which were addressed by the Justice Department and discussed at subsequent committee meetings.

At its April 1997 meeting, the advisory committee recommended that a new Rule 32.2—as revised by the Justice Department—be published for public comment. The proposal, which is virtually identical to the new rule contained in the draft Criminal Asset Forfeiture Act, has been published by the Standing Committee for a six-month comment period, beginning on August 15, 1997. About 10,000 copies of the proposal were mailed to the federal judiciary, government and state officials, lawyers, law professors, and bar organizations. The draft is being posted on the Internet and published by major legal publishing firms, e.g., West Publishing Company. A public hearing on the proposed new rule is scheduled for December 12, 1997, in New Orleans.

The advisory committee will meet in spring 1998, and it will review the proposal in light of the public comments and testimony. If approved, the new rule—with or without revisions—will be sent to the Standing Committee for consideration at its June 1998 meeting and later in the same year to the Judicial Conference and the Supreme Court. Under this review process, the proposal will be subject to thorough and widespread scrutiny by those who will be most affected by it on both sides—prosecution and defense.

Observing the rulemaking process in this instance is particularly vital because forfeiture provisions are controversial, complicated, and for many they remain unknown. Most lawyers and judges have little or no experience with forfeiture practice, yet recourse to forfeiture proceedings is growing and many predict a steady and significant increase in its use. The substantive criminal code is replete with separate forfeiture provisions, many slightly different, and the interplay between any new, national uniform forfeiture procedural rule and the substantive laws must be carefully analyzed to avert any unintended conflict. The advisory committee is very interested in learning from the experiences of others involved in forfeiture practice on both sides before proceeding further on this proposal, which will undoubtedly have profound and wide-ranging effects.

As envisioned by Congress, the Rules Enabling Act rulemaking process offers a systematic review of rule proposals that is designed to identify potential problems, suggest improvements, unearth lurking ambiguities, and eliminate possible inconsistencies. Rule changes vetted under the rulemaking process have been thoroughly studied and debated, and they meet the highest standards of draftsmanship. By permitting the rulemaking process to proceed, Congress will have assured itself of a well-documented record on which to make a decision once the rule change has completed its course in accordance with the Rules Enabling Act.

I look forward to continuing this dialogue with you and your colleagues on the subcommittee. Please feel free to contact me if I can be of further assistance.

Sincerely,



Alicemarie H. Stotler
United States District Judge

cc: Honorable George W. Gekas
Honorable Howard Coble
Honorable Steven H. Schiff
Stephen E. Buyer
Honorable Steven J. Chabot
Honorable Bob Barr
Honorable Asa Hutchinson
Honorable Charles E. Schumer
Honorable Sheila Jackson-Lee
Honorable Martin T. Meehan
Honorable Robert Wexler
Honorable Steven R. Rothman

SEC. 102. USE OF CRIMINAL FORFEITURE AS AN ALTERNATIVE TO CIVIL FORFEITURE.

(a) IN GENERAL.-- Section 2461 of title 28, United States Code, is amended by adding the following subsection:

"(c) Whenever a forfeiture of property is authorized in connection with a violation of an Act of Congress, but no specific statutory provision is made for criminal forfeiture upon conviction, or the criminal forfeiture provisions contain no procedural provisions, the government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure and the procedures set forth in section 982 of title 18, United States Code, and upon conviction, the court shall order the forfeiture of the property."

(b) ORDER OF FORFEITURE.-- Section 3554 of title 18, United States Code, is amended --

(1) by striking "an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970" and inserting "an offense for which criminal forfeiture is authorized"; and

(2) by inserting "pursuant to the Federal Rules of Criminal Procedure," after "shall order,".

SEC. 103. FEDERAL RULES OF CRIMINAL PROCEDURE

(a) IN GENERAL.-- The Federal Rules of Criminal Procedure are amended by inserting the following new Rule after Rule 32.1:

"32.2. Criminal Forfeiture

"(a) INDICTMENT OR INFORMATION. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information alleges that a defendant has a possessory or legal interest in property that is subject to forfeiture in accordance with the applicable statute.

"(b) HEARING AND ENTRY OF PRELIMINARY ORDER OF FORFEITURE. As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the indictment or information for which criminal forfeiture is alleged, the court must determine what property is subject to forfeiture because it is related to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post trial hearing. If the property is subject to forfeiture, the court must enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim. If no such petition is timely filed, and the court finds that a defendant had a possessory or legal interest, the property is forfeited in its entirety.

"(c) PRELIMINARY ORDER OF FORFEITURE. When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture; conduct any discovery as the court considers proper in identifying, locating or disposing of

the property; and commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing--or at any time before sentencing if the defendant consents--the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

"(d) ANCILLARY PROCEEDING. If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court must conduct an ancillary proceeding in accordance with the applicable statutory procedures.

"(e) STAY OF FORFEITURE PENDING APPEAL. If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court determines that the order of forfeiture must be amended to recognize a third party's interest in the property, the court must amend the order of forfeiture but must refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the

record, to the transfer of the property or interest to the third party.

"(f) SUBSTITUTE PROPERTY. If the applicable statute authorizes the forfeiture of substitute property, the court may at any time consider a motion by the government to order forfeiture of substitute property. If the government makes the requisite showing, the court must enter an order forfeiting the substitute property or must amend an existing preliminary or final order to include that property."

(b) CONFORMING AMENDMENTS.-- (1) Rules 7(c)(2), 31(e), and 32(d)(2), Federal Rules of Criminal Procedure, are repealed.

(2) Rule 38(e), Federal Rules of Criminal Procedure, is amended by striking "3554," and by striking "Criminal Forfeiture" in the heading.

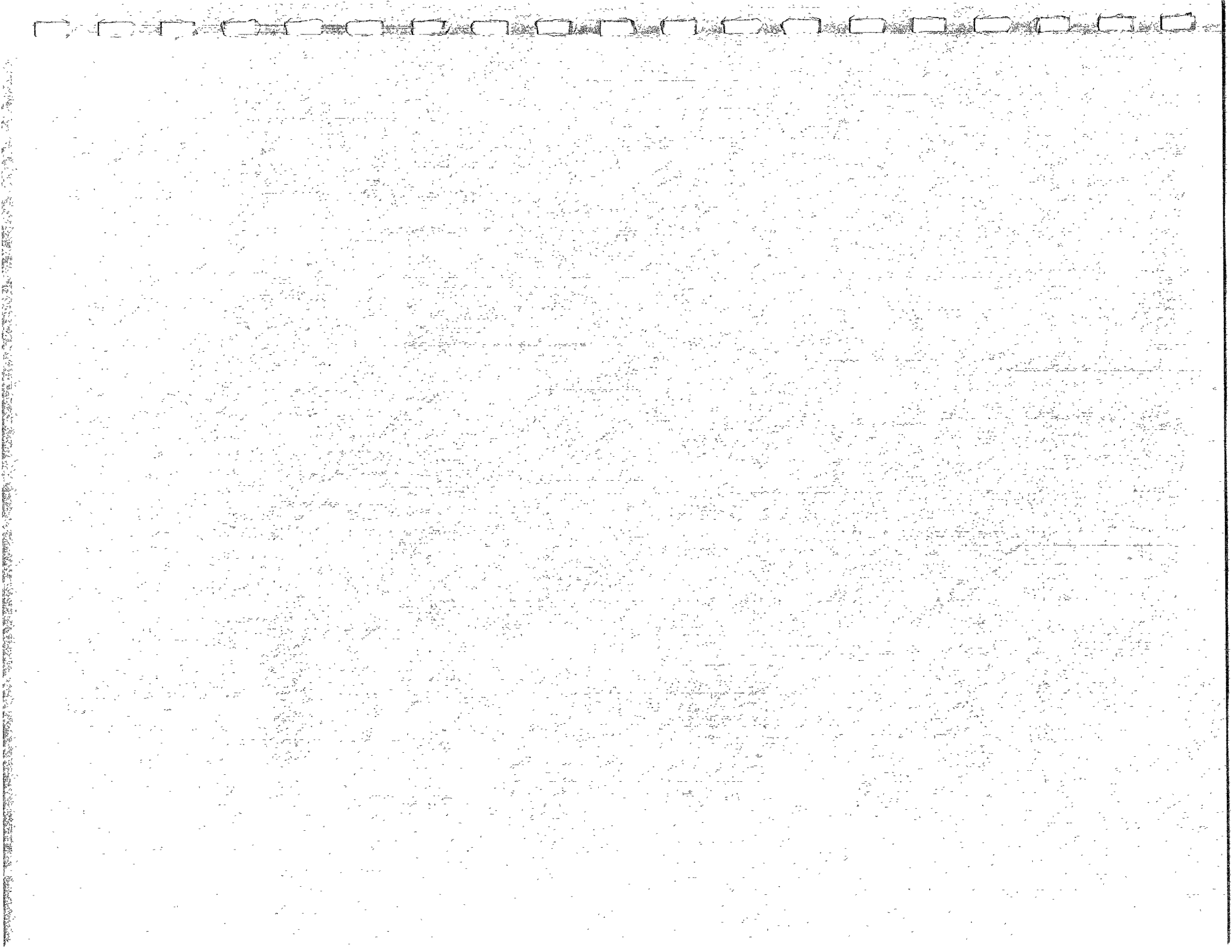
SEC. 104. PRE-TRIAL RESTRAINT OF SUBSTITUTE ASSETS.

Section 413(e)(1) of the Controlled Substances Act (21 U.S.C. § 853(e)(1)) is amended by striking "(a)" and inserting "(a) or (p)".

SEC. 105. REPATRIATION OF PROPERTY PLACED BEYOND THE JURISDICTION OF THE COURT

(a) ORDER OF FORFEITURE.-- Section 413(p) of the Controlled Substances Act (21 U.S.C. § 853(p)) is amended by inserting the following at the end:

"In the case of property described in paragraph (3), the court may, in addition, order the defendant to return the proper-



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WASHINGTON, D.C. 20544

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CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

June 17, 1997

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

Dear Chairman Hatch:

Six sections of the *Omnibus Crime Control Act of 1997* (S. 3) affect the rulemaking process, including five provisions that directly amend the Federal Rules of Practice and Procedure. On behalf of the Judicial Conference's Rules Committees, I had previously written to the House and Senate Judiciary Committees opposing two of the sections, which were included in earlier pending legislation. Additionally, the provisions of §§ 501, 502, 503, and 713 of the Act will be considered by either the Criminal or Evidence Rules Advisory Committee, as appropriate, at their fall meetings. Finally, a proposal to amend Rule 35(b) of the Criminal Rules (related to § 821 of the Act) has already been approved by the Advisory Committee on Criminal Rules and will be considered by the Standing Rules Committee at its June 19-20, 1997 meeting. For these reasons, I urge you and your colleagues on the Senate Judiciary Committee to decline approving these six sections of S. 3.

Composition of the Rules Committees (§ 505 of the Act)

Section 505 of S. 3 would require that the composition of the Appellate, Civil, Criminal, Evidence, and Standing Rules committees of the Judicial Conference include no fewer prosecutors than defenders. Our letter of August 21, 1995, commented on an identical provision contained in § 504 of the *Violent Crime Control and Law Enforcement Improvement Act of 1995* (S. 3) and § 604 of the *Local Law Enforcement Act of 1995* (S. 816). The following discussion tracks my earlier correspondence.

At its March 1995 session, the Judicial Conference approved the recommendation of the Standing Rules Committee to oppose legislation regulating the composition of committees constituted to advise the Conference and the Chief Justice on the rules governing practice and procedure in the federal courts. Chief Justice Rehnquist had noted in his 1994 year-end report, that "this system (rulemaking) has worked well, and ... Congress should not seek to regulate the composition of rules committees any more than it already has."

Section 505 of S. 3 raises important concerns relating to the Chief Justice's prerogative to appoint members to committees expressly established to provide advice to the Judicial Conference. The rules committees serve in an advisory capacity under the *Rules Enabling Act*, 28 U.S.C. §§ 2071-77. Members of the rules committees are appointed by the Chief Justice and include federal judges, practicing lawyers, law professors, state chief justices, and representatives from the Department of Justice. The tradition of rulemaking has been based on a disinterested expertise, as opposed to decisionmaking controlled by interest-groups. The recommendations of the rules committees have been given great respect and weight among the bench, bar, and academia. No small part of this deference is due to the neutral character of the committees, which is enhanced by a membership that represents a wide cross-section of the bench and bar and reflects the leadership of the federal judges.

Although rendering fair decisions is certainly not the exclusive province of federal judges, they do have the knowledge to act in the best interest of the public those courts serve. Judges are of course lawyers too, with substantial experience on both sides of the bench and many have substantial prosecutorial backgrounds. Placing a premium on the notion of representativeness, i.e., that there ought to be a "seat" on the rules committees for each identifiable faction of the bar, would undermine the integrity of the rulemaking process. Committees would be perceived as promoting self-interested goals rather than the interests of justice.

For these reasons, I urge you and your colleagues to reject a provision mandating a particular composition of the rules committees.

Equalize Number of Peremptory Challenges (§ 501 of the Act)

Under Criminal Rule 24(b), the prosecution is allowed 6 peremptory challenges of prospective petit jurors, while the defense is allowed 10 peremptory challenges in a felony case. Section 501 of S. 3 would amend Rule 24(b) to equalize the number of peremptory challenges available to the prosecution and the defense. On November 10, 1993, we had written to Congressman Schumer and his colleagues on the House Judiciary Subcommittee on Crime and Criminal Justice on a similar provision contained in the *Sexual Assault Prevention Act of 1993* (H.R. 688).

The rules committees' study of proposed amendments to Rule 24(b) goes back to 1973, when the Advisory Committee on Criminal Rules recommended that the number of peremptory challenges be fixed at five for each side in a felony case. The proposal was submitted to Congress later in 1976 after the Judicial Conference and the Supreme Court had approved the amendments. But Congress rejected the amendments. (Pub. L. No. 95-78 (1977).) The Senate Judiciary Committee noted in its report that: "Of all the proposed amendments, it (equalization of peremptory challenges) probably drew the most vigorous criticism in the House hearing and in correspondence received by this Committee." Senate Report No. 95-354, p. 9 (July 25, 1977).

The Senate Judiciary Committee was particularly concerned with the voir dire procedures and the claimed inability of counsel to ferret out biased prospective jurors.

In March 1990, the Advisory Committee on Criminal Rules again published for public comment proposed amendments to Rule 24(b) equalizing the number of peremptory challenges. Although the comments received were essentially adverse, the advisory committee nonetheless recommended that the proposed amendments be approved for submission to the Judicial Conference. The Standing Rules Committee, however, rejected unanimously the recommendation. The following arguments in favor of retaining the present rule were considered persuasive by the Standing Rules Committee:

- The defense's additional peremptory challenges are needed to offset the availability of the government's overwhelming resources to examine prospective jurors.
- The defendant has little control over the voir dire process that is exercised often by the judge in many trials.
- The defense's greater number of peremptory challenges represents a historical right.
- The committee was mindful of the Congressional rejection of a similar proposal in 1977.
- No convincing data was provided to demonstrate that the amendment was necessary.

This background discloses that over time the rules committees' position on equalizing peremptory challenges has changed. In part, the committees' views were based on deference to the perceived will of Congress on this subject. The Advisory Committee on Criminal Rules considered but declined to act on this subject most recently in 1993; nonetheless, it has now placed the matter on the agenda for its October 1997 meeting. I respectfully request that § 501 be withdrawn pending renewed consideration by the advisory committee.

Amendments of Evidence Rule 404(a) (§ 503 of the Act)

Section 503 would amend Evidence Rule 404(a) of the Federal Rules of Evidence to provide that "if an accused offers evidence of a pertinent character trait of the victim of the crime, evidence of a pertinent character trait of the accused" may be offered by the prosecution.

Under current law, the defendant does not necessarily open the door to his own character by proffering evidence about the character of the victim. The Advisory Committee on Evidence Rules discussed the proposal at its April 1997 meeting. A majority of the committee was favorably disposed to the general concept, although several expressed concern with the details on how the provision would work. For example, would the introduction by the accused of evidence, which only slightly involved a victim's character trait, permit the wholesale introduction of the defendant's character traits? The advisory committee has placed the proposal at the top of the

agenda for its meeting in October 1997. Under these circumstances, I respectfully request that section 503 be withdrawn pending consideration by the advisory committee.

Amendments of Evidence Rule 404(b) (§ 713 of the Act)

Section 713 would amend Evidence Rule 404(b) of the Federal Rules of Evidence to include "disposition toward a particular individual" among the valid purposes for admitting evidence of a person's uncharged misconduct. The Advisory Committee on Evidence Rules considered this proposal on a preliminary basis at its April 1997 meeting. Reservations were expressed by some committee members on the advisability of amending Rule 404(b) to add another permissible purpose to a list that is universally recognized as non-exclusive. The concern was that by adding another permissible purpose to the rule, courts might get the wrong impression and exclude evidence of uncharged misconduct if offered for a purpose that does not happen to be on the list.

The advisory committee will study the matter further, and has placed the proposal on the agenda for its October 1997 meeting. In preparation for that meeting, the reporter to the advisory committee will survey the case law to determine whether evidence of "disposition toward another" has been wrongly excluded in any reported cases. I respectfully request that § 713 be withdrawn pending consideration of that proposal by the advisory committee.

Six-Person Juries in Criminal Cases (§ 502 of the Act)

Section 502 would amend Rule 23(b) of the Federal Rules of Criminal Procedure to permit a six-person jury in a criminal case on the request of the defendant and with the approval of the government and the court. The Advisory Committee on Criminal Rules was advised of the proposal in the pending legislation. Neither the advisory committee nor the Judicial Conference has taken a position on it. Several members of the advisory committee expressed concern that such a change should first be considered under the rulemaking process. The advisory committee decided to consider the proposal at its October 1997 meeting, and I request that § 713 be withdrawn pending its review.

Reduction of Sentence for Substantial Assistance (§ 821)

Section 821 would amend Rule 35(b) of the Federal Rules of Criminal Procedure to permit consideration of a defendant's "substantial assistance in an investigation *of any offense or* the prosecution of another person who has committed an offense" when reviewing a motion to reduce sentence under this rule. The Advisory Committee on Criminal Rules published in August 1996 proposed amendments clarifying Rule 35(b) that would permit a court to consider both pre-sentence and post-sentence assistance provided by the defendant in determining whether to reduce the sentence. The proposed amendments will be considered by the Standing Rules Committee at its June 19-20, 1997, meeting for submission to the Judicial Conference and later to the Supreme Court for their consideration. The committee was advised of the pending

legislation, but decided not to take any action on it. Under these circumstances, I request that legislation be stayed until the judiciary's consideration of changes to Rule 35(b) has been completed and the provision is brought before the Congress in the regular course of the rulemaking process.

Conclusion

The Judicial Conference of the United States strongly supports and promotes the integrity of the rulemaking process as prescribed by the *Rules Enabling Act*. (28 U.S.C. §§ 2071-77.) The Act establishes a partnership between the courts and Congress designed to handle the daily business of the courts, which are matters of concern to all branches of the Government. This partnership has worked well.

The general rules of practice and procedure affect the daily business of the courts. The rules have evolved over time and now form an intricate, interlocking whole. Changes in one rule can have unforeseen and unintended consequences affecting other rules. Widespread opportunity to comment by those who work daily with the rules and meticulous care in drafting by experts in the area — as envisioned under the *Rules Enabling Act* — are the hallmarks of the rulemaking process.

Both the courts and Congress have a clear duty in rulemaking. The genius of the *Rules Enabling Act* rulemaking process is that it accords to each branch of Government its proper role in this shared endeavor. I hope that the cooperation on rulemaking between the Congress and the Judiciary will continue to remain strong.

Sincerely yours,



Alicemarie H. Stotler
United States District Judge

cc: Committee on the Judiciary,
United States Senate

105th Congress Legislation Affecting the Federal Rules of Practice and Procedure

Senate Bills

S. 3, Omnibus Crime Control Act of 1997

- Introduced by: Hatch and others
- Date Introduced: January 21, 1997
- Status:
- Provisions affecting rules
  - *Sec. 501.* Increase the number of government peremptory challenges from 6 to 10 **[CR24(b)]**
  - *Sec. 502.* Allow for 6 person juries in criminal cases upon request of the defendant, approval of the court, and consent of the government **[CR23(b)]**
  - *Sec. 505.* Requires an equal number of prosecutors and defense counsel on all rules committees **[§ 2073]**
  - *Sec. 713.* Allow admission of evidence of other crimes, acts, or wrongs to prove disposition toward a particular individual **[EV404(b)]**
  - *Sec. 821.* Amends the language of CR35(b) (Reduction of Sentence) and the sentencing guidelines **[CR35(b)]**
  - *Sec. 904.* Amends the statute governing proceedings in forma pauperis **[AP Form 4]**

S. 79 Civil Justice Fairness Act of 1997

- Introduced by: Hatch
- Date Introduced: January 21, 1997
- Status: Referred to Committee on the Judiciary — letter from Standing Committee to Hatch (4/29/97)
- Provisions affecting the Rules:
  - *Sec. 302* Amends Evidence Rule 702 regarding expert testimony **[EV702]**
  - *Sec. 302* Amends Civil Rule 68 regarding offers of judgment **[CV68]**

S. 225, Sunshine in Litigation Act of 1997

- Introduced by: Kohl
- Date Introduced: January 28, 1997
- Status: Referred to Committee on the Judiciary — letter from Standing Committee to Hatch (4/1/97)
- Provisions affecting rules
  - *Sec. 2* Adds a new section to title 28 controlling procedures for entering and modifying protective orders **[CV26(c)]**

S. 254, Class Action Fairness Act of 1997

- Introduced by: Kohl
- Date Introduced: January 30, 1997
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules
    - *Sec. 2* requires class counsel to serve, after a proposed settlement, the State AG and DOJ as if they were parties to the class action. A hearing on the fairness of the proposed settlement may not be held earlier than 120 days after the date of that service. **[CV23]**

S. 400, Frivolous Lawsuit Prevention Act of 1997

- Introduced by: Grassley
- Date Introduced: March 5, 1997
- Status: Referred to Committee on the Judiciary
    - Provisions affecting rules: Section 2 amends Civil Rule 11(c) removing judicial discretion not to impose sanctions for violations of rule 11. **[CV11]**

S. 1081, Crime Victim's Assistance Act

- Introduced by: Kennedy and Leahy
- Date Introduced: July 29, 1997
- Status: Referred to ?
- Provisions affecting rules:
    - Section 121 would amend Criminal Rule 11 by adding a requirement that victims be notified of the time and date of, and be given an opportunity to be heard at a hearing at which the defendant will enter a plea of guilty or nolo contendere. **[CR11]**
    - Section 122 would amend Criminal Rule 32 to provide for an enhanced victim impact statement to be included in the Presentence Report. Victims should be notified of the preparation of the Presentence Report and provided a copy. **[CR32]**
    - Section 123 would amend Criminal Rule 32.1 by requiring the Government notify victims of certain crimes of preliminary hearings on revocation or modification of probation or supervised release. The victims will also be given the right of allocution at those hearings. **[CR32.1]**
    - Section 131 would amend Evidence Rule 615 to add victims of certain crimes to the list of witnesses the court can not exclude from the court room.**[EV615]**

S. 1352,

- Introduced by: Grassley
- Date Introduced: October 31, 1997
- Status: Referred to
- Provisions affecting rules
    - amends Civil Rule 30 to restore the stenographic preference for recording depositions.

House Bills

H.R. 660

- Introduced by: Canady
- Date Introduced: February 10, 1997
- Status: Referred to Committee on the Judiciary and/or Banking and Finance — letter from Standing Committee to Canady (4/1/97) — Judge Niemeyer met with and discussed bill with Canady on 4/29/97
- Provisions affecting rules
    - *Sec. 1* would amend title 28 to allow for an interlocutory appeal from the decision certifying or not certifying a class **[CV23]**

H.R. 903

- Introduced by: Coble
- Date Introduced: March 3, 1997
- Status: Letter to Hyde from Standing Committee (4/21/97)
- Provisions affecting rules:
    - Section 3 Amends title 28 to provide an offer of judgment provision **[CV68]** and
    - Section 4 amends Evidence Rule 702 governing expert witness testimony. **[EV702]**

H.R. 924

- Introduced by: McCullum
- Date Introduced: March 5, 1997
- Status: Passed and signed into law.(Pub. L. No. 105-6)
- Provisions affecting the rules:
    - Adds new section 3510 to title 18 that prohibits a judge from excluding from viewing a trial any victim who wishes to testify as an impact witness at the sentencing phase of the trial. **[EV 615]**

H.R.1252 (Judicial Reform Act of 1997)

- Introduced by: Hyde
- Date Introduced: April 9, 1997
- Status: Referred to Committee on the Judiciary — Committee on Court Administration and Case Management is studying the proposal on peremptory challenge of case assignment to a judge; statement prepared for Judiciary witnesses at May 15 hearing, including discussion of interlocutory appeal of class action certification
- Provisions affecting rules:
    - Section 3 amends title 28, section 1292(b), and would provide for interlocutory appeal of a class action certification decision. **[CV23]**
    - Section 6 adds new section 464 to chapter 21 of title 28 that would allow, as matter of right, reassignment of a case to another judge if all parties on one side agree.

H.R. 1280 (Sunshine in the Courtroom Act)

- Introduced by: Chabot
- Date Introduced: April 10, 1997
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules:
  - Enacts a stand alone statute that would authorize the presiding judge to allow media coverage of court proceedings. Authorizes the Judicial Conference to promulgate advisory guidelines to assist judges in the administration of media coverage. **[CR53]**

H.R.1492 (Prisoner Frivolous Lawsuit Prevention Act of 1997)

- Introduced by: Gallegly
- Date Introduced: April 30, 1997
- Status: Referred to Committee on the Judiciary, Subcommittee on Crime
- Provisions affecting rules:
  - Would amend Civil Rule 11 to mandate imposition of a sanction for any violation of Rule by a prisoner. **[CV11]**

H.R. 1536

- Introduced by: Goodlatte
- Date Introduced: May 6, 1997
- Status: Referred to Committee on the Judiciary — CACM will consider the proposal at its June 15-18, 1997, meeting
- Provisions affecting rules:
  - Would amend Section 3321 of title 28, reducing the number of grand jurors to 9, with 7 required to indict. **[CR6]**

H.R. 1745

- Introduced by: Schumer on behalf of the Administration — *Forfeiture Act of 1997*
- Date Introduced: May 22, 1997
- Status: Referred to Judiciary and Ways and Means
- Provisions affecting rules:
  - Several including §§102 and 105 directly amending Admiralty Rules and § 503 creating a new Criminal Rule 32.2 on forfeiture and related conforming amendments to other criminal rules **[CR32.2]**

H.R. 1965 (formerly H.R. 1835) *Civil Asset Forfeiture Reform Act*

- Introduced by: Hyde and Conyers
- Date Introduced: June 20, 1997
- Status: Marked up by Judiciary

- Provisions affecting rules:
  - Section 12(b) amends Paragraph 6 of **Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims** (extends the notice requirement from 10 days to 20).

H.R. 2603 *Alternative Dispute Resolution and Settlement Encouragement Act*

- Introduced by: Coble and Goodlatte
- Date Introduced: October 20, 1997
- Status:
- Provisions affecting rules:
  - Section 3 would amend § 1332 of title 28, United States Code, to provide for awarding reasonable costs, including attorneys' fees, if a written offer of judgment is not accepted and the final judgment is not more favorable to the offeree than the offer. The provision would not apply to claims seeking equitable remedies.

Joint Resolutions

S.J. Res. 6 (See also H.J. Res 71 & HR 1322)

- Introduced by: Kyl and Feinstein
- Date Introduced: January 21, 1997
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules:
  - Victim's rights **[CR32]**

LEGISLATIVE SUMMARY
105th Congress, First Session
(EXCERPTS)

Prepared by the Office of Legislative Affairs
Administrative Office of the U.S. Courts
(Current through August 7, 1997)

This legislative summary is an overview of issues and bills pending during the First Session of the 105th Congress that are of interest to the federal judiciary. Significant bill numbers are referenced throughout the discussion of topics.

I. CONGRESSIONAL OVERVIEW

The Presidential and Congressional elections of 1996 returned President Clinton to office and left the House and Senate in control of the Republicans. In the House, Republicans slipped from 230-204 with 1 independent to the present 227-205 with 1 independent. After elections were held to fill the seats of Representative Bill Richardson (D-NM) and Representative Frank Tejeda (D-TX), the Republicans hold 228 seats, the Democrats 206 with 1 independent. In the Senate, the Republicans gained three net seats and now hold a 55-45 majority.

The last Congress was dominated by the legislative agenda embodied in the "Contract With America" and was marked by strong partisan rancor. The 105th Congress promises to deliver much of the same discord notwithstanding the professed intentions of the Congressional leadership to conduct the nation's business in a collegial manner. Indeed, the federal judiciary finds itself squarely in the ideological crossfire as Republicans have identified "judicial activism" as a major issue area for discussion in the 105th Congress. Focus on this issue has already had a negative effect on the process of filling judicial vacancies and will, in all likelihood, delay passage of a Judicial Conference judgeship package.

THE HOUSE OF REPRESENTATIVES

The Leadership

The Republicans. Representative Newt Gingrich was reelected Speaker of the House. The following members complete the Republican Leadership slate: Representative Dick Armey (TX), Majority Leader; Representative Tom DeLay (TX), Republican Leadership Whip; Representative John Boehner (OH), Republican Conference Chairman; Representative

C. Christopher Cox (CA), Policy Committee Chairman; Representative Susan Molinari (NY), Vice Chair of the Conference; and Representative Jennifer Dunn (NV), Secretary of the Republican Conference. Representative Molinari will resign her seat effective August 1, 1997.

The Democrats. The House Democratic Leadership is as follows: Representative Richard Gephardt (MO), Minority Leader; Representative David Bonior (MI), Whip; Representative Vic Fazio (CA), Caucus Chairman; and Representative Barbara Kennelly (CT), Vice Chair.

Judiciary. Representative Henry Hyde (R-IL) remains Chairman of the House Judiciary Committee. Representative John Conyers (D-MI) is the Ranking Democrat on the Committee. A list of the membership of the House Judiciary Committee is included in Appendix A.

The Subcommittee on Courts and Intellectual Property, chaired by Representative Howard Coble (R-NC), retains its jurisdiction over the intellectual property laws (patent, copyright, trademark) and the federal court system.

The Subcommittee on the Constitution, chaired by Representative Charles Canady (R-FL), retains jurisdiction over proposed constitutional amendments and the federal civil rights laws. In addition, it has jurisdiction over lobbying reform, the federal ethics laws, and legislation dealing with private property rights.

The Subcommittee on Commercial and Administrative Law, chaired by Representative George Gekas (R-PA), has jurisdiction over the bankruptcy code, bankruptcy judges, Legal Services Corporation, and the Administrative Procedure Act.

The Subcommittee on Immigration and Claims, chaired by Representative Lamar Smith (R-TX), has jurisdiction over immigration, naturalization, and refugee policy. In addition, it retains jurisdiction over legislation dealing with claims against the United States.

The Subcommittee on Crime, chaired by Representative Bill McCollum (R-FL), retains its jurisdiction over most federal criminal laws and drug enforcement. It also received legislative jurisdiction over prisons/corrections, RICO, death penalty procedures, habeas corpus reform, the exclusionary rule and the independent counsel statute. Finally, the Crime Subcommittee added oversight of the Federal Bureau of Investigation.

THE SENATE

The Leadership

The Republicans. Senator Trent Lott (R-MS) is the Senate Majority Leader. Senator Don Nickles (R-OK) is the Majority Whip, the number two position in the Republican Leadership.

The Democrats. The Democratic leadership team for the 105th Congress consists of Senator Tom Daschle (D-SD) as the Minority Leader and Senator Wendell Ford (D-KY) as the Minority Whip.

Judiciary. Senator Orrin Hatch (R-UT) remains Chairman of the Senate Judiciary Committee. Senator Patrick Leahy (D-VT) is the Ranking Member. A list of all Senate Judiciary Committee members is included in Appendix C. The key subcommittee of the Senate Judiciary Committee for matters involving the federal judiciary is the Subcommittee on Administrative Oversight and the Courts. Its composition is as follows:

Administrative Oversight and the Courts Subcommittee

V. JUDICIAL REFORM ACT OF 1997

On June 10, the House Judiciary Subcommittee on Courts and Intellectual Property marked up H.R. 1252, the "Judicial Reform Act of 1997," and ordered it reported to the full Judiciary Committee on an 8-7 party-line vote, with the exception of Representative F. James Sensenbrenner, (R-WI) who voted with the minority against the bill. It is expected that the bill will come before the full Judiciary Committee sometime after the August recesses.

This bill represents the Republicans attempt to address perceived acts of "judicial activism" by imposing reforms on the judicial branch, such as the peremptory challenge of judges and the transfer of complaints of judicial misconduct to another circuit. In an effort to make the bill more palatable to the federal judiciary, the bill also includes "delinkage" of judicial salaries from that of Members of Congress and the repeal of section 140 of Pub. L. No. 97-92. The House Judiciary Committee and its leadership are under pressure from the Majority Leadership of the House to move a bill to the floor. Recent hearings on the subject and discussions relating to the possible impeachment of various judges have brought the issue to a boil in the House. The mark-up follows a May 14 hearing on H.R. 1252 at which the Judicial Conference positions were represented by Judge Henry Politz, Chief Judge of the Court of Appeals for the Fifth Circuit, and Judge Ann Williams, Chair of the Committee on Court Administration and Case Management.

Chairman Howard Coble (R-NC) presided over the mark-up of the bill. Other Republican Members in attendance over the two-and-one-half-hour session included, Representative F. James Sensenbrenner (R-WI), Representative Elton Gallegly (R-CA), Representative Bob Goodlatte (R-VA), Representative Sonny Bono (R-CA), Representative Edward Pease (R-IN), Representative Christopher Cannon (R-UT), Representative Bill McCollum (R-FL), and Representative Charles Canady (R-FL). Democratic Members present at various times were Ranking Member Barney Frank (D-MA), Representative John Conyers (D-MI), Representative Howard Berman (D-CA), Representative Rick Boucher (D-VA), Representative Zoe Lofgren (D-CA), and Representative William Delahunt (D-MA).

The bill as reported is a substitute for the original bill and includes the five provisions in the original bill, with amendments to four of the five, plus five new provisions.

H.R. 1252--JUDICIAL REFORM ACT OF 1997 (As Amended)

Section 2--THREE JUDGE COURTS FOR CERTAIN INJUNCTIONS

This provision would require three-judge courts, 28 U.S.C. 2284(b)(1), to consider applications for interlocutory or permanent injunctions restraining the enforcement, execution, or operation of state laws adopted by referendum on the ground that such state law is "repugnant to the Constitution, treaties, or laws of the United States." The bill would require the three-judge panel to expedite consideration of an injunction, and a decision would be directly appealable to the Supreme Court. The substitute version would apply only to state-wide laws adopted by referendum as distinguished from the original bill which included the term "ordinances" within the definition of State law. Representative Sonny Bono (R-CA) is the main proponent of this measure. An amendment striking this provision was offered by Representative Howard Berman (D-CA) but it was defeated 6-9.

The Judicial Conference opposes three-judge panels as generally inconsistent with sound administration of justice and opposes the imposition of litigation priority in civil cases and opposes routinely bypassing intermediate appellate review prior to review by the Supreme Court.

Section 3--INTERLOCUTORY APPEALS OF COURT ORDERS RELATING TO CLASS ACTIONS

This provision would amend Section 1292(b) of title 28, United States Code, to authorize a court of appeals to permit, in its discretion, an appeal by either party from a district court's class action certification decision. The appeal would not stay proceedings in the district court unless the district judge or court of appeals so ordered. The Advisory Committee on Civil Rules has been studying a similar provision amending Rule 23 of the Federal Rules of Civil Procedure. The committee approved such a change in early May. The Standing Committee on Rules approved the proposal at its June 19, 1997 meeting.

The Judicial Conference opposes action by Congress which circumvents the operation of the Rules Enabling Act.

Section 4--PROCEEDINGS ON COMPLAINTS AGAINST JUDICIAL CONDUCT

This provision, as originally introduced, would have transferred all complaints of judicial misconduct filed under Section 372(c)1 of title 28, United States Code, to another judicial circuit. Representative Pease offered an amendment that was adopted by voice vote to

restore some of the current authority of chief circuit judges to process complaints. Under the Pease amendment, the chief judge could dismiss complaints as frivolous, as relating to the merits of the case or ruling, or as not being in conformity with the statutory requirements. The amendment would not allow the chief judge to dismiss a complaint based on corrective action, or commence a special committee to investigate the complaint. Those actions could only be initiated by the chief judge of another circuit court upon transfer. Representative Zoe Lofgren (D-CA) spoke in support of the amendment. The proponent of the original broader language, Representative Ed Bryant (R-TN), is not a member of the subcommittee and was not present to oppose the Pease amendment. We believe he will attempt to restore the broader language when the bill is considered at the full Judiciary Committee.

The Judicial Conference is opposed to the transfer to another circuit of complaints of judicial misconduct due to the disruption this would cause to the informal means of correcting conduct as envisioned and practiced under the present statutory scheme. It is also opposed to such a measure because of the costs associated with the fact-finding process that would result from such transfers.

Section 5--LIMITATION OF COURT IMPOSED TAXES

As originally introduced, this provision would limit a federal court's ability to enter orders or approve settlements that result in a state or local government imposing or increasing taxes for the purpose of complying with the order. In a surprising move, the Republicans accepted, and the subcommittee adopted by a voice vote, an amendment offered by Representative William Delahunt (D-MA) which would narrow the scope of the bill to orders or settlements that "expressly directs" any state or political subdivision of a state to impose, increase, levy, or assess any tax. The bill still requires the courts to find by clear and convincing evidence that certain conditions are met. These conditions are that there are no other means available to remedy the deprivation of a right under the Constitution, the proposed imposition, increase, levying or assessment is narrowly tailored, the tax will not contribute to or exacerbate the deprivation, and plans submitted to the court by state or local authorities will not effectively redress the deprivation.

Representative Bill McCollum (R-FL) spoke in support of the Delahunt amendment. However, during the debate, it was clear the Republican intent is to limit the remedial powers of federal courts to enter orders in cases where the state, or a political subdivision thereof, is a defendant, which orders result in tax increases. It is clear from discussions with staff that the Republicans misunderstood this amendment. The staff were surprised to realize that the phrase "expressly directs" as a modifier to the court order was in the Delahunt amendment which passed. Republicans are likely to try to delete the Delahunt language at full committee.

The Judicial Conference is opposed to the limitations on the remedial powers of courts, as imposed by the original bill language, which go beyond the facts and law in Missouri

v. Jenkins, but rather includes all orders to state or local units of government regardless of whether the order requires a tax increase.

Section 6--REASSIGNMENT OF CASE AS OF RIGHT

This provision provides that any party to a civil case in a United States district court may bring a motion to reassign the case to another appropriate judicial officer. Each party would be entitled to one reassignment without cause as a matter of right. If a change of location is required, the travel costs incurred by the non-moving party shall be borne by the moving party.

The substitute bill would require this practice in the 21 district courts with the largest number of authorized Article III district judgeships. The requirement would sunset five years from the date of enactment. The bill would also require the Federal Judicial Center to monitor the use of the right to bring a motion to reassign and report annually to Congress on its findings. The bill as originally drafted applied this provision to all courts.

An amendment striking the provision from the bill was offered by Representative Frank (D-MA) but it was defeated 4-8 on a party-line vote.

An amendment was offered by Representative Frank to require the government to pay the reasonable costs associated with travel when the moving party is one who is financially unable to obtain adequate representation. This amendment was passed by voice vote.

Representative Charles Canady (R-FL) said he will offer an amendment at the full committee to expand the right to reassignment to criminal cases.

The Judicial Conference is opposed to the peremptory challenge of judges contained in this provision on the grounds that appropriate procedures are currently available to challenge judges to recuse themselves from cases if a party claims the judge is somehow biased.

Section 7--RANDOM ASSIGNMENT OF HABEAS CORPUS CASES

This provision was added to the bill at the request of Representative William Delahunt (D-MA). It would require random assignment of all habeas corpus cases in a given judicial district. The Judicial Conference does not have a position on this issue at present.

Section 8--AUTHORITY OF PRESIDING JUDGE TO ALLOW MEDIA COVERAGE OF APPELLATE COURT PROCEEDINGS

This provision would give the presiding judge (or justice) of an appellate court, or any panel thereof, or the Supreme Court, in his or her discretion, authority to allow cameras in the court during court proceedings. Presently the judicial councils have authority to authorize such coverage for their courts.

Section 9--ADJUSTMENT OF SALARIES OF FEDERAL JUDGES

This section provides for delinkage of judges' salaries from that of Members of Congress by tying them to the COLAs received by employees of the General Schedule. It also repeals Section 140 of Pub. L. No. 97-92, which requires that for judges to receive a COLA the Congress must pass a law specifically allowing the COLA to apply. The provision does not provide the 9.6 percent catch-up COLA requested by the Judicial Conference.

Inclusion of this language in the bill is evidence of Chairman Hydes's commitment to his pledge to try and help judges receive COLA increases in those years where economic conditions warrant them but where Congress, because of political pressures, refuses to grant COLAs to themselves. It also reflects, however, the belief that "delinkage" and repeal of 140 are of sufficient magnitude as to outweigh the harm that might be done to the federal judiciary by passage of the more onerous provisions of the bill, like the peremptory challenge or the transfer to another circuit of misconduct complaints.

Although Subcommittee Chairman Howard Coble (R-NC) supported the inclusion of this provision as a courtesy to Chairman Henry Hyde (R-IL), he indicated that he would oppose its inclusion when the bill is considered by the full committee. The only other opposition to the provision came from Representative F. James Sensenbrenner (R-WI) who offered an amendment to strike it. Representatives Frank and Delahunt spoke in strong support of the provision on the grounds that we should encourage diversity in our judiciary and also because of the effect the present salary ceiling has on the other personnel in the judicial branch. The Sensenbrenner amendment failed by a vote of 1 aye 8 nos. Representative Sensenbrenner voted against the marked up bill on the final vote to report it to the full committee.

The Judicial Conference supports delinkage and repeal of Section 140 of Pub. L. No. 97-92 but it also supports a 9.6 percent catch-up COLA to restore judges' salaries to their appropriate levels.

Section 10--MULTIPARTY-MULTIFORUM JURISDICTION OF DISTRICT COURTS

This provision was added to the bill at the request of Representative Sensenbrenner reportedly on behalf of the Boeing Aircraft Corporation. This bill passed the House in 1990 and 1991 when it was put forward by Representative Robert Kastenmeier (D-WI) and later by Representative Bill Hughes (D-NJ). In each case the provision was deleted in the Senate by Senator Howell Heflin (D-AL). It addresses single event mass tort cases such as aircraft accidents or hotel fires by consolidating such actions. The bill provides original jurisdiction in the district courts of any civil action involving minimum diversity between adverse parties that "arise from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the

case of injury, the injury has resulted in damages which exceed $50,000 per person, exclusive of interest and costs."

The Judicial Conference supports passage of this provision.

Section 11--APPEALS OF MERIT SYSTEM PROTECTION BOARD

This provision would extend from 30 to 60 days the time the Office of Personnel Management would have to appeal decisions taken by the Merit Systems Protection Board. These appeals go to the Court of Appeals for the Federal Circuit. This provision was added at the request of the Ranking Minority member of the full committee, Representative John Conyers, who as former Chair of the Committee on Government Operations, retains close relations with government personnel managers.

The Judicial Conference does not have a position on this issue.

VII. CRIME CONTROL LEGISLATION

In spite of the considerable crime control legislation passed in the 104th Congress, there is apparently great interest in the 105th Congress to turn once again to that issue. This interest has manifested itself with introduction of several crime-related proposals, including a constitutional amendment specifying rights for the victims of crime (introduced in the Senate as S.J. Res. 6 and in the House as H.J. Res. 71) and the principal Senate comprehensive crime bill, S. 3, the "Omnibus Crime Control Act of 1997." There also appears to be a particular focus on juvenile crime in the 105th Congress, and several measures, such as H.R. 3, the "Juvenile Crime Control Act of 1997," S. 10, the "Violent and Repeat Juvenile Offender Act of 1997," and the Administration's juvenile crime bill (H.R. 810 in the House and S. 362 in the Senate) have been introduced to focus specifically on younger offenders.

Victims' Rights Constitutional Amendment

The Senate

This amendment, introduced in the Senate on January 21, 1997 as S.J. Res. 6, would grant a number of rights to the victims of crime, including the right:

- to notice of, and not to be excluded from, all public proceedings relating to the crime;
- to be heard, if present, and to submit a written statement at a public pretrial or trial proceeding to determine a release from custody, an acceptance of a negotiated plea, or a sentence;
- to notice of a release pursuant to a public or parole proceeding or an escape;
- to a final disposition of the proceedings relating to the crime free from unreasonable delay;
- to an order of restitution from the convicted offender; and
- to consideration for the safety of the victim in determining any release from custody.

S.J. Res. 6 additionally provides that the victim shall have standing to assert the rights established by the amendment. However, it expressly states that nothing in the amendment shall provide grounds for the victim to challenge a charging decision or a conviction, to obtain a stay of trial, or to compel a new trial. The resolution further provides that Congress and the states shall have the power to enact exceptions to the amendment when required for compelling reasons of public safety or for judicial efficiency in mass victim cases.

This resolution was introduced by Senators Jon Kyl (R-AZ) and Dianne Feinstein (D-CA). The bill was referred to the Senate Judiciary Committee on January 21, 1997. A hearing on this proposal was held on April 16, 1997.

The House

On April 15, 1997, Representative Henry Hyde (R-IL), Chairman of the House Judiciary Committee, introduced his version of the victims' rights constitutional amendment, H.J. Res. 71. This resolution is similar, in large part, to S.J. Res. 6, but there are differences. Among the more significant differences, the House version provides a right to "seek relief from unreasonable delay of the final disposition of the proceedings" (as opposed to the blanket right to final disposition free from unreasonable delay provided under the S.J. Res. 6), provides that the amendment will not provide grounds for the victim to overturn a sentence, and empowers Congress and the states to enact exceptions to the amendment when "required by the public interest." Additionally, on the same day in which he introduced H.J. Res. 71, Chairman Hyde introduced H.R. 1322, the "Victims" Rights Constitutional Amendment Implementation Act of 1997."

H.J. Res. 71 and H.R. 1322 were referred to the House Judiciary Committee on April 15, 1997. On June 25, 1997, Judge George P. Kazen, chairman of the Committee on Criminal Law, and Judge Wm. Terrell Hodges, chairman of the Executive Committee, testified on behalf of the Judicial Conference at a hearing on H.J. Res. 71 and H.R. 1322 held by the House Judiciary Committee.

At its March 1997 meeting, the Judicial Conference took no position regarding the adoption of a victims' rights amendment "at this time." However, the Conference authorized the Committee on Criminal Law, in consultation with the Federal-State Jurisdiction Committee and the Chair of the Executive Committee, to maintain contact with Congress as it deliberates enactment of a victims' rights constitutional amendment to inform how it may impact the administration and costs of operating the federal courts.

The Committee on Criminal Law, assisted by the Federal-State Jurisdiction Committee, has reviewed the proposed victims' rights amendment legislation and will continue to monitor this issue and provide information as directed by the Conference. Staff of the Office of Legislative Affairs has conducted extensive research on this issue, focusing particularly on state constitutional amendments establishing victims' rights, related statutes, and the case law interpreting them. A central issue is what practical and financial

impact would this amendment have on the federal judiciary. Staff has also met regarding this proposed amendment with key congressional staff and senior officials at the Department of Justice (DOJ). DOJ has consulted with Congress on this matter and has played a pivotal role in the development of the proposed language of the amendment.

Statutory Alternative to a Victims' Rights Amendment

On July 31, 1997, Senator Patrick J. Leahy (D-VT), Ranking Democrat of the Senate Judiciary Committee, and Senator Edward Kennedy (D-MA) introduced S. 1081, a statutory alternative to a Victims' Rights Amendment entitled the "Victim of Crime Assistance Act." The bill would provide many of the rights contained in S.J. Res 6 and H.J. Res. 71 through amendments to various provisions of titles 18 and 28, United States Code, Rules 11, 32 and 32.1 of the Federal Rules of Criminal Procedure, and Rule 615 of the Federal Rules of Evidence. In addition, the bill contains broad victim assistance initiatives, including increases in victim assistance personnel in the criminal justice system, increased training for state and local law enforcement and judiciary personnel and increased services for victims of crime and domestic violence.

On April 11, 1997, Senators Leahy and Kennedy wrote to Judge George P. Kazen, Chair of the Judicial Conference Committee on Criminal Law, asking for the views of the Judicial Conference regarding the proposed legislation. On April 16, 1997, the Judicial Conference authorized Judge Kazen to send to Senators Leahy and Kennedy a letter expressing the judiciary's preference for a statutory approach to the issue of victims' rights. On April 17, 1997, Judge Kazen sent a letter to Leahy and Kennedy, with a copy to each member of the Senate Judiciary Committee, expressing this preference for a statutory approach. However, in his letter, Judge Kazen reserved the right to express views on the specifics of the proposed legislation at a later time.

On June 24, 1997, the Administration forwarded to both the House and Senate proposed legislation to protect the rights of crime victims. While this proposed bill, named the "Victims' Rights Act of 1997," has not necessarily been suggested by the Administration as a statutory alternative to a victims' rights constitutional amendment, it does implement a number of victim protections by statutory means without resort to a constitutional amendment.

Victims' Rights to Testify at Sentencing and Attend Trial

On March 5, 1997, Representative Bill McCollum (R-FL), Chair of the House Subcommittee on Crime, introduced H.R. 924, a bill prohibiting a federal judge from excluding from viewing the trial any victim who wishes to testify as a victim impact witness at the sentencing phase of the case. Moving with unusual alacrity, a slightly amended version of the bill was passed by the House on March 18 and quickly passed the Senate the following day. The President signed the bill later that same day, March 19.

The new law, Pub. L. No. 105-6, essentially "overruled" a decision by Judge Matsch in the case pending against Timothy McVeigh, allowing victims of the Oklahoma City bombing to attend the trial in that case. Judge Matsch had ruled that victims who wished to testify under a 1994 law allowing prosecutors in capital cases to call victims or their surviving family members to testify during the sentencing phase, could not view the trial. The language of the new law makes it expressly applicable to cases pending at the time of the law's enactment.

Omnibus Crime Bill

On January 21, 1997, Senator Orrin Hatch (R-UT), on behalf of himself and key members of the Senate Republican leadership, introduced S. 3, the "Omnibus Crime Control Act of 1997." The bill was referred to the Senate Judiciary Committee. This broad, sweeping proposal, nearly 300 pages long, constitutes one of the more ambitious anti-crime initiatives introduced in recent years. In addition to the juvenile and gang provisions of the bill (which are discussed *supra*), the bill contains numerous provisions that are of interest to the judiciary, including the following:

- **Transfer of Alien Prisoners.** The bill would require the Attorney General to transfer aliens (whose convictions were final) to their country of citizenship for service of their sentences. The proposal would eliminate the requirement of consent of the transferee, which is an important feature of the current transfer provisions. Sanctions in the form of withdrawal of foreign assistance and denial of visas for nationals of a country would be implemented if a country refused to accept at least 75% of aliens eligible and designated for transfer by the Attorney General or if a country did not confine transferred prisoners for at least 85% of their sentences. Countries could be exempted from such sanctions if deemed vital to the national interest.

- **Exclusionary Rule Reform.** S. 3 would codify and extend the result in *United States v. Leon*, 468 U.S. 897 (1984), to permit introduction of evidence obtained as a result of a search or seizure, with or without a warrant, "if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the fourth amendment."

- **Confessions.** The bill would require the Attorney General to promulgate guidelines to require the Department of Justice to "pursue" the admission of confessions that are voluntarily given regardless of whether the defendant was advised of his or her right to silence and the assistance of counsel.

- **New Federal Violent Crime, Drugs and Terrorism Offenses.** The bill creates a number of new federal offenses, including a new offense for murder committed in or in relation to the

Olympic games if held within the United States, and new offenses relating to the development or production of chemical weapons.

- **Firearms.** The bill would amend 18 U.S.C. 924(c) to establish new mandatory minimum sentences for the possession of a firearm (five years), discharge of a firearm (10 years), and homicide committed with a firearm (at least life or the death penalty) in relation to a crime of violence or drug trafficking offense. The mandatory minimum sentences would be enhanced for the use of certain weapons, and the mandatory sentence for the second or subsequent offense would be life imprisonment. Though section 924(c) currently includes a mandatory minimum penalty, this proposed amendment to that provision would significantly raise the mandatory penalties for many defendants.

- **HIV.** The bill would require HIV testing at the request of the victim in sexual abuse cases. The testing would be ordered as part of the pretrial release order under 18 U.S.C. 3142(a), and a defendant subject to testing would be detained until the test is performed. The defendant will be required to pay for the test unless indigent. Section 714 also directs the Sentencing Commission to amend the guidelines to enhance the defendant's sentence if the defendant knew or had reason to know that he or she was infected with HIV.

- **Kidnapping.** S. 3 extends the federal kidnapping statute, 18 U.S.C. 1202, to include cases in which the offender travels in interstate commerce or uses the mail or a facility in interstate or foreign commerce, but in which the victim does not cross a state line.

- **Cooperation.** The bill would amend 18 U.S.C. 3553, F.R.Cr.P. 35(b), and 28 U.S.C. 994(n) by adding to the circumstances in which a defendant can receive a departure from the guidelines for cooperation. In addition to providing "substantial assistance in the investigation or prosecution of another person who has committed an offense," the amendment would permit a departure for "substantial assistance in an investigation of any offense." On July 31, 1997, Representative Steven Schiff (R-NM) introduced H.R. 2361, a bill to amend title 18, United States Code, with respect to the "three strikes" life sentence. It was referred to the Judiciary Committee.

- **Prison Litigation Amendments.** Title IX of S. 3 proposes numerous amendments affecting prison litigation, many of which change provisions enacted in 1996 by the Prison Litigation Reform Act (PLRA) (Pub. L. No. 104-134). Subtitle A affects litigation over prison conditions or actions brought by prisoners. Subtitle B contains amendments affecting the interception of communications by prisoners, federal prison amenities, and federal prisoner work requirements.[1]

  More specifically, the bill affects several aspects of prison litigation, such as the issuance

of prisoner release orders, the termination of prospective relief, and the timing of rulings on motions to intervene. The bill provides for interlocutory appeals for any order staying or suspending the operation of an automatic stay of prospective relief in prison condition cases. The bill also amends provisions enacted as part of the PLRA concerning special masters appointed in prison condition cases in such areas as the effective date of their appointment requirements, the source of their compensation, the record of their hearings and the basis for their findings, and the court's ability to authorize special masters to assist in the development of remedial plans. On July 29, 1997, the Senate passed the Gregg (for Kyl) amendment number 995, to provide for payment of special masters for civil actions concerning prison conditions. The amendment was part of S. 1022 - Commerce, Justice, State and the Judiciary Appropriations, 1998.

In addition, S. 3 adds a definition of "violation of a Federal right," modifies the formula for calculating and the procedure for transmitting partial filing fee payments, and extends the application of the Civil Rights of Institutionalized Persons Act (CRIPA) to any civil action with respect to prison conditions instead of actions filed only by prisoners. The bill also restricts awards of attorney's fees and establishes a mechanism for the revocation of good time credit by state officials for malicious or harassing filings in federal court by state prisoners.

X. FEDERAL COURTS IMPROVEMENT ACT

The Judicial Conference transmitted to Congress a new Federal Courts Improvement bill on July 14. Issues in the bill include a firearms training program for judges, changes to the authority of bankruptcy administrators, abolition of in-state plaintiff diversity jurisdiction, and modification of magistrate judge's authority. The bill was transmitted to the Speaker of the House, the President of the Senate, and chairs and ranking members of the House and Senate Judiciary Committees, both subcommittee and full. On July 30, 1997, the draft was introduced by Chairman Howard Coble (R-NC) Chairman of the Subcommittee on Courts and Intellectual Property as H.R. 2294. A hearing is scheduled for October 9, 1997. H.R. 903, the "Alternative Dispute Resolution and Settlement Encouragement Act" will also be the subject of that hearing. The Table of Contents of H.R. 2294 is attached as Appendix K.

XV. PRODUCT LIABILITY/LEGAL REFORMS

Product Liability

Legislation was again introduced to establish legal standards and procedures governing product liability actions brought in any state or federal court on any theory for harm caused by a product. The measure, S. 5, was introduced on January 21, 1997, by Senator John Ashcroft (R-MO), for himself and 32 cosponsors, including the Majority Leader and the Chair of the Judiciary Committee. The Senate Commerce, Science and Transportation Committee held a hearing on S. 5 on March 4, 1997. S. 5 is identical to the Conference Report on product liability passed by the 104th by Congress and vetoed by the President.

On April 24, 1997, Senator Slade Gorton (R-WA) introduced a slightly revised version of the product liability bill, S. 648, the Product Liability Reform Act of 1997, and it was this bill that the Senate Commerce Committee approved in May 1997 by a vote of 11-9.

S. 648 establishes standards of liability for product sellers, renters, and lessors. The bill, however, specifically bars a federal cause of action based upon the Act (although product liability actions will still be filed in the federal courts if diversity of citizenship exists, and such suits will be subject to the provisions of this Act). Among the other provisions in the bill are the following:

- Limits punitive damages in product liability actions to $250,000 or two times economic or noneconomic damages, whichever is greater;
- Reduces the plaintiff's damages by the percentage of responsibility for the plaintiff's harm attributable to misuse or alteration of the product;
- Establishes a uniform statute of limitations for filing product liability suits (no later than two years after the plaintiff first discovered, or should have discovered, both the harm and the cause of the harm);
- Provides a complete defense if the defendant proves that the plaintiff was intoxicated and was more than 50 percent responsible for the injury; and
- Allows a party, within a limited time at the beginning of the action, to serve upon an adverse party an offer to proceed pursuant to any voluntary, nonbinding alternative dispute resolution procedure recognized under state law or under the rules of the court in which such action is maintained.
- S. 648 also includes a provision that this committee and the Conference of Chief Justices have reviewed in the context of previous product liability bills. Section 301 provides:

> A decision by a Federal circuit court of appeals interpreting a provision of this Act (except to the extent that the decision is overruled or otherwise modified by the Supreme Court) shall be considered a controlling precedent with respect to any subsequent decision made concerning the interpretation of such provision by any Federal or State court within the geographical boundaries of the area under the jurisdiction of the circuit court of appeals.

Although S. 648 is very similar to S. 5, it makes several changes to address provisions identified by President Clinton in his veto message in the 104th Congress. However, S. 648 does not address two major areas of Administration concern: the proposal to limit punitive damages, and the proposal to eliminate joint and several liability.

S. 648 also includes provisions that would:

- Clarify that the liability protections are not extended to those who sell alcohol to people who are already intoxicated or to minors;
- Require the defendant to bear the burden of proof that a claimant is injured while under the influence of alcohol or drugs;

- Suspend the statute of limitations if an action is stayed or enjoined; and
- Exempt silicone gel breast implant litigation from the bill's coverage.

The prospects for passage of product liability legislation in this Congress are uncertain. S. 648 was passed by the Senate Commerce Committee without the support of key Democratic Senators who have indicated that unless Republicans are willing to address some of the concerns identified by the Administration, they have little interest in passing a bill that will be vetoed.

There has been little action in the House of Representatives. In April, the House Subcommittee on Telecommunications, Trade and Consumer Protection of the House Commerce Committee held a hearing on the general issue of the affect of product liability litigation on consumer access to products. Also in April, the House Judiciary Committee began a series of hearings on civil justice reform, including product liability litigation.

Recently, the President has indicated his intention to create an Interagency Working Group, led by Deputy White House Counsel Bruce Lindsey, to negotiate a product liability bill. This group includes representatives of the Small Business Administration, the Commerce Department, and the Department of Justice, among others.

Habeas Corpus Reform

S. 105, introduced by Senator Patrick Moynihan (D-NY) on January 21, 1997, would repeal a provision included in the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132). That provision generally limits federal courts from granting habeas corpus relief where a state court has previously decided the petition on the merits unless the decision was an "unreasonable" application of federal law or determination of the facts. The repeal of this provision would allow federal courts to exercise independent review of state habeas petitions.

More specifically, the bill would repeal subsection (d) of section 2254 of title 28, as well as make a conforming amendment to section 2264(b). Section 2254(d) limits federal court review of a habeas petition filed by a person in custody pursuant to a state court judgment, if the claim was adjudicated on the merits in the state court, unless the adjudication--
"resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law...or
resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."The bill has been referred to the Judiciary Committee.

S. 488, the Crime Prevention Act of 1997, introduced by Senator Jon Kyl (R-AZ) on March 20, 1997, includes a provision on habeas corpus. Title VI of the bill provides that decisions of state courts will not be subject to review in the lower federal courts, so long

as there are "adequate and effective remedies in the state courts" for testing the legality of a person's detention. This bill was referred to the Judiciary Committee.

H.R. 903, the Alternative Dispute Resolution and Settlement Encouragement Act, was introduced by Representative Howard Coble (R-NC) on March 3, 1997. The bill would require all federal district courts to establish an arbitration program, which in the discretion of the court could be either voluntary or mandatory. The bill would also amend section 1332 of title 28 to include a provision concerning offers of settlement. The offer of settlement procedure would allow a party, at any time up to 10 days before trial, to make a formal offer to settle any or all claims. If the offer is rejected, and the offeree does not obtain a judgment more favorable than that offered, the offeree is liable for the costs and attorney's fees of the offeror for those claims from the date the last offer was made. The bill provides two exceptions to the award of costs and attorney's fees. The bill was referred to the Judiciary Committee and will be the subject of a hearing on October 9, 1997.

Class Actions

S. 254, the Class Action Fairness Act of 1997, was introduced by Senator Herb Kohl (D-WI) on January 30, 1997. The bill amends title 28 by adding a new chapter titled "Class Actions." The bill requires that no later than 10 days after a proposed settlement in a class action is filed in court, class counsel shall serve the State Attorney General of each state in which a class member resides and the Department of Justice with certain information, including a copy of the complaint and any amended complaints, information on any settlement proposals, and notification of class members of their rights to be excluded from the class. A hearing to consider final approval of a proposed settlement may not be held earlier than 120 days after the date on which the Department of Justice and the State Attorneys General are provided the above information.

The bill also requires the court with jurisdiction over a plaintiff class action to require that specific information be communicated to potential class members in "plain, easily understood language." In addition, new section 1711 is titled "Notification of Class Action Certifications and Settlements," which suggests that notice requirements must also be provided when a class is certified. The bill text, however, does not appear to provide such notice requirements when a class is certified. The bill was referred to the Judiciary Committee.

Protective Orders

Senator Herb Kohl (D-WI) has introduced S. 225, the Sunshine in Litigation Act of 1997 on January 28, 1997. This bill requires judges to make particularized findings of fact that the protective order would not pose a threat to public health and safety and would apply to all cases including those in which health and public safety is not a factor. The judge must also determine that the protective order is no broader than necessary to protect the asserted privacy interest.

This proposal was added to last year's Courts Improvement Bill at the Senate Judiciary Committee but was dropped prior to floor consideration. Senator Kohl agreed to drop the amendment with the understanding the Courts Subcommittee would revisit the issue in the 105th Congress.

Civil Asset Forfeiture

On June 10, 1997, Representative Henry Hyde (R-IL) introduced H.R. 1835, the "Civil Asset Forfeiture Act of 1997." The bill, which has numerous bipartisan cosponsors and has been coordinated with the Department of Justice, would reform civil asset forfeiture law by shifting the burden of proof in such cases to the government, allowing for release of property pending disposition of the case, providing for appointment of counsel for indigents paid from the asset forfeiture fund, eliminating the cost bond requirement to challenge a forfeiture, establishing an innocent owner defense, providing a remedy for property damage caused by government negligence, and extending the time period for challenging a forfeiture. The bill was reported out of the full House Judiciary Committee on June 20, 1997, and is now pending House floor action.

The primary impact upon the Judiciary would be a requirement in the bill that counsel for indigents be funded from our defender services appropriation. The Committee on Defender Services has under consideration a recommendation to seek a revision to the bill that such funding be provided instead from the asset forfeiture fund and, failing that, that sufficient funds be appropriated to meet this new responsibility.

H.R. 1581, Reauthorizatation of the District Court Arbitration Pilot Program

On June 10, 1997, Representative Coble's Subcommittee on Courts and Intellectual Property passed this bill by voice vote. On June 19, 1997, the bill passed the House Judiciary Committee by voice vote. This bill provides for the permanent reauthorization of the 20 court pilot arbitration program established by Pub. L. No. 100-702.

S. 996, Reauthorization of the District Court Arbitration Pilot Program and S. 997, a bill to require courts to establish arbitration procedures in all courts.

On July 8, Senator Grassley introduced the above referenced bills. S. 996 is identical to H.R. 1581 as recently passed by the House. S. 996 passed the Senate by voice vote on July 31, 1997. In addition, an amendment by Senator Joseph Biden (D-DE) was attached to the bill. This amendment reauthorizes the reporting requirements established under the Civil Justice Reform Act of 1990. The amendment makes permanent the requirement that a list of each Federal judges' six-month old motions and three-year old cases be published and disseminated twice a year.

S. 997 would go further by requiring all 94 district courts to establish arbitration procedures. The Judicial Conference is opposed to mandating the establishment of these programs.

Item 3B

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JOHN K RABIEJ
Chief
Rules Committee Support Office

December 8, 1997

MEMORANDUM TO THE STANDING RULES COMMITTEE

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

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

Update on New Initiatives

The docket sheets of all suggested amendments for Civil and Criminal Rules have been updated to reflect the committees' recent respective actions. A new docket sheet for Evidence Rules has been completed. Every suggested amendment along with its source and status or disposition is listed. The docket sheets will be updated after each committee meeting, and will be included in each agenda book.

A computer program is being developed to create a list of pending projects from the docket sheet. The office will next complete a draft docket sheet for Appellate Rules, based on Professor Mooney's "Table of Agenda Items." The docket sheet for Bankruptcy Rules will follow.

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

Record Keeping

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

All rules-related documents from 1935 through 1990 have been entered on microfiche and indexed. The documents for 1991 and 1992 have been catalogued and shipped to a government record center. The documents for 1993 will be catalogued and boxed prior to the January 8 meeting. Congressional Information Services (CIS) — the publisher of the microfiche collection — has entered the documents for 1991 on microfiche and incorporated them into existing indexes. The microfiche cards and indexes for 1991 should be shipped shortly. CIS should complete the documents for 1992 in early 1998. The microfiche collection continues to prove useful to us and the public in researching prior committee positions. Professor Richard Marcus, Special Reporter for the Discovery Subcommittee of the Civil Rules Committee, used the collection to do extensive research on past suggestions to amend the rules governing discovery, and the committee's action on those suggestions.

Automation Project (FRED)

Progress on our automated document management system (FRED) was temporarily stymied. During this past summer, all the personal computers in the entire agency were upgraded to the Windows 95 operating system. Problems with the migration to Windows 95, especially its interaction with FRED, delayed the final testing of the FRED system. Meanwhile, the original FRED project manager left the Administrative Office aggravating the delays. Although the system runs with little technical oversight, the absence of a project manager during the difficult migration to Windows 95 added more delay. A large backlog of documents ready to be inputted into the system has developed. As a result of these general delays, we also deferred the adoption of planned FRED enhancements. For example, development of reports designed to ensure that data is entered properly and that all comments are acknowledged with appropriate follow-up responses explaining the committee's actions has been postponed. A new project manager was hired in September, however, and we expect to proceed on the deferred projects as soon as the manager becomes familiar with FRED. We have also arranged to obtain more "robust" personal computers, which should alleviate most of the "migration to Windows 95" problems. The manual system is being maintained while we complete final testing of the automated system.

Since February 1996, all letters commenting on the proposed amendments have been scanned. For the last two summers an intern abstracted minutes and rules-related articles from our files and the microfiche collection and added them to the FRED system. We are exploring the feasibility of providing access to the document database to committee chairs and reporters, and possibly to other committee members and the public at some point in the future.

The office conducted a demonstration of our automated FRED filing system for the Department of Justice's Office of Legislative Affairs, which is considering its adoption for their office. The system was also demonstrated for several other offices within the Administrative Office, which is actively considering adopting our document management system on an agency-

wide basis. If it is adopted, better overall technical support can be expected and some of the enhancements may be effected sooner than planned.

Manual Tracking

Our manual system of tracking comments continues to work well. For the current public comment period, the office to date has received, acknowledged, and forwarded approximately 25 comments and many suggestions to the appropriate committees. Each comment has been numbered consecutively, which enables committee members to determine instantly whether they have received all of them.

Distribution of Proposed Rule Changes

Efforts to improve the distribution of proposed rule amendments for public comment continue. The title page of the *Request for Comment* pamphlet, which contains the text of the proposed amendments to the rules, was reformatted to highlight the comment-seeking purpose of the publication and indicate which rules were being amended. The foldout brochure that summarizes the proposed rules amendments has proven useful. The office has received many requests for it. Response to the *Request for Comment* continue to be monitored and necessary steps have been taken to improve our circulation of rules-related materials. For example, the names of several legal publishers have been added to the list of those who receive rules-related documents, bringing the total to 64 publishers.

Working with the Office of Public Affairs several press releases have been released updating the media on rules-related activity. At the direction of several rules committees' chairs, our office has taken additional steps to ensure the participation of a wide cross-section of the bench and bar at every stage of the rulemaking process.

State Bar Points-of-Contact

In August 1994, Judge Stotler sent a letter to the president of each state bar association requesting that a point-of-contact be designated for the rules committee to solicit and coordinate that state bar's comments on the proposed amendments. She sent a follow-up letter in November 1994 to those who failed to respond to the original request. The Standing Committee outreach to the organized bar has resulted in 43 state bars designating a point-of-contact. The names and affiliations of the points-of-contact were included in the August 1997 *Request for Comment* pamphlets.

The points-of-contact list was updated late last year. A letter was sent to the points-of-contact requesting them to inform us if they had been replaced or would be replaced before the mailing of the next *Request for Comment* pamphlet on proposed amendments in August 1997.

Because of this effort, several state bars updated their designated point-of-contact. The process will be repeated every year to ensure that we have an accurate and up-to-date list.

Mailing List

The Administrative Office has purchased a new automated mailing list system. It recently became fully operational and should substantially reduce the time involved in maintaining and expanding the mailing list. During the transition period from the old system to the new system efforts to expand the mailing list were suspended. We had planned to add an additional 200 attorneys and 100 professors to a temporary list every six months until the list contains 2,500 names. The last mailing, however, resulted in many returned books. Therefore, we focused our efforts on updating the existing mailing list. The updating is complete, and new names are being added according to the above schedule.

Internet

The *Request for Comment* pamphlet will be available each fall on the AO's Internet Home Page (http://www.uscourts.gov). Internet access supplements, rather than replaces, our current system of targeted mailing.

The possibility of making other rules-related documents available on the Internet and other electronic bulletin boards is being explored. The brochure outlining the rulemaking process has been updated and it will be posted on the AO's Internet Home Page. A revised draft memorandum advising the courts to submit an electronic version of their local rules to us for posting on the Internet is being circulated within the Administrative Office for approval. We are also exploring the possibility of placing official forms, minutes of meetings, and brief summaries of each committee meeting on the Internet.

We can receive comments on the proposed rules amendments via the Internet; however, we are currently not doing so. The Technology Subcommittee has been asked to study the issue.

In addition to the AO's home page on the Internet, which is available to the public, we are investigating which rule-related documents should be available on the J-Net (the courts' Intranet).

Tracking Rule Amendments

The time chart showing the status of all rules changes has been updated. It will be distributed at the meeting.

Miscellaneous

In September 1997, the Judicial Conference approved the proposed amendments to the Federal Rules of Evidence and Appellate, Civil, and Criminal Procedure recommended by the Standing Committee at its June 1997 meeting. The formatting and proofreading of the proposed rules amendments were extensive, particularly the comprehensive revision of the Appellate Rules. In November the proposals were forwarded to the Supreme Court.

On August 15, 1997, the *Preliminary Draft of the Proposed Revision of the Federal Rules of Bankruptcy and Criminal Procedure* was published for comment. A brochure summarizing the proposed amendments was also prepared and published.

In September 1997, the courts were advised that the amendments to the Official Bankruptcy Forms approved by the Judicial Conference on September 23, 1997, would take effect immediately and their use would be mandatory starting March 1, 1998.

In November 1997, the courts were advised that the amendments to the Federal Rules of Evidence, and Civil and Criminal Procedure approved by the Supreme Court on April 11, 1997, would take effect on December 1, 1997.

In December 1997, the pamphlets printed by the General Printing Office for the House Judiciary Committee containing the recently effective amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and the Rules of Evidence were distributed to the court family. The House Judiciary Committee does not print any pamphlets for the bankruptcy rules, and our effort to convince Congressman Henry Hyde, chair of the House Judiciary Committee, of the need for such a pamphlet has so far been unsuccessful.

