ADVISORY COMMITTEE
ON
CIVIL RULES

Charleston, South Carolina
November 12-13, 1998

AGENDA
Advisory Committee on Civil Rules
November 12-13, 1998

I. Opening Remarks of Chairman

   A. Report on the June 1998 Standing Committee Meeting
   B. Adjournment of Congress
   C. Overview of Items for Committee Consideration

II. Approval of Minutes of March 16-17, 1998, Meeting

III. Report of Discovery Subcommittee (Oral Report)

IV. Preliminary Report of the Mass Tort Working Group (To be Distributed Separately)

V. Civil Rule 83: Local Rules

VI. Abrogation of Copyright Rules

VII. Civil Rule 51: Jury Instruction Requests Before Trial and More

VIII. "Prison Litigation Reform Act" Provision Affecting Time to Answer Complaint in Prisoner Suit

IX. Report on Pending Items for Committee Consideration (To be Distributed Separately)

X. Duration of Rulemaking Process

XI. Long-term Agenda

XII. Appellate Rule 26.1: Financial Disclosure

XIII. Designation of Time and Place of Next Meeting

ADVISORY COMMITTEE ON CIVIL RULES

Chair:

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

Area Code 410
962-4210

FAX-410-962-2277

Members:

Honorable C. Roger Vinson
Chief Judge, United States District Court
United States Courthouse
100 North Palafox Street
Pensacola, Florida 32501

Area Code 850
435-8444

FAX-850-435-8489

Honorable David F. Levi
United States District Judge
2504 United States Courthouse
650 Capitol Mall
Sacramento, California 95814

Area Code 916
498-5725

FAX-916-498-5464

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

Area Code 713
250-5980

FAX-713-250-5213

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

Area Code 651
848-1160

FAX-651-848-1162

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

Area Code 212
805-0246

FAX-212-805-7920

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Honorable John L. Carroll United States Magistrate Judge United States District Court Post Office Box 430 Montgomery, Alabama 36101	Area Code 334 223-7540 FAX-334-223-7114
Honorable Christine M. Durham Justice of the Utah Supreme Court Scott M. Matheson Courthouse 450 S. State Street, P.O. Box 140210 Salt Lake City, Utah 84114-0210	Area Code 801 238-7945 FAX-801-238-7980
Professor Thomas D. Rowe, Jr. Duke University School of Law Science Drive at Towerview Box 90360 Durham, North Carolina 27708-0360	Area Code 919 613-7099 FAX-919-613-7231
Mark O. Kasanin, Esquire McCutchen, Doyle, Brown & Enersen Three Embarcadero Center San Francisco, California 94111	Area Code 415 393-2144 FAX-415-393-2286
Sheila L. Birnbaum, Esquire Skadden, Arps, Slate, Maegher & Flom LLP 919 Third Avenue New York, New York 10022-3897	Area Code 212 735-2450 FAX-212-735-2000
Andrew M. Scherffius, Esquire Andrew M. Scherffius, P.C. 400 Colony Square, Suite 1018 1201 Peachtree Street, N.E. Atlanta, Georgia 30361	Area Code 404 881-6464 404-881-6467
Myles V. Lynk, Esquire Dewey Ballantine LLP 1775 Pennsylvania Avenue, N.W. Washington, D.C. 20006-4605	Area Code 202 862-1000 202-862-1093

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Assistant Attorney General Civil Division (ex officio) Honorable Frank W. Hunger U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530	Area Code 202 514-3301 FAX-202-514-8071

Liaison Members:

Honorable Adrian G. Duplantier United States District Court United States Courthouse 500 Camp Street New Orleans, Louisiana 70130	Area Code 504 589-7535 FAX-504-589-4479
Sol Schreiber, Esquire Milberg, Weiss, Bershad, Hynes & Lerach One Pennsylvania Plaza, 49th Floor New York, New York 10119-0165	Area Code 212 594-5300 FAX-212-868-1229

Reporter:

Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, Michigan 48109-1215	Area Code 734 764-4347 FAX-734-763-9375

Secretary:

Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, D.C. 20544	Area Code 202 273-1820 FAX-202-273-1826

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106
Area Code 215-597-2399
FAX 215-597-7373

Honorable Will L. Garwood
United States Circuit Judge
903 San Jacinto Boulevard
Suite 300
Austin, Texas 78701
Area Code 512-916-5113
FAX 512-916-5488

Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130
Area Code 504-589-7535
FAX 504-589-4479

Honorable Paul V. Niemeyer
United States Circuit Judge
United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201
Area Code 410-962-4210
FAX 410-962-2277

Honorable W. Eugene Davis
United States Circuit Judge
556 Jefferson Street, Suite 300
Lafayette, Louisiana 70501
Area Code 318-262-6664
FAX 318-262-6685

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159
Area Code 617-552-8650,4393
FAX-617-576-1933

Patrick J. Schiltz
Associate Professor
University of Notre Dame
Law School
Notre Dame, Indiana 46556
Area Code 219-631-8654
FAX-219-631-4197

Professor Alan N. Resnick
Hofstra University
School of Law
121 Hofstra University
Hempstead, NY 11549-1210
Area Code 516-463-5872
FAX-516-481-8509

Professor Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215
Area Code 734-764-4347
FAX 734-763-9375

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602
Area Code 210-431-2212
FAX 210-436-3717

CHAIRS AND REPORTERS (CONTD.)

Chairs

Honorable Fern M. Smith
United States District Judge
United States District Court
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102
Area Code 415-522-4120
FAX 415-522-4126

Reporters

Professor Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, New York 10023
Area Code 212-636-6855
FAX 212-636-6899

I-A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 18-19, 1998
Santa Fe, New Mexico

DRAFT MINUTES

The midyear meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Santa Fe, New Mexico, on Thursday and Friday, June 18-19, 1998. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Alan C. Sundberg, Esquire
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Deputy Attorney General Eric H. Holder, Jr. represented the Department of Justice and attended part of the meeting. He was accompanied by Deborah Smolover and Stefan Cassella of the Department. Judge John W. Lungstrum articipated as a liaison from the Court Administration and Case Management Committee.

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

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Professor Richard L. Marcus, special reporter to the Advisory Committee on Civil Rules, participated in the meeting and shared in the presentation of the advisory committee's report.

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, project director of the local rules project; Thomas E. Willging and Marie Leary of the Research Division of the Federal Judicial Center; and Jean Ann Quinn, law clerk to Judge Stotler.

INTRODUCTORY REMARKS

Changes in Committee Membership

Judge Stotler introduced Mr. McCartan and welcomed him to his first meeting as a committee member. She reported that her own term on the committee and that of Mr. Sundberg were due to expire on October 1, 1998. She expressed great satisfaction that the Chief Justice had just named Judge Anthony J. Scirica to succeed her as committee chair on October 1, 1998. She also congratulated Chief Justice Veasey on his imminent succession to the presidency of the Conference of Chief Justices. Following committee tradition, all the members, participants, and observers introduced themselves in turn and made brief remarks.

March 1998 Judicial Conference Action

Judge Stotler reported that the Judicial Conference at its March 1998 meeting had adopted the recommendation of the Advisory Committee on Criminal Rules that the Conference oppose pending legislation that would reduce the size of the grand jury. She added that the Director of the Administrative Office had sent a letter on behalf of the Conference to Representative Goodlatte, sponsor of the legislation, stating the reasons for opposition.

Judge Stotler stated that the Conference had discussed proposals to remove the current prohibition in 18 U.S.C. § 3060 and FED. R. CRIM. P. 5(c) preventing a magistrate judge from granting a continuance of a preliminary examination in the absence of consent by the defendant.

Although the Magistrate Judges Committee had recommended that the Conference seek an amendment to the statute, it was suggested during Conference deliberations that the better course would be to follow the rulemaking process and amend Rule 5(c). Judge Stotler emphasized that this procedural matter had demonstrated the need for close coordination with other committees of the Judicial Conference on legislative proposals.

Judge Stotler reported that she had written a letter to Mr. Mecham, Director of the Administrative Office, expressing concern over a growing tendency in the Congress to pursue legislation that would amend the federal rules directly or otherwise circumvent the Rules Enabling Act. She noted, for example, that several provisions in the pending, comprehensive bankruptcy legislation — especially sections dealing with bankruptcy forms — reflected unfamiliarity with the rulemaking process established by the Act.

Judge Stotler said that she had acknowledged to Mr. Mecham the success of the Administrative Office's legislative efforts to protect the rulemaking process and deflect harmful statutory proposals. She had also urged greater interchange and dialog between the Legislative Affairs Office of the Administrative Office and the advisory committees, as well as additional dialog with both members and staff of the Congress.

Judge Stotler noted that Judge Niemeyer would represent the rules committees at the June 29, 1998 meeting of the long range planning committee liaisons of the Judicial Conference. She emphasized that defending the Rules Enabling Act process was a priority goal of the committee's long range planning process. Other long range planning priorities of the committee included restyling the federal rules and addressing the impact of technology on the rules.

Judge Sear reported that he had appeared at Judge Stotler's request on behalf of the committee before the ad hoc committee of the Judicial Conference studying: (1) the respective mission and authority of the Federal Judicial Center vis a vis the Administrative Office in education and training; and (2) the advisability of creating a special mechanism to resolve disputes between the two organizations. He stated that the ad hoc committee had emphasized that the Judicial Conference is the policy-making body for the judiciary, and that the Federal Judicial Center is the judiciary's primary educational body, but that the Administrative Office needs to maintain its own educational programs. He added that an interagency coordinating committee of senior managers of the two agencies had been formed to resolve disputes, but it was not expected that there would be a need for the committee to meet.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 8-9, 1998.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 28 bills and three joint resolutions were pending in the Congress that would affect the rules process. Summaries of each of the provisions, he noted, were set forth in the agenda report of the Administrative Office. (Agenda Item 3A) He added that 11 letters had been sent to the Congress on these legislative provisions expressing the views and concerns of the rules committees, and in some cases those of the Judicial Conference.

Mr. Rabiej stated that Judge Davis, chair of the Advisory Committee on Criminal Rules, had testified before the House Judiciary Subcommittee on Crime on proposed legislation that would amend FED. R. CRIM. P. 46 to authorize forfeiture of a bail bond only if the defendant fials to appear as ordered by the court.

He reported that the House had passed H.R. 1252. Section 3 of that legislation, now pending in a separate bill in the Senate, would authorize an interlocutory appeal of a decision to grant or deny certification of a class action. He pointed out that Judge Niemeyer had written to Senators Hatch and Leahy urging that they oppose section 3 on the grounds that: (1) it would achieve substantially the same results as new Rule 23(f) approved by the Supreme Court and due to take effect on December 1, 1998; and (2) it suffered from drafting problems that would introduce confusion and generate satellite litigation. He expressed confidence that if the legislation proceeded further, section 3 would either be eliminated or converted to a provision accelerating the effective date of new Rule 23(f).

Mr. Rabiej noted that S. 1352, introduced by Senator Grassley, would undo the 1993 amendments to FED. R. CIV. P. 30(b) and take away from parties the flexibility to use the most economical method of reporting depositions.

He pointed out that Judge Niemeyer had informed Representative Coble, chair of the House Judiciary Subcommittee on Courts and Intellectual Property, that the Advisory Committee on Civil Rules was planning to publish a proposed abrogation of the copyright rules for comment. At Mr. Coble's request, though, the committee had decided to defer the matter for another year.

Mr. Rabiej reported that the committee had notified Senator Kohl that the advisory committee had completed its discussion of protective orders and had decided to oppose his legislation that would require a judge to make particularized findings of fact before issuing a protective order under FED. R. CIV. P. 26(c). Mr. Rabiej also reported that the Administrative Office was continuing to monitor a bill that would federalize most class actions.

Administrative Actions

Mr. Rabiej reported that the Administrative Office was ready to place proposed amendments to the federal rules on the Internet for public comment. Some members suggested that the bar should be informed through notices in legal journals and newspapers about the opportunity to send comments electronically regarding the amendments on the Administrative Office's home page.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) She noted that the Center had conducted nearly 1,500 educational programs in 1997 that had reached 41,000 participants. The number of people reached, she said, will increase as a result of the new programs being developed for the Federal Judiciary Television Network.

She mentioned that the Center had more than 40 research programs pending and referred specifically to two of them: (1) a study of mass torts, focusing on policy and case management issues in the settlement of mass torts; and (2) a study on the use of expert testimony, specialized decision makers, and case management innovations in the National Vaccine Injury Compensation Program.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 12, 1998. (Agenda Item 5)

Judge Garwood stated that the advisory committee had approved several proposed amendments at its April 1998 meeting. But the committee had decided not to seek authority to publish the proposals for comment. Rather, it would hold them for publication in 1999 or 2000.

Judge Garwood said that a great deal of praise was due to Judge Logan for his prodigious and very successful efforts in achieving a complete restyling of the appellate rules. He noted that the restyled rules had recently been approved by the Supreme Court and would take effect on December 1, 1998.

Professor Schiltz reported that the advisory committee was considering a number of other potential changes in the appellate rules, but it wanted the bar to become familiar with the new, restyled appellate rules before requesting authority to publish any further proposed

amendments. He added that several of the most recent changes approved by the advisory committee were intended to address complaints by the bar about the proliferation of local court rules. The advisory committee had decided to approve certain national provisions in order to promote national uniformity.

He pointed out that the advisory committee was very supportive of the concept of establishing a uniform effective date for all local rules. He added that it had approved a proposed amendment to FED. R. APP. P. 47(a)(1) that would establish an effective date of December 1 for all revisions to local court rules. The amendment would allow a court to establish a different effective date for a specific rule only if there were an "immediate need" for the rule. It would also provide that a local rule may not take effect until it is received in the Administrative Office. He noted, however, that the Administrative Office wanted an opportunity to study the likely administrative and logistical consequences flowing from the proposal.

Professor Schiltz reported that the advisory committee had announced at the last Standing Committee meeting that its priority long-term project was to consider promulgating uniform national rules on unpublished opinions in the courts of appeals. But, he said, that after careful consideration, the matter was removed from the committee's agenda.

Professor Schiltz also reported that the advisory committee at its last meeting had discussed the desirability of: (1) shortening the length of the Rules Enabling Act process; and (2) permitting public comments on proposed rules amendments to be submitted to the Administrative Office electronically through the Internet. He said that the consensus of the Advisory Committee on Appellate Rules was that the Rules Enabling Act process is too long, but it did not have specific recommendations to shorten it. With regard to Internet comments, the advisory committee favored the proposal.

He said that the advisory committee had also addressed whether there was a need for national rules governing attorney conduct. He noted that a national standard of conduct was set forth in FED. R. APP. P. 46, that the rule had worked well, and that the advisory committee was not aware of serious problems with attorney conduct in the courts of appeals. He added that the advisory committee would be pleased to appoint members to serve on an ad hoc committee to consider attorney conduct, but the committee had no special expertise in this area. He also pointed out that some members of the advisory committee had expressed reservations regarding the proposed draft national rules on attorney conduct. He noted that they were broad in scope, and some of them went beyond conduct related to federal court proceedings. They governed, for example, conduct in a law office, such as confidentiality of client matters. Members of the advisory committee had also expressed concern as to possible limits on the authority of the rules committee to promulgate rules in this area.

Judge Stotler asked Judge Garwood and Professor Schiltz to share these comments and any other reservations of the advisory committee with the reporters of the other rules committees.

Professor Coquillette noted for the record that he personally did not advocate adoption of the 10 illustrative federal attorney conduct rules. He noted that he had been asked as reporter to prepare them only as a model of what national rules might encompass. He said that any set of national rules that the Standing Committee might adopt could be narrower than the 10 draft rules. He added that there was substantial support for a single national rule or a very small number of national rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier presented the report of the advisory committee, as set forth in his memorandum and attachments of May 11, 1998. (Agenda Item 6)

Rules Amendments for Judicial Conference Approval

Judge Duplantier reported that the advisory committee was recommending that the Judicial Conference approve proposed amendments to 16 rules. The proposals had been published in August 1997. The advisory committee had considered the comments at its March 1998 meeting and was now seeking final approval of the amendments.

Professor Resnick stated that seven of the 16 amendments dealt with the issue of an automatic 10-day stay of certain bankruptcy court orders which, if not stayed, could effectively moot any appeal by the losing party. Three of the amendments dealt with narrowing certain notice requirements. Several of the remaining amendments, he said, involved technical matters.

10-Day Stay Provision

FED. R. BANKR. P. 7062 and 9014

Professor Resnick explained that FED. R. BANKR. P. 7062, which applies to all adversary proceedings, incorporates FED. R. CIV. P. 62 by reference and imposes a 10-day stay on the enforcement of all judgments. The advisory committee would not change this provision.

Bankruptcy Rule 9014 governs contested matters, which are initiated by motion. It specifies that Rule 7062 (and Civil Rule 62) apply to contested matters, unless the court directs otherwise. But Rule 7062 — the adversary proceeding rule — sets forth a laundry list

of specific categories of matters, added piece by piece over the years, that are excepted from the 10-day stay provision, all of them contested matters.

Professor Resnick said that the current structure and interaction of these rules was awkward, and it had caused problems in application. As a result, the advisory committee had appointed an ad hoc subcommittee to take a fresh look at the operation and effect of the 10-day stay on all types of contested matters.

After considerable study, the subcommittee and the full advisory committee concluded that it was appropriate to restructure the rules and separate the procedures for adversary proceedings from those for contested matters. First, it had decided to eliminate from Rule 9014 the reference to FED. R. BANKR. P. 7062 (and Civil Rule 62). Second, it would remove the list of excepted contested matters from Rule 7062. As a result, the rules would provide that orders in contested matters — unlike orders in adversary proceedings — would become effective upon issuance, and there would be no 10-day stay.

The committee decided, however, that there were a few types of contested matters to which the 10-day stay should apply as a matter of policy. Professor Resnick explained that the committee had concluded that it was best to relocate the stay provisions for these matters to the specific rules governing these contested matters.

FED. R. BANKR. P. 3020

Professor Resnick noted that Rule 3020 governs confirmation of a plan. He explained that the law today is ambiguous as to whether the court's confirmation order is stayed automatically. The advisory committee would amend the rule to make it clear that an order confirming a plan is stayed for 10 days after the entry of the order to allow a party to file an appeal. He added, though, that a bankruptcy judge would have discretion not to apply the 10-day stay in an individual case, or to shorten the length of the stay.

FED. R. BANKR. P. 3021

Professor Resnick stated that the proposed change in Rule 3021 was a technical amendment conforming to amended Rule 3020 and the 10-day stay of an order confirming a plan.

FED. R. BANKR. P. 4001

Professor Resnick stated that the proposed amendment to Rule 4001, dealing with relief from the automatic stay under section 362 of the Bankruptcy Code, was the most controversial proposal contained in the package of published amendments. He explained that, under the proposed revision, the parties would have 10 days to file an appeal from a judge's

order granting a motion for relief from the automatic stay unless the judge ordered immediate enforcement.

He noted that the advisory committee had received 13 letters during the public comment period addressing this provision, the majority of which had expressed opposition to the amendment. Several commentators were concerned that it would not be fair to give a debtor — whose request to life the automatic stay under section 362 of the Bankruptcy Code is denied by the court — an additional automatic 10 days enjoyment of the premises or automobile that is the subject of the lift-stay motion. Professor Resnick said that the advisory committee had debated the merits of the matter carefully and had voted to proceed with the amendment on the merits. He added that the moving party may always ask for immediate enforcement of an order lifting the stay, and the court has authority to include a provision for immediate enforcement in its order.

FED. R. BANKR. P. 6004

Professor Resnick explained that Rule 6004 governs court orders authorizing the use, sale, or lease of property. He said that the most common use of the rule involves application by the debtor to sell assets out of the ordinary course of business. He reported that the advisory committee concluded that this was the type of order that should be stayed for 10 days to allow the losing party to file an appeal. The 10-day stay was necessary because otherwise the holder of the property could sell it immediately to a good faith purchaser and effectively moot any appeal.

FED. R. BANKR. P. 6006

Professor Resnick said that the advisory committee proposed a similar provision in Rule 6006. He explained that the assignment of an executory contract was akin to a sale of property under Rule 6004, and an order authorizing the assignment should be stayed for 10 days to allow an appeal before the assignment is consummated.

Professor Resnick said that the proposed amendments to rules 3020, 3021, 4001, 6004, and 6006 were based on considerations of fundamental fairness. The advisory committee was aware of the need for finality of judgments but, on balance, it believed that it was necessary to establish a presumption of a 10-day stay in these discrete categories of contested matters in order to prevent a party's right of appeal from being mooted.

Some of the members expressed concern over the proposed amendments on the ground that they would delay time-sensitive matters and shift the burden from the losing party to the successful moving party. They stated that in ordinary civil litigation, there are not the same time-sensitive considerations as in bankruptcy.

Professor Resnick explained that ordinarily in civil cases there is a 10-day stay of all judgments. The proposed amendments to the bankruptcy rules, however, would provide a general rule that there is no 10-day stay in contested matters. But the above amendments to Rules 3020, 3021, 4001, 6004, and 6006 were designed as specific exceptions to the general rule. Moreover, the moving party can always ask the judge to waive the 10-day stay on the grounds that there is time sensitivity in a given case. In other words, in the specified excepted categories of contested matters the proposed amendments give the losing party 10 days to appeal the judgment, as under FED. R. CIV. P. 62.

The committee approved the proposed amendments to Rules 3020, 3021, 4001, 6004, and 6006 by a vote of 8 to 4. It approved all the other proposed amendments without objection.

B. Other Proposed Amendments

FED. R. BANKR. P. 1017

Professor Resnick stated that Rule 1017 currently provides that when a motion to dismiss is made — either for failure of the debtor to file schedules or for failure to pay the filing fee — the clerk must send notice of the motion to all creditors. He explained that the advisory committee had been asked by the Administrative Office to save money by considering limits on the amount of noticing to be performed by the clerk. The proposed amendment would have the clerk serve notice of the motion only on the debtor, the trustee, and such other entities as the court may direct.

A new subdivision 1017(c) would be added to specify the parties who are entitled to receive notice of the motion to dismiss. Professor Resnick explained that without the new subdivision there would be a gap in the rules, in that there would be no way to ascertain who must receive notice of the motion.

Professor Resnick pointed out, however, that in the new "litigation package" of amendments recommended by the advisory committee for publication, the substance of Rule 1017(c) would be moved to Rule 9014 as part of a general restructuring of the rules dealing with litigation and motion practice. Accordingly, if the litigation package were to become law on schedule, the new subdivision 1017(c) would remain in effect for only one year.

The advisory committee, he said, was very sensitive to the general policy of avoiding frequent changes in the rules, especially when changes are proposed in the same rule. Nevertheless, if the litigation package were not to become law, the change in Rule 1017(c) would be needed permanently.

FED. R. BANKR. P. 1019

Professor Resnick stated that Rule 1019 governs conversion of a case from chapter 11, 12, or 13 to chapter 7. He noted that there is uncertainty in practice as to what document should be filed by one seeking to recover preconversion administrative expenses. Therefore, the advisory committee would amend subdivision (6) to specify that a holder of an administrative expense claim incurred after commencement of the case but before conversion must file a request for payment under section 503 of the Code, rather than a proof of claim. Notice of the conversion would be given to the administrative expense creditors.

He noted that the advisory committee had made a change in the rule following the public comment period by deleting a deadline for filing requests for payment of preconversion administrative expenses that would be applicable in all cases. Instead, the rule would have the court fix the deadline.

FED. R. BANKR. P. 2002

Professor Resnick reported that the proposed change in Rule 2002(a)(4) conformed the rule to the changes proposed in Rule 1017.

FED. R. BANKR. P. 2003

Professor Resnick stated that Rule 2003(d) deals with disputed elections of chapter 7 trustees. He explained that Rule 2007.1 — which governs disputed elections of chapter 11 trustees — was better written and clearer. Accordingly, the advisory committee had chosen to conform the language of Rule 2003 to that of Rule 2007.1.

FED. R. BANKR. P. 4004

Professor Resnick reported that the language of Rule 4004(a) would be amended to clarify that a complaint objecting to discharge must be filed within 60 days after the first date set for the meeting of creditors, whether or not the hearing is held on that date. Rule 4004(b) would be amended to specify that a motion to extend the time for filing a complaint objecting to discharge must be "filed," rather than "made."

FED. R. BANKR. P. 4007

Professor Resnick explained that Rule 4004 governs denial of a discharge, while Rule 4007 governs the dischargeability of a particular debt. He said that the proposed changes in Rule 4007 were parallel to those proposed in Rule 4004.