At the request of Professor Coquillette the seven studies on *Rules Governing Attorney Conduct* were assembled into a single volume. The office prepared indexes, a table of contents, and compiled the materials into the *Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct.*

John K. Rabiej

Attachments

UNCLASSIFIED

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by cmte 10/96 — Considered by cmte 10/97 — Deferred until spring '98 meeting **PENDING FURTHER ACTION**
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to cmte 4/96 — Considered by cmte 10/96 — Considered by committee, assigned to subc 5/97— Considered by cmte 10/97 — Request for publication and accelerated review by ST Cmte **PENDING FURTHER ACTION**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Subc **PENDING FURTHER ACTION**
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/4 — Referred to reporter and chair **PENDING FURTHER ACTION**
[Non-applicable Statute]— 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition **COMPLETED**
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by cmte **DEFERRED INDEFINITELY**
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by cmte 4/94 — Considered by cmte 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Humphrey Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV5] — Electronic filing		10/93 — Considered by cmte 9/94 — Published for comment 10/94 — Considered 4/95 — Cmte approves amendments with revisions 6/95 — Approved by ST Cmte /95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**
[CV5] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 9/97 — Information sent to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV5(b)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule	Prof. Edward Cooper 10/27/97	10/97 — Referred to cmte
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by cmte 10/93 — Considered by cmte 10/94 — Considered by cmte 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Cmte for submission to Jud Conf 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court 12/97 — Effective **COMPLETED**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Letter from Blommer, Legislative Affairs officer, on general court workload concerns **PENDING FURTHER ACTION**
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G) #2830	5/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration **PENDING FURTHER ACTION**
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97	12./97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by cmte and deferred **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by committee 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte **PENDING FURTHER ACTION**
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV26] — Revamp current adversarial system of federal legal practice — RAND evaluation of CJRA plans	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College of Trial Lawyers; Allan Parmelee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by cmte 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by cmte; subc appointed 1/97 — Subc held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Subc 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by subc and left for consideration by full cmte **PENDING FURTHER ACTION**
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Subc. **PENDING FURTHER ACTION**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair **PENDING FURTHER ACTION**
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96; #1045	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study **PENDING FURTHER ACTION**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Cmte 1/95 — ST Cmte approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox, Esq.	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Considered by advisory cmte; recommended increased attention by Fed. Jud. Center at judicial training **COMPLETED**
[CV47(b)] — Eliminate peremptory challenges	Judge Willaim Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by cmte 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — ST Cmte approves 9/96 — Jud Conf rejected 10/96 — Committee's post-mortem discussion **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV50] — Uniform date for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Subc **PENDING FURTHER ACTION**
[CV51] — Jury instructions submitted before trial	Judge Stotler (96-CV-E)	11/8/96 — Referred to chair **PENDING FURTHER ACTION**
[CV52] — Uniform date for filing for filing post trial motion	BK Rules Cmte	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16.1 regarding "pretrial masters" 10/94 — Draft amendments considered **DEFERRED INDEFINITELY**
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV59] — Uniform date for filing for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmteapproves publication 4/94 — Approved by committee 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**
[CV64] — Federal prejudgment security	ABA proposal	11/92 — Considered by cmte 5/93 — Considered by cmte 4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV65.1] — To amend to avoid conflict between 31 U.S.C. § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Subc. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch **PENDING FURTHER ACTION**
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to committee's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair **PENDING FURTHER ACTION**
[CV77(d)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N)	9/97 — Mailed to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV77(d)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Subc. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered **PENDING FURTHER ACTION**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte **DEFERRED INDEFINITELY**
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I)	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Subc **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte **PENDING FURTHER ACTION**

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AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 12/95 — Effective **COMPLETED**
[CR 5(c)] — Misdemeanor defendant in custody is not entitled to preliminary examination. Cf CR58(b)(2)(G)	Magistrate Judge Robert B. Collings 3/94	10/94 — Deferred pending possible restylizing efforts **PENDING FURTHER ACTION**
[CR 5(c)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte **PENDING FURTHER ACTION**
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte **PENDING FURTHER ACTION**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Committee declined to act on the issue **COMPLETED**
[CR6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte **PENDING FURTHER ACTION**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte for public comment 10/94 — Discussed and no action taken **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Cmte decided that current practice should be reaffirmed **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**
[CR6 (f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and aprroved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter C. Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter and chair **PENDING FURTHER ACTION**
[CR 10] — Arraignment of detainees through video teleconferencing	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 11(d)] — Examine defendant's prior discussions with an government attorney	Judge Sidney Fitzwater 11/94	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcommittee on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **PENDING FURTHER ACTION**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcommittee appointed 4/96 — No action taken **COMPLETED**
[CR 12(b)] — Require defense to give notice of intent to raise entrapment defense.		**PENDING FURTHER ACTION**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Committee for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **COMPLETED**
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 **PENDING FURTHER ACTION**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, but should be subject to continued study and education; FJC to pursue educational programs **COMPLETED**
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary ; Judge Acker (97-CR-E)	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED**
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcommittee will be appointed **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte **PENDING FURTHER ACTION**
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project; Judge Stotler 1/15/97 (97-CR-A)	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED** 1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte **PENDING FURTHER ACTION**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **PENDING FURTHER ACTION**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules **PENDING FURTHER ACTION**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**
[CR 43(b)] — Arraignment of detainees by video teleconferencing; sentence absent defendant	DOJ 4/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte **PENDING FURTHER ACTION**
[CR 43(c)(5) — Defendant to waive personal arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I)	10/97 — Referred to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized **PENDING FURTHER ACTION**
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other committees in Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CR-J)	11/97 — Referred to reporter and chair **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Committee and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment **PENDING FURTHER ACTION**

[redacted]

AGENDA DOCKETING

ADVISORY COMMITTEE ON EVIDENCE RULES

Proposal	Source, Date, and Doc #	Status
[EV 101] — Scope		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 102 — Purpose and Construction		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 103] — Ruling on EV		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 103(a)] — When an *in limine* motion must be renewed at trial (earlier proposed amendment would have added a new Rule 103(e))		9/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Approved for publication by ST Cmte. 5/95 — Considered. Note revised. 9/95 — Published for public comment 4/96 — Considered 11/96 — Considered. Subcommittee appointed to draft alternative. 4/97 — Draft requested for publication 6/97 — ST Cmte. recommitted to advisory committee for further study 10/97 — Request to publish revised version **PENDING FURTHER ACTION**
[EV104] — Preliminary Questions		9/93 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 105] — Limited Admissibility		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Remainder of or Related Writings or Recorded Statements		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Admissibility of "hearsay" statement to correct a misimpression arising from admission of part of a record	Prof. Daniel Capra (4/97)	4/97 — Reporter to determine whether any amendment is appropriate 10/97 — No action necessary **COMPLETED**
[EV 201] — Judicial Notice of Adjudicative Facts		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to amend **COMPLETED**
[EV 201(g)] — Judicial Notice of Adjudicative Facts		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided to take no action **DEFERRED INDEFINITELY**
[EV 301] — Presumptions in General Civil Actions and Proceedings. (Applies to evidentiary presumptions but not substantive presumptions.)		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
[EV 302] — Applicability of State Law in Civil Actions and Proceedings		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 401] — Definition of "Relevant Evidence"		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 402] — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 403] — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 404] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Sen. Hatch S.3, § 503 (1/97)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Considered with EV 405 as alternative to EV 413-415 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Recommend publication **PENDING FURTHER ACTION**
[EV 404(b)] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other crimes, wrongs, or acts. (Uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.)	Sen. Hatch S.3, § 713 (1/97)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Discussed 11/96 — Considered and rejected any amendment 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Proposed amendment in the Omnibus Crime Bill rejected **COMPLETED**
[EV 405] — Methods of Proving Character. (Proof in sexual misconduct cases.)		9/93 — Considered 5/94 — Considered 10/94 — Considered with EV 404 as alternative to EV 413-415 **COMPLETED**
[EV 406] — Habit; Routine Practice		10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 407] — Subsequent Remedial Measures. (Extend exclusionary principle to product liability actions, and clarify that the rule applies only to measures taken after injury or harm caused by a routine event.)	Subcmte. reviewed possibility of amending (Fall 1991)	4/92 — Considered and rejected by CR Rules Cmte. 9/93 — Considered 5/94 — Considered 10/94 — Considered 5/95 — Considered 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Approved & submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Enacted **COMPLETED**
[EV 408] — Compromise and Offers to Compromise		9/93 — Considered 5/94 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 409] — Payment of Medical and Similar Expenses		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
EV 410] — Inadmissibility of Pleas, Plea Discussions, and Related Statements		9/93 — Considered and recommended for CR Rules Cmte. **COMPLETED**
[EV 411] — Liability Insurance		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 412] — Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 10/92 — Considered by CR Rules Cmte. 10/92 — Considered by CV Rules Cmte. 12/92 — Published 5/93 — Public Hearing, Considered by EV Cmte. 7/93 — Approved by ST Cmte. 9/93 — Approved by Jud. Conf. 4/94 — Recommitted by Sup. Ct. with a change 9/94 — Sec. 40140 of the Violent Crime Control and Law Enforcement Act of 1994 (superseding Sup. Ct. action) 12/94 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 413] — Evidence of Similar Crimes in Sexual Assault Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 414] — Evidence of Similar Crimes in Child Molestation Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 415] — Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 501] — General Rule. (Guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors be adequately protected in Federal court proceedings.)	42 U.S.C., § 13942(c) (1996)	10/94 — Considered 1/95 — Considered 11/96 — Considered 1/97 — Considered by ST Cmte. 3/97 — Considered by Jud. Conf. 4/97 — Reported to Congress **COMPLETED**
[EV 501] — Privileges, including extending the same attorney client privilege to in-house counsel as to outside counsel		11/96 — Decided not to take action 10/97 — Rejected proposed amendment to extend the same privilege to in-house counsel as to outside counsel **COMPLETED**
[EV 601] — General Rule of Competency		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 602] — Lack of Personal Knowledge		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 603] — Oath or Affirmation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 604] — Interpreters		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 605] — Competency of Judge as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 606] — Competency of Juror as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 607] —Who May Impeach		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 608] — Evidence of Character and Conduct of Witness		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 609] — Impeachment by EV of Conviction of Crime. See 404(b)		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Declined to act **COMPLETED**
[EV 610] — Religious Beliefs or Opinions		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 611] — Mode and Order of Interrogation and Presentation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611(b)] — Provide scope of cross-examination not be limited by subject matter of the direct		4/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to proceed **COMPLETED**
[EV 612] — Writing Used to Refresh Memory		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 613] — Prior Statements of Witnesses		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 614] — Calling and Interrogation of Witnesses by Court		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 615] — Exclusion of Witnesses. (Statute guarantees victims the right to be present at trial under certain circumstances and places some limits on rule, which requires sequestration of witnesses. Explore relationship between rule and *Victim of Crime Bill of Rights*, passed in 1996.)	42 U.S.C., § 10606 (1990)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 3/97 — Amended by statute P.L. 105-6 4/97 — Submitted for approval without publication 6/97 — Approved by ST Cmte. 9/97 — Approved by Jud. Conf. **PENDING FURTHER ACTION**
[EV 701] — Opinion testimony by lay witnesses		10/97 — Subcmte. formed to study need for amendment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 702] — Testimony by Experts	H.R. 903 and S. 79 (1997)	2/91 — Considered by CV Rules Cmte. 5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered and revised by CV and CR Rules Cmtes. 6/92 — Considered by ST Cmte. 4/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Considered (Contract with America) 4/97 — Considered. Reporter tasked with drafting proposal. 4/97 — Stotler letters to Hatch and Hyde 10/97 — Subcmte. formed to study issue further **PENDING FURTHER ACTION**
[EV 703] — Bases of Opinion Testimony by Experts. (Whether rule, which permits an expert to rely on inadmissible evidence, is being used as means of improperly evading hearsay rule.)		4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 5/94 — Considered 10/94 — Considered 11/96 — Considered 4/97 — Draft proposal considered. 10/97 — Subcmte. formed to study issue further **PENDING FURTHER ACTION**
[EV 705] — Disclosure of Facts or Data Underlying Expert Opinion		5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered by CV and CR Rules Committees 6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective **COMPLETED**
[EV 706] — Court Appointed Experts. (To accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases.)	Carnegie (2/91)	2/91 — Tabled by CV Rules Cmte. 11/96 — Considered 4/97 — Considered. Deferred until CACM completes their study. **PENDING FURTHER ACTION**
[EV 801(a-c)] — Definitions: Statement; Declarant; Hearsay		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

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

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

Proposal	Source, Date, and Doc #	Status
[EV 804(b)(6)] — Hearsay Exceptions; Declarant Unavailable. (To provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence.)	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 5/95 — Combined with EV 803(24) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. **COMPLETED**
[EV 805] — Hearsay Within Hearsay		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 806] — Attacking and Supporting Credibility of Declarant. (To eliminate a comma that mistakenly appears in the current rule. Technical amendment.)	EV Rules Committee 5/95	5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 806] — To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant		11/96 — Declined to act **COMPLETED**
[EV 807] — Other Exceptions. Residual exception. The contents of Rule 803(24) and Rule 804(b)(5) have been combined to form this new rule.	EV Rules Committee 5/95	5/95 — This new rule is a combination of Rules 803(24) and 804(b)(5). 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 10/96 — Expansion considered 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 807] — Notice of using the provisions	Judge Edward Becker	4/96 — Considered 11/96 — Reported. Declined to act. **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 901] — Requirement of Authentication or Identification		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902] — Self-Authentication		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902 (11) and (12)] — Self-Authentication of domestic records (See Rule 803(6) for consistent change)		10/97 — Approved for publication **PENDING FURTHER ACTION**
[EV 903] — Subscribing Witness' Testimony Unnecessary		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions (Cross references to automation changes)		10/97 — Considered
[EV 1002] — Requirement of Original. Technical and conforming amendments.		9/93 — Considered 10/93 — Published for public comment 4/94 — Recommends Jud. Conf. make technical or conforming amendments 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1003] — Admissibility of Duplicates		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1004] — Admissibility of Other Evidence of Contents		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1005] — Public Records		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 1006] — Summaries		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1007] — Testimony or Written Admission of Party		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1008] — Functions of Court and Jury		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1101] — Applicability of Rules		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1102] — Amendments to permit Jud. Conf. to make technical changes	CR Rules Committee (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 9/93 — Considered 6/94 — ST Cmte. did not approve 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1103] — Title		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[Admissibility of Videotaped Expert Testimony]	EV Rules Committee (11/96)	11/96 — Denied but will continue to monitor 1/97 — Considered by ST Cmte. **PENDING FURTHER ACTION**
[Automation] — To investigate whether the EV Rules should be amended to accommodate changes in automation and technology	EV Rules Committee (11/96)	11/96 — Considered 4/97 — Considered **PENDING FURTHER ACTION**
[Circuit Splits] — To determine whether the circuit splits warrant amending the EV Rules		11/96 — Considered 4/97 — Considered **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Obsolete or Inaccurate Rules and Notes] — To identify where the Rules and/or notes are obsolete or inaccurate.	EV Rules Committee (11/96)	5/93 — Considered 9/93 — Considered. Cmte. did not favor updating absent rule change 11/96 — Considered 1/97 — Considered by the ST Cmte. 4/97 — Considered and forwarded to ST Cmte. 10/97 — Referred to FJC **PENDING FURTHER ACTION**
[Privileges] — To codify the federal law of privileges	EV Rules Committee (11/96)	11/96 — Denied **COMPLETED**
[Statutes Bearing on Admissibility of EV] — To amend the EV Rules to incorporate by reference all of the statutes identified, outside the EV Rules, which regulate the admissibility of EV proferred in federal court		11/96 — Considered 4/97 — Considered and denied **COMPLETED**
[Sentencing Guidelines] — Applicability of EV Rules		9/93 — Considered 11/96 — Decided to take no action **COMPLETED**
[Forfeiture] — Applicability		4/96 — Considered **PENDING FURTHER ACTION**
[Foreign Business Records]		4/96 — Considered 10/97 — Considered **PENDING FURTHER ACTION**

Item 4

Agenda Item 4
Committee on Rules of
Practice and Procedure
December 1997
Information

FEDERAL JUDICIAL CENTER UPDATE

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

I. Education and Training Seminars and Workshops

The educational programs described here are only representative of the many seminars and workshops offered to judges and court staff. During the past year, the Center has offered:

- 57 seminars and workshops for judges, reaching over 2,713 participants;
- a satellite videoseminar highlighting the major cases of the 1996/1997 Supreme Court term, reaching 1355 participants at 80 viewing sites;
- 5 programs for federal defender personnel, reaching 844 participants;
- 50 national and regional programs for supporting personnel, reaching 2,629 participants;
- 4 satellite and video conferences for 2,552 court personnel; and
- 1,348 programs for supporting personnel conducted in their own courts, reaching over 30,063 participants.

Programs and Training for Judges

In fiscal 1998, the Center will offer circuit-based continuing education for district and appellate judges. Bankruptcy judges will be able to attend one of three national programs; magistrate judges will be able to attend one of two national programs. The following "special focus" seminars are representative of the many other programs offered for judges.

1. **Health Care and the Legal System.** Two programs for federal and state court judges will explore current legal issues in the health care industry and the health care delivery system. These programs, scheduled for November and March, are supported by a grant from the Henry J. Kaiser Family Foundation.

2. **Employment Law Seminar**. This program, scheduled for March for appellate and district court judges, is co-sponsored by the Institute of Judicial Administration and the Center for Labor and Employment Law at New York University. It will cover such topics as sexual harassment, glass ceiling law and theory, disability discrimination, and age discrimination.

3. **Financial Statements in the Courtroom**. The Center will again co-sponsor these workshops with the American Institute of Certified Public Accountants (AICPA). In FY98, four workshops are scheduled: December, February, March, and April. The program is a practical and useful means to increase understanding of financial statements, financial reporting concepts, and how financial statement information is used in the courtroom. The Center is exploring with AICPA whether it can incorporate into the program discussions of court budgeting issues.

4. **Improving Jury Selection and Comprehension**. In conjunction with the district judge workshop in September, the Center offered a program on improving jury selection and juror comprehension. The program presented the latest empirical research on effective judicial voir dire and jury selection, Batson problems and jury diversity issues, techniques for improving jury comprehension, and the merits of increasing the size of civil juries. The program was designed in part around a series of video vignettes on voir dire techniques, which the Center created. These vignettes are slated to be part of the Judges' Series on the Federal Judicial Television Network.

Programs and Training for Court Staff

The programs described below are a small sample of those offered to court supporting personnel.

1. **Jury Administrators' On-Line Conferences**. Two computer on-line conferences will be held from November 1-31 for U.S. district court jury administrators, clerks of court, and other court staff. The conferences will provide further training and technical assistance in effective jury administration.

2. **Satellite Conferences.** By the end of this year, Center staff will have conducted four satellite conferences (Court Leadership, Managing Multiple Projects, Communicating From a Distance, and Special Needs Offenders), altogether reaching more than 2,500 court personnel. The remaining program, Special Needs Offenders, is a multi-phased training program for probation and pretrial services officers. It was introduced in August and will conclude with a December 9 satellite conference where selected officers will share case management practices and available resources for supervising offenders who are gang members. The program began with distribution of two training bulletins that described the profiles of street and prison gang members. In two subsequent on-line conferences, representatives from probation and pretrial services units discussed supervision strategies for offenders suspected of being gang members. These programs have provided us valuable lessons on what works and what does not work in satellite education.

3. **Workshop on Leading a Team-Based Organization.** A September program for unit executives and managers whose units are organized by teams explored critical ways leaders can support the development and implementation of successful teams. The program built on skills developed through the Center's maximizing productivity project.

4. **Leadership Development Programs.** Managers who want to prepare for positions of increasing leadership responsibility may apply to participate in one of two multi-year programs: the Federal Court Manager Leadership Program or the Leadership Development Program for Probation and Pretrial Services Offices (LDP). The eighty members of the third LDP class concluded their work with a final management seminar in August.

5. **Workshop for Chief Bankruptcy Judges and Executive Team Development Program.** In September, the Center held a workshop for all chief bankruptcy judges and for bankruptcy judges from single judge districts. Immediately following the workshop, the Center presented a two-day Executive Team Development Program for new bankruptcy chief judges and clerks of court and for those clerks and chief judges who had not previously had an opportunity to attend the Team Development Program.

6. **Workshop for Bankruptcy Clerks, Chief Deputies, Bankruptcy Administrators, and BAP Clerks.** As part of an experimental 1996 workshop, the Center asked participants to design a hypothetical bankruptcy court for the future. In the next step in using this teaching device, participants are meeting in November to develop actual implementation plans for their hypothetical court. They will consider budget, personnel, information technology, and

space and facilities implications. The implementation plans will be reviewed by representative court customers and stakeholders (including judges, attorneys, and creditors) who will also attend.

7. **Seminar for Bankruptcy Appellate Panels.** For the first time, at a seminar held this past August, the Center brought together all active bankruptcy appellate panel (BAP) judges to discuss different models of appellate decision making, the structure of the bankruptcy appellate panel, and other issues relevant to BAP judges.

Education by Satellite

The Center plans next year to broadcast directly to federal courthouses a limited schedule of satellite education and information programs for federal judges and staff, in order to complement other Center educational programs and to conserve both the travel expense and the time of judges and court staff. Developing the technical backbone for this satellite network and the educational programs suitable for satellite transmission has been a major task.

The Administrative Office has done an admirable job in the effort to procure and install the satellite downlinks and hopes to equip up to 200 courts by next year. The Center committed over $500,000 of its FY96 funds to create a second media studio in the Thurgood Marshall Building, equipped specifically for satellite teletraining. Funds from the Sentencing Commission, the salaries and expense appropriation, and the Architect of the Capitol, as well as the assistance of the AO, ensured the studio's construction.

Distance education by satellite is a much more complex task than simply presenting standard educational programs in a different format. We are developing, in consultation with satellite education personnel in other government agencies, a schedule of programs that will put this medium to its best uses. Ability to broadcast directly to the courthouses will provide us much greater flexibility in program design than is possible when judges or staff must travel to another location in the city to watch a broadcast. For judges, Center staff are developing a monthly series of educational programs, which is likely, during its first year, to include programs on difficult recurring evidentiary issues, voir dire and jury selection, scientific evidence, habeas and prisoner litigation, sentencing, and the Supreme Court Update for the 1997-1998 term.

II. Research Projects

Many of the research projects described below have been undertaken at the request of Judicial Conference Committees. These projects represent only a few of the more than thirty-seven projects in support of Conference Committees, including the Criminal Law Committee, Defender Services Committee, Civil and Bankruptcy Rules Committees, the Committee on the Administration of the Bankruptcy System, and this Committee.

1. **Civil Discovery**. At the request of the Advisory Committee on Civil Rules, the Center conducted a study of the discovery process, examining the extent to which discovery is used, the frequency and nature of problems in discovery, the impact of the 1993 amendments, and whether additional rule changes are needed. The Center presented its report at a symposium hosted by the Advisory Committee in September and sent it to the members of this Committee as well. Subsequent to the September meeting, the Advisory Committee has asked the Center to undertake further studies, including an examination of the cost of discovery to litigants.

2. **Court-Appointed Experts.** In response to an invitation from the Advisory Committee on Evidence Rules and based on its prior research on Rule 706 court-appointed experts, the Center prepared a list of topics that should be considered in developing proposed amendments to Rule

706. Among the topics suggested were (1) clarify authority to assess costs to compensate the expert according to a party's ability to pay; (2) clarify expectations regarding ex parte communication between the judge and appointed expert; (3) clarify authority to limit deposition and cross-examination of court-appointed experts; and (4) reconcile overlapping authority of court-appointed experts, special masters, and technical advisors. The Advisory Committee decided to defer consideration of any amendments until the Court Administration and Case Management Committee has reviewed the results of Judge Pointer's national panel of science experts.

3. Survey of Local Rules on Attorney Conduct. At the request of the Standing Committee on Rules of Practice and Procedure, the Center gathered empirical information on several issues relating to rules on attorney conduct, including whether districts use state, ABA, or other rules; what kinds of misconduct are most frequent; and whether judges perceive a need for a new model rule. The Center's survey went to every district, including the fifteen that had adopted a local rule similar to the model rule of disciplinary enforcement proposed by CACM's predecessor committee in 1978. That rule directs districts to look to the ethics rules of the state in which the district is located. The Center has now been asked by the Advisory Committee on Bankruptcy Rules to undertake a similar study in the bankruptcy area.

4. Management of Silicone Breast Implant Litigation. The Center provides technical support for a World Wide Web page created and maintained by Chief Judge Sam C. Pointer, Jr., the transferee judge of MDL 926 (the Silicone Gel Breast Implant Products Litigation). The Web page, which is updated regularly and includes significant MDL 926 opinions and orders, is at http://www.fjc.gov/mdl926.html.

5. Evaluation of Court-Appointed Science Experts, Breast Implant Litigation. At the request of this Committee, the Center is conducting a study of Chief Judge Pointer's national panel of experts in the breast implant litigation. Also at the request of this Committee, the Center has undertaken a project to describe efforts made by Judge Robert Jones (OR) to establish a panel of experts for use by litigants in the breast implant cases on his docket. The status of both projects is described at Agenda Item XII.

6. Science-Related Judicial Education Seminars. This year the Center presented three programs on the relationship of science and the law: a program in September on law and biology and programs in October on environmental law and on understanding scientific concepts that arise in litigation, such as statistical proof. The Center tentatively has scheduled a program for next year on scientific evidence as part of the Judges' Series on the Federal Judicial Television Network.

7. Voir Dire. In response to a request from the Advisory Committee on Civil Rules to develop educational programs on problems that arise in voir dire, the Center is preparing a publication that alerts judges to ways in which questions presented by attorneys—for example, during voir dire or through a screening questionnaire—may intrude on the privacy of potential jurors. The publication will identify instances of intrusive questions and offer suggestions for minimizing the intrusion while making appropriate information available to attorneys.

8. Study of Ethical Problems in Mediation in Bankruptcy Cases. At the request of the Advisory Committee on Bankruptcy Rules, the Center conducted a survey to assess the need for national rules on mediation in bankruptcy. A questionnaire, which was sent to mediators and lawyers who participated in the mediation of one or more bankruptcy matters after judicial referral, sought to determine the extent and severity of any problems in mediation. For example, the survey asked about the incidence of conflicts of interest, ex parte contacts, and breaches of confidentiality. A preliminary report was presented to the Advisory Committee in September, and a final report will be submitted early next year. The Advisory Committee has not taken a position on the use of mediation in bankruptcy cases.

9. Mediation Workshops for Bankruptcy and Magistrate Judges. In September the Center conducted two mediation workshops. The first, co-sponsored with the American Arbitration Association, was for bankruptcy judges in the Third Circuit; its purpose was to help them become more familiar with mediation techniques and to acquaint them with the range of issues that can arise with judicial referral to mediation. The second workshop was for magistrate judges and provided hands-on training in mediation skills. Interest was so strong in both programs that the Center plans to repeat them next year.

10. Assistance with Seventh Circuit's Evaluation of its Preargument Conferencing Program. At the request of the Seventh Circuit, the Center analyzed questionnaire data collected by the appellate court to determine the impact of its preargument conferencing program. The Center submitted a memorandum report to the court and will conduct further analyses if requested by the court.

11. Waiver of Chapter 7 Filing Fee in Bankruptcy Courts. Legislation passed in 1993 requires the judiciary to implement a three-year pilot program to study the costs and benefits of waiving the filing fee for individual Chapter 7 debtors who cannot pay the fee in installments. Evaluation of the program, which was implemented in six districts, is under supervision of the Committee on the Administration of the Bankruptcy System, with assistance from the Center and the AO. In January, the Center submitted an interim report to the Bankruptcy Committee, which the committee distributed for comment to members of Congress, the Bankruptcy Review Commission, and other interested parties. The final report is due to Congress in March 1998.

12. Survey of the United States Trustee Program and the Bankruptcy Administrator Program. The Center has been assisting the Committee on the Administration of the Bankruptcy System in two projects, the first to develop suggestions to help the Executive Office for United States Trustees improve the United States Trustee Program and the second to explore ways for enhancing the efficiency and effectiveness of the Bankruptcy Administrator Program. For both projects, the Center surveyed bankruptcy judges and clerks; for the first the Center also surveyed chapter 7 and 13 trustees to elicit their suggestions. The Center submitted its report to the Committee in July.

13. Resource Guide for Managing Capital Cases. The Center is preparing a two-part manual to provide guidance on managing capital cases. The first part will cover federal death penalty prosecutions, and the second will discuss state and federal capital habeas cases. The Center has notified the chairs of all Conference committees with an interest in this subject.

14. Death Penalty Law Clerks. At the request of the Ninth and Tenth Circuits and in coordination with this committee, the Center has undertaken a study of the death penalty law clerks allocated to the Ninth and Tenth Circuits. This project is discussed more fully at Agenda Item X.

III. Finding the Center on the J-NET (Judiciary's Internal Website for Information)

The Center now has a server on the J-NET. You can access the Center's server by pointing your Web browser at 156.132.47.230. The server currently has general information about the Center, links to other J-NET servers, and a list of Center publications for downloading. During the next year the Center will be looking for ways to expand information and services offered on the J-NET. Possible new services include a virtual campus and an on-line media catalog for ordering video tapes and other media products. Your suggestions are welcome.

Item 5

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

DATE: November 14, 1997

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

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

Detailed information about the recent and future activities of the Advisory Committee on Appellate Rules can be found in the minutes of the Committee's September 1997 meeting and in the Committee's docket, both of which are attached to this report. At this time, the Advisory Committee is not seeking Standing Committee action on any proposals. I wish to draw the Standing Committee's attention to only three matters:

1. Moratorium on Submission of Rule Changes for Public Comment. As you know, the Advisory Committee recently completed the restylized rules project, which required the Committee to rewrite all of the Federal Rules of Appellate Procedure ("FRAP") in "plain English." The restylized rules were approved by the Standing Committee in June 1997 and by the Judicial Conference in September 1997.

There is a strong consensus on the Advisory Committee that members of the bench and bar should be given an opportunity to become accustomed to the restylized rules before being asked to comment on proposed amendments to those rules. At its September meeting, the Advisory Committee unanimously decided that, barring an emergency, no amendments to FRAP will be forwarded to the Standing Committee until the restylized rules have been in effect for at least a few months. If the restylized rules are approved by the Supreme Court and not blocked by Congress, they will take effect on December 1, 1998. Thus, the Advisory Committee does not anticipate submitting proposed amendments to the Standing Committee until, at the earliest, the Summer 1999 or Winter 2000 meetings of the Standing Committee.

The Advisory Committee will continue to consider and approve proposed amendments to FRAP, and it will continue to inform the Standing Committee of its work through its minutes and reports from its Chair. But rather than submitting each proposed amendment to the Standing Committee after it is approved, the Advisory Committee will present a group of proposed amendments to the Standing Committee sometime after the restylized rules take effect.

2. Amendment to FRAP 31(b). At its September meeting, the Advisory Committee approved an amendment to FRAP 31(b). As currently drafted, (restylized) FRAP 31(b) requires that two copies of every brief "must be served on counsel for each separately represented party." FRAP 31(b) thus seems to imply that briefs need not be served on *unrepresented* parties. The Committee approved an amendment that will clarify that briefs must be served on all parties, including those who are not represented by counsel. For the reasons described above, this amendment will not be submitted to the Standing Committee until sometime after the restylized rules take effect.

3. Uniform Plan for the Publication of Opinions. The Advisory Committee has determined that a principal long-term project will be to consider development of uniform rules concerning:

a. The circumstances (if any) under which a judgment may be entered without opinion.

b. The circumstances (if any) under which a circuit court may designate one of its opinions as unpublished.

c. When (if ever) unpublished opinions may be electronically disseminated (*e.g.*, via Westlaw or LEXIS).

d. The circumstances (if any) under which an unpublished opinion may be cited. And

e. The precedential effect (or lack of precedential effect) of unpublished opinions.

The circuits currently have varying and conflicting rules and practices on these issues. There is substantial sentiment on the Advisory Committee that the time has come to consider whether to develop uniform national rules in all or some of these areas and, if so, what rules would be appropriate.

The Advisory Committee is aware that work on these issues — or at least on closely related issues — is currently being done by two other committees:

i. The Committee on Court Administration and Case Management ("CACM") has been given responsibility for implementing Recommendation 37d of the Long Range Plan for the Federal Courts, which Recommendation states: "Opinions should be restricted to appellate decisions of precedential import. A uniform set of procedures and mechanisms for access to court of appeals opinions, guidelines for publication or distribution, and clear standards for citation should be developed."

ii. The Committee on Automation and Technology ("CAT") reported to the Judicial Conference in September that it was studying the "desirability, feasibility, and cost of establishing a centrally maintained, publicly accessible electronic database of all opinions submitted by federal courts for inclusion in the database."

The work of the Advisory Committee should not overlap with the work of CAT, as CAT is studying the feasibility of establishing a database containing opinions that the federal courts choose to submit, while the Advisory Committee is studying the advisability of establishing uniform rules governing the publication, citation, and precedential effect of appellate opinions. However, both the Advisory Committee's work and CAT's work could overlap with the work of CACM, depending upon how broadly CACM construes Recommendation 37d.

The Advisory Committee believes that its involvement in this issue is important, notwithstanding the work being done by CACM. Traditionally, CACM's focus has been on matters of internal case management, while the Advisory Committee's focus has been on issues more closely related to those listed in paragraphs (a) through (e) above. Moreover, the Advisory Committee has broader representation than CACM, and the Advisory Committee's process, unlike CACM's, is public. That said, the Advisory Committee will of course consult with CACM and strive to avoid duplication of effort.

DRAFT

Minutes of the Fall 1997 Meeting of the
Advisory Committee on Appellate Rules
September 29, 1997
Santa Fe, New Mexico

I. Introductions

Judge Will L. Garwood called the meeting of the Advisory Committee to order on Monday, September 29, 1997, at 8:35 a.m. at the Homewood Suites Hotel in Santa Fe, New Mexico. The following Advisory Committee members were present: Judge James K. Logan, Chief Justice Pascal F. Calogero, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, Mr. Michael J. Meehan, and Mr. Luther T. Munford. Mr. Douglas N. Letter, Appellate Staff, Civil Division, U.S. Department of Justice, was present representing the Acting Solicitor General. Judge Alicemarie H. Stotler, who chairs the Standing Committee, was present, as was Judge Frank H. Easterbrook, the liaison from the Standing Committee. Mr. Patrick J. Fisher, Jr., the liaison from the appellate clerks, and Mr. Charles R. "Fritz" Fulbruge, III, who will replace Mr. Fisher as liaison on October 1, were both present. Also present were Ms. Judy McKenna from the Federal Judicial Center and Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office.

Judge Garwood made a series of announcements: Prof. Mooney, longtime Reporter to the Committee, has been appointed a member of the Committee, and Prof. Patrick J. Schiltz of Notre Dame Law School has been appointed to replace her as Reporter. Mr. Letter has replaced Mr. Robert E. Kopp as the representative of the Acting Solicitor General. Judge Alex Kozinski has resigned from the Committee; his replacement has not yet been appointed. Judge Stanwood R. Duval, Jr., of the Eastern District of Louisiana has been appointed to the Committee, but was unable to attend today's meeting. Judge Phyllis A. Kravitch will replace Judge Easterbrook as the liaison from the Standing Committee, and Mr. Fulbruge will replace Mr. Fisher as the liaison from the appellate clerks.

Judge Logan explained that he technically remains Chair of the Advisory Committee until October 1, when Judge Garwood's appointment as Chair becomes effective. However, Judge Logan asked Judge Garwood to preside at today's meeting because the focus of the meeting will be to set priorities for Judge Garwood's tenure.

II. Approval of Minutes of April 1997 Meeting

The minutes of the April 1997 meeting were approved, with one correction: The first sentence of the last full paragraph on page 3 was in err in stating that, "[i]n Rule 4(a)(5)(A)(i), the Committee approved changing 'not later than' to 'within.'" In fact, the Committee approved changing "within" to "not later than."

III. Report on Actions of Standing Committee (6/97) and Judicial Conference (9/97)

Judge Logan reported that, at its June 1997 meeting, the Standing Committee approved the restylized rules and accompanying advisory committee notes ("ACNs"), with one exception: The Standing Committee deleted the sentence in the ACN to FRAP 35 that had urged the Supreme Court to delete the last sentence of Supreme Court Rule 13.3. Judge Logan further reported that neither the Executive Committee of the Judicial Conference nor any member of the Conference had placed the restylized rules on the discussion calendar for the Conference's September 1997 meeting. Thus, the rules were deemed to be submitted to the Supreme Court with the Conference's unanimous approval.

Mr. Rabiej stated that the Administrative Office was in the process of proofreading the restylized rules carefully and would submit them to the Supreme Court within three to four weeks. Judge Garwood asked that each member of the Advisory Committee be provided with a copy of the version of the restylized rules that is submitted to the Supreme Court.

IV. Moratorium on Submission of New Changes for Public Comment

Judge Garwood suggested that the Committee should give the bench and bar a chance to become familiar with the restylized rules before publishing proposed changes to those rules. He recommended that the Committee continue to send proposed amendments to the Standing Committee, but ask the Standing Committee not to publish them for comment until sometime after December 1, 1998, when the restylized rules will take effect (if approved by the Supreme Court and not blocked by Congress).

Judge Logan agreed and stated that changes to the rules should not even be submitted to the Standing Committee before 1999, unless there was an urgent need for a change. He suggested that the Advisory Committee continue to consider and approve amendments, but that the amendments be held back and then presented as a group to the Standing Committee sometime after the restylized rules take effect.

Judge Easterbrook agreed with Judge Logan. He stated that there is substantial sentiment within the Standing Committee that the bench and bar deserve a "period of reticence" in which they can grow accustomed to the new rules and be spared yet another round of amendments. Judge Stotler agreed with Judge Easterbrook and Judge Logan and strongly recommended that amendments to FRAP not be forwarded to the Standing Committee, but instead be forwarded as a group sometime after the restylized rules take effect.

After further discussion, the Advisory Committee reached a consensus that, barring an emergency, no amendments to FRAP will be forwarded to the Standing Committee until after the restylized rules have been in effect for at least a few months. However, the Standing Committee will continue to be informed of the work of the Advisory Committee through the Committee's minutes and reports from Judge Garwood.

V. Presentation on Electronic Filing Technology

Judge Garwood announced that, immediately after lunch, a demonstration of electronic filing technology would be presented.

VI. Action Items

A. Item No. 97-15: Amend FRAP 40(a)(1) to provide that a petition for rehearing in a criminal case in which the United States is a party must be filed within 45 days.

FRAP 40(a)(1) generally requires that a petition for panel rehearing be filed within 14 days after entry of judgment. In 1994, at the request of the Solicitor General ("S.G."), the Rule was amended to lengthen the time for filing a rehearing petition to 45 days in *civil* cases in which the United States is a party. (Under FRAP 35(c), these same deadlines apply to petitions for rehearing en banc.) The S.G. now requests that the Rule be amended again so that the deadline is extended to 45 days in *any* case — civil or criminal — in which the United States is a party.

A member questioned the need for the change. He noted that the government brings an appeal in only a very small percentage of criminal cases, that the government loses very few of those appeals, and that, even when the government loses, the legal issues are rarely worthy of en banc consideration. In the rare case in which the issues are important, the government can seek an extension of time within which to file a rehearing petition. In the member's experience, those requests are virtually always granted.

Mr. Letter replied that, although the percentage of criminal cases in which the government brings and loses an appeal is small, the total number of such cases is still substantial, and in those cases it is difficult for the S.G.'s office to decide whether to petition for rehearing within 14 days. Often, the S.G. is not even informed of a decision until three or four days after it is issued, and often, in "the heat of the moment," the losing U.S. Attorney pressures the S.G. to file a rehearing petition. Extending the 14 day period would ensure that there was enough time for cooler heads to prevail and for the S.G. to give careful consideration to the matter, without having to burden the court with a potentially needless motion for an extension. Also, Mr. Letter reported, when it is clear that the issue is worthy of en banc consideration, the S.G. is reluctant to gamble on getting an extension, and thus the rehearing petition must be hastily prepared.

Several members of the Committee expressed concern about the degree to which the S.G.'s proposal would burden the system. There was substantial sentiment on the Committee that the deadline for filing a rehearing petition should be "symmetrical" — that is, identical for the government and the defendant. Thus, agreeing to the S.G.'s request would mean that every one of the thousands of criminal defendants who lose appeals each year would get 45 days to petition for rehearing. One member predicted that such an extension would result in more and lengthier rehearing petitions. Other members pointed out the cost to the system of delaying the

mandates in all criminal cases for an additional 31 days. One possible cost would be an increase in motions to expedite the issuance of mandates.

Mr. Letter asked whether extending the 14 day deadline to 21 days would be more acceptable to the Committee. In response, Mr. Letter was asked whether the S.G. would accept a universal 21 day deadline that would apply to all parties in all cases, civil and criminal. Mr. Letter replied that a 21 day deadline in civil cases would cause significant hardship for the S.G.'s office. In criminal cases, generally only the responsible U.S. Attorney and perhaps one or two other agencies need to be consulted about a potential rehearing petition. In civil cases, though, a half dozen or more agencies may have to be consulted.

Several members of the Committee wondered why the S.G., after operating successfully under the 14 day deadline for many years, was now seeking an extension. What has changed? Mr. Letter pointed to the large number of appeals created by the enactment of the sentencing guidelines. A member responded that most of the major issues raised by the sentencing guidelines have been decided, and that few sentencing guideline cases today present issues worthy of en banc consideration.

A member moved that FRAP 40 be retained as presently written. The motion was seconded. The motion carried (6-1).

B. Item No. 97-21: Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."

FRAP 31(b) provides that "[t]wenty-five copies of each brief must be filed with the clerk and 2 copies must be served on counsel for each separately represented party." Oddly, FRAP 31(b) does not require service of briefs on *un*represented parties. A member of the Advisory Committee noted this omission at the Committee's April 1997 meeting, and the Committee added the matter to its study agenda.

The Committee considered the following amendment and ACN:

Rule 31. Serving and Filing Briefs

(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

Advisory Committee Note

Subdivision (b). In requiring that two copies of each brief "must be served on counsel for each separately represented party," Rule 31(b) may be read to imply that copies of briefs need not be served on unrepresented parties. The Rule has been amended to clarify that briefs must be served on all parties, including those who are not represented by counsel. The courts of appeals have authority under the last sentence of the Rule to provide by local rule or by order that briefs need be served on only one of two or more unrepresented parties who are proceeding jointly. For example, a local rule might provide that when two unrepresented appellants have filed a joint notice of appeal and a joint brief, the brief of the appellee need only be served on one of them.

Several members expressed concern about the last two sentences of the draft ACN. One member noted that in suggesting that one pro se litigant could serve as the legal representative of another, the sentences appeared to be encouraging the unauthorized practice of law. Judge Easterbrook also pointed out that any ACN that encourages further disparity in local rules will be a "red flag" for the Standing Committee.

A member moved that the amendment and all of the ACN except the last two sentences be approved. The motion was seconded. The motion carried (unanimously).

Judge Garwood noted that, pursuant to the Advisory Committee's new policy, the amendment would not be forwarded to the Standing Committee until sometime after the restylized rules take effect.

VII. Discussion Items

A. Removal from Table of Agenda Items of Proposals Upon Which Advisory Committee, Standing Committee, and Judicial Conference Action is Completed

Judge Garwood asked that the 14 items listed under § VII(A) of the agenda be removed from the Table of Agenda Items. These are items upon which the Advisory Committee, Standing Committee, and Judicial Conference have all completed action.

A member moved that Nos. 89-5, 90-1, 91-4, 91-9, 91-24, 91-25, 91-28, 92-4, 93-3, 93-4, 93-5, 93-6, 95-9, and 96-1 be removed from the Table of Agenda Items. The motion was seconded. The motion carried (unanimously).

B. Removal from Table of Agenda Items of Proposals That Have Been Withdrawn or Made Moot By Pending Rule Changes

Judge Garwood asked that the two items listed under § VII(B) of the agenda be removed from the Table of Agenda Items. No. 92-11, regarding the requirement of some courts of appeals that government attorneys join their bars before appearing before them, was withdrawn by the S.G. No. 97-17, a proposal that FRAP 4 be amended to provide that the 10 day deadline for filing a "tolling" FRCP 60 motion be calculated pursuant to FRCP 6(a) rather than pursuant to FRAP 26(a), has been implemented in the restylized rules.

A member moved that Nos. 92-11 and 97-17 be removed from the Table of Agenda Items. The motion was seconded. The motion carried (unanimously).

The Committee took a 15 minute break.

C. Prioritization of Other Proposals on Table of Agenda Items

The Reporter informed the Committee that there were 40 proposals on the Table of Agenda items that had received little or no Committee attention and nine more proposals that had been received by Judge Garwood after the Agenda Book had been distributed. Those nine proposals come from the Methods Analysis Program's appellate working group and were conveyed in a September 15, 1997 letter to Mr. McCabe from Mr. Fisher. Copies of Mr. Fisher's letter were distributed to the Committee. Mr. Fisher stated that the working group was not seeking immediate action, but merely asking that its proposals be put on the Advisory Committee's study agenda for discussion at a future meeting. Judge Garwood indicated that the proposals would receive initial discussion at the Committee's Spring 1998 meeting.

Judge Garwood stated that, unless there were any objections, he would lead the Committee through each of the 40 proposals remaining on the study agenda and ask the Committee to decide whether each item should remain on the agenda and, if so, what priority the item should receive.

1. Item No. 91-3: Final decision by rule/expanding interlocutory appeal by rule.

In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to "define [by rule] when a ruling of a district court is final for the purposes of appeal under section 1291 [of title 28]." 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the Rules Enabling Act process to promulgate rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [in § 1292]." 28 U.S.C. § 1292(e). The Advisory Committee on the Civil Rules was the first to take advantage of this new authority; it proposed, and the Judicial Conference approved and forwarded to the Supreme Court, new FRCP 23(f), which permits

discretionary appeals from district court orders granting or denying class action certification. New FRAP 5 was drafted to accommodate such appeals, and any other interlocutory appeals that might be authorized in the future. The question for the Advisory Committee is whether it wants to go further and use the authority provided in §§ 2072(c) and 1292(e) to define in FRAP the circumstances under which district court orders will be considered final and/or the circumstances under which interlocutory appeals will be permitted.

At Judge Garwood's invitation, the Reporter informed the Committee of the following:

> Sections 2072(c) and 1292(e) resulted from a suggestion made by Prof. Thomas D. Rowe, Jr., a member of the Federal Courts Study Committee. In April 1991, Judge Kenneth F. Ripple, who then chaired the Advisory Committee, wrote to Prof. Rowe and asked him exactly what he had in mind in suggesting the amendments to §§ 2072 and 1292. Prof. Rowe replied that he did not have any specific problems in mind; he merely thought that when specific problems did arise, the Advisory Committee, Standing Committee, and Judicial Conference would have "an especially valuable additional perspective to bring to the process." Prof. Rowe cautioned, though, that his "suggestion was truly procedural in the most contentless sense of the word." His view was that, if the Advisory Committee had ideas for improving the law, great; if not, "no harm done."
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> In January 1993, Judge Ripple wrote to the chief judges of all of the courts of appeals and to the S.G., and asked for suggestions about how the Advisory Committee might use its authority under §§ 2072(c) and 1292(e). Mr. Rabiej's recollection is that virtually all of the chief judges responded, and that they were overwhelmingly opposed to the Committee using its newly granted authority to broadly define in FRAP the circumstances under which district court orders will be considered final and/or the circumstances under which interlocutory appeals will be permitted. However, the only documentation of the responses to Judge Ripple's request that can be located today are copies of letters that Judge Ripple received from the Fifth, Sixth, Tenth, and District of Columbia circuits. Those letters are consistent with Mr. Rabiej's recollection. Also, according to the minutes of the Committee's April 1993 meeting, the S.G. told Judge Ripple that he "hope[d] that the Committee would not take an activist role simply because the authority had been granted."

After the Reporter conveyed this information, the Advisory Committee discussed the question of whether No. 91-3 should remain on its agenda. Several members expressed agreement with Prof. Rowe's suggestion that, in the future, specific problems relating to finality or interlocutory appeals might be productively addressed through the Rules Enabling Act process. However, at this point, the only question before the Committee was whether it should attempt to write into FRAP a broad "restatement" of the law of finality or interlocutory appeals. The consensus of the Committee was that attempting such a codification would be

extraordinarily difficult and time-consuming, and thus that No. 91-3 should be removed from the study agenda.

A member moved that No. 91-3 be removed from the study agenda, without prejudice to any future proposals requesting the Committee to use its authority under §§ 2072(c) or 1292(e) to address specific problems. The motion was seconded. The motion carried (unanimously).

A member asked that the minutes reflect that the Committee's decision should in no way be interpreted as reflecting reluctance to use its authority under §§ 2072(c) and 1292(e) to address specific problems that are brought to its attention, as it did in rewriting FRAP 5 to accommodate the interlocutory appeals that will be authorized by new FRCP 23(f). At this point, however, no such specific proposals were before the Committee.

2. Item No. 95-8: Does FRAP 4(a)(7) repeal collateral order doctrine?

The Committee next considered No. 95-8, as it is related to No. 91-3.

No. 95-8 was placed on the Committee's study agenda by Mr. Munford, who is concerned that FRAP 4(a)(7) may be read to effectively repeal the collateral order doctrine. FRAP 4(a)(1)(A) generally provides that, in a civil case, a notice of appeal "must be filed . . . within 30 days after the judgment or order appealed from is entered." FRAP 4(a)(7) then provides that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Mr. Munford explained that the source of his concern is the phrase "entered in compliance with Rule[] 58." Some orders that traditionally have been appealable under the collateral order doctrine are not, in fact, "entered in compliance with Rule[] 58."

A member said that he did not share Mr. Munford's concern, as, to his knowledge, orders have continued to be appealed under the collateral order doctrine notwithstanding the language in FRAP 4(a)(7) upon which Mr. Munford focuses. Judge Easterbrook agreed and referred to a unanimous decision that he wrote for the en banc Seventh Circuit that accepted as uncontroversial the proposition that FRAP 4(a)(7) does not affect the collateral order doctrine.[1] Mr. Munford replied that he is aware of at least one Fifth Circuit case to the contrary.

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[1] *Otis v. City of Chicago*, 29 F.3d 1159, 1165 (7th Cir. 1994) (en banc) ("[W]e know from *Mallis* [*Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978)] and *Schaefer* [*Shalala v. Schaefer*, 509 U.S. 292 (1993)] that a Rule 58 judgment is not the *sine qua non* of appeal. It has been clear since *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), that § 1291 permits appeals from final 'decisions' that are not final 'judgments.' See also *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995-96 (1994).").

A member moved that No. 95-8 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

Judge Garwood asked Mr. Munford to draft a proposed amendment to FRAP 4 that would address his concern. Mr. Munford agreed.

3. Item No. 91-17: Uniform plan for publication of opinions.

In its 1990 report, the Federal Courts Study Committee recommended to the Judicial Conference that it appoint an ad hoc committee to develop uniform guidelines regarding the practice of the courts of appeals of designating certain opinions as "unpublished." In 1991, the Judicial Conference considered but declined to follow the FCSC recommendation. The question for the Advisory Committee is whether it wishes to pursue this issue, notwithstanding the lack of interest expressed by the Judicial Conference six years ago.

A member said that he favored retaining this issue on the study agenda. He said that rules governing unpublished opinions ought to be uniform. He also expressed concern that current practice favors wealthy lawyers and clients, who can afford to retrieve unpublished opinions through Westlaw and LEXIS.

Another member agreed that the Committee ought to look at this issue. He thought it quite possible that, given the technological developments of the past few years and the turnover in the membership of the Judicial Conference, the Conference might have more interest in the issue today than it did in 1991.

Another member said that at least two issues were before the Committee: First, should FRAP be amended to require that all opinions be published? Second, if not, should FRAP be amended to impose uniform rules regarding the citation and precedential effect of unpublished opinions? The member described how his circuit has struggled with these issues.

Judge Easterbrook essentially agreed, although he said that phrasing the first issue in terms of whether an opinion should be "published" is anachronistic. In years past, talking about "publishing" opinions made sense, as, roughly speaking, what was published was what was available to the bar. Westlaw and LEXIS have changed that; whether or not they are "published," judicial opinions find their way into the Westlaw and LEXIS databases and become available to the bar. The real issue, Judge Easterbrook said, is not which opinions should be "published," but rather which opinions should be cited, and which opinions should be regarded as precedential — that is, as binding on subsequent panels.

A member argued that uniform rules are badly needed. He said that the varying and conflicting local rules of the circuits create a hardship for government attorneys and other attorneys with national practices.

Mr. Rabiej reported that, in 1995, the Judicial Conference approved a Long Range Plan for the Federal Courts. Recommendation 37d of that plan is a proposal to develop uniform rules regarding the publication of opinions. That item was assigned to the Committee on Court Administration and Case Management ("CACM"). CACM has subsequently appointed a subcommittee to work on the issue. Mr. Rabiej said that CACM does not have "exclusive" jurisdiction — *i.e.*, the assignment of the issue to CACM does not preclude the Advisory Committee from also taking up the issue — but the Advisory Committee should try to avoid duplicating CACM's efforts.

A member said that he thought that the Advisory Committee ought to take up the issue, notwithstanding the assignment to CACM. He noted that the composition of CACM is considerably different from that of the Advisory Committee. He also thought it important that the Committee solicit the views of the chief judges of the circuits on this issue.

Judge Easterbrook said that the Committee should study the practice of affirming district court judgments without *any* opinion at the same time that it studies the question whether unpublished opinions should be cited or have precedential effect. A member disagreed, stating that the question of whether an opinion of some kind should be required in every case can be separated from the question of whether opinions that are issued can be cited or are precedential.

A member said that, while he would have no objection to amending FRAP to address which opinions may be *cited*, he was concerned that the question of which opinions are *precedential* is substantive and thus beyond the Committee's authority. Another member disagreed, pointing to the fact that local rules already govern both issues.

Ms. McKenna warned that, in studying this issue, it is important to go beyond what the local rules of each circuit say, and examine how unpublished opinions are treated in practice. Ms. McKenna said that the practice of some circuits is inconsistent with their rules. Ms. McKenna also pointed out that three or four circuits do not provide their unpublished opinions to Westlaw and LEXIS for inclusion in their databases. Finally, Ms. McKenna said that, although a lot of work was already underway on this issue as a result of the assignment of Recommendation 37d to CACM, she hoped that the Advisory Committee would also get involved.

A member said that Recommendation 37d seemed to him to be addressed mainly to the availability of unpublished opinions, and not to the question of whether unpublished opinions can be cited and/or treated as precedential.

Mr. McCabe agreed with Ms. McKenna that the Advisory Committee had a valuable role to play in studying this issue, notwithstanding the involvement of CACM. CACM is primarily devoted to addressing matters of internal case management, whereas the Advisory Committee addresses more fundamental policy issues. Moreover, the Advisory Committee has broader representation that CACM, and the Advisory Committee's process is public.

Judge Garwood stated that he intended to appoint a subcommittee of the Advisory Committee to address this issue, and that he would ask the subcommittee to work with CACM's subcommittee to try to avoid duplication.

Judge Stotler reinforced the notion that the Advisory Committee's subcommittee should be careful to avoid duplicating work being done by others. She pointed out that the Judicial Conference is also considering the ABA's uniform citation proposal and is attempting to establish a universal database containing all opinions — published and unpublished — of all federal courts.[2]

Judge Garwood said that he did not think any of the judges on the Fifth Circuit read any of the court's unpublished opinions. Indeed, unpublished opinions, unlike published opinions, are not even circulated to the court. Judge Logan reported that the practice of the Tenth Circuit is different. Until he took senior status, Judge Logan received and read the unpublished opinions of his court.

Mr. Fulbruge reported that, during the year ended June 30, 1997, the Fifth Circuit issued roughly 500 published opinions and 2700 unpublished opinions. He agreed with Judge Garwood that no Fifth Circuit judge could possibly read all of the court's unpublished opinions.

Ms. McKenna said that the circuits differ: In some, unpublished opinions are not circulated to the court, and thus are presumably not read by the judges. In others, the unpublished opinions are circulated and, presumably, read.

A member of the Committee pointed out that state courts are also confronting this issue. In some states, only 10 to 15 percent of the court's opinions are published. Thus, with respect to many issues, the only way that a practitioner can get a sense of the court's recent thinking is to read the court's unpublished opinions.

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[2]Judge Stotler clarified this comment in an October 6, 1997 memorandum to Judge Garwood. Judge Stotler reported that while CACM "is generally charged with carrying out Long Range Plan Recommendation 37d," the Committee on Automation and Technology ("CAT") is specifically charged with studying the "desirability, feasibility, and cost of establishing a centrally maintained, publicly accessible electronic database of all opinions submitted by federal courts for inclusion in the database." Judge Stotler stated that the Advisory Committee's work should not overlap with CAT's, as CAT is studying the feasibility of establishing a database containing opinions that the federal courts choose to submit, while the Advisory Committee is studying the advisability of establishing uniform rules governing the publication, citation, and precedential value of appellate opinions. However, the Advisory Committee's work could overlap with CACM's, depending upon how broadly CACM construes Recommendation 37d.

Chief Justice Calogero described the practice of the Louisiana courts. The Supreme Court publishes all of its opinions, although some are very brief. The Court of Appeals does not publish all of its opinions. Chief Justice Calogero said that he understands the need for being able to issue unpublished opinions, but he is concerned that judges sometimes use the option of designating opinions as unpublished as a "crutch" to avoid coming to grips with difficult issues.

A member moved that No. 91-17 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

4. Item No. 95-1: Amend FRCP 23 so class members do not need to intervene to appeal.

There is a sharp split in authority over whether an absent class member who has appeared before the district court and objected to a proposed class action settlement must formally intervene as a party in order to have standing to appeal a judgment approving the settlement to which she objected. Some circuits hold that such intervention is necessary, while others hold that it is not. A commentator has urged that FRCP 23(e) be amended to provide that no such intervention is necessary. If such an amendment is adopted, the commentator suggests that a "conforming amendment" to FRAP "may also be appropriate."

A member stated that, in his view, this is a "substantive" matter that should not be addressed in FRAP.

Mr. Rabiej reported that this proposal was considered by the Advisory Committee on Civil Rules, and that the Committee had decided not to act upon it.

A member stated that any action on this proposal should first come from the Advisory Committee on Civil Rules. Another member agreed. He stated that the problem may be that FRCP 23, as presently worded, misleads absent class members into believing that intervention is not necessary, but fixing FRCP 23 is obviously not the responsibility of this Advisory Committee.

A member moved that No. 95-1 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

5. Item No. 95-2: Amend FRAP 3 & 24 re: denial of in forma pauperis status.

Two commentators complain that the United States District Court for the Western District of Tennessee often denies permission to proceed on appeal IFP in the same order in which it denies the relief sought by the plaintiff. This triggers two 30 day deadlines: The deadline in FRAP 4(a)(1) to file a notice of appeal, and the deadline in FRAP 24(a)(5) to move in the court of appeals for permission to proceed IFP. Although the former deadline can be

extended by the district court for excusable neglect or good cause (FRAP 4(a)(5)(A)) and "tolled" by the filing of one of the motions listed in FRAP 4(a)(4)(A), the latter cannot, putting the litigant in the awkward position of having to petition for permission to proceed on appeal IFP before the litigant even knows whether he will be appealing.

A member stated that, to his knowledge, this problem had not been experienced outside the Western District of Tennessee, and thus was not worth the Committee's attention. Another member agreed, pointing out that FRAP 24(a)(5) states that, after the district court denies leave to proceed on appeal IFP, the litigant "*may*" seek permission to proceed IFP from the court of appeals within 30 days, not that the litigant *must* do so. The member further noted that, in cases in which an appellant has proceeded IFP in the district court, his court treats the appeal from the merits as an automatic application for permission to proceed IFP on appeal.

Mr. Fisher speculated that this problem may be unique to the Sixth Circuit. He said that, to his knowledge, all other circuits read FRAP 24(a)(5) as had been suggested and permit a litigant to seek permission to proceed on appeal IFP more than 30 days after being informed of the denial of his motion by the district court.

A member moved that No. 95-2 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

6. Item No. 95-3: Amend FRAP 15(f) to conform to recent amendments to FRAP 4(a)(4).

FRAP 4(a)(4)(A) provides that if a party timely files in the district court any of several specified motions — *e.g.*, a motion for a new trial under FRCP 59 — "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." FRAP 4(a)(4)(B)(i) further provides that if a party files a notice of appeal after the court announces or enters its judgment, but before the court disposes of any of the motions listed in FRAP 4(a)(4)(A), "the notice becomes effective . . . when the order disposing of the last such remaining motion is entered."

Judge Stephen Williams of the D.C. Circuit has proposed that FRAP 15 be amended so that petitions to review or applications to enforce agency orders are treated the same as appeals from district court orders. First, Judge Williams suggests that FRAP 15 be amended so that if a party moves an agency to rehear, reopen, or reconsider an order, the time to file a petition to review or application to enforce that order would not begin to run until the agency disposes of the last such motion outstanding. Second, Judge Williams suggests that FRAP 15 be amended so that a petition to review or application to enforce an agency order that is filed after the order has been entered or announced, but before the agency has disposed of any motions to rehear, reopen, or reconsider the order, would become effective when the agency disposes of the last such petition outstanding.

Mr. Letter stated that, although the S.G. does not have any objection to the Committee studying Judge Williams' proposal, the S.G. was skeptical that FRAP could be amended to achieve what Judge Williams suggests. Mr. Letter further stated that Judge Williams has himself "backed off" his proposal. The problem is that agencies have widely differing rules regarding petitions to rehear, reopen, or reconsider. Some of those rules are internal, and others are imposed by statute. Amending FRAP in the manner suggested by Judge Williams would be nearly impossible and might exceed the Committee's powers under the Rules Enabling Act.

A member suggested that Judge Williams' two proposals could be separated. He agreed that Judge Williams' first proposal — essentially defining in FRAP when an agency action is final for purposes of appeal — should be dropped. He pointed out, though, that there may be some value in studying Judge Williams' second proposal. FRAP could provide that when a petition for review of an agency action is filed, and then a motion is made before the agency which motion has the legal effect of rendering the action unappealable because of lack of finality, the petition for review will be deemed effective after the agency disposes of the "finality-blocking" motion. In other words, FRAP 15 might be amended to conform to FRAP 4(a)(4)(B)(i), even if it cannot be amended to conform to FRAP 4(a)(4)(A).

A member agreed with this suggestion, but stated that, before the Committee takes any action on Judge Williams' second proposal, it should study how much of a "trap" currently exists for attorneys involved in agency practice. The member reminded the Committee that FRAP 4(a)(4)(B)(i) was necessary to remove a trap that FRAP itself created. (See the ACN to the 1993 amendment to FRAP 4(a)(4).) FRAP does not create a similar trap with respect to petitions to review agency action.

A member moved that the first of Judge Williams' two suggestions — amending FRAP 15 to define finality in agency proceedings similar to the manner in which FRAP 4(a)(4)(A) defines finality in district court proceedings — be removed from the study agenda, but that the second of Judge Williams' two suggestions — amending FRAP 15 so that premature petitions to review agency actions are treated the same as premature notices of appeal under FRAP 4(a)(4)(B)(i) — be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

7. Item No. 95-4: Amend computation of time to conform to FRCP method.

8. Item No. 97-1: Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a).

These two proposals are identical. The Federal Rules of *Civil* Procedure compute time differently than the Federal Rules of *Appellate* Procedure. FRCP 6(a) provides that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

FRAP 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under FRCP than they are under FRAP, creating a trap for unwary litigants. The question before the Committee is whether FRAP 26(a)(2) should be amended to remove this trap.

Judge Easterbrook pointed out that there are actually three different methods of calculating time: The appellate rules method, the civil rules method (which is identical to the criminal rules method), and the bankruptcy rules method (which differs from both the appellate rules method and the civil/criminal rules method). He stated that the Standing Committee should adopt a uniform method of calculating deadlines that would apply in all four sets of rules — preferably, a rule that said that "all days count," except that, when the last day of a time period falls on a Saturday, Sunday, or legal holiday, the deadline moves ahead to the next working day.

One member expressed his support for amending FRAP 26(a)(2), so that at least the appellate, civil, and criminal rules would be uniform on this point. Another member agreed.

A member moved that Nos. 95-4 and 97-1 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

9. Item No. 95-5: Amend FRAP 32 to require submission of digitally readable copy of brief, when available.

No. 95-5 comes from Judge Easterbrook, who has suggested amending FRAP 32 to require counsel to file one copy of each brief on digital media — that is, on a computer disk — and to serve a copy of the disk on each party. This would permit judges with impaired vision to enlarge the text and all judges to search the text for particular words or citations.

Judge Easterbrook reported that the Seventh Circuit amended its local rules to implement this change. Counsel appearing before the Seventh Circuit must now file both a paper copy and an electronic copy of their briefs, and must serve both a paper copy and an electronic copy on the other parties. This rule applies only if the brief was prepared on computer; if not, filing and service of paper copies is sufficient. Judge Easterbrook said that a number of the judges on the Seventh Circuit are pleased with the change, particularly because they no longer have to carry around stacks of briefs, but instead can carry briefs on disk or in their laptop computers.

Judge Easterbrook expressed the hope that the Advisory Committee would not read his suggestion narrowly. He pointed out that, by the time that FRAP can be amended to require the filing and service of briefs on disk, it might already be clear that putting briefs on CD-ROM or filing and serving briefs through the Internet would be preferable.

Judge Garwood said that he supported keeping No. 95-5 on the study agenda, but that he would like to survey the chief judges and circuit clerks about the proposal before taking any action.

Mr. Fulbruge said that the Fifth Circuit now requests — but does not require — attorneys to provide the court with electronic copies of their briefs. He said that the Fifth Circuit has found it extremely helpful to receive briefs on disk; it makes information management much easier for the clerk's office and for the staff attorneys.

A member moved that No. 95-5 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

The Committee broke for lunch at 12:00 noon. At 1:45 p.m., the Committee reconvened and watched a brief demonstration of electronic filing technology. The Committee then returned to the task of paring and prioritizing its study agenda.

10. Item No. 95-6: Amend FRAP 3(d) & 15(c) to require appellant/ petitioner to serve copies of notice of appeal.

FRAP 3(d)(1) requires that notice of the filing of a notice of appeal must be given by the district clerk, rather than by the party who files it. Likewise, FRAP 15(c) requires that notice of the filing of a petition for review or application for enforcement of an agency order must be given by the circuit clerk, rather than by the filing party. The question for the Advisory Committee is whether FRAP should be amended to require service by the filing party instead of by the clerk.

Several members briefly expressed satisfaction with the manner in which the rules currently operate. No member spoke in favor of the proposal.

A member moved that No. 95-6 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

11. Item No. 95-7: Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.

12. Item No. 97-2: Amend FRAP 4(a)(5) — standard for granting extension in first 30 days different than in second 30 days.

These two proposals are identical. On its face, FRAP 4(a)(5) permits a district court to extend the time to file a notice of appeal if two conditions are met: (1) First, a party must move for an extension "no later than 30 days after the time prescribed by this Rule 4(a) expires." FRAP 4(a)(5)(A)(i). In general, FRAP 4(a) requires a notice of appeal in a civil case to be filed within 30 days (60 days if the United States is a party) after the judgment or order appealed from

is entered. (2) Second, a party must "show[] excusable neglect or good cause." FRAP 4(a)(5)(A)(ii).

With one exception, FRAP 4(a)(5) does not distinguish between the "original" 30 day period — that is, the 30 days following entry of the judgment or order — and the "second" 30 day period — that is, the 30 days following expiration of the original deadline for filing a notice of appeal. (The exception is that a motion to extend the time to file a notice of appeal may be heard ex parte if it is filed during the original 30 day period, but only upon notice to the other parties if it is not filed until the second 30 day period.) Thus, the Rule seems to provide that a district court may grant a motion for an extension — regardless of whether it is filed during the original or second 30 day period — if the movant shows *either* excusable neglect *or* good cause.

Almost all of the courts of appeals do not interpret the Rule in this manner. Rather, the courts have distinguished between motions made during the original 30 day period and those made during the second 30 day period, holding that the "good cause" standard applies to the former, while the "excusable neglect" standard applies to the latter. *See, e.g.*, *Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from seven other circuits). In making this distinction, these courts have relied heavily upon the ACN to the 1979 Amendment to FRAP 4(a)(5), which provides in relevant part:

> The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b), seems to be more appropriate.

The First Circuit does not follow the majority rule. It holds that whether a motion for an extension is examined under the "excusable neglect" or "good cause" standard depends not upon *when* the motion was filed, but upon whether the reason given for requesting the extension involves neglect on the part of the movant. If it does, then the "excusable neglect" standard applies. If it does not — as would be the case, for example, if the original notice of appeal was not timely filed because of a mistake made by the Postal Service — then the "good cause" standard applies. *See Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 453 (1st Cir. 1995).

Mr. Munford has suggested that FRAP 4(a)(5) be amended to resolve this circuit split.

The Reporter called the Committee's attention to restylized FRAP 4(b)(4) — the criminal counterpart to FRAP 4(a)(5). FRAP 4(b)(4) clearly provides that the "excusable neglect" standard can be applied either "before or after the time has expired," and that the "good cause"

standard can likewise be applied "before or after the time has expired." The ACN to restylized FRAP 4(b)(4) confirms that the Rule "does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired. The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do so . . . ." Thus, there is a bit of a "conflict" between the majority construction of FRAP 4(a)(5) and restylized FRAP 4(b)(4).

A member noted that the majority construction of FRAP 4(a)(5) seems inconsistent with the language of the Rule, and that the source of the discrepancy appears to be the 1979 ACN. But, the member said, Wright & Miller report the following:

> As originally drafted, the Rule allowed an extension on a showing of good cause only if the motion was filed during the original appeal time. The Note of the Advisory Committee to that earlier draft stated that only excusable neglect would justify an extension on motion filed after expiration of the original time. The text of the Rule was changed, but the Note was not changed.

16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148 (1996).

One member said that he favored amending FRAP 4(a)(5) to read more like FRAP 4(b)(4) and thus to make clear that either the "excusable neglect" or "good cause" standard can be applied at any time. Another member said that the wording of FRAP 4(b)(4) reflected an intentional decision by the Committee that, in the criminal context, either standard can be applied at either stage.

Another member said that he did not have a strong view on the matter, but that, if the Committee was comfortable with the majority interpretation of FRAP 4(a)(5), then the Rule should be amended to give fair warning to litigants. As written, the Rule does not suggest that the standard applied after expiration of the original period will be tougher than that applied before expiration, as most circuits have held.

One member asked whether the 1979 ACN could be "amended." Several members expressed the view that it could not.

A member moved that Nos. 95-7 and 96-2 be retained on the study agenda with low priority, and that No. 97-2 (which is identical to No. 95-7) be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

13. Item No. 96-2: Amend FRAP 4(b) so that an extension of time to file a notice of appeal can be granted in a criminal case even without excusable neglect.

Under FRAP 4(b)(1)(A), a defendant in a criminal case must file a notice of appeal within 10 days after entry of judgment against him. The district court may extend the deadline, but only "[u]pon a finding of excusable neglect or good cause." FRAP 4(b)(4). In *United States v. Marbley*, 81 F.3d 51, 53 (7th Cir. 1996), Judge Posner expressed dissatisfaction with FRAP 4(b), describing it as "ripe for reexamination," and suggesting that "[i]t might be better to permit untimely appeals in any criminal case in which the district judge and the court of appeals agreed that the appeal should be heard." Judge Posner pointed out that "today the right of a criminal defendant to appeal is considered so fundamental that the usual consequence of an inexcusable failure to perfect the appeal is merely to have the appeal heard later through the Sixth Amendment route." Judge Posner communicated his displeasure with FRAP 4(b) to Judge Logan, and Judge Logan put Judge Posner's suggestion on the study agenda.

No. 96-2 was not separately discussed by the Committee, except that one member made a brief comment in support of it during the discussion of Nos. 95-7 and 97-2 (to which No. 96-2 is related). As noted above, at the same time that a motion was made with respect to Nos. 95-7 and 97-2, it was also moved that No. 96-2 be retained on the study agenda with low priority. That motion was seconded, and it carried (unanimously).

14. Item No. 96-3: Add presumption against oral argument for all matters other than the substance of the appeal (in FRAP 34?).

A member stated that this suggestion was his, that he had thought better of it, and that he now moved that No. 96-3 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

15. Item No. 97-3: Amend FRAP 6 to require service of statement of issues on all parties not just on appellee.

FRAP 6(b)(2)(B)(i) requires that, in a bankruptcy case, the appellant must file with the clerk possessing the record and "serve on the appellee" a statement of the issues that the appellant intends to pursue on appeal and a designation of the parts of the record to be sent to the appellate court. A commentator asks why the appellant should not be required to serve the statement of issues and record designation on *all* parties. And the commentator asks a similar question about FRAP 6(b)(2)(B)(ii), which requires an appellee who wishes to designate additional parts of the record to be sent to the appellate court to serve that designation only "on the appellant."

The Reporter informed the Committee that he had received a call from Prof. Alan N. Resnick, the Reporter to the Advisory Committee on the Bankruptcy Rules. Prof. Resnick explained that this "discrepancy" was intentional: Bankruptcy proceedings can involve hundreds or even thousands of "parties," but an appeal from an order entered in such a proceeding may involve only a couple of those parties. Prof. Resnick said that FRAP 6(b)(2)(B) works well in ensuring that statements of issues and designations of records are served on those parties who

need them, but not on those parties who do not. Prof. Resnick does not know any bankruptcy judge or bankruptcy attorney who believes that FRAP 6(b)(2)(B) needs "fixing," and he recommends that the Advisory Committee leave well enough alone.

A member moved that No. 97-3 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

16. Item No. 97-4: Amend FRAP 15(c)(1) re: informal rulemaking.

FRAP 15(c)(1) requires the petitioner to serve a copy of her petition for review or application for enforcement of an agency order "on each party admitted to participate in the agency proceedings." A problem arises when the agency order has resulted from an informal rulemaking process. Agencies do not "admit" parties to "participate" in such proceedings; rather, they solicit comments, both formal and informal, and sometimes receive comments from thousands of persons. In such cases, upon whom should a petition for review be served? The Advisory Committee expressed interest in pursuing this issue at its April 1997 meeting; it suggested at that time the possibility of patterning an amendment to FRAP 15(c)(1) after D.C. Cir. Local Rule 15(a) (which provides that "in cases involving informal agency rulemaking . . . a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute").

Mr. Letter said that the D.C. Circuit Advisory Committee had struggled with this problem. He recalled an administrative proceeding that involved 25,000 commentators, each of which was considered a "party" by the agency. He strongly recommended that No. 97-4 be retained on the study agenda, and that the Advisory Committee talk with the clerk and chief staff counsel of the D.C. Circuit about how D.C. Cir. Local Rule 15(a) has worked.

A member asked whether the D.C. Circuit Advisory Committee had given any thought to adopting a rule that would require that a petition for review be served on every commentator who had filed a written request for such service with the agency. Mr. Letter replied that the Committee had considered such a rule, but thought that it did not have the authority to order the agencies to invite and collate such requests.

A member agreed that FRAP 15(c)(1), as written, is ambiguous because it is often not clear who was "admitted to participate" in the proceedings of an agency. Another member agreed, noting that each agency has its own rules about who is considered a "party" to agency proceedings.

A member wondered why, if this issue is primarily a problem for the D.C. Circuit, and if the D.C. Circuit's local rule is working well, the Advisory Committee should give the issue any further attention. Another member responded that the question whether the D.C. local rule is working well and the question whether other circuits are experiencing problems are precisely what the Committee should study.