FED. R. BANKR. P. 7001

Professor Resnick pointed out that under the present rule, a request for injunctive relief requires the filing of an adversary proceeding. But in practice an injunction is often embodied in a chapter 11 plan, and adversary proceedings are not in fact commenced. The advisory committee proposed conforming the rule to the practice and provide explicitly that an adversary proceeding is not necessary to obtain injunctive or other equitable relief, if that relief is specified in a chapter 9, 11, 12, or 13 plan.

Professor Resnick stated that Department of Justice representatives had expressed reservations to the advisory committee that the proposed amendment did not provide adequate procedural protections to all parties that might be affected by injunctive relief. They suggested, for example, that injunctive relief provisions might be embedded in plans that parties would likely not see or recognize in the absence of an adversary proceeding.

Deputy Attorney General Holder and Professor Resnick added that the Department had been discussing the matter with the advisory committee. As a result, its initial objections had now been withdrawn with the understanding that Mr. Kohn of the Department would be presenting the advisory committee at its October 1998 meeting with proposed procedural protections for inclusion in other bankruptcy rules.

FED. R. BANKR. P. 7004

Professor Resnick stated that the proposed change in Rule 7004(e) would provide that the 10-day limit for service of a summons does not apply to service made in a foreign country.

FED. R. BANKR. P. 9006

Professor Resnick reported that the proposed change in Rule 9006(b), governing time, was a purely technical amendment that had not been published for public comment. He explained that the rule currently provides that a court may not enlarge the time specified in Rule 1017(b)(3). But since the advisory committee would abrogate Rule 1017(b)(3), the cross-reference in Rule 9006 would need to be eliminated.

The committee approved the proposed amendments without objection. It further voted to approve the amendment to Rule 9006 without publication.

Amendments for Publication

A. Litigation Package

Judge Duplantier reported that the Federal Judicial Center, at the request of the advisory committee, had conducted an extensive survey of the bench and bar in 1995 inquiring as to the effectiveness of the Federal Rules of Bankruptcy Procedure. The survey results had indicated general satisfaction with the rules, but had identified motion practice and litigation in connection with "contested matters" as areas of significant dissatisfaction that needed improvement.

He added that the bar had complained that the national rules had left too many procedures for handling contested matters to local variation. Some of the local rules, moreover, are inconsistent with the national rules. Many local rules, for example, require a response to a motion, even though the national rules do not require a response. In addition, the national rules specify that a motion must be served five days before a hearing on a motion. Local rules, however, often specify different time frames.

The advisory committee, accordingly, undertook to address in a comprehensive manner the problems of litigation and motion practice. Judge Duplantier stated that the project had proven to be very complex and controversial. The committee had appointed a special subcommittee, which worked for two years to produce a package of proposed amendments. In turn, the full advisory committee addressed the proposals at four meetings, and it had approved a package of amendments that it believed would provide substantially better guidance and national uniformity for the bar. He added, however, that two members of the advisory committee had dissented on the proposals, largely on the grounds that they believed that litigation and motion practice should be left to local practice.

Professor Resnick added that the terminology currently used in the Federal Rules of Bankruptcy Procedure is confusing. He pointed out that the proposed amendments would not affect "adversary proceedings," which are akin to civil law suits in the district courts and are governed largely by the Federal Rules of Civil Procedures. Rather, they would govern the handling of proceedings that are presently called "contested matters."

"Contested matters," generally, are proceedings commenced by motion that initiate litigation unrelated to other litigation that may be pending in a bankruptcy case. But they are not akin to the kinds of motions filed in the district courts, which typically involve matters within a pending civil action. Rather, they embrace such subjects as the rejection of an executory contract, relief from the automatic stay, requests to obtain financing, and the appointment of a trustee in a chapter 11 case.

Professor Resnick said that the purpose of the proposed amendments is to provide greater guidance and uniformity in handling these important matters. At the same time, the amendments would allow more routine, non-contested matters to be resolved quickly, and normally without a hearing. The advisory committee's general restructuring would, thus, create three principal categories of bankruptcy proceedings: (1) adversary proceedings, governed by Part VII of the rules; (2) motions, governed by amended Rule 9014; and (3) applications, governed by amended Rule 9013.

The proposed amendments to Rules 9013 and 9014, he said, constituted the heart of the proposed package of amendments.

FED. R. BANKR. P. 9013

The amended Rule 9013 would establish a new category of proceedings called "applications," consisting of the 14 specific categories of matters set forth in subdivision 9013(a). These proceedings are normally non-controversial and unopposed, and the rule would allow them to be handled quickly and inexpensively. Included, for example, are such matters as motions to jointly administer a case and motions for routine extensions of time.

Rule 9014 would be the default rule. Accordingly, if a matter were not specifically listed as an application in subdivision (a), it would be governed by Rule 9014 or another rule expressed designated in Rule 9014(a).

Subdivision 9013(b) sets forth the requirements for requesting relief by application, and subdivision (c) specifies the manner of service. An application need not be served in advance and may be served at the same time that it is presented to the court. Service may be made in any manner by which a motion may be served under the bankruptcy rules, including service by electronic means, if authorized by local rule. Professor Resnick pointed out that the provision for electronic service represented an advance over FED. R. BANKR. P. 5005, which authorizes electronic means only for the filing of papers with the court.

A member of the committee asked why the advisory committee had chosen the term "application," rather than "motion." He pointed out that FED. R. CIV. P. 7 states explicitly that "an application for an order shall be by motion." Professor Resnick responded that the civil rules and the bankruptcy rules simply do not use the same terminology. He noted that a difference is made in bankruptcy between applications and motions. An application, in effect, is something less significant than a motion.

FED. R. BANKR. P. 9014

Professor Resnick explained that Rule 9014, as amended, would create a new category of proceedings called "administrative proceedings." They include more complex matters than applications and are more likely to be contested. Yet they do not require all the procedures of adversary proceedings under Part VII of the bankruptcy rules.

Subdivision 9014(a) carves out certain proceedings from the scope of Rule 9014, including involuntary bankruptcy petitions, petitions to commence an ancillary proceeding under section 304 of the Bankruptcy Code, bankruptcy appeals, adversary proceedings, and motions within adversary proceedings.

Professor Resnick stated that Rule 9014(b) provides that a request for relief in an administrative proceeding must be made by written motion entitled an "administrative motion." Unless made by a consumer debtor, the motion must be accompanied by supporting affidavits.

Rule 9014(c) governs service and provides that a copy of an administrative motion must be served at least 20 days before the hearing date on the motion. A response to the motion must be filed at least five days before the hearing. These dates currently are governed by local rules, which vary substantially from district to district. The proposed amendment to Rule 9014(c) also specifies the entities that must receive notice of the motion. Service may be made by any means by which a summons may be served or by electronic means if authorized by local rule. If the respondent fails to respond to the motion, the court may issue an order without a hearing.

Professor Resnick said that subdivision 9014(h) provides that the discovery provisions of the Federal Rules of Civil Procedure would be made applicable in administrative proceedings, with two exceptions: (1) the initial disclosure provisions of FED. R. CIV. P. 26(a); and (2) the requirement of a meeting of the parties under FED. R. CIV. P. 26(f). In addition, the 30-day time periods specified in the civil discovery rules, *i.e.*, FED. R. CIV. P. 30(e), 33(b)(3), 34(b), and 36(a), would be reduced to 10 days in order to expedite the processing of administrative proceedings.

Under subdivision 9014(i), witnesses would not be brought to an initial hearing. Professor Resnick explained that local rules of court currently contain great variations on this point. Under the proposed national rule, the court would conduct a hearing on the specified hearing date to determine whether there is a material issue of fact or law. The judge at that time would determine whether there is a need for an evidentiary hearing.

The amended rule provides that no testimony may be given at the initial hearing unless the parties consent or there is advance notice. If the court finds that there is an issue of fact,

the hearing becomes a status conference. The evidentiary hearing would be held at a later date. The rule, however, provides exceptions for certain time-sensitive matters, such as relief from the automatic stay and preliminary hearings on the use of cash collateral or obtaining credit.

Professor Resnick pointed out that the proposed new subdivision 9014(j) would make FED. R. CIV. P. 43 inapplicable at an evidentiary hearing on an administrative motion. The advisory committee, he said, had decided as a matter of policy that live testimony, rather than affidavits, should be required at the hearing. He added that new subdivision 9014(l) specifies several of the Part VII adversary proceeding rules that would apply to administrative proceedings.

Finally, subdivision 9014(o) would operate as a safety valve and would authorize the court, for cause, to change any procedural requirements of the rule. But it requires the court to give the parties notice of any proposed changes in the requirements.

OTHER RULES

Professor Resnick reported that the advisory committee had determined that a few proceedings in the bankruptcy courts simply did not fit well into one of the three major categories of adversary proceedings, administrative motions, and applications. Therefore, it had excluded these proceedings from Rule 9014(a) and would have them governed by other specific rules. He offered as examples FED. R. BANKR. P. 2014, which would prescribe special procedures for the employment of an attorney, and FED. R. BANKR. P. 3020, which would govern the confirmation of a chapter 11 plan.

Professor Resnick explained that most of the remaining amendments in the litigation package were conforming changes to accommodate the provisions of Rules 9013 and 9014.

Judge Duplantier asked the Standing Committee to approve:

(1) publishing the proposed litigation package, consisting of amendments to FED. R. BANKR. P. 1006, 1007, 1014, 1017, 2001, 2004, 2007, 2014, 2016, 3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001, 6004, 6006, 6007, 9006, 9013, 9014, 9017, 9021, and 9034 ;

(2) publishing the accompanying commentary to the amendments, entitled, *Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice,* as a guide to bench and bar; and

(3) providing a five-month public comment period from August 1, 1998, to January 1, 1999.

Professor Resnick noted that the litigation package included amendments to 27 different rules. He said that the volume of the changes made it difficult to follow without an explanation focusing on the heart of the changes, set forth in Rules 9013 and 9014. Therefore, the advisory committee's accompanying commentary had been prepared to assist the Standing Committee and the public during the publication period. It was not intended to become a permanent committee note.

The committee approved the litigation package and the accompanying commentary for publication without objection. It also approved the proposed five-month public comment period without objection.

Other Rules Amendments

Judge Duplantier reported that the advisory committee recommended publication of changes in several other rules, three of which deal with providing notice to government entities.

Government Notice Provisions

FED. R. BANKR. P. 1007

Professor Resnick stated that Rule 1007 requires the debtor to file schedules and statements. The proposed amendments to Rule 1007(m) would provide that if the debtor lists a governmental unit as a creditor in a schedule or statement, it must identify the specific department, agency, or instrumentality of the governmental unit through which it is indebted. Failure to comply with the requirement, however, would not affect the debtor's legal rights.

FED. R. BANKR. P. 2002

Professor Resnick stated that when the government is a creditor, the debtor must mail notices both to the pertinent government department and the United States attorney. He noted that the Department of Justice had complained that the United States attorney normally receives notices, but frequently does not know which government agency is involved. Accordingly, the proposed amendment to Rule 2002(j)(5) would require that the appropriate governmental department, agency, or instrumentality be identified in the address of any notice mailed to the United States attorney.

FED. R. BANKR. P. 5003

The proposed amendments to Rule 5003, dealing with records kept by the clerk, would require the bankruptcy clerk to maintain a register of the mailing addresses of federal and state governmental units within the state where the court sits.

Professor Resnick stated that concern had been expressed that if updates to the register were too frequent, lawyers might not have the latest edition at hand. Pending legislation in the House of Representatives would require the clerks to maintain a register and update it quarterly. The advisory committee, however, had decided that annual updates were sufficient.

The proposed amendment would not require the clerk to list more than one mailing address for any agency. But the clerk may do so and include information that would enable a user of the register to determine which address is applicable.

The mailing address listed on the register would be presumed conclusively to be the correct agency address. But failure by the debtor to check the register and use the proper address would not invalidate a notice if the agency in fact received the notice. Thus, the register would serve as a "safe harbor." A debtor who used it would be protected, and a debtor who did not would act at its own peril.

Other Provisions

FED. R. BANKR. P. 1017

The proposed amendment to Rule 1017, dealing with dismissal or conversion of a case, would authorize the court to rule on a timely-filed request for an extension of time to file a motion to dismiss a case for substantial abuse, whether or not it ruled on the request before or after expiration of the 60-day deadline specified in the rule.

FED. R. BANKR. P. 2002

Professor Resnick explained that the proposed amendment to Rule 2002(a)(6), dealing with notices, would provide an adjustment for inflation. Under the current rule, notice of a hearing on a request for compensation or expenses must be given if the request exceeds $500. The rule has remained unchanged since 1987. The advisory committee would raise the threshold amount to $1,000.

FED. R. BANKR. P. 4003

Professor Resnick said that the proposed amendment to Rule 4003, dealing with exemptions, was very similar to that proposed in Rule 1017. A party currently has 30 days to object to the list of property claimed as exempt by the debtor unless the court extends the time period. Case law has held that the court must actually rule on the extension request within the 30-day period. The amendment would permit the court to grant a timely request for an extension of time to file objections to the list, as long as the request is made within the 30-day period.

FED. R. BANKR. P. 4004

Professor Resnick explained that the proposed change to Rule 4004, dealing with the grant or denial of discharge, is a technical one, designed to conform to the proposed change in Rule 1017(e). It would provide that a discharge will not be granted if a motion is pending requesting an extension of time to file a motion to dismiss the case for substantial abuse.

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

Proposed Amendments to the Official Forms

OFFICIAL FORMS 1 AND 7

Professor Resnick stated that the reasons for the proposed changes to the Official Forms were set forth at Tab 6D of the agenda book.

The committee voted to authorize publication of the amendments to the Official Forms without objection.

National Bankruptcy Review Commission Recommendations

Professor Resnick reported that the advisory committee was studying the recommendations contained in the October 1997 report of the National Bankruptcy Review Commission. He noted that the report was more than 1,300 pages long and contained 172 recommendations, some of which called specifically for changes in the Federal Rules of Bankruptcy Procedure and were addressed to the advisory committee.

Judge Duplantier noted that the Committee on the Administration of the Bankruptcy System was taking the lead for the Judicial Conference in preparing and coordinating responses to the Commission's various recommendations. It had referred a number of recommendations to the Advisory Committee on Bankruptcy Rules, which in turn had decided that it would not take a position on any Commission recommendations that called for substantive changes in the Bankruptcy Code as a precedent to rules amendments. Several of the recommendations, however, called on the advisory committee to make changes in the rules and forms independent of legislative action. The advisory committee concluded that the appropriate response was to recommend that the provisions of the Rules Enabling Act be followed with regard to such rules-related recommendations.

Professor Resnick also pointed out that many of the Commission's recommendations called for substantive changes in the Bankruptcy Code. In addition, he said, comprehensive bankruptcy legislation is pending in the Congress that would change many of the substantive

provisions of the Code. He said that legislative enactment of these provisions would require the advisory committee to draft amendments to the bankruptcy rules to implement the statutory changes.

Judge Sear moved to adopt the recommendations of the advisory committee regarding the report of the National Bankruptcy Review Commission. **The committee voted to approve the recommendations without objection.**

Informational Items

Judge Duplantier reported that the advisory committee had considered the issue of establishing a uniform effective date for local rules. It concluded that the issue was not very important, but that if a single date were chosen, it should be December 1 of each year. It also concluded that a safety valve should be provided in the rule to take care of emergencies and newly-enacted legislation.

Professor Resnick reported that the advisory committee had considered the proposal to permit the public to comment on proposed rule amendments by e-mail. It favored implementing the proposal for a trial period, but was of the view that e-mail comments should be treated the same as written comments.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of May 18, 1998. (Agenda Item 7)

Amendments for Judicial Conference Approval

FED. R. CIV. P. 6

Professor Cooper reported that the proposed change to Rule 6, dealing with computing time, was purely technical. He explained that a conforming amendment was needed in Rule 6(b) to reflect the abrogation of Rule 74(a) in 1997. The rule would be amended to delete its reference to Rule 74(a). He added that since the change was technical, there was no need to publish it for public comment.

FORM 2

Professor Cooper reported that paragraph (a) of Form 2 sets forth an allegation of jurisdiction founded on diversity of citizenship. It asserts that the matter in controversy exceeds $50,000. But the governing statute, 28 U.S.C. § 1332, had been amended to raise the

diversity jurisdiction threshold amount to its current level of $75,000. The advisory committee recommended that the language of Form 2 be amended to refer to the statute itself, rather than to any specific dollar amount.

Professor Cooper added that the advisory committee was of the view that this, too, was a technical change that did not require publication.

The committee approved the amendments to Rule 6 and Form 2 without objection and voted to forward them to the Judicial Conference without publication.

Amendments for Publication

Discovery Package

Judge Niemeyer reported that the advisory committee had been debating discovery issues for several years. Among other things, it had considered proposed amendments to FED. R. CIV. P. 26(c) as an alternative to pending legislation that would narrow or restrict the use of protective orders. More importantly, the committee had to address the impact on the district courts of the expiration of the Civil Justice Reform Act of 1990. Specifically, it had to decide whether the 1993 amendments to the civil rules — largely inspired by the Act and authorizing local variations in pretrial procedures — should be continued permanently or amended in certain respects.

The advisory committee had appointed a special discovery subcommittee — chaired by Judge David F. Levi and staffed by Professor Richard L. Marcus as special reporter — to study these issues and to take a comprehensive look at the architecture of discovery itself. Judge Niemeyer said that the subcommittee had been asked to address such matters as whether discovery is too expensive in light of its contribution to the litigation process. And, if it is too expensive, are there changes that could be made that would preserve the existing system, which promotes disclosure of information, yet produce cost savings? He added that the subcommittee had also been asked to consider restoring greater national uniformity to the rules by eliminating or reducing local "opt out" provisions authorized by the 1993 amendments.

Judge Niemeyer reported that the advisory committee had conducted an important conference at Boston College Law School with leading members of all segments of the bar, interested organizations, the bench, and academia. It had also asked the Federal Judicial Center to conduct a survey of lawyers on discovery matters. The data from that survey showed that about 50% of the cost of litigation is attributable to discovery, and that in the most complex cases that percentage rises to about 90%. The lawyers responded that discovery was very expensive, and 83% of them stated that they favored certain changes in the discovery

rules. In particular, they expressed support for providing: (1) greater access to judges on discovery matters; and (2) national uniformity in procedures.

Judge Niemeyer reported that there had been a consensus among the participants at the Boston College conference that:

1. Full disclosure of relevant information is an important element of the American discovery system that should be preserved.

2. Discovery works very well in a majority of cases.

3. In those cases when discovery is actively used, both plaintiffs and defendants believe that it is unnecessarily expensive. Plaintiffs complain that depositions are too numerous and expensive, and defendants complain most about the costs of document production, including the costs of selection, review to avoid waiver of privileges, and reproduction.

4. Where initial mandatory disclosure is being used, it is generally liked and is generally seen as reducing the cost of litigation.

5. National uniformity is strongly supported, and the local rule options authorized by FED. R. CIV. P. 26 should be eliminated.

6. The cost of discovery disputes could be reduced by greater judicial involvement.

7. The costs of document production are attributable in large part to the review of documents necessary to avoid waiver of the attorney-client privilege. Costs could be reduced if there could be a relaxation of the waiver rules for discovery purposes. (The advisory committee, however, was initially of the view that because privileges are generally governed by state law, it might be difficult to address this matter through the federal civil rules.)

8. Discovery costs could be reduced by imposing presumed limits on the length of depositions and the scope of discovery, particularly with regard to the production of documents.

9. An early discovery cutoff date and a firm trial date are the most effective ways of reducing costs. (The advisory committee concluded, however, that this matter could best be addressed by the Court Administration and Case Management Committee and by education of judges, rather than by rule amendments.)

Judge Niemeyer stated that the special discovery subcommittee had considered a wide variety of ideas and had presented the advisory committee with several different options. The central goal was to reduce the costs of discovery without undercutting the basic principles of open disclosure of relevant information. The advisory committee considered all the alternatives and concluded that any package of amendments that it would propose should be designed to enjoy general support from both plaintiffs and defendants.

He added that the political aspects of changes in the discovery rules were very important. Plaintiffs and defendants simply do not agree on some procedural matters. Nevertheless, the advisory committee was of the view that the package it had selected was very well balanced and fairly addressed the concerns of both sides. Judge Niemeyer reported that the advisory committee had chosen to proceed with proposals on which the vote was unanimous or represented a strong majority. On close votes, the committee either dropped the proposal or modified it to satisfy a significant majority.

Judge Niemeyer explained that the package adopted by the advisory committee did not reduce discovery. Rather, it would narrow attorney-managed discovery and make some of it court-managed discovery. The committee's proposal would limit attorney-managed discovery under FED. R. CIV. P. 26(b) to any matter, not privileged, that is relevant to a claim or defense of a party. Broader discovery of matters relevant to "the subject matter involved in the pending action" would still be available to the parties, but only on application to the court.

A proposed amendment to FED. R. CIV. P. 34(b) would authorize the court to limit discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party. Judge Niemeyer reported that the special discovery subcommittee had recommended placing that provision in Rule 26, but the full advisory committee decided to retain it as an amendment to Rule 34. It also decided to include a note on the matter in the publication and invite public comment on the proper placement of the provision.

One of the members expressed strong opposition to the proposed changes, especially the amendment limiting the scope of attorney-managed discovery, and he described the amendments as "revolutionary." He said that they would "throw out" the present discovery system, which was well understood by the bar and had worked very well, and replace it with a system that required judges, rather than lawyers, to make discovery decisions. He also strongly objected to the amendment to Rule 34 authorizing the court to order cost sharing, which he described as "cost shifting." He predicted that defense lawyers would routinely challenge discovery requests by plaintiffs and seek to shift the costs of discovery to the plaintiffs.

Professor Cooper stated that the discovery subcommittee had not been discharged. It would continue to consider other matters, including the advisability of providing limited initial

disclosure of documents without waiving attorney-client privileges in order to reduce the burdens of document production and a presumptive age limit on the production of documents. It would also explore whether it would be practicable to develop discovery protocols or guidelines for various kinds of civil cases.

Professor Cooper also reported that the advisory committee had decided not to proceed further with proposals to amend the protective order provision of FED. R. CIV. P. 26(c).

Several members of the committee complimented the advisory committee and its discovery subcommittee on producing a well-researched, carefully-crafted, and objective package of amendments that, they said, managed to accommodate many difficult and competing considerations and achieve national uniformity. They said that although they might have reservations about individual provisions in the proposed discovery package, they favored publication of all the proposed amendments.

Judge Niemeyer asked Professor Marcus to describe the proposed amendments to each of the rules.

FED. R. CIV. P. 5

Professor Marcus stated that the proposed amendment to Rule 5(d) would provide that discovery materials need not be filed until they are used in a proceeding or the court orders that they be filed. He explained that the rule had been amended in 1980 to authorize a court to order that discovery materials not be filed with the clerk of court. Before that time, they had been filed routinely with the courts.

He reported that by the late 1980's about two thirds of the district courts had promulgated local rules prohibiting the filing of discovery materials generally. The Standing Committee's Local Rules Project had concluded that these rules were inconsistent with the national rules but had suggested consideration of amendment of the national rule. He added that the Judicial Council of the Ninth Circuit had recently recommended that Rule 5(d) be amended to authorize local rules to prohibit the filing of discovery materials, but the advisory committee had decided not to pursue that course of action.

Instead, the advisory committee had decided to propose a national rule that would excuse the filing of discovery materials and supersede existing local rules. The proposed Rule 5(d), which includes disclosures under Rule 26(a)(1) or (2) as well as discovery information, would provide that these materials "need not be filed." The committee note makes it clear that deposition notices and discovery objections would be covered by the rule. But medical examinations under Rule 35 would be unaffected by the amendment. Professor Cooper added that although discovery responses need not be filed under the proposed amendment, they could be filed if a party wished to file them.

Some members of the committee stated that clerks of court were experiencing serious space problems and that the filing of discovery materials would create burdens and costs for the courts. They suggested that the national rule be amended to prohibit the filing of all discovery materials except with court permission. Professor Marcus responded that public access to discovery materials was a controversial matter. Moreover, some lawyers wanted to reserve the opportunity to file certain materials with the clerk.

Judge Niemeyer noted that when Rule 5(d) had been amended in 1980, the press had expressed opposition on the grounds that the amendment would restrict its access to "court records." He added that the advisory committee had been concerned that a national rule banning the filing of discovery materials might provoke similar controversy and impede eventual passage of the amendment. Accordingly, it had decided to make only a modest change that would allow, but not require, parties to file materials.

Several members of the committee stated, however, that there was no requirement that discovery materials be made public, since they are not part of the public record unless actually used in a case. Justice Veasey moved to substitute the words "must not be filed" for the words "need not be filed" in line 7 of the proposed amendment to Rule 5(d). **The committee voted to approve the substitution without objection.**

Two of the members suggested that the proposed amendment include a provision placing an explicit responsibility on attorneys to preserve discovery materials. Other members stated, however, that local rules and case law adequately cover this matter.

The committee approved the proposed amendment for publication with one objection.

FED. R. CIV. P. 26

Professor Marcus reported the advisory committee had decided as a matter of policy to seek national uniformity in the rules regarding initial disclosures under Rule 26(a). He pointed out that mandatory disclosure was a controversial matter among the bench and bar, with strong views expressed both for and against it. He said that the advisory committee had considered three options: (1) to make the current Rule 26(a)(1) mandatory in all districts; (2) to abrogate Rule 26(a)(1) and preclude initial disclosure everywhere; or (3) to fashion a form of disclosure that would be nationally acceptable.

The advisory committee chose the third course. To that end, the proposed amendments to Rule 26(a)(1) would limit a party's disclosure obligation to materials "supporting its claims or defenses." Professor Marcus emphasized that the revised rule would promote national uniformity by eliminating the explicit authority of a court under the current rule to opt out of the disclosure requirements by local rule.

Two members questioned whether the phrase "supporting its claims or defenses" was broad enough to cover information that controverted an opponent's claims or defenses. They noted that this issue had been addressed in the committee note, but suggested that more comprehensive language might be incorporated in the rule itself. Professor Cooper responded that the advisory committee had deliberately chosen the language to be consistent with language already used elsewhere in the discovery rules. He pointed out, for example, that FED. R. CIV. P. 26(b), which defines the scope of discovery, refers only to "claims and defenses." He added that claims and defenses includes denials, but not impeaching materials.

One of the members suggested publishing alternative language on the scope of disclosure and soliciting public comment on the two versions. Judge Niemeyer responded that the advisory committee was of the view that only one version should be published for comment.

Professor Marcus stated that subparagraph 26(a)(1)(E) sets forth a list of 10 categories of civil actions that would be exempt from the initial disclosure requirements of the rule. He explained that discovery would be an unnecessary burden in these types of cases. He also pointed out that, after consulting with the chair and reporter of the Advisory Committee on Bankruptcy Rules, the two bankruptcy exceptions set forth as items (i) and (ii) in the subparagraph were unnecessary. Accordingly, Judge Niemeyer, Professor Cooper, and Professor Marcus suggested eliminating them from the proposed amendment.

Some of the members asked whether the list of exemptions in Rule 26(a)(1)(E) was accurate and complete. Professors Marcus and Cooper responded that the advisory committee expected to use the public comment process to refine the list further. They noted that the publication would flag the issue and ask for public comment on whether the types of civil cases listed were proper for exclusion, whether they were properly characterized, and whether other categories of cases should also be excluded.

Professor Marcus pointed out that the parties would be given 14 days, rather than 10 days, following the conference of attorneys under Rule 26(f) to make the required disclosures. Later-added parties would have to make their disclosures within 30 days, unless a different time were set by stipulation. And minor changes would be made in paragraphs 26(a)(3) and (4) to conform with the proposed changes in Rule 5(d) on the filing of disclosure materials.

Professor Marcus said that the proposed amendments to Rule 26(b)(1) would limit attorney-controlled discovery. But the court would have authority to permit discovery beyond matters related to the claims or defenses of a party. The language would be amended to make it clear that evidence sought through discovery must be relevant, whether or not admissible at trial. He pointed out that a new sentence had been added at the conclusion of paragraph (b)(1) to call attention to the limitations on excessive or burdensome discovery imposed by subdivision 26(b)(2)(i), (ii), and (iii).

Professor Marcus pointed out that the amendments to Rules 26(d) and 26(f), dealing with the timing and sequence of discovery and the conference of the parties, were linked. The language of both provisions would be amended to exclude "low end" cases, *i.e.*, the categories of cases exempted from initial disclosure requirements under Rule 26(a)(1)(E). He added that the amended rule would require that the conference of the parties under Rule 26(f) be held seven days earlier than currently in order to give the court more time to consider the report and plan arising from the conference. The amended rule would no longer require a face-to-face meeting of parties or attorneys, but a court could by local rule or order require in-person participation.

The committee approved the proposed amendments, with the change to Rule 26(a)(1)(E) described above, for publication with one objection.

FED. R. CIV. P. 30

Professor Marcus stated that Rule 30(d)(2) would be amended to limit the duration of depositions. Unless otherwise authorized by the court or stipulated by the parties and the deponent, a deposition would be limited to one day of seven hours. The rule would also be amended to include non-party conduct within the rule's prohibition against individuals impeding or delaying the examination.

Some of the members expressed doubts that a uniform limit on the length of depositions would be effective in practice, especially in multi-party cases. They noted that many variables had to be considered, and attorneys often do not have control over the course of their own depositions. They suggested that time limits on depositions would be difficult to regulate by rule and would best be left to the attorneys and discovery plans. Professor Marcus responded that there had been a strong majority on the advisory committee for making the change. Many attorneys have complained that overlong depositions result in undue costs and delays. Professor Cooper added that Rule 26(b)(2) currently authorizes a court to impose limits on the number and length of depositions. Moreover, a court would retain the power to extend a deposition on a party's request.

One member recommended that the amended rule require that the party taking the deposition notify the deponent 10 days in advance which documents owuld be the sugject of interrogation, that the moving party send the deponent pertinent documents in advance, and that the deponent be required to read the documents before taking the deposition. Some of the members agreed with the substance of the recommendation, but they suggested that the matter was one that should be left to good practice and trial strategy, rather than national rule. Judge Niemeyer added that the member's point was well taken, but that lawyers had told the advisory committee that the problem of unprepared witnesses rarely arose with experienced attorneys. In addition, there was a concern that deponents would be swamped with unrealistic volumes of documents submitted to protect any possible opportunity for use. Therefore, the

advisory committee had decided not to include in the amendments an express requirement that the deponent read certain documents in advance.

The committee approved the proposed amendments for publication by a vote of 6 to 4.

FED. R. CIV. P. 34

Professor Marcus stated that the proposed amendment to Rule 34(b) would provide that when a discovery request exceeds the limitations of Rule 26(b)(2), the court could limit the discovery or require that the requesting party pay part or all of the reasonable expenses of producing it.

One of the members strongly objected to this provision, stating that it would be used routinely by defense counsel to shift costs to plaintiffs, thereby driving many poor or economically-limited litigants out of the court system. He said that it would alter the entire philosophy of federal practice and should be rejected. He added that the courts already had the power to limit discovery and should not be given the authority to impose costs on the parties requesting discovery, except in very large cases.

But another member disagreed, countering that the "discovery" problem was real and needed to be addressed. He said that the proposed advisory committee amendment was neutral and applied equally to defendants and plaintiffs. He added that it was inappropriate to characterize it as an attempt to drive poor litigants out of the court system.

One member observed that the proposed amendments to Rules 26(b) and 34(b) would establish two different regimes of discovery, which might be denominated as "regular discovery" and "supplemental discovery." The former would be self-executing and without cost to the requesting party. The latter, though, would require court approval and could entail the payment of costs by the requesting party. Judge Niemeyer agreed with this characterization.

Judge Niemeyer added that the advisory committee would invite public comment on whether the cost-bearing provision was properly placed as an amendment to Rule 34(b) or should be added to Rule 26(b)(2), dealing with discovery scope and limits.

The committee approved the proposed amendments for publication by a vote of 7 to 3.

FED. R. CIV. P. 37

Professor Marcus pointed out that the proposed change in Rule 37, dealing with sanctions, would add a cross-reference to Rule 26(e)(2). This would close a gap left by the 1993 amendments to the rules and authorize sanction power for failure to supplement discovery responses.

The committee approved the proposed amendment for publication without objection.

Service on the United States

Judge Niemeyer reported that the advisory committee had received a request from the Department of Justice to allow additional time for the government to respond in cases when an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with the performance of official duties. The committee agreed with the Department's position and recommended publishing proposed amendments to Rules 4 and 12.

FED. R. CIV. P. 4

Professor Cooper stated that when an officer of the United States is sued in an individual capacity, the proposed rule would give the officer 60 days in which to answer. Subparagraph 4(i)(2)(A) would govern service in cases when an officer of the United States is sued in an official capacity. Subparagraph 4(i)(2)(B) would govern service of an officer sued in an individual capacity for acts or omissions incurring "in connection with the performance of duties on behalf of the United States." Professor Cooper pointed out that the quoted language had been crafted carefully with the assistance of the Department of Justice and was designed to avoid using existing terms such as "color of office" or "scope of employment" or "arising out of the employment," because these terms had developed particular meanings over time.

Under subparagraph 4(i)(2)(B), when a federal officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States, service must be effected on both the officer or employee and the United States. The advantage of requiring service on the United States is that under Department of Justice regulations, the Department ordinarily defends officers sued individually if their acts were committed in the course of business.

Professor Cooper explained that new subparagraph 4(i)(3)(B) would allow a reasonable time to correct a service defect. Thus, if a plaintiff served only the affected officer

or employee, additional time would be provided to correct the defect and effect service on the United States.

Deputy Attorney General Holder stated that the rule was beneficial and would provide a single set of clear and understandable rules to govern all suits against the United States.

FED. R. CIV. P. 12

Professor Cooper stated that the proposed changes to Rule 12, dealing with defenses and objections, would provide that a response is due by the United States or an officer or employee sued in an individual capacity within 60 days after service. He added that the Department of Justice needed 60 days to determine whether to provide representation to the defendant officer or employee. Thus, the response time would be the same, whether the officer or employee were sued in an individual capacity or an official capacity.

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

Informational Items

Judge Niemeyer provided the committee with a status report on the work of the Working Group on Mass Torts. He said that the issues raised in mass tort litigation were very complex and controversial, and the working group had conducted meetings with some of the most experienced judges, lawyers, and academics in the country. He added that the group was planning on producing a report that would describe mass-tort litigation and identify problems that may deserve legislative and rulemaking attention. He expressed the hope that the report could also present a preliminary blueprint for action by identifying the legislative and rulemaking steps that might be taken to reduce the problems. He expected that the working group force would file a draft report in time for consideration by the Standing Committee at its January 1999 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of May 15, 1998. (Agenda Item 8)

Rules Amendments for Judicial Conference Approval

Judge Davis reported that the Standing Committee had approved publication of proposed amendments to eight rules and the addition of one new rule at its June 1997 meeting. The advisory committee had considered the public comments at its April 1998 meeting and

had conducted a public hearing addressing the proposed amendments on Rule 11 pleas and criminal forfeiture.

FED. R. CRIM. P. 6

Judge Davis stated that there were two amendments proposed in Rule 6, dealing with grand juries. The first, in subdivision 6(d), would authorize the presence of interpreters during deliberations to assist grand jurors who are hearing or speech impaired. He explained that under the current rule, no person other than the grand jurors themselves may be present during deliberations.

As authorized for publication by the Standing Committee, the rule had been broader in scope and would have allowed all types of interpreters to be present with the grand jury. But comments were received that it would not be legal to have interpreters assist jurors who do not speak English, since 28 U.S.C. § 1865 requires that all grand jurors and petit jurors speak English. Accordingly, the advisory committee modified the amendment to permit only interpreters assisting hearing or speech impaired grand jurors to be present during deliberations and voting.

The second amendment would modify subdivision 6(f) to permit the grand jury foreperson to return the indictment in open court. The present rule requires that the whole grand jury be present for the return.

The committee approved the proposed amendments without objection.

FED. R. CRIM. P. 11

Judge Davis and Professor Schlueter pointed out that three changes were proposed in Rule 11, governing pleas. The first would make a technical change in subdivision 11(a) to conform the definition of an organizational defendant to that in 18 U.S.C. § 18.

The second change would amend Rule 11(e)(1) to reflect the impact of the Sentencing Guidelines on guilty pleas. It would recognize that a plea agreement may specifically address a particular sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. The proposed change would distinguish clearly between a plea agreement under subparagraph 11(e)(1)(B), which is not binding on the court, and one under subparagraph 11(e)(1)(C), which is binding once it is accepted by the court.

Some members of the committee expressed concern that the proposal would remove the court further from the sentencing process and give greater authority to the United States attorney and defense counsel. They pointed out, for example, that a judge might accept a plea initially, but later be required to reject it when the facts become known. The case, then, would

have to be tried after considerable delay. Professor Schlueter responded that the advisory committee wanted only to address the reality of the current practice, under which the parties reach an agreement with regard to specific guidelines or factors. He added that a judge may always accept or reject such a plea agreement.

Judge Davis stated that the third proposed change, to Rule 11(c)(6), was also controversial, particularly with defense counsel. It would reflect the increasing practice of including provisions in plea agreements requiring the defendant to waive the right to appeal or to collaterally attack the sentence. The amendment would require the court to determine whether the defendant understands any provision in the plea agreement waiving such rights. A majority of the public comments had opposed the amendment, largely on the grounds that it would be seen as an endorsement of the practice of waiving appellate rights.

Judge Davis pointed out that most courts had upheld the kinds of waivers contemplated in the amendment, and the Criminal Law Committee of the Judicial Conference had recommended the provision to the advisory committee. The advisory committee, however, decided to add a sentence to the committee note stating that: "Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers."

The committee approved the proposed amendment to Rule 11(e) by a vote of 11 to 1. It approved the other amendments to Rule 11 without objection.

FED. R. CRIM. P. 24

Judge Davis reported that the proposed change to Rule 24(c), dealing with trial jurors, would give a trial judge discretion to retain alternate jurors if a juror becomes incapacitated during the deliberations. The current rule explicitly requires the court to discharge all alternate jurors when the jury retires to deliberate.

One member pointed out that the committee note set forth certain procedural protections to insulate the alternate jurors during the deliberative process. It stated that if alternates are in fact used, the jurors must be instructed that they must begin their deliberations anew. He recommended that the latter provision be placed in the language of the rule itself.

Judge Davis agreed to insert additional language in the rule. Accordingly, Judge Stotler asked him and Professor Schlueter to draft appropriate text and present it to the committee later in the meeting.

After consultation with the Style Subcommittee and further committee deliberations, Judge Davis and Professor Schlueter suggested adding the following language at the end of

paragraph 24(c)(3): "If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew."

The committee voted without objection to approve the proposed amendment.

FED. R. CRIM. P. 32.2

Judge Davis reported that the proposed new Rule 32.2 was the heart of a major revamping and reorganization of the criminal forfeiture rules. He noted that the government proceeds in criminal forfeiture on an *in personam* theory. There must be a finding of guilt in order to forfeit property.

He explained that new Rule 32.2 states that no judgment of forfeiture may be made unless the government alleges in the indictment or information that the defendant has an interest in property that is subject to forfeiture in accordance with an applicable statute. Accordingly, a conforming change would be made in Rule 7(c)(2), prescribing the nature and contents of the indictment or information, to make it clear to the defendant that the government is seeking to seize his or her property.

Judge Davis pointed out that paragraph (b)(1) contained the principal change in the criminal forfeiture amendments and had attracted the most comments from the public. The new rule would eliminate any right of the defendant to a jury trial on the forfeiture count. The provision flowed from the decision of the Supreme Court in *Libretti v. United States,* 516 U.S. 29 (1995), where the Court held that criminal forfeiture is a part of sentencing. A defendant, accordingly, is not entitled to a jury trial on the forfeiture count.

The judge would have to make a decision on the nexus of the property to the offense "as soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere." This language would replace current Rule 32.1(e). Under the current rule, after returning a guilty verdict, the jury is required to hear evidence and enter a special verdict on the forfeiture count. Under the proposed rule, however, the jury would be excused once it has returned a guilty verdict, and the court would proceed right away on its own to decide upon forfeiture of the applicable property. The judge may use the evidence accumulated during the course of the trial or in the plea agreement, and it may take additional evidence at a post-trial hearing.

One of the members expressed concern as to whether the new rule afforded the defendant the opportunity to contest an allegation by the government that the property in question had been purchased with drug proceeds. Judge Davis responded that the court has considerable discretion to take evidence at a hearing and allow both sides to present additional evidence. The judge would not be required to hold a hearing, but would surely do so if a party asked for one. And the judge would have to hold a hearing if there were a dispute as to the

facts. A hearing would be held, for example, if the defendant were to claim that he or she had purchased the property legitimately, without using drug proceeds. Professor Schlueter added that the rule was designed to give the trial judge maximum discretion and therefore did not specify all the steps that the judge must follow.

Judge Davis said that if a third party comes forward to assert an interest in the forfeited property, the court must conduct an ancillary proceeding. It would have discretion to allow the parties to conduct appropriate discovery. At the conclusion of the ancillary proceeding, the court must enter a final order of forfeiture. It would amend the preliminary order of forfeiture, if necessary, to account for disposition of the third-party petition.

Judge Davis stated that proposed Rule 32.2(b) contained two principal provisions. First, the court, rather than the jury, would determine whether there is a nexus between the offense and the property. Second, the court would defer until a later time the question of the defendant's interest in the property. Since *Libretti v. United States* had made it clear that criminal forfeiture is a part of sentencing, it makes sense for the judge, rather than the jury, to decide the ownership questions. He added that in most cases defense counsel currently waives a jury trial on forfeiture issues.

He added that subsection (b)(2) covers the situation when the court decides that the nexus between the property and the offense has been established, but no third party appears to file a claim to the property. In that case, the court may enter a final order forfeiting the property in its entirety. He said that the advisory committee had added a proviso after publication that the court must determine, consistent with the *in personam* theory of criminal forfeiture, that the defendant had an interest in the property.

Subsection (b)(3) states that the government may seize the property, and the court may impose reasonable conditions to protect the value of the property pending appeal.

Subdivision 32(c) would require an ancillary proceeding if a third party appears to claim an interest in the property. Paragraph (c)(4) was added following publication to make it clear that the ancillary proceeding is not a part of sentencing. Therefore, the rules of evidence would be applicable. Although the ancillary proceeding was designed to protect the rights of third parties, the defendant would have a right to participate in it. At the conclusion of the proceeding, the court would be required to file a final order of forfeiture of the property.

Subdivision (d) would authorize the court to issue a stay or impose appropriate conditions on appeal. Subdivision (e) would govern subsequently located property. The court would retain jurisdiction to amend a forfeiture order if property were located later. It also could enter an order to include substitute property.

In conclusion, Judge Davis summarized the sequence of events under the new Rule 32.2 as follows: the jury's verdict, a preliminary order of forfeiture by the court, a third party's petition, an ancillary proceeding, and a final order of forfeiture.

Some members pointed out that a defendant has the right to a jury trial in a civil forfeiture proceeding. They expressed concern about taking away the defendant's right to jury trial in criminal forfeiture proceedings, even though that right might not be constitutionally required under *Libretti v. United States*. One member added that he would vote against the proposal, as written, but would be inclined to support it if it retained the right to a jury trial on the single issue of the nexus of the property to the offense.

The committee rejected the proposed amendment by a vote of 7 to 4.

FED. R. CRIM. P. 7, 31, 32, and 38

Judge Davis said that the advisory committee would withdraw the amendments to these rules because they were part of the proposed criminal forfeiture package and were designed to conform to the proposed new Rule 32.2.

FED. R. CRIM. P. 54

Judge Davis stated that the change in Rule 54, dealing with application of the criminal rules, was purely technical. It would eliminate the current rule's reference to the Canal Zone, which no longer exists.

The committee approved the proposed amendment without objection.

Informational Items

Judge Davis stated that the advisory committee had discussed the draft attorney conduct rules at its April 1998 meeting. Some of the lawyer members on the committee, he said, had expressed opposition to the concept of having another set of conduct rules. The advisory committee agreed to appoint two of its members to serve on the ad hoc attorney conduct committee.

FED. R. CRIM. P. 5

Judge Davis reported that the advisory committee had approved a proposed amendment to Rule 5(c) that would authorize a magistrate judge to grant a continuance of a preliminary examination without the consent of the defendant. But, he added, the advisory committee had voted not to seek publication of the amendment until a later date.

He explained that the proposed amendment would conflict with 18 U.S.C. § 3060(c). Therefore, the advisory committee had recommended at its April 1997 meeting that the Judicial Conference seek a change in the statute. The Standing Committee, however, at its June 1997 meeting decided that it would be more appropriate to propose a change to Rule 5(c) through the Rules Enabling Act process. Accordingly, it remanded the matter back to the advisory committee for further action.

At its October 1997 meeting, the advisory committee considered the issue again. It decided not to pursue an amendment to Rule 5(c) and so advised the Standing Committee. The Magistrate Judges Committee, however, presented the issue to the Judicial Conference at its March 1998 session with a request for a change in the statute.

Judge Davis added that the Judicial Conference had considered the matter, and following the Conference session, the chair of the Executive Committee had asked the advisory committee to consider publishing a proposed amendment to Rule 5(c). As a result, the advisory committee approved an amendment at its April 1998 meeting. But it decided not to seek publication on the grounds that: (1) the proposed amendment itself was not crucial, and (2) the committee had begun restyling the body of criminal rules and wished to avoid making piecemeal amendments in the rules until that process had been completed.

Judge Stotler said that the larger issue debated by the Judicial Conference at its March 1998 session was how best to coordinate proposed rules changes with proposed legislative changes. She emphasized that the debate had underscored the need for the rules committees to work closely with other committees of the Conference in coordinating changes that affect both rules and statutes. She added that the Executive Committee had acquiesced in the advisory committee's decision to defer publication of the proposed amendment to Rule 5(c).

FED. R. CRIM. P. 30

Professor Schlueter reported that the advisory committee had published a proposed amendment to Rule 30 that would permit the court to require the parties to submit pretrial requests for instructions. But, he noted, the Advisory Committee on Civil Rules was considering similar changes to FED. R. CIV. P. 51. Therefore the criminal advisory committee had decided to defer presenting the matter to the Standing Committee until further action is taken with regard to proposed amendments to the civil rule.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of May 1, 1998. (Agenda Item 9)

Amendments for Publication

Judge Smith reported that at the January 1998 meeting, the Standing Committee had authorized the advisory committee to publish proposed amendments to FED. R. EVID. 103, 404, 803, and 902. It was understood that these amendments would be included in the same publication as any additional amendments approved at the June 1998 meeting. She added that the advisory committee was sensitive to the need to limit the number and frequency of changes in the rules. Therefore, it did not expect to recommend further amendments for some time, unless required by legislative developments.

Judge Smith said that the decision of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), had generated a great deal of controversy regarding testimony by expert witnesses. The advisory committee had decided as a matter of policy to delay acting on potential changes in the rules in order to allow sufficient time for case law to develop at both the trial and appellate levels on the impact of the decision. The committee, however, believed that the time was now appropriate to proceed. Accordingly, it voted to seek authority to publish amendments to three rules dealing with testimony of witnesses. She added that all the amendments had been designed to clarify *Daubert*, yet the advisory committee wished to make as few changes as possible in the existing rules of evidence.

FED. R. EVID. 702

Judge Smith stated that Rule 702, governing expert testimony, was the focal point of the *Daubert* decision. The advisory committee simply would add language at the end of the existing rule reaffirming the role of the district court as gatekeeper and providing guidance in assessing the reliability and helpfulness of proffered expert testimony. The amendment would make it clear that expert testimony of all types — scientific, technical, and specialized — are subject to the court's gatekeeping role.

Judge Smith pointed out that the *Daubert* decision had set forth a non-exclusive checklist of factors for the trial courts to consider in assessing the reliability of scientific testimony. The advisory committee had made no attempt to codify these factors, as *Daubert* itself made clear that they were not exclusive. Moreover, case law has added numerous other factors to be considered in individual cases in determining whether expert testimony is sufficiently reliable.

Judge Smith said that the *Daubert* decision also addressed the issue of methodology. It requires a judge to review both the methodology used by the expert and how it has been applied to the facts. She added that application of these factors to expert testimony will necessarily vary from one kind of expertise to another. She emphasized that the trial courts had demonstrated considerable ingenuity and wisdom in applying *Daubert*. The advisory

committee, thus, determined that it was not necessary to set forth any specific procedural requirements in the rule for the trial courts to follow.

Some members expressed concern about the meaning of the terminology "sufficiently based upon," as used in the phrase "the testimony is sufficiently based upon reliable facts or data." Professor Capra explained that the opinion of an expert might be based on reliable information, but it must also be based on sufficient facts or data. The phrase, thus, refers to the quantity, rather than the quality, of the information.