A member moved that No. 97-4 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

17. Item No. 97-5: Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.

There appears to be a conflict between FRAP 24(a)(2) and the Prisoner Litigation Reform Act of 1996 ("PLRA"), Pub. L. No. 104-134. FRAP 24(a)(2) provides that, if the district court grants a motion to proceed IFP, "the party may proceed on appeal without prepaying or giving security for fees and costs." By contrast, the PLRA requires that "[a] prisoner seeking to . . . appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor" must file "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the . . . notice of appeal." 28 U.S.C. § 1915(a)(2). The PLRA also requires that a prisoner who "files an appeal in forma pauperis . . . shall be required to pay the full amount of the filing fee," § 1915(b)(1), although a prisoner unable to afford to prepay the entire fee may make an initial partial payment and then make subsequent partial payments until the entire fee has been paid. (A prisoner who has "no assets and no means by which to pay the initial partial filing fee" is not required to do so. § 1915(b)(4).)

One member stated that it was obvious that FRAP 24(a)(2) needed to be amended to address this conflict. Several other members agreed.

A member moved that No. 97-5 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

18. Item No. 97-13: Amendments made necessary by Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132).

The Committee next considered No. 97-13, as it relates to No. 97-5.

A member stated that the two major problems created in FRAP by the Antiterrorism and Effective Death Penalty Act — amending the caption of current FRAP 22 to refer to "section 2255 proceedings" when the Rule itself does not mention § 2255 and creating an ambiguity regarding whether a district court judge may issue a certificate of appealability — were addressed in the new rules. No other conflicts had been brought to the Committee's attention. That being the case, he recommended that No. 97-13 be removed from the study agenda, without prejudice to any specific problems that might be brought to the Committee's attention in the future.

A member moved that No. 97-13 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

19. Item No. 97-6: Amend FRAP 27(b) to permit appellate commissioners to rule on procedural motions.

FRAP 27(b) provides that a court of appeals "may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions." A commentator suggests that the Rule might be amended so that courts could also authorize "appellate commissioners" to rule on procedural motions. Appellate commissioners are apparently routinely used in the Ninth Circuit.

A member pointed out that, as far as he can tell, the position of "appellate commissioner" does not exist outside the Ninth Circuit, and the position is not authorized or even mentioned in any statute or regulation. Judge Easterbrook agreed.

Mr. McCabe reported that the Ninth Circuit tried, without success, to interest the Judicial Conference in creating the position and that, after it became clear that the Judicial Conference had no interest in the proposal, the Ninth Circuit went forward and created the position anyway.

A member said that FRAP should not be amended to address the powers of appellate commissioners until the position is formalized in some way outside the Ninth Circuit. Other members agreed.

A member moved that No. 97-6 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

20. Item No. 97-7: Amend FRAP 28(j) to allow brief explanation and statement of significance.

21. Item No. 97-26: Amend FRAP 28(j) to (1) require that parties attach copies of supplemental authorities to their letters, (2) require all 28(j) submissions to be made at least 24 hours before oral argument, and (3) limit 28(j) submissions to materials that did not become available until after the party filed its most recent brief.

FRAP 28(j) permits a party to notify the court of "pertinent and significant authorities" that come to the party's attention after the party's brief has been filed, but before decision. A party is authorized to notify the court of such authorities by letter, but parties are warned that "[t]he letter must state without argument the reasons for the supplemental citations" and that "[a]ny response . . . must be similarly limited." In fact, FRAP 28(j) is widely violated, as parties often are unable to resist the temptation to slip in a few words of argument. A commentator argues that in some circumstances — such as when "the relevance of a new authority to a particular argument may not be immediately obvious" — "both counsel and the courts would be better served if the rule permitted a *brief* explanation of the new authority and its significance to be included in the letter." That is the source of No. 97-7.

No. 97-26 comes from Judge Alex Kozinski of the Ninth Circuit. Judge Kozinski reports that his court receives FRAP 28(j) submissions in a high percentage of cases, that the letters often do not attach the authorities they cite, that the submissions sometimes arrive minutes before oral argument, and that the authorities cited often were available at the time the briefs were filed, but were simply overlooked by counsel. He proposes amending FRAP 28(j) to (1) "require the parties to attach copies of the cases or statutes to their letters," (2) "require that, absent extraordinary circumstances, all 28(j) submissions be made at least 24 hours before oral argument," and (3) "limit 28(j) submissions to materials that became available after the filing of the party's most recent brief."

A member stated that he favored No. 97-7. FRAP 28(j) violations are a persistent problem in his court. He is inclined to amend the Rule to permit some explanation, but to place a strict word limit — one easily enforced by the clerks — on the explanation.

The member said that he did not favor No. 97-26. He cannot imagine a judge *not* wanting to be informed of a supplemental authority. Although he sympathizes with Judge Kozinski's frustration, he does not favor amending FRAP 28(j) to bar the parties in some circumstances from informing the court of supplemental authorities. If a supplemental authority exists, he would rather hear about it late than not hear about it at all.

Another member expressed support for both No. 97-7 and No. 97-26. He expressed frustration at being ambushed in cases in which he followed the Rule in both spirit and letter — by informing the court of supplemental authorities as soon as they came to his attention, and by resisting the temptation to argue about those authorities in his FRAP 28(j) letter — only to have his opponent make argumentative 28(j) submissions at the last minute.

Another member expressed opposition to both No. 97-7 and No. 97-26. He argued that the problem giving rise to No. 97-7 was a problem of enforcement. FRAP 28(j) is perfectly clear; the circuit courts just lack the will to enforce it. He agreed with the earlier comments about FRAP 97-26.

Judge Easterbrook said that the Seventh Circuit had studied proposals similar to both No. 97-7 and No. 97-26 and decided to act on neither. The Seventh Circuit concluded that a word limit on 28(j) explanations would likely be no better enforced that the current ban on explanation, and that trying to regulate the timing of 28(j) submissions would be fruitless: Parties are going to notify the court of supplemental authorities, even if the rules discourage or forbid it.

One member suggested that it may be helpful at least to amend FRAP 28(j) to instruct the parties to notify the court of supplemental authorities as soon as they are discovered. Judge Easterbrook responded that the Seventh Circuit had done that in its local rules, with no discernable impact on the conduct of attorneys.

A member expressed confusion at why a lawyer would be concerned about being "ambushed" with a 28(j) submission made to the court immediately before oral argument. He said that the practice in his court — and, he assumes, in most circuits — is to give the ambushed party a chance to file a supplemental brief after oral argument to address the authorities cited in the last minute 28(j) submission. This gives the ambushed party an advantage.

A member moved that No. 97-7 be removed from the study agenda. The motion was seconded. The motion failed (3-4). By consensus, No. 97-7 was assigned low priority.

A member moved that No. 97-26 be removed from the study agenda. The motion was seconded. The motion carried (5-2).

22. Item No. 97-8: Amend FRAP 29 to permit a state officer or agency to file without consent or leave of court.

FRAP 29(a) permits "[t]he United States or its officer or agency" to file an amicus brief without the consent of the parties or leave of the court. It permits "a State" to do likewise, but says nothing about an "officer or agency" of a state. A commentator has requested that FRAP 29(a) be amended so that state officers and agencies are treated the same as federal officers and agencies.

A member said that amending FRAP 29 was unnecessary because in the unusual case in which an attorney general of a state seeks to file an amicus brief in the name of one of the state's officers or agencies, but not in the name of the state itself, the attorney general can seek and be virtually assured of receiving permission to file the brief.

Another member asked Mr. Fisher and Mr. Fulbruge whether state officers and agencies had any difficulty getting permission to file amicus briefs. Both clerks replied that they could not recall such permission being denied.

A member moved that No. 97-8 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

23. Item No. 97-9: Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.

A commentator has asked that FRAP 32 be amended to provide uniform national rules regarding the color of the cover of (1) a petition for rehearing (or rehearing en banc); (2) a response to a petition for rehearing (or rehearing en banc); and (3) supplemental briefs. Local practice among the circuits varies.

One member said that he did not understand the need for such a rule, given that FRAP 32(c)(2)(A) states that no covers are *necessary* on rehearing petitions and the like. The Reporter responded by explaining that the problem is with varying local rules, which provide that if, say, a rehearing petition is filed with a cover, the cover must be a particular color. Judge Easterbrook agreed. He said that the Seventh Circuit has such a local rule, and the rule is widely violated by attorneys unfamiliar with Seventh Circuit practice. He urged the adoption of uniform national rules.

A member agreed. He said that the varying local rules created a hardship for government attorneys and others with national practices. He said that he personally has made several dozen calls over the years to clerks about cover colors.

Another member asked whether new FRAP 32(d) solves this problem by providing that "[e]very court of appeals must accept documents that comply with the form requirements of [FRAP 32]." Judge Easterbrook replied that a problem remains: If a litigant puts *no* cover on her petition, the petition must be accepted. But if she uses a cover of the "wrong" color, the petition can be rejected consistent with FRAP 32(d).

A member moved that No. 97-9 be retained on the study agenda with low priority. The motion was seconded. The motion carried (unanimously).

24. Item No. 97-10: Amend FRAP 36 re: disposition without opinion.

25. Item No. 97-28: Amend FRAP 36 to require that the court of appeals issue an opinion in every case in which a judgment is entered.

FRAP 36(a)(2) contemplates that a court of appeals can render a judgment without an opinion. Two commentators object that this practice violates due process, is unfair to litigants, creates doubts about the grounds for the court's decision, and "effectively — and unfairly — insulates the appellate court's judgment from a rehearing petition and from a petition for certiorari." The commentators ask that FRAP 36 be amended to require that an opinion of at least a few sentences be issued in every case.

A member expressed opposition to the proposals, noting that some courts — such as his own — simply could not function if they had to write an opinion in every case. Another member agreed that any attempt by the Committee to amend FRAP 36 to bar dispositions without opinion would encounter fierce opposition among many circuit judges. Judge Easterbrook agreed, but added that the proposals were serious and deserved discussion. He noted that the present practice reflects a trade-off between circuit size and opinion writing: If Congress expanded the number of judges on each circuit, disposing of appeals without opinion would become less necessary. But Congress has resisted expanding the circuit courts, leaving a few circuits with little choice but to dispose of some appeals without opinion.

Mr. Fulbruge said that, in the Fifth Circuit, very few appeals are disposed of without any opinion, but a substantial number are disposed of with one or two sentence "opinions" that either say that the Fifth Circuit is affirming for the reasons given by the district court or give only a few words of explanation of the judgment.

A member said that his understanding is that the Eleventh Circuit disposes of about a third of its cases without opinion. Another member said that the Virginia Supreme Court likewise disposes of a substantial number of appeals without opinion. Chief Justice Calogero said that the Louisiana Supreme Court issues an opinion in all cases. He pointed out, though, that the Court has discretionary review and that many of its opinions are brief per curiams drafted by staff attorneys.

A member expressed the view that the issue was worth studying, even if the proposals had little chance of getting through the Judicial Conference. Judge Garwood agreed, and said that he would poll the chief judges of the courts of appeals on the matter.

Ms. McKenna reported that the practice of disposing of appeals without opinion is far more prevalent in the Third Circuit than in the Eleventh. She also warned that the statistics kept by various circuits on this matter are sometimes misleading.

A member moved that Nos. 97-10 and 97-28 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

26. Item No. 97-11: Amend FRAP 39 re: procedure for determining award of attorney's fees for appeal.

27. Item No. 97-24: Amend FRAP 38 or 39 to clarify whether it is the court of appeals or the district court that determines the amount of attorneys' fees awarded as sanctions or costs on appeal.

Nos. 97-11 and 97-24 apparently refer to the same proposal.

A commentator suggests that FRAP 39 be amended to set forth the procedure under which attorneys' fees can be requested "as an element of costs on appeal" and to specify whether it is the court of appeals or the district court that determines the amount of those fees. This suggestion is ambiguous, as FRAP 39 does not authorize an award of attorneys' fees "as an element of costs on appeal," and thus the issue should never arise. *See Hirschensohn v. Lawyers Title Ins. Corp.*, 1997 WL 307777, at *6 (3rd Cir. June 10, 1997). There are specific statutes — most notably, the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 — that, in the context of particular types of actions, define attorneys' fees as an element of recoverable "costs." But the courts of appeals hold that assessing costs under one of these statutes "is separate and distinct from the question of 'costs' under Rule 39." *McDonald v. McCarthy*, 966 F.2d 112, 116 (3rd Cir. 1992). It is not clear whether the commentator was suggesting that

FRAP 39 be amended to specify the process by which attorneys' fees will be awarded as "costs" under statutes such as § 1988, or whether instead the commentator meant to address the award of attorneys' fees as a *sanction* under FRAP *38*.

A member said that this matter should be removed from the study agenda, as it simply has not presented much of a problem for the courts of appeals. His court's approach is typical: The question of whether *any* attorneys' fees should be awarded is decided by the court of appeals. The question of the *amount* of those fees — when the amount is disputed — is remanded to the district court, which can take testimony and other evidence.

A member moved that Nos. 97-11 and 97-24 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

28. Item No. 97-12: Amend FRAP 44 to apply to constitutional challenges to federal regulations.

FRAP 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Judge Cornelia Kennedy of the Sixth Circuit has asked the Committee to consider whether FRAP 44 should be expanded to require notice in cases in which a party questions the constitutionality of a federal *regulation*.

FRAP 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

Thus, FRAP 44 likely does not extend to federal regulations because § 2403(a) is limited to "any Act of Congress." Interestingly, though, § 2403(*b*) contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state, and yet that duty is not implemented in FRAP 44. Thus, there are two issues before the Committee: (1) Should FRAP 44 be amended as Judge Kennedy suggests? (2) Should FRAP 44 be amended to require any party who questions "the constitutionality of any statute of [a] State" in a case "to which [that] State or any agency, officer, or employee thereof is not a party" (§ 2403(b)) to provide written notice of that challenge to the clerk?

A member said that he was hesitant to adopt Judge Kennedy's suggestion. First, it seems inconsistent with Congressional intent, as expressed in § 2403(a). Second, it will create drafting

and interpretation problems, as courts and parties struggle to distinguish "regulations" from "policy statements" from "interpretive bulletins" and so on. And finally, the need for the change is doubtful. If a regulation is not authorized by statute, it will be struck down on that basis. If it is authorized by statute, then the constitutionality of the *statute* will be challenged. It is hard to imagine a "stand alone" challenge to the constitutionality of a *regulation.*

Another member agreed and added that, in any such case that arose, the agency would almost certainly already be a party.

Mr. Letter said that the S.G. did not support Judge Kennedy's suggestion, although he did not object to studying the § 2403(b) problem.

A member moved that the Committee continue to study (with low priority) the question whether FRAP 44 should be amended to require any party who questions the constitutionality of a state statute in a case in which that state is not a party to provide written notice of that challenge to the clerk. The motion was seconded. The motion carried (unanimously). (No motion was made with respect to Judge Kennedy's proposal, although a member commented that it would not hurt to discuss it again at the time the Committee considers amending Rule 44.)

29. Item No. 97-14: Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.

For over two years, the Standing Committee has been studying the wide variety of local rules governing attorney conduct in the district courts and the courts of appeals. The primary focus of the study has been on the standards governing attorney conduct in the district courts. The courts of appeals have made relatively infrequent use of FRAP 46 (the Rule has been cited in only 37 appellate opinions since 1990), and, for the most part, FRAP 46 has been applied to conduct that is universally considered sanctionable (such as making misrepresentations to the court).

Prof. Daniel R. Coquillette, the Reporter to the Standing Committee, has suggested four options for addressing this problem: (1) Do nothing. (2) Draft a model local rule that could be adopted voluntarily by the district courts, and possibly by the courts of appeals. (3) Draft national rules governing those types of attorney misconduct that are of "primary concern" to the bench and bar. (4) Draft both a model local rule and national rules.

Judge Easterbrook reported that, at its June 1997 meeting, the Standing Committee essentially decided to keep its options open. There is widespread agreement among the members of the Committee that *something* ought to be done, but widespread disagreement as to *what.* Judge Easterbrook said that the Standing Committee has asked Prof. Coquillette to draft national

rules and model local rules, but that request does not in any way indicate what action the Committee will eventually take.

A member said that this matter should stay on the Advisory Committee's study agenda, but that the Advisory Committee should devote no time to it until the Standing Committee decides what it intends to do with respect to the district courts. At that point, this Advisory Committee could decide whether to recommend conforming amendments to FRAP. In the appellate courts, the disparity of standards has just not been a problem. There are very few FRAP 46 cases, and almost all of those cases involved obvious misbehavior.

A member moved that No. 97-14 be retained on the study agenda, but with (very) low priority until the Standing Committee adopts attorney conduct rules governing practice in the district courts. The motion was seconded. The motion carried (unanimously).

30. Item No. 97-16: Amend unspecified FRAP to address potential overlap in jurisdiction between the Federal Circuit and the regional circuits in patent cases.

In 1996, Judge J. Clifford Wallace of the Ninth Circuit contacted the Administrative Office to describe a series of related cases that (in his view) supported his longstanding contention that the exclusive patent jurisdiction of the Federal Circuit should be eliminated. Judge Wallace's suggestion was referred to the Committee on Federal-State Jurisdiction, which considered and rejected Judge Wallace's proposal. John Rabiej then forwarded Judge Wallace's memo to this Advisory Committee. Mr. Rabiej stated that, although "[t]he Federal/State Jurisdiction Committee's action on Judge Wallace's suggestion officially completes action on Judge Wallace's suggestion . . . the Appellate Rules Committee can consider the matter sua sponte."

The Reporter briefly summarized the litigation cited by Judge Wallace (the *FilmTec* litigation) and described how one of the parties to that litigation was essentially permitted to get two inconsistent appellate decisions (one from the Federal Circuit and one from the Ninth Circuit) on the same issue.

A member said that he favored dropping No. 97-16 from the study agenda. The *FilmTec* litigation was not only highly unusual, but the problem it created stemmed not from the fact that the two circuits lacked the authority to prevent the inconsistent determinations, but from the fact that they chose not to use the authority that they had.

A member moved that No. 97-16 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

31. Item No. 97-18: Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."

At the April 1997 meeting of the Advisory Committee, Judge Easterbrook suggested that FRAP 1(b) is wrong in asserting that "[t]hese rules do not extend or limit the jurisdiction of the courts of appeals." The Supreme Court has held that the time limits imposed by FRAP 3, 4, and 5 are jurisdictional. *See, e.g.*, *Smith v. Barry*, 502 U.S. 244 (1992); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). Moreover, the ACN accompanying FRAP 3 specifically states (quoting *United States v. Robinson*, 361 U.S. 220, 224 (1960)) that the timely filing of a notice of appeal under FRAP 3 and 4 "is 'mandatory and jurisdictional.'" Thus, certain of the Rules *do* "extend or limit the jurisdiction of the courts of appeals." Moreover, the recent enactment of 28 U.S.C. § 1292(e), which gives the Supreme Court authority to define in FRAP when interlocutory appeals will be permitted, further illustrates the jurisdictional nature of the Rules.

Judge Easterbrook again asked that the Advisory Committee give consideration to FRAP 1(b), which, he said, is "flat wrong," and should be deleted. A member agreed.

A member moved that No. 97-18 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

32. Item No. 97-19: Amend FRAP 4(b)(1)(B)(ii) to clarify whether, in multi-defendant criminal cases, the government must file its notice of appeal within 30 days after the *first* notice of appeal is filed by a defendant or within 30 days after the *last* notice of appeal is filed by a defendant.

FRAP 4(b)(1)(B) provides that, when the government is entitled to bring an appeal in a criminal case, its notice of appeal must be filed "within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant." The use of the phrase "any defendant" creates an ambiguity in multi-defendant cases: Does the 30 days begin to run after the *first* notice of appeal is filed by a defendant or not until the *last* such notice of appeal is filed? The Committee took a stab at correcting this problem at its April 1997 meeting, but the complexity of the problem soon became apparent, and the Committee decided to postpone further discussion.

A member said that it was obvious that the Committee had to address this problem, and he added another concern: He pointed out that 18 U.S.C. § 3731 provides that appeals brought by the United States in criminal cases "in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered." FRAP 4(b)(1)(B)(ii), by permitting the United States to appeal in some circumstances more than "thirty days after the decision, judgment or

order has been rendered," seems inconsistent with § 3731. Judge Logan said that he had written an opinion addressing this conflict.[3]

A member moved that No. 97-19 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

33. Item No. 97-20: Amend FRAP 27(a)(3)(A) by adding a sentence explicitly stating that a court need not give notice or await a response before *denying* a motion.

FRAP 27(a)(3)(A) provides:

> **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

At its April 1997 meeting, the Advisory Committee expressed its understanding that FRAP 27(a)(3)(A) implicitly provided that a circuit court could *deny* any motion without giving notice or awaiting a response. However, the Committee questioned whether FRAP 27(a)(3)(A) should be amended to make that authority explicit.

Judge Easterbrook said that he saw no reason to address this issue at this time. Rather, he recommended that the Advisory Committee wait to see if a problem develops in practice.

A member moved that No. 97-20 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

34. Item No. 97-22: Amend FRAP 34(a)(1) to establish a uniform federal rule governing party statements as to whether oral argument should or should not be permitted.

FRAP 34(a)(1) states that "[a]ny party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted." The Rule does not

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[3] *United States v. Sasser*, 971 F.2d 470, 472-75 (10th Cir. 1992) (holding that the court had no jurisdiction over an appeal by the United States that was "filed in the district court within 30 days after . . . (ii) the filing of a notice of appeal by any defendant" for purposes of FRAP 4(b), but that was not filed "within thirty days after the decision, judgment or order has been rendered" for purposes of § 3731).

specify when such a statement should be filed, nor does it say anything about the manner in which such a statement should be made. At the April 1997 meeting of the Advisory Committee, several members suggested that FRAP 34(a)(1) should be amended to establish a uniform national rule governing statements by parties concerning the need for oral argument.

A member said that his court has a local rule requiring that statements regarding opening argument be made in each party's opening brief, and that he had found the rule helpful. Another member said that his court has a similar rule, and that parties generally put their statement regarding oral argument either on the cover of the brief or at the end of the brief. The member was concerned, though, that parties be given a chance to "back out" of a request for oral argument. As far as he is concerned, if a party wants to waive oral argument as late as the day before the argument is scheduled, the party should not be prohibited from making that request.

Mr. Letter said that the S.G. favors the issue being addressed, one way or the other, in FRAP. Rules governing statements regarding oral argument should be uniform. The current hodgepodge of local rules creates unnecessary inconvenience for the government and others with national appellate practices.

A member moved that No. 97-22 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

Judge Garwood said that he would survey the chief judges of the circuits on this issue.

35. Item No. 97-23: Amend FRAP 34(g) to specify whether an attorney or unrepresented party may, during oral argument, use a physical exhibit (such as a chart or diagram) that has not been admitted into evidence.

Apparently, disputes have sometimes arisen regarding whether an attorney (or unrepresented party) may, during oral argument before the court of appeals, make use of a chart, diagram, or other physical exhibit that was not admitted into evidence by the district court or agency. At its April 1997 meeting, the Advisory Committee decided to add to its study agenda the question whether this issue should be more explicitly addressed in FRAP 34(g).

A member said that he sees no reason for a rule. He has never seen a problem arise, and he cannot imagine that a rule could address any potential problem better than the panel before which the problem arises. Another member agreed; this has never been a problem in his court.

A member said that he did not want to drop No. 97-23 from the study agenda. He described a recent experience in which the judge and parties had a conference regarding one attorney's desire to set up a computer with several monitors in the courtroom. The member said that he anticipated more such issues arising in the future, and he thought FRAP 34(g) might well be amended to provide guidance in those situations.

Judge Easterbrook agreed that technology will continue to present such issues, but he disagreed that FRAP 34 should be amended to address these issues. The technology is developing too rapidly, and the situations presented to courts are too diverse, for this area to be profitably addressed by rule. Rather, Judge Easterbrook said, FRAP 34 should continue to maintain its silence on this issue, so that each judge has discretion to address each problem as it arises.

Another member agreed with Judge Easterbrook, pointing out that nothing in FRAP 34 prohibits judges from accommodating technological innovations.

Another member agreed, but stated that he would still like the Committee to study how FRAP 34 might be amended to *encourage* the use of technology in the courtroom.

A member moved that No. 97-23 be removed from the study agenda. The motion was seconded. The motion carried (4-2).

36. Item No. 97-25: Merge FRAP 35 (governing en banc determinations) and FRAP 40 (governing panel rehearings) into a single rule.

At its April 1997 meeting, the Advisory Committee decided to add to its study agenda the question whether FRAP 35 (which governs en banc determinations) and FRAP 40 (which governs panel rehearings) should be merged into a single rule.

A member expressed opposition to the proposal, noting that it would be extremely difficult to combine FRAP 35 — which permits *initial* arguments before the court en banc (as well as en banc rehearings of panel decisions) — with FRAP 40 — which addresses only *rehearings* of panel decisions.

Another member also expressed opposition to the proposal, arguing that the Committee should not undertake such an extensive rewriting of two important rules so soon after the restylized rules were approved.

A member moved that No. 97-25 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

37. Item No. 97-27: Amend FRAP 46(a)(1) to make eligible for admission to the bar of a court of appeals those attorneys who have been admitted to practice before the Supreme Court of the Commonwealth of the Northern Mariana Islands.

FRAP 46(a)(1) provides that an attorney is eligible for admission to the bar of a court of appeals if that attorney is admitted to practice before the United States Supreme Court, "the highest court of a state," another court of appeals, or "a United States district court (including the

district courts for Guam, the Northern Mariana Islands, and the Virgin Islands)." A commentator informs the Committee that there are *two* courts in the Northern Mariana Islands from which appeals may be taken to the Ninth Circuit: the U.S. District Court for the Northern Mariana Islands and the Supreme Court of the Commonwealth of the Northern Mariana Islands. He suggests that FRAP 46(a)(1) be amended so that lawyers who are admitted to practice before the latter but not the former are eligible for admission to the bar of a court of appeals.

A member expressed opposition to the proposal. He said that it was difficult to believe that any such lawyer exists — that is, a lawyer who belongs to the bar of the Supreme Court of the Commonwealth of the Northern Mariana Islands, but who does not belong to the bar of the U.S. District Court for the Northern Mariana Islands. If such a lawyer does exist, he or she should simply join the District Court bar.

Judge Easterbrook wondered whether the Supreme Court of the Commonwealth of the Northern Mariana Islands is not "the highest court of a state" for purposes of FRAP 46(a)(1). After all, FRAP 46(a)(1) does not explicitly mention the highest courts of the District of Columbia, or Puerto Rico, or American Samoa, yet Judge Easterbrook has never heard of any problem involving attorneys admitted to practice before any of those courts.

One member suggested that the Committee contact the commentator to determine whether he is aware of any attorney in the Northern Mariana Islands for whom FRAP 46 has presented a problem. Another member agreed. A couple other members disagreed, though, expressing the view that such an inquiry would be a poor use of Committee time.

A member moved that No. 97-27 be removed from the study agenda. The motion was seconded. The motion carried (6-1).

38. Item No. 97-29: Amend FRAP 28(a)(5) to require that the "statement of the issues presented for review" be phrased as "deep issues" — that is, in separate sentences that show how the legal question arises, in no more than 75 words, and with a question mark at the end.

In an article in the 1994-95 edition of *The Scribes Journal of Legal Writing*, Bryan A. Garner advocated what he referred to as the "deep issue" approach to framing legal questions. Under this approach, a description of an issue presented to an appellate court for review should, *inter alia*, "consist of separate sentences," "contain no more than 75 words," and "end with a question mark." At the end of his article, Mr. Garner proposed two alternative amendments to FRAP 28(a)(5) (which, as written, simply requires that a brief contain "a statement of the issues presented for review"). These amendments would require attorneys to use the "deep issue" framework in describing the issues presented for review.

Judge Logan said that he had asked that Mr. Garner's proposal be put on the study agenda out of respect for Mr. Garner, who has done outstanding work in assisting the Committee with

the restylized rules project. Judge Logan said, though, that he had tried to use Mr. Garner's approach in writing opinions, and found it difficult to implement in multi-issue cases.

A member asked the judges present whether they were encountering substantial problems with the manner in which litigants were framing the issues presented. Judges Garwood and Logan said that statements of the issues are written no better or worse than other parts of most briefs. Judge Easterbrook said that poorly written briefs are a significant problem, but it is not a problem that can be addressed through FRAP. Judge Garwood agreed that FRAP should not be used to teach attorneys how to write.

A member moved that No. 97-29 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

39. Item No. 97-30: Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.

This proposal comes from Mr. Munford. Mr. Munford reported that the Fifth Circuit had recently adopted a local rule that is essentially the same as restylized FRAP 32, and that the Fifth Circuit has adopted a standard certificate of compliance that attorneys can use to certify that their brief complies with the type-volume limitations contained in the rule. Mr. Munford wonders whether it might be helpful to include such a form in FRAP. The form would be exemplary, not mandatory.

Two members of the Committee agreed that such a form would be helpful.

Mr. Rabiej pointed out that it is not clear whether forms that are merely exemplary need to be approved by the Supreme Court and reviewed by Congress. That has been done in the past, he said, but recently some have questioned whether the involvement of the Supreme Court and Congress is necessary.

A member moved that No. 97-30 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

40. Item No. 97-31: Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1.

This proposal also comes from Mr. Munford and arises from a recommendation made by the American Academy of Appellate Lawyers. Amendments to FRAP generally take effect on December 1. Mr. Munford suggests that, for the convenience of the appellate bench and bar, FRAP 47(a)(1) should be amended to require that amendments to the local rules of the courts of appeals also take effect on December 1.

A member expressed reservations about the proposal. He noted that at times the circuit courts find themselves "out of step" with the national rules or with newly enacted statutes, and have to act immediately to change their local rules.

Judge Easterbrook agreed. He pointed to the recently enacted Antiterrorism and Effective Death Penalty Act, which required his circuit and others to move quickly to implement local rules. Amending FRAP 47(a)(1) as Mr. Munford suggests would present a difficult drafting exercise; essentially, the Rule would have to say, "All local rules must take effect on December 1, unless it is important that they take effect before December 1."

Mr. Fisher reported that the Tenth Circuit attempts to make changes to local rules effective on January 1, one month after changes to the national rules take effect.

A member noted that the publication deadlines of the United States Code Annotated may be relevant to this problem. It is important that, if local rules are to take effect on the same date, that the date be set so that the amended rules will make it into the next edition of the U.S.C.A.

A member suggested that the publication deadlines of the popular state compilations published by West are even more important. More attorneys look up local rules in those volumes than in the U.S.C.A.

Judge Easterbrook cautioned that the Committee should not confuse the issue of when new rules are provided to a publisher with the issue of when new rules take effect. A set of rules scheduled to take effect on December 1 could be provided to a publisher long before then. Also, he reminded the Committee again that any constraints on local rules would have to include an exception for emergencies.

A member suggested that the rule could be drafted very generally — *e.g.*, "Except in an emergency, all local rules must take effect on December 1." Each circuit could then define for itself what qualifies as an "emergency." Presumably, very few local rules would qualify, and thus the vast majority of new local rules would take effect on December 1.

Judge Easterbrook pointed to the language of 28 U.S.C. § 2071(e) as providing helpful guidance: "If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment." Perhaps the emergency exception to a "December 1" rule could be phrased in terms of "immediate need."

A member expressed interest in the Tenth Circuit's practice of making changes in local rules effective one month after changes in the national rules. This gives the circuits a chance to be certain of the nature of changes to the national rules before they make changes to their local rules. Another member pointed out, though, that changes in national rules are usually known 14 months before they take effect.

A member moved that No. 97-31 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

VIII. Additional Old Business and New Business

There was no additional old business.

Mr. Letter noted that the S.G. had recently sent a proposal for an amendment to FRAP to Mr. Rabiej, and that initial discussion of the proposal could wait until the Spring 1998 meeting.

Judge Garwood announced that, with respect to scheduling that meeting, his first preference would be April 16 and 17. His second preference would be March 19 and 20. The meeting will be in Washington, D.C. Judge Garwood asked Mr. Rabiej to survey the members of the Advisory Committee regarding their availability on those dates.

Judge Garwood concluded the meeting by presenting a certificate of appreciation to Judge Logan, and by thanking Judge Logan for his excellent work as Chair of the Advisory Committee. Judge Garwood said that the appellate bench and bar owed an enormous debt to Judge Logan.

IX. Adjournment

By unanimous consent, the Advisory Committee adjourned at 5:00 p.m.

Respectfully submitted,

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Patrick J. Schiltz
Reporter



Advisory Committee on the Appellate Rules
Table of Agenda Items — Revised November 1997

FRAP Item	Proposal	Source	Current Status
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Awaiting initial discussion Further study recommended 12/91 Retained on agenda with high priority 9/97
95-3	Amend FRAP 15(f) to conform to new FRAP 4(a)(4)(B)(i).	Hon. Stephen F. Williams (CADC)	Awaiting initial discussion Retained in part on agenda with medium priority 9/97
95-4	Amend computation of time to conform to Civil Rules method. (Related to No. 97-1.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97
95-5	Amend FRAP 32 to require submission of digitally readable copy of brief, when available.	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with medium priority 9/97
95-7	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period. (Related to No. 96-2.)	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97
95-8	Does FRAP 4(a)(7) repeal collateral order doctrine?	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97
96-2	Amend FRAP 4(b) so that an extension of time to file a notice of appeal can be granted in a criminal case even without excusable neglect. (Related to No. 95-7.)	Hon. Richard A. Posner (CA7)	Awaiting initial discussion Retained on agenda with low priority 9/97
97-1	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to No. 95-4.)	Advisory Committee & Los Angeles County Bar Assn.	Awaiting initial discussion Retained on agenda with medium priority 9/97
97-4	Amend FRAP 15(c)(1) re: informal rulemaking.	Advisory Committee & Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97
97-5	Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 9/97
97-7	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97

FRAP Item	Proposal	Source	Current Status
97-9	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 9/97
97-10	Amend FRAP 36 re: disposition without opinion. (Related to No. 97-28.)	Philip Lacovara, Esq.	Awaiting initial discussion Retained on agenda with high priority 9/97
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 9/97
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.	Standing Committee	Awaiting initial discussion Retained on agenda with low priority 9/97
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with high priority 9/97
97-19	Amend FRAP 4(b)(1)(B)(ii) to clarify whether, in multi-defendant criminal cases, the government must file its notice of appeal within 30 days after the *first* notice of appeal is filed by a defendant or within 30 days after the *last* notice of appeal is filed by a defendant.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 9/97
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion Draft approved 9/97 for submission to Standing Committee after 12/1/98
97-22	Amend FRAP 34(a)(1) to establish a uniform federal rule governing party statements as to whether oral argument should or should not be permitted.	Advisory Committee	Awaiting initial discussion Retained on agenda with medium priority 9/97
97-28	Amend FRAP 36 to require that the court of appeals issue an opinion in every case in which a judgment is entered. (Related to No. 97-10.)	Bruce Committe, Esq.	Awaiting initial discussion Retained on agenda with high priority 9/97

FRAP Item	Proposal	Source	Current Status
97-30	Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with high priority 9/97
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97
97-32	Amend FRAP 12(a) to require the appellate caption to identify only the parties to the appeal.	Methods Analysis Program	Awaiting initial discussion
97-33	Amend FRAP 3(c) to require that an appellant file with the notice of appeal a statement identifying all appellants, all appellees, and counsel for all represented parties.	Methods Analysis Program	Awaiting initial discussion
97-34	Amend FRAP 3(d)(1) to specify when the district clerk must forward updated docket entries to the appellate clerk.	Methods Analysis Program	Awaiting initial discussion
97-35	Amend unspecified rules to establish uniform standards for the docketing of complex cases by district courts, bankruptcy courts, and BAPs.	Methods Analysis Program	Awaiting initial discussion
97-36	Amend FRAP 25(a)(4) to permit the clerk to refuse to accept for filing documents that do not comply with the rules.	Methods Analysis Program	Awaiting initial discussion
97-37	Amend unspecified rules to require counsel who represents a criminal defendant at trial to continue to represent the defendant on appeal unless relieved by the appellate court. (Related to No. 97-38.)	Methods Analysis Program	Awaiting initial discussion
97-38	Amend unspecified rules to prohibit district courts from permitting counsel who has represented a criminal defendant at trial to withdraw before a notice of appeal is filed. (Related to No. 97-37.)	Methods Analysis Program	Awaiting initial discussion

97-39	Amend FRAP 15(c) to require the petitioner to list respondents and to attach a copy of the agency order to the petition for review.	Methods Analysis Program	Awaiting initial discussion
97-40	Amend unspecified rules to require advance notice and pre-filings in state and federal death penalty cases.	Methods Analysis Program	Awaiting initial discussion

Item 6

TO: Honorable Alicemarie H. Stotler, Chair
Committee on Rules of Practice
and Procedure

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 2, 1997

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 11-12, 1997, in Williamsburg, Virginia.

II. Action Items

The Advisory Committee on Bankruptcy Rules will not be presenting any matters for action at the Standing Committee's meeting in Santa Barbara, California, on January 8-9, 1998.

III. Information Items

A. Rule Amendments Effective December 1, 1997. On April 11, 1997, the Supreme Court promulgated amendments to 12 Bankruptcy Rules (Rules 1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035) and promulgated four new Bankruptcy Rules (Rules 1020, 3017.1, 8020, and 9015). Most of these amendments and new rules were designed to implement or conform to the Bankruptcy Reform Act of 1994. These amendments and new rules became effective on December 1, 1997.

B. Amendments to the Official Bankruptcy Forms Promulgated in September 1997. At its June 1997 meeting, the Standing Committee approved proposed amendments to nine Official Bankruptcy Forms (Forms 1, 3, 6, 8, 9, 10, 14, 17, and 18), and added two new Official Bankruptcy Forms (Forms 20A and 20B). Most of the amendments were designed to clarify the forms, provide plain English instructions for users, and to make them easier to complete. The amended and new forms were promulgated by the Judicial Conference in September. Although the amended and new forms may be used at this time, they will not become mandatory until March 1, 1998.

C. Publication of Proposed Rule Amendments. At its June 1997 meeting, the Standing Committee authorized the publication of a preliminary draft of proposed amendments to 16 Bankruptcy Rules. The preliminary draft was published in August for comment by the bench and bar. A public hearing is scheduled for January 30,

1998, in Washington, D.C., and the deadline for submitting comments is February 15, 1998. The Advisory Committee will consider all comments at its next meeting to be held on March 26-27, 1998, and it is expected that proposed amendments will be presented for approval by the Standing Committee at its June 1998 meeting.

D. Work-in-Progress on Proposed Amendments to Revise Litigation Procedures. The Advisory Committee's Subcommittee on Litigation has been working for more than two years on a package of proposed amendments that would substantially revise the rules governing litigation in bankruptcy cases, other than adversary proceedings. This effort is the result of a survey conducted by the Federal Judicial Center at the Advisory Committee's request which indicated that, although judges and practitioners are generally satisfied with the Federal Rules of Bankruptcy Procedure, there has been significant dissatisfaction with the rules governing motion practice.

The proposed amendments would revise procedures for obtaining court orders, both for routine administrative matters that usually are unopposed and for resolving more complex disputes that now constitute "contested matters" under the Bankruptcy Rules. Confusing terminology would be eliminated (such as the phrase "contested matter" which, in many cases, is not contested at all), and greater national uniformity in litigation procedures would be achieved. Preliminary drafts of complete revisions of Bankruptcy Rules 9013 (Motions; Form and Service) and 9014 (Contested Matters), as well as related amendments to more than 20 other Bankruptcy Rules, were presented to the Advisory Committee at its September 1997 meeting. These drafts, as revised at the meeting, were approved subject to further refinement and stylistic improvements.

Preliminary drafts of proposed amendments to Rules 9013 and 9014 have been reviewed by the Standing Committee's Style Subcommittee and its comments have been received by the Advisory Committee. Drafts of proposed amendments to other rules were forwarded to the Style Subcommittee for its comments. At its March 1998 meeting, the Advisory Committee expects to approve a revised draft of this package of amendments, including stylistic improvements, and to present the package to the Standing Committee in June 1998 with a request that these proposed amendments be published for comment by the bench and bar.

E. National Bankruptcy Review Commission. The National Bankruptcy Review Commission was created by the Bankruptcy Reform Act of 1994 and was charged with performing a comprehensive two-year study of the American bankruptcy system. The Chairman of the Commission, Brady C. Williamson, and Commissioner James I. Shepard attended part of the Advisory Committee's September 1997 meeting.

The nine-member Commission completed its work and submitted its final report to the President, Congress, and the Chief Justice on October 20, 1997. The report is approximately 1300 pages in length (including almost 300 pages of dissenting opinions and separate views of individual Commissioners) and contains 172 recommendations for improving the bankruptcy system. Although some recommendations had unanimous or wide support of the Commissioners, others were controversial and were adopted by a divided vote (often 5-4).

Most of the Commission's recommendations are addressed to Congress and call for legislative amendments to either title 11 or title 28. Many recommendations are substantive and, if adopted by Congress, would not require any Bankruptcy Rule amendments. Other recommendations for legislative changes would, if adopted, require conforming rule amendments. For example, if Congress follows the Commission's recommendation to amend title 28 to provide for the appointment of Article III bankruptcy judges (which would eliminate the need to distinguish between core and noncore proceedings), extensive conforming rule amendments would be required. Similarly, if Congress adopts the Commission's recommendation to permit appeals from bankruptcy court orders directly to the court of appeals (i.e., eliminating appeals to the district court or bankruptcy appellate panel), Part VIII of the Bankruptcy Rules would have to be repealed.

Several Commission recommendations are expressly directed to the Advisory Committee on Bankruptcy Rules and suggest amendments to the Rules or the Official Bankruptcy Forms, but only if related legislative changes are enacted. For example, the Commission recommends Code amendments that would permit the court, after notice and a hearing, to waive or simplify requirements relating to disclosure statements in "small business" chapter 11 cases. It also recommends that, "within a reasonable time after enactment" of these legislative changes, the Bankruptcy Rules be amended to provide standard forms for disclosure statements and plans in small business cases.

Other Commission recommendations call for amendments to the Bankruptcy Rules or the Official Forms and are not dependent on related legislation. For example, the Commission recommended to the Advisory Committee that the language of Rule 9011 be changed to make explicit that an attorney's responsibility to make a reasonable inquiry into the accuracy of information extends to the lists, schedules, and statement of affairs (these documents are now excluded from the attorney signature requirements of Rule 9011). Another example is the Commission's recommendation that Rule 2004(a) be amended to include examiners as persons who may examine witnesses under that Rule.

The Reporter is in the process of analyzing the Final Report of the Commission and will present to the Advisory Committee before its March meeting summaries of those recommendations that call for changes to the Bankruptcy Rules or the Official Bankruptcy Forms. In addition, the Advisory Committee will closely monitor legislative activity that could impact on the Rules or Official Forms.

F. Notice to Governmental Units. The Advisory Committee has been considering proposals to improve the effectiveness of notices to governmental units in bankruptcy cases. Several proposals were considered and refined at the Advisory Committee's September 1997 meeting and have been referred to the Subcommittee on Government Noticing for further review. In addition, proposals designed to require disclosure of certain information relating to governmental claims, including information regarding environmental claims, violations, or hazards, have been referred to the Subcommittee on Forms for further review. The Committee expects to consider proposals in these areas at its March 1998 meeting.

G. Rules on Attorney Conduct. At the Advisory Committee's request, the Federal Judicial Center is preparing an appropriate form to be used in a survey to identify areas regarding attorney conduct that have caused significant problems in bankruptcy cases and proceedings. The survey results will be used by the Advisory Committee in determining the need for (and possibly the formulation of) new or amended Bankruptcy Rules that govern attorney conduct. This is an extension of Professor Coquillette's efforts in formulating national rules governing certain aspects of attorney conduct in district and circuit courts.

H. Survey on Mediation in Bankruptcy Cases. The Federal Judicial Center, at the Advisory Committee's request, is conducting a survey to assess the need for national rules on mediation in bankruptcy courts. The survey will seek to identify problems or concerns, such as mediator conflicts of interest and confidentiality. The Advisory Committee will consider the results of the survey in determining whether there is any need for Bankruptcy Rules governing mediation.

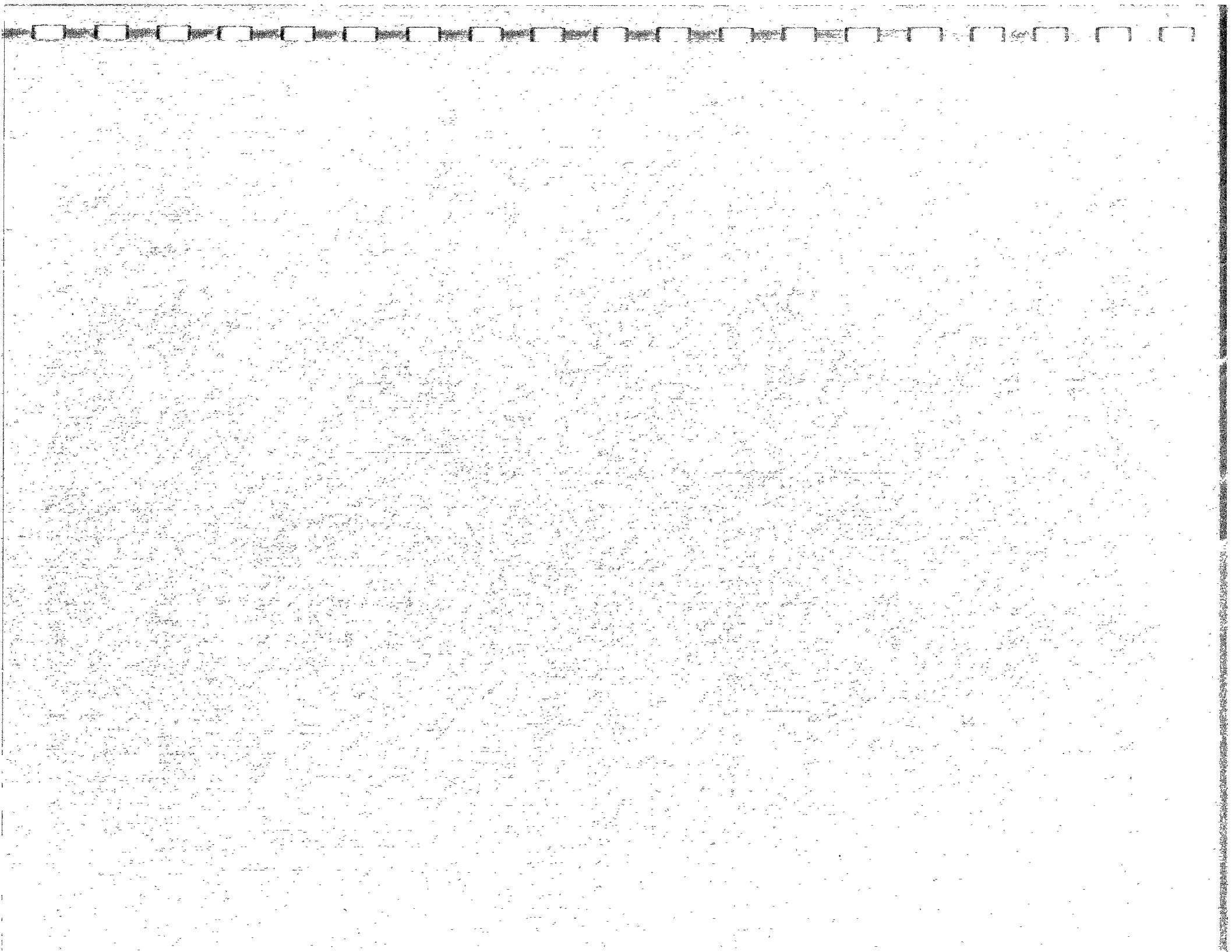
I. Automatic Dollar Adjustments. The Bankruptcy Reform Act of 1994 amended § 104 of the Bankruptcy Code to provide for automatic dollar adjustments of particular monetary amounts in specified sections of the Code every three years. These dollar adjustments, which are based on changes in the Consumer Price Index for All Urban Consumers, will be made on April 1, 1998, and on April 1 of every third year thereafter. Each dollar adjustment becomes effective only for bankruptcy cases that are filed on or after the effective date of the adjustment.

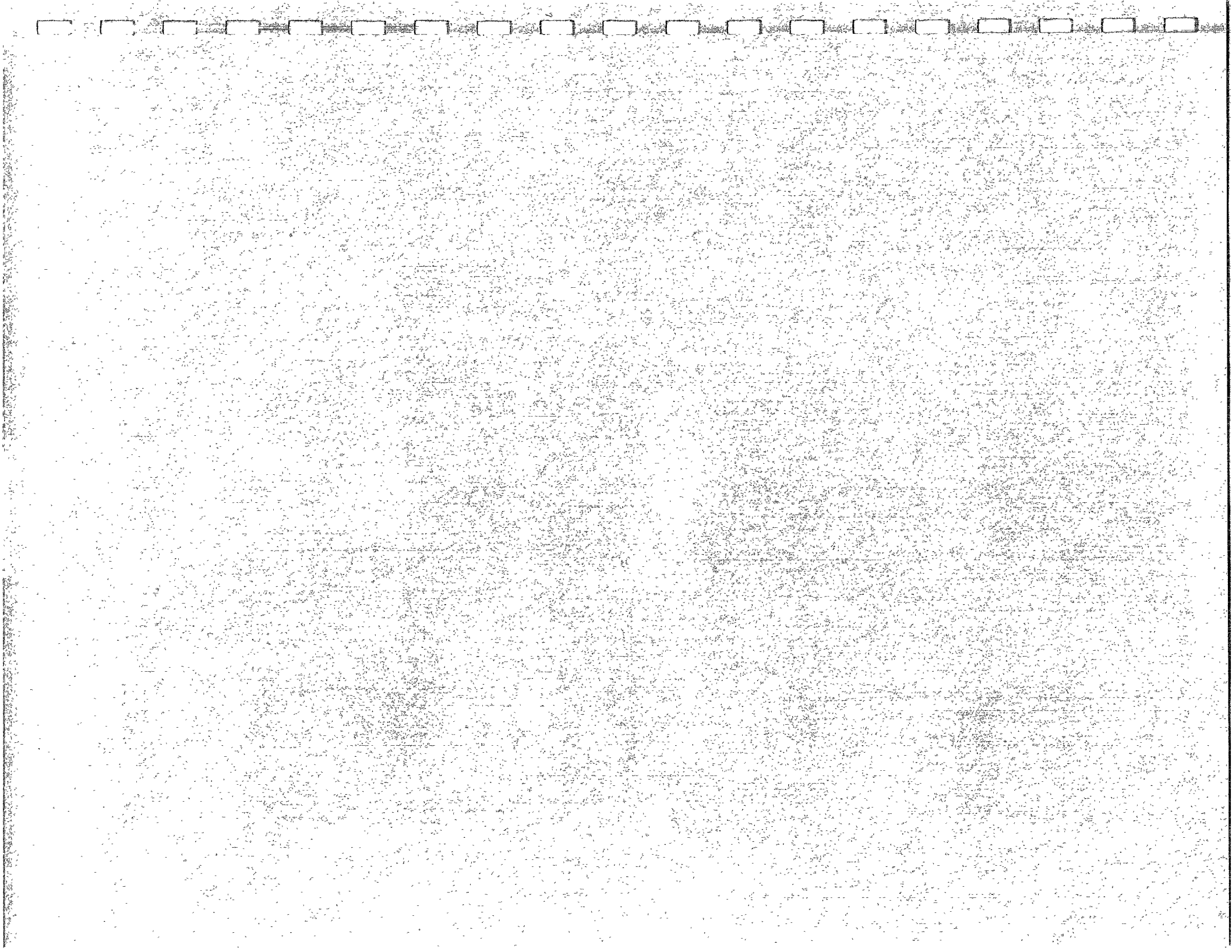
Some of the monetary amounts that will be changed every three years appear on two of the Official Bankruptcy Forms (Form 6, Schedule E - Creditors Holding Unsecured Priority Claims, and Form 10 - Proof of Claim). When these forms were amended in 1995, a warning was included in the forms stating that the dollar amounts stated therein are subject to adjustment on April 1, 1998, and every three years thereafter, for cases filed on or after the effective date of the adjustment.

In anticipation of these dollar adjustments, the Standing Committee (at the Advisory Committee's suggestion) recommended to the Judicial Conference that it approve automatic revisions to the Official Bankruptcy Forms to conform to automatic dollar adjustments made under § 104 of the Code. The Judicial Conference followed that recommendation and, in March 1996, authorized such automatic revisions without the need for any additional action by the Judicial Conference. On April 1, 1998, and at each 3-year interval thereafter, the Administrative Office may send to the courts and to publishers copies of the forms that have been revised to conform to automatic dollar adjustments under § 104.

Attachment:

Draft of minutes of the Advisory Committee meeting of September 11-12, 1997.





ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 11 - 12, 1997

Williamsburg, Virginia

Draft Minutes

The following members were present at the meeting:

District Judge Adrian G. Duplantier, Chairman
District Judge Eduardo C. Robreno
District Judge Bernice B. Donald
District Judge Robert W. Gettleman
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge A. Thomas Small
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Charles J. Tabb
R. Neal Batson, Esquire
Leonard M. Rosen, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Professor Alan N. Resnick, Reporter

District Judge Alicemarie H. Stotler, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee"), and Alan W. Perry, Esquire, liaison to this Committee from the Standing Committee, were unable to attend. Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"), attended the meeting. Bankruptcy Judge George R. Hodges, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), attended part of the meeting as a representative of that committee. Brady C. Williamson, Esquire, the chairman of the National Bankruptcy Review Commission ("NBRC"), and James I. Shepard, a member of the NBRC, also attended part of the meeting.

The following additional persons attended the meeting: Joseph G. Patchan, Director, Executive Office for United States Trustees (EOUST); Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Cecelia B. Morris, Clerk, United States Bankruptcy Court for the Southern District of New York; Patricia S. Channon, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Elizabeth C. Wiggins and Robert Niemic, Research Division, Federal

Judicial Center ("FJC").

In addition, David B. Foltz, Jr., Esquire, from Houston, Texas, and Alan S.Tenenbaum, Esquire, of the Environment and Natural Resources Division, United States Department of Justice, attended part of the meeting.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold.**

Introductory Items

The Chairman introduced the guests and welcomed them to the meeting.

The Committee approved the draft minutes of the March 1997 meeting subject to minor editorial changes on pages 4, 15, and 19.

Judge Duplantier and Professor Resnick reported on the June 1997 meeting of the Standing Committee. Judge Duplantier said the Standing Committee had approved the amendments to the Official Forms, as proposed by the Committee, including the changes made to proposed Official Form 10, the Proof of Claim, after the March 1997 meeting and circulated by mail and facsimile transmission to the members. At the Standing Committee meeting, Alan W. Perry, Esquire, had inquired about inconsistencies in the dates and abbreviated designations of the forms in the top left corner of each form. In response to these questions, these dates and designations were edited uniformly to the month and year of anticipated Judicial Conference action and variations in the abbreviated designations were reduced, the Chairman said. The Standing Committee also had approved the Advisory Committee's recommendation that a transition or phase-in period for the new forms be authorized, with March 1, 1998, as the date on which the new forms would become mandatory.

The Chairman said the Standing Committee also had approved the publication for comment of the package of rules forwarded by the Advisory Committee. He noted that the preliminary draft pamphlets had just been printed and had been distributed to the members at the meeting as well as by mail.

Professor Resnick said the Standing Committee has been examining over the past several years a few areas of practice in federal courts in which issues of attorney conduct have arisen, with a view toward ascertaining whether any uniform federal rules might be either appropriate or helpful in a field that traditionally has been regulated by the states and local federal district courts. The various state rules and the American Bar Association's model code are often

inconsistent, especially with respect to defining and addressing conflicts of interest, a situation that can leave practitioners subject to contradictory rules. Professor Resnick said he had spoken with Professor Daniel R. Coquillette, Reporter to the Standing Committee, who stated that he planned to draft an amendment to Federal Rule of Civil Procedure 83 that would prohibit courts from making local rules that would conflict with "Appendix A." Professor Coquillette told Professor Resnick that he also planned to draft an "Appendix A" to the civil rules that would contain five to eight "core" federal rules of attorney conduct.

Professor Resnick noted that the Standing Committee has held two seminars on the subject, which were attended by Gerald K. Smith of the Advisory Committee, and that there appears to be recognition that bankruptcy practice may have to be carved out of at least some aspects of the kinds of rules the Standing Committee appears to be contemplating. Professor Resnick also noted, however, that most bankruptcy court local rules on the subject refer to district court or state rules and, therefor, if the Federal Rules of Civil Procedure are amended, those amendments may be binding on the bankruptcy courts. Accordingly, he said, the Advisory Committee needs to monitor this attorney conduct rules project very attentively. Ultimately, the Advisory Committee may have to draft its own "core" rules or, at minimum, consider and comment on any proposed civil rules amendments. Professor Resnick also said that the FJC last year had completed a study of attorney conduct issues in district courts and that Professor Coquillette has suggested that a similar study be done in the bankruptcy courts. This proposed study, he said, will require input from the Advisory Committee. **The Chairman said that he, Mr. Smith, and the Reporter would consult with Ms. Wiggins concerning any proposed study.**

The Reporter noted that on April 1, 1998, adjustments to certain dollar amounts in the Bankruptcy Code are scheduled to take effect. Some of the affected dollar amounts also appear on some of the official forms. He reminded the Committee that in 1996 the Standing Committee and the Judicial Conference had acted to permit these adjustments to be made automatically without further Committee or Conference involvement. Amendments to the Bankruptcy Code enacted in 1994 specify the procedure and formula to be used to adjust the dollar amounts and require that the adjustments be published in the Federal Register no later than March 1. The Administrative Office will take care of making the computations needed and arranging and paying for the publication. Conforming amendments to the affected forms -- the Proof of Claim and Schedule E -- will be distributed in the normal way.

Judge Duplantier said that the Advisory Committee on Civil Rules had sponsored a two-day conference on discovery the week before at Boston College Law School. Professor Resnick said he had attended the conference and that it appeared to him that the only consensus reached during the two days is that local opt-outs from an otherwise national rule should not be permitted. There was a divided vote on what the national rule should provide with respect to mandatory disclosures, with the majority opposed. The minority, however, was sizable, he said.

Judge Robreno said he had attended a meeting of the Civil Rules Committee and would be attending another in October. He said he had been studying the Rand Corporation report issued in connection with the experiments conducted under the Civil Justice Reform Act. The Rand researchers had studied 12,000 cases and their findings are quite controversial, he said. The report indicates that the various pilot programs undertaken under the Civil Justice Reform Act had little effect on costs of litigation or parties' satisfaction with the process, and that alternative dispute resolution (ADR) programs also made little difference. The only factor that made a difference, according to the report, was the setting of an early trial date. The report also indicated that differentiating cases for appropriate management according to size and complexity is a useful exercise, he said. Judge Robreno also said the Advisory Committee should be aware of the June 1997 decision of the Supreme Court in the "Georgine" case, Amchem Products, Inc. v. Windsor, ____ U.S. ____, 117 S.Ct. 2231 (1997), which held that settlement classes are not permissible unless they meet all the requirements for a regular class under Federal Rule of Civil Procedure 23.

Judge Duplantier also said he had attended the June 1997 meeting of the Bankruptcy Committee. Judge Hodges, who attended the Advisory Committee meeting as a representative of the Bankruptcy Committee, observed that the two committees overlap very little in their responsibilities but have many common interests. One area of interest to both groups is fees and he noted that the Bankruptcy Committee had made recommendations concerning bankruptcy fees at the June meeting. Other issues the Bankruptcy Committee is working on actively, he said, are additional judgeships, consolidation of bankruptcy and district court clerks' offices, the *in forma pauperis* study which is due to Congress on March 31,1998, and methods to improve the operations of United States trustees and bankruptcy administrators.

Mr. McCabe added that the Bankruptcy Committee also had taken up Recommendation 73 of the Long Range Plan for the Judiciary, which states that the judiciary does not have enough information about its bankruptcy cases to support program decisions, and assigned to its Long Range Planning Subcommittee the task of recommending ways to make more and better bankruptcy information available to those who need it. The subcommittee had met September 9 and divided into two subgroups, one of which will focus on court data and the other of which will work on financial and demographic information. Mr. McCabe said he believes the best way to standardize information coming in to the courts may be through the official forms. Mr. Sommer, after noting that amendments to the official forms would be considered by the Judicial Conference the following week, said the Committee should be mindful about timing future amendments to the forms, because lawyers must purchase new or upgraded software each time the forms are amended.

Ms. Wiggins said the FJC presently transfers district and appellate court data to the Interuniversity Consortium for Political Research, which makes the data available to other researchers, and is working with the Statistics Division of the Administrative Office to make

bankruptcy data available also. Professor Resnick reported that he had attended a conference held in April 1997 under the sponsorship of the Rand Corporation and the EOUST which had included social scientists, academics, and a National Bankruptcy Review Commissioner, John A. Gose. Professor Resnick said he was concerned about privacy issues that arise with widespread distribution of information disclosed by debtors in bankruptcy cases. For example, he said, there is a 10-year limit on including bankruptcy information in a credit report, but information placed on the Internet cannot be erased. Ms. Wiggins said the FJC is sensitive to the privacy issues and is working to purge certain items from the bankruptcy data. She said the FJC intends to work with the General Counsel of the Administrative Office and with the Bankruptcy Committee on the matter. Judge Duplantier asked if the Committee ever had been asked to add social science questions to the official forms. The Reporter said requests had been made in the past, such as a request to add the question whether the debtor is male or female.

Notice to the Government

Judge Small introduced the discussion by noting that proposals by the Reporter, Mr. Kohn, and Mr. David B. Foltz, Jr., had been considered at the Committee's last meeting and been referred to a new subcommittee chaired by him. He recalled that one proposal would have required the clerk to establish and maintain a register for addresses of governmental units. The March 1997 discussion had highlighted problems with the proposal: 1) on the part of clerks concerning the frequency of updates and the number of addresses permitted per government agency, and 2) on the part of debtors over the effect, under § 523(a)(3), of a debtor's failure to provide a correct address. Over the summer, Judge Small said, the subcommittee had met by telephone and, after further discussion, had directed the Reporter to draft amendments incorporating many of the proposals presented at the March 1997 meeting. The Reporter added that the effort to amend the rules to provide for better notice to governmental units actually had begun at the March 1995 meeting, when the Committee had considered the issues and requested new proposals that would reflect the concerns raised at that time.

Professor Resnick summarized the elements of the various proposals that the Committee had considered at the March 1997 meeting; 1) amending Rule 1007 to require that wherever a debt to a governmental unit is listed a debtor state the name of the agency through which the debt was incurred; 2) amending Rule 5003 to require the clerk to keep a register of mailing addresses for government agencies; 3)requiring the debtor to use the register address if the entity listed is a unit of the federal government or of the government of a state; 4) providing a "safe harbor" for the debtor who uses the address in the register but providing also that use of a different address does not bar the discharge if the governmental unit involved receives actual notice of the

bankruptcy case;[1] 5) amending Rule 2002 to provide that when notice to the United States attorney also is required, that the name of the agency through which the debt was incurred be included in the notice to the United States attorney; 6) requiring disclosure in the Statement of Financial Affairs of additional information about the debtor's personal and business relationships that would enable taxing authorities to investigate the status of the debtor's tax obligations and about environmental claims, both actual and potential; and 7) requiring a debtor to mail a copy of the environmental part of its Statement of Financial Affairs to the relevant government agencies.

Mr. Klee said the Committee needs a policy basis for approving the proposals, which he viewed as having conflicting objectives. On the one hand, he said, a false oath can jeopardize the discharge and on the other, the proposed tax and environmental disclosures could result in self-incrimination. With respect to the notice proposals, he said, due process requires notice, but with these proposals, if notice is not given correctly, the discharge may be jeopardized. What is different about a bankruptcy, he asked, that these disclosures should be required? He said the clerk, rather than the debtor, should give notice, and that the only practical approach is for the clerk to give notice to the entire register, which should be national and not limited to the state where the court is located. Professor Resnick responded that the use of the register would occur only when a governmental unit is a creditor and that its purpose is to help government agencies overcome the problems that arise from the massiveness of their programs. He said the environmental disclosures proposed for the Statement of Financial Affairs are a different matter and are much more controversial.

Notice to the Government — Rules 2002 and 5003

The Committee began its consideration of the draft amendments with the proposed amendments to Rule 5003(e) (establishment of a register) and proposed new Rule 2002(g)(2) (filing by governmental unit of preferred address information). Mr. Shepard said the NBRC had heard much about the importance of notice, especially when the time to act is short. The opportunity clearly exists to delay notice, he said, and a remedy is needed. The NBRC view is that the Bankruptcy Code should provide sanctions for deficient noticing, and the rules should specify the mechanics of proper noticing. Mr. Shepard said he thinks the register should go beyond the immediate state in the which the court is located. Mr. Klee added that Indian reservations, foreign states, municipalities, and other, smaller, government units also should be included. Mr. Heltzel pointed out that the number of government entities in the State of California alone is over 7,000, and including further jurisdictions is simply impractical. Professor Resnick suggested that it probably would be better to start with a manageable amount

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[1]Although the Reporter characterized this as a "safe harbor" provision for the debtor who uses the address in the register, Mr. Kohn emphasized that it makes use of the register address voluntary.

of material and see how it goes. He said the Committee also had been asked why the register should be limited to governmental units, with a suggestion to include private creditors such as Citibank as well. A relatively small register will help, he said, and probably be sufficient for most cases.

Judge Cristol expressed concern about the debtor using a register list that is more than five months old. He said he thinks there should be a distinction in treatment depending on whether a creditor is a voluntary one (private lending institution) or an involuntary one (such as a taxing authority). For a voluntary creditor, he said, a debtor should have records and the debt should not be discharged if notice is not provided. Mr. Kohn said the "outside" states may need to be listed in a register more than the immediate one. He also said a register would benefit debtors, because using the address listed there is *per se* effective notice and creditors also benefit because timelier notice helps them to avoid violating the automatic stay. Mr. Sommer said he favors good notice, but that if a registry is too large it is not really useful. Judge Kressel suggested turning the thrust of the amendment around to say "do the best you can in providing an address, but you can do even better if you use the register." He said he also would want the rule to make clear that notice will still go to the address listed by the debtor on the mailing matrix and not require the clerk to override the matrix with any different address from the register.

Mr. Klee said he still would like the word "state" in line 7 of Rule 5003(e) changed to "state or territory" and to have conforming changes made throughout the drafts. Mr. Rosen asked whether the government could search for information using a debtor's social security number. Mr. Kohn said this is impractical, because the federal government has no central database and each state would have to go through all one million annual filings to find the cases in which that state is a creditor.

Judge Duplantier asked whether anyone on the Committee opposed the general idea of "a register." Mr. Heltzel said he opposed the amount of work it would require of the clerk. Mr. Batson said he doubted the idea would work in practice. **When the matter was put to a vote, the result was 9 - 4 in favor. On the question of expanding the scope of the register** beyond the proposal, as amended, Mr. Heltzel said clerk opposition would be massive, and **only one member voted in favor.**

Continuing with the various provisions of the draft of Rule 5003, the Chairman asked if the Committee thought the dates on which the register is updated should be uniform. The consensus was that they should.

Mr. Kohn said he does not like limiting an agency to one address and would prefer to give the clerk discretion in the matter. Judge Duplantier asked how the debtor would know which one to choose if several addresses were listed. Kohn suggested that the addresses could be distributed by counties, but Mr. Heltzel said the government agencies are not all organized the

same way, that their boundaries seldom match those of the court districts. His district, for example, comprises parts of three IRS districts, he said. Professor Tabb asked if there should be a safe harbor provided for a debtor who has only a one-in-three chance of choosing the right address. Mr. Heltzel questioned what will happen when people move. He also said he had been sampling matrices filed in his district to determine how well debtors are complying with the addresses posted in the local roster of government agency addresses that he has maintained for many years; he found compliance is only about 50 percent.

Judge Kressel suggested changing the word "district" on line 7 of Rule 5003(e) to "court" and making conforming changes throughout the drafts. Judge Gettleman made a motion to change the frequency of register updates to once per year (from twice per year), which carried with one opposed.

Mr. Sommer said that in the draft of Rule 2002(g)(2), at lines 13 through 15, he found the language confusing and asked the Reporter why he did not simply say "the agency"? Professor Resnick responded that it is not the agency that has the claim, but the United States or the state. If agency were to be added, he said, it might appear that municipalities could be included. In the same way, he said, the reference to Rule 5003 is intended to show that the United States or a state can file an address for one or another of its agencies, but the creditor is still the United States or the state. Judge Kressel concurred and observed that the cases on notice say that notice to the Small Business Administration, for example, is not notice to the Internal Revenue Service. There was general agreement that drafting on this points presents difficult issues and that the definition of "governmental unit" in §101 of the Code increases the difficulties. The Reporter invited help from the Committee in resolving this drafting point.

Mr. Rosen said the heading of Rule 2002(g)(2) should be changed to use the phrase "the United States, states, and territories" to reflect the discussion at the meeting. Judge Cordova said the would "separate" on line 21 of the rule should be deleted.

Mr. Sommer asked how Rule 2002(g)(2) would work with Rule 2002(g)(1), which provides for using the address on a filed proof of claim if that address differs from the one provided by the debtor. Professor Resnick suggested that he could either insert in (g)(1) a carve-out such as "except as provided in (g)(2)" or he could add a proof of claim option to subdivision (g)(2).

A motion by Mr. Rosen that in the draft of Rule 2002(g)(1), lines 10 - 11, a provision be inserted that a creditor that wants a different address used in subsequent notices must file a request and serve copies on the debtor and trustee carried by a vote of 9 - 3. The Committee then reconsidered the matter, based on the amount of paper that would be generated. Professor Resnick suggested amending proposed subdivision (g)(2) at lines 17 - 19 to carve out subdivision (g)(1), but Mr. Sommer said it would be a mistake to carve out of subdivision (g)(1)

the requirement to use the address on the matrix or any later-filed schedule unless a request is filed to use a different address. Mr. Heltzel said the real process of sending notices is highly computerized, with the actual printing and mailing performed by a contractor at a remote site. As a practical matter, he said, the clerk can't make corrections, but simply adds any new addresses received and sends notices to all.

After this discussion, a new suggestion was made: **delete subdivision (g)(2), (refrain from amending Rule 2002 at all), and rely instead on draft Rule 1007(m)(2) (debtor's duty to use register address). Although there was no vote taken, no member expressed any objection** to this approach. The Reporter said he would redraft Rule 5003(e) to delete the reference to (g)(2) and to provide simply for setting up the register.

The Committee discussed again Rule 5003 and the issue of whether to limit a government agency to one address or permit multiple addresses to be used. Mr. Batson spoke passionately against requiring citizens to help the government by providing information that may be damaging to their interests. Mr. Smith said he is ready to reconsider the creditor's option to provide a new address by doing so on the Proof of Claim. Mr. Kohn said that multiple addresses seem to be working without causing problems in those district that have established registers by local rules and that the various addresses conform to geographic divisions within the particular district. **A motion to limit each agency to one register address carried by a vote of 5 - 4.**

With respect to the draft of Rule 2002(j), the Reporter said the proposed changes all were stylistic with the exception of lines 61 - 64, which contain the provision requiring that when notice must be mailed also to the United States attorney, the notice shall identify in the address the name of the department, agency, or instrumentality through which the debt was incurred. **The Chairman stated that, seeing no objection, the amendment would be adopted, subject to review by the Style Subcommittee.**

National Bankruptcy Review Commission

Brady C. Williamson, chairman of the NBRC, reported that the Commission expected to issue its report on time, on October 20, 1997, and that it would be published electronically as well as in paper form. He said the report would be available on several websites, including the Government Printing Office (GPO) and the site maintained by the judiciary. Commissioner James I. Shepard spoke of the importance of notice to the bankruptcy system. If the public's right and interest is not protected in bankruptcy proceedings, he said, the system is not working properly.

Notice to the Government — Rule 1007

The Committee, returning to its consideration of government noticing, discussed the draft

of proposed Rule 1007(m), in particular the "safe harbor" provisions that safeguard the discharge if the debtor incorrectly names a government agency or uses an address that is different from the address in the clerk's register, but the creditor agency timely receives actual notice of the case. Mr. Klee said the language should track that of § 523(a)(3). Mr. Sommer and Judge Kressel said the provision should be rewritten more explicitly as a "safe harbor." Judge Duplantier asked how many members thought there should be no "safe harbor." Only Mr. Kohn raised his hand. Judge Duplantier asked how many members would favor language such as "the debtor may use" the register address rather than "the debtor shall" use it. The show of hands was clearly in favor. Mr. Klee observed that some circuits have ruled that if a requirement is in the rules and not followed, the debtor is not discharged. Mr. Rosen said that whether an agency is correctly named should not control whether a debtor receives a discharge in an actual notice situation. **The draft of Rule 1007 was recommitted to the subcommittee.**

Notice to the Government — Official Form 7 (Tax and Environmental Questions)

The Reporter introduced the discussion of the proposed addition of several tax questions to Official Form 7, the debtor's Statement of Financial Affairs, and stated that the four questions shown in the agenda book represent the Government Noticing Subcommittee's winnowing of the submissions received from the Department of Justice. It was the subcommittee's judgment, he said, that if any tax questions are added, the addition should be limited to the questions shown. Mr. Sommer said that in the proposed new question 16, on line 3, the phrase "had been married" should be changed to "was married." He also said some of the proposed questions overlap existing ones, and the Committee should try to avoid duplication of information. He suggested referring the proposed questions either to the Forms Subcommittee or the Style Subcommittee.