One member questioned whether there was a need to change the rule at all at this point. Professor Capra responded that the advisory committee had been unanimous in favoring amendments to the rule. He noted that the developing case law was inconsistent as to whether *Daubert* applies to all kinds of experts. Moreover, he said, legislation had been introduced in the Congress to modify the rule through legislation. Judge Smith affirmed the need to amend the rule at this point, and she emphasized again that the advisory committee had attempted to change the current rule as little as possible.

FED. R. EVID. 701

Judge Smith reported that the advisory committee would add a clause to the end of Rule 701, which deals with testimony by lay witnesses. The addition would clarify and emphasize the opening clause of the rule, which limits application of the rule to a witness who is not testifying as an expert. The rule then proceeds to state the limits on the testimony of a lay witness. Therefore, the amendment makes it clear that a lay witness may not provide testimony based on scientific, technical, or other specialized knowledge. She added that the advisory committee had been concerned over a growing tendency among attorneys to attempt to evade the expert witness rule by using experts as lay witnesses.

Judge Smith pointed out that representatives from the Department of Justice disagreed with the proposed amendment. They had said that the amendment would conflict with FED. R. CIV. P. 26 and require additional efforts by United States attorneys in providing reports of experts. Ms. Smolover of the Department stated that the agency believed that the amendment would effect a significant change in the law. She added that it attempted to draw a bright line between specialized knowledge and non-specialized knowledge in an area that was especially murky. She proceeded to provide two examples of factual situations where it would be difficult to distinguish specialized knowledge from non-specialized knowledge.

Professor Capra responded that three states currently have evidence rules in place that are similar to the proposed amendment and distinguish sharply between expert and lay testimony. He said that the courts in those states had experienced no difficulties in applying the rules. And, he said, the courts — federal and state — make these kinds of distinctions every day.

Judge Smith added that there may be close calls in some factual situations, but the courts normally handle these distinctions very well. She said that the potential harm that may be caused by attempts to evade Rule 702 greatly outweigh any problems of potential uncertainty in distinguishing between specialized knowledge and non-specialized knowledge in certain cases. Several members of the committee expressed their agreement with Judge Smith on this point.

Judge Stotler asked the trial judges attending the meeting whether they had encountered problems in distinguishing expert testimony from lay testimony. Several of the judges responded that they already applied the law in the manner specified in the proposed amendment, and they had experienced no difficulty in doing so. They expressed strong support for the proposed amendment and stated that it would provide the bar with additional, necessary guidance on distinguishing among categories of proposed testimony and complying with the requirements of FED. R. CIV. P. 26 for an advance written report of expert testimony.

The members proceeded to discuss how the proposed amendment would be applied to a number of hypothetical situations. They generally anticipated few practical problems, but some noted that problems arise with regard to treating physicians. It was pointed out that the committee note to FED. R. CIV. P. 26 states explicitly that a written report of expert testimony is not needed from a treating physician. It was reported by several, though, that some attorneys call treating physicians as observing witnesses under Rule 701, but then attempt to use them as expert witnesses under Rule 702. Professor Capra emphasized that although there are "mixed" witnesses, the committee note accompanying the proposed amendment makes it clear that the rule distinguishes between expert and lay *testimony,* rather than between expert and lay *witnesses.*

FED. R. EVID. 703

Judge Smith reported that the advisory committee had been concerned about a growing tendency to attempt to present hearsay evidence to the jury in the guise of materials supporting expert testimony. Accordingly, the proposed amendment to Rule 703, dealing with bases of opinion testimony by experts, would provide that when an expert relies on underlying information that is inadmissible, only the expert's conclusion — and not the underlying information — would ordinarily be admitted. The trial court must balance the probative value of the underlying information against the safeguards of the hearsay rule, with the presumption that the facts or data upon which an expert bases an opinion or inference will not be admitted.

The committee approved proposed amendments to FED. R. EVID. 701, 702, and 703 for publication without objection.

Informational Items

Professor Capra reported that the advisory committee had approved the suggestion that the use of electronic mail be authorized for transmitting public comments on proposed amendments to the secretary.

He stated that the advisory committee was continuing to consider the impact of computerized evidence on the Federal Rules of Evidence, and it had produced a detailed report on the matter for the chairman of the Technology Subcommittee. The advisory committee had concluded that the courts were simply not having problems in applying the evidence rules to computerized records. Moreover, the committee had determined that it would be very difficult to amend the rules expressly to take account of computerized evidence. It would require changes in many of the rules or the drafting of new and difficult definitional provisions.

Professor Capra noted that Judge Stotler had asked the advisory committee to consider whether FED. R. CIV. P. 44 should be abrogated in light of its overlap with certain of the evidence rules. He explained that the committee had researched the matter in detail, had consulted with the Advisory Committee on Civil Rules, and had concluded that there was not a complete overlap between Rule 44 and the evidence rules. Moreover, there was no indication of any problems in the case law. Therefore, the committee decided not to pursue abrogating the rule.

Professor Capra reported that legislation had been introduced in the Congress to provide for a parent-child evidentiary privilege. The House bill would directly amend FED. R. EVID. 501 to include such a privilege, and the Senate bill would require the Judicial Conference to report on the advisability of amending the Federal Rules of Evidence to include a parent-child privilege. The advisory committee had considered the matter and concluded that the evidence rules should not be amended to include any kind of parent-child privilege.

Professor Capra stated that the proposed privilege would be contrary to both state and federal common law. Moreover, it would not be appropriate to create it by amending the Federal Rules of Evidence, since the Congress had rejected a detailed list of privileges in favor of a common law, case-by-case approach. Professor Capra added that the advisory committee had prepared a proposed response to the Congress to that effect.

Judge Smith said that the Congress had expressed a good deal of interest in privileges in recent years, including a possible rape counselor privilege, a tax preparer privilege, and now a parent-child privilege. She said that she had written to Congress stating that a piecemeal, patchwork approach to privileges would be a mistake. FED. R. EVID. 501 had worked well in practice, and if the Congress were to act at all, it should consider making a comprehensive review of all privileges.

Professor Capra noted that the advisory committee had completed a two-year project to notify the public that certain advisory committee notes to the Federal Rules of Evidence may be misleading. He stated that the report identified inaccuracies and inconsistencies created because several of the rules adopted by the Congress in 1975 differed materially from the version approved by the advisory committee. He stated that the committee's report would be printed by the Federal Judicial Center and would appear in Federal Rules Decisions.

ATTORNEY CONDUCT

Professor Coquillette summarized his May 18, 1998, Status Report on Proposed Rules Governing Attorney Conduct, set forth as Agenda Item 10. He recommended the appointment of an ad hoc committee to work on attorney conduct matters consisting of two members from each of the advisory committees, Chief Justice Veasey, Professor Hazard, and representatives from the Department of Justice.

He stated that the debate, essentially, had come down to two options. The first would be to have a single dynamic conformity rule that would eliminate all local rules and leave attorney conduct matters up to the states. The second would be to adopt a very narrow core of specific federal rules on attorney conduct. He said that there were serious differences of opinion on these options, and the ad hoc committee would seek to reach a consensus on the matter.

Professor Coquillette pointed out that misleading articles had appeared stating that the committee was proposing enactment of the 10 draft attorney conduct rules. He noted that the rules had been drafted only for internal debate and added that American Bar Association officials had been informed that the committee was not making any proposals at this point.

He stated that another misconception had been that the committee was proposing to increase the amount of federal rulemaking regarding attorney conduct. In fact, he said, the committee was trying to accomplish just the opposite. The thrust of the committee's discussions to date had been to reduce the number of local federal court rules and turn attorney conduct matters over generally to the states.

Finally, Professor Coquillette said that the study of attorney conduct would not be completed quickly. Time would be needed to coordinate efforts with the American Bar Association, the American Law Institute, and other bar groups. Time would also be needed to study attorney conduct issues in a bankruptcy context. Accordingly, the only action needed was for the Standing Committee to affirm the appointment of the ad hoc committee.

The committee voted without objection to appoint an ad hoc committee to study attorney conduct matters.

Professor Coquillette noted that the Court Administration and Case Management Committee had provided the committee with a set of principles to govern conduct in alternate dispute resolution proceedings. He said that no action was required on the part of the committee, but pointed out that there is likely to be more activity in this area at the local and national levels.

Professor Coquillette reported that two bills had been introduced in the Congress to govern attorney conduct. He said that the committee should respond to Congressional inquiries by referring to the ongoing attorney conduct project.

LOCAL RULES AND UNIFORM NUMBERING

Professor Squiers reported that about 70% of the district courts had renumbered their local rules, as required by the Judicial Conference. One member suggested that the circuit councils should be asked to assist the remaining courts in complying with the renumbering requirement.

Professor Squiers reported that the Civil Justice Reform Act of 1990 had expired and that many of the provisions contained in the district courts' individual civil justice expense and delay reduction plans had now been incorporated into local rules. The status and legality of other procedural requirements contained in local plans, however, was uncertain.

Judge Stotler praised the efforts of the Local Rules Project and pointed out that it had identified many good local rules that have now been adopted as national rules. She asked whether it would be helpful for the committee to commission a new national survey of local rules in light of the renumbering project, the 1993 amendments to the civil rules, and the expiration of the Civil Justice Reform Act. She suggested that Professor Squiers might consider preparing a specific proposal for committee consideration, including a provision for obtaining appropriate funding for a survey.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the Supreme Court had approved the restyled body of appellate rules with one minor amendment. He said that the restyling project had been successful because of the leadership shown by Judges Stotler and Logan and the hard work and expertise of Professor Mooney and Mr. Garner. Judge Stotler added that a great debt was also due to Judge Robert Keeton, who had initiated the project, and to Professor Charles Alan Wright, Judge George Pratt, and Judge James Parker.

Judge Parker said that the next project would be to restyle the body of criminal rules. He noted that a first draft had been prepared and would be considered by the Style Subcommittee. A final draft would likely be submitted to the Advisory Committee on Criminal Rules by December 1, 1998.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte referred to the docket sheet of technology issues set forth in the agenda book. He pointed out that electronic filing of court papers was the most significant technological development that would affect the federal rules. He noted that Mr. McCabe and his staff had prepared a paper summarizing the rules-related issues that had been raised in the 10 electronic filing pilot courts. He added that the paper would be circulated to the reporters and considered by the advisory committees.

PROPOSALS TO SHORTEN THE RULEMAKING PROCESS

Judge Stotler stated that the Executive Committee of the Judicial Conference had asked the committee to consider ways to reduce the length of the rulemaking process. Each of the advisory committees had discussed the matter and had concurred in principle that there should be some shortening of the process. No specific proposals, however, had been forwarded.

At Judge Stotler's request, Mr. Rabiej distributed and explained a chart setting forth the time requirements for the rules process and setting forth various ways in which the times might be reduced. He noted that some of the suggestions made for shortening the process are controversial. He proceeded to explain each of the proposed scenarios.

Mr. Rabiej stated that proposed amendments are normally presented to the Supreme Court following the September meeting of the Judicial Conference each year. He explained that, except in emergency situations, the Conference does not send proposals to the Court following the March Conference meetings because the justices do not have sufficient time to act on them before the May 1 period specified in the Rules Enabling Act.

One member questioned the need to shorten the process and asked the chair whether a policy decision had been made to shorten the process. She replied that no decision of the kind had been made, but that the Executive Committee had asked the rules committees to consider the issue. She added that the amount of time needed to consider a rule depends largely on the nature of the particular rule.

Another member suggested that it would be better to leave the existing, deliberative process in place, but to consider developing an emergency process that could be used to address special circumstances requiring prompt committee action. Several other members concurred in this judgment and suggested the need to develop a fast track procedure.

Several members noted that the need for accelerated treatment of an amendment usually arises because the Congress or the Department of Justice decides to act on a matter through legislation. They observed that the Congress in several instances has decided not to wait for the orderly and deliberative promulgation of a rule because the process was seen as taking too long. The chair replied that the advisory committees might consider certifying a particular rule for fast track consideration.

One of the participants suggested that consideration be given to eliminating one or more of the six entities that participate in considering an amendment, *i.e.*, advisory committee, public, standing committee, Judicial Conference, Supreme Court, and Congress. Others responded, however, that each entity plays an important part in the process. Therefore, it would be unwise, both substantively and politically, to consider elimination of any of them. Members pointed to the important role played by the standing committee in assuring quality and consistency in the rules and that of the Supreme Court in giving the rules great prestige and credibility.

One member recommended that the committees adopt a fixed schedule for submitting proposed amendments to the rules as packages, such as once every five years. The advisory committees could stagger their changes so that civil rules, for example, might be considered in one year and criminal rules in the next. He advised the committee to accept the inevitability that: (1) emergencies will arise on occasion; and (2) the Congress or the Department of Justice will continue to press for action outside the Rules Enabling Act when they feel the political need to do so. He concluded, therefore, that the committees should establish a firm schedule for publishing and approving rules amendments in multi-year batches, but also take due account of emergencies, political initiatives, and statutory changes.

Judge Stotler suggested that further thought be given to the issue of shortening the length of the rulemaking process and that additional discussion take place at the next committee meeting. She also suggested that further thought be given to the issue of making the chairs of the advisory committees voting members of the Standing Committee.

NEXT COMMITTEE MEETINGS

The committee is scheduled to hold its next meeting on Thursday and Friday, January 7 and 8, 1999. Judge Stotler asked the members for suggestions as to a meeting place so that

the staff could begin making reservations. She also asked the members to check their calendars and let the staff know their available dates for the June 1999 committee meeting.

Respectfully submitted,

Peter G. McCabe
Secretary

I-B

LEGISLATION AFFECTING
THE FEDERAL RULES OF PRACTICE AND PROCEDURE
105th Congress

SENATE BILLS

S. 3 Omnibus Crime Control Act of 1997

- Introduced by: Hatch and others
- Date Introduced: January 21, 1997
- Status: Referred to the Committee on Judiciary
- 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 (See H.R. 903)

- 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; Subcommittee on Oversight and Courts.
- 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; Subcom. on Oversight and the Courts
- 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 (See H.R. 924; H.R. 1322; S.J. Res 6)

- Introduced by: Kennedy and Leahy
- Date Introduced: July 29, 1997
- Status: Referred to Committee on Judiciary.
- 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. 1301 Consumer Bankruptcy Reform Act of 1997

- Introduced by: Grassley
- Introduced: October 21, 1997;9/23/98 Senate passed companion measure H.R. 3150 in lieu of this measure
- Status: 5/21/98 - Ordered to be reported with amendments favorably; 6/4/98 placed on Senate Legislative Calendar; Jul 21, 1998 Senator Hatch from Committee on Judiciary; filed written report. Report No. 105-253(Additional and minority views filed.) Letter sent from Judge Stotler.
- Provisions affecting rules: None directly amending the rules or instructing judicial conference to propose rule amendments, will likely move with either H.R. 3150, S. 1914, or both, which do contain rules issues.

S. 1352 Untitled

- Introduced by: Grassley
- Date Introduced: October 31, 1997
- Status: Referred to Committee on the Judiciary — letter from Civil Rules Committee to Hatch (4/17/98)
  - 4/2/98 Approved by Subcom. on Oversight and Courts; Sent to full committee
- Provisions affecting rules
  - amends Civil Rule 30 restoring stenographic preference for recording depositions

S. 1721 Untitled

- Introduced by: Leahy
- Date Introduced: March 6, 1998
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules
  - requires the Judicial Conference to review and report to Congress on whether the FRE should be amended to create a privilege for communications between parents and children

S. 1737 Taxpayer Confidentiality Act (See Public Law 105-206)

- Introduced by: Mack
- Date Introduced: March 10, 1998
- Status: Referred to Committee on Finance; included in the IRS restructuring Bill marked-up on 3/31/98 (HR 2676); HR 2676 passed the senate on 5/7/98; June 24th Conference Report;
- Provisions affecting rules
  - Amends the Internal Revenue Code to apply attorney-client privilege to communications between a taxpayer and any authorized tax practitioner (CPA, Enrolled Agent, etc) in noncriminal matters before the IRS and in federal court

S. 1914 Business Bankruptcy Reform Act

- Introduced by: Grassley
- Introduced: April 2, 1998
- Status: 6/2/98 Subcommittee on Oversight and Courts concluded hearings; letter from Judge Stotler sent; likely to be attached to S. 1301 following July 4 recess.
- Provisions affecting rules: several provisions request the bankruptcy rules committee to propose for adoption rules or forms to implement statutory changes; See H.R. 3150 and S. 1301

S. 2030 Grand Jury Due Process Act (See S. 2260)

- Introduced by: Bumpers
- Date Introduced: May 4, 1998
- Status: Referred to Committee on Judiciary
- Provisions affecting rules
  - Would amend CR 6 [The Grand Jury] to allow witnesses before the grand jury the assistance of counsel while in the grand jury room

S. 2083 Class Action Fairness Act of 1998

- Introduced by: Grassley and Kohl
- Introduced on: May 14, 1998
- Status: 9/10/98: Subcommittee on Oversight and Courts. Approved for full committee consideration with an amendment in the nature of a substitute favorably.
- Provisions affecting rules
  - Limits attorney fees in class actions to a reasonable percentage of damages actually paid; general removal of class actions from state to federal courts; undoes 1993 amendments to Civil Rule 11 and requires sanction for frivolous filing **[CV11]**

S. 2163 Judicial Improvement Act of 1998 (See H.R. 660; H.R. 1252)

- Introduced by: Senator Hatch
- Introduced on: June 11, 1998
- Status: Committee on the Judiciary
- Provisions affecting rules
  - Section 3 deals with special masters;
  - Section 4 allows for interlocutory appeal of court orders granting or denying class action certification decisions

S. 2260 Appropriations for Department of Commerce; Justice etc.- ***Amendment 3262***

- Introduced by: Bumpers
- Date Introduced: July 22
- Status: Amendment agreed to(S. 2260 passed the senate 99-0 on 7/23/98); Not in bill, but conference report requires Judicial Conference to study the issue and report to Appropriations Committee by 4/15/99
- Provisions affecting rules:
  Requires Judicial Conference to issue a report on the grand jury amendments by 4/15/99

S. 2289 Grand Jury Reform Act of 1998 (SEE S. 2030)

- Introduced by: Senator Bumpers
- Introduced on: July 10, 1998
- Status: Committee on the Judiciary
- Provisions affecting rules
  - Section 2 would amend **CR6** [The Grand Jury] to list the rights and responsibilities of jurors and providing notice to witness of certain rights
  - Section 2 would also give Grand Jury witnesses the right to an attorney, paid for under 18 USC 3006A if necessary

S. 2373 Alternative Dispute Resolution of 1998

- Introduced by: Senator Grassley
- Introduced on: July 30, 1998
- Status: 10/13/ 98 Referred to Subcommittee on Oversight and Courts
- Provisions affecting rules
  - Requires courts to authorize by local rule adopted under 2071 the use of voluntary ADR procedures

HOUSE BILLS

H.R. 660 Untitled (See S. 2163)

- Introduced by: Canady
- Date Introduced: February 10, 1997
- Status: Referred to Committee on the Judiciary; 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 Alternative Dispute Resolution and Settlement Encouragement Act (See S. 79)

- Introduced by: Coble
- Date Introduced: March 3, 1997; Mar 7, 1997 Referred to the Subcommittee on Courts and Intellectual Property.
- 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 Victim Rights Clarification Act

- 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 (See H.R. 660; S. 2163)

- Introduced by: Hyde
- Date Introduced: April 9, 1997
- Status: 4/23/98 passed House; 4/24/98 referred to Senate—Letter from Civil Rules Committee to Hatch, re: Section 3 (5/7/98)
- Provisions affecting rules:
  - Section 3 amends title 28, section 1292(b), and would provide for interlocutory appeal of a class action certification decision. **[CV23]**
  - Provides discretion to judge to televise civil and criminal case proceedings, including trials
  - Sunsets provision governing CJRA plans

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 Grand Jury Reduction Act

- Introduced by: Goodlatte
- Date Introduced: May 6, 1997
- Status: Referred to Committee on the Judiciary — CACM considered proposal 6/97; referred to ST, rec'd that Judicial Conference oppose the legislation; Rec. Approved 3/98; letter sent by Conference Secretary to Goodlatte (4/17/98)
- 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 Forfeiture Act of 1997

- Introduced by: Schumer on behalf of the Administration —
- 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: Reported to the House, 10/30/97; Letter with Judiciary's comments being coordinated by LAO; including concerns about time deadlines in admiralty cases; 10/20 98: Ways and Means and Commerce discharged
- 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. 2135 Bail Bond Fairness Act of 1997

- Introduced by: McCollum
- Date Introduced: July 10, 1997
- Status: 3/12/98 Judge Davis testified at Subcommittee Hearings Held.
- Provisions affecting rules: Section 2 of the bill would amend CR46(e)

H.R. 2603 (became H.R.3528) *Alternative Dispute Resolution and Settlement Encouragement Act*

- Introduced by: Coble and Goodlatte
- Date Introduced: October 2, 1997
- Status: April 21, 1998 passed House, amended; 04/22/98 Referred to Senate Committee on the Judiciary
- Provisions affecting rules:
  - Requires courts to authorize by local rule adopted under 2071 the use of voluntary ADR procedures

- 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.

H.R. 3150 Bankruptcy Reform Act of 1998

- Introduced by: Gekas
- Introduced: February 3, 1998
- Status: 6/10/98 Passed House; 6/5/98 letter sent to Judiciary Committee leadership; 7/7/98 Placed on Senate Legislative Calendar, Calendar No. 457; died in conference
- Provisions affecting rules: several provisions request the bankruptcy rules committee to propose for adoption rules or forms to implement statutory changes

H.R. 3396 Citizens Protection Act of 1998 (See S. 2260)

- Introduced by McDade
- Introduced on March 5, 1998
- Status: referred on 3/5/98 to full Judiciary Committee (193 co-sponsors as of 8/4/8); passed as part of budget bill
- Provisions affecting rules: Subjects government lawyers to attorney conduct rules established by State laws or rules

H.R. 3577 Confidence in the Family Act (See H.R. 4286)

- Introduced by: Lofgren
- Date Introduced: March 27, 1998
- Status: Referred to Judiciary; attempt to add to HR 1252 failed
- Provisions affecting rules:
  - would amend **EV501** by adding a new section creating a privilege for communications between parents and children

H.R. 3745 Money Laundering Act of 1998 (See also H.R. 1756 and S. 2165)

- Introduced by: McCollum
- Date Introduced: May 5, 1998
- Status: 6/5/98 Forwarded by Subcommittee to Full Committee; 6/12/98 letter sent to Judiciary Committee leadership.
- Provisions affecting rules: Section 11 provides for admission of foreign records in civil cases. It is consistent with the proposed amendments to EV 803 and 902, which will be published for comment this fall.

H.R. 3789 Class Action Jurisdiction Act of 1998

- Introduced by: Hyde
- Date Introduced: April 29, 1998
- Status: Referred to Judiciary; mark-up by subcommittee; mark-up by full committee 8/5; 9/10/98 : reported to full House
- Provisions affecting rules: The bill would give federal courts original jurisdiction in class actions in diversity cases without regard to the value of the item in controversy and provide for removal of all class actions from state courts.

H.R. 3905 Fairness in Asbestos Compensation Act of 1998

- Introduced by: Representative Hyde
- Date Introduced: May 20, 1998
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules
    - Creates the Asbestos resolution Corporation to conduct medical reviews and ADR. Also sets out provisions governing asbestos litigation in courts, including offer of judgment provisions, limits on class actions, and pre-filing medical certification.

H.R. 4221 Untitled

- Introduced by: Representative Coble
- Date Introduced: July 16, 1998
- Status: Referred to Committee on the Judiciary — letter from Civil Rules Committee to Hatch (7/21/98)
- Provisions affecting rules
    - Amends Civil Rule 30 restoring stenographic preference for recording depositions

H.R. 4286 Parent-Child Privilege (See H.R. 3577)

- Introduced by: Representative Andrews
- Date Introduced: July 21, 1998
- Status: Referred to Committee on the Judiciary; 7/31/98 referred to Subcommittee on Courts and Intellectual Property
- Provisions affecting rules
    - Adds Rule 502 to Federal Rules of Evidence establishing a parent/child privilege
    - Has technical error in section b Clerical amendments and a very strange effective date.