Mr. Smith said that proposed question 17 should clarify whether the word "owned" means only 100 percent ownership or is intended also to cover partial ownership. He referred the Committee to the current question 16, which is quite similar, and suggested that it could be broadened to include proposed question 17. Mr. Smith also asked why the information on former spouses is needed. Mr. Kohn said that is for community property purposes. Mr. Sommer suggested substituting "if you listed community debts, name any former spouse." Mr. Klee said trustees also would find the information useful for contribution purposes. Other suggestions by members were to generally refine question 22 and add "If the debtor is a corporation . . . ," and in question 23 to limit applicability to the debtor as an employer and possibly to corporations only. **The consensus was that these question should not be added specially, but only when there is a general review of forms.**

Judge Small introduced the discussion of the proposed environmental questions by noting that they pertain to identified claims only and do not include the disclosure of "imminent danger" on property of the debtor, which Mr. Kohn advocates. Mr. Klee said he would want question

24.a. limited to disclosure of notices actually received by the debtor and would want the clerk, rather than the debtor, to mail the part of the statement containing the disclosures. The Reporter said any requirement to mail part of the statement to creditors should be in the rules and that Rule 1007 could provide for it. Mr. Batson asked whether affording environmental protection agencies with extra information could open the door to requests for similar service by other agencies. **There was consensus that merely adding an instructional note to the form would not be sufficient to require a debtor to mail a portion of its statement to certain creditors and that, if the Committee approves such a requirement, it must be stated in the rules.**

Mr. Smith said he thinks the "imminent danger" information should be disclosed. Mr. Klee said that goes beyond the debtor-creditor relationship and had Fifth Amendment implications. Judge Robreno suggested that such information would be appropriate to inquire about at a § 341 meeting. Judge Gettleman asked whether such disclosures would go beyond what the environmental laws would require. Judge Cristol said environmental issues generally arise in a chapter 7 case where there is a fight between the bank, the trustee, and the other creditors over who will bear the expense of cleanup, and the sooner the existence of an environmental problem is known the better it is for all. Mr. Sommer asked whether it is so important that the participants in the case need the information sooner than the § 341 meeting. Mr. Patchan said it should be known to the U.S. trustee, who appoints the case trustee, before the appointment is made and suggested that there should be a requirement in the rules for separate notice. Mr. Foltz stated that question 24, as drafted, would not have uncovered the problems he has encountered, which included representing a debtor that had hazardous biomedical material on its premises. Mr. Foltz said he would like the substance creating an "imminent danger" to be identified and thinks it should be disclosed immediately. Mr. Klee said there should be a distinction between different types of debtors and what is required of them. He said he supports requiring disclosure by a business and thinks the standard should be that the substance does, rather than may, pose a hazard. Mr. Batson suggested that the standard should be "imminent threat to public health and safety," including environmental safety.

Concerning the general principle of requiring disclosure, the vote was in favor, with one opposed. Turning to the mechanism for establishing the requirement, Professor Resnick suggested that the disclosures in question may go beyond what already is required under § 521 and need a statutory change, especially if separate notice is to be given. Mr. Patchan again supported special notice to the U. S. trustee as the person most likely to respond immediately. Professor Resnick suggested there could be a checkbox on the petition, and checking the box would signal the clerk to notify the U. S. attorney immediately. Judge Cordova said the U.S. trustee should receive the notice, not the U. S. attorney. Judge Robreno said he favors using the statement of affairs rather than adding to the filing requirements set out be Congress. He said he also was concerned about how the word "imminent" would be interpreted. Mr. Rosen said that in a bankruptcy, the property is transferred to a new person, the trustee, who should know the risk being undertaken.

The Reporter suggested that a two-step disclosure might be possible, with items that create an imminent danger and need urgent attention to be disclosed on Day 1, and other items that are not urgent disclosed in the statement of affairs. A show of hands indicated that the Committee generally favored a two-stage approach, with one opposing vote and two abstentions. A second vote showed nine members favoring broad disclosure at the outset, including both urgent and non-urgent items. Professor Resnick said he thought disclosure might be more effective if limited to matters that require urgent attention. He said this could be done with a box labeled "Check here and give a brief description." Mr. Sommer said he favored a combination of a rule and form to go out for comment with the rule amendment. Judge Donald said the requirement should be only for disclosure of hazards known to the debtor, with a duty to amend based on later information.

The Committee determined to recommit to the Forms Subcommittee the issue of environmental disclosures, both those that present an "imminent danger" and those for which disclosure is less urgent.

Litigation Subcommittee — Rules 9013 and 9014

The Reporter introduced the discussion by reviewing the Committee's action at the March 1997 meeting approving in principle the subcommittee's proposed amendments, subject to further refinement, review by the Style Subcommittee, and deferral of certain issues. He said he had submitted the drafts to the Style Subcommittee of the Standing Committee for its recommendations, and that the Advisory Committee's own Style Subcommittee had gone over those recommendations in a telephone conference in which the Litigation Subcommittee chairman, Mr. Klee, also had participated. Professor Resnick said that during the summer he also had reviewed the rules generally to identify those that would require conforming amendments. He said that as a result of this review he also wanted to bring back to the Committee the matter of amending Rule 9034, which governs notice to the United States trustee. A proposal to amend that rule had been defeated at the March 1997 meeting, but deleting notice to the U.S. trustee as part of the conforming of rules to the proposed Rules 9013 and 9014 might cause the Committee to take a different view of amending Rule 9034, he said. Professor Resnick described the various agenda materials: Exhibit A contains the style revision, with portions related to deferred issues shown in brackets; Exhibit B is identical to Exhibit A, but marked to show some additional proposals from the Reporter that resulted from his review of other rules; Exhibit C lists proposed amendments to 20 rules to conform to the proposed amendments to Rules 9013 and 9014; Exhibit D contains proposed amendments to Rule 1006, deferred at the March 1997 meeting; and Exhibit E shows proposed amendments to Rule 1007 that were approved in principle at the March 1997, subject to further refinement.

Judge Duplantier said that, although the Committee had approved in principle the proposed amendments to Rules 9013 and 9014, the proposals were open to reconsideration and

he noted that Judge Robreno had written a letter describing a different approach. Judge Robreno's letter, which was distributed to the Committee separately from the agenda book, would be discussed at the appropriate moment, he said. Speaking for himself, Judge Duplantier said his objective in managing litigation is to identify the big case early on, so it can be singled out for special attention and management. The routine matters, however, should not be unduly burdened with requirements that are needed only in a big case. He suggested as targets for deletion from proposed Rule 9014 two items that he thinks will burden routine matters and can be specially provided for when needed: the list of witnesses, and the 25-day response time. He said that motion practice is similar to discovery; the problems are in the big cases.

Mr. Smith said the attorney for the movant usually knows when a matter is complex and should trigger the extraordinary procedures, but Judge Duplantier said it may sometimes be the responder who creates the complexity. Judge Robreno spoke generally against the proposed Rule 9014(m), which gives the court discretion to depart from the prescribed procedures. He said it seemed to him to be like the opt-out provided in Federal Rule of Civil Procedure 26(a) and is really like adopting no rule. He also said the draft seems to be legislating for the extraordinary, while he prefers an approach that states basic principles for all, leaving the court to give directions in major matters. Judge Duplantier said he did not think proposed subdivision (m) would create a general opt-out.

Mr. Klee reviewed the status of the litigation project. Like Gaul, he said, it is divided into three parts. Adversary proceedings comprise one part, and are not affected by the proposals. Proposed Rule 9013 is another part, addressing matters that usually proceed unopposed, and the proposals concerning these appear to enjoy broad support within the Committee. Proposed Rule 9014 is the third part, and there are three approaches within the Committee: Judge Robreno's, Judge Duplantier's, and the subcommittee's draft. The Committee then turned to the materials and considered the proposals in order.

The Reporter noted that the first bracketed material in the draft of Rule 9013 is subdivision (a)(5), concerning an application for approval of employment of a professional. Professor Resnick said that deleting the brackets would create a conflict with what is proposed for Rule 2014 and that perhaps the best course would be to delete (a)(5) from Rule 9013 altogether and leave Rule 2014 as a stand-alone rule. **There was no opposition to deleting subdivision (a)(5).**

The next bracketed subdivision is (a)(11), which addresses a request for examination under Rule 2004, and the Reporter noted that the Rule 2004 Subcommittee had decided to table the proposals to require notice of a Rule 2004 examination. Deleting subdivision (a)(11), he said, would leave the question of notice to local rule. **Mr. Klee made a motion to retain subdivision (a)(11) (and delete the brackets), which carried by a vote of 7 to 6.**

Turning to Exhibit B, which includes additions made to the draft after the Reporter's review of other rules, **there was consensus to retain subdivision (a)(14),** concerning conditional approval of a disclosure statement under Rule 3017.1. With respect to subdivision (a)(15), concerning protection of secret, confidential, scandalous, or defamatory materials, Judge Robreno raised the issue of public interest. **A motion to include subdivision (a)(15) drew a tie vote of 6 to 6, which the Chairman resolved by voting to include (a)(15).**

Judge Kressel expressed concern about the provision in subdivision (e) that the applicant is to serve the order, once it has been signed by the judge. Judge Kressel said the rule needs to ensure that the order is served, because the clerk will docket it and the appeal time will begin to run. He said he thinks the rule should require that, if the court issues an order, the clerk must serve a copy on the applicant, any entity listed in Rule 9013(c), and any other entity the court directs. **A motion to amend the draft to require the clerk to serve any order carried by a vote of 9 to 2.**

A motion to approve proposed Rule 9013 as amended at the meeting carried on a voice vote.

Turning to the subcommittee's draft of Rule 9014, the Chairman said the draft is nearing completion. He said he would like to shorten the response time, put the burden on the respondent to say the matter is complex and needs more time. Judge Robreno made a motion to substitute his draft. He said the essence of his proposed rule is its subdivision (c). Under his draft rule, he said, the rule would state the principles, and the details would be left to local rule. Mr. Sommer said he supports the principle of uniformity and would publish the subcommittee's draft. Judge Kressel agreed and said the sole finding of the FJC study was a desire for uniformity. He said the Committee should publish the draft and see what the comments are. Professor Tabb said the draft seems to him to be micromanagement. Professor Resnick said he did not agree and noted that the draft had been streamlined since two meetings prior. He also observed that the policy of the Standing Committee is uniformity in rule and against local rules. Judge Cordova said the draft appears to be unduly complicating motion practice, and the only items needed are notice to the opposing party, and opportunity to respond (which should be ten days), and reasonable time to be heard. Judge Donald said the procedures look more complicated on paper than they would be in practice, and Judge Duplantier and Mr. Sommer agreed. The Reporter said the trend in the civil rules with respect to discovery is toward limiting the number of depositions and interrogatories. This is a technique for identifying the big case, he said, because studies show that in most cases discovery takes less than three hours, and a need for more than the rule permits forces the parties to go to the judge. If the draft of Rule 9014 is amended to make the response time ten days, he said, that would have a similar result of sending the parties in a complex matter to the judge with a request for more time. **The motion to substitute Judge Robreno's draft for the subcommittee's draft of Rule 9014 failed by a vote of 2 to 9.**

The Committee then turned to the subcommittee's draft of Rule 9014. The Chairman said the rule should be drafted so that in a non-routine matter, the respondent can request more time. Mr. Smith said the extension should be automatic if there is a response. The Reporter said this extension already is built-in, because, if there is a response, the first hearing is a status conference (unless there is no genuine triable issue of fact). Judge Small said he thinks the shortest response time possible would be 15 days. Others suggested ten days, with 24 hours for further response from the movant, or with three days for further response. Mr. Sommer said shortening the time is workable so long as the rule retains the "at least" language, so the time can be extended. **A suggestion to establish 15 days as the time for response, with five days for further response, drew 9 votes in favor. A subsequent motion to change the 15 days to 20 days carried by a vote of 8 to 2.**

A motion to strike the requirement that the movant (lines 31-35) and the respondent (lines 95-101) provide witness lists with their initial pleadings carried, 7 to 3.

The Committee then began a subdivision-by-subdivision review of the subcommittee's draft. In response to a question about the inclusion in subdivision (a)(2) of the approval of a disclosure statement and the confirmation of a plan as matters to which Rule 9014 would not apply, the Reporter said no motion or status conference is required for these matters now, that the Code requires the court to hold a confirmation hearing, and that Rule 9014 would allow the court to skip the confirmation hearing if no objection were filed. **A motion to apply Rule 9014 procedures to Rules 3017, 3019, and 3020(b) carried by a vote of 6 to 5.** Judge Kressel said it is the objection to a disclosure statement or to confirmation of a plan that triggers Rule 9014 now, and that should continue. The Reporter said any motion involving valuation needs an attached appraisal under the subcommittee's draft, which may not be appropriate for a disclosure statement or a plan. **A motion that Rule 9014 apply to these matters but that the objection be the initiating "motion" failed by a vote of 3 to 6.** Mr. Klee reiterated that the survey showed people think there are too many different procedures in the rules. The Reporter noted that there also is a conflict with existing Rule 2002(b), which requires a 25-day notice of a hearing on approval of a disclosure statement or confirmation of a plan. **A motion to reconsider and carve out Rules 3017 and 3020(b) from Rule 9014 carried by a vote of 10 to 1. A motion to retain the reference to Rule 3015(g), modification of a chapter 13 plan, in subdivision (a)(2) carried 8 to 2. [Subsequently, the Committee determined that Rule 3015(g) is to be governed by Rule 9014.] The Committee then agreed to amend Rule 3019 to provide that a request for a determination that a class be deemed unaffected by a plan is governed by Rule 9014. The Committee decided to delete as redundant, however, the reference to Rule 3017.1, because it is included in Rule 9013(a) which is carved out generally.**

In subdivision (a)(5), the Committee also determined to delete the word "other" in line 18 and to insert the word "the" after the word "or" in line 19. The Committee voted 7 to 2 to retain subdivision (b)(3)(C), requiring the movant to provide a copy of any valuation

report when valuation is "an" (rather than "at") issue.

Concerning subdivision (c), Mr. Sommer said there is an ambiguity surrounding the phrase "at least" when applied to the time limit that could permit a party to file a motion and wait to serve it. The Reporter asked whether the court can change time periods other than under Rule 9014, which permits such changes in a particular case only. **The Committee voted 7 to 4 in favor of allowing the court to circumvent the "at least" and allow a local rule to provide for a longer initial time period.** Judge Duplantier said this action would destroy uniformity, and **in a second vote, the Committee reversed and voted 8 to 3 against a local rule opt-out.**

In subdivision (c)(1)(F), the Committee determined to insert the word "on" after "lien" in line 60 and to delete the word "adversely" in line 62. In subdivision (c)(1)(G), the Committee inserted the words "to service" after "entitled" in line 64.

Concerning subdivision (h)(1)(C), a member questioned whether the shortened time period provided in the subcommittee's draft would be workable with the shortened answer time voted earlier. **The Committee voted 4 to 3 against shortening these periods and then voted to delete the subdivision entirely. Upon a motion to reconsider, subdivision (h)(1)(C) was restored with the phrase "30 days" in line 141 deleted and the brackets surrounding "10 days" deleted in line 143. The Committee voted to delete subdivision (h)(2),** which Judge Gettleman had pointed out as redundant of Federal Rule of Civil Procedure 37.

In subdivision (i)(1)(B), line 171, the Committee discussed how much notice the court should be required to give when it decides that the first hearing in a matter will be an evidentiary hearing. Five members favored three days, but Mr. Batson wanted a longer time. Mr. Klee said a longer time would not work when the response does not come in until five days before the originally scheduled hearing date. Both Rule 9006 and subdivision (n) of the (Exhibit B) draft allow for alteration of time periods, he said, and the Reporter suggested that line 171 could simply require "reasonable" notice. **The Committee voted 7 to 3 in favor of requiring reasonable notice. In subdivision (i)(2), line 181, the Committee changed "unrepresented" to "not represented."**

In subdivision (l), line 211, the Committee agreed to delete the brackets around "7009" in the list of adversary proceeding rules that will apply. In lines 216-17, and in subdivision (n), line 229, the Committee determined to delete the phrase "within the time necessary." In subdivision (n), line 225, the Committee also determined to delete the phrase "with or without prior notice."

The Chairman requested that, for the publication of the draft for comment, the Reporter and Mr. Klee write an introduction to the litigation package that would tell members of the bench and bar what to focus on, such as the issues just debated by the

Committee. Ms. Wiggins suggested as a model the "Call for Comment" that accompanied the preliminary draft of Rule 11 of the Federal Rules of Civil Procedure. Judge Robreno asked if any report or other document accompanying the package would contain a disclaimer that it is not approved by the Committee. The Reporter said he envisioned a report to the Standing Committee that the Committee would ask to have published with the preliminary draft. **At the Chairman's request, the Reporter and Mr. Klee agreed to have the report ready in time to include in the agenda book for the March 1998 meeting.**

A motion to adopt the subcommittee's draft of Rule 9014 as amended at the meeting carried by a vote of 8 to 3.

Litigation "Package" — Conforming Amendments to Other Rules

The Committee then turned to Exhibit C, which contains proposed conforming amendments to other rules that would be required if proposed Rules 9013 and 9014 become national rules. The Reporter noted that he had included style changes also, and that, if approved by the Committee, these amendments still would have to be reviewed by the style subcommittees of the Standing Committee and the Advisory Committee.

Rule 1014. **The Committee approved the Reporter's draft with one change, inserting in line 17, before the word "transfer," the phrase beginning on line 18 "if the court determines . . . ."**

Rule 1017. The Reporter noted that Rule 1017(c), which is shown as deleted because it would conflict with proposed Rule 9014, had been published for comment. He said the subdivision would simply remain in effect if Rule 9014 does not become effective. **The Committee changed the word "motion" to "application" in subdivision (f)(2), line 40, and approved the Reporter's draft.**

Rule 2001. **The Committee approved the Reporter's draft.**

Rule 2004(a). (Not in materials.) **The Committee determined to change the word "motion" to "application."**

Rule 2007. The Reporter noted that the changes shown are all stylistic except for the addition of a provision that the matter is governed by Rule 9014. **The Committee approved the Reporter's draft.**

Rule 2016. The Reporter said he had restyled the rule, making substantive changes only to change "application" to "motion" and provide that Rule 9014 governs. **The Committee changed the word "request" on line 28 to "motion," changed "applies" to "apply" in line 56,**

and changed "application" to "motion" in line 57. The Committee approved the Reporter's draft with the changes noted.

Rule 3001. It was noted that the response time in the current rule would be shortened as a consequence of bring the matter under Rule 9014. **The Committee approved the Reporter's draft.**

Rule 3006. The Committee discussed whether the rule should say "claim" or " proof of claim," and Judge Cordova noted that usage is inconsistent throughout the rules. **The Committee approved the Reporter's draft.**

Rule 3007. The Reporter noted that conforming the procedure for objecting to a claim would shorten the response time from 30 days to 15 and change the procedures generally, by requiring that the matter be set for hearing and a status conference be held. Judge Kressel said he thinks the existing rule contemplates that some basis for the objection will be stated in the papers filed. Several members thought the response time should be longer, wanted to retain the 30 days, and change the response time in Rule 9014 to 30 days also (subdivision (c)(1), line 43). Mr. Patchan said the Rule 9014 procedures would burden the pro se party and generate unnecessary paper to get the matter before the court. **The Committee approved the Reporter's draft with the following changes. In line 2, insert "except that the motion shall be served and filed at least 30 days before the hearing" after "Rule 9014"; in line 6, change "If" to "But", and delete the word "is" before the word "joined"; and, line 7, delete the comma and substitute "is" for "it becomes."**

Rule 3012. **The Committee deleted the phrase "of a party in interest" and approved the Reporter's draft.**

Rule 3013. **The Committee approved the Reporter's draft.**

Rule 3015. Subdivision (f), objection to confirmation, the Reporter said, would be a stand alone procedure, and the changes from the current rule would be to provide for service as in Rule 9014 and to make discovery available. A member raised the issue of whether there should be a deadline for filing an objection, and **the Committee decided to delete the word "timely" from line 14. The Committee also struck the text of subdivision (g), subject to review by the Reporter. Subdivision (g) is to remain, but simply say that modification of a plan after confirmation is governed by Rule 9014. The Committee approved the Reporter's draft with the changes specified.**

Rule 3020(b)(1). After discussion, **the Committee decided to change the first sentence back to the passive voice, and approved the Reporter's draft, with that change.**

Rule 4001. Professor Resnick explained that most of the changes he was recommending are to eliminate redundancies, state that Rule 9014 applies, or make style improvements. **The Committee approved the Reporter's draft.**

Rule 6004. The consensus was that the redrafting effort had become overzealous with respect to the rearranging of the paragraphs. **The Committee directed that the paragraphs be restored to the order in which they appear in the existing rule and that lines 11 - 13 and 38 - 42 be restored to the passive voice. The Committee also changed the reference to "(d)" in line 11 to "(e)" and decided to move the clause on lines 35 - 38 beginning "to all creditors" to form an insert at line 33, after the word "give."** When redrafted, Judge Duplantier said, the **rule should make it clear that a sale may be accomplished by notice, but, if an objection is filed, Rule 9014 applies and the objection is treated as a response. The objector should be required to obtain a hearing date if none has been set in the notice. In addition, the Committee decided to delete the bracketed language at lines 49 - 51. The Committee approved the Reporter's draft, subject to the changes stated.**

Rule 6006. **The Committee approved the Reporter's draft.**

Rule 6007. **The Committee restored the phrase "or debtor in possession" on lines 3 and 4,** which had been marked for deletion by the Reporter, **and inserted in line 15 after the word "is" the phrase "treated as a motion." The Committee also directed that Rule 6007(b) also be amended to provide that Rule 9014 applies. The Committee approved the Reporter's draft, subject to the changes stated.**

Rule 9006. **The Committee approved the abrogation of subdivision (d),** and noted a typographical error in identifying the subdivision in the Committee Note.

Rule 9017. **The Committee approved the Reporter's draft.**

Rule 9021. **The Committee approved the Reporter's draft.**

Rule 9034. **The Committee deleted lines 27 and 28 and approved the Reporter's draft.**

Rule 1006. Turning to Exhibit D, the Reporter explained that Rule 1006 would be a stand alone rule. The change to the existing rule is to substitute the word "request" for the word "application," as that is now a specific procedure governed by Rule 9013. The Reporter said he also had made substantive clarifications about pre- and post-petition payments to bankruptcy petition preparers. **The Committee approved the Reporter's draft.**

Rule 1007. (Exhibit E.) The Reporter noted that this also is a stand alone rule which the

Committee had previously approved and is back for review after redrafting. **After changing the word "is" in line 16 to "are," the Committee approved the Reporter's draft.**

The Reporter said these 23 rules will be submitted to the two style subcommittees and then reviewed by the Committee at the March 1998 meeting.

Rule 2002(a)(6)

After discussion of the Reporter's draft of amendments to raise from $500 to $1000 the amount of a fee request that would trigger notice to all creditors, **the Committee inserted in line 9 of the draft the phrase "of an entity," deleted line 11, and substituted the word "request" for the word "hearing" in line 12. The Committee approved the Reporter's draft with the changes noted.**

Rule 2002(g)

This rule requires the clerk to use the address provided by a creditor in a filed proof of claim, if that address differs from the one listed on the schedules filed by the debtor. The rule allows the clerk to ignore any new address on a proof of claim, however, if a notice of no dividend has been given. The Reporter noted that Bankruptcy Judge Paul Mannes, the former chairman of the Committee, had suggested that, in a case in which assets later appear and a further notice of possible distribution must be sent, any address provided by a creditor on a proof of claim should be used. **A motion to adopt the Reporter's draft, except the portion that requires the use of an address provided in a proof of claim, failed by a vote of 3 to 9. A motion to adopt the Reporter's draft carried by a vote of 9 to 0.** A member requested that the Style Subcommittee give particular attention to this amendment, especially to clarifying the purpose and use of the word "subsequent" in line 10.

Alternative Dispute Resolution Subcommittee

Professor Tabb stated that the subcommittee is in a watching mode. The FJC has completed a survey aimed at discovering whether problems exist, he said. A second survey to explore any problems found in the initial one remains a possibility, he said. Mr. Niemic reported on the preliminary results of the survey. He said a very small number of problems had been reported, leaving the Committee to consider whether any problems in the areas of mediator confidentiality and ex parte communication between the mediator and the judge should be tolerated. Mr. Klee indicated he would be interested in whether the results of the survey differed depending on whether the mediator was paid or was a volunteer. He said he also is interested in how frequently the ex parte contact between the judge and the mediator was with the consent of the parties.

Field Trip to Courtroom 21

The Committee visited Courtroom 21, which is located at the Marshall-Wythe School of Law of the College of William and Mary. Professor Frederick A. Lederer of the law school faculty demonstrated some of the special features of the courtroom, which include video-conference participation by judges at remote locations, video presentation of evidence, and real time court reporting. Ms. Morris used the facilities to explain and demonstrate for the Committee the electronic filing system now being used in the Manhattan office of the bankruptcy court for the Southern District of New York. The Committee could view actual documents filed in cases, and Ms. Morris demonstrated the procedures an attorney would use to file a new document in one of the cases on the system. A private vendor of an electronic filing system also made a presentation.

Miscellaneous Matters

The Committee discussed dates and locations for the autumn 1998 meeting. Members appeared to favor New York, Boston, New England, Sun Valley, or the north rim of the Grand Canyon as possible locations. Staff will explore availability of space at these locations for October 8 - 9, 1998.

All other matters on the Committee's agenda were put over to the March 1998 meeting.

Respectfully submitted,

Patricia S. Channon

Item 7A

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

FERN M. SMITH
EVIDENCE RULES

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

From: **Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules**

Date: **December 8, 1997**

Re: **Report of the Advisory Committee on Civil Rules**

I Introduction

The Advisory Committee on Civil Rules and two of its subcommittees met at the Boston College of Law on September 4, 5, and 6, 1997. The Advisory Committee met again on October 6 and 7, 1997, in Deer Park, Utah. A summarizing statement of the topics considered at these meetings is provided in this Introduction. Part II recommends that this Committee approve for publication proposed revisions of Supplemental Admiralty Rules B, C, and E, with a parallel change in Civil Rule 14. Part III sets out several items for information. Part III(A) describes the ongoing work on discovery, spearheaded by the Discovery Subcommittee. Part III(B) summarizes the deliberations that led the Advisory Committee to defer further action on Civil Rule 23 class-action proposals, both those published for comment in August, 1996, and new proposals. Part III(C) describes the Mass Torts Subcommittee that is being formed, perhaps with liaisons from other Judicial Conference committees, to consider the ways in which the problems of mass-tort litigation might be addressed by combining proposals that can be advanced through the Rules Enabling Act process with proposals that require legislative action.

The September meeting was held to enable Advisory Committee members to participate in the Boston College Law School symposium on the discovery system that was organized by the Discovery Subcommittee. Several Standing Committee members also attended and participated in the conference. The conference's splendid success was reflected in the meeting of the Discovery Subcommittee that followed its conclusion. The Subcommittee helped the Special Reporter, Professor Marcus, to shape the discovery portion of the October meeting agenda.

The October meeting considered three main topics, as well as a few more nearly incidental matters. Discovery proposals, class-action revisions, and Admiralty Rules amendments dominated the agenda. The Admiralty Rules proposals are described in Part II. The class-action revisions and ongoing discovery work are described in Part III.

II ACTION ITEM

Rules Proposed for Publication

Admiralty Rules B, C, and E; Civil Rule 14

The proposals to amend the Supplemental Admiralty Rules spring from the desire to adjust the rules to reflect the growing importance of civil forfeiture proceedings. In rem admiralty procedure has long been invoked for civil forfeiture proceedings. The dramatic growth in land-based civil forfeiture has demonstrated the need to adopt some distinctions between maritime and forfeiture procedure. The process of considering these changes led also to a small number of other proposed changes, including some designed to reflect the 1993 reorganization of Civil Rule 4.

These proposals have been developed over a long period. The initial work was done by the Maritime Law Association and the Department of Justice. The proposals that emerged from that process were considered at length by the Advisory Committee's Admiralty Rules Subcommittee. The chair of the MLA rules committee and a representative of the Department of Justice attended the Advisory Committee's October meeting and participated in the discussion that led to some final revisions of the proposals.

The proposals draw two major distinctions between forfeiture and admiralty proceedings, reflected in Rule C(6)(a) and (b). A longer time to respond is provided in forfeiture proceedings. And forfeiture proceedings allow an automatic right to participate to a broader range of those who assert rights against the forfeiture property than is permitted in maritime proceedings; the maritime procedure will continue to require intervention, rather than more direct participation, where intervention has been required in the past. These topics may be caught up in pending forfeiture legislation. Careful efforts are being made through the Administrative Office, in coordination with the Department of Justice, to keep abreast of legislative developments.

The portions of the rules affected by the proposed changes have been revised to incorporate current style conventions. These changes have included substantial reorganization of current rule provisions. Style suggestions were received from the Style Subcommittee after the Advisory Committee meeting. The suggestions were based on the pre-meeting draft, a matter of little consequence since few changes were made at the meeting. The draft submitted

for publication incorporates the suggestions made by Bryan Garner, as well as some of the suggestions made by Joseph Spaniol. Other of the suggestions have not been incorporated because there was not an adequate opportunity to review them with the Admiralty Subcommittee and the MLA and Department of Justice advisers. The Admiralty Subcommittee feared that adoption of these suggestions might have unintended substantive consequences, and has recommended that the style questions be carried forward for consideration along with the public comments and testimony.

Admiralty Rule B

Rule B governs maritime attachment, a procedure that can be used for one or both of two purposes. Maritime attachment may be used to establish quasi-in-rem jurisdiction when personal jurisdiction is not available and the claim does not support a true in rem claim against the attached property. Maritime attachment also is available as a security device when personal jurisdiction is available, so long as the defendant is not "found within the district."

Rule B(1)(d)(ii) is new. Rule C(3) was amended in 1993 to provide that in an in rem action service need not be made by a United States Marshal if the property seized is not a vessel or tangible property on board a vessel. Although a parallel change was considered for Rule B maritime attachment, for reasons that cannot be discovered only Rule C was changed. The Rule C(3) alternative is adopted by proposed Rule B(1)(d)(ii). The change reflects a continuing process of reducing the demands placed on the Marshals Service. Admiralty practitioners believe that service on board a vessel continues to involve sensitive and potentially dangerous circumstances that require the authority of an armed public official. Other attachments can be made effectively by any of the persons listed in the rule.

Rule B(1)(e) represents a significant change in a peculiar corner of present Rule B(1). Rule B(1) now provides that in addition to maritime attachment, the plaintiff may invoke state-law remedies for attachment and garnishment "pursuant to Rule 4(e)." Until 1993, Rule 4(e) allowed use of state attachment and garnishment procedures in an action against "a party not an inhabitant of or found within the state." In 1993, Rule 4(e) was revised and redesignated as Rule 4(n)(2). At a minimum, Rule B(1) must be revised to incorporate the correct portion of Rule 4. Present Rule 4(n)(2), however, allows invocation of state remedies as to assets "found within the district" only on "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." Maritime attachment is available in every such case. After lengthy discussion, it was concluded that nothing significant would be accomplished by continuing to incorporate Rule 4(n)(2) in Rule B.

At the same time, admiralty practitioners have found it helpful to invoke state-law security devices under Rule 64. There was some fear that reliance on Rule 64 might be found inconsistent with Rule B. Under Rule A, the Civil Rules apply in admiralty "except to the extent that they are inconsistent with these Supplemental Rules." To avoid any risk that Rule 64 might not continue to be available in admiralty, Rule B(1)(e) expressly incorporates Rule 64.

Rule C

Rule C(2)(d)(ii) is new. It reflects statutory provisions that permit a forfeiture proceeding against property that is not in the district.

Rule C(4) is amended to reflect the changes in terminology made in Rule C(6). In addition, an apparent gap is filled by providing for the first time that publication of notice of an in rem proceeding can be terminated if the property is released after the 10-day period that triggers the obligation to publish but before publication is completed.

Rule C(6) is split into separate subdivisions to reflect the distinctions between forfeiture and maritime in rem proceedings. Subdivision (a), governing forfeiture, reflects the two central distinctions. One distinction involves the nature of the interests that establish an automatic right to participate in the proceeding. Present Rule C(6) refers to the "claimant." This reference has generated confusion. "Claimant" is replaced in subdivision (a)(i) by "a person who asserts an interest in or right against the property." This phrase includes those who assert any sort of interest, including such non-ownership and nonpossessory interests as liens. Such a person can assert the interest or right by filing a statement of interest or right, and later filing an answer. Proposed subdivision (b)(i), governing admiralty proceedings, replaces "claimant" with the phrase "[a] person who asserts a right of possession or any ownership interest in the property." This phrase is narrower than the parallel phrase in (a)(i), and is intended to capture the traditional and still continuing admiralty practice. Under this practice a person who asserts an interest or right less than possession or ownership — such as many varieties of lien — can participate only by intervention, not by simply filing a statement of right or interest.

Rule E

Rule E(3) is amended to reflect statutory provisions that permit service of process outside the district in some forfeiture proceedings. (The parallel pleading change is made in Rule C(2)(d)(ii), described above; the statutes are illustrated in the Rule C Note.) The Advisory Committee, on recommendation of its Subcommittee, voted for the lengthier version set out as paragraphs

(a) and (b). The alternative version is set out because both Garner and Spaniol preferred it.

Rule E(7) is amended to make it clear that if Defendant A gives security, the plaintiff need not give security when Defendant B counterclaims.

Rule E(8) is amended to delete the provision for a restricted appearance when state quasi-in-rem jurisdiction provisions are invoked. This change reflects the amendment of Rule B(1)(e) that deletes the Rule B(1) provision invoking what now is Civil Rule 4(n)(2), as described above.

Rule E(9) is amended to reflect the changes in terminology in Rule C(6).

Rule E(10) is new. It provides for protection of attached or arrested property that remains in the possession of the owner or another person.

Finally, the change in Rule C(6) terminology requires parallel changes in Civil Rule 14(a) and (c).

Publication Schedule. The Admiralty Rules proposal offers an occasion to reflect on the time-consuming pace of the Enabling Act Process. The Advisory Committee has not deliberated on this question, and there is no recommendation that the publication period be shortened. The circumstances, however, provide a typical illustration of the circumstances that add to the time required to effect a rule change.

Development of these proposals has taken a long time. The areas of practice involved are not familiar even to most members of the Admiralty Subcommittee. The patient and careful work of the Maritime Law Association committee and the Department of Justice have provided strong reassurance that the proposals are well developed. They are eager to press toward actual adoption. If the proposals were published by early February, a three-month comment period ending in April might enable the Advisory Committee to make a final recommendation for adoption to the June, 1998 meeting of this Committee. If accepted, that would allow full time for consideration by the Judicial Conference in September and Supreme Court action by the end of April, 1999. The traditional six-month comment period would, for all practical purposes, set the process back by one year. Even if a final recommendation were made to this Committee in January, 1999, it would seem hasty to ask that the Judicial Conference act in March to recommend action by the Supreme Court before the end of April.

Although the time tables are clear enough, it is less certain whether there is in fact any great urgency. It would be nice to have a proposal published and a clear time table to show to

Congress as it considers forfeiture legislation. The topic is addressed primarily to specialized — indeed highly specialized — segments of the bar, who may be able to respond clearly and quickly. A highly visible and expert body of admiralty lawyers, the MLA, has been deeply involved with the drafting process already. Scrutiny by forfeiture specialists at the Department of Justice provides comparable reassurance on that front.

Set against these observations is the powerful force of ordinary practice. Part I(4)(b) of the Procedures for the Conduct of Business under the Enabling Act provides:

> In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.

Subparagraph (d) is longer:

> Exceptions to the time period for public comment and the public hearing requirement may be granted by the Standing Committee or its chairman when the Standing Committee or its chair determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. * * *

It would be difficult to argue "that the administration of justice requires" a one-year advance in the time required to effect these rule changes. The best that can be hoped is that after a normal six-month comment period, the responses will show no more than minor adjustments that could as well have been suggested in three months. But it remains possible that the full period will be needed to ferret out more elusive but more important issues that need to be addressed.

This observation on the frustrations that arise from the deliberately careful nature of the full process is offered as food for long-range thought. It may be that some experimentation will prove possible with matters that are not mere "technical or conforming amendment[s]," but that involve cohesive and highly specialized constituencies that can respond more rapidly than the many and diverse constituencies that are affected by most rule changes.

Admiralty Rules B, C, E; Civil Rule 14

Rule B. In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process.

(a) If a defendant in an in personam action is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees [to be] named in the process.

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d) **(i)** If the property is a vessel or tangible property on board a vessel, the clerk must deliver the summons, process, and any supplemental process to the marshal for service.

(ii) If the property is other tangible or intangible property, the clerk must deliver the summons, process, and any supplemental process to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

(2) Notice to Defendant. No default judgment may be entered except upon proof — which may be by affidavit — that:

(a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4;

(b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

Committee Note

Rule B(1) is amended in two ways, and style changes have been made.

The service provisions of Rule C(3) are adopted in paragraph (d), providing alternatives to service by a marshal if the property to be seized is not a vessel or tangible property on board a vessel.

The provision that allows the plaintiff to invoke state attachment and garnishment remedies is amended to reflect the 1993 amendments of Civil Rule 4. Former Civil Rule 4(e), incorporated in Rule B(1), allowed general use of state quasi-in-rem jurisdiction. Rule 4(e) was replaced in 1993 by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the defendant cannot be obtained in the district where the action is brought. Little purpose would be served by incorporating Rule 4(n)(2) in Rule B, since maritime attachment and garnishment are available whenever the defendant is not found within the district, a concept that allows attachment or garnishment even in some circumstances in which personal jurisdiction also can be asserted. In order to protect against any possibility that elimination of the reference to state quasi-in-rem jurisdiction remedies might seem to defeat continued use of state security devices, paragraph (e) expressly incorporates Civil Rule 64. Because Rule 64 looks only to security, not jurisdiction, the former reference to Rule E(8) is deleted as no longer relevant.

Rule B(2)(a) is amended to reflect the 1993 redistribution of the service provisions once found in Civil Rule 4(d) and (i). These provisions are now found in many different subdivisions of Rule 4. The new reference simply incorporates Rule 4, without designating the new subdivisions, because the function of Rule B(2) is simply to describe the methods of notice that suffice to support a default judgment. Style changes also have been made.

Rule C. In Rem Actions: Special Provisions

* * * * *

(2) Complaint. In an action in rem the complaint must:

(a) be verified;

(b) describe with reasonable particularity the property that is the subject of the action;

(c) in an admiralty and maritime proceeding, state that the property is within the district or will be within the district while the action is pending;

(d) in a forfeiture proceeding for violation of a federal statute, state:

(i) the place of seizure and whether it was on land or on navigable waters;

(ii) whether the property is within the district, and if the property is not within the district the statutory basis for the court's exercise of jurisdiction over the property; and

(iii) all allegations required by the statute under which the action is brought.

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(ii) (A) In other actions, the court must review the complaint and any supporting papers. If the conditions for an in rem action appear to exist the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

(B) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue [a summons and] a warrant for the arrest [of the vessel or other property that is the subject of the action]. The plaintiff has the burden in any post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(b) Service.

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the clerk must deliver the warrant and any supplemental process to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the clerk must deliver the warrant and any supplemental process to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(c) Deposit in court. If the property that is the subject of the action consists in whole or in part of freight, the

proceeds of property sold, or other intangible property, the clerk must issue — in addition to the warrant — a summons directing any person controlling the property to show cause why it should not be deposited in court to abide the judgment.

(d) Supplemental process. The clerk may upon application issue supplemental process to enforce the court's order without further court order.

(4) Notice. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within 10 days after execution, the plaintiff must promptly — or within the time that the court allows — give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as amended.

* * * * *

(6) Responsive pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within 20 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows;

(ii) an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; and

(iii) a person who files a statement of interest in or right against the property must serve an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by subdivision (a):

(i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under subdivision C(4), or

(B) within the time that the court allows.

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must file an answer within 20 days after filing the statement of interest or right.

(c) Interrogatories. Interrogatories may be served with the complaint in an in rem action without leave of court. Answers to the interrogatories must be served with the answer to the complaint.

Committee Note

Style changes have been made throughout the revised portions of Rule C. Several changes of meaning have been made as well.

Subdivision 2. In rem jurisdiction originally extended only to property within the judicial district. Since 1986, Congress has enacted a number of jurisdictional and venue statutes for forfeiture and criminal matters that in some circumstances permit a court to exercise authority over property outside the district. 28 U.S.C. § 1355(a)(1) allows a forfeiture action in the district where an act or omission giving rise to forfeiture occurred, or in any other district where venue is established by § 1395 or by any other statute. Section 1355(b)(2) allows an action to be brought as provided in (b)(1) or in the United States District Court for the District of Columbia when the forfeiture property is located in a foreign country or has been seized by authority of a foreign government. Section 1355(d) allows a court with jurisdiction under § 1355(b) to cause service in any other district of process required to bring the forfeiture property before the court. Section 1395 establishes venue of a civil proceeding for forfeiture in the district where the forfeiture accrues or the defendant is found; in any district where the property is found; in any district into which the property is brought, if the property initially is outside any judicial district; or in any district where the vessel is arrested if the proceeding is an admiralty proceeding to forfeit a vessel. Section 1395(e) deals with a vessel or cargo entering a port of entry closed by the President, and transportation to or from a state or section declared to be in insurrection. 18 U.S.C. § 981(h) creates expanded jurisdiction and venue over property located elsewhere that is related to a criminal prosecution pending in the district. These amendments, and related amendments of Rule E(3), bring these Rules into step with the new statutes. No change

is made as to admiralty and maritime proceedings that do not involve a forfeiture governed by one of the new statutes.

Subdivision (2) has been separated into lettered paragraphs to facilitate understanding.

Subdivision (3). Subdivision (3) has been rearranged and divided into lettered paragraphs to facilitate understanding.

Paragraph (b)(i) is amended to make it clear that any supplemental process addressed to a vessel or tangible property on board a vessel, as well as the original warrant, is to be served by the marshal.

Subdivision (4). Subdivision (4) has required that public notice state the time for filing an answer, but has not required that the notice set out the earlier time for filing a statement of interest or claim. The amendment requires that both times be stated.

A new provision is added, allowing termination of publication if the property is released more than 10 days after execution but before publication is completed. Termination will save money, and also will reduce the risk of confusion as to the status of the property.

Subdivision (6). Subdivision (6) has applied a single set of undifferentiated provisions to civil forfeiture proceedings and to in rem admiralty proceedings. Because some differences in procedure are desirable, these proceedings are separated by adopting a new paragraph (a) for civil forfeiture proceedings and recasting the present rule as paragraph (b) for in rem admiralty proceedings. The provision for interrogatories and answers is carried forward as paragraph (c). Although this established procedure for serving interrogatories with the complaint departs from the general provisions of Civil Rule 26(d), the special needs of expedition that often arise in admiralty justify continuing the practice.

Both paragraphs (a) and (b) require a statement of interest or right rather than the "claim" formerly required. The new wording permits parallel drafting, and facilitates cross-references in other rules. The substantive nature of the statement remains the same as the former claim. The requirements of (a) and (b) are, however, different in some respects.

In a forfeiture proceeding governed by paragraph (a), a statement must be filed by a person who asserts an interest in or a right against the property involved. This category includes every right against the property, such as a lien, whether or not it establishes ownership or a right to possession. In determining who has an interest in or a right against property, courts may continue to rely on precedents that have developed the meaning of "claims" or "claimants" for the purpose of civil forfeiture proceedings.

In an admiralty and maritime proceeding governed by paragraph (b), a statement is filed only by a person claiming a right of possession or ownership. Other claims against the property are advanced by intervention under Civil Rule 24, as it may be supplemented by local admiralty rules. The reference to ownership includes every interest that qualifies as ownership under domestic or foreign law. If an ownership interest is asserted, it makes no difference whether its character is legal, equitable, or something else.

Paragraph (a) provides more time than paragraph (b) for filing a statement. Admiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings.

Paragraphs (a) and (b) do not limit the right to make a restricted appearance under Rule E(8).

Rule E. Actions In Rem and Quasi In Rem: General Provisions

* * * * *

(3) Process.

(a) In admiralty and maritime proceedings process in rem or of maritime attachment and garnishment may be served only within the district.

(b) In forfeiture cases process in rem or quasi in rem may be served within the district or outside the district when authorized by statute.

(~~b~~c) * * *

[Note: Both Garner and Spaniol voted for an alternative draft that was rejected by the Advisory Committee:

(a) Territorial limits of Effective Service. In rem process and maritime garnishment and attachment may be served:

(i) within the district; or

(ii) outside the district when authorized by statute.]

* * * * *

(7) Security on Counterclaim.

(a) When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given, unless the court directs otherwise.

(b) The plaintiff is required to give security under paragraph (a) when the United States or its corporate instrumentality counterclaims and would have been required to give security to respond in damages if a private party but is relieved by law from giving security.

(8) Restricted Appearance. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment, may be expressly restricted to the defense of such claim, and in that event is not an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) Disposition of Property; Sale.

* * * * *

(b) Interlocutory Sales; Delivery.

(i) On application of a party, the marshal, or other person having custody of the property, the court may order all or part of the property sold — with the sales proceeds, or as much of them as will satisfy the judgment, paid into court to await further orders of the court — if:

(A) the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or disproportionate; or

(C) there is an unreasonable delay in securing release of the property.

(ii) In the circumstances described in (i), the court, on motion by a defendant or a person filing a statement of interest or right under Rule C(6), may order that the property, rather than being sold, be delivered to the movant upon giving security under these rules.

* * * * *

(10) Preservation of Property. When the owner or another person remains in possession of property attached or arrested under the provisions of Rule E(4)(b) that permit execution of process without taking actual possession, the court, on a party's motion or on its own, may enter any order necessary to preserve the property and to prevent its removal.

Committee Note

Style changes have been made throughout the revised portions of Rule E. Several changes of meaning have been made as well.

Subdivision (3). Subdivision (3) is amended to reflect the distinction drawn in Rule C(2)(c) and (d). Service in an admiralty or maritime proceeding still must be made within the district, as reflected in Rule C(2)(c), while service in forfeiture proceedings may be made outside the district when authorized by statute, as reflected in Rule C(2)(d).

Subdivision (7). Subdivision (7)(a) is amended to make it clear that a plaintiff need give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security to respond in damages in the original action.

Subdivision (8). Subdivision (8) is amended to reflect the change in Rule B(1)(e) that deletes the former provision incorporating state quasi-in-rem jurisdiction. A restricted appearance is not appropriate when state law is invoked only for security under Civil Rule 64, not as a basis of quasi-in-rem jurisdiction.

Subdivision (9). Subdivision 9(b)(ii) is amended to reflect the change in Rule C(6) that substitutes a statement of interest or right for a claim.

Subdivision (10). Subdivision 10 is new. It makes clear the authority of the court to preserve and to prevent removal of attached or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

Civil Rule 14

Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party. * * * The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, ~~the claimant of~~ a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

* * * * *

(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or ~~claimant~~ person who asserts a right under Supplemental Rule C(6)(b)(i), as a third-party plaintiff, may bring in a third-party defendant * * *.

Committee Note

Subdivisions (a) and (c) are amended to reflect revisions in Supplemental Rule C(6).

November, 1997 Draft: Spaniol Edits (Showing other changes too)

Rule B. In Personam Actions: Attachment and Garnishment~~: Special Provisions~~

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process.

(a) ~~If a defendant in an in personam action is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property -- up to the amount sued for -- in the hands of garnishees [to be] named in the process.~~

~~**(b)** The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district.~~ In an action in personam the court may issue process to attach a defendant's tangible or intangible property up to the value of the amount sued for — including property in the hands of any garnishee named in the process — if the plaintiff or the plaintiff's attorney files with the complaint an affidavit stating that to the affiant's knowledge the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, ~~enter~~ issue an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process ~~enforcing~~ to enforce the court's order ~~upon application~~ without further court order.

(c~~b~~) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and

process of attachment and garnishment.~~, and t~~ The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(~~d~~c) ~~**(i)**~~ If the property is a vessel or tangible property on board a vessel, the clerk must deliver the summons, process, and any supplemental process to the marshal for service. Otherwise

~~**(ii) If the property is other tangible or intangible property,**~~ the clerk must deliver the summons, process, and any supplemental process, to a person or organization authorized to serve it, who may be: (~~A~~i) a marshal; (~~B~~ii) someone under contract with the United States; (~~C~~iii) someone specially appointed by the court for that purpose; or, (~~D~~iv) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke a state-law remedy~~ies~~ under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment ~~attachment and garnishment or similar seizure of the defendant's property under Rule 4(n) [as well as] [in addition or in the alternative to] the remedies provided in this Rule. Only Rule E(8) of these Rules applies to state remedies so invoked~~.

(2) **Default Judgment.** ~~**Notice to Defendant.**~~ ~~No~~ The court may not enter a default judgment ~~may be entered~~ except upon proof — ~~which may be~~ by affidavit or otherwise — that: ~~of one of the following:~~

(a) ~~that~~ the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4; or

(b) ~~that~~ the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) ~~that~~ the plaintiff, or the garnishee, has tried diligently to give notice of the action to the defendant, but could not do so.

Committee Note

Rule B(1) is amended in two ways, and style changes have been made.

The service provisions of Rule C(3) are adopted in paragraph (d), providing alternatives to service by a marshal if the property to be seized is not a vessel or tangible property on board a vessel.

The provision that allows the plaintiff to invoke state attachment and garnishment remedies is amended to reflect the 1993 amendments of Civil Rule 4. Former Civil Rule 4(e), incorporated in Rule B(1), allowed general use of state quasi-in-rem jurisdiction. Rule 4(e) was replaced in 1993 by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the defendant cannot be obtained in the district where the action is brought. Little purpose would be served by incorporating Rule 4(n)(2) in Rule B, since maritime attachment and garnishment are available whenever the defendant is not found within the district, a concept that allows attachment or garnishment even in some circumstances in which personal jurisdiction also can be asserted. In order to protect against any possibility that elimination of the reference to state quasi-in-rem jurisdiction remedies might seem to defeat continued use of state security devices, paragraph (e) expressly incorporates Civil Rule 64. Because Rule 64 looks only to security, not jurisdiction, the former reference to Rule E(8) is deleted as no longer relevant.

Rule B(2)(a) is amended to reflect the 1993 redistribution of the service provisions once found in Civil Rule 4(d) and (i). These provisions are now found in many different subdivisions of Rule 4. The new reference simply incorporates Rule 4, without designating the new subdivisions, because the function of Rule B(2) is simply to describe the methods of notice that suffice to support a default judgment. Style changes also have been made.

Rule C. In Rem Actions: Special Provisions

* * * * *

(2) Complaint. In an action in rem the complaint must:

(a) be verified;

(b) describe with reasonable **[redundant?]** particularity the property that is the subject of the action;

(c) in an admiralty and maritime proceeding, state that the property is within the district or will be **[meaning "will arrive?]** within the district while the action is pending;

(d) in a forfeiture proceeding for the violation of a federal statute, state:

(i) the place of seizure and whether ~~it was~~ the seizure occurred on land or on navigable waters;

(ii) whether the property is within the district, and if the property is not within the district the statutory basis for the court's exercise of jurisdiction over the property; and

(iii) ~~all~~ any other allegation~~s~~ required by the statute under which the action is brought.

(3) ~~**Judicial Authorization and Process.**~~ **Arrest Warrant.**

(a) ~~**Arrest Warrant**~~ **Issuance.**

(~~i~~iii) When the United States files a complaint ~~demanding a~~ seeking the forfeiture of property ~~for violation of a federal statute~~, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or seizure of other property

without requiring a certificate~~ion~~ of exigent circumstances.

(~~iii~~i) ~~(A) In other actions, t~~The court must review the complaint and any supporting papers~~.~~, and ~~I~~if the conditions for an in rem action appear to exist, the court must ~~enter~~ issue an order ~~directing~~ authorizing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

(B~~ii~~) ~~But~~ If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue ~~[a summons and] a~~ the warrant. ~~for the arrest [of the vessel or other property that is the subject of the action].~~ The plaintiff has the burden in any post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

[Insert newly designated (iii) from above.]

(b) Service.

~~(i)~~ If the property ~~that is the subject of the action~~ is a vessel or tangible property on board a vessel, the clerk must deliver the warrant and any supplemental process to the marshal for service. Otherwise

~~(ii) If the property that is the subject of the action is other property, tangible or intangible,~~ the clerk must deliver the warrant and any supplemental process to a person or organization authorized to enforce it, who may be: (A~~i~~) a marshal; (B~~ii~~) someone under contract with the United States;

(~~C~~iii) someone specially appointed by the court for that purpose; or, (~~D~~iv) in an action brought by the United States, any officer or employee of the United States.

(c) Deposit in court. If the property that is the subject of the action consists in whole or in part of freight, the proceeds of property sold, or other intangible property, the clerk must issue — in addition to the warrant — a summons directing any person controlling the ~~property~~ funds to show cause why it should not be deposited in court to abide the judgment.

(d) Supplemental process. The clerk may ~~upon application~~ issue supplemental process to enforce the court's order without further court order ~~of the court~~.

(4) Notice. No notice — other than the execution of process — is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within 10 days after execution, the plaintiff must promptly — or within the time that the court allows — give public notice of the action and arrest in a newspaper having general circulation in the district, as designated by court order ~~and having general circulation in the district~~, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as amended.

* * * * *

(6) Responsive pleading; Interrogatories.

(a) Civil Forfeiture. In ~~an in rem~~ a forfeiture action for the violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

~~**(A)**~~ within 20 days after ~~the earlier of (1)~~ receiving actual notice of the execution of process, or after ~~(2) completed~~ the publication of notice under Rule C(4), whichever is earlier, or

~~**(B)**~~ within the time that the court allows;

(ii) an agent, bailee, or attorney must ~~describe~~ state the authority to file a statement of interest in or right against the property on behalf of another; and

(iii) a person who files a statement of interest in or right against the property must serve an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by subdivision (a):

(i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

~~**(A)**~~ within 10 days after ~~the earlier of (1)~~ the execution of process, or ~~(2)~~ the completi~~oned~~ of publication of notice under subdivision C(4), whichever is earlier, or

~~(B)~~ within the time that the court allows.

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or the right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must file an answer within 20 days after filing the statement of interest or right.

(c) Interrogatories. Interrogatories may be served with the complaint ~~in an in rem action~~ without leave of court. Answers to the interrogatories must be served with the answer to ~~at the time of answering~~ the complaint.

Committee Note

Style changes have been made throughout the revised portions of Rule C. Several changes of meaning have been made as well.

Subdivision 2. In rem jurisdiction originally extended only to property within the judicial district. Since 1986, Congress has enacted a number of jurisdictional and venue statutes for forfeiture and criminal matters that in some circumstances permit a court to exercise authority over property outside the district. 28 U.S.C. § 1355(a)(1) allows a forfeiture action in the district where an act or omission giving rise to forfeiture occurred, or in any other district where venue is established by § 1395 or by any other statute. Section 1355(b)(2) allows an action to be brought as provided in (b)(1) or in the United States District Court for the District of Columbia when the forfeiture property is located in a foreign country or has been seized by authority of a foreign government. Section 1355(d) allows a court with jurisdiction under § 1355(b) to cause service in any other district of process required to bring the forfeiture property before the court. Section 1395 establishes venue of a civil proceeding for forfeiture in the district where the forfeiture accrues or the defendant is found; in any district where the property is found; in any district into which the property is brought, if the property initially is

outside any judicial district; or in any district where the vessel is arrested if the proceeding is an admiralty proceeding to forfeit a vessel. Section 1395(e) deals with a vessel or cargo entering a port of entry closed by the President, and transportation to or from a state or section declared to be in insurrection. 18 U.S.C. § 981(h) creates expanded jurisdiction and venue over property located elsewhere that is related to a criminal prosecution pending in the district. These amendments, and related amendments of Rule E(3), bring these Rules into step with the new statutes. No change is made as to admiralty and maritime proceedings that do not involve a forfeiture governed by one of the new statutes.

Subdivision (2) has been separated into lettered paragraphs to facilitate understanding.

Subdivision (3). Subdivision (3) has been rearranged and divided into lettered paragraphs to facilitate understanding.

Paragraph (b)(i) is amended to make it clear that any supplemental process addressed to a vessel or tangible property on board a vessel, as well as the original warrant, is to be served by the marshal.

Subdivision (4). Subdivision (4) has required that public notice state the time for filing an answer, but has not required that the notice set out the earlier time for filing a statement of interest or claim. The amendment requires that both times be stated.

A new provision is added, allowing termination of publication if the property is released more than 10 days after execution but before publication is completed. Termination will save money, and also will reduce the risk of confusion as to the status of the property.

Subdivision (6). Subdivision (6) has applied a single set of undifferentiated provisions to civil forfeiture proceedings and to in rem admiralty proceedings. Because some differences in procedure are desirable, these proceedings are separated by adopting a new paragraph (a) for civil forfeiture proceedings and recasting the present rule as paragraph (b) for in rem admiralty proceedings. The provision for interrogatories and answers is carried forward as paragraph (c). Although this established procedure for serving interrogatories with the complaint departs from the general provisions of Civil Rule 26(d), the special needs of expedition that often arise in admiralty justify continuing the practice.

Both paragraphs (a) and (b) require a statement of interest or right rather than the "claim" formerly required. The new wording permits parallel drafting, and facilitates cross-references in other rules. The substantive nature of the statement remains the same as the former claim. The requirements of (a) and (b) are, however, different in some respects.

In a forfeiture proceeding governed by paragraph (a), a statement must be filed by a person who asserts an interest in or a right against the property involved. This category includes every right against the property, such as a lien, whether or not it establishes ownership or a right to possession. In determining who has an interest in or a right against property, courts may continue to rely on precedents that have developed the meaning of "claims" or "claimants" for the purpose of civil forfeiture proceedings.

In an admiralty and maritime proceeding governed by paragraph (b), a statement is filed only by a person claiming a right of possession or ownership. Other claims against the property are advanced by intervention under Civil Rule 24, as it may be supplemented by local admiralty rules. The reference to ownership includes every interest that qualifies as ownership under domestic or foreign law. If an ownership interest is asserted, it makes no difference whether its character is legal, equitable, or something else.

Paragraph (a) provides more time than paragraph (b) for filing a statement. Admiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings.

Paragraphs (a) and (b) do not limit the right to make a restricted appearance under Rule E(8).

Rule E. Actions In Rem and Quasi In Rem: General Provisions

* * * * *

(3) Process.

(a) In admiralty and maritime proceedings process in rem or of maritime attachment and garnishment may be served only within the district.

(b) In forfeiture cases process in rem or quasi in rem may be served within the district or outside the district when authorized by statute.

(~~b~~c) * * *

* * * * *

(7) Security on a Counterclaim.

(a) When a person who has given security for ~~to respond in~~ damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for ~~to respond in~~ damages ~~to~~ arising from the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until ~~this~~ security on the counterclaim is given, unless the court directs otherwise.

(b) The plaintiff is required to give security under paragraph (a) when the United States or its corporate instrumentality asserts a counterclaim~~s and would have been required to give security to respond in damages if a private party but is relieved by law from giving security~~ even though the United States has not given security for damages on the original claim.

(8) Restricted Appearance. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment, ~~whether under these Supplemental Rules or under Rule 4(n),~~ may be expressly restricted to the defense of such claim, and in that event is not an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) Disposition of Property; Sale.

* * * * *

(b) Interlocutory Sales; Delivery.

(i) Upon ~~On~~ application of a party, the marshal, or other person having custody of the property, the court may order that all or part of the property be sold ~~— with the sales~~ and that the proceeds, or ~~as much of them as will satisfy the judgment,~~ a portion thereof be paid into court ~~to await further orders of the court —~~ if:

(A) the attached or arrested property is perishable, or liable to deterioration, decay, or injury ~~by being detained in custody pending the action~~;

(B) the expense of keeping the property is excessive or disproportionate; or

(C) there is an unreasonable delay in securing the release of the property.

(ii) In the above circumstances ~~described in (i)~~, the court, upon motion ~~by~~ of a defendant or a person filing a statement of interest or right under Rule C(6), may order that the property, rather than

being sold, be delivered to the movant ~~upon giving~~ who must give security ~~under these rules~~.

* * * * *

(10) Preservation of Property. ~~When the owner or another person remains in~~ If the marshal or other person having the warrant does not take possession of the property attached or arrested under ~~the provisions of~~ Rule E(4)(b), ~~that permit execution of process without taking actual possession,~~ the court, on a party's motion ~~of a party~~ or on its own, may ~~[must]~~ enter any order necessary to preserve the property ~~and~~ or to prevent its removal.

Committee Note

Style changes have been made throughout the revised portions of Rule E. Several changes of meaning have been made as well.

Subdivision (3). Subdivision (3) is amended to reflect the distinction drawn in Rule C(2)(c) and (d). Service in an admiralty or maritime proceeding still must be made within the district, as reflected in Rule C(2)(c), while service in forfeiture proceedings may be made outside the district when authorized by statute, as reflected in Rule C(2)(d).

Subdivision (7). Subdivision (7)(a) is amended to make it clear that a plaintiff need give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security to respond in damages in the original action.

Subdivision (8). Subdivision (8) is amended to reflect the change in Rule B(1)(e) that ~~incorporates state law quasi-in-rem jurisdiction under Civil Rule 4(n). The reference to attachment and garnishment includes all forms of borrowed state process, whatever the state name may be~~ deletes the former provision incorporating state quasi-in-rem jurisdiction. A restricted appearance is not appropriate when state law is invoked only for security under Civil Rule 64, not as a basis of quasi-in-rem jurisdiction.

Subdivision (9). Subdivision 9(b)(ii) is amended to reflect the change in Rule C(6) that substitutes a statement of interest or right for a claim.

Subdivision (10). Subdivision 10 is new. It makes clear the authority of the court to preserve and to prevent removal of attached or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

Civil Rule 14

Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party. * * * The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, ~~the claimant of~~ a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

* * * * *

(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or ~~claimant~~ person who asserts a right under Supplemental Rule C(6)(b)(i), as a third-party plaintiff, may bring in a third-party defendant * * *.

Committee Note

Subdivisions (a) and (c) are amended to reflect revisions in Supplemental Rule C(6).

Item 7B

III Information Items

(A) Discovery Project

The Discovery Subcommittee was created at the October, 1996 Advisory Committee meeting to carry on the studies of discovery that have been an almost constant fixture on the Committee's agenda for the last three decades. The immediate impetus was provided by several concerns. The Federal Rules Committee of the American College of Trial Lawyers had recommended that the time had come to consider once more a proposal to narrow the general scope of civil discovery that was first advanced by the American Bar Association in 1977. Moreover, the Civil Justice Reform Act of 1990 and the RAND Institute's report in response urged that means for reducing cost be found. And finally, emerging experience with disclosure under the 1993 provisions of Civil Rule 26(a), combined with the wide diversity of disclosure practice under local rules, suggested that the time had come to begin to review disclosure and seek some uniformity in the national rules.

From the beginning, the scope of the discovery project has been broader than the immediate impetus. Complaints continue to be made about the operation of the discovery rules in cases that constitute a small percentage of all federal litigation but that contribute a large share of the difficult case administration and case management problems. A study of disclosure, moreover, directly involves study of the discovery moratorium and discovery conference practices adopted in Civil Rules 26(d) and (f) as part of the disclosure system. As a package, it was hoped that these devices would help the parties to engage in more responsible discovery planning, reducing the need to consider other rules or to provoke still greater judicial management. Rather than attempt to view some parts of discovery practice in isolation, it was determined that all issues would be open for inquiry.

It was recognized that the broad scope of inquiry does not automatically translate into broad ambitions for reform. There is strong support for the view that the present discovery rules, coupled with the pretrial management powers established by Civil Rule 16, provide all the authority needed for effectively controlling discovery. There also is strong support for the view that there should be a pause in reform efforts, giving litigants and courts time to fully digest and shape the several sets of rules changes adopted between 1970 and 1993. It was agreed that further changes must be supported by strong reasons unless there is broad support throughout the profession or there is clear promise that substantially the same amount of useful information can be discovered at lower cost. The Advisory Committee does believe that the conjoint uniformity and disclosure questions must be addressed now, but all else may be suspended indefinitely.

Early in its deliberations, the Discovery Subcommittee convened a one-day conference of highly experienced litigators from a variety of practice specialties and perspectives. This conference was useful for several purposes. Initially, it confirmed the general impression that discovery now works reasonably well in most cases. But it also confirmed the view that problems remain. It is worthwhile to explore further the possibility that some of the problems may be reduced by further rules changes. The problems discussed also were important in helping the Discovery Subcommittee and its Special Reporter, Professor Richard Marcus, in planning the Boston College conference described below.

The Discovery Subcommittee also worked with the Federal Judicial Center to design a questionnaire study of discovery practices. The study was based on a sample of 1,000 closed cases that were selected to weed out cases of types that often do not involve any discovery — social security disability review cases are one of the most obvious categories of "no discovery" cases. The study, which was nearly complete by the time of the Boston College conference, reinforced the results of earlier empiric studies. Even in a sample of cases selected as these were, there were a substantial number of cases with no discovery. In most cases, the total level of discovery activity was modest. There was no general sense of an emergency in discovery practice.

The Boston College discovery conference was held in early September. All members of the Advisory Committee, and several members and the Reporter of the Standing Committee, attended. In addition to academic papers, the conference included several panels of lawyers who represented a sterling cross-section of the best and most experienced litigators the country has to offer. Several major lawyer organizations were invited to participate, and did. The conference concluded with a panel of rulemaking veterans. It seems safe to say that the conference was as successful as a conference can be. It is beyond doubt that the conference admirably served the Advisory Committee's desire to gather as much information as possible from as many lawyers as possible.

With the conclusion of the Boston College conference, the Discovery Subcommittee and the Advisory Committee moved from a stage that primarily involved the gathering of information to a stage that continues to seek out information but that also seeks to work through the information to an evaluation of possible responses. The first full day of the October Committee meeting was devoted to discovery topics. A summary of the discussion is set out at pages 4 to 21 of the October Minutes. The Discovery Subcommittee is scheduled to meet on January 6 and 7 to develop specific proposals for consideration at the March Advisory Committee meeting. A bare summary of the central topics illustrates the directions of present study.

Uniformity. Both at the Boston College conference and elsewhere, the Committee has found widespread concern with the disuniformity of disclosure practice. Civil Rule 26(a)(1) was deliberately written to allow individual districts to opt out of the national disclosure rule, either to adhere to a local disclosure rule or to dispense entirely with disclosure. Concerns range from abstract principle to simple pragmatism. In principle, there should be a uniform national practice to support the intrinsic values of uniformity. The more pragmatic concerns face lawyers — and even more often large litigants — who must learn to comply with diverse local practices as litigation confronts them in many different courts. As widespread as the concerns are, their depth is less certain. Although there is much interest in restoring uniformity — a goal that resonates to the entire history of the Local Rules project — the ultimate conclusion is not foregone.

Disclosure. The uniformity inquiry necessarily entails an examination of disclosure itself. The RAND study of early experience under the Civil Justice Reform Act, the Federal Judicial Center study, and reports on local plans all indicate that the dire fears of disclosure opponents have not been realized in practice. There even is some ground for a tentative suggestion that disclosure may have some of the hoped-for beneficial effects. But the evidence so far suggests that disclosure also has not had important general benefits independent of the Rule 26(f) conference. And some cogent doubts remain. Disclosure and the Rule 26(f) conference may be unnecessary work in small cases that would have little or no discovery. The duty to continually supplement disclosure under Rule 26(e)(1) may yet prove burdensome. The fear that untoward sanctions will be visited on disclosure failures probably cannot be evaluated until disclosure practice has matured over a period that includes several years of trials completed in a disclosure regime. And there is little way to gather evidence to support or refute the fear that disclosure will, by forcing superior counsel to reveal information that would not have been obtained by discovery, unbalance the adversary system and disrupt attorney-client relationships. The Discovery Subcommittee will provide, to support further Committee deliberations, at least three drafts. One will abandon all disclosure, another will require uniform adherence to the present national rule, and the third will seek some middle ground — perhaps disclosure by each party of the information it will rely on at trial.

Discovery Management. A third major topic will address the balance between the parties and the court in discovery management. Perhaps the single most frequently repeated theme at discovery hearings and conferences has been the view that the discovery rules need not be changed. They are designed to be administered by the parties without judicial interference and without much need for judicial assistance. For the most part they work well in that mode. What is needed is more consistent and ready availability of judicial management for the small portion of cases that can lead to big

discovery problems. But it is difficult to rewrite the rules yet again to emphasize how important it is that judges actually use the tools provided by Rule 16 and the discovery rules. Various alternatives have been suggested. One is to distinguish sharply between three stages: (1) initial disclosure; (2) a "core" discovery stage, perhaps limiting still further the presumptive numbers of interrogatories and depositions set by present rules, and perhaps even adding some form of quantity limit on document discovery; and (3) a final stage that permits discovery only under a plan adopted and enforced by the court. A simpler alternative would be to require that a judge become involved in shaping a discovery plan on request by any party. Parallel changes might be made in Rule 16(b), clearly authorizing a conditional scheduling order before the parties have had a Rule 26(f) conference. It also may be desirable to consider the value of setting presumptive discovery cut-off times and even trial dates. The RAND study reported favorably on the combination of early case management, early discovery cut-offs, and the early fixing of firm trial dates. At the same time, local circumstances may prove so diverse that a uniform national rule would be unworkable, failing even as a means of forcing more judges to become more involved in pretrial management. The Discovery Subcommittee will report on all of these matters.

Scope of Discovery. Rule 26(b)(1) defines the scope of discovery to include "any matter, not privileged, which is relevant to the subject matter involved in the pending action." The longstanding proposal has been that the problems of discovery could be substantially reduced if the scope of discovery were narrowed to matters relevant to the claims — or perhaps the issues — framed by the pleadings. Although this proposal has been often considered and as often rejected by the Advisory Committee, it will be considered one more time. In addition, the Discovery Subcommittee will attempt to draft for Committee consideration some alternative to the occasionally criticized final sentence of Rule 26(b)(1), which provides that "[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Document Discovery. Many lawyers believe that most of the problems that remain in discovery practice arise from document discovery, particularly in the "big documents" case. A number of general approaches have been suggested, and remain open for consideration. Among the possibilities are the probably fruitless attempt to establish presumptive limits parallel to the 1993 limits on the numbers of interrogatories or depositions; a document-specific rule that narrows the scope of production-discovery below the scope allowed by Rule 26(b)(1) for other means of discovery; and an amendment to Rule 26(b)(2) that makes explicit the power — now provided by the protective-order powers of Rule 26(c) — to allow defined document discovery only if the demanding party pays the

response costs. In addition to such general proposals, at least two specific issues have been identified for attention. One involves discovery of information stored by electronic means. The general principle is clear enough — information stored in a computer is as discoverable as information stored on paper. But lawyers report that there are a continually shifting array of problems arising from changing methods of storing, deleting, and retrieving electronic information. The initial sense of the Advisory Committee is that these problems will continue to change so rapidly that the cumbersome rulemaking process cannot at present hope to achieve lasting, or even relevant, responses. It may be that similar problems will plague other advisory committees to an extent that will justify coordinated work.

The other specific document discovery problem deserves separate discussion. Many lawyers report that the costs of responding to massive document requests are greatly increased by the need for very careful screening to avoid inadvertent waiver of privileges. They also report that these problems are greatly reduced when parties of good will agree to a protective order that allows the demanding party to examine documents informally, before they are formally produced, without triggering any waiver. The demanding party then commonly makes a much narrower and better focused demand, enabling the producing party to make equally focused and effective privilege objections. It is recognized that this procedure is vulnerable to arguments by third parties that the protective order does not defeat waiver. The Discovery Subcommittee will explore the possibility of establishing some similar procedure by rule. If this path is pursued very far, the Evidence Rules Committee will be asked to participate. And all committees must begin thinking about the special Enabling Act provisions for privileges. Any rule that creates, abolishes, or modifies a privilege can take effect only if approved by Congress, 28 U.S.C. § 2074(b). It must be decided whether a rule that simply defines the consequences of a federal discovery procedure modifies a privilege for § 2074 purposes. Even if it is determined that the rule governs discovery and its consequences, not the scope of the privilege, the question must be identified and discussed for the benefit of the Judicial Conference, the Supreme Court, and Congress.

Protective Orders. The Advisory Committee has worked on the Rule 26(c) protective order provisions for some time. Two proposals were published for comment. The questions raised by the second proposal and the hearing testimony and comments have been carried forward as part of the larger discovery project. The Discovery Subcommittee has not been asked to review these matters further, but they continue to have a place on the agenda.

(B) Class Actions

The Committee concluded its consideration of the testimony and comments on the Rule 23 proposals that were published in August, 1996. Active consideration of Rule 23 will continue on several fronts. It may be some time, however, before additional proposals are recommended for adoption.

At its May meeting, the Advisory Committee concluded that two of the proposed factors bearing on certification of a Rule 23(b)(3) class, published as (A) and (B), should be abandoned as unnecessary. A third proposed factor (C), suggesting consideration of the maturity of the claims, was revised and has been carried forward for further consideration with such other revisions as may one day be recommended.

In June, the Advisory Committee recommended that this Committee approve adoption of a revision of Rule 23(c)(1) that would allow the class certification decision to be made "when practicable" rather than "as soon as practicable." This proposal was remanded to the Advisory Committee for further consideration in conjunction with such other Rule 23 proposals as might be advanced. It remains as part of the ongoing Rule 23 study.

Great controversy has surrounded the 1996 proposal that Rule 23(b)(3) include a new factor (F), suggesting consideration "whether the probable relief to individual class members justifies the costs and burdens of class litigation." The proposal was an attempt to provide a means of denying certification of classes that seem calculated to enrich class counsel without providing any meaningful benefit to class members. It has been staunchly defended, and even criticized as an unduly timid approach. It has been vehemently attacked as the death knell of small-claims class actions, a repeal of the private-attorney-general reform accomplished by the 1966 creation of (b)(3) class actions. The Committee concluded that the controversy reflects such deep divisions between legitimate competing views that any further study should focus on only one of the many alternatives considered. This alternative would allow certification of an opt-in class, rather than an opt-out class, when there is reason to question the desire of putative class members to resolve their claims through class litigation.

Successive Committee Rule 23 drafts have included opt-in classes in various roles. Early drafts allowed broad discretion to choose between opt-in and opt-out classes. Among possible uses for opt-in classes, mass tort cases were seen as particularly important. Many of the difficulties that surround class treatment of large individual claims can be reduced by limiting the class to those who elect to participate. More recent discussion has added a consideration that parallels the "just ain't worth it" concern reflected in proposed factor (F): certification of an opt-in class

may be an appropriate means of determining whether class members, rather than class counsel alone, care about enforcing the alleged class rights. These and other opt-in class possibilities will remain on the agenda for active consideration.

The 1996 publication-for-comment included also a proposed settlement-class provision, Rule 23(b)(4), and added an explicit hearing requirement to the settlement-approval provisions of Rule 23(e). The (b)(4) proposal was designed only to supersede the Third Circuit ruling that a (b)(3) class can be certified for settlement only if the same class would be certified for trial. Nearly a year after publication, the Supreme Court overruled the narrow holding of the Third Circuit approach in *Amchem Prods., Inc. v. Windsor*, 1997, 117 S.Ct. 2231, 2248, but it affirmed much of the Third Circuit's jurisprudence on settlement classes. The Supreme Court decision makes it unwise to proceed further with the (b)(4) proposal at this time. The Supreme Court opinion, moreover, seems in some ways broader than the proposal. Adoption of the proposal could easily lead to confusion and inconsistencies between the Court's intentions, the purposes of the rule, and the eventual interpretation of the rule. The Committee concluded that it is better not to attempt to respond by hurried drafting and publication of a new and more ambitious settlement-class proposal. Instead, these problems will continue to be considered in the framework where they seem most pressing, mass torts.

Many new Rule 23 proposals were advanced from the hearings and comments on the 1996 proposals. Two have been added to the package of continuing proposals. One of these would stiffen the "common evidence" requirement for a (b)(3) class. The other would seek to address repetitive requests to certify the same or overlapping classes. These topics will remain part of the Rule 23 agenda.

Congress continues to be interested in class actions. The Private Securities Litigation Reform Act of 1995 addressed several class action issues. Among the topics that seem of special interest to Congress are attorney fees and class notice. The Advisory Committee has considered several notice proposals, including attempts to encourage "plain English" notices that most class members can understand. Fee issues have been a persisting Committee concern, particularly as part of the effort to find some way to deal with class actions that seem calculated to win fees without producing any significant private benefit for class members or law-enforcement benefit for the public. Fee questions may move toward the uncertain line that separates procedure from substance. Both of these topics will remain part of the continuing Rule 23 project.

(C) Mass Torts

The most challenging issues confronting current class action practice arise from dispersed mass torts. It is not clear whether

Rule 23, or an analogous new rule, provides the best means of dealing with widespread injuries arising from a common source or course of conduct. The Report of the National Bankruptcy Review Commission in October, 1997, proposes means of treating "Mass Future Claims" in bankruptcy. Many of the solutions that may be desirable outside of bankruptcy are likely to involve matters of jurisdiction or substance that are outside the Enabling Act process. At the same time, it seems inevitable that any solutions will require parallel changes in the Civil Rules. It is important that any Civil Rules revisions be accomplished within the Enabling Act framework.

The Advisory Committee has created a Mass Torts Subcommittee. Experience with the Discovery Subcommittee and Admiralty Subcommittee has proved the wisdom of providing intensive consideration of special problems by smaller subcommittees to prepare the way for more effective deliberation by the full Committee. The constitution of the Mass Torts Subcommittee, however, remains uncertain as this Report is written. If possible, it will be desirable to appoint a Special Reporter, and also to invite participation by representatives from other Judicial Conference committees. Mass torts problems raise issues within the scope of at least the Federal-State Jurisdiction Committee, the Bankruptcy Administration Committee, and the Judicial Panel on Multidistrict Litigation. The Court Administration and Case Management Committee may be interested as well. These possibilities may be resolved by the time this Committee meets in January. Whatever information can be provided then will help to describe the composition and initial directions of the Subcommittee.

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 6 and 7, 1997

NOTE: This Draft Has Not Been Reviewed by the Committee

The Civil Rules Advisory Committee met on October 6 and 7, 1997, at the Stein Eriksen Lodge, Deer Park, Utah. The meeting was attended by all members of the Committee: Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Judge David S. Doty; Justice Christine M. Durham; Francis H. Fox, Esq.; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge David F. Levi; Carol J. Hansen Posegate, Esq.; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Anthony J. Scirica; Chief Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Edward H. Cooper was present as Reporter, and Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Sol Schreiber, Esq., attended as liaison member from the Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Eduardo C. Robreno attended as liaison member from the Bankruptcy Rules Committee. Leonidas Ralph Mecham, Director of the Administrative Office of the United States Courts attended, as did Administrative Office representatives Peter G. McCabe, John K. Rabiej, Mark J. Shapiro, and Mark Miskovsky. Thomas E. Willging represented the Federal Judicial Center. Observers included Alan Mansfield, Mark Gross, Fred S. Souk, Robert Campbell (American College of Trial Lawyers), Reece Bader (ABA Litigation Section), Beverly Moore, Alfred Cortese, and Nick Pace.

Chairman's Introduction

Judge Niemeyer opened the meeting by welcoming Leonidas Ralph Mecham. He observed that the policy of rotating committee membership serves the good purpose of bringing new perspectives the committee work, but also carries a significant price. The committee has worked on Rule 23 for six years, accumulating much knowledge, and now the time has begun when experienced committee members will leave while Rule 23 remains on the agenda of active items. Carol Posegate is finishing her second three-year term. The committee expressed thanks to Ms. Posegate, who responded that work with the committee has been one of the highlights of her professional career. Sheila Birnbaum was welcomed as a new committee member, with the observation that her regular attendance at committee meetings over a period of several years will serve her and the committee well as she becomes an official member.

Mark Kasanin was appointed to the discovery subcommittee to fill Carol Posegate's place, since the work of the subcommittee is not finished.

The Standing Committee is paying close attention to this committee's work, as to the work of each advisory committee; its

confidence in the committee must continually be earned to be deserved. Congress also is paying close attention to this committee's work; its respect and deference also must be continually earned by careful and responsible behavior.

A proposed amendment to Civil Rule 23(c)(1) and a proposed new Rule 23(f) were taken to the Standing Committee in June with a recommendation that they be advanced to the Judicial Conference to be adopted. Members of the Standing Committee raised concerns about the proposal that Rule 23(c)(1) be amended to require certification "when practicable," replacing the present "as soon as practicable." After some discussion, it was decided that this proposal should remain part of the full package of Rule 23 proposals still being considered by this committee. The proposed permissive interlocutory appeal procedure was approved and transmitted to the Judicial Conference. The proposal has been approved by the Judicial Conference as a consent calendar item, and will be sent on to the Supreme Court.

Judge Niemeyer met with the Judicial Conference Executive Committee before the Judicial Conference session, along with other committee chairs. This committee's agenda was described, with the observation that the committee understands the risks of undertaking controversial topics.

After the Judicial Conference meeting, Judge Niemeyer met with other committee chairs. He urged on them the importance of the national rules, not simply as a convenience for practitioners but as an intrinsically national body of federal law that should remain uniform throughout the country. The Boston discovery conference provided support for national uniformity. The disclosure rule amendments of 1993 effected a breach in the wall of uniformity. Although the permission for local rules departing from the national standard was prudent at the time, the result has been great diversity of practice. It is incumbent on the rulemakers to provide a national rule. Some reservation might be expressed on the ground that not enough time has yet been allowed for experimentation that may show the way to better disclosure practices. But disclosure has been studied by the RAND report on the CJRA, and by the Federal Judicial Center. Local CJRA plan studies also are being made, including detailed studies in the Eastern District of Pennsylvania. District judges should be enlisted in the quest for uniformity.

The report to the Standing Committee described the discovery project. The difficulty of persuading district courts to surrender adherence to local rules was observed. One of the committee chores — as exemplified by the discovery project — will be to get district courts to understand the need to adhere to uniform national procedure.

Judge Niemeyer met with the Long Range Planning Liaison Group. They were interested in creating an ad hoc committee on mass torts.

This topic has been much in the public eye. Judge Hodges, chair of the Long Range Planning Committee, suggested an ad hoc committee. The advantages of consideration by this committee were considered, recognizing that it will be important to coordinate efforts with other committees. Other committees that may be interested include the Federal-State Jurisdiction Committee, the Judicial Panel on Multidistrict Litigation, the Bankruptcy Administration Committee, and perhaps the Court Administration and Case Management Committee. This committee has devoted many years to studying class actions, and in the process has heard much about mass tort actions. The difficulties of responsible change have become apparent, as has the futility of trivial change.

Judge Niemeyer further observed that this committee can no longer think of itself as having a constituency of lawyers, judges, and academics. There is more public scrutiny of court procedure and of the committee's work. The committee and its members must become leaders of a dialogue beyond the confines of the Enabling Act process. Congress is increasingly interested and active, at least as measured by the introduction of bills that would affect procedure. Many members of Congress remain sympathetic to the role of the Enabling Act process, but there also are signs of impatience, arising in part from the deliberately deliberate pace of the process. An illustration is provided by the proposal to amend Rule 23 to provide for permissive interlocutory appeals — although the proposal is now on the way to the Supreme Court, a bill to establish the same appeal procedure remains pending in Congress.

Legislative Report

John Rabiej provided a report on pending legislation. There are 15 or 16 pending bills that directly affect the civil rules. It does not seem likely that action will be taken on any of them this year.

Hearings will be held on HR 903, which includes offer-of-judgment provisions, but the hearings will focus on the arbitration issues in the bill. Last spring a letter was sent to Congress indicating that the rules committees take no position on the merits of the offer-of-judgment provisions, but also noting that after substantial study of Rule 68 this committee concluded that this is a very complicated subject. Some technical problems with the bill also were pointed out. Judge Hornby will testify on the arbitration parts of HR 903 for the Court Administration and Case Management Committee.

Bills dealing with Rule 11 seem to lack momentum.

A question was asked about progress on HR 1512, the current embodiment of longstanding attempts to adopt a minimum-diversity jurisdiction basis for consolidating single-event mass tort litigation in federal courts. It was noted that this topic

requires coordination with the Federal-State Jurisdiction Committee, but that it fits squarely within the mass torts topic that will continue to attract this committee's attention.

The committee noted with appreciation the good help that John Rabiej and the Administrative Office continue to provide in tracking relevant legislation.

Minutes Approved

The Minutes for the May and September committee meetings were approved.

Agenda Items

The Copyright Rules remain an enigma on the agenda. Further consideration of the proposal to rescind these rules is set for the spring agenda. Congress has shown an interest in the topic, reflecting concern that nothing should be done that will make it more difficult to enforce copyrights against pirate and bootleg infringers. Parallel concerns have been identified by those working with the TRIPS portion of the Uruguay round of the GATT agreement. GATT countries are required to provide effective copyright remedies. There is a fear that simple rescission of the Copyright Rules might seem to other countries to belie the United States commitment to vigorous enforcement. These fears will need to be addressed when the topic comes up for consideration. It must be made clear that any action taken will be designed to remove the doubts that now surround the continuing force of Copyright Rules that were adopted under, and refer only to, the 1909 Copyright Act, and that are subject to serious constitutional challenge.

It was observed that the docket of agenda items should not state that the committee "rejected" the proposed amendment of Rule 47(a) that would create a party right to participate in voir dire examination of prospective jurors. Although the committee elected not to pursue the proposal in light of substantial controversy, it did urge the Federal Judicial Center to frame its sessions for new judges to stress the importance of party participation. This has been done. Judge Patrick Higginbotham, the former chair of this committee, has spoken on the topic at several meetings.

Discovery Subcommittee

Introduction. Judge Niemeyer introduced the report of the Discovery Subcommittee by observing that the discovery project aims at three central questions. We hope to find out how expensive discovery is, both in general and in the most expensive cases; to decide whether the cost exceeds the benefits often enough to warrant attempts at remedial action; and if remedies should be sought, whether changes can be made that do not interfere with the full development of information for trial. The undertaking is more likely to focus on the framework of discovery than on attempts to control "abuses."

The Boston conference in September was as good as a conference can be. It was part of a process of generating a "smorgasbord" of ideas. The subcommittee has generated a comprehensive memorandum gathering the wide array of ideas that have been suggested. For this meeting, the objective is to explore the ideas to determine which of them deserve development through specific proposals to be considered at the spring meeting.

Judge Levi and Richard Marcus presented the work of the subcommittee. Judge Levi noted that the smaller January conference in San Francisco and the larger September conference in Boston had been the main work of the subcommittee to date. The purpose of these conferences has been in part to afford the bar an opportunity to take the lead on discovery reform, to advise the committee on what needs to be done and perhaps to suggest more detailed means of doing it.

The first big question is whether to do anything at all about discovery. Discovery seems to be working rather well in general, but there are problem spots. Lawyers are open to change, but doubt whether much can be accomplished. There may be a division between trial lawyers, who believe that real savings can be had in discovery, and litigators, who spend most of their time in preparing for trial and are inclined to doubt whether significant savings are possible. Many lawyers believe that the committee should not "tinker"; changes should be significant. At the same time, it is recognized that desirable technical changes should not be thwarted by fixing them with the "tinkering" label.

The Special Reporter was asked to list all of the many separate suggestions that have been made for discovery changes. The purpose of this list is to preserve the suggestions, not to imply that all of them should be adopted. As a guide to discussion, five central areas have been chosen as most deserving of attention.

The first central problem is uniformity. There is some chagrin among alumni of the 1991-1992 committee deliberations that the 1993 amendments deliberately invited disuniformity. Uniformity was thought desirable by many participants in the Boston conference. But it is not clear how broad or deep is the desire for uniformity. Many at the ABA Litigation Section meeting in Aspen this summer suggested that good local rules can be better than a blandly uniform national rule. The sense of that meeting was that it would be important to know what the national rule would be before deciding whether uniformity is a good thing.

If uniformity is to be pursued, the committee must address disclosure. The original wave of fear seems to be subsiding. It is agreed that all of the information that Rule 26(a) requires to be disclosed could properly be sought by interrogatory. But some lawyers like to have an interrogatory to show to the client to justify the need to reveal the information, and to demonstrate that

the lawyer is not penalizing the client for the lawyer's better understanding of the case. Yet if Rule 26(a) has not been the disaster that some anticipated, no one thinks it has been a major improvement. The studies may show some cost saving — it is too tentative to be sure — but it is clear that nothing terribly significant has happened. And Rule 26(a) will not be much help in the problem discovery cases that are the focus of concern. The complex and contentious cases are likely to be exempted from disclosure in any event.

There may be support to limit disclosure to "your case" information. But it is difficult to know how meaningful it is to ask that each party reveal at the beginning of the litigation, before discovery, what information it plans to introduce at trial.

Another approach to disclosure is to view it as the first step in a staged sequence of managed discovery.

Managed discovery is a third area for study. The central idea is that discovery might proceed in three stages. First would be disclosure, however disclosure may be reshaped. Second would be some level of core discovery, defined to be available to the lawyers without court management. This stage might well include stricter limits on the numbers of interrogatories and depositions than those set by current rules. It also might include time limits on depositions, and even might include some attempt to limit the quantity of document exchange. The third stage would require court management when any party wishes to engage in discovery beyond the core limits. In many ways this would involve a party-selected means of tracking; court management would be provided at the request of any party coming up against the limits of core discovery. This managed discovery system could be viewed together with Judge Keeton's proposal, including changes in Rule 16, using the whole pleading-discovery-pretrial conference process to get a better definition of the issues.

The managed discovery approach is consistent with the frequent observations that discovery works well in most cases. It would mean that for most cases, the parties would be left alone to manage the litigation without need for judicial involvement.

Core discovery rules could be drafted to include a clear and firm cutoff on the time for discovery.

Pattern discovery also should be considered. It seems to have support from both plaintiffs and defendants. The project would be to develop pattern discovery requests for each of several distinctive subject-matter areas. The pattern requests would be agreed upon by working committees that include experienced lawyers from all sides of litigation in the particular subject area.

A fourth area of inquiry is the basic scope of discovery. The American College of Trial Lawyers has long supported the 1977 proposal to narrow the scope of discovery defined by Rule 26(b)(1).

There is a related view that the major problem of discovery arises with document production, and that the scope of discovery should be narrowed only for document discovery.

The fifth major area of inquiry is document production. This seems to be the area of greatest concern. No specific proposal is ripe for discussion.

Document production involves particular questions about privilege. There seems to be a consensus that there is a problem with the effort required to protect against inadvertent waiver. There also may be difficulties arising in courts that disregard the terms of Rule 26(b)(5) and insist on privilege logs that both impose excessive burdens and threaten to reveal the very privileged information to be protected. It has been suggested that it works to provide for informal review of potentially privileged documents by the demanding party under a protective rule that this mode of disclosure does not waive privilege. The demanding party then specifies any of the examined documents that it wants to have produced, opening the way to formal assertion and litigation of the privilege claim. Apart from this privilege problem, there are continuing problems with the sheer volume of documents that may be relevant to a discovery demand. The problem of volume is exacerbated when the production demand is addressed to a multinational enterprise that has documents, often in many different languages, scattered around the globe. And the problem of volume may be further exacerbated by electronic storage and erasing techniques that may complicate determination of what "documents" a party actually "has." Information that has been erased often remains available upon sophisticated inquiry.

Beyond these five major areas, many other worthy suggestions were grouped into a "B" list of second-level priority. The most important idea on the list is the firm trial date, an item relegated to this list only because it is not a discovery matter, even though it is closely related to discovery cutoff issues.

There also is a "C" list of technical changes that need not be reviewed at this meeting.

Professor Marcus extended the introduction. The inquiry has followed an interactive process up to now. The subcommittee has been in a receptor mode. The time has come to switch to an action mode. Yet the subcommittee will remain open to receive further information. The Federal Judicial Center continues to analyze the data from the discovery survey it did at the subcommittee's request, and the several bar groups that participated in the Boston Conference have been invited to continue to provide further ideas.

The five items on the A list include three "bullet" items: uniformity; initial disclosure; and the scope of discovery.

"Tinkering" is in order if the committee decides to make one or more significant changes. Once the amendment process is

launched, it is appropriate to act as well on any technical changes that have accumulated and that deserve attention.

There are two main themes that underlie these separate questions: Should the committee seek only to tinker, or should it seek global changes in discovery? And should the change process be launched now, or is it better to wait, recognizing that there have been many discovery rules changes over the last quarter-century?

There are other thematic questions as well. Uniformity creates tensions, not only with the desire for local autonomy but also with the more general managerial view that it is better to leave individual judges free to manage litigation as best they can. The experience with "high discovery" cases may suggest that the committee should turn back the clock on activities that the 1983 and 1993 changes require in all cases. And the consideration of "core" discovery proposals might move beyond limits on the number and extent of discovery requests that can be initiated without judicial involvement to describe what the requests can demand.

Judge Niemeyer stated that the subcommittee had done a splendid job. The committee should start with its recommendations. Although attention can properly focus initially on the major areas of inquiry identified by the subcommittee, the items on the B list should not be removed from the agenda. As the process continues, it may prove desirable to move some B-list items up for active discussion and adoption.

General discussion began with the observation that this list of topics for consideration is not a definitive proposal. There has not been time, nor committee discussion, to support a narrow focus. The purpose of the current report is to open the question whether the time has come to do anything with the discovery rules, and to begin to identify the areas that seem best to deserve more concrete proposals.

Uniformity: Disclosure. The need for uniformity was identified as a central issue. The view was expressed that there is no pressing need for uniformity. Lawyers have learned to live with their present situations. Frequent change of the rules is not desirable, not even when the object is to establish national uniformity.

It was asked whether uniformity is important even apart from whatever difficulties or frustrations may — or may not — face lawyers who move among different disclosure regimes. How important is it that there be a nationally uniform practice in all areas governed by national rules adopted under the Enabling Act? And there also is a need to serve the courts' interest in good policy, in having an effective procedure even if it makes lawyers unhappy. And the committee must recognize that it will be difficult to achieve much consensus among the bar on this topic, perhaps even as support for doing nothing.

It was urged that "we need to bring these horses back into the

barn." The flirtation with local practice can intoxicate, and it will be increasingly difficult to restore uniformity. If uniformity is to be restored, the committee should move quickly.

Of course a decision to pursue uniformity in disclosure practice will entail determination of what the uniform practice should be. We cannot pursue uniformity in the abstract. If the only uniform rule that can be pursued successfully through the full Enabling Act process is one that uniformly abandons disclosure, or uniformly narrows disclosure, is uniformity worth the price? Before deciding whether uniformity is the most important goal, the committee must decide what disclosure rule would be best.

One sense of the importance of uniformity is that Congress was anxious in 1988 to move away from divergent local rules and practices. The Standing Committee local rules project has sought for many years to cabin diversity in practice arising from local rules. If the committee cannot successfully pursue uniformity, there is a prospect that Congress will. For that matter, Rule 26(a)(1) was proposed as a uniform rule. The local option was added from concern for the variety of practice that had emerged from Civil Justice Expense and Delay Reduction plans, some of it stimulated by the disclosure rule the committee had published for comment in 1991. In addition, there was substantial opposition to any disclosure rule; the opposition was so substantial that for a while the committee thought it should abandon disclosure.

An alternative to amending the national discovery and disclosure rules is to explore the opportunities for offering advice through the Manual for Complex Litigation. The Third Edition of the Manual contains many suggestions for regulating discovery practice similar to those offered to the committee. The subcommittee plans to study the Manual both as a source of ideas and as an alternative to further revision of the discovery rules.

A related opportunity is to expand the use of magistrate judges. The RAND study found that hands-on discovery management is important, and that litigant satisfaction increases when a magistrate judge is available to resolve discovery disputes. There are many very good magistrate judges, and there are many competing demands for their time. In some districts, magistrate judges are "on the wheel" for trial assignments. They do not view themselves, and their courts do not use them, primarily as discovery managers. Discovery management in a complex case, moreover, often goes to the heart of the dispute. The most important contribution a district judge can make may be to assume responsibility for managing discovery in litigation that will come to her for trial.

It was concluded that the subcommittee should bring back to the committee proposals to abandon all disclosure, to require uniform national adherence to the present rule, and to adopt the best identifiable modification of the present disclosure rules that might be adopted as a uniform national practice. It is hoped that

information about the effects of present practice will continue to accumulate while the subcommittee and committee continue to study the issue.

Core discovery. Turning to core discovery, the first question raised was whether there is any need to tighten further the limits on the number of discovery events. The reality of discovery practice is not what might seem from talking with lawyers who pursue high-stakes and complex litigation in the major metropolitan centers. The reality is the small and medium case. In these cases, every study and much experience suggests that discovery is working well. And it seems likely that there is nothing the formal rules can do about the cases that now present problems. The rules provide ample power to control discovery; what is needed is actual use of the power.

The response was that there is no intention to affect discovery as it is practiced in most cases. All of the proposed limits on lawyer-managed discovery would permit discovery without judicial involvement at levels that include the vast majority of cases under actual present practice. Of course that leads to the question of identifying the cases in which the limits will be helpful, since it is highly probable that judicial management will be required in bigger cases under any likely variation of present rules.

The hope is to create a mechanism that develops a plan — a track — for the now-routine cases. These cases might proceed even more freely, more frequently, than under present practices. At the same time, limits that cannot be exceeded without judicial involvement create a system that makes it impossible for reluctant judges to avoid the obligation of involvement. All the studies show little or no discovery in most cases; this is true even of the Federal Judicial Center survey, which was designed to exclude categories of cases in which there is likely to be no discovery. The object is to identify a threshold that will require the court to become involved. And even that threshold can be made subject to party stipulations that allow discovery beyond the core limits when the parties are able to manage discovery without any need for further judicial involvement.

As an alternative, it might be possible to put aside the "core" discovery theory in favor of a system that allows any party to demand formulation of a discovery plan. This system would have the same advantage in requiring judicial involvement when the parties are unable to agree, without the need for elaborate changes in present discovery rules.

The opportunity for judicial involvement is amply provided by present Rule 16. No more may be needed than a mechanism that prompts actual use of Rule 16 powers. And Rule 26(f) conferences provide the framework for stimulating judicial involvement. Perhaps nothing more is needed. These observations were challenged

by the suggestion that both the Rule 26(d) moratorium and the Rule 26(f) conference might be abolished for core discovery cases, and also by the observation that many lawyers are reluctant to approach a judge with a demand for judicial supervision.

The Rule 16(b) scheduling order requirement was discussed as part of this package. One judge observed that despite the language of Rules 16(b) and 26(f), he enters a scheduling order at the beginning of each lawsuit. Many cases involve out-of-town attorneys, making it costly and difficult to arrange conferences. Once a conditional scheduling order is entered, any problems are brought to the judge. But many cases do not require any action by the judge. Rule 26(f) accounts for much of the ability of lawyers to manage discovery without judicial involvement; it is the best part of the 1993 amendments. Others observed that such practices probably are common, and certainly have been followed by several committee members. In some courts, indeed, personnel from the clerk's office manage status calls. One approach would be to make these practices more explicit in the rules, going beyond the direct tie between Rules 16(b) and 26(f).

This discussion concluded with the suggestion that there is substantial support for the Rule 26(f) conference as it now stands, but that it may not be necessary to have the parties report to the court when they do not want judicial help.

It was suggested that if disclosure is retained, it could serve the role of core discovery. All discovery beyond that would require a plan, approved by the court unless the parties could agree.

Another suggestion was that the plaintiff could be required to file specified interrogatories with the complaint, with a like obligation on the defendant to file interrogatories with the answer. The questions would be limited to core discovery. Interrogatory answers would be stayed if there were a motion to dismiss. Many federal cases involve small claims. These routine interrogatories could save six months of discovery. The Rule 33 limits on numbers of interrogatories are a good thing.

A variation is provided by form interrogatories. California state practice includes three different sets of form interrogatories that ordinarily can be used in matching cases without fear that they will be held objectionable.

Judge Keeton has advanced a proposal to address the loose fit between notice pleading and discovery that also deserves attention.

The question of limitations on depositions, and particularly of duration limitations, came next. It was reported that in the Agent Orange litigation, there were 200 depositions conducted under a ruling that permission must be sought to extend any deposition beyond one day. To make this feasible, the deposing party was required to send the deponent all documents relevant to a

deposition before the deposition was taken, so that the deponent could study the documents before hand. Under this system, 168 depositions were conducted in one day each. Most of the remaining depositions were conducted in two days; only a few required three days.

It was urged that some limit on deposition length is better than any further limit on numbers of depositions because it is difficult to plan the number of depositions at the beginning of an action. Even though number limits would be only presumptive, and any limits adopted under a case-specific plan also could be modified, the number of depositions may not be the best means of triggering judicial involvement. But it was urged in response that a more persuasive showing of need for discovery beyond the limits can be made after the limits have been reached and the need can be specifically identified.

A related question was whether a core discovery system would reduce the opportunities for judicial involvement now available so long as discovery remained within the core perimeters. In the same vein, it was asked whether there is any point in changing the present number of permitted interrogatories and depositions, if the goal of changing the numbers is to trigger judicial involvement, and there is little difficulty now with discovery in cases that fall within present limits. Present limits work. 85% of the cases go through the system without difficulty. The Rule 26(f) conference is a good thing; if you cannot afford the time for a simple meeting, you should not take your case to federal court.

Further in the same vein, it was suggested that the discussion of judicial management was moving the committee's focus away from the main point. There is no need for judicial management in the core case. It is the big case that needs it. There is not much need to worry whether there should be 25, or 20, or 15 interrogatories in a normal case. The problem is focusing discovery on the issues that may be dispositive in the big case. But it was suggested in return that there should be some form of judicial involvement — even if only through the clerk's office — in every case. A great majority of cases can be handled by some other court officer without a judge, although it is better to have a judge when that is possible. We should do nothing that might discourage judicial involvement.

This discussion led on to the observation that judicial management can be simple. It can be done on paper, by telephone, or by a courtroom deputy. The need is to ensure uniformly high quality and timely judicial management in cases that involve a potential for over-discovery. The key issue is what should command court time.

Given present limits on the numbers of depositions and interrogatories, and given Rule 26(f) conferences and Rule 16(b) scheduling orders, it was suggested that the remaining targets of

stated discovery limits may be the duration of depositions and the quantity of document discovery. Rather than focus on the length of each individual deposition, it may work better to allocate a total number of deposition hours to each side, to be allocated among as many depositions as will fit. To be sure, lawyers operating under such rules have reported difficulties in allocating the time consumed by each party. But information will be gathered on actual experience under such systems. The subcommittee will frame proposals addressing both deposition length and quantity limits on document production.

It also was suggested that the subcommittee could look at Lord Wolfe's report in England. It includes provisions requiring a party to pay some of the costs of discovery beyond stated limits, a limited form of costshifting.

Discovery cutoff. The RAND report reflected substantial confidence that a combination of early judicial management with earlier discovery cut-offs and firm trial dates can reduce expense and delay without adverse impact. This topic clearly demands attention.

As attractive as early-set and relatively short discovery cutoffs may seem, there are substantial difficulties in attempting to set a uniform period in a national rule.

One difficulty is that cutoffs work only if discovery works. If one party deliberately delays, the discovery period may expire without allowing opportunity for necessary discovery. Many lawyers will say off the record that the famed "rocket docket" in the Eastern District of Virginia is administered in ways that defeat proper discovery in a significant number of cases; obstreperous lawyers are allowed to take advantage of the system by deliberate delay.

Another difficulty is that early discovery cutoffs make sense only if they are combined with reasonably proximate and firm trial dates. Completion of discovery should leave the lawyers ready for summary judgment motions, and then for trial. If these events cannot both be scheduled promptly, there is much waste and little advantage in the early cutoff. To the contrary, the early cutoff may force the parties into discovery that otherwise would not be undertaken at all. Individual case scheduling orders now can effect workable discovery cutoffs in relation to realistic trial dates. But a fictitious trial date, set in a uniform national rule, cannot do this. The circumstances confronting different districts vary widely. Any trial date set to conform to a uniform national requirement would be unrealistic in many districts.

In defense of possible uniform national time limits for discovery and trial dates, it was urged that the limits would exert pressure on judges to become involved in individual cases to set alternative and realistic dates. As with the proposed core

discovery limits, the purpose would be to force judicial action, not to set limits that really can be met in most courts for most cases.

Thomas Willging noted that the RAND findings should be kept in perspective. RAND found that 95% of the variation in cost and delay is driven by factors independent of judicial management. There is only a limited amount of room for addressing the remaining 5% by improved judicial management. The Federal Judicial Center has continued to analyze the data in its discovery study. It has undertaken multivariate regression analyses of many procedures, including discovery cutoffs, meet-and-confer requirements, and other devices. No relationship could be found between any of these devices and cost or delay.

A motion was made to stop further consideration of discovery cutoffs, on the ground that Rules 16(b) and 26(f) provide ample and better means of addressing cutoffs. Differences in the docket burdens of different districts are alone enough to make a national rule unworkable.

Discussion of the motion noted that discovery cutoffs involve more than discovery alone. Unless there is an integrated plan, there is no point in hurry-up-and-wait. Increasing specificity in a national rule is not the answer.

In response, it was repeated that a national rule stating the need to "march along" with a case will serve as a default mechanism that forces recalcitrant judges to pay attention to the needs of cases that do require individual attention. A reply to this argument was that it is rare to find that attorneys are ready for trial, but not the judge.

The committee decided to defer action on the motion to terminate consideration of discovery cutoffs. It was recognized that many observers are keenly interested in discovery cut-offs, and that the subcommittee should explore further the possibility of creating a workable national rule. A close look should be taken, even if it proves impossible to do anything constructive. The subcommittee and the committee should explore all possibilities before giving up on this possible opportunity. But Judge Levi stated that the discovery subcommittee will not look at specific cutoff times.

Pattern Discovery. Pattern discovery might be pursued by developing protocols for acceptable discovery in particular subject-matter areas. Or general sets of interrogatories might be developed, consulting California practice, that are useful for many different types of litigation. Several bar groups and commentators have expressed support for some effort along these lines.

The California practice was described as involving sets of general interrogatories. A party can simply choose from among interrogatories in a set. It is generally accepted that these

interrogatories are proper, and they are routinely used and answered. Further inquiries will be made into the nature of the California practice, the frequency of use, and the level of satisfaction with the results.

Grave doubts were expressed about the need for the committee to become bogged down in the enterprise of drafting form interrogatories. The system works well on its own. There is no lack of forms to be consulted by those who wish.

It was agreed that the subcommittee would further study the prospects of developing some system of discovery forms.

Rules 16(b), 26(d), 26(f). Discussion turned briefly to the interplay among Rules 16(b), 26(d), and 26(f). It was agreed that the subcommittee should consider the desirability of revising Rule 16(b) to clearly authorize entry of a conditional scheduling order before the Rule 26(f) conference. The Rule 26(d) discovery moratorium will be considered in conjunction with the review of disclosure. To the extent that Rule 26(f) ties to Rule 26(d), it will be implicated as well. But there was no sense of dissatisfaction with the general working of Rule 26(f); earlier discussion suggested that it may be among the most successful features of the 1993 amendments.

Scope of discovery. The American College of Trial Lawyers has renewed the suggestion that the Rule 26(b)(1) scope of discovery be narrowed to focus on claims (or issues) framed by the pleadings. The weight of this suggestion figured centrally in the decision to undertake the present discovery project. The specific proposal was first advanced by the American Bar Association Litigation Section in 1977, and was promptly taken up and published for comment by this committee in the form now advanced by the American College. The proposal was abandoned after publication. It has been considered repeatedly by this committee over the years, but never again has advanced as far as publication. Current discussion of the proposal has gone further, suggesting revision of the final (b)(1) provision that the information sought need not be admissible at trial if it appears reasonably calculated to lead to the discovery of admissible evidence.

This proposal has been much argued over the years. The committee agreed that there is little need for additional work by the subcommittee in preparation for the spring meeting. The subject will be discussed at the spring meeting. But the subcommittee should draft alternative proposals to modify the (b)(1) provision allowing discovery of information reasonably calculated to lead to the discovery of admissible evidence.

Documents. Document discovery is more a category of problems than a single proposal. It includes privilege waiver problems. It also includes costshifting, although costshifting can be studied for all discovery devices. Former Rule 26(f), governing "conference[s] on

the subject of discovery," provided that the court should enter an order "determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action." This provision seems not to have had any general impact on the practice of leaving discovery costs where they lie.

It was suggested that document discovery works well in ordinary federal cases. If change is needed for anything, it is only for the "big" cases.

It was asked whether it is possible to limit the volume of document discovery in any way analogous to the present limits on numbers of interrogatories and depositions.

A recurring suggestion has been that the scope of discovery could be narrowed for documents production, but not for other modes of discovery. The American College proposal, for example, could be adopted only as part of Rule 34. Robert Campbell stated that document production problems may be a dominant part of the concern underlying the proposal. But it was suggested that it may be difficult to implement rules that apply different tests for the scope of discovery to different discovery devices.

Notice was taken of the pre-1970 practice that required a court order on showing good cause for document production. The thought was ventured that if disclosure remains in the rules, good cause might be required for production of documents outside those disclosed. But all agreed that it would be a step backward to require a court order for document production. The pre-1970 practice should not be revived.

Costshifting was recognized as a very complex problem. Any adoption of costshifting could easily have unintended consequences. But it is good to be able to condition discovery on payment of the costs by the inquiring party — this practice is authorized now by Rules 26(b)(2) and (c). Costshifting in general should remain open for further discussion, but the subcommittee should be responsible now only for drafting changes in (b)(2) to refer explicitly to the possibility of conditioning discovery on payment of the costs.

Privilege problems arise predominantly from the fear of inadvertent waiver by document production. It seems to be common, among parties of good will, to stipulate that production be made under a protective order providing that production does not waive privileges. It is uncertain, however, whether such orders protect against waiver as to nonparties; general opinion suggests that there is no sure protection against nonparties. Absent a stipulated protective order, the burden of screening to protect privileges is greatly enhanced and, in a "big documents" case, can impose untoward costs. This problem could be much reduced by a rule providing a procedure for preliminary examination of documents by the requesting party without waiver. The requesting party then would demand formal production of the documents actually desired,

focusing the producing party's privilege review and paving the way for direct contest on whatever documents are thought privileged.

Questions were raised as to Enabling Act authority to act with respect to privileges. The Evidence Rules Committee should be consulted on any proposal that might emerge. Any rule that creates, abolishes, or modifies a privilege can take effect only if approved by Congress, 28 U.S.C. § 2074(b). Even if this committee and the other bodies charged with Enabling Act responsibilities conclude that a no-waiver rule that simply governs the effects of federal discovery practice does not modify a privilege, it would be important to state that conclusion and offer it for examination both by the Supreme Court and by Congress. And there may be some question whether "Erie" and Enabling Act concerns should deter action with respect to state-created privileges — and state law governs most privileges. If state law forces waiver by any disclosure, even under a case-specific protective order or under a general procedure rule, does a no-waiver rule enlarge a state-created substantive right?

It was noted that there is some federal law on waiver, including waiver arising from public filings.

Experience often shows that overbroad assertions of privilege can be greatly reduced by scheduling a privilege hearing. Most of the assertions are abandoned before the hearing. But this approach does not alleviate the fear of inadvertent waiver by producing, rather than over-aggressive privilege assertions.

It was generally agreed that case-specific protective orders are a good device, and that a general procedure rule would be a better thing. The subcommittee is to consider these questions further.

Privilege log practice also has been identified as a potential problem. The suggestion is that some courts go beyond the limits of Rule 26(b)(5), demanding specific information about withheld documents that not only imposes undue burdens but that threatens to compel disclosure of the very information protected by the privilege. Some courts have exacerbated the problem by insisting on tight time schedules that cannot be met, and then finding waiver as a sanction for failure to timely produce the privilege log.

The question is whether anything should be done to amend (b)(5) to force all courts to honor its present meaning. One suggestion was that The Manual For Complex Litigation prescribes a good procedure that is easy to follow, and that the real problem is that many judges are too lenient, failing to demand even the level of detail required by (b)(5).

Another suggestion was that an effective protection against inadvertent waiver would greatly reduce the problems of compiling privilege logs. Privilege disputes would be much narrower and better focused. When lawyers are unable to stipulate to protective

orders now, on the other hand, the privilege log can be a serious burden in the big documents case.

Further discussion reflected substantial uncertainty as to the dimensions of any privilege log problems that may exist. It was suggested that the 1993 Committee Note to Rule 26(b)(5) might be amplified, but the committee concluded that it continues to be inappropriate to attempt to modify a former Note when no action is taken on the underlying rule. In addition, it was concluded that the 1993 Note is all that could be asked. If there is a problem, it is not because of inadequacies in the Rule or the Note.

The committee concluded to suspend further consideration of the privilege log issues. The topic will be revived if additional information suggests the need for further action.

Failure to produce. Several participants in the Boston conference suggested that serious problems remain in failures to produce information properly demanded by discovery requests. The problem is not with the present rules but with failure to honor them. The question is whether there is anything to be done to enhance compliance. One suggestion has been that represented clients, as well as their lawyers, should certify the completeness and honesty of discovery responses under Rule 26(g). Another possibility is to generate still more sanctions.

It was asked why there is an asymmetry in the operation of sanctions. Rule 37(c) imposes sanctions directly for failure to make disclosure. The balance of Rule 37 imposes sanctions for failure to respond to discovery requests only if there is a motion to compel compliance, an order to comply, and disobedience to the order. Complete failure by a party to respond also can be reached under Rule 37(d).

The practical problem was identified as arising from the fact that the failures of discovery become apparent close to trial, or at trial. The disputes that arise then tend to make discovery the issue, not the merits. And "huge" fines are imposed. On the other hand, some cases deny sanctions because the demanding party waited too long to move.

Brief note also was made of the complaint that some lawyers seek to set deliberate "sanctions traps" by demanding production of documents they already have obtained by other means, hoping that the responding party will fail to produce them. Failure to produce even marginally relevant documents is then made the basis for sanctions requests and attempts to show the responding party in an unfavorable light.

These questions were put on hold. The subcommittee need not prepare more specific proposals to deal with failures to produce, nor to require party certification of discovery responses.

Rule 26(c). The committee twice published proposals to amend Rule

26(c) to specify procedures for modifying or vacating protective orders. Further action was postponed for consideration as part of this more general discovery project. Congress has been interested in the possibility that protective orders may defeat public knowledge of products of circumstances that threaten the public health or safety, and some in Congress fear that the committee has been considering these problems for too long without acting. The second published proposal also stirred concerns by expressly recognizing the widespread practice of stipulating to protective orders.

It was noted that protective orders relate to the broader problems of sealing court records and closing court proceedings. The Committee once considered a partial draft "Rule 77.1" that sketched some of the issues that must be addressed if these problems are to be covered by a rule of procedure.

It also was noted that practicing lawyers do not find any problems in Rule 26(c) as it stands.

Rule 26(c) will remain on the committee docket, but the subcommittee will not be responsible for considering this topic.

Document preservation. The committee has, but has never considered, a draft Rule 5(d) prepared to require preservation of discovery responses that are not filed with the court. It would be possible to consider a rule that prohibits destruction of discovery materials after litigation is commenced but before discovery is demanded. A beginning has been made in the Private Securities Litigation Reform Act of 1995. Special difficulties would arise with respect to electronic files. Present action does not seem warranted. The subcommittee need not prepare proposals on this topic.

Electronic Information Discovery. The Boston Conference sketched the problems that are beginning to emerge with discovery of information preserved in electronic form. These problems will evolve rapidly. Capturing solutions in rules will be particularly difficult as the pace of technology outdistances the pace of the rulemaking process. The committee must keep in touch with these problems, but it is too early for the subcommittee to attempt to find solutions. The technology subcommittee will be considering these and related problems; many of the problems will need to be explored through the Standing Committee's technology committee in conjunction with all of the several advisory committees.

Masters. The use of discovery masters was encouraged by some participants at the Boston conference. "Everybody is doing it, but Rule 53 does not address it." It was agreed that the role of special masters involves too many issues in addition to discovery issues to be part of the present discovery project. The committee has held a detailed redraft of Rule 53 in abeyance since 1994. The subcommittee need not address the matter further.

Objecting statement of withheld information. It has been suggested that a party who objects to a discovery demand be required to state whether available information is being withheld because of the objection. The underlying problem is that a party may object, force the demanding party through the work of getting an order to compel, and then reveal that there is no information available. The lack of information is not revealed even during the premotion conference. The difficulty with requiring a statement whether available information is being withheld is that the purpose of the objection may be to forestall the burden of finding out whether responsive information is available. It would be necessary to allow a statement that the party does not know without further inquiry whether responsive information is available, that further inquiry is possible, and that it is unwilling to undertake the inquiry before the objection is resolved.

Members of the committee observed that their practice is consistent with this suggestion. If they know that they have no responsive information, they say so at the time of objecting. If they do not know, they state that no search will be made until the objection is resolved.

The most aggravated form of this possible problem may arise when a party makes pro forma objections to all discovery demands, but also responds in terms that leave the inquiring party uncertain whether the responses are complete.

The dimensions of this possible problem remain uncertain. The costs of dealing with it are equally uncertain. For the moment, at least, the subcommittee will not be responsible for formulating a specific proposal.

Firm trial date. The committee turned to the "B" list of discovery subcommittee proposals.

The first of these proposals is that the national rules require early designation of a firm trial date in all actions. It was agreed that a firm trial date is a very good thing. Some courts are able to set firm trial dates, and the results are good. But there are great difficulties in requiring this practice by uniform national rule, recognizing the wide variations in docket conditions in different districts. The committee needs to choose between a national rule and recommending that these matters be handled by the Court Administration and Case Management Committee and the Federal Judicial Center as a judicial management problem. This choice can be made at the spring meeting without requiring further work by the discovery subcommittee.

Notice pleading. It was suggested that the vague notice pleadings authorized by Rule 8 are hopelessly at odds with the need to define and refine the issues for trial. Although disclosure may be used to amplify the pleadings without undoing the "great 1938 design," the role it will play depends on how disclosure practice evolves in

conjunction with Rule 26(f) conferences and on further consideration of the disclosure rules. One approach would be to expand and emphasize the court's authority to order more definite statements of the issues after the initial pleadings. Although courts may order clear formulation of the issues under present Rule 16, perhaps more should be done. The subcommittee was not given any directions on this topic.

Other. It was observed that sets of interrogatories often are prefaced by elaborate definitions and instructions on how to answer. The practicing members of the committee all responded that they ignore these prefaces, choosing to answer the interrogatories as they actually are written.

Questions have been raised about the need to have a treating physician prepare an expert testimony report for disclosure under Rule 26(a)(2). The Rule is clear that such reports are not required, and the Note reinforces this conclusion. There is no need to make these provisions even more clear; if some courts misapprehend the clear rule, there is little to be done apart from pointing the judge to the clear language.

Rule 26(a)(2) does present a possible problem, however, because of the double expense that arises from requiring disclosure of an expert report, followed by deposition of the expert. Experts are being deposed after the reports. It is not clear whether this expense is justified. This topic will remain open to further consideration, but without directions for further work by the subcommittee.

The "C List" of technical discovery rule changes was left in the hands of the subcommittee for further consideration.

The discovery subcommittee is to prepare proposed rule amendments for consideration by the committee in the spring, including alternative formulations where that seems appropriate.

Rule 6(b)

The Supreme Court has sent to Congress a proposed amendment of Civil Rule 73, and proposed abrogation of Rules 74, 75, and 76. These changes reflect repeal of the statute that for some years permitted parties who agree to trial before a magistrate judge to agree also that any appeal will go to the district court, to be followed by the opportunity for permissive appeal to the court of appeals. During this process, Rule 6(b) was overlooked. Rule 6(b) prohibits extension of specified time periods, including the Rule 74(a) appeal time periods. The committee agreed that Rule 6(b) should be amended to conform to the impending abrogation of Rule 74(a). The amendment will be recommended to the Standing Committee, to be sent forward in the process when there is a suitable package of items to accompany it.

Attorney Conduct Rules

Professor Coquillette, as Reporter of the Standing Committee, described for the committee the Standing Committee's work on attorney conduct rules. Much of the work is gathered in a September, 1997 volume of Working Papers, "Special Studies of Federal Rules Governing Attorney Conduct." The Standing Committee has taken the lead on this project because it cuts across several sets of rules, and because it involves the work of the Standing Committee's Local Rules project.

The many inconsistent approaches taken by local rules to regulating attorney conduct have become a special focus of the broader local rules project. At the Standing Committee's request, Professor Coquillette has drafted a set of uniform rules to be adopted by every district court, focusing on the particular problems of attorney conduct that commonly arise and directly affect the district courts. Apart from these specific problems, the rules will adopt the rules of the state in which the district court sits (a choice-of-law provision is included for the courts of appeals). The Standing Committee will consider the draft at its January meeting. After Standing Committee approval, the matter will go to the relevant advisory committees.

The most likely form for implementing this project will be amendment of Civil Rule 83, Appellate Rule 46, and the Bankruptcy Rules. The courts of appeals do not encounter these problems frequently, making incorporation into the Appellate Rules an uncontroversial matter. The Bankruptcy courts, on the other hand, encounter many problems, particularly those involving conflicts of interest, and care a lot about the answers. They operate under the Bankruptcy Code, and are likely to want a special set of rules for bankruptcy.

It was suggested that it might be desirable to use the district court rules as the foundation for the bankruptcy court rules, with such supplemental rules as may be desirable.

Professor Coquillette said that the draft rules would not require a separate federal enforcement system in each district. The matters covered by the specifically federal rules will involve matters that can be directly enforced by the court. He also said that work is still being done on the problem of lawyers not admitted to practice in the district court's state.

Admiralty Rules B, C, E

Mark Kasanin introduced discussion of the proposed amendments to Admiralty Rules B, C, and E. He noted that these proposals began several years ago with the Maritime Law Association and the Department of Justice. Much of the work has been done by Robert J. Zapf, who attended this meeting as representative of the Maritime Law Association, and Philip Berns of the Department of Justice, who also attended this meeting. The Admiralty Rules subcommittee has worked with them, refining the drafts to remove most points of

possible dispute.

Many of the proposed changes reflect changes in statutes or in Civil Rules that are explicitly incorporated in the Admiralty Rules. Styling changes also have been made, and are so extensive that it is not helpful to set out the changes in the traditional overstrike and underscore manner.

Perhaps the most important changes have been separation of forfeiture and admiralty in rem procedures in Rule C(6), and deletion of the confusing "claim" terminology from Rule C(6).

Philip Berns introduced the history of the changes, noting that the roots of this project began back in 1985 or 1986 with the need to relieve marshals of the requirement of serving process in all maritime attachments. Attachment of a vessel or property on board a vessel still demands a marshal, a person with a gun, because these situations can be sensitive and potentially fractious. The service requirements in fact were changed in Rule C(3), but for some unknown reason parallel changes were not made in Rule B(1).

Another need to amend the rules arises from the great growth of forfeiture proceedings. Forfeiture procedure has adopted the maritime in rem procedure of Rule C. But the admiralty procedure for asserting claims against property is not well suited to forfeiture proceedings. In addition, there is a greater need to move rapidly in admiralty in rem proceedings, so as to free maritime property for continued use.

Robert Zapf underscored these reasons for amending the rules.

The adoption of the alternative Rule C(3)(b) service provisions into proposed Rule B(1)(d) was discussed and approved.

Proposed Rule B(1)(e) responds to the problem arising from incorporation of state law quasi-in-rem jurisdiction in the final provisions of present Rule B(1). Rule B(1) now incorporates former Rule 4(e), failing to reflect the amendment of Rule 4(e) and its relocation as Rule 4(n)(2) in 1993. Rule 4(e) allowed use of state quasi-in-rem jurisdiction as to "a party not an inhabitant of or found within the state." It provided a useful supplement to maritime attachment under Rule B(1). New Rule 4(n)(2), however, allows resort to state quasi-in-rem jurisdiction only if personal jurisdiction cannot be obtained over the defendant in the district in which the action is brought. Because maritime attachment is available in many circumstances in which personal jurisdiction can be obtained in the district — it is required only that the defendant not be "found within the district" — substitution of Rule 4(n)(2) for Rule 4(e) would serve little purpose. Discussion focused on the argument that Rule B(1)(e) should incorporate state quasi-in-rem jurisdiction without any limitations, discarding reliance on Rule 4. Objections were voiced in part on the same grounds that led to the restrictions incorporated in Rule 4(n)(2),

and also from doubt that the quasi-in-rem jurisdiction aspect of Rule B(1) needs to be expanded. Further discussion showed that the main use of state law is as a means of effecting security, not jurisdiction. Although present practice seems to recognize that state law security remedies are available in admiralty through Civil Rule 64, it was decided that the draft Rule B(1)(e) should be revised to incorporate Rule 64, deleting any reference to state-law quasi-in-rem jurisdiction. The Note will reflect that this incorporation is effected to ensure that repeal of the former Rule 4 incorporation is not thought to make use of Rule 64 inconsistent with the supplemental rules. It was further agreed that deletion of state law quasi-in-rem jurisdiction seems to justify abandonment of the present reference to the restricted appearance provisions of Rule E(8). This issue was delegated to the admiralty subcommittee for final action.

Draft Rule C(2)(d)(ii) adds a new requirement that the complaint in a forfeiture proceeding state whether the property is within the district, and state the basis of jurisdiction as to property that is not within the district. This requirement responds to several statutory provisions allowing forfeiture of property not in the district. The draft was approved.

The notice provisions of draft Rule C(4) include a new provision allowing termination of publication if property is released after 10 days but before publication is completed. This change simply fills in an apparent gap in the present rule, both for the purpose of avoiding unnecessary expense and for the purpose of reducing possible confusion as to the status of the seized property.

The draft divides Rule C(6) into separate paragraph (a) procedures for forfeiture and paragraph (b) procedures for maritime arrests. Two major distinctions are made. A longer time is allowed to file a statement of interest or right in forfeiture, and the categories of persons who may file such statements include everyone who can identify an interest in the property. In admiralty arrests, on the other hand, a shorter time is allowed for the initial response because of the need to effect release of the seized property for continuing business. The categories of persons who may participate directly is narrower than in forfeiture, being restricted to those who assert a right of possession or an ownership interest. Lesser forms of property interests can be asserted in admiralty arrests only by intervention, in keeping with traditional practice. The Maritime Law Association has urged that the reference to ownership interests in C(6)(b) include "legal or equitable ownership." The Reporter objected that it is better to refer only to "ownership," as a term that includes legal ownership, equitable ownership, and any other form of ownership recognized by foreign law systems that do not respond to the Anglo-American distinction between law and equity. The Note makes clear the all-embracing meaning of "ownership." After discussion it was agreed

that the multiple meanings of ownership could be made secure by amending the draft to refer to "any ownership" in C(6)(b)(i) and (iv). It was emphasized that the Note discussion of the changes in C(6) is an important part of the process, making it clear that elimination of the confusing reference to "claimant" and "claim" in the present rule is not intended to change the substance of admiralty rights or the essence of the allied procedure.

It was noted that draft Rule C(6)(c), continuing the admiralty practice of allowing interrogatories to be served with the complaint, was expressly considered in relation to the discovery moratorium adopted by Rule 26(d) in 1993. It was concluded that the special needs of admiralty practice justify adhering to this longstanding practice.

Draft Rule E(3) was presented in alternatives, a Reporter's draft and an MLA draft. The MLA draft deliberately uses more words to say the same things, in order to emphasize that process in rem or quasi-in-rem may be served outside the district only when authorized by statute in a forfeiture proceeding. The MLA version was supported by the admiralty subcommittee, and adopted by the committee.

Draft Rule E(8) must be adjusted to conform to draft Rule B(1)(e). Incorporation of Rule 64 in Rule B(1)(e) requires deletion of the incorporation of former Civil Rule 4(e) in Rule E(8). If the reference to Rule E(8) is deleted from revised B(1)(e), there is no apparent need to refer to Rule 64 in Rule E(8). The admiralty subcommittee will make the final decision on this point.

Draft Rules E(9) and (10) were approved for the reasons advanced in the draft Note.

Changes to Civil Rule 14 to reflect the changes in Supplemental Rule C(6) also were approved.

The package of Admiralty Rules amendments was approved unanimously. It was agreed that it would be desirable — if possible under Enabling Act processes — to reduce the period required to make these changes effective. This question will be addressed in the submission to the Standing Committee with the request that the proposed rules be published for comment.

Assistant Attorney General Hunger reported on the status of pending statutes that would bear on the proposed forfeiture rule amendments. The Department of Justice will continue to work with Congress on these matters.

Mass Torts

This committee began to review Civil Rule 23 at the suggestion of the Standing Committee in response to the urging of the Ad Hoc Committee on Asbestos Litigation. Mass torts present problems that

are inherently interstate in nature. There often are tensions among state courts, and between state and federal courts, arising from overlapping actions. Special problems arise from the strong need of defendants to achieve global peace; these defense interests affect plaintiffs who want to settle. There are many problems that have not been resolved. Bankruptcy is often held out as a model, with such intriguing variations as "product-line bankruptcy." Interpleader, "bill-of-peace," and other traditional models have been offered for reexamination and possible expansion.

Increasing opportunities to inflict widely dispersed injuries have increased the burden of dispersed litigation and the desire to find solutions. Many of the proposed solutions require legislation. Civil Rules amendments cannot alone provide solutions.

The Judicial Conference has considered appointment of an ad hoc mass torts committee. The work of any such committee would bear on the work of many other Judicial Conference committees, including the rules committees. It would be necessary to coordinate its work with these committees, and particularly to ensure that specific rules proposals be subjected to the full Enabling Act process for adoption. The committees most obviously affected include the Federal-State Jurisdiction Committee, the Bankruptcy Administration Committee, and the Judicial Panel on Multidistrict Litigation. The Court Administration and Case Management Committee also might become interested, and of course the Manual for Complex Litigation is involved. These problems have made the Executive Committee wary of appointing a new committee. At the same time, it is anxious that the Judicial Conference process be actively involved with these problems.

This committee has learned much about mass tort litigation in its Rule 23 inquiries, and is a logical focal point for further efforts. Judge Niemeyer has proposed that a Mass Torts Subcommittee of this committee be created, to include liaison members from the most directly involved Judicial Conference Committees. The subcommittee would be charged with sorting through recommendations for addressing mass torts by coordinated legislation, rules changes, and other means. The task is formidable, and success is by no means guaranteed. A special reporter would be needed. Judge Niemeyer has asked Judge Scirica to chair the subcommittee, if it is authorized, recognizing that this will be a long-range project. The work must be tentative at first, and slow. Although there is a natural reluctance to continue to develop subcommittees, there are too many large-scale projects for this committee to work on each one as a committee of the whole. Here, as with the admiralty and discovery subcommittees, the subcommittee can be put to work on a "task-specific" basis.

It was noted that the subcommittee must remain sensitive to

the risk that enthusiasm for particular proposals may entice it toward rules that trespass over the line into substantive matters.

A prediction was made that unless Congress will enact substantive laws, the only workable answers will be found through amendment of Civil Rule 23 or development of a specific class-action procedure for mass torts.

Rule 23

The proposed new Rule 23(f) is on its way to the Supreme Court. Rule 23(c)(1) has been commended by the Standing Committee for further study in conjunction with remaining Rule 23 questions. At the May meeting, the committee voted to abandon the proposed new factors (A) and (B) for Rule 23(b)(3); the "maturity" element proposed for new factor (C) was redrafted and carried forward. Proposed factor (F), colloquially referred to as the "just ain't worth it" factor, remains on the agenda for further consideration. The proposed settlement-class provision, which would be new Rule 23(b)(4), also remains on the agenda, along with the proposed amendment of Rule 23(e).

"Factor (F)." At the May meeting, the committee determined to consider five alternative approaches to factor 23(b)(3)(F) as published in 1996. The published version added as a factor relevant to the determination of predominance and superiority "whether the probable relief to individual class members justifies the costs and burdens of class litigation." The first approach would be to adopt the factor as published. This approach would require several changes to the Committee Note to reflect concerns raised by the testimony and comments. There was a widespread misperception that this factor would require a comparison between the probable relief to be received by one individual class member with the total costs and burdens of class litigation. If a class of 1,000,000 members stood to win $10 each, the comparison would weigh the $10, not the $10,000,000 in a process that inevitably must find the individual benefit outweighed by the costs and benefits of class litigation. The Note would have to be changed to dispel any remaining confusion, making it clear that the aggregation of individual benefits is to be compared to the aggregate costs. In addition, the Note should be changed to take a position on an issue that the Committee had earlier voted to leave aside — whether measurement of the probable relief to individual class members entails a prediction of the outcome on the merits. Many of those who testified or commented believed that the proposed rule would require such a prediction on the merits. Other issues as well might need to be addressed in the Note, responding to additional concerns presented by the testimony.

A second approach would be to abandon the published proposal.

Another approach would delete the reference to "probable relief," substituting some formula that does not seem to invoke a

prediction of the outcome on the merits. One possible formulation would be: "whether the relief likely to be awarded if the class prevails justifies the costs and burdens of class litigation."

A fourth approach would eliminate the reference to individual relief, focusing only on aggregate class relief. This approach could be combined with the third: "whether the relief likely to be awarded the class if it prevails justifies the costs and burdens of class litigation."

The fifth approach would be to create an opt-in class alternative for situations in which the recovery by individual class members seems so slight as to raise doubts whether class members would care to have their rights pursued. Certification of an opt-in class would provide evidence of class members' desires; if they opt in, that is proof that they wish to vindicate their rights.

All of these approaches were discussed against the underlying purposes that led to proposed factor (F). We do not wish to foster lawyer-driven class actions, where the lawyer first finds a "claim" and then finds a passive client without any substantial purpose to advance the interests of class members or the public interest. But it is different if persons holding small claims desire vindication and seek out a lawyer. Rule 23 should be available for small claims that cannot be effectively asserted through individual litigation. Is it possible to distinguish these situations by rule? One possibility is to resort to the opt-in class alternative, providing direct evidence whether class members desire enforcement.

A new suggestion was made that all of these alternative approaches involve speculation about the outcome on the merits. Focus on cases of meaningless individual relief should instead be placed in Rule 23(e). The problems arise from settlements — often the "coupon" settlements — and they can be addressed by refusing to approve settlements that award meaningless relief to the class and fat fees to counsel.

It was suggested that the specter of fat fees and meaningless class recovery is only a myth. The Federal Judicial Center study showed what other studies show — fee awards generally run in a range of 15% to 20% of the aggregate class recovery. Many cases now are denied certification because the judge thinks they are useless; the superiority requirement authorizes this. Adding any variation of factor (F) will destroy the consumer class; it is contrary to the philosophy of Rule 23. The opt-in alternative is a delusion. In California, once a statutory or constitutional violation by the state has been adjudicated, an opt-in class can be formed. Even in this situation, with liability established, lawyers do not resort to the opt-in class because it is too expensive in relation to the results. Potential class members simply do not undertake the burden of opting in.

It was responded that opt-in never has been given a chance. A class member who is not willing to opt in does not belong in court.

The rejoinder was that there is a vast difference between opt-in and opt-out. Most classes are lawyer driven. This is recognized by rules of professional responsibility that allow lawyers to advance the costs and expenses of the litigation.

It was suggested that the opt-in alternative should be separated. The first decision to be made is whether the merits should be considered as part of the (F) calculation.

Another observation was that there is a philosophical chasm on small-claims classes. Adoption of any of the (F) alternatives would be the death-knell of consumer classes. These alternatives should be considered before moving to consideration of the opt-in class alternative.

This discussion led to the plaint that the committee has pursued these issues around the same tracks for several meetings. After much hard work, there still is no clear definition of what the proposal is designed to accomplish. Comparison to the relief requested for the class will accomplish nothing, since no one begins by asking for coupons or other trivial relief. The opt-in alternative is odd, because with very small claims it is not worth it to opt in. The proposed draft that would incorporate the opt-in alternative in the Rule 23(c)(2) notice provisions turns on finding reason to question whether class members would wish to resolve their claims through class representation, but does not provide any guidance to the circumstances that might raise the question. There has been no definition of what is meant by the "costs and burdens" of class litigation. We do not know how to implement this concern. The effort should be abandoned.

A motion to abandon further consideration of proposed factor (F), keeping the opt-in alternative alive for further consideration, passed with one dissent.

Opt-in classes. Discussion of the opt-in alternative pointed to several issues that must be resolved. Some of the drafts were integrated with the now-abandoned factor (F) proposal, authorizing consideration of an opt-in class only after certification of an opt-out class had been rejected under factor (F). If (F) disappears, some other means must be found to distinguish the occasion for an opt-in class from the occasions for opt-out classes. Even the (c)(2) notice draft adopted for purposes of illustration one alternative formulation of the (F)-factor drafts: "When the relief likely to be awarded to individual class members does not appear to justify the costs and burdens of class litigation and the court has reason to question whether class members would wish to resolve their claims through class representation, the notice must advise each member that the member

will be included only if the member so requests by a specified date." Any of the alternative (F) formulations would do, and some alternative switching point might do better. But some means must be found, unless opt-in is to replace opt-out for all (b)(3) classes, or unless the court is given a discretionary choice between opt-in and opt-out for all (b)(3) classes. And at some point, it may seem inappropriate to aggravate the already curious Rule 23 structure that incorporates the distinction between opt-out and mandatory classes only in the notice provisions of subdivision (c).

Opt-in classes also require attention to several subsidiary issues. It must be made clear that the "class" includes only those who in fact opt in, not those who were eligible to opt in but did not. The class notice must specify the terms on which members can request inclusion; it would be helpful to indicate, in Rule or Note, whether the terms can reach sharing of costs, expenses, and fees. It might be useful to address the effects of opt-in classes on statutes of limitations, and the availability of party-only discovery devices and counterclaims against those who opt in. Thought also must be given to the question whether the judgment in an opt-in class can support nonmutual issue preclusion in later litigation, whether brought by those who were eligible to opt in or by others.

The opt-in class alternative in (c)(2) raised the same question as the (F) factor: what level of individual recovery triggers the opt-in alternative? The "$300" that was the median recovery in one of the districts in the Federal Judicial Center study?

Even the opt-in alternative continues to present the question whether the merits should be considered, as a matter of likely relief or as a matter of justifying the costs and burdens of class litigation.

The opt-in approach was supported as a way of showing whether there is support for litigation among the supposed class members. This is better than present practice, which allows a lawyer to volunteer as a "private attorney general" on behalf of a class that does not care and in service of a public interest that public officials do not find worth pursuing.

It was urged that the opt-in approach should be applied to all (b)(3) classes, without the complications of attempting to separate opt-in from opt-out classes.

It was responded that opt-in classes are a revolutionary idea. The Supreme Court sang the virtues of small-claims classes in the Shutts decision. Even constitutional doubts might be raised about substituting opt-in for opt-out classes. Who pays for notice? What about repetitive classes, made up of those who choose not to opt in to the first class? In effect, settlement classes today

ordinarily are opt-in classes because they reach only those who file proofs of claim.

The fear that due process might defeat opt-in classes was doubted by others.

Opt-in was further supported as simple and clear. The opt-out provision was a last-minute addition to (b)(3). We should find a device that avoids any preliminary consideration of the merits, and opt-in does it.

Another member suggested that the (c)(2) draft that would allow a judge to opt out of opt-out class certification in favor of an opt-in class is a worthy idea, but is overcome by problems. A rule of procedure can generate preclusion consequences — Rule 13(a) and 41 are obvious examples. But we cannot allow nonmutual preclusion to rest on an opt-in class judgment. And we cannot bind those who choose not to opt in. The small-claim area, moreover, is the area where opt-in will work least well. And what is to be done under the draft when a small number of individual claimants in fact appear: does this upset the "reason to question whether class members would wish to resolve their claims through class representation"?

The fear that opt-in classes would spur successive class actions was met by the observation that multiple and overlapping classes occur now.

The private attorney-general function was brought back for discussion with the observation that the committee has never rejected this concept. Opt-in classes would greatly reduce this function.

It was predicted that adoption of an opt-in class alternative would drive small-claims classes to state courts. But federal courts should provide the forum for resolution of nationwide issues. Economically, moreover, a lawyer can afford to invest $200,000, $500,000, or $1,000,000 in notice to an opt-out class; the investment is not possible for an opt-in class, because there will not be enough opt-ins.

The fear of driving national classes to state courts was countered by the suggestion that amendment of the federal rules would lead to parallel amendments by many states, discouraging resort to state alternatives.

An alternative to opt-in classes to control lawyer-driven actions might be to base fees on the amount of relief actually distributed. It has been suggested that counsel fees are often based on the maximum possible distribution, and are a far larger percentage of relief actually distributed in small claims cases. The Committee has not been able to get any clear sense whether this suggestion is often borne out in practice; adoption of the fee rule might give better evidence.

The conclusion was that the opt-in issues should remain open for further exploration. Earlier committee proposals had envisioned opt-in classes as a promising approach to mass tort litigation. The Mass Torts Subcommittee may be the best place for the next phase of study.

Opt-in classes were further defended on the ground that collective action on behalf of many should turn on agreement to be included. The opt-out default presumes consent that is not real.

Settlement classes. In 1996, the committee published for comment a proposed Rule 23(b)(4) that would allow certification of a class when "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial." This proposal followed a long period during which the committee repeatedly considered the problems of settlement classes but found no clearly sound approach to the many problems involved with drafting a rule to regulate the practice. The proposal was intended only to overrule the Third Circuit rule that a class can be certified for settlement purposes only if the same class would be certified for trial. See Georgine v. Amchem Products, Inc., 3d Cir.1996, 83 F.3d 610; In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation, 3d Cir.1995, 55 F.3d 768. The Supreme Court affirmed the Georgine decision, but the opinion states that a (b)(3) class can be certified for settlement even though "intractable management problems" would defeat certification of the same class for trial. Amchem Prods., Inc. v. Windsor, 1997, 117 S.Ct. 2231, 2248. Although the Court took note of the published committee proposal, the opinion also notes that the proposal had been the target of many comments "many of them opposed to, or skeptical of, the amendment," 117 S.Ct. at 2247. The Court's opinion, moreover, discusses settlement classes in terms that are not clearly as limited as the published proposal. The opinion could be found to reach classes certified under subdivisions (b)(1) or (b)(2), and is not limited – as the published proposal was – to situations in which the parties agree on a proposed settlement before seeking class certification. The reach of the Court's opinion may be uncertain in other dimensions as well.

In these circumstances, it was urged that simple adherence to the committee's published proposal would be unwise. The central purpose has been accomplished by the Supreme Court. It is not clear whether adoption of the proposal would merely bring the Court's interpretation into the text of Rule 23. There is only minor benefit in adding this particular gloss to the text of the rule, when so many other important aspects of class-action practice have not been added to the rule. And there is great risk that inconsistencies may exist between what the Court intended and what the amended rule might come to mean. Because the Committee cannot be confident of what the Court intended, cannot be confident whether the published proposal means something else, and cannot be

confident of the ways in which an adopted amendment might be interpreted against the background of the Court's opinion, further work is necessary if Rule 23 is to be amended to address settlement classes.

It was suggested that the Amchem decision means that a nationwide mass tort class action cannot be settled. Problems of conflicting interests within the class and related inadequacies of representation will be insurmountable.

This suggestion led to the more general suggestion that the time is not ripe for immediate action on settlement classes. District court decisions since the Amchem decision seem to be moving toward stricter certification standards. It will be desirable to give more thought to the problem, and to gain the benefit of greater experience. In the Amchem case itself, the result so far has been that individual claims are being settled according to the protocols of the settlement; the only difference is that far greater amounts are being devoted to attorney fees. Many of the settlement-class issues are properly considered with the problems of mass torts. There are genuine problems to be addressed. The "limited fund" problem is real in the most widespread mass torts. Transaction costs are a great problem, as reflected in the RAND study of asbestos litigation. The best solutions may lie beyond the limits of the Enabling Act.

It was observed that the Fibreboard settlement is back in the Fifth Circuit, and may return to the Supreme Court in a way that will shed light on use of limited-fund (b)(1) settlement classes. In the same vein, it was noted that the Court has twice granted certiorari in cases that were meant to present the question whether mandatory classes can be used for mass torts; this level of interest suggests that another vehicle soon may be found to address this issue.

These difficulties and opportunities led to a consensus that it is better to defer further consideration of settlement classes. The committee has never been able to find attractive proposals to do more than overrule the Third Circuit rule that limits settlement classes to those that could be tried with the same class definition. The Supreme Court has provided plenty of food for further lower court thought. Although further proposals are not precluded by the Supreme Court opinion, it is better to await developments. The Mass Torts Subcommittee is likely to be considering these issues. If problems emerge as lower courts develop the Amchem opinion, the committee can return to the issue.

Other Rule 23 issues. The committee considered briefly two drafts that it requested at the May meeting. One provided alternative approaches to enhancing the "common evidence" dimension of Rule 23(b)(3) classes. The more demanding approach would require that for certification of a (b)(3) class, "the trial evidence will be substantially the same as to all elements of the claims of each

individual class member." The softer approach would add a new factor, focusing on "the ability to prove by common evidence the fact of injury to each class member [and the extent of separate proceedings required to prove the amount of individual injuries]."

The other draft dealt with repetitive requests to certify the same or overlapping classes. It would add a new factor to (b)(3), allowing consideration of "decisions granting or denying class certification in actions arising out of the same conduct, transactions, or occurrences."

It was asked whether data can be got on the frequency of multiple certification attempts. Thomas Willging observed that the Federal Judicial Center study had some data, that showed at least one overlapping action in 20% to 40% of the classes, varying from district to district.

State court class actions were again noted as an alternative to federal actions, with the suggestion that changes in Federal Rule 23 might be followed by many states.

It was suggested that both drafts were interesting and deserved study. It was noted that the committee still has on its agenda the proposal to amend Rule 23(c)(1) to allow certification "when practicable," and the revised "maturity" factor for (b)(3) classes. Settlement classes and opt-in questions remain on the table, but are not ready to go ahead with recommendations for publication of specific proposals.

Brief discussion of the (c)(1) proposal asked whether "practicable" is the best word to use. It was noted that during the Standing Committee review of (c)(1), it was suggested that the key is to identify the purposes underlying the desire for early determination of certification requests. It also was suggested that these purposes may implicate so many different factors that it will be difficult to find a better single word.

These Rule 23 issues were continued on the agenda.

Judicial Conference CJRA Report

The Judicial Conference CJRA Report was summarized in the agenda materials. Each of the recommendations that bear on the work of this committee were included. Most of the recommendations were discussed extensively during the report of the discovery subcommittee because they bear directly on its work. All of the recommendations will be subjected to prompt and thorough continuing study.

Certificate of Appreciation

A certificate signed by all committee members was presented to Carol J. Hansen Posegate, commemorating and thanking her for six years of great service on the committee.

Electronic Filing

Peter McCabe presented a report on the status of electronic filing experiments, observing that developing experience is revealing many areas in which the Civil Rules must be studied to ensure effective application to electronic filing and, eventually, electronic service. The report was illuminated by a presentation by Karen Molzen on the Advanced Court Engineering project. Among the practical problems discussed were the use of the log-in and "key" for the attorney's signature; means of covering filing fees — credit cards and attorney deposit accounts are the most likely means; difficulties confronting pro se litigants; and systems for detecting attempts to alter filed documents. The work of the clerk's office has already been affected; the need for paper has been reduced significantly. An attorney who submits an affidavit electronically must retain the original. When a judge authorizes filing, a facsimile signature is affixed to the order. There is a "firewall" system to ensure security. Different persons are allowed different and controlled levels of access to the system. FAX and email noticing are being used; if the message does not go through in three tries, a notice is printed out with a mailing label. A list of potential problems with the rules of procedure is being developed; it will be sent on to Judge Carroll as chair of the Technology Subcommittee.

Next Meetings

The date for the next meeting was set at March 16 and 17, 1998. It was agreed that if a second spring meeting becomes necessary — most likely because great progress has been made with Discovery Subcommittee proposals that might be made ready to recommend for publication with one more meeting — it will be held on April 30 and May 1. Locations were not set for either meeting.

Respectfully submitted,

Edward H. Cooper, Reporter



Minutes

Federal Rules of Civil Procedure Advisory Committee

September 4 to 6, 1997

The Advisory Committee met on September 4 and 5, 1997, at the Boston College Law School to participate in a symposium on the discovery system established by the Federal Rules of Civil Procedure. The Policy and Agenda subcommittee and the Discovery subcommittee met at the Boston Park Plaza Hotel on Saturday, September 6.

All Advisory Committee members attended the symposium, including Judge Paul V. Neimeyer, chair; and Judge John L. Carroll; Judge David S. Doty; Justice Christine M. Durham; Francis H. Fox, Esq; Assistant Attorney General Frank W. Hunger; Judge David F. Levi; Mark O. Kasanin, Esq.; Carol J. Hansen Posegate, Esq.; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Anthony J. Scirica; Chief Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Edward H. Cooper attended as Reporter, and Professor Richard Marcus attended as Special Reporter for the Discovery Subcommittee. Professor Geoffrey C. Hazard, Jr.; Alan W. Parry, Esq.; Judge Morey L. Sear; and Sol Schreiber, Esq., attended as members of the Standing Committee on Rules of Practice and Procedure. Professor Daniel R. Coquillette, Reporter for the Standing Committee, acted as host for the Law School. Peter G. McCabe, John K. Rabiej, and Mark Shapiro attended for the Administrative Office of the United States Courts. The many presenters, panel members, and participants in the symposium are listed with the record of the symposium.