S.J. Res. 6 (See also **S.J 44**; H.J. Res 71; HR 1322; S. 1081; H.R. 924))

- Introduced by: Kyl and Feinstein
- Date Introduced: January 21, 1997
- Status: Referred to Committee on the Judiciary; 4/28/98 hearing held (**S.J. 44**); amended 7/7/98; 7/7/98 Reported to Senate by Senator Hatch with an amendment in the nature of a substitute. Placed on Senate Legislative Calendar - Calendar No. 455.
- Provisions affecting rules:
  - Victim's rights **[CR32]**

I-C

Civil Rules Advisory Committee Agenda: November, 1998

Introduction

Several proposed Civil Rules amendments were published for comment last August. Changes in the discovery rules occupy center stage. Other proposals revise the Admiralty Rules to reflect developing forfeiture practice, and amend Rules 4 and 12 to deal with service and time to answer when an action is brought against a federal employee in an individual capacity for acts occurring in connection with official duties. Three hearings are scheduled for December, mid-January, and late January. Although the precise content of the testimony and written comments cannot be predicted, it seems likely that they will provide a substantial body of material to be considered at the spring meeting. Rather than begin long-range projects that might need to be deferred a full year for further consideration, this agenda pursues more modest goals.

The Discovery Subcommittee will present a review of the discovery proposals in preparation for the hearings.

The Committee is asked to participate in a discussion of the kinds of projects that should be undertaken in the next few years. This discussion will serve in part to orient the several new members, in part to review familiar topics that never come to rest, and in part to begin planning beyond the current proposals. Brief descriptions of some pending proposals are provided for this purpose.

The problems that arise from the proliferation of local district rules have been a perennial topic for discussion in this committee and in the Standing Committee. The Appellate Rules Committee has proposed a uniform effective date for local rules. Because several advisory committees are concerned with local rules problems, proposals to deal with these problems are coordinated by the Standing Committee. Two alternative drafts of Civil Rule 83 are provided for discussion. The first goes a step or two beyond the Appellate Rules proposal; the second goes still further. The committee may well conclude that it can act now to send some form of Rule 83 recommendations to the Standing Committee.

Another proposal also may be ready for present action. The story of the Copyright Rules of Practice is too strange to be summarized. The proposal is that they be repealed — more than two decades too late — and be replaced by modest changes in Civil Rule 65.

A lengthy docket of miscellaneous proposals has accumulated.

Several of them will be discussed to determine whether further attention is warranted now. One of these proposals, arising from 42 U.S.C. § 1997e(g), is discussed at some length because it is a good example of the kinds of perplexing problems that can arise from legislation that creates new procedures outside the framework of the Civil Rules.

A separate document will be submitted to describe the activities of the Mass Torts Working Group and to present the Group's draft report for review by this committee. The Working Group was formed under the leadership of the Civil Rules Advisory Committee because development of the Rule 23 proposals generated a great deal of information about mass tort litigation. The draft report deserves careful review.

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

March 16 and 17, 1998

Note: This Draft Has Not Been Reviewed by the Committee

The Civil Rules Advisory Committee met on March 16 and 17, 1998, at the Duke University School of Law. The meeting was attended by 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; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Anthony J. Scirica; and Chief Judge C. Roger Vinson. 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. Peter G. McCabe and John K. Rabiej represented the Administrative Office of the United States Courts. Thomas E. Willging represented the Federal Judicial Center. Observers included Robert Campbell (American College of Trial Lawyers), Alfred Cortese, Marsha J. Rabiteau, Fred S. Souk, H. Thomas Wells (American Bar Association Section of Litigation), and Jackson Williams (Defense Research Institute). Professor Paul D. Carrington, former Reporter for the Advisory Committee, participated in several portions of the meeting.

Chairman's Introduction

Judge Niemeyer opened the meeting by describing the informal Working Group on Mass Torts authorized by Chief Justice Rehnquist. The working group was established because the Advisory Committee's work on Rule 23 has demonstrated that judicial approaches to dispersed mass torts continue to present difficult questions. The questions suggest that answers may require legislation as well as rulemaking. Many different Judicial Conference committees have interests in the topics that may be addressed in wrestling with possible answers. The experience of the Advisory Committee makes it natural for the Advisory Committee to play a leadership role. Judge Scirica has been named chair of the working group, and Sheila Birnbaum and Judge Rosenthal are members. Liaison members have been appointed by the committees for Bankruptcy Administration, Court Administration and Case Management, Federal-State Jurisdiction, and Magistrate Judges. The chair of the Judicial

Panel on Multidistrict Litigation also is a liaison member. The working group had its first meeting in March, and has set the dates for its next two meetings. It is to report to the Chief Justice at the end of one year. The Advisory Committee will need to consider the proposed recommendations of the working group at the Advisory Committee's fall meeting, if it is to have any opportunity to act.

Turning to relations with Congress, Judge Niemeyer noted that continuing efforts are being made to maintain open communications. Judge Niemeyer and Judge Scirica have recently testified before congressional committees. They sense that Congress continues to support the Enabling Act process, particularly if effective communication continues. But it must be recognized that congressional processes can operate faster than the Enabling Act process, and the desire to accomplish change quickly is likely to continue to press against deference to the Enabling Act process.

Bills to amend procedural rules directly seem to be introduced with greater frequency. Often the bills are introduced because the sponsors do not know that the Enabling Act process can be invoked to pursue the same questions, and indeed often is pursuing the questions even as the bills are introduced. An illustration is provided by proposed Civil Rule 23(f), which is pending before the Supreme Court on the Judicial Conference recommendation for adoption. If the Court sends the rule to Congress, it could become effective on December 1, 1998. But some members of Congress do not want to wait that long for a new permissive interlocutory appeal provision for orders granting or denying class certification. Pressure to adopt proposed Rule 23(f) by legislation continues. One possible outcome might be legislation specifically accelerating the effective date after the Supreme Court transmits the proposal to Congress.

The continued concern about the time required to complete the Enabling Act process has raised the question whether some means might be found to compress the time without reducing the breadth of information and intensity of deliberation that now characterize the process. The Standing Committee has recently urged the advisory committees to consider this issue. There was not time to prepare for thoughtful consideration at this March meeting, but the issue will be on the agenda for the fall meeting.

Judge Niemeyer noted that the Standing Committee continues to be interested in local rules. The specific question of adopting a

nationally uniform effective date for local rules will be addressed later in this meeting. Other issues also may deserve action.

The Judicial Conference is continuing to follow the recently adopted practice of inviting the chairs of some Judicial Conference committees to attend Judicial Conference meetings. This practice provides an invaluable opportunity to explain committee proposals, to learn of the work of other committees, and to understand Conference concerns. Judge Niemeyer, for example, was able to provide information about Advisory Committee work on discovery, the mass torts project, and local rules questions. Local rules have a seductive fascination for district courts, and the strength of their charms was reflected in some of the reactions to his presentation. Any proposals to effect significant curtailment of local rule freedoms are likely to meet substantial resistance. He emphasized, however, that local rules not only threaten national uniformity, but also emerge from processes that of necessity are not as thorough as the advisory committee process. The 6-person jury, for example, took hold through local rules. The Advisory Committee, after thorough study, concluded that a 6-person jury is a significantly different institution from a 12-person jury. But opposition to the proposal to restore the 12-person jury, growing from entrenched habits spawned by the local rules, proved irresistible.

Finally, it was noted that the docket of unfinished Committee business has grown during the period of attention to Rule 23 and, more recently, discovery. A subcommittee should be designated to review the docket and make recommendations for the best methods of attending to the items that remain on it. This task may be assigned to the subcommittee that originally was formed to review the RAND report on the Civil Justice Reform Act.

Legislative Report

John Rabiej provided a report on pending legislation. A number of new bills bearing on procedural matters have been introduced since the descriptive list in the agenda book. The "sunshine in litigation" bills continue to be introduced. There is some concern in Congress that the Advisory Committee has devoted too much time to the questions raised by the bills without reaching any final conclusion. (This topic returned later, when the Committee determined to conclude its study of Civil Rule 26(c) protective orders without recommending any present changes in the rule.) The proposed Judicial Reform Act includes controversial

provisions, including one that in effect allows a party one peremptory challenge of the trial judge.

Other topics addressed in pending bills involve class actions. There is concern that the Private Securities Litigation Reform Act has encouraged some plaintiffs to file class actions in state courts, leading to bills that would preempt state class actions in this area. Civil Rule 11 bills continue to be introduced, including a specific attempt to use Rule 11 to control frivolous class actions.

The perennial bill to require stenographic recording of depositions is again before Congress.

Copyright legislation and proposed international conventions hold an important place in Congress. Specific concern with international efforts to augment effective copyright remedies may bear in the approach this Committee should take to the obsolete Copyright Rules of Practice, a matter addressed later in the meeting.

One of the bills dealing with court-annexed arbitration includes language for establishing local programs by local rule. The Court Administration and Case Management Committee is addressing this legislation, and has urged that an alternative to local rules be found. The local rules issue is the same here as elsewhere — even when it may be desirable to allow local autonomy, particularly to continue to work through such developing matters as alternate dispute resolution techniques, means should be found that do not encourage a further proliferation of local rules with the attending encouragement to depart from uniform national procedure.

The local rules issue also is reflected in the recently accomplished amendment of the "sunset" provisions in the Civil Justice Reform Act. Although the amended statute is not clear, it seems to authorize continued adherence to local practices that could not be adopted by local rules because inconsistent with the national rules. At the same time, the machinery for changing the local plans is dismantled. This is a perplexing situation that requires further attention.

Mass Torts Working Group

Judge Scirica described the formation and organization of the Mass Torts Working Group. The group was formed because Judge Niemeyer was able to draw on this Committee's experience with Rule

23 revision to convince other Judicial Conference committees that there are problems that cut across the jurisdictions and interests of the committee structure. These problems deserve study, and should be studied in a coordinated way. The Federal Judicial Center will be lending help as well; Judge Zobel is interested, and Thomas Willging will be directing a variety of studies. Professor Geoffrey C. Hazard, Director of the American Law Institute and a member of the Standing Committee, also will participate in working group efforts. The first meeting, held on March 4 in Washington, was successful. Preparations are under way for the next two meetings, which will be held with relatively small numbers of richly experienced judges, lawyers, and academicians. The first of these meetings will be held April 23 and 24 at the Hastings College of the Law, and the second on May 27 and 28 at the University of Pennsylvania Law School. Later meetings will be planned when needed.

The goals of the working group are limited by the available time. It would be good to generate two documents. The first would describe the mass-torts phenomenon. It seems important to emphasize that each mass tort that emerges is different from its predecessors. There is a risk that experience with one mass tort may be generalized to prescribe approaches to another that, because it is different, is better approached in a different way. A description of the known problems, in short, can be quite useful. The second document would illustrate possible approaches to resolving the problems that are identified in the first. There are many possible approaches. At one end of the line would be means to assert control by a single court over all parties and all issues involved in a mass tort; nothing of the sort exists now. At the other end of the line would be structures and procedures to regularize and foster coordination among courts that entertain related actions, without effecting any consolidation or other common control. The range between these approaches is thickly populated with alternative approaches. Almost all approaches raise obvious questions of jurisdiction, and many involve substantive and choice-of-law issues. Concerns of federalism and comity will occupy a central position.

One question, growing out of the testimony and comments on proposed Rule 23 revisions, is whether federal courts should encourage nationwide classes in mass torts cases. Class actions seem to accelerate filings, and perhaps increase the total number of claims advanced. They present the familiar "private-attorney-

general" phenomenon, albeit in a setting quite different from the small-claims class action that acts on claims that otherwise would be abandoned without litigation. There are interdependencies between the Enabling Act rules process and legislation that cannot be ignored.

Various models will be drafted "just to see what they look like." It is hoped that the specific focus provided by even a crude first attempt to anticipate some of the procedural and jurisdictional questions raised by various approaches will enrich the advice provided to the working group.

After the April and May meetings, the working group and staff will reflect on the advice gathered at the meetings and attempt to refine the initial models or develop new models. This experience may suggest the need for a third and similar meeting early in the fall. The target will be to prepare a draft report for consideration by the Advisory Committee at its fall meeting. Although it is not entirely clear what date should be viewed as the beginning and end of the one-year term of the working group, the report should be made no later than the March 4 anniversary of the first group meeting. Consideration by the Advisory Committee thus must be at a fall meeting.

Minutes approved

The Minutes for the October, 1997 meeting were approved.

Discovery

Judge Niemeyer opened discussion of the report presented by the Discovery Subcommittee. He noted that the question is whether changes can be made in discovery that will reduce cost while preserving the full information values we now enjoy. Related questions are whether we can restore a uniform national practice, particularly with respect to disclosure, and whether it is possible to elicit greater judicial involvement with discovery problems.

The Boston College conference in September, 1997, provided fine support for the developing efforts of the Discovery Subcommittee. The symposium articles and working papers will be a good resource for the future, as the conference itself has provided strong support for the subcommittee.

The subcommittee report itself is consistent with the three-level model of discovery that has been before the committee. There is initial disclosure, followed by attorney-managed discovery,

within a framework that will provide for judicially managed discovery for cases that extend beyond a reasonably permissive core level of attorney-managed discovery.

The discovery discussion was then turned over to the subcommittee, led by Judge Levi and Professor Marcus.

Disclosure

Four disclosure alternatives were presented by the subcommittee.

The first alternative would retain the disclosure system adopted in 1993, but eliminate the provision that allows individual districts to opt out by local rule. This would establish national uniformity. As reflected in the subcommittee working papers, this alternative would be supported by the initial studies that find the present system effective. The Federal Judicial Center study is the most recent and detailed. On the other hand, this approach would likely encounter vigorous resistance in districts that have chosen to opt out of the national rule. An attempt to force disclosure on reluctant courts, with no more support than the tentative conclusions of early studies, could fail, leaving no disclosure system at all.

The second alternative would repeal most of the present disclosure rule, leaving only the damages and insurance disclosure provisions of Rule 26(a)(1)(C) and (D). These limited disclosures would again be made uniform by defeating the opportunity to opt out by local rule. This approach has the virtue of simplicity, and would accommodate the resistance to disclosure found in many courts.

The third alternative is the main "middle-ground" proposal. This approach would be to retain the present disclosure system and make it national, but limit the witness and document disclosure requirement to items that are in some way favorable to the disclosing party. This proposal would eliminate the "heartburn" that arises from requiring disclosure of the identity of unfavorable witnesses and documents. The model built to illustrate this alternative includes several features that probably should be added to the present rule if it is retained and made nationally uniform. One new feature is an express provision for parties who join the action after disclosure by the original parties. A second is a method of designating the exclusion of categories of cases that should not routinely be made the subjects of disclosure and

the Rule 26(f) party conference. Exclusion could be accomplished either by designating categories of excluded cases in the national rule or by incorporating by reference the local district categories of cases excluded from Rule 16(b). The third reaches cases at the opposite end, allowing exemption from initial disclosure because the case is so complex or contentious that it seems more useful to proceed straight to discovery. The draft provides for exclusion by allowing any party to stall disclosure until the district court has an opportunity to review the objection as part of the Rule 26(f) process.

The final alternative is a much-reduced system that virtually eliminates disclosure by reducing it to an item to be considered by the parties at the Rule 26(f) conference. There would be initial disclosure only if the parties agree on it, a possibility that in any event is available without encouragement in the rules. Form 35 would be amended to emphasize the need to consider disclosure.

All subcommittee members agreed that the Rule 26(f) conference was a successful innovation, and should be retained whatever may be done with initial disclosure. It was suggested that Rule 26(f) provides a natural occasion for opening settlement discussions, and that the parties will exchange the information needed to support settlement whether or not there is any disclosure system.

The approach of abandoning disclosure was supported by the observation that in the real world, people know how to use discovery effectively as soon as the action is filed. A great deal of effort should be devoted to preparation and investigation before the case is filed, providing the framework within which discovery can be managed without any need for delay while the limited and relatively formal information required by Rule 26(a)(1) is exchanged. Many districts have decided to manage without disclosure, and are managing quite well. Many problems would disappear if we got rid of this initial disclosure.

In response, it was observed that there are studies indicating that initial disclosure often is a neutral force, but — as in the FJC study results — rather often succeeds in reducing cost or delay, or promoting settlement, or leading to better outcomes. The subcommittee as a whole thought that some form of disclosure should be retained.

The reformulated response was that the names-and-addresses-of-witnesses form of disclosure can help, but that it is not enough to

justify the moratorium on discovery that was adopted to support initial disclosure. The names of witnesses and identity of documents can be obtained on first-wave discovery, and the overall discovery process will work more efficiently if there is no need to wait for several months while process is served and the Rule 26(f) conference is arranged.

The subcommittee report then made it explicit that the subcommittee's first choice is the mid-ground that requires disclosure of information favorable to the disclosing party. This approach is, to be sure, a compromise. But it seems to work well in two districts that now have it, the Central District of California and the Northern District of Alabama. If this form of disclosure is adopted on a uniform national basis and continues to work well, it may provide the foundation for an eventual return to the 1993 disclosure system as a uniform national system.

The Rule 26(f) meeting was again hailed as the key, with the suggestion that it should be made to run with as little interference as possible. The middle ground, synthesized with Rule 26(f), is the best system. Paul Carrington's approach seems best. We should set out the things the parties must exchange, and time limits. The court should become involved only if the parties cannot do it. This alternative would include more detailed instructions on what must be accomplished at the Rule 26(f) conference.

Another approach, not recommended by the subcommittee, is to separate disclosure into separate phases, with the plaintiff making disclosure first. The defendant would follow after a suitable period, responding directly to the plaintiff's disclosures as well as to the issues framed by the pleadings. This approach could support much more detailed disclosures than can be made with simultaneous exchanges based on notice pleadings. The District of South Carolina standing interrogatory approach provides an illustration. It was asked why the subcommittee has not recommended this approach. The subcommittee response was that most cases now have minimal discovery. And in most cases what discovery there is works well. The prospect of forcing detailed discovery of the sort reflected in the South Carolina interrogatories on all cases seems unattractive. They cover more ground than seems likely to be covered in most cases now, and more than is likely to be needed in most cases.

The South Carolina standing interrogatories approach suggests

a different possibility, that of drafting pattern discovery requests for complex cases in specific subject areas. Allen Black and Robert Heim are working on an illustrative set for antitrust cases to help measure whether this task is feasible. If promising results emerge, the subcommittee will want to consider the means for generating pattern discovery systems and for advancing them to the world.

Disclosure could be sequenced in waves without adopting the South Carolina interrogatories. Sequencing, however, increases the number of conflict points. It also encourages those who go next to protest that those who went first did not fulfill the disclosure obligation and that this excuses their own failure to respond or sketchy responses.

The need for disclosure was then championed as a prop for the Rule 26(f) conference. Knowing that disclosure will be required soon after the conference encourages preparation for the conference. The mid-ground that requires disclosure of favorable information was supported on the related ground that if the conference does not lead to settlement, the parties know that the disclosures will be followed immediately by discovery demands for unfavorable information.

Brief mention was made of the subcommittee's review of (a)(2) expert-witness disclosure and (a)(3) pretrial disclosure. The subcommittee believes they should be retained. They now are national rules without the opportunity to opt out by local rule that is available for (a)(1) initial disclosure. Some districts, to be sure, have adopted local rules that purport to opt out of these disclosure requirements. The local rules are not consistent with the national rule and appear invalid.

A question was asked as to the strength of the positive responses to disclosure experience. Is it simply a matter that lawyers think they can live with the present (a)(1) system, or that it actually accomplishes real benefits? The FJC study seems encouraging, but is it enough?

The mid-ground proposal discussion then turned to the means of excluding "low-end" cases from the obligation to disclose even favorable information. One possibility studied by the subcommittee but not advanced for further discussion would be delegation to the Judicial Conference. Disclosure would be required in all cases except those excluded by resolution of the Judicial Conference.

The possible advantage of this approach is that it would allow more flexible adaptation of the exemption list to changing experience, free from the lengthy Enabling Act process. It was concluded, however, that this advantage also is the vice of this technique. This matter is too much part of the procedure rules to be delegated out of the deliberately thorough Enabling Act process.

A variation on the subcommittee proposal would be to list some excluded categories of cases, in the manner of the list of affirmative defenses in Rule 8(c), with a concluding catch-all equivalent to the Rule 8(c) "and any other matter constituting an avoidance or affirmative defense." It was quickly concluded that this approach would provide more confusion than guidance. It was pointed out that the FJC discovery study sought to exclude cases that typically have little or no discovery, and by adopting half a dozen excluded categories eliminated more than half the cases on a typical docket. It should be possible to adopt a specific list of eight or ten or twelve categories that will exclude a great share of the cases that ought not be subject to the burdens of even limited, favorable-information disclosure.

One additional safety valve is provided by the opportunity of the parties to agree that disclosure is not appropriate. Rule 26(a)(1) now allows the parties to stipulate out of disclosure, and this provision will be retained. The Rule 26(f) conference, in addition, provides the natural focus for agreeing to exclude disclosure when it seems redundant or unnecessary.

The alternative middle ground, which would essentially eliminate witness and document disclosure but leave agreement on such disclosure as an explicit topic for the Rule 26(f) conference was noted briefly. It was provided as an alternative to the "favorable information" disclosure, but without strong support.

Turning to the "high-end" exclusion, it was asked whether there was a risk that obstructionist parties would overuse the opportunity to stall disclosure by objecting. The draft Committee Note attempts to deal with this by discussing the nature of the cases that might make disclosure inappropriate. As an illustration, the draft suggests that disclosure may properly be deferred pending disposition of motions challenging the court's jurisdiction. The draft raises the question whether deferral also may be appropriate pending decision of dispositive motions, particularly those addressed to the pleadings. This sort of question is something that can be worked out in generating the next

draft.

The subcommittee's support for the mid-ground approach was reiterated. There are some challenging drafting problems, but they are not so great as to defeat the enterprise. Disclosure in some form should be retained, and made uniform on a national basis.

It was asked whether trial judges would encounter substantial burdens in administering the distinction between favorable and not favorable information. Thomas Willging responded that in studying the two districts that take this approach to disclosure, the FJC found that attorneys spend less time with the court, and more time meeting and conferring with each other. It seems to work. But this information does not address the prospect that claimed failures to disclose will become issues at trial. At the same time, limiting the disclosure requirement to favorable information provides a much more natural and effective base for the exclusion sanction at trial. The threat of exclusion does not work well as to information a party does not want to use at trial, but should work well as to information a party does want to use.

Professor Carrington observed that the 1991 committee would say that the mid-ground proposal goes in the right direction. During the deliberations then, disclosure was not limited to favorable information because of the expectation that favorable-information disclosure would inevitably be followed by discovery demands for unfavorable information. But in the setting of adopting a truly national rule, the recommendation is a politic step. There is no virtue in the local option, which was added to the 1993 amendments from a sense of compulsion arising from the variety of practices that had proliferated under the Civil Justice Reform Act. There are enough virtues in disclosure to support adoption of a uniform national rule.

The committee voted unanimously to adopt the favorable-information approach to disclosure, and to work further on the details.

Work on the details must be done expeditiously after the committee has gone as far as can be done in full meeting to establish the general directions. The Style Subcommittee must be allowed time to review the drafts, and then the full Advisory Committee must review them. A report to the Standing Committee must be prepared by mid-May.

The first detailed drafting question is how to describe

"favorable information." Those words will not do the job; too much information is potentially favorable or unfavorable to any given position. Three alternatives were considered: (1) "information that tends to support the positions that the disclosing party has taken or is reasonably likely to take in the action"; (2) "information that the disclosing party may use to support its positions in the action"; and (3) "information upon which the party bases its claims, prayer for damages or other relief, denials, or defenses in the action." Difficulties can be imagined in each formulation, and offsetting advantages.

The "may use" formulation was supported on the ground that it ties directly to the incentive to disclose, and best describes to all parties the disclosure obligation. The subcommittee recommended — with the support of the committee — that the duty to supplement disclosures imposed by Rule 26(e)(1) be retained. A party can easily understand and implement the duty to disclose the names of witnesses and identity of documents it may want to use at trial. It can as easily understand and implement its freedom to fail to identify the material — which may amount to warehouses full of documents — that it does not want to use at trial. As trial preparation proceeds, the disclosure obligation can be supplemented easily and naturally. There is no real risk that a party can avoid the duty to supplement by arguing that it did not know at the time of the initial disclosure that it might want to use information it later decided to use.

The formulation that addresses information on which a party bases its claims, denials, or defenses was supported on the ground that "bases" implies that the information is significant. The information need not be everything that the party may want to use at trial; this formulation narrows the obligation of initial disclosure. In particular, it avoids the need to identify witnesses or documents that will be used only for impeachment purposes.

Discussion of the draft drawn from information on which claims are based quickly concluded that whatever approach is taken, there is no need to refer to the "prayer for damages or other relief." Damages and relief are part of the claim, and the disclosure requirement of Rule 26(a)(1)(C), which will be continued under all proposals, will catch up most of the damages element as a double precaution.

An initial expression of preferences canvassed four possible

523 descriptions of disclosure information: "tends to support" got one
524 vote. "Supports" got three votes. "May use to support" got three
525 votes. "Upon which bases" got four votes. Further discussion led
526 to further endorsements for "supports." It was urged that this
527 term fits the time of initial disclosure, a time when the parties
528 do not know what they may want to use at trial. "We want to know
529 what you know will support your positions." "Supports" clearly
530 signals the intention to exclude an obligation to disclose
531 unfavorable information. "May," in the "may use" formulation, is
532 equivocal. And "positions," in any of the formulations, is too
533 broad. "May use" again was endorsed because it provides the focus
534 for enforcement by exclusion at trial. It is an essential
535 qualifier, because a party may not know with certainty what it will
536 use. And "use" avoids the ambiguity of "supports," since the same
537 information may both support and undermine a position — many a
538 witness has both supporting and undercutting information, as does
539 many a document. And parties will disclose more than they will
540 with "supports."

541 The next vote provided 7 votes for "supports claims, denials,
542 or defenses," no votes for the "bases" formulation, and 4 votes for
543 "may use to support the disclosing party's claims, denials, or
544 defenses." It was decided to adopt the "supports" formulation,
545 most likely to be rendered as "discoverable information supporting
546 the claims, denials, or defenses of the disclosing party."

547 With disclosure limited to supporting information, attention
548 turned to the limitation in present (a)(1)(A) and (B) that
549 witnesses and documents need be identified only as relevant "to
550 disputed facts alleged with particularity in the pleadings." This
551 limit was introduced to the disclosure provision because notice
552 pleading often makes it very difficult for an opposing party to
553 know the contours of the case as it will emerge from discovery.
554 The whole design of the 1938 system, indeed, was to transfer much
555 of the information exchange between the parties from pleading to
556 discovery. Contention interrogatories, requests for admission, and
557 Rule 16 practice have developed over the years to augment the
558 subordination of pleading even as to identification of the legal
559 issues. But this concern is greatly reduced when the nature of
560 disclosure is reduced to disclosure of information supporting the
561 claims, denials, or defenses of the disclosing party. The
562 disclosing party presumably knows at the time of disclosure what
563 its positions will be, and is obliged to supplement its disclosure
564 as it perfects its understanding of its own positions. Nor is it

simply that there is no apparent reason for continuing this limitation. A major reason for adopting it was the hope that it would encourage each party to plead with greater particularity so as to enhance the disclosure obligation imposed on its adversaries. With disclosure changed to supporting witnesses and documents only, the limitation would encourage each party — and perhaps most especially the plaintiff — to plead in broad terms so that it has no disclosure obligation. The committee voted 9 to 2 to delete the words that limit disclosure to disputed facts pleaded with particularity.

Discussion next turned to the draft designed to relieve the parties of the disclosure obligation in "high-end" cases that are better handled through court-managed discovery. The draft Rule 26(a)(1)(E) provides for disclosure with 10 days [later changed to 14 days] after the Rule 26(f) meeting "unless a party contends that initial disclosure is inappropriate in the circumstances of the action, in which event disclosure need not be made until 10 [later changed to 14] days after the initial scheduling order is entered by the court pursuant to Rule 16(b)." The effect would be that disclosure occurs if all parties want it, and — under the "unless otherwise stipulated" language carried over from the current rule — does not happen if all parties agree to dispense with it.

It was asked whether language should be included to identify "complex or class actions" as inappropriate for disclosure. The subcommittee responded that this possibility had been considered because it is indeed the complex cases that today are routinely exempted from disclosure in favor of judicial discovery management. Anecdotal experience suggests strongly that disclosure is inappropriate in such cases. But all of the studies suggest that it is not possible to define "complex" cases by subject-matter or other criteria.

Further discussion of drafting alternatives led to adoption of this formulation:

> These initial disclosures must be made at or within 14 days after the subdivision (f) meeting of the parties unless otherwise stipulated or directed by the court. If a party objects before this time that initial disclosures are not appropriate in the circumstances of the action, the court must determine what disclosures — if any — are to be made, and direct that any disclosures be made no earlier than 14 days after entry of the initial

scheduling order under Rule 16(b).

The next set of problems arises from the failure of the present rule to address the disclosure obligation of parties who join the action after the time for initial disclosures. The Rule 26(e)(1) duty to supplement does not reach later-added parties because it applies only to a party who has made a disclosure. The proposed draft, also part of proposed 26(a)(1)(E), would provide that: "Any party not served at the time of the meeting of the parties under subdivision (f) shall make these disclosures within 30 days after the date on which the party first appears in the action unless otherwise stipulated or ordered by the court, or unless the disclosure obligation has been excused for other parties by stipulation or order." Difficulties in this formulation were recognized. The reference to a party "served" seems to overlook those who join by intervention, plaintiffs added by amendment of the complaint, and perhaps others. The reference to a person not a party "at the time of the meeting of the parties" seems to fit awkwardly with those who become parties immediately before the meeting. It was agreed that the problem of later-added parties should be addressed, and that these apparent drafting glitches should be worked out. The resolution may look something like this: "A person who becomes a party after the eleventh day before the subdivision (f) meeting of the parties must make these disclosures within 30 days after becoming a party unless otherwise stipulated or ordered by the court, or unless the disclosure obligation has been excused for other parties by stipulation or order."

A question not raised by the subcommittee was presented by the question whether disclosure should occur before the Rule 26(f) meeting. Paul Carrington noted that this had been the initial thought of the committee when Rule 26(f) was rewritten for 1993, but that it had been concluded that the meeting is necessary to make disclosure effective. The need may be reduced to some extent by the proposed retrenchment of disclosure to supporting information. But even under this reduced disclosure system, the meeting may well serve to focus the positions — the claims, denials, and defenses — of the parties. It was suggested that perhaps the note to the amended Rule 26(f) should suggest that disclosure before the meeting is desirable. But it was responded that even if that would be desirable in an ideal world, the meeting is where arrangements particular to the case are made. Disclosure may not be important to what actually is done. And the committee was reminded that Rule 26(f) seems widely regarded as the most

useful of the 1993 discovery changes — and there have not been any complaints that it would be improved by requiring disclosure before the meeting. The meeting "breaks the ice." Disclosure often occurs at the meeting. The committee agreed that no change should be made.

Another question not raised by the subcommittee was identified in the timing provisions of Rule 26(f). It sets the meeting at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). It requires a report to the court "within 10 days after the meeting." Because of Rule 6(a), "intermediate Saturdays, Sundays, and legal holidays" are excluded from the 10-day period. With a three-day legal holiday weekend, it is possible that the report will be due one day after the scheduling conference or order (the intermediate weekend and holidays are not excluded from a 14-day period). The need to have the report due in time to allow consideration before the conference has led one member to routinely order that the Rule 26(f) conference be held within 30 days after an answer is filed; the report is to be filed 14 days after the meeting. The Rule 16(b) conference follows the report unless the parties do not want the conference — and most often the parties work things out at the meeting. It might be desirable to adopt an idea suggested by Paul Carrington, setting the meeting within 90 days after a defendant is served.

Renewed discussion of the 26(f) time limits agreed that it is not desirable to have the report of the meeting presented to the court for the first time at the scheduling conference. It was agreed that the time for the meeting should be set at 21 days, rather than the present 14 days, before the scheduling conference or order. The time for the report of the meeting also should be changed, to 14 days after the meeting. This change will coincide with the change to Rule 26(a)(1)(E) that sets the time for disclosure at 14 days after the Rule 26(f) meeting, and — in part by moving outside the Rule 6(a) rules for calculating periods of less than 11 days — set a clear date one week before the scheduling conference. This sequence will allow the parties to focus on a common deadline for disclosures and report, and will ensure adequate time for the court's consideration of the report.

Other Rule 26(f) matters also were raised. The subcommittee report had not suggested any exclusions, but its recommendation to delete the power to adopt exclusions by local rule is accepted by the committee. That leaves a need to provide for exclusion in low-

end cases. It was noted at the Boston College conference that the meet-and-confer requirement is an unnecessary burden in many simple cases, simply one more useless hoop to jump through. The committee agreed that Rule 26(f) should be modified to incorporate the same low-end exclusions as are adopted for initial disclosures under Rule 26(a)(1). The court will continue to have discretion to exclude other cases.

The final Rule 26(f) question is posed by the language requiring that the parties "meet to discuss," and making them responsible for "being present or represented at the meeting." The 1993 Committee Note states that the rule requires a face-to-face meeting. This obligation ordinarily is reasonable in dense urban areas, but may impose untoward burdens in large and sparsely populated districts. The present power to exempt cases by local rules enables each district to take account of its own circumstances and adopt mollifying exemptions — one example was offered of a rule that allows a telephone meeting when any attorney is located more than 100 miles from the court. Removal of the option to have local rules requires that this issue be reconsidered for the national rules. There are great advantages in a face-to-face meeting that cannot be duplicated by telephone, and are not likely soon to be duplicated by videoconferencing. It might be possible to adopt a compromise rule that seeks to preserve these advantages by requiring the parties to "confer in person if geographically practicable." Potential administrative difficulties, however, persuaded the committee to agree without dissent to change the "meet" requirement to a "confer" requirement.

The topic of low-end exclusions from disclosure and the Rule 26(f) meeting returned. With the help of the Federal Judicial Center, a survey of exclusions adopted by local rules shows an astonishing array of categories of cases that have been excluded in at least one district. Some of the exclusions are unique, and a few are inscrutable. Some are fairly common, and some are almost universal. The effort must be directed toward identifying common categories of actions that typically will not benefit from disclosure or a Rule 26(f) meeting because typically there is little or no occasion for discovery. A first rough estimate includes at least these cases: bankruptcy appeals; bankruptcy matters withdrawn from the bankruptcy court (see § 157(d)); actions for review on an administrative record; social security review cases; prisoner pro se cases; habeas corpus; actions challenging conditions of institutional confinement (perhaps unnecessary if

prisoner pro se cases are excluded, particularly since complex actions needing discovery are brought under the Civil Rights of Institutionalized Persons Act); actions to enforce or quash administrative summonses or subpoenas; other Internal Revenue Service actions; government collection actions; civil forfeiture proceedings; student loan collections (perhaps only those below $75,000); proceedings ancillary to proceedings in other courts — as for discovery or to register or enforce a judgment; and actions to enforce arbitral awards. Further thought will be given to which of these categories may make most sense, and the Administrative Office will be asked for help in developing formulas that accurately describe the intended categories. It was agreed that it would be unwise to exclude all pro se cases; the disclosure requirement can prove especially useful in focusing some pro se actions.

Scope of Discovery

The subcommittee reminded the committee that a major impetus for the present discovery project was the recommendation of the American College of Lawyers that the committee adopt the discovery scope limitation first advanced by the American Bar Association Litigation Section in 1977. The subcommittee brought three models to the committee for consideration. One would limit the initial scope of discovery to matter relevant to "the claim or defense" of a party," but allow the court to expand discovery to "any information relevant to the subject matter" of the action. The second would modify the final sentence of present Rule 26(b)(1), emphasizing that only relevant information may be sought under the permission for discovery of information that is not admissible but is reasonably calculated to lead to the discovery of admissible evidence. The third would add to (b)(1) an explicit cross-reference invocation of the "reasonable discovery" principles articulated in present (b)(2).

The question whether to displace the "subject matter" scope of discovery limit was introduced by the reminder that the Advisory Committee published essentially this same proposal in 1978, and then withdrew it in light of the comments received. The proposal has been considered periodically since then, and was considered during the deliberations that led to the 1993 discovery amendments. There is reason for caution because it is not clear whether the proposed change would lead to mild restraint or considerable curtailment. Whatever the outcome, moreover, the very fact of change will lead to a transitional period in which contending

parties seek to attribute unintended meanings to the change. No language is available to calibrate precisely the degree of desired change, even if agreement could be reached on the precise degree. These concerns suggest that the Committee should demand a clear reason for moving toward the change.

The context for defining the scope of discovery begins with the 1938 decision to turn to notice pleading, to be fleshed out by discovery managed by the attorneys. Discovery kept expanding through the 1970 amendments. More recent efforts have been directed toward reducing the excesses of lawyer-managed discovery. The ABA suggestion has been with us for a long time. At the Boston College conference, many lawyers suggested that adopting this suggestion would not lead to any great change. The modified version created by the subcommittee is new, and addresses the concerns that have surrounded the proposal. Discovery remains available of matter relevant to the subject matter of the litigation, but this full sweep of discovery is made subject to court control. Doubts as to the scope of the change in rule language will be resolved by agreement of the parties — always a good thing in discovery — or will be taken to the court. The change thus will provide an effective way to encourage involvement by courts that have been reluctant to devote time to discovery management. The single most important discovery change championed by lawyers is greater judicial involvement in problem cases. This proposal will help move toward that goal.

The subcommittee has not formed a recommendation on this model. But it acknowledges the effort and help provided by the American College in advancing and refining the initial proposal.

Robert Campbell, representing the American College, then addressed the initial recommendation, which did not restore discovery relevant to the subject matter if ordered by the court. He noted that in 1995 Judge Higginbotham, then chair of this Committee, asked the American College to study discovery issues. The question is whether a change from subject matter to claims and defenses makes a difference in the real operation of discovery. The American College believes that it does make a difference. It has offered examples of cases in which judges thought the "subject matter" language of the present rule does make a difference. The Board of Regents of the College has adopted the recommendation as the recommendation of the College itself, a highly unusual step. Neither the College nor its federal rules committee has considered the possibility of restoring subject-matter discovery under court

control; probably they would oppose this new feature.

The first reaction voiced was that this proposal "will create a firestorm." If it is coupled with discovery cost-shifting, the Committee will be seen as defendant-oriented. Even the more modest change in the language about discovery of inadmissible matter will draw fire, but it makes sense. It is, by contrast, difficult to say just what difference there is between "subject-matter" discovery and "claim or defense" discovery. Rule 26(b)(2) now establishes ample power to limit discovery in suitable proportion to the needs of the case. The proposal "projects an image, however much it is not intended, that all that is wrong with discovery is the practice that favors plaintiffs." The proposal abandons 60 years of precedent establishing the scope of discovery in return for a well of new uncertainties. The more sensible approach is to offer minor adjustments in the sentence that deals with discovery of inadmissible evidence, and to enhance the force of (b)(2) principles by explicit cross-reference. We should be particularly wary of discovery proposals advanced by senior members of the bar who have advanced to careers that allow delegation of most hands-on discovery to younger lawyers.

The proposal was defended as "not earth-shaking, but a good idea. Document discovery is the problem. This will send a signal. That's all it will do."

The subcommittee noted that the authority to expand the scope of discovery back to the subject-matter scope of the present rule is an important part of this model. It puts the judge in the position of demanding and considering explanations of the needs for the full sweep of discovery. There is no need for metaphysical precision in describing the different scopes of discovery; this is simply a practical means of encouraging judicial control by expanding the occasions for seeking it. The proposal "changes the message of open-ended, unrestricted discovery." It may force the parties to identify their needs more clearly.

This model, in short, is not the American College proposal. It is instead a means of stimulating judicial involvement. It changes the balance between lawyer-managed discovery and court-managed discovery. It is important to find some means to encourage court management. Rule 26(b)(2) was intended to have this effect, but inexplicably has failed to have much noticeable impact. Establishing different scopes for lawyer-managed and court-managed discovery, and expressly incorporating (b)(2) by reference, will

help accomplish what (b)(2) was designed to do many years ago.

Strong support was expressed for the American College proposal. Out-of-control discovery is common. No one who participated in designing the discovery system foresaw what it would become. Technological advances in storing and retrieving information have only exacerbated a problem that already was made acute by document discovery excesses. Adoption of the proposal will send an important signal that discovery must be better controlled. Reasonable proportionality is required by (b)(2) now, and it has not been made to work.

A judge observed that experience in refereeing many discovery disputes shows that the real culprit is in the "reasonably calculated" sentence. We do need to establish some new limit on the scope of discovery. But we should clarify the connection between the "reasonably calculated" sentence and the two separate scopes of discovery — does it bear on information relevant to the parties' claims or defenses, or does it bear on information relevant to the subject matter of the action?

It was asked whether it is possible to provide more concrete illustrations of the differences that the proposal would make. Doubt was expressed at the Boston College conference whether this change in the language defining the scope of discovery would make much difference. If that is uncertain, it is certain at the same time that any change will lead to many discovery disputes. Can we be sure that the change is worth the uncertainty and the resulting costs?

It was responded that the change is designed to create a new management tool to be used when the parties fail to effect reasonable discovery. The adoption of a distinction between the scope of lawyer-controlled discovery and the scope of court-controlled discovery is a great compromise. It is an advance over present (b)(2) because courts are not effectively using the management possibilities established by the proportionality principle. It will make a difference, among other litigation, in product-liability cases that now seem particularly prone to excessive discovery demands.

On a vote among three options, no votes were cast for adhering to present Rule 26(b)(1). Two votes were cast for bypassing any change in the scope of discovery, but in favor of cross-referring to (b)(2) and modifying the language about discovering inadmissible

evidence. Nine votes were cast for narrowing the scope of lawyer-controlled discovery to matter relevant to claims or defenses, while allowing the court to expand discovery back to matter relevant to the subject matter of the action.

A drafting change was suggested to limit discovery of inadmissible evidence only if relevant to the parties' claims or defenses. This limit could be expressed by beginning the second sentence: "This relevant information need not be admissible at trial * * *." It was responded that if the court orders discovery of information relevant to the subject matter, the same opportunity to discover inadmissible evidence should be available. A motion to add "this" failed.

It was asked whether the reference to (b)(2) principles should be limited to the (b)(2)(iii) cost-benefit provision. The subcommittee responded that this question had been considered and resolved in favor of incorporating all of the (b)(2) principles. All are important, and all deserve this emphasis.

Further discussion of drafting led to agreement on this language for a revised (b)(1)

> **(1) In General.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The court may, for good cause shown, order discovery of any information relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by subdivision (b)(2).

Deposition Length

In 1991 the Committee published a proposal that would limit the length of a deposition to 6 hours, unless additional time were allowed by the court. The proposal was withdrawn from the final amendments. During the San Francisco meeting that first began gathering discovery information, many attorneys suggested that no

deposition should need more than 6 hours absent obstructionist activity. If a limit is to be adopted, there is a question as to the best means of defining the limit — as six hours, as one business day, or as one day of six hours.

It was asked whether a longer time should be allowed for expert depositions — some fear was expressed that many expert witnesses are expert at drawing out a deposition without saying anything.

It was observed that in the Agent Orange litigation 168 depositions — including expert depositions — were taken in one day each. This was made possible, however, by requiring that before the deposition all documents to be used be submitted to the deponent, and read by the deponent. It was noted that the subcommittee had considered the document-submission requirement, but had put it aside because a number of lawyers had expressed the fear that deponents would be swamped with unrealistic volumes of documents submitted to protect any possible opportunity for use.

Concern was expressed that it will be difficult to allot six hours, or a day, among all the parties, particularly in cases that involve more than two parties. But confidence was expressed that lawyers would generally work out these problems, recognizing that the court will have power to extend the time limit and that most courts will be displeased by requests to make the parties behave sensibly in ways they should be able to work out for themselves.

It was asked whether there is any pressing need to set a presumptive limit for depositions. The response was that many lawyers at the Boston College conference noted that the expense of depositions is a significant problem. An illustration was offered of practice in New York, where depositions lasting 6 to 8 days are routine in employment-discrimination cases. A presumptive limit is needed; appropriate requests for additional time will be granted routinely. Plaintiff lawyers are particularly apt to favor a limit as a means of reducing unnecessary time and also reducing transcript expenses.

It was decided by a 9 to 1 vote that a durational limit should be adopted.

Turning to the task of defining the limit, it was suggested that a "one business day" term would avoid the foreseeable problems of squabbling over the hourglass or stopwatch, and would particularly avoid the definitional questions presented by the 1991

proposal for 6 hours "of actual examination of the deponent on the record." Any time limit is an invitation to filibuster; the "one business day" expression may reduce the temptation. The notion of a business day is admittedly loose; this should work in its favor.

Confidence was expressed that there is not as much game playing now as formerly, and that the vast majority of attorneys who know there is a time limit will prepare in advance and complete depositions within the limit.

It was noted that the FJC data indicate that courts that impose time limits seem to have longer depositions. These data do not, however, provide any information as to the direction of any causal connection that may exist. It seems more likely that time limits have been adopted in districts that have had problems with undue deposition length, and that it is long depositions that have caused the rules to be adopted, than that the rules have caused long depositions.

In response to another question, it was stated that the subcommittee recommendations would include amendment of Rule 26(b)(2) to allow a court to set different limits on deposition length by local rule. In the end, however, it was agreed that local rules would not be allowed to change the presumptive limit. Alterations would require consent of the parties and deponent or court order. Neither Rule 26(b)(2) nor Rule 30(d)(2) will allow variation by local rule.

It was urged that it would be better to place the deposition time limit in Rule 30(d)(2) than in Rule 30(a).

It was suggested that although there may be significant differences between the time needed for depositions for discovery and the time needed for depositions for trial testimony, these differences can be taken into account in administering the limit. Many lawyers will prefer to keep trial depositions short; the fear that these depositions may need extra time may be misplaced.

After concern was expressed about the indefiniteness of "one business day," a vote found 6 members in favor of "one day of n hours," and 5 members in favor of "one business day." Discussion of how many hours should be specified found 6 members in favor of 7 hours, and 5 members in favor of 8 hours.

It was agreed that the limit should be "one day of 7 hours." The Committee Note should discuss the desirability of flexible

administration — many doctors, for example, seek to schedule depositions beginning late in the afternoon, perhaps at 4:30, so as to be able to treat patients all day.

The question whether the limit should be expressed as "actual examination of the deponent on the record" returned. Although the actual meaning of this limit is unclear, it seems to exclude colloquy between counsel, rest breaks, and the like. It was noted that this limit will exacerbate timekeeping problems, and even invite them. It will be argued that objection time is not actual examination time, and so on. It was agreed that this limit would be deleted. The Committee Note should say that reasonable breaks are permitted.

The committee agreed unanimously that Rule 30(d)(2) should be amended to provide that "a deposition is limited to one day of seven hours." It was further agreed that extension of this time by stipulation should be permitted only if the deponent joins the stipulation. The purpose of the time limit properly includes witness protection.

It was further agreed that there is no need to adopt a parallel time limit for Rule 31 depositions on written questions. If unreasonably long questions are submitted, relief can be won from the court in advance.

Cost-Bearing

The subcommittee noted that both the Reporter and Special Reporter believe that Rule 26(c) allows a court to enter a protective order that conditions discovery on payment of all or part of the expenses by the party demanding discovery. Similar authority should be read into Rule 26(b)(2) as a less limiting alternative to an order that simply prohibits discovery as disproportionate to the needs of the case or otherwise beyond reason. Nonetheless, it may be helpful to adopt an express cost-bearing provision if it is believed that courts should consider this alternative more frequently.

The subcommittee proposal is that Rule 26(b)(2) be amended to allow the court to order that a party demanding discovery pay all or part of the reasonable expenses incurred by the responding party if the court makes any of the determinations that authorize an order that discovery not be had, as specified in present items (i), (ii), or (iii). In many situations, this proposal will expand, not contract the opportunity for discovery — the determination that

discovery is inappropriate under item (i), (ii), or (iii) would lead to an order barring the discovery, but the softer alternative is allowed of permitting discovery on payment of part or all of the resulting expenses. The item (iii) cost-benefit calculation is the one most likely to be involved in this process: the cost of the discovery is reallocated to a party willing to bear it in return for the anticipated benefits. But nothing in this process would authorize discovery beyond the scope permitted by Rule 26(b)(1); cost-bearing is simply an alternative to a (b)(2) prohibition.

It was suggested that this proposal would not accomplish any meaningful change. Judges now condition discovery on payment by the demanding party. Nonetheless there is likely to be protest by those poorly informed, or by those who oppose present practice, that this proposal is simply one more attempt to protect institutional defendants that have a wealth of discoverable information. We are accustomed to a procedure that generally makes no attempt to allocate the costs of demanding and responding to discovery. To emphasize the authority to impose on the demanding party not only the costs of demanding discovery but also the costs of responding will go against the grain of many. If it is feared that (b)(2) is not being used as often or as vigorously as should be, the Committee should find ways to draw attention to (b)(2) principles. Parties and courts can be trained to use (b)(2) more. "It is there and available."

In response, the subcommittee noted that even though courts probably do have authority under present rules to condition discovery on payment of costs, the authority is not clearly stated. It is not clear that all courts understand the power, and it is not clear that it is used as often as it would be if made explicit. The lack of any explicit provision may make the power seem more exotic than it is.