These Minutes will not attempt to summarize the two days of papers presented, panel discussions, and general participation discussion. The papers are to be published in the Boston College Law Review, and a full record of the discussions is to be prepared.

Judge Niemeyer provided a brief summary of the symposium events at the conclusion. On behalf of the Committee, he thanked all panels, presenters, and participants. The information and advice offered to the Committee were invaluable. Inevitably, many divergent experiences and views were expressed.

He noted that there seemed to be substantial consensus that uniformity in the disclosure and discovery rules is important. Some form of disclosure seemed to be acceptable to most participants. But the discussion suggested changes that might improve disclosure. The concern that present disclosure rules distort and invade the relationship between attorney and client might be addressed by changing disclosure to a sequence in which the plaintiff first discloses the support presently available for the plaintiff's position, followed after an interval by the defendant's disclosure of the support presently available for its position. The concern that immediate disclosure of damages calculations might require an impossible chore in some

circumstances suggests reexamination of Rule 26(a)(1)(C). Expert witness disclosure under Rule 26(a)(2) also may deserve reconsideration.

There was nearly unanimous agreement that discovery presents serious problems in only a minor fraction of all federal-court cases. It is important that any changes made to address the problem cases not upset the good working of discovery in most cases. One approach might be to establish a relatively limited system of discovery to be managed by the attorneys, with court intervention only as a last resort, coupled with the right of any party to opt into a court-supervised system in which greater discovery is permitted. Access to a judge would be an integral part of the court-supervised system.

There was great support for an early discovery cut-off, coupled with the early setting of a firm trial date. It was commonly agreed that this combination works best if the firm trial date is close to the discovery cut-off date.

The Advisory Committee is not committed to making any changes. Discovery is a centrally important aspect of our adversary procedure. Adjusting it in any way is a sensitive and delicate responsibility. The Committee also recognizes that Congress remains interested in discovery topics, and hopes to continue the long record of mutually respectful relationships.

Special thanks and congratulations were expressed to Judge Levi and Professor Marcus for organizing an outstanding event, as well as to Peter McCabe, John Rabiej, and Mark Shapiro. And a final note of thanks was made to Professor Coquillette and the Boston College Law School.

Policy & Agenda and Discovery Subcommittee Meetings

September 6, 1997

The Policy and Agenda and Discovery Subcommittees met on Saturday, September 6, 1997. Advisory Committee Chair Judge Paul V. Niemeyer and Reporter Edward H. Cooper were present for both meetings. Professor Daniel R. Coquillette attended as Reporter for the Standing Committee on Rules of Practice and Procedure.

The Discovery Subcommittee meeting was attended by Judge David F. Levi, Chair; Judge David S. Doty; Francis H. Fox, Esq.; Carol J. Hansen Posegate, Esq.; and Judge Lee H. Rosenthal. Professor Richard L. Marcus attended as Special Reporter.

The Policy and Agenda Subcommittee meeting was attended by Judge Anthony J. Scirica, Chair; Judge David F. Levi; and Phillip A. Wittmann, Esq. Mark O. Kasanin attended to report on proposals of the Admiralty Rules subcommittee.

John K. Rabiej and Peter G. McCabe represented the Administrative Office at both meetings.

Policy and Agenda Subcommittee

The Policy and Agenda Subcommittee meeting began with the observation that the proposal to amend Civil Rule 23(f) has been placed on the consent calendar for the September Judicial Conference meeting.

The main topics for the October 6 and 7 meeting will be discovery, Rule 23, and proposals to amend the Supplemental Admiralty Rules.

The Rule 23 work will include all of the proposals held on the agenda for further study after the May Advisory Committee meeting, as well as the two new proposals that were added. The discussion of settlement classes of course will spring from the Supreme Court decision in the Amchem case.

The Rule 23 work will be tied to continuing work with mass torts. The Rule 23 study and hearings have provided a great deal of information about mass tort litigation. The Long-Range Planning Committee is very interested in exploring mass tort problems through the Judicial Conference Committee structure, and the Civil Rules Committee has special advantages because of this longstanding study. A study group should be formed, perhaps including a few people who are not Advisory Committee members.

Mark Kasanin described the work being done by the Admiralty Rules Subcommittee. The Admiralty Rules have applied to forfeiture proceedings without any variation from the procedures used for in rem admiralty proceedings. There have been confusions in terminology arising from this combination, particularly with respect to divergent uses of the "claim" concept. It seems desirable to provide more time to respond in forfeiture procedures than can be accommodated in admiralty proceedings. And there are

various changes that should be made to catch up to the reformulation of Civil Rule 4 and new forfeiture statutes. The Maritime Law Association will provide further views on the only two matters that remain uncertain in the proposals. And the Administrative Office will keep in touch with the progress of pending legislation that would directly amend Admiralty Rule C. Mr. Kasanin reported that representatives of the Maritime Law Association and the Department of Justice planned to attend the October meeting, and it was agreed that the Admiralty Rules topic should be placed on the agenda for discussion during the morning of Tuesday, October 7.

Professor Coquillette observed that he would want half an hour on the agenda of the October meeting to present information on the progress of proposals to shape rules affecting attorney conduct. The Federal Judicial Center has completed its study of local rules in this field. The Standing Committee is interested in studying a draft of national rules on attorney conduct that would govern specific matters. One possible format will be an amendment of Civil Rule 83 that incorporates by reference an appendix of 8 to 10 rules on the problems that most affect the district courts. The Standing Committee is taking on initial responsibility for this chore because the topic cuts across the responsibilities of most of the several advisory committees. The Bankruptcy Rules Advisory Committee, indeed, has already appointed a subcommittee to study this topic. A further reason for proceeding with this topic now is that the Department of Justice and the Conference of Chief Justices seem to be approaching agreement on a draft Rule 4.2. If everyone — including the American Bar Association — agrees on a resolution, a national uniform rule seems within reach. It was observed that the district courts that have undertaken to enforce disciplinary rules themselves, rather than refer infractions to state disciplinary bodies, have been unhappy with the experience. Local case law grows up, creating possible confusions. Professor Coquillette responded that the core rules generally will govern matters that a judge must do anyway. The new rules will take over state disciplinary standards.

Judge Niemeyer stated that a subcommittee of the Advisory Committee will be appointed to work with the disciplinary rule proposals.

It was suggested that proposals by the Department of Justice to amend Civil Rules 4 and 12 for "Bivens" cases may be ready in time for consideration on the October agenda. It was concluded, however, that the agenda will be so crowded with Rule 23, discovery, and the Admiralty Rules proposals that this topic most likely should be put on the agenda for the spring meeting.

The lack of organized response by copyright groups to the proposal to abolish the Copyright Rules was noted. It was concluded that rather than rush them into hasty response, the topic would be put on the spring agenda.

It was noted that the October agenda could include a technical

change to Civil Rule 6(b) that would abolish the cross-reference to Civil Rule 74(a), to conform to the repeal of Civil Rule 74.

Finally, the Committee must be sure to attend to the topics commended to it by the Judicial Conference Report to Congress on experience under the Civil Justice Reform Act. Many of these topics are caught up with the ongoing discovery project. At least one, however, is in part independent, calling for study of Rule 16 to determine whether it should be amended to provide further support for alternate dispute resolution methods. These items should be placed on the October agenda, recognizing that most will carry forward as part of the discovery project.

As a separate matter, Congress continues to be interested in offer-of-judgment proposals that would shift attorney fees. The Committee has studied such proposals in the past, and has concluded that they are very complicated. In addition, feeshifting has manifest substantive characteristics. The central question may be whether there is some way in which the Committee can be of help to Congress as Congress wrestles with these intricately difficult problems. This subject should be noted in the October agenda.

Discovery Subcommittee

Judge Niemeyer began by noting areas in which there was not much disagreement during the discovery symposium.

There was strong support for restoring uniformity, deleting the local option to discard the national disclosure rules. If uniformity is to be restored, there must be some change in Rule 26(a). This will provide the occasion for reconsidering the present disclosure rules. There also will be problems as local CJRA plans expire. Without statutory authority, many local practices will become invalid because they have not been adopted by Local Rules.

The present disclosure rule could be retained, simply deleting the local option to reject it. But there was much interest in revisions that would address many of the objections that have been advanced since the beginning. One approach is to change disclosure to a device that elucidates the issues as well as they can be understood at the beginning of an action, so as to give direction to subsequent discovery (if any). A staged sequence could be developed, beginning with the plaintiff's statement of the issues as presently understood and with an identification of the witnesses and documents that will be used to support the plaintiff's position on those issues. After an interval, the defendant would respond with a comparable statement of the issues as the defendant understands them, with comparable identification of the witnesses and documents the defendant will use to support its position on those issues. This system would greatly reduce the complaint that present disclosure forces each attorney to betray client interests and confidentiality, working to develop the other party's theories. It also might substantially alleviate the concern that the limitation of disclosure to disputed issues alleged with

particularity in the pleadings does not provide much guidance for disclosure. There is some prospect that both plaintiffs and defendants can agree on such a system; plaintiffs lawyers at the conference seemed to react to it with favor. Most of the bar would prefer to scale back disclosure. The subcommittee should prepare a statement of this approach for consideration by the Advisory Committee in October, understanding that likely there is not enough time to prepare actual draft language.

The disclosure alternatives submitted for discussion should include abolition of all disclosure. Even with staged disclosure, a defendant may not know enough about the case to be able to make meaningful disclosure early in the proceedings. Notice pleading complaints often tell very little.

It also may be appropriate to reconsider the expert disclosure requirements of Rule 26(a)(2). Providing both for a written expert witness report and a deposition seems unnecessary duplication. Federal cases require a large volume of paper as it is.

A second step that should be presented to the Advisory Committee for study is a two-staged discovery process. The first phase would be attorney-controlled, probably with substantial limits on the amount of discovery that can be had. The total hours of deposition time might be limited; the number of interrogatories might be reduced below the present level; some limit on document discovery could be added. In this area, the parties should be expected to manage discovery without interference or help from the court. This proposal might even omit the meeting now required by Rule 26(f). Only in case of special difficulties should the judge be invoked. Any party wishing discovery in excess of these limits would be required to propose a discovery plan, if possible with the concurrence of other parties. Judicial approval would be required. This approach would provide the judicial supervision that so many participants asked for during the discovery symposium.

It was asked why there should be attempts to amend the rules to take care of cases that are not now a problem. There are many cases with little or no discovery. They present no difficulty. The response was that a 100 mile-an-hour speed limit is a problem even if 95% of the travelers drive at 55. Requiring judicial supervision for discovery beyond some relatively low threshold would take care of those who now take untoward advantage of the outer boundaries of the present discovery rules. The system is a kind of tracking — it is the lawyers who initiate the tracking, rather than the court or some abstract formula provided by rule. It responds to the difficulty of drafting rules that tell the court to get involved when court involvement is desirable.

One approach to this lawyer-option tracking is to view it as a means the lawyers have for pushing judicial involvement. It should go beyond a management plan for the cases that need it, as seen by the parties, to include exhortations that the judge should be available for prompt disposition of discovery disputes. It would be desirable to encourage informal submission of simpler

disputes, without papers or memoranda, and oral disposition. Care must be taken, however. Some local rules require written supporting memoranda; to preempt them, an explicit contrary provision would be needed in the Civil Rules. And however an explicit provision might be drafted, there is a risk that it would encourage lawyers in the belief that they have a right not to submit discovery motions orally in all cases, not alone in the simpler disputes appropriate to this procedure.

Beyond these provisions, the desire for discovery cutoffs and early-set, firm trial dates might also be addressed. One approach would be through the discovery rules, setting a default rule that requires all discovery to be initiated within a defined period — perhaps six months after issue is joined. A rule also could require early setting of a trial date. This approach runs into the feeling of some that such matters are better handled as a matter of practice, not by Civil Rule. There is ample provision for this sort of planning through Rule 16 now. The case can be got moving by an early Rule 16 conference — the routine cases can meet this need by providing for handling by someone from the clerk's office. And when actual judge involvement is required, it can be by letter, by telephone, or by other means measured to the needs of the case. The Discovery Subcommittee will review these issues and prepare drafts.

The use of a "time clock" for depositions was discussed separately. Some local rules, and some state rules, provide time limits on depositions. Texas is considering rules proposals that would allocate a set time — 40 hours — for all depositions by each "side." A single side could allocate all of its 40 hours to one deposition, or to 40, or in any other proportion. It was objected that while a time clock may work at trial, where a judge supervises the allocation of time between each party, it will be very difficult to supervise during depositions. This topic will require further study, but should be part of the proposals brought to the full Committee.

Discussion turned to the question whether more help should be asked from the Federal Judicial Center. The FJC staff would like to undertake an inquiry into the discovery costs incurred by clients, information that has not been captured by any past studies. It seems clear that parties often incur great costs in responding to discovery, but there are not careful empirical studies to sketch the dimensions of the costs. If only the target would stand still, moreover, a present study by the FJC could provide an important source of comparative information for later studies of the effects of any discovery changes that might be made. It also is possible that the FJC might be able to find a way to measure the frequent complaint of lawyers that it is difficult to secure prompt judicial attention to discovery disputes and prompt discovery rulings. Comprehensive data on the time from submission of discovery disputes to the time of disposition would give an important basis for learning whether there are widespread general problems, or only isolated and occasional difficulties. But it may

be difficult to capture a full picture. Docket information, for example, may not reflect all discovery activity. There is a particular danger that docket information may not reflect the practices of judges who hold themselves available for telephone resolution of discovery disputes at any time. And it is fair to ask whether we should force judges to make records of such informal dispute resolution proceedings, either for present study purposes or as a long-range policy.

There is some indication that the Product Liability Advisory Council would like to submit party-cost information from its members. If in fact they should decide to provide such information, it is important that it be made readily available to all of the interested organizations that participated in the discovery symposium. Independent reactions will assist the committee in evaluating any information that might be provided. In addition, it is possible that some of the organizations could provide competing information, covering such matters as the internal discovery costs borne by plaintiffs. Such information would amplify statements at the symposium discovering the care that contingent-fee firms take in assessing the probable costs and benefits of proposed discovery programs. All of these groups have been helpful, and must continue to be involved in any further inquiries. Professor Marcus, as Special Reporter for the discovery project, will write to the bar groups that participated in the discovery symposium, thanking them for their participation and inviting submission of information about party costs.

It was concluded that some combination of the reporters and Judge Levi should discuss three projects with the FJC. The FJC should be asked to gather data on local federal rules and state rules that limit the time for individual depositions or limit the total time available for all depositions in a case. The FJC should be asked to consider the possible opportunities and to submit proposals about two added studies. One would explore the time required to dispose of discovery disputes. The other would explore the costs incurred directly by the parties in responding to discovery demands. And, of course, the FJC should be encouraged to finish the further steps it has in mind for using the data gained in its current discovery survey. The FJC will be asked to aim for a February 1 submission, to be ready in time for the spring Advisory Committee meeting.

Turning to other discovery items for the October agenda, it was agreed that the American College of Trial Lawyers proposal on the scope of discovery should be included. This proposal should be coupled with an alternative that would limit the scope of discovery only as to documents. Other proposals as well should be catalogued.

The protective order proposal published in 1995 should remain in the materials to be further considered.

The symposium provided much discussion of the practical problems in developing Rule 26(b)(5) privilege logs. There also

was discussion of the great costs incurred to screen documents to avoid inadvertent waiver of privilege. It was noted that this problem often is addressed by stipulated protective orders that include nonwaiver provisions, but recognized that such stipulations between the parties are not likely to bind nonparties. It also was noted that there are questions of Enabling Act competence to deal with waiver of state-created privileges, and of the special limits on addressing privilege rules through the Enabling Act. The Evidence Rules Committee should be consulted on any waiver provisions.

The symposium also emphasized the emerging problems that arise from computer storage of information. The problems are particularly acute in at least two special areas. One area involves formulation of the search queries for computer-stored information, and review of the results of the queries so as to develop further queries. The inquiring party may prefer to shape the inquiries — when it is possible to learn enough of the way the storage system is programmed — but there may be grave objections to providing access to all of the irrelevant and confidential information that is likely to be mixed in with the properly responsive material. Another area involves the great difficulties of knowing what has become of information that has been moved out of the organized storage system. Often there are vast quantities of information stored in back-up media, but stored in essentially random form and without any workable index. A party may know that these media have unknown contents, and can certify that there is no relevant information there only after incredibly expensive searches through mountains of material that would never have been considered during earlier and organized storage periods. In addition, there may be special problems with discarded information. Current technology frequently means that "erased" information remains available until something else is written over it. Again, parties may have much information that they believe they do not have at all. An inquiring party may prefer that its own experts attempt to retrieve the information through direct access to the storage device. And there may be a particularly acute problem that a discovery order prohibiting the destruction of any current information will literally freeze a computer system because of the risk that further ordinary use will write over "deleted" but not forgotten information.

The problems of discovering computer-stored information seem vast and unmanageable. A special subcommittee should be appointed, charged in part with coordinating with the Standing Committee's technology committee.

Respectfully submitted,

Edward H. Cooper, Reporter

Item 8

TO: Standing Committee

FROM: Daniel R. Coquillette, Reporter

DATE: December 1, 1997

RE: Federal Rules of Attorney Conduct

1. Charge

At our last meeting, I was asked by the Committee to draft uniform federal rules that would supersede the complex thicket of local rules now governing attorney conduct in the federal courts. This follows two invitational conferences of experts, on January 9-10, 1996 in Los Angeles and on June 18-19, 1996 in Washington, which focused on this problem. There were also seven special reports, five by this reporter and two by Marie Leary of the Federal Judicial Center. These are now available printed together as Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), hereafter "Working Papers." (I strongly recommend that you keep this useful volume at hand in reviewing what follows. If you need an extra copy, please call.)

In drafting the attached rules, I had important assistance from Bryan A. Garner, John K. Rabiej, and Alan N. Resnick, Reporter to the Bankruptcy Advisory Committee. I am most grateful. Errors are my own.

These rules are now being reviewed by the Style Sub-Committee, under the regular procedures. If the Standing Committee approves of a version of this draft, the rules will be sent next to the relevant advisory committees for review at their spring meetings. The final draft would then come back to this Committee at its June meeting for a vote on publication.

2. Basic Structure

I have attached just one "rule system," but it does, in fact, offer the Committee four options:

1. To accept the complete package, which establishes a narrow core of uniform federal rules, the ten "The Federal Rules of Attorney Conduct." All other matters would be governed by current state standards, the so-called "dynamic conformity" model;

2. To adopt only some of the ten proposed uniform Federal Rules of Attorney Conduct, i.e. only the conflict of interest rules;

3. To accept only the new uniform rule that establishes a state standard, with no core of uniform federal standards at all. (This would mean adopting only Rule 1 of the Federal Rules of Attorney Conduct);

4. To adopt none of the above, and leave the matter to the present system of local rules.

There is one option I have not included. Based on my extensive studies and discussions with the Advisory Committees on Appellate Rules and Bankruptcy Rules, I would strongly recommend that district courts and appeals courts be treated alike, and that bankruptcy courts, and other special courts, be treated separately. See Working Papers, supra, 235-292 (appeals courts); 293-334 (bankruptcy courts). Thus, these proposed new rules cover just district courts and appeals courts.

3. New Fed. R. Civ. P. 83 (c)

At the moment, attorney conduct in the district courts is governed by local rules promulgated pursuant to Fed. R. Civ. P. 83. It is thus logical to start there. I have drafted a new subdivision (c) which would provide that the standards of attorney conduct in the district courts are established by the ten Federal Rules of Attorney Conduct, together with other uniform rules. (Such as Fed. R. Civ. P. 11.) This supersedes the existing local rules. The ten Federal Rules of Attorney Conduct are incorporated by Rule 83 (c) as Fed. R. Civ. P. Appendix 1, just as the Appendix of Forms is incorporated by Rule 84. Like the Appendix of Forms, the Federal Rules of Attorney Conduct would go through the full Rules Enabling Act process established by 28 U.S.C. § 2072 (b).

There is also a practical advantage with this structure. On being admitted to the bar of a federal district court or appeals court, a lawyer would be handed a small pamphlet containing the ten Federal Rules of Attorney Conduct. These rules would always govern where relevant. Otherwise, Rule 1 of the Federal Rules of Attorney Conduct directs the attorney to the current standards for the state where the district court is located or, as in the case of a court of appeals, to a choice of law rule selecting the appropriate state standard.

It has been suggested by the Reporter to the Criminal Rules Advisory Committee, Professor David Schlueter, that a parallel change should be made to the Federal Rules of Criminal Procedure. This would assure that identical rules should govern civil and criminal proceedings-- a fundamental assumption of the ABA Model Rules. (There are certain exceptions. See ABA Model Rule 3.8: "Special Responsibilities of a Prosecutor") Professor Schlueter suggests that:

"A possible candidate for that new provision might be existing Rule 57, Rules by District Courts, which in some respects already parallels Civil Rule 83. I would recommend that the new language already proposed for

Civil Rule 83 simply be added to what would become a new subdivision (d) in Criminal Rule 57, as follows:

Rule 57. Rules by District Courts

* * * * *

(d) ATTORNEY CONDUCT. The standards of attorney conduct in the district courts are established by the Federal Rules of Attorney Conduct, together with other rules adopted under 28 U.S.C. §§ 2072 and 2075."

As Professor Schlueter correctly observes, this would be a matter for the Advisory Committee on Criminal Rules.

4. New Fed. R. App. P. 46

Of course, the courts of appeals already have a uniform rule governing attorney conduct, Fed. R. App. P. 46. This rule establishes the notoriously vague "conduct unbecoming a member of the bar" standard. After In re Snyder, 472 U.S. 634 (1985), courts of appeals have adopted many different local rules to give Rule 46 some specificity of content. See Working Papers 239-240, and cases cited. (In re Snyder is set out in full at Working Papers 265-271.) Thus the advantages of uniformity have been lost.

The new Fed. R. App. P. 46 would adopt the Federal Rules of Attorney Conduct, except for matters arising before other courts. There the standards of the other court will be applied. (Of course, under the new Fed. R. Civ. P. 83 (c) district courts will also follow the Federal Rules of Attorney Conduct, but not necessarily bankruptcy courts.) Under Rule 1 of the Federal Rules of Attorney Conduct, the appeals court will have a choice of law rule selecting an appropriate state standard, unless the conduct falls within the ambit of the other Federal Rules of Attorney Conduct. See Fed. R. Attny. Conduct 1 (a) (2).

There are in fact very few cases involving attorney conduct in the courts of appeals, and most of those involve matters arising in the district courts. There is every reason to amend Fed. R. App. P. 46 to track the district court rule. See Working Papers, supra, 237-247.

5. The Federal Rules of Attorney Conduct (Fed. R. Attny. Conduct)

Eight of the ten Federal Rules of Attorney Conduct closely follow the substance of the ABA Model Rules, which have already been adopted in the majority of state and federal courts. (Some stylistic changes have been made by Bryan Garner to conform these rules with the Guidelines for Drafting and Editing Court Rules (1996). See Working Papers, supra, 45-77. The exceptions are Rule 1 and Rule 10. Rule 1 sets up

the "dynamic conformity" with state standards, and is closely modeled on Model Local Rule 4 of the Federal Rules of Disciplinary Enforcement, first recommended by the Committee on Court Administration and Case Management in 1978. It also contains a choice of law rule, which closely follows ABA Model Rule 8.5.

Rule 10 is based on the most recent negotiations between the Department of Justice and the Conference of Chief Justices relating to "Communication with Persons Represented By Counsel," Tentative Working Draft, July 1, 1997. It is different from ABA Model Rule 4.2. Nearly 12% of all controversies between 1990 and 1996 in federal court relating to attorney conduct concerned communications with represented parties. See Working Papers, supra, 201-205.

Four of the other rules relate solely to conflict of interest standards. See Rules 3, 4, 5 and 6, tracking ABA Model Rules 1.7, 1.8, 1.9 and 1.10. These rules together account for 44% of all attorney conduct controversies in the federal courts. See Working Papers, supra, 100-102, 107-116, 189-210. They are also closely cross-referenced to each other. The Committee may wish to add provisions to Rule 6 permitting some "screening." Otherwise state standards will apply, which usually limit any screening to former public officers or employees. See ABA Model Rule 1.11.

Three of the remaining rules concern the related subjects of confidentiality, candor toward the tribunal, and truthfulness in statements to others. See Rules 2, 7, and 9, tracking ABA Model Rules 1.6, 3.3, and 4.1. These rules are also cross-referenced to each other. While there rules together account for only 6% of all attorney conduct controversies in federal courts, they all relate to issues that are central to the judicial process. See Roger C. Cramton, Memorandum to Participants of the Special Conference, 2 (Jan. 8, 1996).

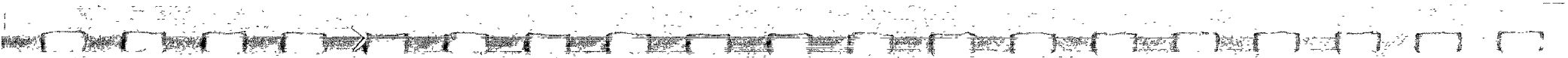
The last rule, Rule 8, is the "Lawyer as Witness" rule. It tracks ABA Rule 3.7, and cross-references Rules 3 and 5. This rule accounts for a surprising share of federal court attorney controversies between 1990 and 1996-- over 9.5%. See Working Papers, 203. It is also an issue which directly confronts the tribunal.

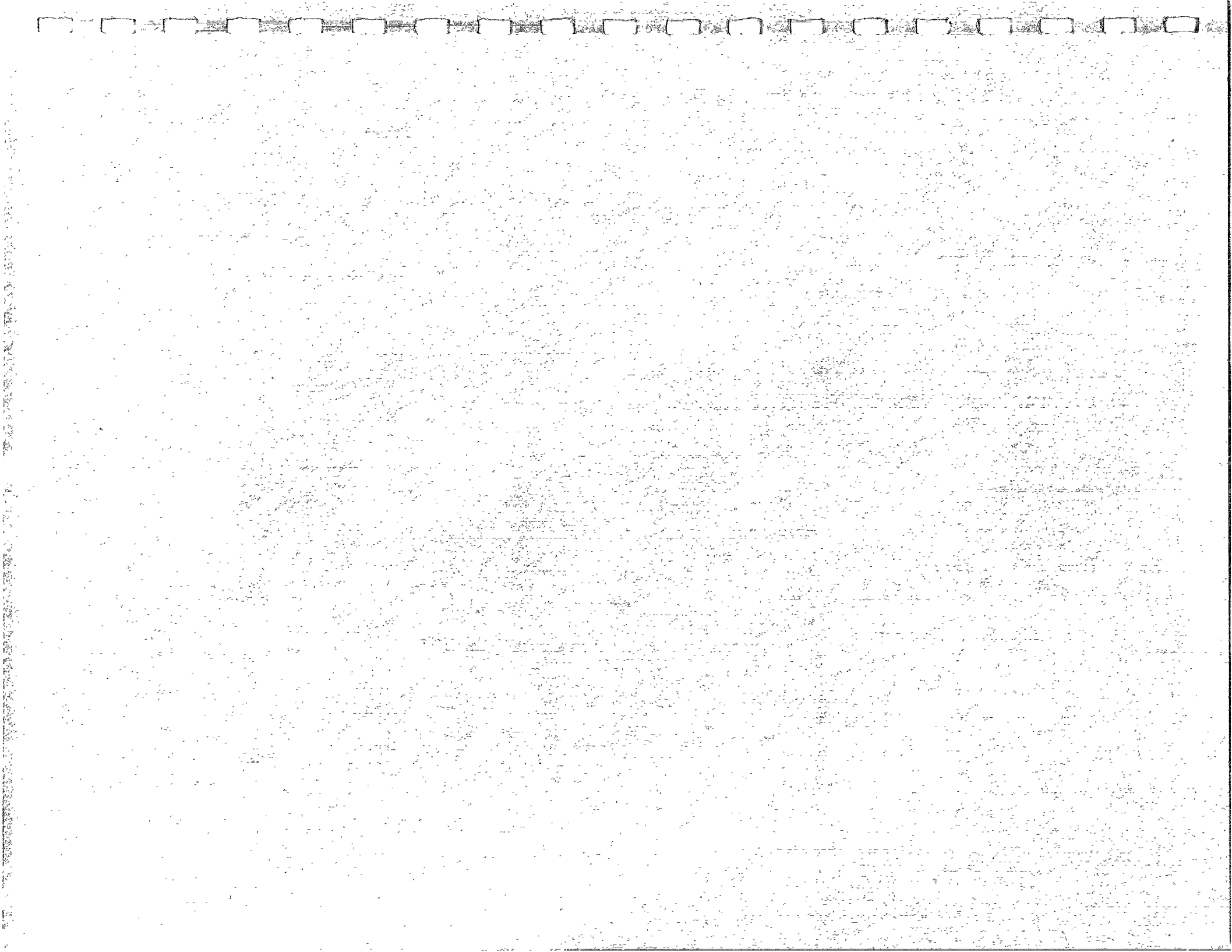
Altogether, Rules 2-10 account for nearly 72% of the attorney conduct issues raised in federal courts from 1990-1996. See Working Papers, supra, 201-205. This leaves only 28% of the issues previously governed by local rules for determination by reference to state standards under Rule 1. Of course, since many of the state standards are also based on the ABA Model Rules, the actual uniformity would be even greater.

6. Conclusion

The Standing Committee is mandated by Congress to "maintain consistency and otherwise promote the interest of justice." 28 U.S.C. § 2073 (b). These rule changes replace nearly one hundred differing local rules with a single set of ten rules. These follow the standards already adopted in a majority of state and federal courts. The new rules are also limited to matters particularly concerning the federal courts and, indeed,

account for nearly 72% of all federal attorney controversies from 1990-1996. For all the rest, Rule 1 refers the court to dynamic conformity with appropriate state standards. If you have any questions, do not hesitate to call me at 617-552-8650 or FAX 617-576-1933.





FEDERAL RULES OF CIVIL PROCEDURE

(Addition of a new Fed. R. Civ. P. 83(c))

RULE 83: RULES BY DISTRICT COURTS

(c) *ATTORNEY CONDUCT. The standards of attorney conduct in the district courts are established by the Federal Rules of Attorney Conduct, enacted as an Appendix to these rules, together with other rules adopted under 28 U.S.C. § § 2072 and 2075.*

NOTE

The new part (c) of this rule promotes uniformity in the standards of conduct for all attorneys admitted to practice before federal district courts. In the past, the federal district courts relied upon many different local rules to prescribe standards of attorney conduct. See, D.R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts,* 1-3 (July 5, 1995) (Appendices I and II charted the many different of attorney conduct rules in the 94 districts). These local rules took many forms. Some were ambiguously drafted. Others adopted conflicting standards of conduct. Still others adopted standards so vague they may have violated constitutional due process principles. See Report, supra, at 11-23, Appendix IV (Appendix IV contains Professor Linda Mullinex's article entitled, *Multiforum Federal Practice: Ethics and Erie,* in 9 Geo. J. Legal Ethics 89 (1995)); Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics,* 29 Geo. L. Rev. 137, 151-58 (1994). Finally, some districts failed to incorporate any standards of conduct in their local rules, leaving attorneys to guess the applicable standards. See Report, supra, at 8-11; Richardson, supra, at 152. This rule, applicable in all districts, seeks to eliminate the confusion. See D.R. Coquillette, *Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct,* Appendix IV (Dec. 1, 1995) (containing: Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created,* 64 Geo. Wash. L. Rev. (1996)); Roger C. Cramton, *Memorandum to Participants of the Special Study Conference,* 3 (Jan. 8, 1996). See also D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), which contains the reports cited above, among others. (Hereafter, "Working Papers.")

The new part (c) leaves unchanged other uniform federal rules that already govern attorney conduct. See, for example, Fed. R. Civ. P. 11, 26(g), 30(d), and 37(b).

The proposed new Fed. R. App. P. 46 would also institute the Federal Rules of Attorney Conduct in the courts of appeals, but bankruptcy proceedings are not included due to special policy concerns and the provisions of the Bankruptcy Code, especially § 327. See 11 U.S.C. § 327(a). See D.R. Coquillette, Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct, May 11, 1997, set out in Working Papers, supra, 293-333.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 46. Attorneys

(a) Admission to the Bar.

(1) **Eligibility.** An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and has been admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) **Application.** An applicant must file an application for admission, on a court-approved form that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

> "I,_____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) **Admission Procedures.** On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) has failed to comply with the court's standards governing attorney conduct. ~~is guilty of conduct unbecoming a member of the court's bar~~.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing (if requested) is held, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it ~~for conduct unbecoming a member of the bar or~~ for *violating* ~~failure to comply with~~ *the court's standards governing attorney conduct or any of these rules.* ~~any court rule~~. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

(d) Attorney Conduct. *The court's standards governing attorney conduct are as follows:*

(1) Proceedings Before District or Other Court. The standards of attorney conduct of a district or other court govern any act or omission of an

attorney connected with proceedings before that court unless the rules of that court provide otherwise; and

(2) *Any Other Act or Omission by Attorney. The standards of the Federal Rules of Attorney Conduct, together with other rules adopted under 28 U.S.C. § 2072 and 2075, govern any other act or omission by an attorney.*

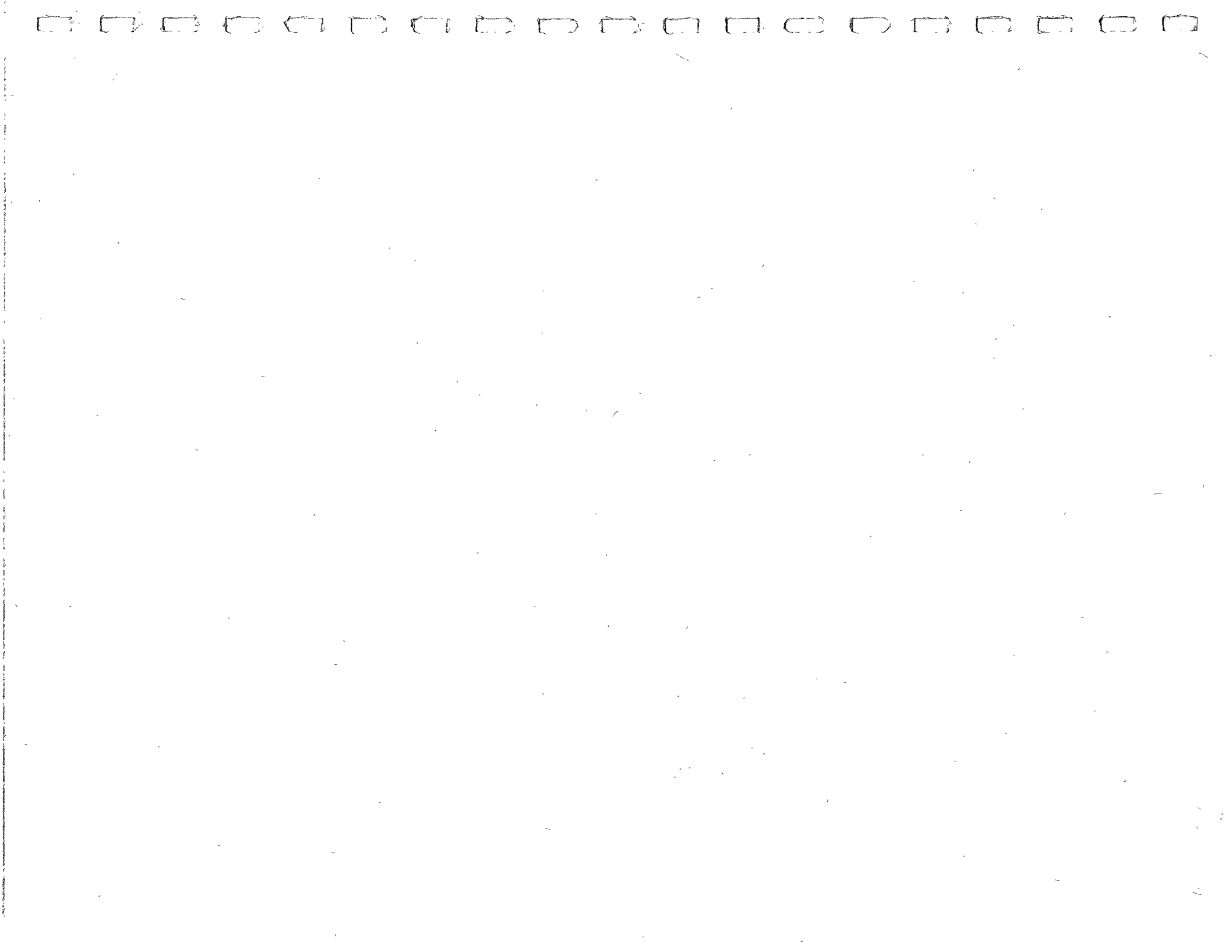
NOTE

The changes to Fed. R. App. P. 46(b) (1) (B) and (c) eliminate the vague "conduct unbecoming" text and replace it with the more specific standards of the new section (d). This permanently resolves the concerns about ambiguity voiced by the Supreme Court in In re Snyder, 472 U.S. 634, 645 (1985). See also Matter of Hendrix, 986 F. 2d. 195, 201 (7th Cir. 1993) and In re Bithony, 486 F. 2d 319, 324 (1st Cir. 1973). See the full discussion in D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 235-247. (Hereafter, "Working Papers.")

The new Section (d) eliminates the many inconsistent local standards that have previously governed attorney conduct issues in the courts of appeals. See the extensive studies in Working Papers, supra, 10, 73-77, 235-247, 289-291. Section (d) (1) requires that the court of appeal look to the standards of the relevant district or other court when considering an attorney's act or omission before such courts. Otherwise, the court should look to the new Federal Rules of Attorney Conduct, set out as Fed. R. Civ. P. Appendix 1. The standards of all district courts will also be established by the Federal Rules of Attorney Conduct under the new Fed. R. Civ. P. 83(c), but bankruptcy proceedings may be governed by different standards due to the Bankruptcy Code, particularly 11 U.S.C. § 327 (a). See discussion in Working Papers, supra, 293-333.

It should be noted that, by adopting the Federal Rules of Attorney Conduct, the new Fed. R. App. P. 46 (d) incorporates a choice of law rule, Rule 1 (a) of the Federal Rules of Attorney Conduct, closely modeled after Rule 8.5 (b) (1) of the ABA Model Rules.





Appendix

Federal Rules of Attorney Conduct

RULE 1. GENERAL RULE

(a) Standards for Attorney Conduct. Except as provided by subdivision (c) of this rule, or a rule adopted in accordance with 28 U.S.C. §§ 2072, or a rule of the Federal Rules of Attorney Conduct, the standards for attorney conduct for United States district courts and courts of appeals are as follows:

(1) Conduct in Proceedings Before District Court. For conduct in connection with a case or proceeding pending in a district court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the standards to be applied must be the standards of attorney conduct currently adopted by the highest court of the state in which the district court sits, unless the district court's rules provide otherwise; and

(2) All Other Conduct. For any other act or omission by an attorney admitted to practice before a district court or court of appeals, the standards for attorney conduct are:

(A) if the attorney is licensed to practice only in one state, the rules of that state as currently adopted by its highest court, or

(B) if the attorney is licensed to practice in more than one state, the rules of the state in which the attorney principally practices as currently adopted by its highest court; but if particular conduct has its predominant effect in another state in which the attorney is licensed to practice, then the rules of that state as currently adopted by its highest court.

(3) **Violation as Misconduct.** If an attorney violates these rules — whether individually or in concert with others, and whether or not the violation occurred in the course of the attorney-client relationship — the violation constitutes misconduct and is grounds for discipline.

(b) Sanctions. For misconduct defined in the Federal Rules of Attorney Conduct, for good cause shown, and after notice and opportunity to be heard, an attorney admitted to practice before a district court or court of appeals may be disbarred, suspended, reprimanded, or subjected to any other disciplinary action that the court deems appropriate. The same misconduct may also subject an attorney to the disciplinary authority of the state or states where the attorney is admitted to practice.

(c) Applicability. Rules 2-10 of the Federal Rules of Attorney Conduct apply only in a case or proceeding pending in a United States district court or court of appeals. Rule 1(a) and (b) and Rules 2-10 of the Federal Rules of Attorney Conduct do not apply in a case or proceeding pending in the district court within the jurisdiction conferred by 28 U.S.C. §§ 1334 or 158, or in a case or proceeding referred to a bankruptcy judge under 28 U.S.C. § 157(a), unless otherwise provided by the Federal Rules of Bankruptcy Procedure or by local bankruptcy rules promulgated in accordance with F.R. Bankr. P. 9029.

NOTE

This rule is based on Model Local Rule IV of the Federal Rules of Disciplinary Enforcement as recommended by the Committee on Court Administration and Case Management in 1978 and ABA Model Rule of Professional Conduct 8.5 governing choice of law for disciplinary authority. See D.R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts,* Appendix V (July 5, 1995) (original version of Rule IV of the Federal Rules of Disciplinary Enforcement), republished in D.R. Coquillette, M. Leary, Working Papers of

the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 1-95. (Hereafter, "Working Papers.")

The words "case or proceeding pending before" a court mean any matter which is actually before such a court, or is certain to be before such a court.

The Federal Rules of Attorney Conduct were not designed to govern bankruptcy cases and proceedings. The Committee on Rules of Practice and Procedure recognizes that there may be situations in which standards for attorney conduct in bankruptcy cases and proceedings should or must differ in some respects from standards applicable in other federal cases. First, there are statutory provisions that govern aspects of attorney conduct in bankruptcy cases, but have no application in other federal litigation. The Bankruptcy Code contains several provisions that govern attorney conduct, such as the requirement that an attorney for a trustee or committee be "disinterested," limitations on compensation, and a prohibition against sharing compensation. See 11 U.S.C. §§ 327-331, 504. Second, the Federal Rules of Bankruptcy Procedure contain several rules governing aspects of attorney conduct, such as Rule 2014 on disclosures of relationships with parties in interest.

Rule 1(c) renders the Federal Rules of Attorney Conduct generally inapplicable in bankruptcy cases and proceedings. It is anticipated that the Advisory Committee on Bankruptcy Rules will consider formulating additional standards for attorney conduct applicable in bankruptcy cases and proceedings if, by local bankruptcy rule, the attorney conduct standards of the district court are made applicable.

RULE 2. CONFIDENTIALITY OF INFORMATION

(a) A lawyer must not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal, and to the extent required by Federal Rules of Attorney Conduct 7 and 9(b) must reveal, such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or in substantial injury to another's financial interests or property; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.6 in its entirety with one significant exception. The rule modifies Rule 1.6 to permit disclosures of confidential information in order to prevent a fraudulent act which would result in substantial injury to the financial interests or property of another. (The ABA Model Rule 1.6 only permits such disclosure in the cases of criminal acts "likely to result in imminent death or substantial bodily harm.") The rule was modified to reflect prevailing state views which permit this type of disclosure. Thirty-six states permit disclosure under these circumstances, and five states mandate disclosure in these circumstances. By permitting disclosure, the federal

rule comports with or avoids conflict with forty-one jurisdictions, and follows the trend in the most recent state adoption of the Model Rules, such as in Massachusetts, effective Jan. 1, 1998. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference, 2* (Jan. 8, 1996). Finally, the rule provides a reference to Federal Rules of Attorney Conduct 7 and 9 which are based on the ABA Model Rules of Professional Conduct 3.3 and 4.1 respectively. This reference emphasizes that Federal Rule of Attorney Conduct 2(b) is not the only provision of these rules which deals with disclosure of information and that in some circumstances disclosure of such information may be required and not merely permitted.

Small stylistic changes have been made in all of the ABA Model Rules, even those adopted without substantive changes. For example, in Rule 2 the ABA Model Rule 1.6 (a) uses "shall," and the Federal Rule 2(a) uses "must." This is to comport with uniform federal drafting guidelines. See Bryan A. Garner, Guidelines for Drafting and Editing Court Rules (1997), 29.

While the "Comments" published with the ABA Model Rules have not been formally adopted, even for those federal rules that closely follow the ABA models, they are useful as "guides to interpretation." See ABA Model Rules, "Preamble," Sec. 21, in Model Rules of Professional Conduct (1998 ed.), 8.

RULE 3. CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer must not represent a client if that representation will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer must not represent a client if that representation may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation; when representation of multiple clients in a single matter is undertaken, the consultation must include explanation of the implications of the common representation and the advantages and risks involved.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.7 in its entirety, with small stylistic changes. Over the last five years, the largest number of federal disputes involving attorney conduct concerned conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules). See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 4. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer must not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing.

(b) A lawyer must not use information relating to representation of a client to the client's disadvantage unless the client consents after consultation, except as permitted or required by Federal Rules of Attorney Conduct 2 or 7.

(c) A lawyer must not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Until the representation of a client ends, a lawyer must not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer must not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on the client's behalf.

(f) A lawyer must not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the attorney-client relationship; and

(3) information relating to the representation of a client is protected as required by Federal Rules of Attorney Conduct 2, 7, and 9.

(g) A lawyer who represents two or more clients must not participate in making aggregate settlement of claims of or against the clients, or in a criminal case an aggregated agreement on guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer must not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. Nor may a lawyer settle a claim for such liability with an unrepresented person or former

client without first advising that person in writing to seek independent representation.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse must not represent a client whose interests in that matter are directly adverse to a person whom the lawyer knows is represented by the other lawyer unless the client consents after a consultation about the relationship.

(j) A lawyer must not acquire a proprietary interest in a claim or in the subject matter of litigation that the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.8 in its entirety except for small stylistic changes and cross references to these rules. Again, over the last five years, the largest category of federal disputes involving attorney conduct centered on conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules). See Working Papers, supra, 100-102, 107-116. DR 4-101(B)(2) and (3), DR 5-103, DR 5-104, DR 5-106, DR 5-107(A) and (B), DR 5-108 and DR 6-102 are the corresponding provisions of the ABA Code of Professional Responsibility. See Working Papers, supra, 115-116, 199-200, 205-210.

RULE 5. CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter must not later represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client's interests unless the former client consents after consultation.

(b) (1) Except as noted in (b)(2), a lawyer must not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer was formerly associated had previously represented a client:

(A) whose interests are materially adverse to that person; and

(B) about whom the lawyer had acquired information protected by Federal Rules of Attorney Conduct 2 and 5(c), that is material to the matter.

(2) The former client may, after consultation, consent to the type of representation described in (b)(1).

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter must not later:

(1) use information relating to the representation to the disadvantage of the former client except as Federal Rule of Attorney Conduct 2 and 7 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Federal Rule of Attorney Conduct 2 or 7 would permit or require with respect to a client.

NOTE

This rule adopts the substance of ABA Model Rule of Professional Conduct 1.9 in its entirety except for the cross references to these rules. DR 4-101(B) and (C) and DR 5-105(C) are the corresponding provisions of the ABA Code of Professional Responsibility. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 6. IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, they must not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Federal Rules of Attorney Conduct 4, 5(c), or 6.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from later representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information that is both protected by Federal Rules of Attorney Conduct 2 and 5(c), and material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Federal Rule of Attorney Conduct 3.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.10 almost in its entirety except for small stylistic changes and cross references to these rules. The rule does not include a federal rule similar to ABA Model Rule 2.2, dealing with the lawyer as an intermediary. No recent federal cases have involved ABA Model Rule 2.2, and the matter should be left to state rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (no reported federal disputes involve Model Rule 2.2). See Working Papers, supra, 189-210. DR 5-105(D) is the corresponding provision of the ABA Code of Professional Responsibility. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 7. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer must not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the client's position and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer must take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Federal Rule of Attorney Conduct 2.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer must inform the tribunal of all known material facts that will enable the tribunal to make an informed decision, even if the facts are adverse.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.3 in its entirety except for small stylistic changes and a cross reference to these rules. To

preserve the integrity of the court proceedings, candor toward the tribunal is a matter of significant federal interest, and as such, requires a single uniform standard applicable in all federal courts. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference,* 2-3 (Jan. 8, 1996). The rule is also needed in continuing Federal Rules of Attorney Conduct Rule 2 and 4, where it is cross-cited. DR 7-102 and DR 7-106(B) are the corresponding provisions of the ABA Code of Professional Responsibility. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 8. LAWYER AS WITNESS

(a) A lawyer must not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) the lawyer's disqualification would work a substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from so doing by Federal Rules of Attorney Conduct 3 or 5.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.7 in its entirety, except for small stylistic changes and a cross reference to these rules. Between 1990-1995, ten percent of reported federal disputes involve lawyer as witness rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995). See Working Papers, supra, 100-102, 107-116, 189-210. This trend dropped to five percent between July 1, 1995 and March 23, 1996, id., 196, but the 1990-1996 culminated totals are still high at 49 cases, or more than nine percent. Id., 203. Thus, a federal lawyer as witness rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provisions of the ABA Code of Professional Responsibility are DR 5-101(B) and DR 5-102. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 9. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer must not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client, unless disclosure is prohibited by Federal Rule of Attorney Conduct 2.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 4.1 in its entirety except for a small stylistic change and a cross reference to these rules. This rule is rarely invoked in federal court proceedings, but it is a central rule of conduct. See Working Papers, supra, 203. See Roger C. Cramton, Memorandum to Participants of the Special Study Conference (Jan. 8, 1996). It is also needed in applying Rule 2, supra, where it is cross-cited. The corresponding provision of the ABA Model Code of Professional Responsibility is DR 7-102. See Working Papers, supra, pp. 116, 210.

RULE 10. COMMUNICATIONS WITH PERSONS REPRESENTED BY COUNSEL

(a) General Rule. Except as provided in subsection (d) of this rule, in representing a client, a lawyer must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or by:

(1) a prior judicial ruling of a court of competent jurisdiction;

(2) a rule of a court of competent jurisdiction; or

(3) a prior written authorization by a court of competent jurisdiction obtained by the lawyer in good faith.

(b) Limitations On Communications. When communicating with a represented person pursuant to this Rule, a lawyer must not inquire about information regarding litigation strategy or legal arguments of counsel, or seek to induce the person to forego representation or disregard the advice of the person's counsel.

(c) Organizations as Represented Persons.

(1) When the represented "person" is an organization, an individual is "represented" by counsel for the organization if the individual

(A) is not separately represented with respect to the subject matter of the communication, and

(B) is known to be a current member of the "corporate control group" of the represented organization.

(2) The term "corporate control group" means the following persons (A) the chief executive officer, chief operating officer, chief financial officer, and chief legal officer of the corporation; and (B) to the extent not encompassed by the foregoing, the chair of the board of directors, president, treasurer, and secretary, and a vice-president or vice-chair who is in charge of a principal business unit, division, or function (such as salaries, administration, or finance) or performs a major policy making function for the corporation; and (C) any other current employee or director who is known to be participating as a principal decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter.

(d) **Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement.** With respect to a government lawyer engaged in criminal or civil law enforcement, this Rule does not prohibit the following communications by the lawyer, or a person acting under the lawyer's direction, with a person known by the government lawyer to be represented concerning the subject matter of the representation:

(1) Pre-Charge Communications. Any communication occurring during the course of an overt or undercover investigation prior to the person's having been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding, if the subject of the communication relates to the investigation of criminal activity or other unlawful conduct; or

(2) Post-Charge Communications. Any communication:

(A) made in the course of an overt or undercover investigation of additional, different, or ongoing violations of criminal activity or other unlawful conduct;

(B) made at any time that the government lawyer reasonably believes is necessary to protect against a threat to the safety or life of any person;

(C) made at the time of the represented person's arrest and after he or she is advised of his or her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) and voluntarily and knowingly waives them; or

(D) initiated by the represented person, either directly or through an intermediary, if prior to the communication the represented person has given a recorded or written voluntary and informed waiver of counsel for that communication.

NOTE

Except for small stylistic changes, this rule is based on the outcome of intense negotiation between the Department of Justice and the Conference of Chief Justices, "Tentative Working Draft, July 1, 1997." Thus, it differs from the comparable ABA rule, ABA Model Rule 4.2, in many respects. See ABA Formal Opinion 97-408 (1997); ABA Formal Opinion 95-396 (1995) and ABA Informal Opinion 1377 (1997). This rule, as negotiated, has an extensive "comment," which notes that: "It is essential to understand that this Rule is a rule of professional conduct and is not a rule of evidence or a rule of procedure. The admissibility of evidence, whether or not obtained in accordance with this Rule, is not affected by, and is not to be excluded pursuant to, this Rule. Similarly, this Rule is not intended to govern discovery or other procedures that are governed by the rules of civil or criminal procedure of the pertinent jurisdiction." "Comment," Tentative Working Draft, supra, July 1, 1997, 4.

As of July 1, 1997, the Department of Justice maintained that the "authorized to do so by law" wording in Rule 10(a) included "the Attorney General's regulation asserting exclusive authority to regulate the ability of Department of Justice

attorneys engaged in law enforcement to communicate with persons represented by counsel." See 28 C.F.R. Part 77 (August 1, 1974). The Conference of Chief Justices disagreed.

From 1990-1995, twelve percent of reported federal cases involve rules governing communications with represented persons. See Daniel R. Coquillette, *Study of Recent Federal Cases* (1990-95) *Involving Rules of Attorney Conduct*, 3 (Dec. 1, 1995). See Working Papers, supra, 99-211. This trend increased between July 1, 1995 and March 23, 1996, to sixteen percent. Id., 196. Thus, a federal rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provision of the ABA Code of Professional Responsibility is DR 7-104. See Working Papers, supra, 115-116, 199-200, 209-210.

Item 9A

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

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

FROM: **Hon. W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT **Report of Advisory Committee on Rules of Criminal Procedure**

DATE: **December 3, 1997**

I. INTRODUCTION.

At its meeting on October 13th and 14th, 1997, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting are attached.

II. ACTION ITEM--The Size of Grand Juries

The Advisory Committee was asked to study a pending legislative proposal which would amend 18 U.S.C. § 3321 to reduce the size of grand juries to not less than nine, nor more than thirteen persons and would require at least seven jurors to concur as long as nine members were present. Currently not less than 16 nor more than 23 jurors compose a grand jury, with a requirement that 16 jurors be present. See Rule 6(a). Additionally, Rule 6(f) requires that at least 12 jurors concur before returning an indictment.

Following discussion of the issue, the Advisory Committee voted unanimously to oppose any reduction in the size of the grand jury. As the attached minutes reflect, the Committee was concerned in part with reducing citizen participation in an important aspect of criminal trials and the loss of a wider diversity of viewpoints and experiences if the size was reduced.

Recommendation: *The Advisory Committee recommends that the Judicial Conference oppose any attempts to reduce the size of grand juries.*

III. INFORMATION ITEMS

1. Amendments to Rules of Criminal Procedure Out for Public Comment

At its June 1997 meeting the Standing Committee approved a number of amendments for public comment; the comment period ends February 15, 1998. The rules affected are as follows:

a. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)

b. Rule 7(c)(2). The Indictment and the Information (Technical amendment connected to adoption of Rule 32.2, *infra*)

c. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.).

d. Rule 24(c). Alternate Jurors (Retention During Deliberations).

e. Rule 30. Instructions (Submission of Requests for Instructions).

f. Rule 31(c). Verdict. (Technical amendment connected to adoption of Rule 32.2, *infra*).

g. Rule 32(d). Sentence and Judgment (Technical amendment connected to adoption of Rule 32.2, *infra*).

h. Rule 32.2. Criminal Forfeiture (New rule).

i. Rule 38. Stay of Execution (Technical amendment connected to adoption of Rule 32.2, *supra*).

j. Rule 54. Application and Exception (Technical amendment).

2. Proposed Amendments to the Rules of Criminal Procedure Being Considered by the Advisory Committee

At its October 1997 meeting the Advisory Committee considered proposed changes to: Rule 5(c) (Initial Appearance Before Magistrate, discussed *infra*); Rule 6 (Response to legislative proposal to reduce size of grand jury, discussed *supra*); Rule 11 (Notice to defendant of relevant sentencing information); Rule 12.2 (Ordering of mental examination); Rule 23 (Response to proposal to reduce size of jury); Rule 24 (Proposal to equalize number of peremptory challenges and proposal to provide for random selection); Rule 26 (Taking of testimony from remote location); Rule 32 (Ordering of mental examination of defendant); Rule 43 (Permit defendant to waive appearance at arraignment); and the Rules Governing Habeas Corpus Proceedings (Conflict in timing of responses to petitions).

A number of the foregoing rules will be on the agenda for the Committee's Spring meeting, at which point it will consider specific amending language. The Committee's discussion of the foregoing issues is reflected in the attached minutes from the meeting.

3. Action on Proposed Amendment to Rule 5(c) (Initial Appearance Before Magistrate).

Under 18 U.S.C. § 3060, a magistrate judge does not have the authority to grant a continuance in a preliminary examination if the defendant objects to such. In that case, a continuance may nonetheless be granted by a district judge. Rule 5(c) currently tracks the language of the statute. The Federal Magistrate Judges Association (FMJA) had proposed in October 1996 that the Advisory Committee consider proposing amendments to both Rule 5(c) and 18 U.S.C. § 3060. Given the past discussions about using the Rules Enabling Act to amend a rule of procedure which would then conflict with a clear statutory provision, the Advisory Committee recommended to the Standing Committee at its June 1997 meeting that the appropriate bodies within the Judicial Conference propose an amendment to the statute. Following discussion, the Standing Committee indicated that it would be more appropriate for the Advisory Committee to use the Rules Enabling Act, i.e., propose an amendment, if any, to Rule 5(c), publish the rule for comment, and provide a catalyst for legislative change.

The Advisory Committee discussed the issue at its October meeting and, as noted in the attached minutes, ultimately decided not to propose any amendments to Rule 5(c) at this point.

4. Discussion of Pending Legislation Affecting Victims' Rights

A subcommittee, chaired by Judge David Dowd, has, and will continue to monitor the pending Crime Victims' Assistance Act (S. 1081). The bill includes a number of proposed amendments to the Federal Rules of Criminal Procedure and also provides for a six-month delay in the effective date to provide the Judicial Conference with the opportunity to propose any alternatives.

Attachments

Minutes of Committee Meeting, Oct. 1996

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

December 9, 1997

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Grand Jury Legislation*

I am attaching a copy of H.R. 1536, which would reduce the size of a grand jury. It was introduced by Representative Bob Goodlatte on May 6, 1997, and was referred to the Committees on Court Administration and Case Management and Criminal Law for consideration. At their respective summer meetings, the committees took no position on H.R. 1536 and recommended that the bill be referred to the rules committees for consideration under the rulemaking process.

I am also attaching a memorandum describing the historical background regarding the advisory committee's consideration of an earlier similar proposal, including a preliminary report on the legal aspects.

John K. Rabiej

Attachments

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GPO's PDF version of this bill | References to this bill in the Congressional Record | Link to the Bill Summary & Status file. | Download this bill. (1,869 bytes).

Grand Jury Reduction Act (Introduced in the House)

HR 1536 IH

105th CONGRESS

1st Session

H. R. 1536

To amend title 18, United States Code, to reduce the size of grand juries.

IN THE HOUSE OF REPRESENTATIVES

May 6, 1997

Mr. GOODLATTE (for himself and Mr. GOODE) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to reduce the size of grand juries.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the `Grand Jury Reduction Act'.

SEC. 2. REDUCTION OF SIZE OF GRAND JURIES.

Section 3321 of title 18, United States Code, is amended to read as follows:

`Sec. 3321. Number of grand jurors; summoning additional jurors

`(a) Every grand jury impaneled before any district court shall consist of not less than 9 nor more than 13 persons. If less than 9 of the persons summoned attend, they shall be placed on the grand jury and the court shall order that an additional number of persons be summoned to complete the grand jury in a manner ordered by the court in accordance with procedures set forth in section 1866 of title 28. Whenever a challenge to a grand juror is allowed, and there not in attendance others jurors sufficient to complete the grand jury, the court shall make a like order.

`(b) An indictment may be found only if at least 9 jurors are present and 7 of those present concur.'.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 16, 1997
Via Federal Express Mail

MEMORANDUM TO JUDGE D. LOWELL JENSEN AND PROFESSOR DAVID A. SCHLUETER

SUBJECT: *Background on Grand Jury Materials*

For your information, I have attached materials that we located in our records on an earlier proposal considered by the Advisory Committee on Criminal Rules to reduce the number of grand jurors.

In 1972, the chair of the House Judiciary Committee requested the judiciary to study the grand jury process. The Chief Justice assigned the project to the Advisory Committee on Criminal Rules. The committee prepared a draft report with wide-ranging recommendations on the grand jury process, including one to reduce its size. The committee expected to forward the report to the Judicial Conference for approval in 1976, before sending it to the Hill. In late 1975, however, the House Judiciary Committee was considering several pending bills on grand jury. And it requested a copy of the preliminary report before the report was submitted to the Conference. The preliminary report on the grand jury was sent to the Hill, but the report was never submitted to the Conference. (In the interim, several new bills were introduced that raised new issues. A new subcommittee was planned to be formed, but it appears that the subcommittee was not renewed at that time.)

In sum, a proposal to amend the statute governing the grand jury process to reduce the number of grand jurors was considered and approved by the Advisory Committee on Criminal Rules. But the Standing Committee and the Judicial Conference were not requested to adopt the position nor was the proposal vetted through the rulemaking process.

Items G and Q are memoranda from the Reporter, Professor Wayne R. LaFave, on the proposal to reduce the number of grand jurors. It is a detailed memorandum of law that addresses and answers a number of challenges to the proposal. If we decide to poll the committee on this proposal, this memorandum would be helpful to them and to the drafting of a Committee Note. The Committee on Court Administration and Case Management meets on June 15-18 outside of Washington. I will forward to you a copy of the final agenda item prepared for that committee, which should be available next week.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler (with attach.)

9

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

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PHILLIP FORMAN
BANKRUPTCY RULES
WILLIAM H. HASTIE
APPELLATE RULES
ALBERT E. JENNER, JR.
RULES OF EVIDENCE

December 8, 1975

TO THE ADVISORY COMMITTEE ON CRIMINAL RULES

Enclosed is a copy of the Grand Jury Report which has been submitted to the House Judiciary Committee.

Sincerely,

William E. Foley
Secretary

cc: Honorable Alfonso J. Zirpoli
Honorable Alexander Harvey II
Honorable Roszel C. Thomsen
Professor Frank J. Remington

(10/29/75 draft)

REPORT

(PRELIMINARY DRAFT)

OF THE

ADVISORY COMMITTEE

ON CRIMINAL RULES

CONCERNING

THE

FEDERAL GRAND JURY

November, 1975

REPORT OF THE ADVISORY COMMITTEE

ON CRIMINAL RULES

CONCERNING

THE FEDERAL GRAND JURY

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This is a preliminary draft of a Report by the Advisory Committee on Criminal Rules concerning the operation of the federal grand jury system. The Report has not yet been approved by the Judicial Conference of the United States, to which it will be presented at the next meeting of the Conference in the Spring of 1976. Attached hereto is an addendum which presents in summary form the additional views of the Committee on the Administration of the Criminal Law of the Judicial Conference.

Recommendations are made in this Report for certain changes by way of additions to or amendment of statutes and rules of court which it is believed would make the grand jury system more fair and efficient in its operation. Although the Committee has given primary emphasis to those changes which could be accomplished by rule or statute consistent with the existing provisions of the Fifth Amendment, Part One of this Report deals with H.J. Res. 46, 94th Cong., 1st Sess., which proposes an amendment to the Constitution.

The Committee presents six affirmative recommendations in this Report. They are: (1) that 18 U.S.C. § 3321 and Fed. R. Crim. P. 6 be revised to provide that federal grand juries be reduced in size so as to consist of nine to fifteen members and that concurrence by two-thirds of the members be required for an indictment; (2) that 18 U.S.C. § 3321 be amended to make it clear that a grand jury may be summoned from the entire district or from any statutory or nonstatutory division or divisions thereof and that a grand jury so impanelled be empowered

to consider offenses alleged to have been committed at any place in the district; (3) that Fed. R. Crim. P. 6 be revised to make the recordation of grand jury proceedings mandatory rather than permissible; (4) that Fed. R. Crim. P. 7 be revised to provide expressly that a motion to dismiss an indictment may not be based on the ground that it is not supported by sufficient or competent evidence; (5) that a statute be enacted making the unauthorized disclosure of grand jury proceedings a criminal offense, and that an appropriate accommodating amendment be made to Fed. R. Crim. P. 6; and (6) that 18 U.S.C. § 3500 be amended to provide for disclosure in advance of trial of the grand jury testimony of witnesses. These six proposals are discussed herein in Parts Two through Seven, respectively, of this Report.

The Committee has also given careful consideration to several other proposals which have been made, including but not limited to those appearing in H.R. 1277, H.R. 2986, H.R. 6006, and H.R. 6207, 94th Cong., 1st Sess. The Committee recommends that these other proposals not be adopted, and specifically does not favor enactment of any of the aforementioned four bills. Although the reasons for rejecting many of the proposals which have been made are detailed in Part Eight of this Report, it may be noted here that opposition to the four bills is primarily based upon the following general considerations: 1) that the proposals with respect to the granting of various rights to grand jury witnesses and the altering of existing procedures

of the grand jury should be preserved. Except in some few special cases where a special statutory method of compelling testimony is provided, the grand jury provides the only means by which the prosecutor may require the attendance of witnesses and compel them to testify under oath. An abolition of the investigatory function of the grand jury would leave the government without any power to summon and examine witnesses under oath in many important areas unless, of course, some alternative investigatory procedure were devised. The Committee is therefore in agreement with so much of Section 2 of the proposed amendment as embodies the principle that the investigatory function of the grand jury not be disturbed.

PART TWO: SIZE OF THE GRAND JURY

It is recommended that federal grand juries be reduced in size so as to consist of nine to fifteen members and that concurrence by two-thirds of the members be required for an indictment. This would require revision of 18 U.S.C. § 3321 as follows:

Every grand jury impaneled before any district court shall consist of not less than <u>nine</u> ~~sixteen~~ nor more than <u>fifteen</u> ~~twenty-three~~ persons. If less than <u>nine</u> ~~sixteen~~ of the persons summoned attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the

district, and not from the bystanders, a sufficient number of persons to complete the grand jury. Whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.

In addition, rule 6 would be revised in the following fashion:

(a) SUMMONING GRAND JURIES. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 9 ~~16~~ nor more than 15 ~~23~~ members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) OBJECTIONS TO GRAND JURY AND TO GRAND JURORS.

***

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualifications of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(c) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it

appears from the record kept pursuant to subdivision (c) of this rule that the requisite number of ~~12 or more~~ jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) FOREMAN AND DEPUTY FOREMAN. The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors present at, and the number concurring in, the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

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(f) FINDING AND RETURN OF INDICTMENT. An indictment may be found only if at least 9 jurors are present and two-thirds of those present concur. ~~upon the concurrence of 12 or more jurors.~~ The indictment shall be returned by the grand jury to a judge in open court. If the defendant is in custody or has been released pending action of the grand jury ~~given bail~~ and the requisite number of ~~12~~ jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

The early common law grand jury consisted of twelve persons, all of whom had to concur in the indictment. Thompson & Merriam, Juries §§ 464, 583 (1882); United States v. Williams, 28 F. Cas. 666 (No. 16, 716) (C.C.D. Minn. 1871). Later, however, the size of the grand jury was increased, the purpose being "to prevent, on the one hand, the course of justice from being defeated if the accused should have one or more friends on the jury; and on the other hand, the better to protect persons against the influence of unfriendly jurors upon the panel." United States v. Williams, supra. The requirement that twelve concur in the finding of an indictment continued without change, and thus an upper limit of twenty-three was placed on the grand jury so that at least a majority vote would be required for indictment. Thompson & Merriam, supra, at § 583; Fitts v. Superior Court, 6 Cal.2d 230, 57 P.2d 510 (1936). The common law maximum of 23 and requirement of 12 for indictment were made applicable to federal grand juries by statute, see 13 Stat. 500, discussed in United States v. Williams, supra, and were continued with the adoption of rule 6.

The provision in present rule 6 that the grand jury should consist of at least sixteen, also derived from the statute, most likely originated primarily for the benefit of the government rather than the defendant. It ensured that the prosecutor could obtain an indictment upon the concurrence of not more than three-quarters (i.e., 12 of 16) of the grand jury. Thus, while it is sometimes said that sixteen are

required for a quorum, United States v. Belvin, 46 Fed. 381 (C.C.E.D.Va. 1891), it appears that a defendant may not challenge an indictment concurred in by twelve on the ground that less than sixteen were present. See In re Wilson, 140 U.S. 575 (1891), rejecting defendant's post-conviction objection that he had been indicted by a grand jury of 15, contrary to a territorial statute setting the size of the grand jury at 17 to 23, because "if the two had been present, and had voted against the indictment, still such opposing votes would not have prevented its finding by the concurrence of the twelve who did in fact vote in its favor." Rule 6(a)(2) expressly provides that an indictment shall not be dismissed because there are less than sixteen legally qualified jurors if twelve or more of those legally qualified voted for indictment. This provision and the Wilson decision are consistent with the prevailing view that, in the absence of a statute making the presence of a certain number of grand jurors mandatory, an indictment may be returned by less than a full grand jury so long as enough remain to constitute the number necessary to concur. See Edwards, The Grand Jury 46 (1906); People v. Dale, 79 Cal.App.2d 370, 179 P.2d 870 (1947); State v. Belvel, 89 Iowa 405, 56 N.W. 545 (1893); State v. Pailet, 139 La. 697, 71 So. 951 (1916); State v. Connors, 233 Mo. 348, 135 S.W. 444 (1911).

There does not appear to be any constitutional obstacle to the reduction of the size of federal grand juries or of the

number of jurors who must concur in an indictment. There are a few early state decisions, interpreting state constitutional provisions comparable to the grand jury clause of the Fifth Amendment, holding that neither the size of the grand jury nor the number required to concur in an indictment may be reduced below twelve, State v. Hartley, 22 Nev. 342, 40 P. 372 (1895); State v. Barker, 107 N.C. 913, 12 S.E. 115 (1890). It is fair to conclude, however, that the number twelve is no more a part of the constitutional right to grand jury indictment than it is of the right to a petit jury in criminal and civil cases. See Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970) (criminal cases); Colgrove v. Battin, 413 U.S. 149, 93 S. Ct. 2448, 37 L.Ed.2d 522 (1973) (civil cases).

The grand jury "has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). It is "regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused ... to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569

(1962). Given the fact that the petit jury is likewise "a safeguard against arbitrary law enforcement," Williams v. Florida, supra, the considerations which are relevant in determining the size of that jury seem equally relevant with respect to the grand jury. It is important that the number "be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." Williams v. Florida, supra. If that test is met with a six-person petit jury, as held in Williams, then it would seem to follow that an indictment concurred in by six or more grand jurors, particularly when that number constitutes at least two-thirds of the grand jury, does not violate the Fifth Amendment.

The proposal to reduce the size of federal grand juries from between 23 and 16 to between 15 and 9 is based upon several considerations. One is that the reduction in size will improve the quality of the deliberative process. With a smaller number of grand jurors, responsibility will not be diffused, and the size will be conducive to more active participation by all of the jurors. See Note, 5 U.Mich.J.L. Reform 87, 99-106 (1971). Secondly, the reduction will decrease the number of citizens who will have to absent themselves from their employment and other productive endeavors for substantial periods of time in order to perform the necessary but

demanding responsibilities of a federal grand juror. In addition, the reduction in the size of federal grand juries will result in an appreciable saving of money which would otherwise be spent on the attendance, mileage and substinence of grand jurors. See 1972 Annual Report of the Director of the Administrative Office of the United States Courts 166 (1973), noting that the cost of grand jurors for fiscal year 1972 was $3,085,800, a 5.7% increase over the previous year. At least in some districts, the requirements of the Speedy Trial Act of 1974, 18 U.S.C. § 3161(b), will in the future result in the calling of grand juries at more frequent intervals than formerly.

The proposed change continues the concept of a variable membership size for federal grand juries. This approach is fairly common on the state level, see, e.g., Fla. Stat. Ann. § 905.01 (15 to 18); Ill. Rev. Stat. ch. 38, § 112-2 (16 to 23); N.Y. Crim. Pro. Law § 190.05 (16 to 23) although some states set a specific size for the grand jury, see, e.g., Cal. Pen. Code § 888.2 (23 or 19); Colo. Const. art. II, § 23(12); Ore. Const. art. VII, §5(7). The variable size approach has the advantage that if a jury of the maximum size is initially selected, then if some jurors are later excused from the panel or are absent during the consideration of certain cases because of illness or other reason, there is no need for them to be replaced. It avoids the type of mechanical error held to invalidate an indictment in State v. Vincent, 91 Md. 718, 47 A. 1036 (1900),

where an indictment found by a jury of 22 persons, where state law required 23, was subject to attack even though more than 12 had voted for indictment.

Nine has been selected as the lower limit of the variable membership. Taking account of the considerations expressed in Williams v. Florida, supra (that the number be such as to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility of obtaining a representative cross section of the community), it is an appropriate number. Given the requirement discussed below that two-thirds of the jurors concur in the indictment, it ensures that no indictment may be returned without the concurrence of at least six jurors. Fifteen has been selected as the upper limit, as that number provides an adequate "cushion" of 6 jurors more than the minimum required and thus ensures against a grand jury being unable to indict because of the illness or other justified absence of some of its members.

One incidental consequence of the variable membership approach as heretofore utilized in the federal courts and in the states listed above is that the percentage of jurors needed to indict will vary withthe size of the grand jury. For example, under the present federal scheme, where 12 are required to indict and the grand jury may number anywhere from 16 to 23, the percentage required for indictment may vary from 75% to 52%. This consequence appears to be the result of nothing more

than historical accident, and is less rational than the proposed approach whereby the percentage is fixed. The two-thirds requirement, which is about midway between the present possibilities, ensures that there will be at least six votes for indictment. Cf. Williams v. Florida and Colgrove v. Battin, supra, and compare Colo. Const. art. II, § 23 (12-man grand jury, 9 must concur in indictment); Ind. Code §§ 35-1-15-1 35-1-16-1 (6-man, 5 must concur); La. Code Crim. P. arts. 413, 444 (12-man, 9 must concur); Mont. Const. art. II, §20 (11-man, 8 must concur); Ore. Const. art. VII, § 5 (7-man, 5 must concur); Texas Const. art. 5, § 13 (12-man, 9 must concur); Va. Code §§ 19.1-150, 19.1-157 (5 to 7-man, 4 must concur).