An alternative might be to add this provision to Rule 26(c)(2), so that a protective order specifying the "terms and conditions" of discovery could include cost-bearing terms. The Rule 26(b)(2) context, however, provides ready-made criteria that seem appropriate to the purpose. The (b)(2) conditions — the item (i), (ii), and (iii) determinations that justify a limitation — must be coupled to the limitation.

Another alternative was suggested. Judge Schwarzer has suggested that since the most frequently cited source of unduly expensive discovery is document production, the cost-bearing

principle should first be adopted as part of Rule 34. Although it may prove awkward to draft a Rule 34 provision that seeks to define the "exceptional" or "complex case," the purpose would be to reach the cases that involve large burdens of document search and retrieval with little prospect of benefits reasonably proportioned to the burdens. It remains true that it is very easy to impose enormous document production costs at little cost to the demanding party. One of the complaints voiced about document discovery, indeed, is that some litigants do not even bother to read all of the documents whose production they have demanded.

Concern was expressed that if a Rule 34 approach were taken, it might seem to exclude by implication the cost-bearing authority now found in Rule 26(c). The Committee Note will have to make clear the intention to emphasize the power as particularly useful in document-production cases, while retaining it as a general matter under Rule 26(c) as well.

In addressing the Rule 34 proposal, it was noted that it is not proper to characterize either recommendation as cost-sharing. All that is involved is the power to insist that a party making a demand for discovery that lies at the margin of reasonableness pay part or all of the costs of responding. Discovery should not afford a carte blanche to impose staggering costs on other parties. Civil Rule 45(c)(2)(B) has made clear that nonparties are to be protected against the costs of producing documents in general terms. Parties deserve similar protection against demands that, although within the Rule 26(b)(1) scope of discovery, seem excessive.

The subcommittee moved adoption of Judge Schwarzer's Rule 34 version, including references to both Rule 26(b)(2) and Rule 26(c). The motion was resisted on the ground that the original subcommittee version was better. Cost-bearing protection may be useful against such events as distant depositions — a party who wishes to take a marginally useful deposition in a distant place might be ordered to pay another party's travel costs, for example. The general approach, moreover, avoids the difficulty of ensuring against undesired negative implications that cost-bearing is inappropriate outside Rule 34 discovery. The subcommittee proposal, further, explicitly requires that the court make one of the Rule 26(b)(2) determinations as a foundation for ordering one party to bear another party's costs. The Schwarzer proposal, in addition, requires the court to make an advance estimate of compliance costs, a tricky concept to manage.

The Rule 34 approach was again championed on the ground that it addresses the most common source of complaint about excessive discovery. This is the problem everyone continues to talk about. Further drafting can establish a clearer link to Rule 26(b)(2) and require its determinations. There is a similarity between this proposal and reforms contemplated in England. The rule is likely to be invoked only in cases that involve parties able to bear the discovery costs that may be imposed, or who at least are represented by firms able to bear the costs. It was suggested that the Committee Note should say that the cost-bearing power should be exercised only in cases involving large document volumes.

The original subcommittee proposal to adopt a general cost-bearing provision in Rule 26(b)(2) failed by 4 votes for and 7 votes against.

A proposal to add cost-bearing to rule 34 was adopted by 10 votes for, 1 vote against.

Drafting the Rule 34 approach remains to be done.

Judge Schwarzer's proposal was to add a new paragraph to Rule 34(b), following the present second paragraph:

> On motion of the responding party, made in accordance with Rule 26(c), the court shall, when appropriate to implement the provisions of Rule 26(b)(2), determine the estimated cost of responding to a request and impose all or part of the cost on the requesting party.

Three alternatives were considered. Two of them would add a new sentence at the end of the second paragraph in Rule 34(b): "On such a motion, the court shall limit the discovery, or require the moving party to pay part or all of the reasonable expenses incurred by the responding party, as appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)." The second alternative omitted the reference to limiting discovery: "On such a motion, the court may require the moving party to pay all or part or all of the reasonable expenses incurred by the responding party, as appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)." The third would add a new paragraph following the second paragraph of Rule 34(b): "On motion by the responding party under Rule 26(c), the court shall limit the discovery in accordance with Rule 26(b)(2)(i), (ii), or (iii), or require the party submitting the request to pay part or all of the reasonable

expenses incurred by the responding party."

Each alternative repeats Rule 26(b)(2), a problem not encountered when cost-bearing is incorporated in Rule 26(b)(2), and in the same way each might seem to negate by implication the exercise of the same power as to other forms of discovery.

A preference was expressed for the third alternative because it expressly ties cost-bearing to Rule 26(c) as well as Rule 26(b)(2). It requires a Rule 26(c) motion, freeing the issue from confusion with the motion-to-compel practice. The Committee Note can say that there is no negative implication as to cost-bearing incident to other forms of discovery. And it also can note that the explicit provision has been adopted in Rule 34 because document production has been the most frequent source of problems.

It was suggested that the drafting would better show that the court can both deny some part of the document demand and order cost-bearing as to other parts if it read: "the court shall, in accordance with Rule 26(b)(2)(i), (ii), or (iii), limit the discovery or require the demanding party to pay * * *."

Another suggestion was that the first two alternatives could tie the cost-bearing remedy to the objection process in Rule 34(b). The second paragraph requires a responding party to state that inspection will be permitted or to object, and requires that the reasons for objections be stated. It should be possible to draft the rule to implement the general discovery-enforcement structure that requires the demanding party to assume the moving burden. This can be accomplished by providing that one ground for objection is that discovery should be limited, or cost-bearing ordered, under Rule 26(b)(2). This approach has the advantage of incorporating the explicit Rule 37(a) motion procedure. The demanding party must first attempt to confer with the objecting party, and then must move to compel. An approximate version might be:

> * * * The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. <u>An objection may include an assertion that discovery should be denied under Rule 26(b)(2) or that the principles of Rule</u>

> 26(b)(2)(i), (ii), or (iii) [and Rule 26(c)] should be implemented by an order that the party submitting the request pay part or all of the reasonable expenses incurred by the objecting party. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

The Committee Note would make it clear that the court can order production of some items, bar production of others, and condition production of still others on payment of part or all of the reasonable production costs.

It was moved that the cost-bearing principle be implemented by adding a new third paragraph to Rule 34(b), beginning: "On such a motion, or on motion by the responding party under Rule 26(c), the court shall, in accordance with Rule 26(b)(2)(i), (ii), or (iii), limit the discovery or require the requesting party to pay part or all of the reasonable expenses incurred by the responding party." The Note could say that the authority exists now; it is not intended to imply any limit on the same power as to other discovery methods. It might be illustrated by referring to distant depositions, or depositions beyond the number that seem reasonable for the case. This emphasis will protect against the fear that because defendants often have to bear the burden of document discovery, this proposal is intended primarily to protect defendants. But it should be emphasized that special problems seem to arise in "big documents cases."

The Committee voted unanimously to adopt a Rule 34 cost-bearing principle, on terms to be drafted by the Reporters and submitted to the Committee for review by mid-April.

Discovery Moratorium

Rule 26(d) was amended in 1993 to provide that a party may not seek discovery from any source until the parties have met and conferred as required by Rule 26(f). The proposal to reduce the scope of initial disclosure to supporting information raises the question whether the moratorium should be abandoned. There is less reason to defer the beginning of discovery as initial disclosure provides less of the information that inevitably will be sought. Deletion of the moratorium would require amendment of Rule 26(d), and changes in Rules 30, 33, 34, and 36 that would restore the

timing provisions deleted by the 1993 amendments. The subcommittee seemed to favor this approach at the Santa Barbara meeting. But the Rule 26(f) conference remains, and the purpose of the conference in part is to discuss and agree on a discovery plan. It does not seem to make much sense to allow what may be substantial discovery before the parties ever begin to confer and plan.

Support for abandoning the moratorium was found in the lengthy delays that may arise from postponed service and then awaiting the Rule 26(f) conference and scheduling conference. Courts should not deceive themselves as to the extent of influence they exert through the scheduling conference. Discovery continues to be managed by the lawyers, for the most part without court supervision. The moratorium made sense as a quid pro quo for initial disclosure of adverse information. But if initial disclosure is reduced to self-serving information, it becomes more important to get discovery launched as soon as possible. The moratorium has value as a means of delaying discovery while motions to dismiss are considered, but more direct means are better for this purpose. The moratorium may discourage plaintiffs from starting out fast; deleting it may balance the package of discovery changes.

Support for retaining the moratorium was found in the integral role it plays in the scheme of disclosure and Rule 26(f) conference. "If we are to have disclosure at all, there should not be willy-nilly discovery first." Lawyers can stipulate out of the moratorium if prompt discovery is needed, or simply accelerate the Rule 26(f) conference.

The view was expressed that it really makes no sense to retain any form of initial disclosure and Rule 26(f) conference if they are to be preceded by substantial discovery. The disclosure of supporting information will seldom have any function in this setting. And early discovery would defeat the very purposes of a conference designed to discuss settlement, focus the issues for discovery beyond the often vague contours of notice pleading, and develop a plan for coordinated and effective discovery.

A motion to retain the Rule 26(d) discovery moratorium was adopted by unanimous vote.

Time Limit on Document Production

The subcommittee noted that proposals have been made to establish a presumptive backward time limit for the scope of document production. The nature of the proposals is illustrated by

a formulation that would require that good cause be shown to secure production of documents created more than seven years before the conduct, transaction, or occurrence giving rise to the litigation. Because these proposals came to the subcommittee after its January meeting, it offered no recommendation.

The concept of establishing a presumptive temporal limit on the scope of document production was found interesting. It was agreed that any specific time period chosen for a rule must be, in one sense, arbitrary. There are no data to support a seven-year period rather than a period of six years or eight years. Nor are there data to support distinctions among different types of litigation, to suggest, for example, that employment discrimination cases deserve a longer or shorter presumptive limit than product liability cases.

The Committee agreed that more work must be done to develop and support this concept before a decision can be made whether to recommend it for adoption. The question was remanded to the subcommittee for further work.

Discovery Time Cut-Off

Following the recommendations of the Judicial Conference in reporting on experience under the Civil Justice Reform Act, the Committee has studied the desirability of revising the rules that relate to the time allowed to complete discovery and to the process of setting a trial date. Rule 16(b) now requires that the scheduling order set a time for completing discovery, and provides that the scheduling order may set the date for trial. The district court has ample power to begin case management by setting firm dates for concluding discovery and for trial. The question is whether the rules should be made more specific, setting out a presumptive period for completing discovery and a presumptive trial date.

The RAND report on CJRA experience emphasized that time to disposition can be reduced, without increasing costs, by a combination of early judicial management that sets an early discovery cut-off and an early and firm trial date. Case-management practices differ among courts, however, raising the question whether the national rules should specify periods for completing discovery and trial dates. Any specifications must necessarily be presumptive only, not mandatory — some cases present special needs that cannot be met within the periods that are

satisfactory for most cases, and some courts have docket problems that preclude adherence to a rigid trial schedule set by national mandate.

The subcommittee report began with the suggestion that the enduring problem is whether to "decouple" discovery completion from trial date. The Committee has recognized throughout its study of these questions that it is not feasible to set even a presumptive trial date by national rule. Some federal districts are burdened with heavy criminal dockets that, in part because of speedy trial requirements, would make unrealistic any attempt to set a firm trial date during the early stages of a civil action. But it is agreed on all sides that it would be a mistake to mandate a discovery cut-off without any reference to a realistic trial date. A lengthy period between the conclusion of discovery and trial is regarded as at best costly, and at worst as an impediment to effective trial.

With this caveat, the subcommittee presented three options. One does not address trial dates, but directs that discovery be completed within a specified number of days. This proposal does not advance any recommendation for the actual number of days to be specified; the FJC study finds that 6 months — 180 days — is the mode. The second proposal requires that the Rule 16(b) scheduling order set a date for trial — the first alternative in this proposal would specify a still undetermined number of days after the date set to complete discovery, while the second alternative would only require that the trial date be set a reasonable time after the date set to complete discovery. The third proposal simply requires that the scheduling order set a date for trial.

Discussion began with the observation that additional rules may not be the best approach to these problems. The issue is one of case management. The Committee on Court Administration and Case Management and the Federal Judicial Center can work to foster sound case-management practices, including early discovery cut-offs and early and firm trial dates.

Thomas Willging reported that the FJC study could not duplicate the RAND findings on the effect of a discovery cut-off. No correlation with cost or delay was shown by this study.

It was observed that for many years, lawyers and judges have believed that cost and delay can be reduced when the court sets an early trial date "carved in stone." The difficulty is that some

courts simply are not in a position to do this.

Doubt was expressed as to the universality of the benefits gained by early and firm trial dates. In some complex cases, lawyers find that they need to gather information through discovery before they are able to make realistic assessments about the best means of case management and possible settlement. The Rule 16(b) conference is too early for realistic consideration of a trial date for these cases. Other types of cases may present different problems. In personal-injury actions, for example, trial should not be scheduled until the plaintiff's condition has stabilized. And for the same reasons, it would be wrong to cut off discovery before the condition is stabilized.

The impact of heavy criminal dockets was again noted. And it was stated that it is difficult to make accurate early estimates of the time needed to decide the dispositive motions that commonly follow completion of discovery. Some courts, in addition, find it helpful to order alternate dispute resolution efforts when a case is not fully resolved on post-discovery motions. Again, the time required cannot be predicted at the outset of the action.

A more direct view was that a national rule directing that a firm trial date be set in all cases would be a fiction in many courts. It would be a mistake to mandate something that cannot be done.

These concerns led back to the view that it is irrational to establish a specified time for completing discovery that is severed from a firm trial date. The best that might be done is to require an "on-or-about" trial date; the Committee should consider whether this alternative would have sufficient benefit to justify its vagueness. Or Rule 16(b) might be amended to require that a trial date be set at the beginning when it is feasible to do so, but this would be a minor variation on the present Rule 16(b)(5) provision that makes the trial date a permissive scheduling-conference subject.

Discussion turned to the proposition that there may be more than one pretrial conference, particularly in complex cases. Some judges find it helpful to schedule a routine second conference just to make sure that the lawyers do not forget about a case in the press of other work. Cases that have multiple Rule 16 conferences are particularly suited for working toward a firm trial date after the first conference.

The Committee concluded that present Rule 16 should not be amended. The most effective response to the findings in the RAND report — remembering that the FJC study could not replicate them — is to encourage the Committee on Court Administration and Case Management and the Federal Judicial Center to emphasize in training programs and other efforts the values of early case management, early discovery cut-offs, and early and firm trial dates.

Privilege Waiver

The subcommittee has received repeated suggestions that great costs are incurred to avoid inadvertent waiver of privileges in cases that involve production of vast numbers of documents. Some lawyers have noted that they achieve an uncertain measure of protection by stipulating to protective orders that allow preliminary examination of responsive documents on terms that provide the preliminary examination is not production of the documents and that the producing party does not waive any privilege. The examining party then specifies the documents it wants to have produced, and the ordinary privilege-assertion process is resumed. This process can substantially reduce the costs of reviewing documents that are not obviously privileged. The need for such review is that inadvertent disclosure of a document that proves privileged on detailed factual inquiry and fine legal analysis may waive the privilege as to many documents that obviously are privileged. This process seems to work when the parties trust each other. But it is not at all clear that a stipulation of the parties can protect against waiver arguments by nonparties.

The subcommittee prepared a model for consideration. The model, with a variation advanced in a footnote, would establish a new mode of responding to a Rule 34 request to produce. Rather than produce or object, the response would be to allow initial examination. The responding party could withhold from the initial examination any documents within the scope of the request, complying with the "privilege log" requirements of Rule 26(b)(5). Allowing initial examination would not waive any privilege. After the initial examination, the requesting party could specify the documents still requested. The ordinary Rule 34 process would resume at that point.

It is not clear how many lawyers believe that a process like this would be useful. Some support was offered at the Boston College conference, and substantial interest was expressed at the

earlier San Francisco meeting. Strong interest was shown at the Litigation Section summer 1997 meeting. Even if stipulated protective orders work to reduce the costs of document review, they do not provide clear protection.

Skepticism was expressed on various grounds. One view was that no able lawyer would allow a preliminary examination without undertaking a review as careful as the review required to respond directly to a demand to produce. Another view is that there are doubts whether even a preliminary examination rule designed to limit the effects of a federal procedure is within the scope of the Enabling Act. 28 U.S.C. § 2074(b) provides that rules that modify a privilege can take effect only if approved by Act of Congress. Many privilege issues in federal court are governed by state law; there may be "Erie" questions about a federal rule that mollifies a state waiver rule.

The committee agreed that the subcommittee should study these issues further.

Number of Depositions

Rule 30(a)(2)(A) was added in 1993 to establish a presumptive limit on the number of depositions. Court permission must be obtained if a proposed deposition would result in more than 10 depositions being taken under Rule 30 or Rule 31 by plaintiffs, by defendants, or by third-party defendants. The FJC study shows that most cases involve far fewer depositions than this. If most cases need less discovery, it may be desirable to reduce the presumptive number. The purpose would be to increase the number of cases that are forced into judicial discovery management. This would enhance the model that looks toward a three-stage discovery procedure: initial disclosure is followed by party-managed discovery within a reasonably narrow core that meets the needs of most cases. More burdensome discovery is to be controlled by the court as well as the parties, to protect against the occasional excesses that continue to give rise to dissatisfaction with the discovery system.

Despite the attraction of this possibility, it was noted that there has not been any protest that 10 depositions "per side" is too many. There are significant numbers of cases that deserve this number. The fact that most cases are completed with far fewer depositions tends to support the conclusion that the stated limit has not encouraged parties to take more depositions than they otherwise would.

It was agreed that no action should be taken now to limit the number of depositions set in Rule 30(a)(2)(A) and the parallel provision in Rule 31(a)(2)(A).

Rule 26(c)

The possibility of amending Rule 26(c) has been on the Committee agenda for several years. The topic first arose in response to bills that reflected concern that discovery protective orders may prevent public access to information that is important to protect public health and safety. Throughout the period of Committee study and public reactions to published proposals, the Committee was unable to find any persuasive evidence that present practice in fact defeats public access to such information. The proposal published in September, 1995, was designed to capture the good practices that are generally followed so as to ensure that all courts do the same wise things. The power to modify or dissolve a protective order was made explicit. It was provided that modification or dissolution could be sought by a nonparty, and that the test for intervention for this purpose does not require the showings required to intervene as a party. Modification or dissolution would be available to protect public interests, including public health or safety, and also would be available to relieve the burden of duplicating discovery efforts in separate litigation. After considering the testimony and comments on this proposal, the Committee concluded that there was no urgent need for action and carried the proposal forward for further consideration as part of the broad discovery project.

As the discovery project has unfolded, the Committee again has found that richly experienced lawyers, from all fields of practice, find no need to change present protective-order practice. At the Boston College conference, plaintiff and defense lawyers alike seemed to agree on this.

Further discussion expressed concern that when the Judicial Conference returned this proposal for further study, some members may have misunderstood its reach and effect. Even that possibility was not found a ground for renewing the proposal, however, given the lack of apparent need for present amendments. The Committee voted unanimously to terminate consideration of the 1995 Rule 26(c) proposal.

Although the Committee does not believe that there is any need to change protective-order practice, the Committee recognizes that

some members of Congress believe there is a need. Legislative proposals will continue. As with other matters, there is reason to regret the difficulty of integrating the benefits of the Enabling Act process with the strengths and direct-action capacities of the legislative process. The Committee remains willing to study these questions further if new information becomes available — remembering that the Federal Judicial Center did a sophisticated and helpful study at the Committee's request — and to provide support by other means if Congress finds that desirable.

Technical Amendments

Subcommittee recommendations for technical amendments in the discovery rules were adopted without extensive discussion.

Rule 30(d)(1) would be amended to delete the potentially confusing reference to "evidence," and to make it clear that nonparties as well as parties are bound by the rules limiting instructions not to answer: "(1) Any objection ~~to evidence~~ during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A person ~~party~~ may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ~~on evidence~~ directed by the court, or to present a motion under paragraph (3).

Rule 30(d)(2) would be amended to conform to the proposal to limit the time allowed for taking a deposition. The second sentence would also be divided out, creating a new paragraph (3), and revised to make it clear that sanctions may be imposed for any impediment, delay, or conduct that frustrates fair examination of the deponent.

Rule 37(c)(1) would be revised to apply sanctions not only to a failure to supplement initial disclosures as required by Rule 26(e)(1), but also to a failure to supplement a discovery response as required by Rule 26(e)(2).

A number of discovery rules will be amended to conform to the provisions that reestablish national uniformity, deleting the option to depart by local rule.

It was decided not to do anything about the potential uncertainty created by the 1993 amendments as to discovery of liability insurance. Until 1993, the rules expressly included liability insurance within the scope of discovery. This provision was added because it was not obvious that insurance coverage is

relevant to the subject matter of an action or may lead to the discovery of admissible evidence. The 1993 amendments made insurance coverage one of the items covered by initial disclosure and deleted the scope-of-discovery provision. The uncertainty arises in cases that are exempted from initial disclosure. Under the 1993 framework, the uncertainty arises most obviously in districts that have opted out of initial disclosure by local rule. Under the proposed amendments, the uncertainty will arise most obviously in cases that are exempted from initial disclosure by the "low-end" exemption. There is no indication, however, that this potential uncertainty has created any difficulty. The earlier rule made it clear that liability insurance coverage is within the scope of discovery. The continuing provision for initial disclosure establishes the same terms and limits, and inevitably must be followed in defining the scope of discovery for cases exempted from initial disclosure. It does not seem worth the complication to craft a rule that removes insurance coverage from the disclosure exemptions that otherwise might apply.

Rule 5(d)

In 1978, the Advisory Committee published a proposal to amend Rule 5(d) to bar routine filing of discovery materials. The published proposal read:

> **(d) Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but, unless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examination and interrogatories and requests for admission and the answers thereto need not be filed unless and until they are used in the proceedings.

This proposal was put aside in favor of present Rule 5(d), which provides that the court may order that discovery materials not be filed. The Ninth Circuit Judicial Council study of local rules found that many districts in the Ninth Circuit have local rules that bar filing. Many other districts around the country have similar rules. The Ninth Circuit Judicial Council has recommended that Rule 5(d) be amended to allow adoption of such local rules, which now seem invalid because inconsistent with Rule 5(d).

The 1978 proposal was supported by cost concerns. One set of costs is incurred by courts that must find means of storing everything that is filed. Another set of costs is incurred by the parties who must pay for copies to be filed. It was withdrawn, however, in face of expressed concerns that nonfiling defeats public access to information that may be of public interest. Now a legion of local rules have done what the Advisory Committee was not willing to do twenty years ago. This widespread experience with the costs of filing may of itself provide strong support for reconsidering the 1978 proposal.

In addition, there are particular difficulties caused by developing discovery technology. Rule 30(f)(1) has been amended to provide that the officer presiding at a deposition shall either file the transcription or recording with the court, or shall "send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it * * *." This provision seems inconsistent with Rule 5(d). The reference to "recording" obviously reflects burgeoning audiotape and videotape means of recording depositions. The burdens that would be imposed on district courts obliged to make such recordings available for public "inspection" could be considerable.

The obvious direct response to the Ninth Circuit Judicial Council recommendation would be to propose that Rule 5(d) authorize local rules that bar filing. But there is no apparent reason why local variations are appropriate. There should be a uniform national rule, one way or the other. A motion was made to propose adoption of the 1978 proposal.

Discussion of the 1978 proposal noted that it would provide for filing when discovery materials "are used in the proceedings," so that they must be filed if used to support summary judgment or other motions. It says only that materials "need not" be filed, so that a party who prefers to file may do so. Perhaps most important, the proposal reflects what actually is being done. Even apart from local rules or specific court orders, there are indications that the apparent filing requirement for deposition transcripts is routinely ignored by many lawyers in many districts — perhaps with the support of amended Rule 30(f)(1).

A motion to propose the 1978 proposal was adopted by unanimous vote.

Discussion of the Discovery Subcommittee report concluded with

thanks and applause for the Subcommittee, and particularly for Judge Levi as chair and Professor Marcus as special reporter.

Federal Rules of Attorney Conduct

Professor Coquillette introduced the Standing Committee's study of the rules that govern attorney conduct in federal courts. The origins lie in the 1987-1988 concern of Congress with local rules, which led to legislation tightening the rules that limit local rules. Congress saw local rules not only as confusing to lawyers, but also as circumventing the role of Congress and the Enabling Act process.

The Local Rules Project helped to reduce the number of local rules. Then the Civil Justice Reform Act fostered a proliferation of local practices. Now the pendulum is again swinging the other way — as shown by Judge Wilson's proposal at the last Standing Committee meeting that an absolute number limit should be imposed on local rules. The American Bar Association Litigation Section has launched a local-rules project to study the problems.