The proposed change in rule 6 (f) would require that at least nine grand jurors be present when an indictment is found and that two-thirds of those present concur in the indictment. This means, for example, that an indictment would be open to challenge if it were concurred in by six jurors but only six, seven, or eight jurors were present. This is contrary to the position taken in In re Wilson, supra, that an indictment concurred in by the requisite number cannot be challenged on the ground that the grand jury had been reduced below its minimum size. The Wilson rule may have been appropriate when considered with the requirement that 12 concur in the indictment

but with the proposed reduction in the size of the grand jury it is believed desirable that no less than nine be present when an indictment is voted. This better ensures group deliberation, free from outside influence, by a group representative of the community. The proposed change in rule 6(c), requiring that a record be kept of the number of jurors present at and concurring in the finding of every indictment, is to provide a means whereby it can be determined that the requisite number were present and that the number concurring in the indictment were no less than two-thirds of those present.

It must be emphasized that the proposed change in rule 6(f) merely requires the presence of at least nine and a two-thirds vote at the time an indictment is found. No change has been made in the well-established rule that an indictment is not necessarily subject to challenge because some of those present at or voting for the finding of an indictment were absent at some earlier time. See, e.g., United States ex rel. McCann v. Thompson, 144 F.2d 604 (2d Cir. 1944); United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971); United States v. Armour and Co., 214 F.Supp. 123 (S.D.Cal. 1963). As noted in Thompson: "Since all the evidence adduced before a grand jury--certainly when the accused does not appear--is aimed at proving guilt, the absence of some jurors during some part of the hearings will ordinarily merely weaken the prosecution's case. If what the absentees actually hear is enough to

satisfy them, there would seem to be no reason why they should not vote."

The proposed change to rule 6(b)(2) is necessary in light of the fact that the number required to concur in the indictment under rule 6(f) may vary, depending upon the number of grand jurors present. It does not change the present policy, which is that if some of the jurors are not legally qualified, the indictment shall not be dismissed if, deducting those jurors, the required number still voted for indictment. Because of the rejection of the Wilson rule, discussed above, it might well be argued that a corresponding change should be made in rule 6(b)(2), so that it must also be shown that at least nine legally qualified jurors were present when the indictment was found. That approach has been considered but rejected. It is one thing to apply such a strict rule with respect to the rather simple requirement that nine jurors be present, but quite another to apply the same rule with respect to the likely inadvertent presence on the grand jury of one or more persons not legally qualified. While it is true that the legal qualifications are fewer in number than they once were, see 18 U.S.C. § 1865 and compare Castle v. United States, 238 F.2d 131 (8th Cir. 1956), it would nonetheless be unduly severe to quash an indictment because, say, one of the nine persons present was thereafter determined to have had a federal charge pending against him. Similarly, to the extent that rule 6(b)(2) is utilized in cases where the defendant claims that one of the

jurors was biased against him, see, e.g., United States v. Anzelmo, 319 F.Supp. 1106 (E.D.La. 1970), which is also unlikely to occur by government design, it should again be sufficient that there are the requisite number of votes for indictment after elimination of the prejudiced juror.

The change in rule 6(f) at line 34 reflects the fact that under the Bail Reform Act of 1966 some persons will be released without requiring bail. See 18 U.S.C. § 3146, § 3148. "The purpose of the last sentence of Rule 6(f) can only be carried out if it is construed as being applicable to such persons, and a 'no bill' promptly reported in such cases." 1 Wright, Federal Practice and Procedure - Criminal § 110 (1969).

PART THREE: SUMMONING THE GRAND JURY

It is recommended that it be expressly provided by statute that a grand jury may be summoned from the entire district or from any division or divisions thereof and that such a grand jury may indict for any offense committed in the district. This could best be accomplished by amendment of 18 U.S.C. § 3321, previously set out, by adding the following sentence to the end of the section:

1 A grand jury may be summoned from the entire district,
2 or from any statutory or nonstatutory division or divisions
3 thereof, and a grand jury so impanelled shall be empowered
4 to consider offenses alleged to have been committee at any
5 place in the district.

ADDENDUM:

REPORT OF ~~THE COMMITTEE~~ ON THE ADMINISTRATION OF THE CRIMINAL LAW

[Note: An earlier draft of the Report of the Advisory Committee on Criminal Rules, not including what are now Parts One, Three, and Seven of the Report and referring to H.R. 1277 and H.R. 2986 but not H.R. 6006 and H.R. 6207, was considered by the Committee on the Administration of the Criminal Law of the Judicial Conference. The Report of the latter Committee, as contained in a letter from Judge Alfonso J. Zirpoli to Judge J. Edward Lumbard, is set out below.]

1. Size of the Grand Jury.

We approve the recommendation of your Committee that Title 18 U.S.C. section 3321 and Rule 6 of the Federal Rules of Criminal Procedure be revised to provide that the grand jury be reduced in size to not less than nine and not more than fifteen and that concurrence by two-thirds of the members thereof be required for an indictment. The mechanics of such statutory revision and change in Rule 6 should be so timed that each becomes effective on the same date.

Item 9B

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

October 13-14, 1997
Monterey, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at Monterey, California on October 13th and 14th, 1997. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, October 13, 1997. The following persons were present for all or a part of the Committee's meeting:

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

Also present at the meeting were: Hon. Alicemarie Stotler, Chair of the Standing Committee on Rules of Practice and Procedure; Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. David Pimentel, Judicial Fellow at the Administrative Office, and Ms. Mary Harkenrider from the Department of Justice.

The attendees were welcomed by the incoming chair, Judge Davis, who welcomed the two new members to the Committee, Judge Roll and Magistrate Judge Miller

II. APPROVAL OF MINUTES OF APRIL 1997 MEETING

Judge Marovich moved that the Minutes of the Committee's April 1997 meeting be approved. Following a second by Professor Stith, the motion carried by a unanimous vote.

III. RULES PUBLISHED FOR PUBLIC COMMENT AND PENDING FURTHER REVIEW BY ADVISORY COMMITTEE

The Reporter informed the Committee that at its June 1997 meeting, the Standing Committee had approved the publication of a number of amendments to the Criminal Rules:

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)
2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.)
3. Rule 24(c). Alternate Jurors (Retention During Deliberations)
4. Rule 30. Instructions (Submission of Requests for Instructions)
5. Rule 32.2. Forfeiture Procedures.
6. Rule 54. Application and Exception.

The Reporter added that the Standing Committee had modified the proposed amendment to Rule 6 to permit all necessary interpreters to be present during grand jury deliberations--and not just interpreters for the hearing-impaired. The Committee believed that it would be beneficial to obtain public comments on an amendment which would expand the list oft those permitted to remain in the deliberations. Finally, the Reporter informed the Committee that a hearing on the proposed amendments has been tentatively set for December 12, 1997 in New Orleans. The Comment period ends on February 15, 1998.

IV. RULES APPROVED BY STANDING COMMITTEE AND FORWARDED TO JUDICIAL CONFERENCE AND SUPREME COURT

The Reporter informed the Committee that at its June 1997 meeting, the Standing Committee had approved and forwarded to the Judicial Conference the amendments to the following rules:

1. Rule 5.1 (Preliminary Examination; Production of Witness

Statements);
2. Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings);
3. Rule 31 (Verdict; Individual Polling of Jurors);
4. Rule 33 (New Trial; Time for Filing Motion);
5. Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances);
6. Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence).

V. CRIMINAL RULE APPROVED BY SUPREME COURT AND PENDING BEFORE CONGRESS

The Reporter informed the Committee that the Supreme Court had approved an amendment to Rule 58 and that absent any further action by Congress, the amendment would become effective on December 1, 1997.

VI CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Report of Subcommittee on Victim Allocution Legislation; Possible Amendments to Rules 11, 32, and 32.1.

Judge Davis offered introductory comments on pending legislation which would amend a number of criminal rules to provide for notice to victims and victim allocution when the accused enters a plea, at sentencing, and at revocation of probation proceedings. He noted that in the past the Committee had been reluctant to provide for victim allocution but that the proposed legislation provided the Committee with an opportunity to re-examine its position. He noted that a subcommittee consisting of Judge Dowd (Chair), Judge Smith, Mr. Josefsberg, and Mr. Pauley had been appointed to study the legislation and recommend a course of action to the Committee.

Speaking for the subcommittee, Judge Dowd provided additional information on the legislation, and the fact that it had apparently been offered as an alternative to a move to amend the Constitution. He added that under the legislation, the Judicial Conference would be given a short period of time to respond to the proposed changes and that the role of the subcommittee had been to review the proposed changes and be prepared to recommend changes to the full Committee for its consideration.

Mr. Rabiej believed that the legislation was not going to be passed in the current session of Congress. Mr. Pauley agreed but indicated that the legislation might be passed

in the next session. He believed that the Committee might be overreacting to the proposed legislation because it disregards the legislation proposed by the President and the it disregards the fact that the legislation will only move at the behest of the chairs of the congressional committees on the judiciary. He agreed, however, that the subcommittee should continue to monitor the legislation.

Judge Jensen observed that the legislation put the committee in the unique posture of requiring the Judicial Conference to react to specific amendments. Judge Stotler echoed that view and indicated that once again there was a question about the fundamental role of Congress in the rule-making enterprise. Justice Wathen noted that from a State's perspective, there was concern that the victim's movement might result in a constitutional amendment. Mr. Josefsberg opined that the proposed legislation seemed to require very little, e.g., notice to victims of pending hearings and an opportunity to be heard. Judge Marovich agreed with that assessment and saw little danger in the legislation. Several members indicated that under the circumstances, it would be wise to keep the subcommittee in place and ready to react to the legislation. Judge Jensen added that for the most part the federal system was catching up to what was already in place in many state and local jurisdictions. Judge Davis indicated that it would be appropriate, absent the need for more immediate action, to discuss the subcommittee's proposals at the Spring meeting. Following additional discussion concerning the definition of "victim" and "alleged victim" in the proposed legislation, Judge Carnes moved that the Committee express the view that it was not opposed to addressing the legislation. Mr. Josefsberg seconded the motion which carried by a vote of 10 to 1, with one abstention.

B. Rule 5(c). Initial Appearance Before the Magistrate Judge. Proposed Amendment.

Judge Davis provided a brief overview of a proposed amendment to Rule 5(c) which would permit a magistrate judge to grant a continuance in a preliminary examination over a defendant's objection. He noted that the Committee had previously considered the matter at its April 1997 meeting and that because the amendment would have directly contradicted 18 U.S.C. § 3060, that it had been referred to the Standing Committee with a recommendation that the Committee take steps to initiate an amendment to the statute. The Standing Committee responded by referring the proposal back to the Advisory Committee and indicating that the most appropriate method of effecting a change would be to follow the procedures in the Rules Enabling Act. Following brief discussion on proposed style changes to the rule, Mr. Josefsberg moved that the rule be amended. Judge Miller seconded the motion. Following additional discussion on the motion, several members questioned whether the amendment was even necessary. Judge Crigler observed that he had never seen the problem but Judge Miller indicated that in larger cities, it would help if a magistrate judge had the authority to act on a continuance opposed by the defendant. Judge Dowd indicated that in his 15 years of

experience, he had never experienced a problem with the rule. Ultimately, Mr. Josefsberg withdrew his motion to approve the amendment.

Professor Stith moved to approve the amendment. Judge Miller seconded that motion which failed by a vote of 5 to 7.

C. Rule 6. The Grand Jury. Legislative Proposal to Reduce Size of Grand Jury.

The Reporter indicated that at its April 1997 meeting the Committee had briefly discussed pending legislation (sponsored by Congressman Goodlatte from Virginia) which would reduce the size of grand juries. The matter had been carried over as an agenda item to permit additional research and discussion of the issue.

Mr. Josefsberg indicated that if the grand jury system were to continue, that the current size should be retained. Justice Wathen noted that Maine had reduced the size of its grand juries and that many regretted that reduction. Judge Carnes added that in his experience reducing the size of the grand jury would risk the danger of runaway prosecutions. Both Mr. Martin and Judge Jensen shared the view that it was important to get more, rather than less, people involved in the grand jury process. Ms. Harkenrider added that the Department of Justice had sent a letter to Congress last year recommending that the current size of grand juries be retained.

Judge Carnes moved that the Committee oppose any reduction of size in the grand jury. Professor Stith seconded the motion, which carried by a vote of 12 to 0.

D. Rule 11. Pleas. Report of Subcommittee on Proposed Amendments re Notice to Defendant of Relevant Sentencing Information.

Judge Marovich provided an overview of the Rule 11 subcommittee's work on Rule 11 issues. He noted that a number of proposals were in the process of approval and that one issue remained for discussion--the question of whether the Government should be required to notify a defendant of the sentencing factors it intended to rely upon during sentencing, following a plea of guilty. Judge Marovich noted that Professor Stith had provided a memo detailing reasons for such a requirement and that the Department of Justice had responded with reasons for rejecting that requirement. He noted that over the last several years the Committee had touched upon the issue of whether anything more should, or could, be done to insure that a defendant was entering a voluntary and knowing plea of guilty, in the context of guideline sentencing.

Professor Stith provided a lengthy explanation of why Rule 11 should be amended to provide for some form of notice to a defendant on what sort of sentencing information

the prosecution would be relying upon. She noted that the sentencing procedural rules had not kept pace with actual practice and that there was two particular problem areas. First, the question of what the Government would consider to be "relevant conduct." And second, whether the defendant had been a leader or organizer in the alleged criminal activity. It is unrealistic, she said, to assume that a defendant would be able to calculate the effect of such factors, even with the assistance of a defense counsel. She noted that her proposal requiring notice would simply shift the sentencing calculus to pre-plea stages.

Judge Marovich responded by observing that defendants typically want the trial judge to make factual decisions earlier in the process and cannot understand why the judge cannot take a more active role in the plea bargaining stage. Professor Stith suggested that the Rules Enabling Act procedures would be an appropriate means of obtaining debate and comment on her proposal.

Judge Dowd indicated that there seems to be a diversity of practice developing with regard to what should be included in a plea agreement. There was not, in his view, any uniform system of dealing with sentencing guideline issues in such agreements. The real issue, he said, is what constitutes a knowing and voluntary plea of guilty.

Judge Davis observed that in those jurisdictions where there is a heavy caseload, the trial judges generally permit the defendant to withdraw a plea under Rule 32 if there is any real question about whether the plea is knowing and voluntary. Judge Marovich, however, noted that there is some dispute as to what constitutes a fair and just reason for withdrawing a plea and that sentencing proceedings had become more adversarial. And that, said Judge Dowd, leads to a lack of uniformity in practice.

Ms. Harkenrider expressed the view that a system of government notice was not required. Under the current procedures, the prosecutors cannot control what ultimate sentence will be imposed by the court. She added that it would be difficult to draft a rule which would adopt such a notice provision. On the other hand, she noted, it would be better to rely upon the experience and advice of defense counsel to inform the defendant of what, if any, factors or facts, would impact on the sentence.

Mr. Josefsberg observed that in his experience as a defense counsel that defendants do not always understand, or believe, what might happen during sentencing. Amending Rule 11, he stated, would not help.

Ms. Harkenrider continued by noting that if a defendant wants more certainty in sentencing, he or she is free to agree to a specific sentence under Rule 11(e)(1)(C). And the Committee has already taken steps to provide for more certainty in sentencing. In most cases, she added, an amendment to Rule 11 would not fix any problems with a lack of certainty.

Mr. Martin noted that generally most agreements do not cover a specific sentence under Rule 11(e)(1)(C). He urged the Committee to consider providing for more notice in Rule 11 and to approve, in concept, an amendment to the rule. He noted that a study by the Federal Judicial Center has indicated that private practitioners were at the bottom of the list in understanding the sentencing guidelines. He noted that he would prefer to see the prosecutors more involved in the sentencing decisions, rather than probation officers.

Judge Roll was opposed to any proposal to require more notice to the defendant. He noted that it would be difficult to determine what would constitute adequate notice because of the variances in application of the sentencing guidelines among the judicial circuits. He observed that the Committee might be aspiring to certainty which does not exist.

Judge Marovich responded by noting that he did not disagree with the comments opposing an amendment and that he agreed with the point that some problems are not capable of a solution.

Judge Jensen reviewed some of the amendments which have already been made to Rule 11 and that the Committee's work had already focused to some extent on disclosure, even though the current rule lacks any enforcement mechanism. He agreed with those who believed that it would be difficult to craft an enforceable notice provision in the rule.

Professor Stith responded that in her view, any notice provision would not be binding on the trial court and that it could consider facts or factors presented by the probation officer, but not the prosecutor.

After Judge Carnes questioned the advisability of tinkering with the rule, Mr. Martin observed that adding a notice provision would not increase the number of not guilty pleas.

Mr. Pauley observed that intuitively, there are bound to be withdrawn pleas of guilty and that there must be a balance with the fairness to the defendant--who should know as much as reasonably possible--and the fairness intended under the Sentencing Reform Act--which was intended to reduce unwarranted sentence disparity. In short, he said, similarly situated defendants should receive similar sentences.

Following additional brief comments, the Committee agreed do take a "straw" vote on whether to proceed with drafting an amendment to Rule 11. The motion failed by a vote of 5 to 7.

E. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

On behalf of the Department of Justice, Mr. Pauley presented a proposed amendment to Rule 12.2 which would address the authority of the trial court to order a mental examination of the defendant under 18 U.S.C. § 4247. He explained that as a result of *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), there is a real question whether a court may order a custodial mental examination under Rule 12.2(b). To remedy the problem, he indicated that Rule 12.2(c) could be amended to provide for such an examination by adding a reference to § 4247.

Professor Stith questioned whether the proposal would extend to any mental evidence or only expert testimony. Mr. Pauley explained how the rule would work and what would trigger the need, or request, for such a mental examination. Judge Miller observed that the rule would be narrower if the defendant intends to introduce the expert testimony of his or her mental state.

Mr. Martin observed that that the amendment would raise a number of significant constitutional issues and questioned whether there was really a problem to be fixed. He pointed out that the Government got what it wanted in the *Davis* case.

Judge Davis observed that this was a complex issue and noted the interplay between the defendant's notice of an intent to introduce mental evidence and a government requested mental examination. If an examination is held, the Government has the statements of the defendant, regardless of whether the defendant testifies or otherwise introduces evidence of his or her mental health.

Mr. Pauley noted that whatever the merits of the proposal, there should be a balance of opportunity for both the defense and the prosecution to present evidence on the defendant's mental condition. Mr. Martin, however, questioned whether simply adding a reference to § 4247 would remedy whatever gap existed; there was still the problem of custodial examination.

Following additional discussion, the Committee voted 11 to 1, with one abstention, to consider a proposed draft amendment to Rule 12.2 at its next meeting.

F. Rule 23. Trial by Jury or by the Court. Discussion re Possible Reduction of Size of Jury.

The Reporter indicated that pending legislation would reduce the size of juries in federal criminal trials. Mr. Rabiej indicated that there had apparently been no real movement on the proposal. Mr. Josefsberg noted that even with a provision permitting the defendant to agree to a smaller jury, there was the risk that a judge would lean on a

defense counsel to waive a 12-person jury. Following brief discussion Judge Carnes moved that the Committee oppose the legislation. The motion, which was seconded by Judge Dowd, carried by a vote of 12 to 0.

G. Rule 24. Trial Jurors.

1. Discussion re Possible Amendments re Number of Peremptory Challenges.

The Reporter informed the Committee that pending legislation (Section 501) in the Crime Control Act of 1997 (S. 3) would amend Rule 24(b) by equalizing the number of peremptory challenges. He informed the Committee that in 1990 and 1991, the Committee had proposed a similar amendment, that it had been published for public comment, and that the Standing Committee unanimously rejected the proposal at its February 1991 meeting. Since then, the Committee had made no further attempts to equalize the number of challenges, although there had been numerous attempts to do so through legislation. But the Standing Committee's rejection of the Committee's proposal had generally been used to convince Congress not to amend Rule 24(b).

Mr. Pauley indicated that the current status of the legislation was murky but that Crime Bills do tend to get through during the second session of Congress.

Mr. Josefsberg moved that the Committee oppose any attempt to equalize peremptory challenges. Judge Miller seconded the motion.

Following a brief discussion about the benefits and costs of amending the Rule, the motion failed by a vote of 6 to 7.

Judge Roll moved that Rule 24(b) be amended to provide for 10 peremptory challenges for each side in a noncaptial case. Following a second by Judge Dowd, the motion carried by a vote of 7 to 6. The Reporter indicated that he would draft appropriate amending language for the Committee's Spring 1998 meeting.

2. Proposed Amendments re Randomly Selected Petit and Venire Juries and Deletion of Provision for Peremptory Challenges.

The Reporter informed the Committee that Judge William M. Acker, Jr. (N. Dist. Alabama) had recommended that the Rules be amended to abolish peremptory challenges and to provide for random selection of both the venire and petit juries. Following brief discussion, a consensus emerged that no action should be taken on the proposal.

H. Rule 26. Taking of Testimony. Report by Subcommittee re Taking of Testimony from Remote Location.

Judge Davis indicated that Judge Jensen had appointed a three-member subcommittee to study a proposed amendment to Rule 26 which would permit transmission of testimony from a remote location: Judge Carnes (Chair), Mr. Josefsberg, and Mr. Pauley. Judge Carnes reported that the Subcommittee had considered the issue

and that it proposed that Rule 26 be amended to permit contemporaneous transmission of testimony from a remote location where the court concluded that there were compelling circumstances (and good cause shown) and that the witness was unavailable, as that term is defined in Federal Rule of Evidence 804. He noted that there were potential confrontation clause issues and that requiring a showing of "unavailability" was designed to address that point. He also noted that the Committee might wish to address the issue of the potential interplay between using depositions versus contemporaneous transmission and whether one should be preferred over the other.

Judge Davis questioned whether the amendment should cover audio-only transmissions and Judge Crigler raised concerns about relying only on an audio transmission where the fact-finder and defendant would not be able to observe the witness.

Following additional brief discussion on possible confrontation issues, the Committee voted 12-0 to proceed with drafting an amendment to Rule 26 to provide for contemporaneous transmission. The Reporter indicated that he would draft appropriate language for the Committee's consideration at the Spring 1998 meeting.

I Rule 32. Sentence and Judgment. Proposal to Provide for Mental Examination of Defendant.

Continuing an earlier discussion, *supra*, concerning a Department of Justice proposal to regarding mental examinations of the defendant, supra at Rule 12.2, Mr. Pauley proposed that Rule 32 be amended to permit a trial court to order such an examination for purposes of sentencing. (This discussion actually took place in conjunction with the discussion regarding Rule 12.2, but is presented here to coincide with the numbering of the Rules).

Judge Jensen questioned whether the defendant's mental condition or health was a sentencing factor and Ms. Harkenrider indicated that it would be in a capital case. Judge Carnes observed that even in capital cases, the defendant's mental condition would normally have been raised during the cases-in-chief. Mr. Martin gave examples of how the judge may act in capital cases regarding sealing of the mental examination.

Following additional brief discussion, the Committee voted 10 to 1, with one abstention, to proceed with drafting an amendment to Rule 32 which would provide for mental examinations in capital cases, including a notice provision and a provision for sealing the record.

J. Rule 43. Presence of the Defendant. Proposal to Permit Defendant to Waive Presence at Arraignment.

The Reporter stated that the Committee had received a recommendation from Mr. Mario S. Cano (an attorney in Coral Gables, Florida) to amend Rule 43 to permit the defendant to waive his or her presence at an arraignment. He provided some background information on similar amendments which had been previously considered by the Committee in 1992-93 regarding in absentia arraignments from remote locations.

Mr. Rabiej reported that although several pilot programs had been initiated, they had not yet provided any useful empirical data concerning in absentia arraignments. Judge Crigler noted that the Committee's earlier proposals had been opposed by defense counsel because it would have limited their opportunity to meet with their clients at the arraignment proceedings. Mr. Josefsberg responded that in many cases the arraignment is not a critical proceeding and that in his experience his client has waived presence at arraignment. Judge Marovich agreed that in his experience, the arraignments are routine and that he rarely encounters an arraignment where a major issue is raised. Other members shared that view and Mr. Martin indicated that he could probably support a waiver of appearance but not an in absentia arraignment from a remote location.

Judge Dowd indicated that he uses the arraignment to conduct other inquires and in response several members suggested that any amendment for waiver include a provision for obtaining the trial court's approval.

Ultimately, the Committee voted 11 to 1 to proceed with consideration of an amendment to the Rules. The Reporter indicated that he would draft language for amending both Rules 10 and 43 for the Committee's next meeting.

K. Rules Governing Habeas Corpus Proceedings.

Judge Davis reported to the Committee that the Civil Rules Committee had asked the Committee to consider the possibility of amending the Rules Governing § 2254 and § 2255 Proceedings. In memos provided by the Reporters of the Civil Rules and Criminal Committee, he noted two potential problems. First, a technical, conforming, amendment was probably required in Rule 8 to reflect a change in statutory cross-referencing. Second, the timing requirements for filing a response to a habeas petition appear to be inconsistent in Civil Rule 81, § 2243, and Rule 4 of the Rules Governing § 2255 Proceedings and Rule 4 of the Rules Governing § 2254 Proceedings.

Considering the issues involved, and the fact that recent legislation affecting habeas proceedings may have created additional issues, Judge Davis indicated that he would appoint a subcommittee to study the problems. He later appointed Judge Carnes (Chair), Judge Miller, and Mr. Martin.

VII.-RECOGNITION OF OUT-GOING MEMBERS

During the meeting, Judge Davis recognized the outstanding contributions of two out-going members of the Committee: Judge Jensen, who had served the Committee's chair and Magistrate Judge Crigler. He thanked both for their dedicated service and their contributions to the Committee and on behalf of the Committee wished them well.

VIII. RULES AND PROJECTS PENDING BEFORE STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure

Mr. Rabiej informed the Committee that Congress was considering a Civil Forfeiture Act which would exactly following the language in proposed Rule 32.2, which is currently out for public comment. He stated that no action would be taken on the proposed legislation until the second session of Congress.

B. Status Report on Restyling the Appellate Rules of Procedure.

Mr. Rabiej also reported that the restyled Appellate Rules of Procedure had been approved by the Judicial Conference and had been delivered to the Supreme Court for its consideration. He added that the Appellate Rules Committee had received 25 comments on the proposed changes and that all but one of them had been positive in nature.

C. Status Report on Electronic Filing in the Courts

Mr. McCabe informed the Committee that as a result of amendments to several federal rules of procedure which permit courts to accept electronic filings, that a number of federal courts had begun identifying and acquiring appropriate technology to accept such matters. He noted that a number of questions remained to be addressed and introduced Ms. Karen Molzen, who provided an audio-visual presentation on how the District of New Mexico is handling such filings.

IX. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee decided to hold its next meeting on April 27 and 28, 1998 at a location to be determined.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Item 10A

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

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

FROM: **Honorable Fern M. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 1997**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules met on October 20th and 21st in Charleston, S.C. At the meeting, the Committee approved three items for action by the Standing Committee--proposed amendments to Evidence Rules, with the recommendation that they be published for public comment. The Advisory Committee is submitting these proposed amendments to the Standing Committee at this time, but there is no intent to accelerate or otherwise change the regular schedule for public comment.

The Evidence Rules Committee also discussed several proposals for amending other Evidence Rules. Specifically, the Committee has begun to consider whether the rules on expert testimony should be amended in light of the Supreme Court's *Daubert* decision, and also whether the Evidence Rules should be revised to accommodate technological advancements in the presentation of evidence. The discussion of these and other matters is summarized in Part III of this Report, and is more fully set forth in the draft minutes of the October meeting, which are attached to this Report.

II. Action Items

A. Rule 103(a).

The proposed amendment to Rule 103 would add a new paragraph to subdivision (a). The goals of the proposal are: 1) to specify when and whether a party must renew an objection or offer of proof after losing an initial ruling on admissibility; and 2) to codify the principles of *Luce v. United States,* concerning the preservation of a claim of error when admission of evidence is dependent on an event occurring at trial.

The Evidence Rules Committee previously proposed an amendment to Evidence Rule 103 that would have added a new subdivision (e) to the Rule. At its June, 1997 meeting, the Standing Committee sent this proposal back for reconsideration on a number of grounds. Among the suggestions were: 1) that the *Luce* principle set forth in the Evidence Rules Committee's proposal was inappropriately limited to civil cases; and 2) that it would make more sense to amend subdivision (a), which already deals with objections and offers of proof, than it would be to add a new subdivision to the Rule. After considering these suggestions, the Evidence Rules Committee unanimously agreed upon a new proposal. This new proposal incorporates all of the suggestions for improvement made at the Standing Committee meeting, and sets forth clear-cut standards for determining when an objection or offer of proof must be renewed after an initial determination by the trial court. Both the proposed amendment and Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendment to Evidence Rule 103 be published for public comment, at the regularly scheduled time for publication.

B. Rule 404(a)

Congress is currently considering a proposal to amend Evidence Rule 404(a) to provide that evidence of a criminal defendant's pertinent character trait is admissible if the defendant attacks the character of the victim. The Evidence Rules Committee reviewed this proposal and agreed, in principle, that an attack on the victim's character should open the door to permit a corresponding attack on the defendant's character. The Evidence Rules Committee was concerned, however, with the breadth of the language in the Congressional proposal, which might be read to permit an attack on the defendant's *credibility* whenever the defendant attacks the character of the victim. The Evidence Rules Committee agreed upon more limited language, and proposes an amendment to Rule 404(a) that would address Congressional

concerns, and provide a more balanced use of character evidence when the defendant chooses to prove a negative character trait of the victim. Both the proposed amendment and the Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendment to Evidence Rule 404(a) be published for public comment, at the regularly scheduled time for publication.

C. Rules 803(6) and 902.

Under current law, a foreign record of regularly conducted activity can be admitted in a criminal case without the necessity of calling a foundation witness. 18 U.S.C. § 3505 provides that foreign business records may be admitted if they are certified by a qualified witness, under circumstances in which the law of the foreign country would punish a false certification. In contrast, the foundation for all other records admissible under Evidence Rule 803(6) must be established by a testifying witness. The Evidence Rules Committee unanimously agreed that an amendment to Evidence Rule 803(6) was necessary to provide for uniform treatment of business records. The Committee also recognized that if certification of business records is to be permitted, Evidence Rule 902 must be amended to provide a procedure for self-authentication of such records. In that sense, the proposed amendments to Rules 803(6) and 902 are part of a single package--the amendment to Rule 902 is only necessary if the amendment to Rule 803(6) is adopted, and conversely the amendment to Rule 803(6) would be a nullity if the amendment to Rule 902 were rejected.

The Evidence Rules Committee notes that the proposed modification of Rules 803(6) and 902 to permit certification of business records is in accord with a trend in the states. The Evidence Rules Committee's proposed amendments are adapted from state versions of the Federal Rules of Evidence in Indiana, Maryland and Texas. The proposed amendments to Rules 803(6) and 902, and the Advisory Committee Notes to these amendments, are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendments to vidence Rules 803(6) and 902 be published for public comment, at the regularly scheduled time for publication.

III. Information Items

A. Rules on Experts and *Daubert*.

The Supreme Court's *Daubert* decision has spawned a large body of case law, as well as initiatives in Congress to amend Evidence Rule 702. In 1995, the Advisory Committee decided to delay considering any amendment to the Evidence Rules on experts, until the courts had had enough time to digest and interpret the *Daubert* opinion. At its October, 1997 meeting, the Evidence Rules Committee agreed unanimously that there is now enough case law--and conflicts among the courts--to justify consideration of an amendment to Evidence Rule 702 to explicate the standards of reliability to be applied to expert testimony, in light of *Daubert*. Moreover, the Committee is aware of, and has commented upon, two pieces of proposed legislation in Congress that purport to codify *Daubert*, but that in fact create serious problems of interpretation, and impose evidentiary standards so rigorous as to render much traditionally accepted expert testimony inadmissible. In light of these Congressional proposals, the Evidence Rules Committee agreed that it was especially appropriate to consider whether Rule 702 should be amended through the rulemaking process.

The Evidence Rules Committee has agreed on the following general principles: 1) Any attempt to amend Evidence Rule 702 must encompass both scientific and non-scientific testimony; 2) The amendment should not attempt to delineate an all-encompassing set of specific standards that courts must employ in regulating expert testimony; 3) The amendment must cover not only the theories employed by the expert, but also the application of those theories to the specific facts of the case; 4) Any amendment to Evidence Rule 703, concerning the use of inadmissible information by an expert, would be related to and should be considered together with any amendment to Rule 702; and 5) Consideration should be given to the treatment of lay witnesses who are proffered to testify about technical subjects that require some expertise.

A subcommittee has been appointed to consider these points of agreement and to prepare a proposal to amend the Evidence Rules accordingly. The subcommittee's report will be considered at the April, 1998 meeting of the Evidence Rules Committee.

B. Technological Advances in Presenting Evidence

The Evidence Rules Committee discussed, and will consider at its next meeting, whether an amendment is necessary to accommodate technological innovations in the presentation of evidence. One possible solution that is being considered is to use the definition of "writings" and "recordings" that is currently found in Evidence Rule 1001, and to

apply that definition more broadly throughout the Rules. This presents a conceptual problem, because the Federal Rules of Evidence contain no all-encompassing definitions section. The alternative, assuming an amendment is necessary, would be to directly amend each rule in which the terms "writing" or "recording" are found. These matters will be considered by the Evidence Rules Committee at its next meeting in April, 1998.

C. Correcting Advisory Committee Notes.

The Advisory Committee Notes provide comment on the Advisory Committee draft of the Evidence Rules; however, several of the Rules ultimately adopted by Congress differ markedly from the Advisory Committee's version. For example, the Advisory Committee Note to Evidence Rule 804(b)(1) states that the Rule allows "substitution of one with the right and opportunity to develop the testimony with similar motive and interest." Yet Congress rejected the Advisory Committee's position, and added a "predecessor in interest" requirement to the Rule. Another example is the Advisory Committee's Note on Evidence Rule 301. Congress rejected the Advisory Committee's "burden-shifting" approach to presumptions in favor of the "bursting bubble" approach. The Committee Note, however, states that the Rule provides for burden-shifting, and is critical of the "bursting bubble" approach ultimately adopted by Congress.

The Reporter to the Evidence Rules Committee prepared a list of statements contained in the original Advisory Committee Notes that are either wrong as written, or that comment on a draft that was materially changed by Congress. A copy of this memorandum is attached to this Report. The Evidence Rules Committee reviewed the draft and agreed that the Federal Judicial Center should consider whether the memorandum might be distributed under FJC auspices to publishers and other interested persons. The memorandum would not be published as the work product of the Evidence Rules Committee, but rather as a work of the Reporter in his individual capacity.

D. Congressional Proposal to Amend Evidence Rule 615

The Kennedy-Leahy Bill on victims rights, currently in the Senate, would directly amend Evidence Rule 615 to expand the right of victim-witnesses to attend a criminal trial. The proposal gives the Judicial Conference a time period after the date of passage in which to provide comments on the legislation. The Reporter to the Evidence Rules Committee has drafted some suggestions for improvement in the proposed statutory language. It appears that there will be no action on the Kennedy-Leahy proposal during this term of Congress. The Evidence Rules Committee will take up the matter of possible suggestions for improvement in the statutory language at its April, 1998 meeting.

E. Issues the Committee Has Decided Not to Pursue

After discussion at the October meeting, the Evidence Rules Committee has decided not to pursue the following issues at this time:

1. *Rule 404(b)*--The Committee considered whether Evidence Rule 404(b) should be amended along the lines of a proposal contained in the Omnibus Crime Bill. That proposal would add "disposition toward a particular individual" to the list of permissible purposes for evidence of uncharged misconduct. After consideration, the Evidence Rules Committee determined that such an amendment was unnecessary, because the list of purposes set forth in Rule 404(b) is illustrative only; it is not intended to be exclusive.

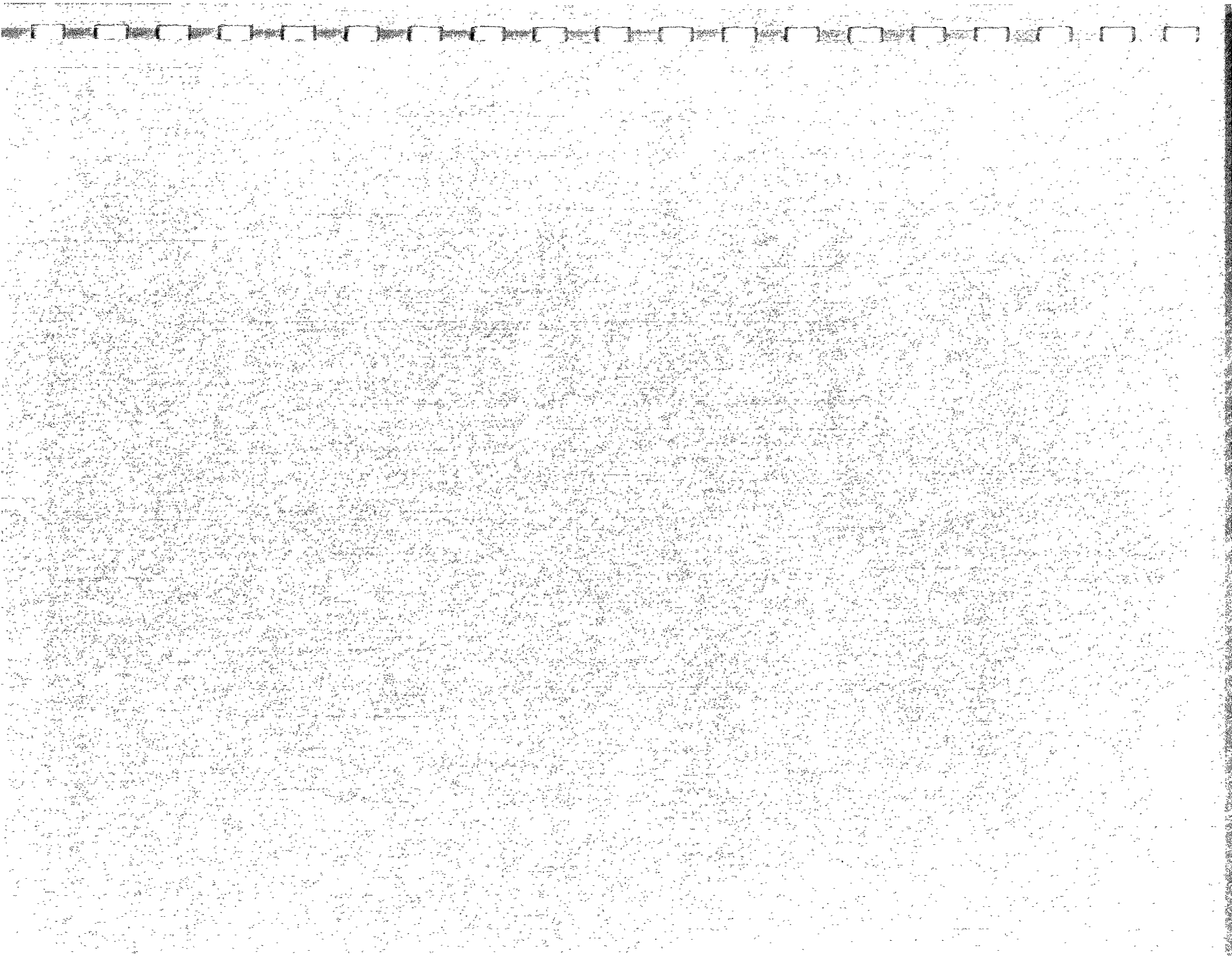
2. *Rule 501*--The Evidence Rules Committee considered a proposal to provide that the attorney-client privilege for in-house counsel should be contiguous with the attorney-client privilege for outside counsel. After discussion, the Committee decided not to propose any change to the rule on privilege at this time.

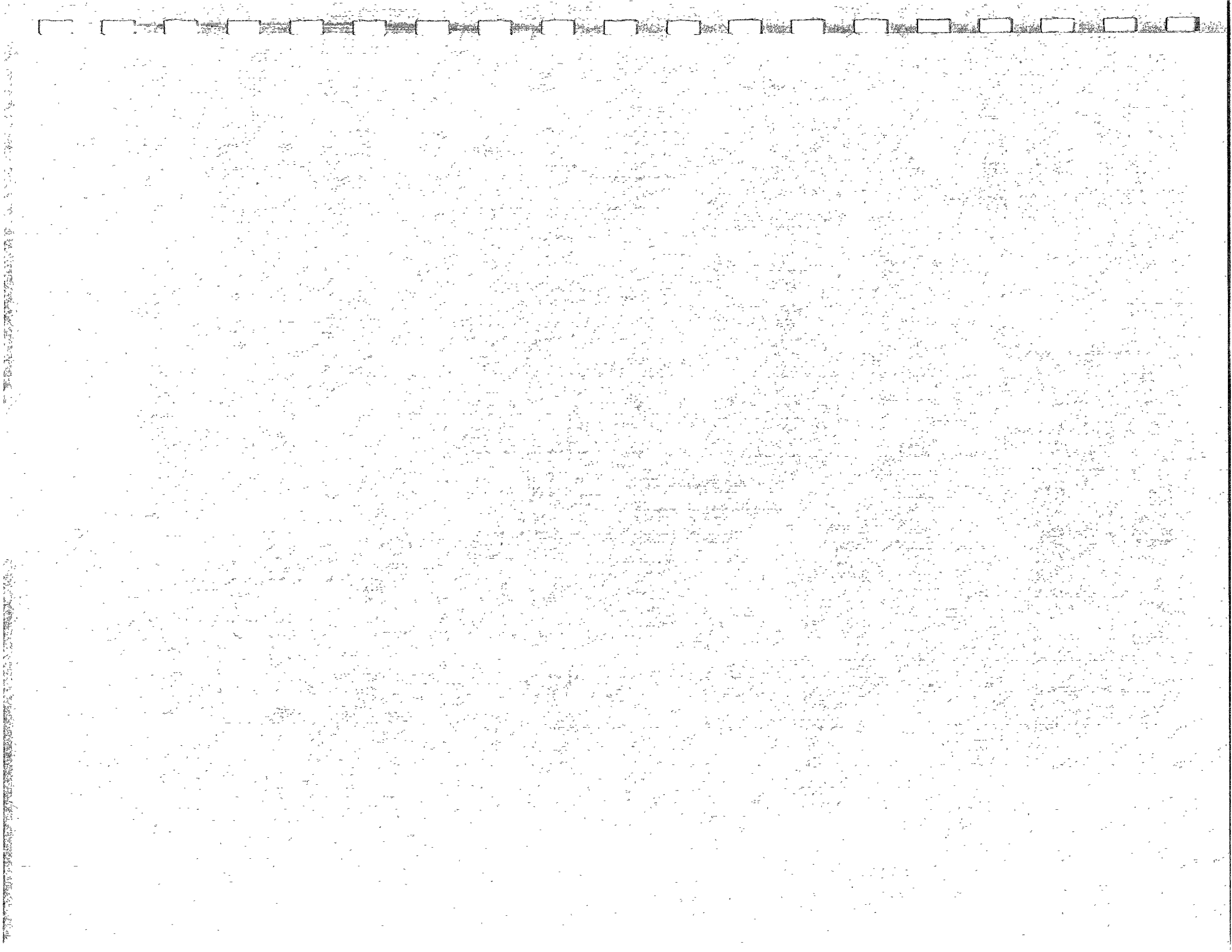
IV. Minutes of the October, 1997 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's October, 1997 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Rules and Committee Notes
Reporter's Memorandum concerning incorrect Advisory Committee Notes
Draft Minutes





Advisory Committee on Evidence Rules
Proposed Amendment: Rule 103(a)

Rule 103. Rulings on Evidence*

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.— In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

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

Once the court, at or before trial, makes a definitive ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. But if under the court's ruling there is a condition precedent to admission or exclusion, such as the introduction of certain testimony or the pursuit of a certain claim or defense, no claim of error may be predicated upon the ruling unless the condition precedent is satisfied.

* * * * *

COMMITTEE NOTE

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g., Collins v. Wayne*

Corp., 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Other courts have held that an objection or offer of proof once made is sufficient to preserve a claim of error because the trial court's ruling thereon constitutes "law of the case." *See, e.g., Cook v. Hoppin,* 783 F.2d 684 (7th Cir. 1986). These differing approaches create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). Where the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. See Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); *Favala v. Cumberland Engineering Co.,* 17 F.3d 987, 991 (7th Cir. 1994) ("once a motion *in limine* has been granted, there is no reason for the party losing the motion to try to present the evidence in order to preserve the issue for appeal"). On the other hand, where the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. *See, e.g., United States v.*

Vest, 116 F.3d 1179, 1188 (7th Cir. 1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial, meant that it was "too late to reopen the issue now on appeal"); *United States v. Valenti,* 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence). While formal exceptions are unnecessary, the amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point.

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error if any in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.,* 896 F.2d 949, 956 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk,* 810 F.2d 809 (8th Cir. 1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

The amendment codifies the principles of *Luce v. United States,* 469 U.S. 38 (1984), and its progeny. In *Luce*, the Supreme Court held that a criminal defendant must testify at trial in order to

preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other comparable situations, and logically applies whenever the occurrence of a trial event is a condition precedent to the admission or exclusion of evidence. *See United States v. DiMatteo,* 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman,* 41 F.3d 785, 788 (1st Cir. 1994), *cert.denied,* 514 U.S. 1007 (1995) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria,* 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz,* 857 F.2d 900 (2d Cir.), *cert. denied,* 489 U.S. 1070 (1989) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error for appeal); *United States v. Bond,* 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher,* 106 F.3d 622 (5th Cir. 1997), *as corrected* 1997 U.S. App. LEXIS

12671 (1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman,* 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas,* 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); United States v. Williams, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes*

(a) Character evidence generally. — Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. — Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same~~;~~, or if evidence of a trait of character of the victim of the crime is admitted under subdivision (a)(2), evidence of a pertinent trait of character of the accused offered by the prosecution;

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

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

(2) Character of victim. — Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness.— Evidence of the character of a witness, as provided in rules 607, 608, and 609.

* * * * *

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

COMMITTEE NOTE

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of a victim under subdivision (a)(2) of this Rule, the door is opened to an attack on a corresponding character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain,* 768 F.2d 790 (7th Cir. 1985) (when the defendant offers proof of self-defense, this permits proof of the victim's character trait for peacefulness, but it does not permit proof of the defendant's character trait for violence).

The amendment makes clear that the accused cannot attack the victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the accused's own corresponding character trait. For example, in a murder case where the defendant claims self-defense, the defendant, to bolster this defense, might offer evidence of the victim's allegedly violent disposition. If the government has evidence that the defendant has a violent character, but is not allowed to offer this evidence as part of its rebuttal, then the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the defendant's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the defendant's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when the accused chooses to attack the character of the victim.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion. Finally, the amendment does not permit proof of the defendant's character when the defendant attacks the victim's character as a witness under Rules 608 or 609.

105TH CONGRESS
1ST SESSION

S. 3

IN THE SENATE OF THE UNITED STATES

Mr. HATCH (for himself _____
_____
_____) introduced the following bill; which was read twice and referred to the Committee on _____

Mr. LOTT
Mr. ABRAHAM
Mr. ALLARD
Mr. ASHCROFT
Mr. CRAIG
Mr. D'AMATO
Mr. DeWINE
Mr. DOMENICI
Mr. ENZI
Mr. FAIRCLOTH
Mr. GORTON
Mr. GRAMS
Mr. GRASSLEY
Mr. HAGEL
Mr. HELMS
Mr. HUTCHINSON
Mr. KYL
Mr. MURKOWSKI
Mr. NICKLES
Mr. ROBERTS
Mr. SMITH
Mr. THOMAS
Mr. THURMOND
Mr. WARNER
Mr. COVERDELL

A BILL

To provide for fair and accurate criminal trials, reduce violent juvenile crime, promote accountability by juvenile criminals, punish and deter violent gang crime, reduce the fiscal burden imposed by criminal alien prisoners, promote safe citizen self-defense, combat the importation, production, sale, and use of illegal drugs, and for other purposes.

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

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Omnibus Crime Control Act of 1997".

shall be made of 12, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.".

SEC. 503. REBUTTAL OF ATTACKS ON THE CHARACTER OF THE VICTIM.

Rule 404(a)(1) of the Federal Rules of Evidence is amended by inserting before the semicolon the following: ", or, if an accused offers evidence of a pertinent trait of character of the victim of the crime, evidence of a pertinent trait of character of the accused offered by the prosecution".

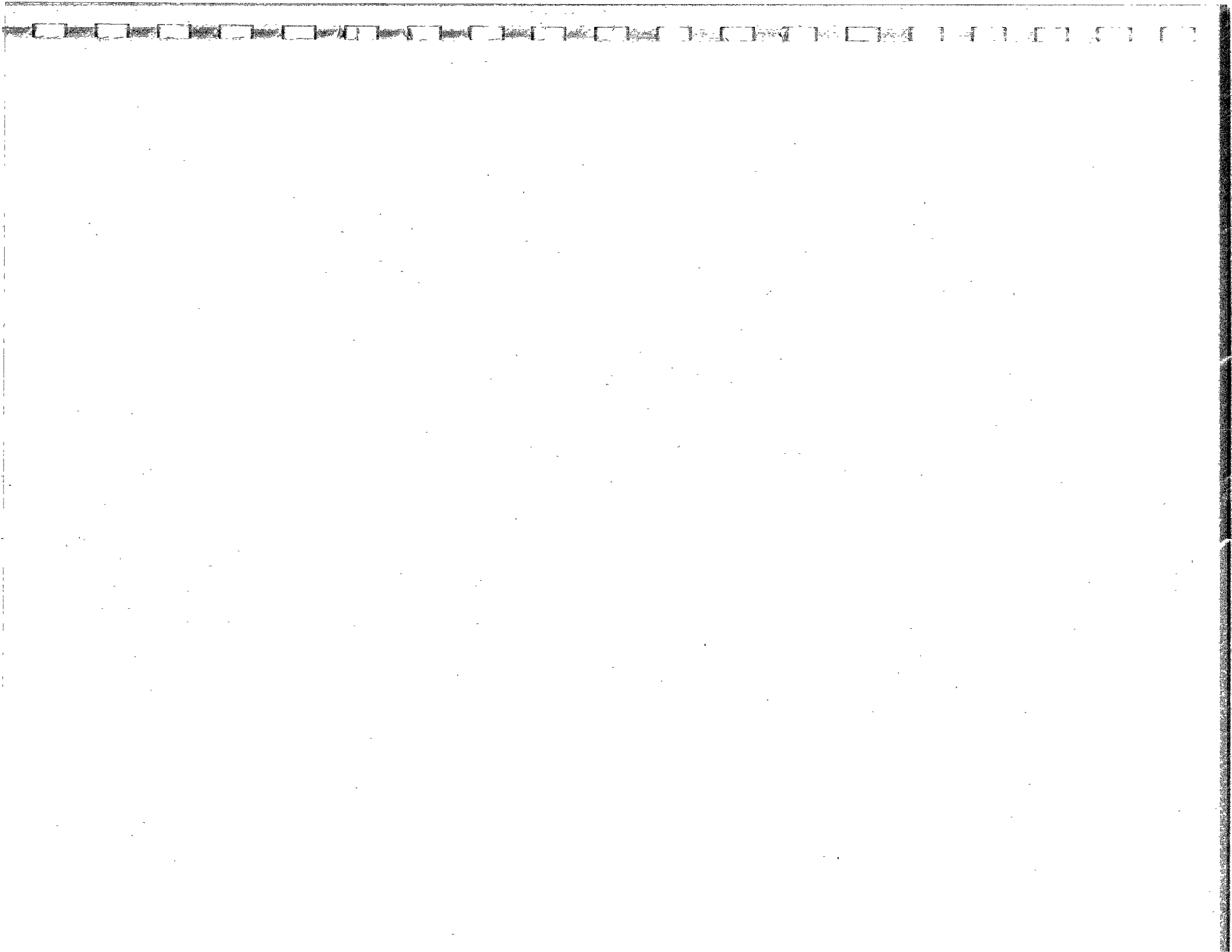
SEC. 504. USE OF NOTICE CONCERNING RELEASE OF OFFENDER.

Section 4042(b) of title 18, United States Code, is amended by striking paragraph (4).

SEC. 505. BALANCE IN THE COMPOSITION OF RULES COMMITTEES.

Section 2073 of title 28, United States Code, is amended—

(1) in subsection (a)(2), by adding at the end the following: "On each such committee that makes recommendations concerning rules that affect criminal cases, including the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Federal Rules of Appellate Procedure, the Rules Govern-



Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(6)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * *

(6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term

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

"business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * * * *

COMMITTEE NOTE

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. See, e.g., *Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 902

Rule 902. Self-authentication*

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * * * *

(11) *Certified domestic records of regularly conducted activity.* The original or a duplicate of a domestic record of regularly conducted activity, which would be admissible under Rule 803(6), and which the custodian thereof or another qualified person certifies under oath—

(A) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

---

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

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.

(12) *Certified foreign records of regularly conducted activity.* In a civil case, the original or a duplicate of a foreign record of regularly conducted activity, which would be admissible under Rule 803(6), and which is accompanied by a written declaration by the custodian thereof or another qualified person that the record—

(A) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The record must be signed in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of the country where the record is signed. A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.

COMMITTEE NOTE

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases. The notice requirements in Rules 902(11) and (12) are intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the certification.

Item 10B

Advisory Committee Notes That May Require Editorial Comment

By Daniel J. Capra, Reporter, Judicial Conference Advisory Committee on Evidence Rules

1. Advisory Committee Note to Rule 104(b)

Problem--Incorrect word that might change the meaning.

Advisory Committee's Note

* * *

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not **[sic]** established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration

2. Advisory Committee Note to Rule 201(g)

Problem--The Rule as enacted distinguishes between civil and criminal cases.

Advisory Committee's Note

* * *

Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend

to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases. People v. Mayes, 113 Cal. 618, 45 P. 860 (1896); Ross v. United States, 374 F.2d 97 (8th Cir. 1967). Cf. State v. Main, 94 R.I. 338, 180 A.2d 814 (1962); State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951). **[Editor's Note: This treatment was rejected by the Congress, which provided that judicial notice is not conclusive in criminal cases.]**

3. Advisory Committee Note to Rule 301

Problem--Internal reference to Rule 303, which was never adopted.

Advisory Committee's Note

* * *

This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 for those against an accused in a criminal case. **[Editor's Note: The latter rule was deleted by Congress.]**

Problem: The Rule as enacted adopts the "bursting bubble" view of presumptions rather than the burden-shifting approach,

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909, 913 (1937); Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 82 (1933); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5 (1959). **[Editor's Note: This approach was rejected by the Congress.]**

The so-called ``bursting bubble'' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too ``slight and evanescent'' an effect. Morgan and Maguire, *supra,* at p. 913. **[Editor's Note: This approach was adopted by the Congress.]**

4. Advisory Committee Note to Rule 402

Problem--Internal reference to privilege rules that were not enacted.

Advisory Committee's Note

* * *

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges **[Editor's Note: The Advisory Committee proposals on Article V were subsequently rejected by Congress]**; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

5. Advisory Committee note to Rule 403

Problem--Internal reference to a Rule that was renumbered.

Advisory Committee's Note

* * *

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 **[Editor's Note: This is now Rule 105]** and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor. * * *

6. Advisory Committee Note to Rule 404(a)

Problem--Incorrect reference to another rule.

Advisory Committee's Note

* * *

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 **[Editor's Note: The correct reference is to Rules 608 and 609]** for methods of proof. * * *

7. Advisory Committee Note to Rule 406

Problem--Proposed Rule 406(b), dealing with the permissible forms of proof of habit, was deleted by Congress.

Advisory Committee's Note

* * *

Subdivision (a). [Editor's Note: As proposed by the Advisory Committee, Rule 406 contained two subdivisions; subdivision (b) was deleted by Congress.] An oft-quoted paragraph, McCormick § 162, p. 340, describes habit in terms effectively contrasting it with character. * * *

Subdivision (b). [Editor's Note: This subdivision was deleted by Congress.] Permissible methods of proving habit or routine conduct include opinion and specific instances sufficient in number to warrant a finding that the habit or routine practice in fact existed. * * *

8. Advisory Committee Note to Rule 410

Problem--The initial Advisory Committee proposal was rejected, because Congress was concerned with its broad exceptions. Then there was an amendment in 1980. Therefore, the Advisory Committee Note to the 1980 amendment is the most appropriate.

Advisory Committee's Note

[Editor's Note: The following material is the Note accompanying the Advisory Committee's draft of the latest versions of the Rule, promulgated in 1980, which sets forth the relevant legislative history. The Rule was changed slightly after the Note was written.]

The major objective of the amendment to rule **[Fed. R. Crim. P.]** 11(e)(6) **[virtually identical to Rule 410]** is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various

circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See United States v. Herman, 544 F.2d 791 (5th Cir. 1977), discussed herein.

Fed. R. Ev. 410, as originally adopted by Pub. L. 93-595, provided in part that `evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere* or an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.' (This rule was adopted with the proviso that it `shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule.') As the Advisory Committee Note explained: `Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise.' The amendment of Fed. R. Crim. P. 11, transmitted to Congress by the Supreme Court in April 1974, contained a subdivision (e)(6) essentially identical to the rule 410 language quoted above, as a part of a substantial revision of rule 11. The most significant feature of this revision was the express recognition given to the fact that the `attorney for the government and the attorney for the defendant or the defendant when acting *pro se* may engage in discussions with a view toward reaching' a plea agreement. Subdivision (e)(6) was intended to encourage such discussions. As noted in H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 7 (1975), the purpose of subdivision (e)(6) is to not `discourage defendants from being completely candid and open during plea negotiations.' Similarly, H.R. Rep. No. 94-414, 94th Cong., 1st Sess. 10 (1975), states that `Rule 11(e)(6) deals with the use of statements made in connection with plea agreements.' (Rule 11(e)(6) was thereafter enacted, with the addition of the proviso allowing use of statements for purposes of impeachment and in a prosecution for perjury, and with the qualification that the inadmissible statements must also be `relevant to' the inadmissible pleas or offers. Pub. L. 94-64; Fed. R. Ev. 410 was then amended to conform. Pub. L. 94-149.)

* * *

[Editor's Note: What follows next is the Advisory Committee's Note on the original version of Rule 410, which was rejected by Congress.]

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in Kercheval v. United States, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in People v. Spitaleri, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in *Kercheval*, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326.

Pleas of *nolo contendere* are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. § 16(a), recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas. General Electric Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), *cert. denied,* 376 U.S. 939, 84 S. Ct. 794, 11 L. Ed. 2d 659; Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967); City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964). See also state court decisions in Annot., 18 A.L.R.2d 1287, 1314.

Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p. 543, ``Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises.'' See also People v. Hamilton, 60 Cal. 2d 105, 32 Cal. Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not

impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code § 1153.

9. Advisory Committee Note to Rule 412

Problem--Congress adopted the Advisory Committee's version rather than the Supreme Court's version; the Supreme Court had rejected the Advisory Committee's version.

[Editor's Note: There is no legislative history to the original Rule 412. Nor is there legislative history to the amended Rule 412, which was passed as part of the Violent Crime Control and Law Enforcement Act of 1994. Congress did in that Act, however, adopt verbatim the version of Rule 412 recommended by the Advisory Committee. The Advisory Committee proposal had been rejected by the Supreme Court in favor of a slightly different version, but Congress chose the Advisory Committee's version over that adopted by the Supreme Court. Accordingly, we include the Advisory Committee's Note on amended Rule 412, as at least some indication of the legislative intent behind amended Rule 412.]

Advisory Committee's Note

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

* * *

10. Advisory Committee Note to Rule 501

Problem--All of the proposed rules on privilege were rejected by Congress, in favor of the common law approach.

Advisory Committee's Note

Deleted. **Editor's Note: Congress rejected the Advisory Committee's proposals on privileges. The reasons given in support of the Congressional action are stated in the report of the House Committee on the Judiciary, the Report of the Senate Committee on the Judiciary, and the Report of the House/Senate Conference Committee, set forth below. [Insert those Reports]**

11. Advisory Committee Note to Rule 601

Problems--Congress added language concerning deference to state law, and the Note makes reference to a Rule that was not adopted by Congress.

Advisory Committee's Note

This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind. For the reasoning underlying the decision not to give effect to state statutes in diversity cases, see the Advisory Committee's Note to Rule 501. **[Editor's Note: This proposal by the Advisory Committee, providing that federal**

rules of competency applied even where state law provided the rule of decision, was rejected by Congress.]

* * *

Admissibility of religious belief as a ground of impeachment is treated in Rule 610. Conviction of crime as a ground of impeachment is the subject of Rule 609. Marital relationship is the basis for privilege under Rule 505 **[Editor's Note: Rule 505 was deleted by Congress.].** Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.

12. Advisory Committee Note to Rule 607

Problem--The Note refers to the Advisory Committee's proposed Rule 801(d)(1), while the version of that Rule enacted is narrower.

Advisory Committee's Note

The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1). **[Editor's Note: This categorical statement is not correct. Congress changed the Advisory Committee's version of Rule 801(d)(1). As enacted, Rule 801(d)(1)(A) exempts prior inconsistent statements from the hearsay rule only if the statements are made under oath at a formal proceeding.]**

* * *

13. Advisory Committee Note to Rule 608

Problem--Congress deleted the Advisory Committee's "remote in time" limitation on admissibility.

Advisory Committee's Note

* * *

(2) Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. **[Editor's note: The Advisory Committee's proposal precluded reference to bad acts that were remote in time. This provision was deleted by Congress in favor of a case-by-case balancing of probative value and prejudicial effect.].** Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

* * *

14. Advisory Committee Note to Rule 609--

Problem--Congress amended Rule 609(a)(1) to provide for balancing of probative value and prejudicial effect.

Advisory Committee's Note

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright,

Federal Practice and Procedure: Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of crimen falsi, without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving ``dishonesty or false statement.'' Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the congressional policy manifested in the 1970 legislation. **[Editor's Note: The Rule ultimately adopted by Congress, and as amended in 1990, provides for Trial Court balancing of probative value and prejudicial effect as to convictions not involving dishonesty or false statement.]**

* * *

Problem--Rule 609(b) was amended to provide for admissibility in exceptional cases, rather than total preclusion of old crimes.

Subdivision (b). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests ▩ Current Trends, 89 U. Pa. L. Rev. 166, 176-177 (1940). This portion of the rule is derived from the proposal advanced in Recommendation Proposing an Evidence Code, § 788(5), p. 142, Cal. Law Rev. Comm'n (1965), though not adopted. See California Evidence Code § 788. **[Editor's Note: The Rule ultimately adopted by Congress provides for admissibility of convictions more than ten years old when the probative value substantially outweighs the prejudicial effect.]**

15. Advisory Committee Note to Rule 611:

Problem--Incorrect internal reference.

Advisory Committee's Note

Subdivision (a). Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.

* * *

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b). **[Editor's Note: The correct reference is to Rule 403; there is no subdivision (b).]**

* * *

Problem--The Advisory Committee recommended the English view as to the permissible scope of cross-examination. Congress opted for the American view.

Subdivision (b). [Editor's Note: The Advisory Committee version of Rule 611(b) called for wide open cross-examination on any relevant issue. Congress rejected this proposal and adopted a rule limiting the scope of cross-examination to the subject matter of the direct, with the Trial Court having discretion to broaden the scope. The Advisory Committee Note makes the case for the Committee's proposal and criticizes the view that was ultimately adopted by Congress.] The tradition in the federal courts and in numerous state courts has been to limit the scope of cross-examination to matters testified to on direct, plus matters bearing upon the credibility of the witness. Various reasons have been advanced to justify the rule of limited cross-examination. (1) A party vouches for his own witness but only to the extent of matters elicited on direct. Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 F. 668, 675 (8th Cir. 1904), quoted in Maguire, Weinstein, et al., Cases on Evidence 277, n. 38 (5th ed. 1965). But the concept of vouching is discredited, and Rule 607 rejects it. (2) A party cannot ask his own witness leading questions.

This is a problem properly solved in terms of what is necessary for a proper development of the testimony rather than by a mechanistic formula similar to the vouching concept. See discussion under subdivision (c). (3) A practice of limited cross-examination promotes orderly presentation of the case. Finch v. Weiner, 109 Conn. 616, 145 A. 31 (1929). While this latter reason has merit, the matter is essentially one of the order of presentation and not one in which involvement at the appellate level is likely to prove fruitful. See, for example, Moyer v. Aetna Life Ins. Co., 126 F.2d 141 (3d Cir. 1942); Butler v. New York Cent. R. R., 253 F.2d 281 (7th Cir. 1958); United States v. Johnson, 285 F.2d 35 (9th Cir. 1960); Union Automobile Indem. Ass'n v. Capitol Indem. Ins. Co., 310 F.2d 318 (7th Cir. 1962). In evaluating these considerations, McCormick says:

> The foregoing considerations favoring the wide-open or restrictive rules may well be thought to be fairly evenly balanced. There is another factor, however, which seems to swing the balance overwhelmingly in favor of the wide-open rule. This is the consideration of economy of time and energy. Obviously, the wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on the other hand, is productive in many courtrooms, of continual bickering over the choice of the numerous variations of the ``scope of the direct'' criterion, and of their application to particular cross-questions. These controversies are often reventilated on appeal, and reversals for error in their determination are frequent. Observance of these vague and ambiguous restrictions is a matter of constant and hampering concern to the cross-examiner. If these efforts, delays and misprisons were the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial, they might be worth the cost. As the price of the choice of an obviously debatable regulation of the order of evidence, the sacrifice seems misguided. The American Bar Association's Committee for the Improvement of the Law of Evidence for the year 1937-38 said this:
>
> ``The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.

``We recommend that the rule allowing questions upon any part of the issue known to the witness ... be adopted....''

McCormick, § 27, p. 51. See also 5 Moore's Federal Practice ¶43.10 (2nd ed. 1964).

The provision of the second sentence, that the judge may in the interests of justice limit inquiry into new matters on cross-examination, is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

Problem--Congress changed the Advisory Committee's proposed Rule 611(c), expanding the definition of hostile witnesses, and applying the Rule to criminal as well as civil cases.

Subdivision (c).

* * *

The final sentence deals with categories of witnesses automatically regarded and treated as hostile. Rule 43(b) of the Federal Rules of Civil Procedure has included only ``an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party.'' This limitation virtually to persons whose statements would stand as admissions is believed to be an unduly narrow concept of those who may safely be regarded as hostile without further demonstration. See, for example, Maryland Cas. Co. v. Kador, 225 F.2d 120 (5th Cir. 1955), and Degelos v. Fidelity & Cas. Co., 313 F.2d 809 (5th Cir. 1963), holding despite the language of Rule 43(b) that an insured fell within it, though not a party in an action under the Louisiana direct action statute. The phrase of the rule, ``witness identified with'' an adverse party, is designed to enlarge the category of persons thus callable. **[Editor's Note: Congress revised the last sentence of Rule 611(c) by expanding it to apply to criminal cases (allowing the defendant, for example, to use leading questions on the direct examination of a witness associated with the government), and by permitting the use of leading questions in the direct examination of any hostile witness.]**

16. Advisory Committee Note to Rule 612

Problem--Congress provided for less extensive disclosure of documents relied on by witnesses before trial.

Advisory Committee's Note

The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. McCormick § 9, p. 15. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942); Needelman v. United States, 261 F.2d 802 (5th Cir. 1958), cert. dismissed, 362 U.S. 600, 80 S. Ct. 960, 4 L. Ed. 2d 980, reh. denied, 363 U.S. 858, 80 S. Ct. 1606, 4 L. Ed. 2d 1739, Annot., 82 A.L.R.2d 473, 562 and 7 A.L.R.3d 181, 247. An increasing group of cases has repudiated the distinction, People v. Scott, 29 Ill. 2d 97, 193 N.E.2d 814 (1963); State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957); State v. Hunt, 25 N.J. 514, 138 A.2d 1 (1958); State v. Deslovers, 40 R.I. 89, 100 A. 64 (1917), and this position is believed to be correct. As Wigmore put it, ``the risk of imposition and the need of safeguard is just as great'' in both situations. 3 Wigmore § 762, p. 111. To the same effect is McCormick § 9, p. 17. **[Editor's Note: The Advisory Committee proposal to require disclosure of documents relied on by witnesses before trial was rejected, in favor of a provision allowing disclosure only if the court, in its discretion, finds that it is necessary in the interests of justice.]**

* * *

17. Advisory Committee Note to Rule 704

Problem--The application of Rule 704 was limited by Congress' later addition of Rule 704(b).

Advisory Committee's Note

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called `ultimate

issue' rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from ``usurping the province of the jury,'' is aptly characterized as ``empty rhetoric.'' 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of ``might or could,'' rather than ``did,'' though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. People v. Wilson, 25 Cal. 2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; Clifford-Jacobs Forging Co. v. Industrial Comm'n, 19 Ill. 2d 236, 166 N.E.2d 582 (1960), medical causation; Dowling v. L. H. Shattuck, Inc., 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; Schweiger v. Solbeck, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed. **[Editor's Note: The inference in this Note, that Rule 704 imposes no limitations on ultimate issue testimony, must be qualified in light of the later addition of Rule 704(b) by Congress. Rule 704(b) prevents an expert from drawing a conclusion that a criminal defendant had or did not have the requisite mental state to commit the crime charged.]**

18. Advisory Committee Note to Rule 801

Problem--The reference to the residual exceptions is no longer accurate, because these exceptions have been combined into a new Rule 807.

Advisory Committee's Note

* * *

(3) The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions ``but having comparable circumstantial guarantees of trustworthiness.'' Rules 803(24) and 804(b)(6) **[Editor's Note: The latter exception was enacted as (b)(5), and both exceptions have been transferred to a single Rule 807 by a 1997 amendment.].** This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

Problem--Congress modified Rule 801(d)(1)(A) to include an under oath requirement.

(A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. **[Editor's Note: The Advisory Committee proposal was modified by the Congress to provide for substantive admissibility only if the prior statement was made under oath at a formal proceeding.]** As has been said by the California Law Revision Commission with respect to a similar provision:

> Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in

time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the ``turncoat'' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

Comment, California Evidence Code § 1235. See also McCormick § 39. The Advisory Committee finds these views more convincing than those expressed in People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968). The constitutionality of the Advisory Committee's view was upheld in California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

19. Advisory Committee Note to Rule 803

Problem--The Note on Rule 803(6) refers to a broader standard of covered activity than the "business" activity ultimately set forth by Congress.

Advisory Committee's Note

* * *

Exception (6) * * * The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287; Laughlin, Business Entries and the Like, 46 Iowa L. Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase ``regular course of business,'' in conjunction with a definition of ``business'' far broader than its ordinarily accepted meaning. The result

is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase ``the course of a regularly conducted activity'' as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a ``business.'' **[Editor's Note: This terminology was rejected by the Congress.]**

Problem--Congress changed Rule 803(6) in a way that could arguably affect the business duty requirement that was traditionally part of the Rule.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short ``in the regular course of business.'' If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander; the officer qualifies as acting in the regular course but the informant does not. The leading case, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. Gencarella v. Fyfe, 171 F.2d 419 (1st Cir. 1948); Gordon v. Robinson, 210 F.2d 192 (3d Cir. 1954); Standard Oil Co. of California v. Moore, 251 F.2d 188, 214 (9th Cir. 1957), cert. denied, 356 U.S. 975, 78 S. Ct. 1139, 2 L. Ed. 2d 1148; Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D.N.Y. 1965); Annot., 69 A.L.R.2d 1148. Cf. Hawkins v. Gorea Motor Express, Inc., 360 F.2d 933 (2d Cir. 1966). Contra, 5 Wigmore § 1530a, n. 1, pp. 391-92. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement ``that it was the regular course of that business for one with personal knowledge ... to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record....'' The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity. **[Editor's Note: Congress' amendment to the Rule makes it unclear whether the informant**

must be acting in the course of business activity; but Congress does not appear to have intended to reject the business duty requirement].

Problem--Rule 803 (24) has been transferred to Rule 807

Exception (24). Editor's Note: Rule 803(24) has been transferred to Rule 807. The Advisory Committee Note on Rule 803(24) has accordingly been transferred to that Rule as well.

20. Advisory Committee Note to Rule 804

Problem--Congress added a deposition preference to Rule 804(a)(5).

Advisory Committee's Note

* * *

Subdivision (a). * * * If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant. **[Editor's Note: A deposition preference was included by Congress when unavailability is asserted on grounds of absence. See the text of Rule 804(a)(5).].** * * *

Problem--Congress added a predecessor in interest requirement to Rule 804(b)(1).

Exception (1). * * * As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. Falknor, *supra,* at 652; McCormick § 232, pp. 487-88. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against

whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. The position is supported by modern decisions. McCormick § 232, pp. 489-90; 5 Wigmore § 1388. **[Editor's Note: This approach was rejected by the Congress, which provided that prior testimony cannot be used against a party unless that party or a predecessor in interest had a similar motive and opportunity to develop the testimony.]**

Problem--The dying declaration exception was renumbered (because the exception for statements of recent perception was deleted), and the Rule was limited to civil cases and homicide cases.

[Editor's Note: The exception for dying declarations, described in the Note as Exception (3), became Rule 804(b)(2) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception. Also, the dying declaration exception was amended by Congress so as to be available only in civil cases and prosecutions for homicide].

Exception (3). The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in Rex v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g., a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo.R.S. § 52-1-20, or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, p. 223, n. 4. Kansas by decision extended the exception to civil cases. Thurston v. Fritz, 91 Kan. 468, 138 P. 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters

other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of firsthand knowledge is assured by Rule 602.

* * *

Problem--The exception for declarations against penal interest was renumbered, and statements against social interest were rejected as a basis for admissibility. Also, there is an incorrect internal reference.

[Editor's Note: The exception for statements against interest, described below as Exception (4), became Rule 804(b)(3) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception. Also, the statement against interest exception was amended by Congress so as not to cover statements against the declarant's "social" interest.]

Exception (4). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. Hileman v. Northwest Engineering Co., 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2) **[Editor's Note: Now Rule 801(d)(2)]**, and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. Highman v. Ridgway, 10 East 109, 103 Eng. Rep. 717 (K.B. 1808); Reg. v. Overseers of Birmingham, 1 B. & S. 763, 121 Eng. Rep. 897 (Q.B. 1861); McCormick § 256, p. 551, nn.2 and 3.

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick § 254, pp. 548-49. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the

motivation here being considered to be as strong as when financial interests are at stake. McCormick § 255, p. 551. * * *

Problem--the exception for statements of pedigree was renumbered.

[Editor's Note: The exception for statements against interest, described below as Exception (4), became Rule 804(b)(3) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception].

Exception (5). The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore § 1483. Item (i) specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii) deals with declarations concerning the history of another person.

Problem--Rule 804(b)(5) has been transferred to Rule 807.

Exception (5). [Editor's Note: Rule 804(b)(5) has been transferred to Rule 807. The Advisory Committee Note on Rule 804(b)(5) simply referred to the commentary under the identical Rule 803(24), which in 1997 was combined with Rule 804(b)(5) into a single Rule 807.]

21. Advisory Committee Note to Rule 807

Problems--This Rule is a combination of two old Rules, so the Advisory Committee Notes to the old Rules should be transferred. Also, the Advisory Committee's proposal on residual exceptions was changed by Congress: Congress added a notice requirement, and also the requirement that the hearsay be probative of a material fact and more probative than any other evidence reasonably available. Also, there are incorrect internal references.

Editor's Note: Below is the Advisory Committee's original Note to what was then Rule 803(24). In 1997, Rule 803(24) was combined with Rule 804(b)(5) and transferred to a new Rule 807.

Advisory Committee Note to Rule 803(24)

The preceding 23 exceptions of Rule 803 and the first five **[Editor's Note: Only four were actually enacted.]** exceptions of Rule 804(b) *infra*, are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b)(6) **[Editor's Note: The Rule 804 residual exception was originally enacted as 804(b)(5).]** are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102. See Dallas County v. Commercial Union Assur. Co., Ltd., 286 F.2d 388 (5th Cir. 1961). **[Editor's Note: Congress added several limitations to the residual exception proposed by the Advisory Committee: 1) the hearsay must be more probative than other evidence reasonably available; 2) the statement must be offered as evidence of a "material fact"; and 3) the proponent must give pretrial notice.].**

[The original Advisory Committee Note to Rule 804(b)(5) stated as follows: "In language and in purpose, this exception is identical with Rule 803(24). See the Advisory Committee's Note to that provision."]

Item 10C

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of October 20-21, 1997

Charleston, S.C.

The Advisory Committee on the Federal Rules of Evidence met on October 20th and 21st at the Charleston Place Hotel in Charleston, South Carolina.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair
Hon. David C. Norton
Hon. Milton I. Shadur
Hon. Jerry E. Smith
Hon. James T. Turner
Professor Kenneth S. Broun
Mary F. Harkenrider, Esq.
Gregory P. Joseph, Esq.
Frederic F. Kay, Esq.
John M. Kobayashi, Esq.
Dean James K. Robinson
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Alicemarie H. Stotler, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. David S. Doty, Liaison to the Civil Rules Committee
Hon. David D. Dowd, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee
Gene W. Lafitte, Esq., Chair of the Standing Committee's Subcommittee on Technology
Roger Pauley, Esq., Justice Department
Joe Cecil, Esq., Federal Judicial Center

John K. Rabiej, Esq., Chief, Rules Committee Support Office
David Pimentel, Esq., Administrative Office
Mark Syska, Esq., Administrative Office
Al Cortese, Esq., Lawyers for Civil Justice
Karen Molzen, Law Clerk, District Court for the District of New Mexico

Opening Business

The Chair opened the meeting by asking for approval of the minutes of the April, 1997 meeting. These minutes were unanimously approved. The Chair expressed the pleasure of the Committee in the reappointment of Judge Jerry Smith and John Kobayashi to new terms. The Chair also welcomed Judge Bullock as the new liaison from the Standing Committee.

The Chair then reported on actions taken by the Standing Committee at its June, 1997 meeting. The Standing Committee remanded the Evidence Rules Committee's proposed amendment to Rule 103 for reconsideration. The Standing Committee accepted the Evidence Rules Committee's proposed amendment to Rule 615 in principle, but changed the proposed language of the amendment to provide that a person whose "presence is authorized by statute" cannot be excluded from trial. The Standing Committee's amendatory language has been approved by the Judicial Conference and is currently before the Supreme Court.

Rule 103

The Committee began a discussion on how to revise the proposed amendment to Evidence Rule 103 in light of the Standing Committee's comments. The major question to be decided is whether the proposal should include treatment of the issues presented in *Luce v. United States*--should the rule provide that when the effect of a ruling is triggered by a trial event, a party cannot appeal unless that event actually occurs? Comment was made that the courts (both state and federal) are generally uniform as to the implications of *Luce,* with the exception of the situation in which a party introduces the offending evidence to remove the sting of anticipated prejudice. In that situation, some courts have found a waiver of a claim of error and others have not. Yet the Committee's proposal to deal with *Luce* does not deal with this problem. Thus, one point of view expressed was that it was not necessary to codify *Luce* and its progeny, as the proposal to the Standing Committee had attempted to do.

A countervailing concern was then expressed: that the failure to mention *Luce* might lead one reading the rule to assume that there was an intent to reject *Luce*. Several members expressed the further view that *Luce* is an important decision, based on sound policy

considerations, that had to be recognized in the rule.

Another question addressed was whether the proposed amendment should be placed in a new subdivision (e), or instead added as a freestanding paragraph to subdivision (a). It was noted that the amendment will deal with all advance rulings, both pre-trial and at-trial. From this it was concluded that the amendment would be most properly placed in subdivision (a), which deals specifically with all evidentiary rulings.

There was general agreement that the heart of the Advisory Committee proposal previously sent to the Standing Committee was correct, i.e., that if the advance ruling is "definitive" a party need not renew an objection or offer of proof in order to preserve a claim of error.

A vote was taken on a motion to include the amendatory language concerning renewal of objections and offers of proof in subdivision (a) of Rule 103. All were in favor. The Committee unanimously agreed that the language should be set forth as a freestanding paragraph at the end of Rule 103(a). Because of the way the rule is structured, the amendatory language could not be added as a new subdivision (a)(3); and restructuring the existing subparagraphs of the rule would lead to a renumbering that would be confusing, especially given the many cases that have already been decided under the subdivision structure that currently exists.

A motion was made to add language codifying *Luce* and its progeny to the new freestanding paragraph in Rule 103(a). This motion was unanimously approved.

The Committee unanimously agreed to submit the proposed amendment to Rule 103(a) to the Standing Committee, with the recommendation that the Rule be published for public comment. The Committee also approved a proposed Advisory Committee Note to accompany the proposed amendment. The approved draft and the Advisory Committee Note are attached to these minutes.

Rule 615

The Kennedy-Leahy bill on victim's rights, currently in the Senate, contains a provision that would directly amend Evidence Rule 615. The bill gives the Judicial Conference a time period after passage in which to provide comments and suggestions on the legislation. The Reporter prepared some suggested drafting changes to the Congressional proposal to amend Rule 615, so that the Committee can be prepared with comments should the legislation pass. After preliminary discussion, the Committee was informed by the Administrative Office that it was unlikely that the Bill would be passed in this Congressional session. Therefore, the Chair suggested that any discussion on this matter should be tabled until the next meeting. This suggestion was unanimously approved. Members were asked to give the Reporter any comments that they might have on the suggested drafting changes.

Rule 404

The Omnibus Crime Bill, currently before Congress, proposes two changes to Evidence Rule 404. The first change would provide that if the defendant attacks the character of the victim, this would open the door to an attack on a pertinent character trait of the defendant. The second change would add "disposition toward a particular individual" as one of the proper purposes for evidence of uncharged misconduct under Rule 404(b). The Advisory Committee considered the merits of these proposals.

The Committee was in agreement that the proposed amendment to Rule 404(b) was unnecessary and unwise. It is unnecessary because the list of proper purposes in Rule 404(b) is illustrative only. It is not intended to be exclusive. The Reporter could find no case in which evidence of disposition toward a particular individual was excluded on the ground that such a purpose was not listed in Rule 404(b). The change is also unwise because it could lead courts to the erroneous conclusion that a purpose must be on the list of not-for-character purposes in Rule 404(b) in order for evidence offered pursuant to that purpose to be admissible under the Rule. The Committee concluded that Rule 404(b) should not be amended along the lines proposed in the Omnibus Crime Bill.

A majority of the Committee agreed in principle that if a defendant attacks the victim's character, this should allow the prosecution some opportunity to attack the defendant's character. There was concern, however, over the breadth of the language in the Omnibus Crime Bill proposal. After substantial discussion, the Committee agreed upon language that would limit proof of the defendant's character to evidence of a character trait that corresponds to the trait of the victim's that the defendant has attacked. This language would prevent the prosecution from attacking the defendant's credibility simply because the defendant had proven a pertinent character trait of the victim.

After agreeing in principle upon language revising the Congressional proposal, the Committee discussed whether it should simply refer this language to Congress in the form of a suggested drafting change, or whether it should propose an amendment to Rule 404(a) by way of the rules process. After extensive discussion, the Committee voted to submit a proposed amendment to Rule 404(a) to the Standing Committee, with the recommendation that the Rule be published for public comment. Two members dissented. The Committee also approved an Advisory Committee Note to accompany the proposed amendment. The approved draft and the Advisory Committee Note are attached to these minutes.

Rules 803(6), 902(11), and 902(12)

At its April, 1997 meeting, the Evidence Rules Committee approved in principle a proposal to amend Rule 803(6) to provide for a means of establishing the foundation requirements for business records other than through a live witness. This change would

correct an anomaly created by 18 U.S.C. § 3505. Under that statute, foreign business records can be proved through certification in criminal cases. But under Evidence Rule 803(6), all other business records in all other cases must be proven through a foundation witness. The Committee agreed that if Rule 803(6) were amended to permit proof by certification, then conforming amendments to Rule 902 would be required to provide that such records can be self-authenticating.

At the April meeting, some concern was expressed about the difficulty that an opponent might have in attacking the trustworthiness of self-authenticating business records. A subcommittee was appointed to determine whether language could be added to the proposed amendments to Rule 902 that would require testimonial foundation if a genuine question were raised about the trustworthiness or authenticity of the proffered records. The subcommittee reported to the Committee that such additional language was not necessary, because the proposed amendments to Rule 902 already incorporated the trustworthiness proviso from Rule 803(6). Also, a studied effort had been made in the proposed amendments to track the provisions of 18 U.S.C. § 3505, in order to provide for consistent treatment of business records in all cases. Adding language to the proposed amendments to Rule 902, when such language is not included in the statute, would result in the disuniformity that the amendments are proposed to avoid.

After discussion, the Committee voted to submit proposed amendments to Rule 803(6) and 902 to the Standing Committee, with the recommendation that these Rules be published for public comment. The Committee also approved Advisory Committee Notes to accompany these proposed amendments. The approved draft and the Advisory Committee Notes are attached to these minutes.

At the end of the discussion on this matter, it was mentioned that Civil Rule 44 deals with the admissibility of public records, and might overlap with the Rules of Evidence, particularly Evidence Rules 803(8) and 902. It was suggested that the Advisory Committee on Civil Rules might consider whether Civil Rule 44 should be deleted.

Rules 702 and 703

At the April meeting, the Committee agreed to consider whether Rule 702 should be amended to account for changes wrought by the Supreme Court's *Daubert* decision. In advance of the November meeting, the Reporter provided the Committee with background information as well as several possible working models that could be used for a possible amendment. The Chair, as well as several members, noted that there is a good deal of conflict in the cases over the meaning of the *Daubert* decision, and particularly over whether the *Daubert* standards are applicable to non-scientific expert testimony.

After a general discussion, the Committee agreed that some amendment to Rule 702 should be proposed, in light of the conflicts created by *Daubert*, and the importance of the issue to courts and litigants. An amendment through the rulemaking process was also considered important in light of the proposals in Congress to amend Evidence Rule 702. Members expressed the opinion that the Committee could perform a valuable service by setting forth some general standards that would guide a trial court in determining whether expert testimony is sufficiently reliable. Other members commented that an amendment to Rule 701 should be considered as well, to address the problem of lay witnesses who testify on technical subjects. The Committee also discussed the question of whether an amended Rule 702 should provide procedural standards to govern the timing of the hearing, notice requirements, etc. While no final decision was made on this point, several members expressed the concern that inclusion of procedural requirements in the rule might be unwise. For one thing, different procedures might have to apply to civil and criminal cases. For another, the addition of extensive and detailed procedural requirements might simply create another set of issues for appeal.

The Committee was in general agreement that any amendment to Rule 702 must cover all expert testimony, not just scientific testimony. Imposing more rigorous standards for scientific expert testimony only would create an incentive for litigants to argue that a proffered expert's methodology is completely unscientific, and therefore should be free from scrutiny. The Committee agreed that any amendment to Rule 702 must provide that all expert testimony is to be scrutinized for reliability. The Committee also agreed that any amendment to Rule 702 must concern itself not only with the theory employed by the expert, but also with the application of that theory to the specific facts of the case.

Consideration was given to the Seventh Circuit's conception of *Daubert*: that an expert should employ the same intellectual rigor in testifying that would be demanded from the expert in her professional life. Members expressed the view that language to this effect might have some utility in an amended Rule 702. It was observed, however, that the Seventh Circuit standard might be insufficient on its own to regulate expert testimony in a situation where there are no professional standards in the expert's particular field.

Finally, it was generally agreed that any amendment to Rule 702 should not be excessively long or detailed. No rule could attempt to include all the factors that should be considered in assessing the trustworthiness of all types of expert testimony. It was agreed that any details or elaborations on general principles should be left for the Advisory Committee Note.

The Chair appointed a subcommittee to prepare a working draft of Rule 702 for the next meeting, taking into account the foregoing Committee discussion and the general points of agreement that had been reached. Judge Shadur, Ken Broun, Greg Joseph, John Kobayashi, and the Reporter were named to the subcommittee, with Judge Shadur serving as the Chair of the subcommittee. The Chair of the Evidence Rules Committee will serve ex officio.

The Chair noted that the Committee had already worked on a proposed change to Rule 703, to deal with the problem of an expert who uses otherwise inadmissible information as the basis of an opinion. It was agreed that consideration of an amendment to Rule 703 must be deferred in order to be considered in tandem with the Rule 702 proposal. The Subcommittee was therefore directed to review the proposed amendment to Rule 703, and to report to the Committee at the next meeting.

Uniform Rules

Professor Leo Whinery, Reporter to the Uniform Rules of Evidence Drafting Committee, reported on developments in the effort to amend those rules. The Drafting Committee has proposed the inclusion of extensive procedural requirements in Rule 404(b). It has also proposed an amendment to Rule 801(d)(1)(B) that would codify the Supreme Court's *Tome* decision. The Drafting Committee is working on an amendment to Rule 702 that would apply a presumption of admissibility to expert testimony based on a generally accepted methodology, and a contrary presumption of inadmissibility for testimony based on a methodology not generally accepted. The Uniform Rules Drafting Committee is also proposing a change to Rule 801(d)(2) that would track the recent amendment to the Federal Rule.

Electronic Filing

Karen Molzen, Law Clerk for Chief Judge Conway of the District Court of the District of New Mexico, gave a visual presentation of a pilot program providing for electronic filing of court papers. Under a system of electronic filing, parties can file pleadings, answers, and other motions (including motions to intervene) electronically. Filings can be retrieved through Netscape for litigants and members of the public to review. The documents cannot be altered electronically once filed. The docket sheet contains hyperlinks so that relevant documents can be called up by the user. The system provides for digital signatures that are equivalent to fingerprints. Sole practicioners seem to prefer the system of electronic filing, because it makes access to the courts easier. The system contains an electronic mailbox for lawyers and judges, allowing them to keep track of orders and opinions. A digital filing stamp is created when a document is filed with the court.

Automation

The Committee discussed whether the Evidence Rules must be amended to accommodate technological changes in the presentation of evidence. One possible solution discussed is to expand the applicability of the definition of "writings" and "recordings" in

Rule 1001 to cover all of the Federal Rules. The Uniform Rules Drafting Committee is considering this solution. Research is required to determine whether any other particular rules must be amended, or whether extending the application of the Rule 1001 definition will adequately cover electronic evidence offered under other rules. The Reporter was directed to report at the next meeting on whether Rule 1001 could be amended to address computerized evidence, and whether conforming amendments to other rules might be necessary as well.

Misleading Advisory Committee Notes

At the April meeting, the Reporter was directed to prepare a list of Advisory Committee Notes that have become misleading because the Advisory Committee proposal on the particular Rule was either rejected or substantially changed by Congress. The Reporter prepared a list of such notes, together with suggested editorial comments that could be included in a published version of the Federal Rules, and that would alert the reader to the fact that the particular Advisory Committee comment is inconsistent or in conflict with the rule as promulgated. The Committee discussed how the Reporter's memorandum might be most usefully distributed. One possibility is to send a letter to all the publishers of the Federal Rules, suggesting that the editorial comments be incorporated. Another possibility is that the memorandum could be distributed in some form by the Federal Judicial Center. It was agreed that inquiries would be made to determine whether the FJC would be interested in distributing the memorandum. It was also agreed that the memorandum would not be distributed as the work product of the Advisory Committee. Rather, it would be distributed, if at all, as a memorandum prepared by the Reporter in his individual capacity.

New Business

The Chair received the text of an ABA resolution providing that the attorney-client privilege should be applied to the same extent for in-house counsel as for outside counsel. The proposal was referred to the Chair for informational purposes. After discussion, the Advisory Committee decided that it would not propose any amendment concerning privileges at this time.

Next Meeting

The Chair announced that the next meeting of the Evidence Rules Committee would take place on April 6th and 7th, 1998, in New York City.

The meeting was adourned at 9:40 am., Tuesday, October 21st.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

Item II-13

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New Orleans, Louisiana
December 5, 1997

via Federal Express

The Honorable Alicemarie H. Stotler
Chair, Committee on Rules of Practice and Procedure
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Re: Report of Subcommittee on Technology --
Committee on Rules of Practice and Procedure

Dear Judge Stotler:

This is a brief report on the activities of the Technology Subcommittee since the last meeting of the Standing Committee.

By memorandum, dated October 14, 1997, addressed to the Advisory Committee Chairs and Reporters, and Liaison Members to the Technology Subcommittee, you requested that brief outlines be submitted to me to identify "what rules might be in the amendment pipeline in the future to deal with automation changes." To date, I have received responses from the Chair of the Advisory Committee on Bankruptcy Rules, the liaison to our subcommittee from the Advisory Committee on Appellate Rules, and the reporter of the Advisory Committee on Evidence. Attached are copies of these written responses.

Assuming that this report will be included in the agenda book for the January meeting of the Standing Committee, I am attaching also a copy of my letter dated November 18, 1997, to the members of the subcommittee bringing them up-to-date on matters, and suggesting a preliminary game plan for further action. That letter mentions a memorandum from John Rabiej suggesting that our subcommittee consider whether electronic submission of public comments on proposed rules amendments via the internet would be appropriate. As of now, I have only three responses from subcommittee members on that issue, but we will develop a subcommittee recommendation to be considered by the various advisory committees at their meetings next spring.

Next, I attach a memorandum to me from Peter McCabe dated December 8, 1997, to which is attached an updated report for the rules committees on the status of electronic filing in the federal courts. I should also mention that Peter has been provided by the Clerk of Court of the federal district court for the Eastern District of Pennsylvania with copies of recommended amendments to Civil Rules 5(b) and 77(d), Criminal Rule 49(c) and Appellate Rule 3(d) in connection with fax noticing. I do not have these recommended changes, and by copy of this letter to John, I am requesting that copies be available at Santa Barbara.

As mentioned in my letter to our subcommittee, after I have received responses to your request identifying rules changes that may be needed as a result of emerging technology, I will suggest a plan for our subcommittee to review all these issues.

Finally, for the benefit of Standing Committee members, I attach a copy of the letter dated November 7, 1997, from Judge Hornby, Chair of the Committee on Court and Case Management in response to your invitation that he make a brief presentation concerning future technology at the January meeting of the Standing Committee.

I look forward to seeing you in Santa Barbara.

With best wishes,

Gene W. Lafitte

GWL:ed
Enclosures
cc: Professor Daniel R. Coquillette (w/enc.) via Federal Express
John K. Rabiej, Esq. (w/enc.) via Federal Express

115214:LAFITGE

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

October 5, 1997

Mr. Gene Lafitte
Liskow and Lewis
50th Floor, One Shell Square
701 Poydras Street
New Orleans, Louisiana 70139

Dear Gene:

After consultation with our Reporter and sub-committee chairman, Judge Cristol, I submit this response to Judge Stotler's request that the Advisory Committees submit to you a brief outline identifying what rules might be in the amendment pipeline in the future to deal with automation changes.

The Advisory Committee on Bankruptcy Rules has tentatively approved, subject to further refinement at our next meeting proposed amendments to Rules 9013 and 9014 that, among other changes, will introduce the concept of electronic service of papers. We anticipate that these opposed amendments will be presented to the Standing Committee in June 1998, with a request that they be published for comment.

As amended, Rule 9013 will govern "applications", a category of procedures that relate to certain enumerated matters that usually are nonsubstantive and noncontroversial. The proposed amendments are designed to enable parties to obtain court orders relating to these matters in a relatively short period of time.

The proposed amendments to Rule 9014 are designed to govern another form of litigation, called "administrative proceedings," in which a party may obtain a court order relating to certain matters that are substantive and often contested. An administrative proceeding will be commenced by filing a motion, and a written response will be required. Examples of administrative proceedings are motions for the appointment of a trustee in a Chapter 11 case, for the relief from the automatic stay, for approval of the assumption or rejection of an executory contract, or for approval of postpetition financing.

The proposed amendments to Rules 9013 and 9014 provide that by local rule the court may permit an application, motion, or response papers to be "served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." This language is similar to the 1996 amendments to Bankruptcy Rule 5005(a) which allow bankruptcy courts, by local rules, to permit parties to file papers by electronic means.

Kind regards.

Sincerely,

Adrian G. Duplantier

c.c. Honorable Alicemarie H. Stotler
751 West Santa Ana Blvd.
Santa Ana, California 92701

CO. ITTEE ON RULES OF PRACTICE AND PRC DURE
OF THE
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DATE: November 14, 1997

TO: Gene W. Lafitte, Chair
Standing Committee Subcommittee on Technology

FROM: Luther T. Munford, Liaison
Advisory Committee on Appellate Rules

In response to Judge Stotler's memorandum of October 14, 1997, I write to inform you that two items currently pending on the docket of the Advisory Committee on Appellate Rules might be of concern to the Subcommittee on Technology:

1. Agenda Item No. 91-17 (Uniform Plan for Publication of Opinions). At its September 1997 meeting, the Advisory Committee determined that a principal long-term project will be to consider development of uniform rules governing the publication, citation, and precedential effect of appellate opinions. The circuits currently have varying and conflicting rules and practices regarding the use of "unpublished" opinions. It is possible that the Advisory Committee will recommend rules governing the release of appellate opinions for electronic dissemination.

2. Agenda Item No. 95-5 (Amend FRAP 31 to require submission of digitally readable copy of brief, when available). Judge Easterbrook has suggested amending FRAP 32 to require counsel to file one copy of each computer-prepared brief on digital media — that is, on a computer disk — and to serve a copy of the disk on each party. This would permit judges to search the text for particular words or citations and judges with impaired vision to enlarge the text. It would also permit judges to load briefs into their laptop computers, so that they need not travel with stacks of briefs. At its September meeting, the Advisory Committee decided to retain this item on its study agenda with "medium" priority.

I should note that there is a strong consensus on the Advisory Committee that members of the bench and bar should be given an opportunity to become accustomed to the restylized appellate rules before being asked to comment on further amendments to those rules. The Advisory Committee has determined that, barring an emergency, no amendments to FRAP will be forwarded to the Standing Committee until the restylized rules have been in effect for at least a few months. If the restylized rules are approved by the Supreme Court and not blocked by

Congress, they will take effect on December 1, 1998. Thus, the Advisory Committee does not anticipate submitting proposed amendments to the Standing Committee until late 1999 or early 2000.

Please contact me if you have any questions. I look forward to working with you.

cc: Judge Will L. Garwood, Chair
Advisory Committee on Appellate Rules

Prof. Patrick J. Schiltz, Reporter
Advisory Committee on Appellate Rules

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Gene W. Lafitte, Esq.
Liskow & Lewis
50th Floor, One Shell Square
New Orleans, LA 70139

November 6, 1997

Per your request, I am enclosing a copy of the Uniform Rules Drafting Committee comment on a possible amendment to the Rules of Evidence. This amendment tries to accommodate technological changes in the presentation of evidence. As you know, the Evidence Rules Advisory Committee has decided to take up this question, but no decision has yet been made on the course that we might take. However, we will certainly be considering possible solutions like that proposed in the enclosed comment.

Best regards. I look forward to seeing you at the Standing Committee meeting in January.

Very truly yours,

Daniel J. Capra
Reed Professor of Law

Rule 106. [Remainder of or Related Records ~~Writings or Recorded Statements~~].

Whenever a record ~~writing or recorded statement~~ or part thereof is introduced by a party, an adverse party may require the introduction ~~him~~ at that time ~~to introduce~~ of any other part or any other record ~~writing or recorded statement~~ which in fairness ought to be considered contemporaneously with it.

Drafting Committee Note

The existing Comment to Rule 106 states that "[a] determination of what constitutes 'fairness' includes consideration of completeness and relevancy as well as possible prejudice."

Uniform Rule 106 also differs from its federal rule counterpart by substituting the phrase "in fairness ought" for the phrase "ought in fairness."

Two amendments to Rule 106 are proposed. First, this proposal for amending Rule 106 eliminates the gender-specific language in the rule which is technical and no change in substance is intended.

Second, the Drafting Committee proposes amending Uniform Rule 106 to substitute the word "record" for the language "writing or recorded statement" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the ~~American Bar~~ Association. Comparable amendments are also made in Rules 612, 801(a), 803(5) through (15), 803(17), 803(24), 901 through 903 and 1001 through 1007.

"Record" is defined by amending Rule 1001(1) of the Uniform Rules of Evidence to embrace the definition of "record" as follows:

> "Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form. All writings, including documents, memoranda and data compilations, audio recordings, videotapes and all photographs are records.

This definition of "record" is derived from § 5-102(a)(14) of the Uniform Commercial Code and would carry forward established policy of the Conference to accommodate the use of electronic evidence in business transactions. The Drafting Committee has inserted for completeness in the foregoing definition of record the words "audio recordings, videotapes" between the words "compilations," and "and all photographs."

In proposing these changes in the Uniform Rules of Evidence, the Task Force believes they "are desirable to ensure that records are placed on the same plane with writings." It further argues as follows:

> To be sure, courts have been generally receptive to the introduction of electronic evidence, at least to the extent courts' actions are revealed in reported appellate opinions. * * * But reported opinions do not tell the entire story. A business person, in deciding whether to rely upon electronic media rather than writings for the storage of business records, may ask his or her lawyer for assurances that business records stored in electronic media will be as reliable as records stored in writings--that is to say, if legal rights must be enforced in court, the business person can have some degree of confidence that information stored electronically will be admissible as information stored in written format. The existing rules and case law do not permit an unambiguous response to this reasonable request.
>
> While the reported appellate cases give some assurance that the courts will lean in the direction of using the structure of the current rules to permit reliance upon electronic evidence, there is still the question of what happens at the trial court level on a day-to-day basis when records electronically stored are sought to be used in evidence. If the trial court refuses to permit admission of electronically stored records into evidence, the parties will likely incur additional expense to prove up the case in other ways, or even settle the case on less favorable terms, rather than appeal the case to get the evidentiary ruling corrected. Consequently, to the extent that the Uniform Rules of Evidence can be amended at least so as to put electronic records on a par with writings, the business community can have greater confidence that it can rely upon electronic records and thereby achieve desired efficiencies and productivity gains.

FILE COPY

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New Orleans, Louisiana
November 18, 1997

To: Members of the Subcommittee on Technology of the Standing Rules Committee (Distribution List Attached)

Dear Friends:

I look forward to working with all of you as members of the Subcommittee on Technology of the Standing Rules Committee. Our work should be interesting and challenging, and I certainly welcome your suggestions and comments as we move ahead.

Because I am new to the subcommittee, I have had discussions with Judge Stotler to gain an understanding of the purposes and objectives of the subcommittee. Our basic responsibility is to monitor carefully rule changes that will be necessary to accommodate application of technologies adopted for use in the federal court system, and of course, to assist the advisory committees in initiating those rule changes. Keeping abreast of technological developments and uses will be formidable, because of the number of committees and groups involved with technology in the court system -- e.g., the Judicial Conference Committee on Automation and Technology, the Judicial Conference Committee on Court and Case Management, and the like. Our plan is to keep aware of the work of these committees and groups through the Administrative Office of the courts and the Rules support staff.

Judge Stotler has already requested of the advisory committees that we be furnished any input each committee may have as to rules that may require amendment in the future to deal with automation changes. In addition, I anticipate receiving from the federal district court in New Mexico a "list" of civil rules problems encountered in the implementation there of a pilot program on electronic case filing procedures. As I receive this input from the advisory committees and from the New Mexico court, I will, of course, provide the material to you.

On another note, I am attaching a copy of a memorandum to me from John Rabiej of the Rules Committee Support office suggesting that the subcommittee consider whether electronic submission of public comments on proposed rules amendments via the Internet would be appropriate. In his memorandum, John notes some pros and cons for the proposal.

Judge Stotler indicated that she would like to have the views of each advisory rules committee before a final decision is reached on this issue. It seems appropriate for our subcommittee to reach a preliminary consensus on this question and share it with each advisory rules committee before the respective spring 1998 meetings. Please let me have your thoughts on this issue. After I have heard from you, we can decide whether a conference call would be advisable to brainstorm about the matter.

Finally, once I have received responses to Judge Stotler's request identifying rules changes that may be needed as a result of emerging technology, I will begin to draw up a plan for the subcommittee to review all these issues, including the electronic submission of public comments.

I will be reporting on all of this to the Standing Rules Committee at its January, 1988 meeting.

Thanks for your help. Once again, I look forward to working with you.

With best wishes,

Gene Lafitte/E.D.

Gene W. Lafitte

GWL:ed
Attachment
cc: The Honorable Alicemarie H. Stotler (w/o attachment)
Professor Daniel R. Coquillette (w/o attachment)
Advisory Committee Reporters (w/attachment)
Richard G. Heltzel, Esq. (w/attachment)

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

October 31, 1997

MEMORANDUM TO GENE W. LAFITTE

SUBJECT: *Receipt of Comments on the Internet*

The proposed amendments to the federal rules, which were published for comment on August 15, 1997, are located on the Judiciary's Home Page on the Internet <http://www.uscourts.gov>. My office now has the capability to receive public comments on the proposed amendments directly on the Internet via E-mail. An E-mail address can be established at my office and we could receive all electronic comments, reproduce them, and circulate hard copies to each committee member.

Although we considered receiving comments electronically, a final decision was deferred. We need now to reach a consensus among our advisory rules committees on this issue. As we earlier discussed, your subcommittee could review this matter and report back to their respective committees the subcommittee's conclusions and recommendations. Hopefully the advisory rules committees will be able to agree on the subcommittee's proposals so that we can present the Standing Rules Committee with a uniform recommendation.

We have identified several arguments for and against the proposal, which may help the subcommittee's deliberations.

Arguments in Favor of Electronic Comments

- Electronic submission of comments would be consistent with the rules committees' policy of reaching out to the bar and public and informing them of proposed rules changes and encouraging public input.

- Electronic submission of comments meets recommendation No. 5 of the Standing

Committee's Self-Study Plan, which recommends to the Administrative Office that: "Electronic technologies should be used to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees." The text of the plan includes a specific recommendation that "Persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee."

Arguments Against Electronic Comments

- Comments via E-mail are less likely to be as well thought out as comments submitted in writing, and many may not be serious.

- Under the Judicial Conference rulemaking procedures, each reporter must "prepare a summary of the written comments received and the testimony presented at the public hearings." Summarizing all Internet comments may be burdensome. Online comments may be viewed as non-written comments, or a clear disclaimer could be included on the Internet Home Page stating that all electronic comments will be circulated to each committee member, but will not be included in the summary of comments. But such treatment may perceived as establishing a "second-class" category of comments.

- Although not required by the Judicial Conference rulemaking procedures, my office has acknowledged each comment and followed it up with a communication explaining the advisory committee's response. Continuing to respond to each electronic comment would probably be impossible, but we could provide a generic explanation of the committee's actions and place it on the Internet.

John K. Rabiej

NAMES AND ADDRESSES OF THE TECHNOLOGY SUBCOMMITTEE

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WASHINGTON, D.C. 20544

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December 8, 1997

MEMORANDUM TO: Gene W. Lafitte, Esq.
Chair, Subcommittee on Technology
Committee on Rules of Practice and Procedure

SUBJECT: Status Report on Electronic Filing in the Federal Courts

Attached for your consideration is an updated report for the rules committees on the status on electronic filing in the federal courts and the potential rules issues arising from the judiciary's efforts to develop and implement electronic case file systems. You will receive further reports on this topic periodically and as developments warrant.

Peter G. McCabe
Secretary to the Committee

Attachment

December 1997

Electronic Filing: A Status Report for the Rules Committees

I. Introduction

A year ago, the federal rules of procedure were amended to authorize courts to accept litigation papers in electronic form.[1] The amendments specifically provide that

> [a] court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.[2]

Empowered by this change, several local courts now are working to identify and test appropriate technology to accept and maintain court records in digitized form. As outlined in an attachment to this report, an Electronic Case Files (ECF) Initiative is also proceeding nationally to develop or acquire "core" electronic case file systems that interested courts can adapt to fit local needs.

II. Potential Issues Affecting the Federal Rules

A. *Issues Arising in ECF Experimentation*

Issues with potential implications for the federal rules of practice and procedure are already surfacing in the ongoing federal court experiments with electronic case filing. The following is a list of issues identified to date:

- Can electronic filing (or certain requirements for electronic filing) be authorized by a court's general or case-by-case orders, rather than by local rule?
- To what extent should initial case pleadings be filed and served electronically in view of filing fee and jurisdictional issues?
- Can service or notice of other documents filed in a case be provided electronically inasmuch as the rules now provide only for service by hand delivery, mail, or leaving a copy with the clerk (Fed. R. Civ. P. 5(b)), and various bankruptcy rules require "notice" of proposed actions?

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[1] Fed. R. Civ. P. 5(e); Fed. R. Bank. P. 5005; Fed. R. App. P. 25(a)(2)(D) (all effective Dec. 1, 1996). Fed. R. Crim. P. 49(d) provides that papers in criminal actions be filed in the manner provided in civil actions.

[2] Fed. R. Civ. P. 5(e). The language of the companion bankruptcy and appellate rules is essentially the same.

- Who—the courts or the parties—should be responsible for service of pleadings and providing proof of service?

- Should notice of court orders and opinions be provided electronically to the parties and, if so, how should it be done?

- Should the timeliness of filings be determined, and action deadlines be computed, differently when filing and service are accomplished electronically by some or all parties?

- How should signatures be verified, especially in terms of "Rule 11" requirements?

- How should signatures be verified on documents not signed by the attorney (e.g., affidavits and bankruptcy schedules of assets and liabilities)?

- How to handle questions involving document format, including:
  — documents received in a technologically incompatible format (and the accompanying potential issues involving timeliness and service of papers); and
  — other software incompatibilities among electronic filers?

B. *Technical Standards*

The 1996 rules amendments authorized electronic filing at local court option, subject to any technical standards the Judicial Conference may adopt. Accordingly, the Administrative Office developed and, in December 1996, circulated a series of "Proposed Technical Standards and Guidelines for Electronic Filing in the United States Courts" for comment in the judiciary and legal community. The proposed standards and guidelines were revised in light of the comments received and presented to the Committee on Automation and Technology at its June 1997 meeting. Recognizing that any standards may need to be further updated in response to other developmental efforts currently under way within the ECF Initiative, that committee chose not to recommend Judicial Conference approval at this time, but instead approved them as "interim technical standards" that courts choosing to implement electronic filing may use as guidance for their efforts.

III. Conclusion

As the judiciary moves forward to develop and implement ECF capabilities, it may be appropriate to consider additional amendments in the federal rules to resolve issues identified during the experimental stage. The staff in the Office of Judges Programs (OJP) assigned to the ECF Initiative will continue to monitor rules-related developments in the courts conducting ECF experiments and in other aspects of the Initiative. Any new or updated information will be

forwarded to the Technology Subcommittee through the Rules Committee Support Office. OJP staff are currently preparing a comparative summary of the electronic filing procedures adopted by local rule, general order, or other method in the 10 courts presently testing electronic filing systems. That summary should be available before the Standing Committee's January 1998 meeting.

The ECF Initiative

The Judicial Conference Committee on Automation and Technology has established the Electronic Case Files (ECF) Initiative as one of four priority Information Resource Management initiatives under the *Long Range Plan for Automation in the Federal Judiciary.*[1] Under that committee's oversight, the Administrative Office manages the ECF Initiative with guidance from an ad hoc ECF Advisory Group (consisting of judges, clerks, and other court managers), and with additional participation from the courts, other government agencies, the bar, and other court users in various forums (including other Judicial Conference committees). The overall objective of the ECF Initiative is to seek consensus on, and expedite the development and implementation of, judiciary-wide electronic case files and case file management systems within the next two to four years. Through the Initiative, ECF systems will be developed that provide flexibility for the individual courts, allowing each court to implement basic capabilities, and to build upon them, according to its local needs.

A fully developed ECF system would be expected to receive documents in electronic form at the earliest possible point, ideally from the person who creates the document. An ECF system would not only contain everything presently included in a paper case file, but could also accommodate the court's internal case-related documents. On the assumption that the transition away from paper documents should promote savings for the courts, an ECF system should include at least the following capabilities:

- electronic submission of documents to, from, and within the court;
- appropriate management of electronic documents, including storage and security;
- docket entries through information provided electronically by the filing party;
- case management based upon the electronic documents and docket entries; and
- retrieval of documents and case files, including public and remote access.

An ECF system should also be modular, enabling each court to implement its capabilities at its own pace. For example, a court could begin using the system with manually filed paper documents only; move through stages with varying proportions of paper documents, court-imaged electronic documents, attorney-imaged electronic documents, and electronic text documents; and eventually reach a stage where most filings are electronic text documents filed and docketed by attorneys.

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[1] Beginning with Fiscal Year 1998, that document is renamed the *Long Range Plan for Information Technology in the Federal Judiciary.*

To pursue these goals, the ECF Initiative consists of three closely interrelated efforts: coordination of the case management system modernization projects; assessment of ECF prototype systems; and further development of the legal and policy issues posed by ECF.

A. *Coordination of Case Management Systems Modernization Projects*

The ECF Initiative is coordinating the separate projects to modernize automated case management systems in the courts of appeals, district courts, and bankruptcy courts, respectively. Under the Initiative, the three projects are now moving together to define, with assistance from courts and other users, the functional requirements that ECF/case management systems would be expected to satisfy. After that process is completed, the three projects will jointly consider the alternatives for meeting the requirements that have been defined.[2]

The three case management modernization projects will be closely coordinated through the process of defining ECF requirements and analyzing alternative solutions. This is essential to gain efficiencies in defining and acquiring common elements of the new systems, and to ensure an adequate degree of consistency and data-sharing among the three court types. Coordination will enable development of common data and other standards to facilitate electronic exchange of information within and among court units throughout the judiciary and to eliminate redundant data entry in different court units.

Coordination under the ECF Initiative is also necessary because of the expected overlap of functions between an electronic case file system and a new automated case management system. Indeed, the capability to handle electronic case files would be an essential feature of any new case management system. Efforts to implement ECF and case management capabilities in the different court types may follow more independent paths (while remaining under the general aegis of the Initiative) after the analysis of alternatives is completed. The separate projects, however, will have the benefit of consistent sets of basic requirements and a common view of the available alternatives for implementation.

B. *Assessment of ECF Prototypes*

A number of federal courts are already operating "prototype" ECF systems. Using a system developed by the Administrative Office, the Northern District of Ohio began receiving electronic filings in maritime asbestos cases through the Internet in January 1996. The Ohio Northern system now manages over 10,000 such cases and has saved the court from handling many thousands of paper documents. Nearly 50 attorneys from around the country have not only

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[2]The Administrative Office employs a controlled procedure for managing the development and deployment of automated systems. The definition of functional requirements and a formal analysis of alternatives are the first and second phases of the five-phase process.

submitted more than 125,000 documents in electronic form, but have also simultaneously and automatically created the court's official docket entries. Late in 1996, the bankruptcy court in the Southern District of New York began testing a prototype ECF system based on the same model that now handles more than 100 Chapter 11 cases, with an average 5 to 10 electronic filings every day.

Based on the early success in the two courts, the Administrative Office has expanded the capabilities of the prototype systems in the first two courts and is working to test those systems in three other district courts (Western District of Missouri, Eastern District of New York, and District of Oregon) and four other bankruptcy courts (Southern District of California, Northern District of Georgia, District of Arizona, and Eastern District of Virginia, Alexandria Division). Each of those courts has agreed to test the functionality of the prototype system initially in specified types of civil actions (e.g., non-prisoner civil rights and employment discrimination cases, intellectual property disputes, cases involving the federal, state and local governments or large national law firms) and various categories of bankruptcy cases (under Chapters 7, 11, and 13). Ultimately, however, the prototypes will be expanded to include broader categories of cases.

Other courts are moving more independently to test ECF capabilities. The district court in New Mexico has developed an Internet-based system with somewhat different capabilities than the Administrative Office prototypes. And the district court in the Southern District of Texas and the bankruptcy courts in the Western District of Oklahoma and the District of Kansas have each constructed their own electronic case files by having court staff scan paper documents into their systems.

All these efforts have already begun to demonstrate that ECF is feasible and could yield savings for the courts. Under the Initiative, the experience gained from the various prototypes and experiments will provide useful information for the above-described modernization efforts, aiding in the identification of functional requirements, providing possible alternatives to consider, and serving as test beds for the cost-benefit analyses needed to demonstrate the expected returns of ECF systems.

C. *Further Development of Legal and Policy Issues*

Moving towards implementation of ECF capabilities will require the federal judiciary to resolve numerous legal and policy questions—including several that may implicate the federal rules. The Administrative Office's March 1997 discussion paper, *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues, and the Road Ahead*, provides a vision for how the courts might implement ECF systems and identifies "topics for further study." The ECF Initiative will follow up on that paper with legal analyses, planning support, policy development, and educational efforts. Among the legal, technical, and management issues to be addressed are:

- authentication, security, and preservation of electronic documents
- possible changes in procedural rules governing service, notice, timeliness, and document format
- appropriate access for all users, and encouragement of user participation
- funding of new systems and services (i.e., through appropriations, user fees, etc.)
- management of judiciary resources (e.g., staff utilization, education and training, allocation of courthouse space)
- potential use of commercial providers of electronic filing services (including questions of public access to court records, custody of public documents, document security, procurement requirements, and court staffing)
- integration of ECF systems with other automated sources of litigation-related information; and
- myriad administrative details needed to implement a timely shift from paper to electronic files.

D. *Status of the Initiative—December 1997*

The ECF Initiative is currently focusing on the above-described activities. The prototype systems developed by the Administrative Office are operational in eight of the nine courts mentioned above (the Southern District of California bankruptcy court is expected to begin testing of its system in December). Those systems continue to receive enhancements and provide substantial experience-based information that may guide further developments. Staff and other participants in the Initiative continue to make presentations to court and bar groups to raise awareness in the court community and to receive feedback from that community. Dialogue groups are being formed on the J-Net to facilitate discussion on the legal and policy issues associated with ECF. Efforts are currently on schedule to complete the definition of functional requirements by June 1998, complete the analysis of alternatives by September to December 1998, and make ECF systems available for implementation within the targeted two-to-four year period.

COMMITTEE ON COURT AND CASE MANAGEMENT
of the
JUDICIAL CONFERENCE OF THE UNITED STATES

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November 7, 1997

Honorable Alicemarie H. Stotler
United States District Court
United States Courthouse
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Dear Judge Stotler:

Re: Request to Attend Standing Committee Meeting

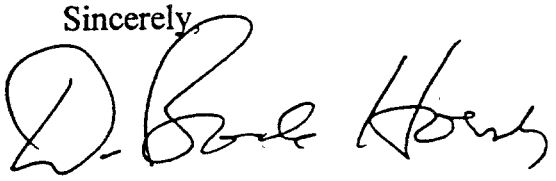
I appreciate receiving your letter of October 27, 1997, inviting me to make a brief presentation concerning future technologies that the Committee on Court Administration and Case Management ("CACM") foresees in connection with courtroom presentation as well as case management at the January meeting of your Committee. I understand from your letter that the Chair of the Committee on Automation and Technology ("CAT") is also invited to attend and discuss related issues. While the opportunity for communication between our Committees is always welcomed, I believe that it may be premature for someone from the CACM Committee to address the Standing Committee on Rules of Practice and Procedure regarding courtroom technology issues at this time.

As I am sure you are aware, the Electronic Courtroom Project is conducting an extensive assessment of various courtroom technologies under the auspices of the CAT Committee. My understanding is that the study will not be completed until the summer of next year. Although the CACM Committee has a sense of some of the policy issues that may need to be addressed as a result of the use of new courtroom technologies, our

Committee's role will only begin in earnest once we have received the final report from the project. In the meantime, the CAT representative will be able to provide to you a knowledgeable overview of the technologies and of the present study.

While I appreciate your Committee's desire to be ready to have rule changes in place to accommodate new technologies, we are not in a position to provide input at this time. I hope that the invitation will be reissued after the results of the study are ready for review. Thank you for keeping our Committee in mind, and I look forward to working with you and the Standing Committee on issues of mutual concern.

Sincerely,



D. Brock Hornby

cc: Honorable Edward W. Nottingham
Mr. Gene W. Lafitte
Mr. John K. Rabiej

Item 14-15

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

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Memorandum

TO: Honorable Alicemarie Stotler,
Committee on Rules of Practice and Procedure,
Chairs and Reporters of Advisory Committees

FROM: Mary P. Squiers MS

RE: Annotated Bibliography

DATE: December 5, 1997

Attached please find an annotated bibliography of articles and other writings discussing court cost and delay in the federal courts. The document covers material published during the time from September 1, 1996 through the summer of 1997. As you may recall, I have provided you with several earlier annotations, the first covering material published through approximately April, 1991, the second covering material published from January, 1991 through June, 1992, the third covering material from June, 1992 through June, 1993, the fourth covering June, 1993 through the summer of 1995, and the fifth covering material through the summer of 1996. This document is the result of long work from my research assistant, Wenyu Ho, who is now a second-year law student at Boston College. Wenyu's assistance was invaluable.

I will be available at the Standing Committee meeting in January to discuss any particular issues or questions you may have concerning this material.

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1. INTRODUCTION

This document is the sixth edition of an annotated bibliography of scholarly articles and other writings that discuss court cost and delay in the federal civil justice system. It covers articles published from September 1, 1996 through the summer of 1997. It contains 24 articles, mostly coming from law reviews and other periodicals, with a special emphasis on empirical studies of cost and delay reduction techniques. The focus was on the federal court system, but particularly informative writings on the state courts were also included. Most news-type articles, opinion pieces, duplicative writings, articles that have been "mooted" by subsequent revisions of law, writings on general topics of civil procedure, and other materials only marginally related to cost and delay reduction have been omitted.

2. RESEARCH METHODOLOGY

Citations to most of the writings described herein were obtained by using the WestLaw computer network. Several different queries, the most fruitful of which are listed below, were used within the TP-ALL database.

To find articles addressing general topics of cost and delay reduction (for example):

> ((COST TIME RESOURC! DELAY CONGESTION) /5 (SAVE REDUCE DECREAS! MINIMIZ! PREVENT CURTAIL)) /30 ((TRIAL LITIGATION JUSTICE PROCEDURE COURT) /10 (REFORM IMPROVE CHANGE)) & DATE (AFTER SEPTEMBER 01, 1996)

To find articles addressing specific topics of cost and delay reduction (for example):

> ("DIFFERENTIATED CASE MANAGEMENT" "DCM") & ("FEDERAL COURTS" "DISTRICT COURTS") & (COST TIME DELAY CONGEST! CASELOAD) /30 (REFORM SAVE SAVING! DECREAS! MINIMIZ!) & DATE (AFTER SEPTEMBER 01, 1996)

To find articles by some of the leading writers in the field (for example):

> AU (ROBEL DUNWORTH STIENSTRA SUBRIN) & DATE (AFTER SEPTEMBER 01, 1996)

The LegalTrac CD-ROM database was also researched with the keywords CIVIL PROCEDURE, COURT CONGESTION AND DELAY, and REFORM.

Finally, the footnotes of all investigated materials were perused for other significant and current articles and leads.

3. EXPENSE AND DELAY REDUCTION IN GENERAL

3.1 Is There A Litigation Crisis?

Molly Treadway Johnson & Scott A. Gilbert, *The U.S. Sentencing Guidelines, Results of the Federal Judicial Center's 1996 Survey, Report to the Committee on Criminal Law of the Judicial Conference of the United States,* Federal Judicial Center, 1997.

This report contains the results of surveys of district and circuit court judges, as well as chief probation officers, regarding their experiences and perceptions of the Federal Sentencing Guidelines. The surveys asked judges and officers to point out areas they believed require substantive change. The report is broken down by ranking these areas of concern. Part Two highlights the broader issues which respondents believed should be addressed. They include judicial discretion and departures, prosecutorial discretion and control of sentences, plea bargaining practices, and mandatory minimum and quantity-based sentences. Part Three discusses specific portions of the guidelines which could be improved upon. These areas are: relevant conduct, standards of proof at sentencing, alternatives to incarceration, role in the offense, multiple-count guidelines, and stabilizing the guidelines. Finally, Part Four points out the topics of less concern among those surveyed. Offense guidelines, acceptance of responsibility, supervised release and probation, appellate issues, criminal history, and retroactivity of guidelines amendments were subjects which judges and probation officers believed should receive less consideration by the U.S. Sentencing Commission. This compilation of surveys is an excellent source for anyone interested in finding out how those most closely connected with the guidelines perceive its strengths and weaknesses.

3.2 The Civil Justice Reform Act of 1990 (CJRA)

Advisory Group for the District of North Dakota, *Second Annual Assessment of the Civil Justice Reform Act Advisory Group,* 72 N.D. L. Rev. 821, 1996.

As a result of the Civil Justice Reform Act of 1990, the Advisory Group for the District of North Dakota proposed a Civil Justice Expense and Delay Reduction Plan, which was adopted by the court in 1993. This is the second annual assessment of the plan, reviewing the period from December 1, 1994 through June 30, 1996. The Plan received a favorable report, with the Advisory Group noting that firm trial dates and pretrial schedules have increased court efficiency and decreased costs. Specifically, two provisions in the original Plan which had originally been reserved for reexamination came up for review. Regarding Rule 26(a)(1), the Group recommended implementing initial disclosure provisions but on a more case-by-case basis. The Advisory Group saw no need, however, to change any aspect of voluntary alternative dispute resolution. The Advisory Group concluded that the Plan was effective in processing the civil case docket and reserved the option to review Rule 26.

Stephanie B. Goldberg, *Rand-ly Criticized,* 83-APR A.B.A. J. 14, April, 1997.

This article reports on the study conducted by the RAND Institute for Civil Justice on the effectiveness of reforms implemented by ten federal district courts under the 1990 Civil Justice Reform Act. The five-year study concludes that most reforms, such as mediation, mandatory arbitration, and judicial case management have neither reduced cost nor delay. Furthermore, the study shows that, in most jurisdictions, the reforms never occurred due to grassroots backlash or ineffective implementation. The study did find, however, that a combination of reforms, such as setting early trial dates, having litigants at settlement conferences or available by phone, reducing discovery time, and having judges manage cases soon after filing could reduce the time to case disposition by as much as thirty per cent. Also, the study argues that the advisory committees not only helped raise awareness of court delay but also improved communication between the judges and attorneys. Finally, the public reporting requirement which forces from the courts semiannual reports of all cases more than three years old has caused a twenty-five per cent decline in those types of cases.

James S. Katalik, Terence Dunworth, Laurel A. Hill, Damiel McCaffrey, Marian Oshiro, Nicholas M. Pace, & Mary E. Vaiana, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act,* RAND, 1996.

RAND's Institute for Civil Justice attempted to study the effect of the 1990 Civil Justice Reform Act (CJRA) on federal district courts. The 1996 Report contains three technical documents which evaluate the implementation and effect of certain case management principles adopted by ten pilot district courts. This executive summary synthesizes the findings of the three reports and presents an overview of the CJRA, the method of

evaluation, and principle findings. The summary concluded that "the CJRA pilot program, as the package was implemented, had little effect on time to disposition, litigation costs, and attorneys' satisfaction and views of the fairness of case management." Furthermore, although the districts did follow the statutory requirements of the CJRA, some changes were not fully implemented. The report did find, however, that the case management techniques of individual judges could have an impact on court cost and delay. Finally, the report noted that, since the implementation of the CJRA, the number of civil cases pending has increased; however, the number of cases pending for more than three years has dropped 25 per cent.

James S. Katalik, Terence Dunworth, Laurel A. Hill, Damiel McCaffrey, Marian Oshiro, Nicholas M. Pace, & Mary E. Vaiana, *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act,* RAND, 1996.

This is one of the four documents in the 1996 RAND Report of the Civil Justice Reform Act (CJRA). It describes the actual effect of the six CJRA case management principles on costs, time to disposition, and litigants' views of fairness. The study concluded that, while early judicial case management decreased time to disposition, it also increased attorney work hours and cost to litigants. However, it discovered that, by combining a shortened time for discovery with early judicial management and the early setting of trial dates, the time to disposition could be reduced by 30 per cent, with no impact on litigation costs, attorney hours worked, satisfaction of participants, or the perception of fairness.

James S. Katalik, Terence Dunworth, Laurel A. Hill, Damiel McCaffrey, Marian Oshiro, Nicholas M. Pace, & Mary E. Vaiana, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act,* RAND, 1996.

This is one of the four documents in the 1996 RAND Report of the Civil Justice Reform Act (CJRA). It assesses the effect of six different alternative dispute resolution (ADR) programs which included mediation and early neutral evaluation. The report determined that, once litigation had begun, ADR did not have a significant impact on time, costs, or perceived satisfaction of the participants. It did note, however, that the litigants who participated in the programs enjoyed ADR. The only statistic that the study found to be significant was the fact that cases utilizing ADR were much more likely to have a monetary outcome than those not using ADR.

James S. Katalik, Terence Dunworth, Laurel A. Hill, Damiel McCaffrey, Marian Oshiro, Nicholas M. Pace, & Mary E. Vaiana, *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts,* RAND, 1996.

This is one of the four documents in the 1996 RAND Report of the Civil Justice Reform Act (CJRA). It traces the implementation of the CJRA in each of the pilot programs. Although all of the districts adhered to the statutory language of the act, there was much variation in the actual adoption of the case management principles. In some districts, the recommendations were not fully implemented. The report concludes, however, that the creation of the act may have "heightened the consciousness of judges and lawyers and brought about some important implicit shifts in their approach to case management."

3.3 Other Legislative Activity

Carl Tobias, *Ongoing Federal Civil Justice Reform in Montana,* 57 Mont. L. Rev. 511, Summer 1996.

The author provides an update of developments regarding civil justice reform in the United States and in the Montana federal district court following a previous article in the same journal. On the national level, the Senate passed a measure intended to reform securities litigation while the House of Representatives passed the AAA, the SLRA, and the PLLRA. Professor Tobias argues these proposals could affect federal civil justice reform. In particular, he believes that aspects of the AAA and product liability reforms which govern procedure and fee shifting should be rejected because they may negatively affect the national process for revising rules or improperly restrict federal court access. In Montana, the Ninth Circuit Local Rules Review Committee (LRRC) was created to examine local procedures against the Federal Rules of Civil Procedure and requirements in the United States Code. The author supports the creation of the committee and urges that the Montana Federal District Court work with the LRRC to detect inconsistencies or duplications between the local and federal rules Finally, Professor Tobias cautions against adoption of additional legal reforms while the federal districts are continuing to experiment with different measures for decreasing court cost and delay.

4. FEDERAL RULES OF CIVIL PROCEDURE

4.1 Rule 16

Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation,* 85 Calif. L. Rev. 225, January, 1997

The article looks at the courts' use of "rocket dockets", the setting of early, firm trial dates at the outset of proceedings, to decrease civil docket delay. Although the author concedes that rocket dockets do create some risks to procedural and substantive fairness, she argues that it is, nonetheless, an appropriate, if limited, solution to the problem of delay. The author proposes several solutions to minimize the recognized risks. She suggests: "(1) formalizing the procedures whereby courts consider requests for trial date continuances; (2) using pretrial conferences to narrow discovery issues as early as possible; and (3) on review, finding prejudice from the denial of a continuance to conduct further discovery on a showing that a party was precluded by the shortness of time from collecting material evidence or locating material witnesses, rather than requiring a showing of adverse trial outcome" (at 225). Ms. Johnson argues that these safeguards will allow a more speedy civil docket, while maintaining the appearance of fairness.

4.2 Rule 26

John Burritt McArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time limits,* 24 Hofstra L. Rev. 865, Summer, 1996.

This article proposes the adoption of mandatory, uniform pretrial deadlines in order to address the problem of delay in federal and state courts. The author suggests that "time limits are the most direct solution to the problem of delay; time limits impose the least burden on the rights of the parties, far less than capping the amount of discovery; and empirical studies have shown the time limits work." (at 868) The author argues that, because most of the delay occurs in discovery, pretrial time limits offer the most effective solution. Empirical studies show that strict enforcement of uniform time frames and limiting the amount of discovery, rather than the number of depositions or interrogatories, is crucial to controlling the delay problem. Specifically, courts should set a firm pretrial schedule and order all discovery to be conducted within a nine-month period, rule promptly on each discovery and dispositive motion, set a trial date within one year of the first hearing, schedule a second hearing three months before the trial date, and force all parties not ready for trial to present a list of uncompleted discovery and their plan for gathering the necessary information. Furthermore, the court should be given a limited amount of cases they may exempt from the above limitations in order to allow for some flexibility. Finally, the article also urges for more judges to ease the backlog of cases and sanctions to ensure compliance by judges.

Federic G. Melcher, *The Positive Effect of Early Discovery Management: A Summary of the Discovery Recommendations in the RAND Report on the Civil Justice Reform Act,* 36 NO. 2 Judges' J. 14, 1997.

This article focuses on the RAND Report's finding that judicial management of discovery significantly reduced attorney work hours as well as the time to disposition. The study, however, also concluded that lawyer work hours and litigant costs were not affected by the type of disclosure (mandatory or voluntary) a court demanded. The author points out that the pilot programs in the Civil Justice Reform Act had little impact on overall cost and delay. Nevertheless, he concurred with the Report's opinion that case management procedures, if tailored to specific districts, could affect court time, cost, satisfaction, and fairness perceptions.

Discovery Guidelines Reducing Cost and Delay, 36 No. 2 Judges' J. 9, Spring, 1997.

This article highlights steps taken by the government to reduce court cost and delay in the area of discovery. Because discovery has traditionally been abused by the litigants, courts are now testing various methods of controlling the discovery process. The attempt to reform civil justice has resulted in a shift toward mandatory disclosures, limitations on discovery, and referrals for arbitration. The guidelines in this article were approved by the NCSTJ Executive Committee and the Judicial Division Council in February, 1997, and will be submitted to the ABA House of Delegates at the August 1997 Annual Meeting.

4.3 Rule 54

Elizabeth C. Williamson, *The 1996 Florida Administrative Procedure Act's Attorney's Fees Reforms: Creating Innovative Solutions or New Problems,* 24 Fla. St. U. L. Rev. 439, Winter, 1997.

This article examines the Florida legislature's 1996 revisions of the Administrative Procedure Act regarding attorney's fees provisions. It found that the changes increased the efficiency of the administrative process. On the other hand, the study also concluded that the amendments resulted in more crowded court dockets, increased litigation costs, chilled agency actions, and created more expenses for the agency and the public. Nevertheless, the author concludes that adoption of certain provisions would minimize the costs while maintaining the benefits of the amendments.

5. ALTERNATE DISPUTE RESOLUTION

5.1 In General

Mori Irvine, *The Lady or the Tiger: Dispute Resolution in the Federal Courts,* 27 U. Tol. L. Rev. 795, Summer, 1996.

This article examines the impact dispute resolution has on federal courts. While the author is not troubled by settlement at the district court level, she does question the effect it has at the appellate level with regard to the evolution of federal law. The author is concerned with the possibility that a settlement may weaken the law by removing the adversarial characteristics of trial and relieving the judges of their duty to decide an important case. The article concludes that the impact of alternative dispute resolution remains undetermined, and cautions against complete adoption of the process.

Judith S. Kaye, *Business Dispute Resolution-- ADR and Beyond,* 59 Alb. L. Rev. 835, 1996.

In this opening statement at the Symposium on Business Dispute Resolution, Judge Kaye discussed the subject of ADR and its increase in popularity over the past two decades. Focusing on specific examples in New York, she points to the success of the state court system in setting up mechanisms to provide ADR for the business community. Specifically, the State Court ADR Project has recently recommended pilot projects for each of the state's judicial districts which include a State Court ADR Office and education for attorneys and judges. ADR has been effective in decreasing litigation costs and offering flexibility to parties searching for specially tailored solutions. However, Judge Kaye does raise some issues which must be addressed in order to make ADR programs even more effective, such as whether ADR should be mandatory, how a mediator should be chosen, and how the programs should be funded and administered

Kathryn M Werdegar, *The Courts and Private ADR Partners in Serving Justice,* 51-SEP Disp. Resol. J. 52, January, 1997.

In many situations, ADR is often much better suited than the courts to resolve certain cases. A mediator or arbitrator who is an expert in the subject matter of conflict can deal with cases more efficiently by focusing discussions on the primary issues. Furthermore, ADR will help ease the court's caseload by offering a flexible, economical, and innovative approach to

settling disputes. Courts lend credibility to ADR, create the legal parameters of the procedure, and enforce the controlling substantive laws. The author argues that not only are the courts and ADR highly interactive, but also they are extremely dependent on each other. Thus, while ADR should be used to find a settlement, the courts must focus on maintaining the integrity of the dispute resolution process.

5.2 Summary Jury Trial

Ann E. Woodley, *Strengthening the Summary Jury Trial: A Proposal to Increase Its Effectiveness and Encourage Uniformity in Its Use,* 12 Ohio St. J. on Disp. Resol. 541, 1997.

This report is the second article of a two-part series designed to evaluate the effectiveness of a summary jury trial in decreasing court cost and time. Relying on surveys submitted to federal district court judges and federal magistrates, Professor Woodley highlighted four issues which affect the willingness of courts and litigants to use a summary jury trial (SJT). They are: "the lack of uniformity in the applicable rules and the use of the process; the lack of necessary limitations on time, expenses, inequality of participation by the parties and other factors affecting the reliability of the SJT verdict; the lack of guidance for the courts, such as the choosing of appropriate cases, the application of sanctions, whether SJT verdicts should be binding, whether the judge and jury members present at the SJT can also participate at the trial should a settlement not be reached; and various other barriers to the use and effectiveness of SJTs." (at 541) The author proposes solutions designed to remedy these problems in the form of a model local court rule. This article is unique because it utilizes comments and reactions from federal judges and magistrates. Thus, it provides recommendations from the people who are responsible for conducting summary jury trials and who can articulate exactly what must be done to enhance the effectiveness of the SJT. Professor Woodley concludes that the summary jury trial would be an effective settlement device if the recommended solutions were implemented. Finally, she argues that the time to make proposals is before the Civil Justice Reform Act of 1990 expires on December 1, 1997.

5.3 Mediation

Anne M. Burr, *Building Reform From the Bottom Up: Formulating Local Rules for Bankruptcy Court-Annexed Mediation,* 12 Ohio St. J. on Disp. Resol. 311, 1997.

This article attempts to provide guidance for bankruptcy courts trying to implement ADR programs. Specifically, the author believes that bankruptcy court-annexed mediation would be the most effective method in decreasing court cost and delay. Furthermore, mediation is desirable because it offers flexibility during the settlement process, and its nonadversarial nature is more likely to promote ongoing business relationships, which are important to a successful organization. Ms. Burr proposes that the guidelines for bankruptcy court-annexed mediation rely on the principle of building reform from the bottom up. Thus, the author supports an amendment to Bankruptcy Rule 9019 which authorizes nonbinding ADR programs, including court-annexed mediation, but still allows the programs to be implemented on a district-by-district basis. Ms. Burr offers minimum guidelines for the scope of the mediation program, the qualification of the mediators, the procedure and standard for participation in the program, and confidentiality throughout the mediation in order to maintain uniformity, formality, and enforceability. Otherwise, the programs should be adapted according to the needs of the individual jurisdiction.

John B. McCammon, *Mediation Fast Becoming Method of Choice in Resolving Disputes,* 14 No. 8 Matrim. Strategist 4, September, 1996.

This article attempts to highlight the advantages of mediation in resolving family disputes. The author points out that the changing structure of the American family created a need for new methods of reaching resolution in conflicts. Mediation allows the parties to engage in discussion aided by an expert capable of encouraging a constructive session. Furthermore, a trained, neutral third party will most likely expose the real issues in a conflict, improve communication by finding a common ground for the parties, and offer flexible and creative settlement possibilities while preserving relationships. Finally, the author offers some suggestions in how to select an attorney and what roles the attorney should play in the process.

Robert J. Niemic, *Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers,* Federal Judicial Center, 1997.

This is a highly useful reference guide on mediation and conference programs currently in existence in the various federal courts of appeals. It offers detailed descriptions and general information about each circuits' mediation and conference programs. There is an excellent introductory table giving concise information on the way each circuit manages its mediation and conference programs and the results they achieve. The substantive portion of the book explores more in-depth each circuit's management practices. It breaks down each section by circuit, and covers areas such as: the selection of cases for conferences; how the conferences are scheduled; how the conference sessions are conducted; other rules or policies affecting the

proceedings; the settlement process; and various aspects of program administration. In addition, the sourcebook also includes judges who may be contacted for more information with regards to a particular circuit. This report provides an easy way to reference the management practices of individual circuits.

Mark R. Privratsky, *A Practitioner's Guide to General Order 95-10: Mediation Plan for the United States District Court of Nebraska,* 75 Neb. L. Rev. 91, 1996.

In 1995, the United States District Court for the District of Nebraska adopted General Order 95-10 which requires federal judges to encourage certain cases for mediation. This article is a comprehensive guide for practitioners whose cases are referred for mediation. The author briefly discusses the relationship between mediation and the Nebraska Dispute Resolution Act and the Civil Justice Reform Act of 1990. He then traces the path a hypothetical case designated for mediation would take, beginning with the types of cases most likely to be referred for mediation. Not only does this paper describe the mechanics of maneuvering a case through this intricate system but it also offers advice to the attorney in her dealings with clients and judges. The author highlights the options a party has during the mediation, such as whether the litigants want attorneys present in the mediation. He then offers the advantages and disadvantages for taking such an action. In addition, the paper discusses specific aspects of the process, for example, filings and motions, costs, and evidentiary concerns. The author provides helpful commentary to guide the party throughout the decisionmaking process. The article concludes with the argument that General Order 95-10 is still in the experimental stage, it will most likely "create speedier dispositions, reduce litigation costs, and eliminate or at least substantially shorten delay." (at 116)

6. DIFFERENTIATED CASE MANAGEMENT

Rya W. Zobel, *Resource Guide for Managing Prisoner Civil Rights Litigation,* Federal Judicial Center.

This is an excellent guide for Federal judges, pro se law clerks, and anyone interested in the management of prisoner litigation. Because over 95 per cent of all prisoner suits are filed pro se and in forma pauperis, the majority of the cases are settled without trial. Thus, courts will be able to lighten their administrative burden by developing procedures which effectively manage the cases during the initial screening and pretrial processes. The report offers suggestions on how the courts can effectively manage prisoner civil rights cases and adapt their procedures to meet requirements set by the Prisoner Litigation Reform Act (PLRA) passed April

26, 1996. It describes the new provisions of the law and the potential effect on management practices. Part I summarizes the PLRA, Part II describes current approaches taken by the courts to manage civil rights cases, and Part III addresses specific case management procedures and the impact of the PLRA on various legal requirements and management options. The guide is particularly helpful because it discusses laws and procedures both prior to and after the passage of the Prisoner Litigation Reform Act. It highlights the different procedures a court should adopt in order to better process prisoner civil rights cases by including commentary on popular procedures and recommending proposals which have proven to be the most useful in various court systems.

7. BANKRUPTCY PROCEDURE

Gordan Bermant, Arlene Jorgensen Hillestad, & Aaron Kerry, *Chapter 11 Venue Choice by Large Public Companies: Report to the Committee on the Administration of the Bankruptcy System,* Federal Judicial Center, 1997.

This report is based on an August, 1996 survey of bankruptcy judges on whether the bankruptcy venue statutes and procedural rules should be altered. Specifically, the survey asked the judges whether they believe 28 U.S.C. s. 1408 should be amended "to prohibit corporate debtors from filing for relief in a district based solely on the debtor's state of incorporation or based solely on an earlier filing by a subsidiary in the district." (p. 1) Of the 221 judges who responded, 37 per cent believed that the statute should be amended, 34 per cent disagreed, 25 per cent did not know, and the remaining final 7 judges did not reply. In addition, the survey also questioned the judges on their interpretation of the language in the bankruptcy venue transfer statute (28 U.S.C. s. 1412), and solicited any further comments about venue and venue transfer in Chapter 11 cases. The second part of this report examined the characteristics of large corporate Chapter 11 cases where plans were confirmed during 1994 and 1995 and also discussed the consequences of venue selection in situations where more than one filing site was available. Finally, the authors analyzed the impact of the current statute on case management, magnet courts, and the inconvenience to creditors regarding cases filed in Delaware and New York.

Anne M. Burr, *Building Reform From the Bottom Up: Formulating Local Rules for Bankruptcy Court-Annexed Mediation,* 12 Ohio St. J. on Disp. Resol. 311, 1997.

This article attempts to provide guidance for bankruptcy courts trying to implement ADR programs. Specifically, the author believes that bankruptcy court-annexed mediation would be the most effective method in

decreasing court cost and delay. Furthermore, mediation is desirable because it offers flexibility during the settlement process, and its nonadversarial nature is more likely to promote ongoing business relationships, which are important to a successful organization. Ms. Burr proposes that the guidelines for bankruptcy court-annexed mediation should rely on the principle of building reform from the bottom up. Thus, the author supports an amendment to Bankruptcy Rule 9019 which authorizes nonbinding ADR programs, including court-annexed mediation, but still allows the programs to be implemented on a district-by-district basis. Ms. Burr offers minimum guidelines for the scope of the mediation program, the qualification of the mediators, the procedure and standard for participation in the program, and confidentiality throughout the mediation in order to maintain uniformity, formality, and enforceability. Otherwise, the programs should be adapted according to the needs of the individual jurisdiction.

Elizabeth C. Wiggins, Molly Treadway Johnson, Gregory A. Mahin & Robert J. Niemic, *Survey on the Federal Rules of Bankruptcy Procedure,* Federal Judicial Center, 1996.

This report is part of the Long-Range Planning Subcommittee of the Judicial Conference's Advisory Committee on Bankruptcy Rules' attempt to conduct a comprehensive review of the Federal Rules of Bankruptcy Procedure to decide whether any of the rules should be amended. Bankruptcy, district, and circuit court judges, as well as bankruptcy court personnel, law professors, and bankruptcy practitioners were asked for their opinions on the organization, scope, and format of the Bankruptcy Rules; the relationship between rules and the Bankruptcy Code; local bankruptcy rules, and the incorporation of Federal Rules of Civil Procedure into the Bankruptcy Rules. Most of those surveyed did not advocate changing the Bankruptcy Rules or report any dissatisfaction with its procedures. After reviewing the results of the survey, the subcommittee recommended that three areas merited a closer examination: issues related to litigation practice; issues related to attorney admissions and ethics; and inconsistencies in the hearing requirements. Additionally, the subcommittee also pointed out other areas of procedure, such as the time frames for filing objections to discharge and inconsistencies in the removal and remand procedures, which deserve analysis by the Advisory Committee. Finally, the report also contains suggestions made by the respondents in order to bring current procedures into harmony with the Bankruptcy Reform Act of 1994.

8. **OTHER PUBLICATIONS, SOURCES, AND ARTICLES.** (The following articles, while not focusing on court cost and delay in the federal civil justice system, may be of interest because of their broader policy arguments on civil justice reform and related issues):

Afshin Ashourzadeh, *Supplemental Jurisdiction in Class Action Lawsuits: Recovering Supplemental Jurisdiction From the Jaws of Aggregation,* 26 Sw. U. L. Rev. 89, 1996.

Sarah Evans Barker, *Federal Court Long Range Planning: Fine Lines and Tightropes,* 71 Ind. L. J. 859, Fall, 1996.

Robert G. Bone, *Modeling Frivolous Suits,* 145 U. Pa. L. Rev. 519, January, 1997.

Hiram E. Chodosh, et. al., *Egyptian Civil Justice Process Modernization: A Functional and Systemic Approach,* 17 Mich. J. Int'l. L. 865, Summer 1996.

Cathy A. Costantino and Christina Sickles Merchant, *How to Design Conflict Management Systems,* 14 Alternatives to High Cost Litig. 48, April, 1996.

Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR,* 59 Alb. L. Rev. 847, 1996.

Ronald J. Fleury, Pamela Brownstein & Jeffrey Kanige, *How Wilentz Changed the Courts,* 7 Seton Hall Const. L. J. 411, Winter, 1997.

Marie L. Garibaldi, *Tribute: The Honorable Robert N. Wilentz, Chief Justice Robert N. Wilentz's Role in the Development of Complementary Dispute Resolution,* 7 Seton Hall Const. L. J. 335, Winter, 1997.

Robert T. Kenagy, *Whirlpool's Search for Efficient and Effective Dispute Resolutions,* 59 Alb. L. Rev. 895, 1996.

George Lange, *Technology in the Courts,* 13 No. 4 Compleat Law. 42, Fall 1996

Patrick E. Longan, *Congress, the Courts, and the Long Range Plan,* 46 Am. U. L. Rev. 625, February, 1997.