There are many local rules on attorney conduct. Many of them are inconsistent. This topic was viewed as too sensitive to approach during the first stages of the Local Rules Project. The early stages focused on numbering systems and eliminating local rules that are inconsistent with the national rules.

In 1995, acting under the Standing Committee mandate to maintain consistency, Judge Stotler asked Professor Coquillette to undertake serious studies of the rules regulating attorney conduct. The resulting studies are brought together in the Working Papers on the rules of attorney conduct. They show a wide variety of approaches among the different districts. One federal district has adopted the 1909 ABA Canons of Professional Ethics. Some follow the Code, including districts in states that have adopted the Model Rules. The opposite phenomenon also occurs. The District of Delaware, for example, has adopted the Model Rules, while Delaware adheres to the Code. Some districts have no rules at all. Some of the no-rules districts look to both the Code and Rules for guidance. One district has its own unique set of rules. The Federal Judicial Center study shows that these differences in approach do in fact create problems.

The Standing Committee sponsored two conferences of experts on professional responsibility. They found four options: (1) Do nothing. Continue to leave these matters to control by local rule.

(2) Establish a uniform federal rule that adopts for each district the current professional responsibility rules of the state embracing the district. This "dynamic conformity" model was favored by 60% of chief judges in a FJC survey. (3) Adhere to the dynamic conformity model for most issues, but establish uniform federal rules governing the core topics that occur most frequently and involve the most important federal interests. Such topics might include conflicts of interest, candor to the tribunal, the lawyer as witness, and other matters. (4) Adopt a complete system of independent federal rules.

The experts did not favor the status quo. "Chaos is growing." There are more and more local rules, and they are increasingly inconsistent. Indeed the Court Administration and Case Management Committee has recently invited the districts to create local rules to govern the conduct of lawyers used as "neutrals" in ADR systems, without suggesting model rules that might foster some measure of uniformity. The Department of Justice, however, would prefer the status quo to adoption of bad national rules.

The Conference of Chief Justices prefers the dynamic conformity model.

The Department of Justice, and 30% of the chief judges in the FJC study, prefer the third approach. The Department of Justice believes that its interests require uniform rules that meet its needs on some topics.

The American Bar Association agrees that something should be done; for now, it prefers the core rules approach.

No one favors adoption of a complete body of independent federal rules. In part this position rests on the belief that it would be a mistake to create independent federal enforcement systems.

The Standing Committee wants the advisory committees to help with the broad issues of policy: should any federal rules be adopted as a freestanding set of Federal Rules of Attorney Conduct, or should they be incorporated in each of the several sets of rules? Civil Rule 83, for example, could be amended to incorporate federal rules that could be adopted as an appendix to Rule 83. So far, virtually everyone seems to favor a freestanding set of rules.

A second policy issue requires identification of the mechanism for developing and reviewing proposed federal rules. For the

moment, the Appellate Rules Advisory Committee has, with Appellate Rule 46, the only uniform national rule. Rule 46, however, is couched in terms of conduct unbecoming a lawyer; the vagueness of this term in turn has spawned many divergent local appellate rules. The Advisory Committee believes that there are few attorney-conduct problems in the appellate courts, and prefers that other committees take the lead. The Bankruptcy Rules Committee believes that bankruptcy practice should be governed by unique rules. The Bankruptcy Code has some statutory provisions governing these matters. Bankruptcy practice, moreover, often involves cases with hundreds or even thousands of claimants-parties; the conflict-of-interest rules that work for ordinary litigation seem inappropriate for bankruptcy administration. Professor Coquillette has recommended that the Bankruptcy Rules Committee be provided the opportunity to develop proposed rules for bankruptcy lawyers. The Evidence Rules Committee does not presently believe that it has much of an independent stake in these issues. That leaves the Criminal and Civil Rules Advisory Committees as the groups that may have the most immediate interests. The question is whether they should each act independently, with such contributions as might be made by the other advisory committees, or whether an ad hoc advisory committee should be formed.

The third policy question involves the choices sketched above: should anything be done at all? If so, should the model be dynamic conformity or a core of federal rules that leaves other matters to dynamic conformity?

The ten core rules that have been drafted provide a concrete image of what the core-rule approach might be. The system has an attractive simplicity. The federal rules would be provided to each lawyer on admission to practice in a federal court. Rule 1 establishes dynamic conformity to local state law for everything not covered by Rules 2 to 10. Rules 2 to 10 provide the core. They cover approximately 85% of the issues that actually arise in federal cases. They are, however, a relatively minor portion of a complete body of rules; creation of a complete body of federal rules would add great length and complexity to reach only a small number of additional cases. Rules 2 through 9 are tightly geared to the Model Rules. This drafting choice has several advantages. It avoids the need for enormous effort by adopting a model that has been carefully worked out. The model will establish national uniformity for the federal courts, but at the same time will make federal law uniform with the law in many states. Rule 10, on the

other hand, is independent of the present Model Rules. It establishes variations from Model Rule 4.2, which governs contact with represented persons. The present Rule 10 draft embodies the current discussion draft that seeks to resolve disagreement between the Department of Justice and the Conference of Chief Justices on this topic. If agreement can be reached on this issue, it will establish support for the core-federal-rules approach from the American Bar Association, the Conference of Chief Justices, and the Department of Justice.

Following this introduction, it was observed that the Advisory Committee has favored an educational approach in dealing with topics this important and complex. Professional responsibility matters have generated enormous bodies of expert thought. Bringing the Civil Rules Committee to the point of useful deliberation on the substance of specific rules will require real effort. The Committee should be able to think fruitfully about the broad issues of approach sketched by the Standing Committee. It will be much more difficult to provide cogent advice on something like the "Rule 4.2 - Rule 10" issues, which invoke competition between the need to protect genuine attorney-client relationships and the needs of law enforcement in settings that may involve attenuated attorney-client relationships.

It was asked whether independent federal rules would increase the risk that a lawyer would be punished twice for the same conduct, once in federal court and once in state court. It was noted that of course a federal court must determine for itself whether a lawyer can continue to practice in the court, and whether some sanction other than revocation should occur; and of course the licensing state has an independent interest in regulating its lawyers. This is true whether or not there are independent federal rules. It can happen that a federal court will impose a sanction and state officials will not, or that state officials will punish conduct that the federal court does not punish.

One Committee member suggested that it makes no sense to incorporate federal rules of attorney conduct into the civil rules or any other discrete set of rules. The rules will apply across the full range of attorney conduct and should be freestanding. He also suggested that it would be better to create a single ad hoc committee with representatives from interested advisory committees than to burden each advisory committee agenda with these questions.

It was asked what agencies would be responsible for

enforcement if core federal rules were adopted. Professor Coquillette answered that federal courts will continue to rely in large part on state agencies. Now federal courts often refer problems to state agencies even when state rules are quite different from the local federal rules. A core-rule approach would reduce the problems because some topics would be governed directly by state law, while federal law would be identical or nearly identical to state law in many states. Simple dynamic conformity of course would eliminate the problem entirely — state officials would be asked to enforce state rules. At the same time, federal courts almost inevitably would have their own procedures for determining whether to suspend or revoke the privilege to appear in federal court. "Study 7" in the work papers is consistent with this expectation.

The core-rule approach was challenged as involving problems of federalism. Much of the impetus for nationally uniform core rules derives from the "Rule 4.2" position of the Department of Justice. The Department wants to immunize its attorneys from state enforcement, but state enforcement is the norm for matters of attorney conduct. And these matters are further complicated if there is a federal rule that favors criminal investigators — joint task forces are common, and the federal rule will encourage the state participants to relinquish to the federal participants investigation techniques that are forbidden to the state participants.

The Conference of Chief Justices is concerned that the core rule approach, by superseding local rules, "defederalizes" the traditional role of the states.

This federalism concern was balanced by the observation that many districts now have rules that resemble the proposed core rules. Others have rules that depart further from state practice. The core rules would make for a uniform national law that presents a political problem more in dealing with the attachments of district courts to their local rules than in dealing with state interests. The core federal rules system would bring federal law closer to state practice, not draw it further away.

Returning to the process question, it was suggested that an ad hoc advisory committee, established with perhaps 2 representatives from each of the interested advisory committees, would make sense. It would be possible for the Civil and Criminal Rules Advisory Committees to cooperate in separate efforts, but the task would be

a heavy load on their dockets. Probably it would be a mistake for each advisory committee simply to abdicate any interest in these problems.

Concern was expressed about the seeming willingness to allow the bankruptcy courts to operate under separate rules. There are, to be sure, special problems in bankruptcy practice. Ordinary conflict-of-interest rules may make it difficult to provide non-conflicted representation for all creditors. But bankruptcy matters often return to the district court; it would be better to have a single set of rules for the district courts. The American Law Institute considered requests for special bankruptcy rules in developing the Restatement Third of the Law of Lawyering, and put these issues aside. To the extent that special rules are required for bankruptcy, they should be incorporated directly into the core rules. Any other approach will detract from the moral force of the core rules. Special treatment may indeed be deserved for some bankruptcy issues. One illustration is provided by a local rule that allows a person initially appointed as mediator to undertake representation of a party if the court approves — the rule seems necessary because it may be impossible to foresee the parties that may become involved at the time bankruptcy proceedings begin.

Strong support for the core-rule approach was voiced from the perspective of an attorney who regularly practices in many different federal districts. A single and uniform set of federal rules would be very helpful. The local rules are not good. And it would be a mistake to incorporate these rules separately into the different bodies of rules. They should be a single, stand-alone set of Federal Rules of Attorney Conduct.

Discussion of an emerging preference for the core federal rules approach, adopted as a formally separate set of Federal Rules of Attorney Conduct, led to reconsideration of the "Rule 4.2 - Rule 10" problem. The Rule 4.2 problem was seen as still dynamic, and such an important element of the core rules that approval of this approach might seem premature. Support also was voiced for the simple adoption of local state rules — the core approach still omits much more of the Model Rules than it embraces. It is too early to make the choice between simple dynamic conformity and adoption of core rules to supplement dynamic conformity on issues outside the core rules.

Professor Coquillette summarized the issues by observing that the Standing Committee does not want this Committee to remain aloof

from the attorney-conduct rules problems. Participation through an ad hoc committee would be desirable if that is the most effective means open to this Committee. Time pressure is not intense. The Bankruptcy Rules Committee will need time, and should be given at least a year. No final answers should be reached until the Bankruptcy Rules Committee has reached its own recommendations. The American Bar Association, moreover, has established an Ethics 2000 Committee that will consider state-federal issues.

A motion to recommend adoption of freestanding rules, and to approve participation by naming delegates to an ad hoc committee, led — without a vote — to a consensus conclusion on several points. Any federal rule or rules should be adopted in a form that is independent of any of the existing sets of rules. The Committee does not want to choose yet between simple conformity to local state practice and conformity supplemented by specific federal rules on core subjects. There is a sense that any special rules for bankruptcy cases should be incorporated into the body of rules adopted for all other proceedings. Participation through an ad hoc committee seems desirable. There is no wish to take sides on the "Rule 4.2" debate.

Service and Answer Time in Actions Against Federal Employees

The Department of Justice has proposed amendments to Rules 4(i)(2) and 12(a)(3) for actions brought against an officer or employee of the United States sued in an individual capacity. Rule 4(i)(2) would be amended to require service on the United States as well as the individual employee. Rule 12(a)(3) would be amended to allow 60 days to answer.

These questions arise when a United States officer or employee is sued in an individual capacity for acts or omissions connected with the duties of office or employment. The United States frequently provides representation for the defendant, and in appropriate circumstances may be substituted as the defendant. It is important that it be served at the outset, so that it knows of the litigation and can decide what course to follow. It also is important that sufficient time be allowed for these purposes; the 60-day period allowed in actions brought against the United States, or against an officer in an official capacity, is appropriate.

Two questions were addressed: Whether these changes are desirable, and which of several alternative formulas should be used to describe the individual-capacity claims reached by these

changes.

It was asked what special interests of the federal government justify according treatment not offered to state governments, or to other large organizations. Many actions are brought against state employees on claims that arise out of their state employment, and states often have interests that parallel the interests asserted by the federal government. Many of these actions against federal employees, moreover, are ordinary lawsuits. The underlying conduct and the legal theories are no more complex than those involved in many other actions.

These questions led to the observation that the Civil Rules began with drafting by the Department of Justice, and in the beginning contained many provisions favorable to the United States. Some of these provisions have been diluted or removed over the years. Rule 4(i)(3) has been recently amended to defeat the occasional government practice of seeking dismissal for failure to meet technical requirements for serving multiple government bodies. Some plaintiffs still were losing cases simply because they had not served enough different people. If the proposed changes are adopted, Rule 4(i)(3) should be further amended to ensure that failure to serve the United States under proposed Rule 4(i)(2)(B) does not defeat the claim.

These doubts were met by the observation that in fact the Department of Justice has found that it really needs notice at the beginning and 60 days to answer. That is what it takes to get the job done. The Federal Employees Liability Reform and Compensation Act of 1988 often leads to certification that an employee was acting within the scope of office or employment and substitution of the United States as defendant. The United States needs at least as much time to respond to these cases — the review and certification decision add to the time requirements, and there is no reduction in other time needs.

It also was noted that some federal courts routinely provide that in § 1983 actions against state employees, service must be made on the state attorney general's office, and automatically grant extensions of time to answer.

Turning to drafting questions, it was noted that some means should be found to ensure that the rules reach actions against former employees as well as current employees. It was suggested that thought be given to adding "agents" to the list of defendants,

since some government agents are not officers or employees of the United States. It was decided that it is better not to raise the complications that might follow an addition of "agents," at least until some actual problems arise on this score. It was agreed that the Committee Note should point out that the purposes of the rule reach former employees as well as current employees.

The most important drafting question turns on the words used to describe the connection between the claim and federal employment that justifies the requirement of service on the United States and a 60-day answer period. The mere fact that a federal employee is a defendant is not sufficient. Three phrases were proposed: that suit be for acts or omissions "occurring in connection with the performance of duties on behalf of the United States"; "arising out of the course of the United States office or employment"; or "performed in the scope of the office or employment."

Although the "scope of employment" language derives from the Federal Employees Liability Reform and Compensation Act of 1988, it won little support. It was found too narrow, and to risk moving the scope-of-employment determination to the initial stages of the litigation.

Initial support was voiced for the "arising out of the course of the * * * employment" formula. The formula seems borrowed from the common phrases used in workers compensation statutes. But it also is used in a variety of procedural rules — familiar examples include Civil Rules 13(a) and 15(c). It does not require a technical determination of the scope of employment. It has the advantage that it is novel in this setting, and thus can be construed to adapt these rules to the evident lessons of accumulating experience in application.

Support also was voiced for the "connection with the performance of duties" phrase. It is even more obviously open-ended and functional than the "arising out of" phrase. It has the advantage of lacking any obvious analogy to developed areas of technical law, freeing courts and lawyers from the need to articulate the reasons why precedents under compensation laws or other procedure rules may not provide suitable guidance in this setting.

It was asked whether "color of law" should be adopted as the test. An earlier draft was written in terms of acts "under color of federal office or employment." This phrase was rejected because

"color of employment" is a new term, and one that might be difficult to cabin. "Color of office" is classically used to include acts made possible by an officer's official position, even though there is no arguable legal justification. Color of employment might be read in similar and perhaps undesirably broad ways. An example was offered of a law-enforcement employee who, while off duty, uses an official badge to perform a robbery.

Further discussion emphasized the difficulty of achieving any perfectly clear language. A deliberately indefinite phrase must be used to support reasonable adaptation to the needs of marginal cases as they may arise. The Committee voted unanimously to adopt "occurring in connection with the performance of duties on behalf of the United States." It also was decided that Rule 4(i)(3) should be amended to ensure that a reasonable time will be allowed to cure failure to serve the United States.

Local Rules

The Standing Committee has asked for consideration of a proposal to amend Rule 83 to provide a uniform effective date for local rules. The draft of Rule 83(a)(1) provided for consideration would read: "A local rule takes effect on ~~the date specified by the district court~~ January 1 of the year following adoption unless the district court specifies an earlier date to meet a[n emergency] {special} need, and remains in effect * * *."

It was suggested that other local rules questions also deserve consideration. The problems caused by local rules might be reduced if requirements of numbering and filing were made conditions on validity. There may be need to determine whether senior judges are included in the "district judges" who are authorized to adopt local rules. Still other issues may arise. Professor Coquillette advised that this Committee need not reach a position in time to report to the June Standing Committee meeting. Further consideration of local rules questions was postponed to the fall meeting.

Copyright Rules of Practice

Judge Niemeyer summarized the proposal to rescind the obsolete Copyright Rules of Practice and to amend Civil Rule 65 to bring copyright impoundment within the general procedures for temporary restraining orders and preliminary injunctions. The Committee has made vigorous efforts to gain advice from intellectual property law experts, and further delay is not indicated by any reason intrinsic

to the Committee process. In many ways, the time is long past for removing this embarrassing reminder of superseded statutes and procedures. At least in reported decisions, district courts seem to be acting as the proposed amendments would have them act: they assume that the Copyright Rules are inconsistent with the 1976 Copyright Act, and that due process requires modification of the impoundment procedures they specify. Rule 65 is used for guidance.

Concern has been expressed that the proposed amendments would be inconsistent with obligations imposed by international treaties to provide effective copyright remedies. In fact the proposed amendments would increase effective copyright remedies by providing a secure legal foundation for the practices now followed by district courts in any event. The fact, however, may not fully meet the concerns expressed by members of Congress. Although they understand that these proposals would add strength to domestic enforcement practices, they fear that other countries cannot be made to understand — in part, perhaps, because they may prefer not to understand. New copyright treaties and legislation are under active consideration.

Recognizing the concerns expressed in Congress, and mindful of the importance of cooperating with Congress, the Committee decided to defer further consideration of the Copyright Rules of Practice to the fall meeting. Judge Niemeyer will write to appropriate members of Congress to report this action.

E-Mail Comments on Rules Proposals

The Standing Committee's Subcommittee on Technology has asked the Advisory Comments to comment on a proposal to experiment with e-mail comments on published proposals to amend federal rules of procedure. The Administrative Office has established the technical capability to receive e-mail comments, and would be responsible for forwarding the comments to all advisory committee members. The proposal is that the Administrative Office also would be responsible for acknowledging each comment by e-mail, and would "make available on the Internet a generic explanation of action of the Advisory Committees in response to comments received." Because this is a 2-year experiment to determine how well e-mail comments will work, the advisory committee reporters will be relieved of the ordinary obligation to summarize comments. A reporter who finds new points made in e-mail comments, however, would be expected to point them out in providing summaries of ordinary mail comments.

Discussion of this proposal explored the possibilities of transmitting the comments to advisory committee members by email. These possibilities will be explored.

The Committee approved the recommendation of the Subcommittee on Technology.

Form 2

Form 2 has not been amended to reflect the increase in the amount in controversy required by § 1332 to establish diversity jurisdiction. The question is whether the form should be changed simply by substituting the current $75,000 amount, or whether it is better to anticipate possible future changes in the amount. It always will be difficult to predict the timing of any legislative changes that may be made, and it is awkward to have forms that are likely to remain behind statutory reality for as long as three years or even more.

It was agreed that Form 2 should be amended to include this language in the statement of diversity jurisdiction: "The matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332 ~~fifty thousand dollars~~."

The Reporter will explore possible means of effecting such technical changes in the forms that do not require the full and lengthy process of the Enabling Act. The Bankruptcy Rules provide more expeditious procedures, and it may be desirable to propose similar provisions for Rule 84.

Rule 65.1

A suggestion to the Committee reflects concern that Rule 65.1 may impose unauthorized duties on district court clerks. Rule 65.1 provides that the surety on a bond given under the rules "submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served." No question has been raised as to the appropriateness of having a court clerk act as agent for the service of process. Confusion may arise, however, from the provisions of 31 U.S.C. § 9306. Section 9306 allows a surety corporation to provide a surety bond outside the state in which it is incorporated or has its principal office only if it "designates a person by written power of attorney to be the resident agent of the corporation for that district." The duties of a resident agent are incompatible with the office of

district-court clerk.

The committee agreed that Rule 65.1 does not contemplate appointment of the court clerk as a § 9306 resident agent. The only rule-imposed obligation is the symbolic role as agent for service in the district, coupled with the functional command that notice be sent to the surety. The automatic appointment effected by Rule 65.1 does not satisfy § 9306 requirements, and does not of itself qualify a "foreign" surety corporation to post a surety bond in the district. The surety corporation is responsible for appointing a resident agent, and cannot appoint the district court clerk.

This conclusion seems sufficiently clear to defeat any proposal to amend Rule 65.1.

Rule 51

The Ninth Circuit Judicial Council survey of local rules has found several local rules that authorize a district judge to require submission of proposed jury instructions before trial. These rules seem inconsistent with Rule 51, which provides that requests may be filed "at the close of the evidence or at such earlier time during trial as the court reasonably directs." The Ninth Circuit Judicial Council proposes that Rule 51 be amended to authorize local rules that require earlier submission.

The Committee agreed that there is no reason why this question should be left to local rules, which will establish nonuniform practices. If earlier submission of requests is a good idea, it should be supported by Rule 51 itself.

It was noted that a proposal to amend Criminal Rule 30 has been published that would provide for instruction requests "at the close of the evidence, or at any earlier time that the court reasonably directs." The Committee Note says: "While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57."

Courts outside the Ninth Circuit also have adopted practices requiring early submission. One judge requires that requests be filed before jury selection, apparently reasoning that this time still is "during trial."

Concern was expressed that new issues frequently arise from

trial evidence, and that there should be a right to submit supplemental requests.

Although it is tempting to try to catch up with the Criminal Rules proposal — although a Civil Rules amendment would be starting out a full year behind the Criminal Rules publication — the Committee concluded that the question should be retained for further study. There are many other questions of Rule 51 practice that might be considered to determine whether the Rule should reflect more accurately the many practices that have grown up around its express language. It may be possible to redraft the rule to provide better guidance to parties and courts.

Civil Rule 44

The Evidence Rules Committee has raised the question whether Civil Rule 44 has become redundant to many different provisions of the Evidence Rules. Correspondence between the Reporters has resulted in a recommendation by the Evidence Rules Committee Reporter that there is no present need to consider these questions. This Committee concluded that the topic does not merit study unless the Evidence Rules Committee concludes that further work is appropriate.

42 U.S.C. § 1997e(g)

The Prison Litigation Reform Act of 1995 added a new provision to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e(g). This statute allows a defendant sued by a prisoner under § 1983 or any other federal law to "waive the right to reply" to the action. "Notwithstanding any * * * rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint." Without a "reply," no relief can be granted to the plaintiff. The court can order a reply "if it finds that the plaintiff has a reasonable opportunity to prevail on the merits."

This statute may well supersede provisions in the Civil Rules, most directly Rules 12(a) and 8(d). Rule 12(a) seems to require an answer to the complaint, and Rule 8(d) provides that failure to deny matters alleged in a pleading to which a responsive pleading is required is an admission. It is possible to strain the language of Rule 12(a) to find that there is no inconsistency. But it might be better to amend these rules to reflect clearly the new statute.

It was pointed out that virtually every district has special

procedures for dealing with civil actions filed by prisoners, and that there may be no need to add to the complexity created by the new statute and local practices.

It was concluded that the subcommittee charged with reviewing pending docket items should include these questions in its review.

Next Meeting

No firm date was set for the fall meeting. It will be important to select a date that allows the mass torts working group time to prepare a draft report to be considered by this Committee. The date may be set as late as early November.

Adjournment

The meeting adjourned with expressions of great appreciation for the fine support work provided by the Rules Committee Support Office.

Respectfully submitted,

Edward H. Cooper
Reporter

III-V

Rule 83: Local Rules

At the January, 1998 meeting, the Standing Committee put one local-rules topic on the agendas of the advisory committees for study and recommendation. The proposal is that local rules ordinarily take effect on a single annual date, with an exception allowed for rules that seem to require immediate effect to meet special situations. The Appellate Rules Committee has approved a proposal that sets December 1 as the effective date and allows a different effective date if there is "an immediate need for the amendment."

The Appellate Rules Committee also has approved a proposal that prohibits enforcement of a local rule "before it is received by the Administrative Office of the United States Courts."

Both proposals of the Appellate Rules Committee have been held back from submission to the Standing Committee so that other advisory committees can consider the topic. The relevant minutes and the amended Appellate Rule 47 draft are attached.

The Rule 83 amendments sketched below follow on the work of the Appellate Rules Committee. In addition, a third change is proposed. Unlike local appellate rules, 28 U.S.C. § 2071(d) requires that a local district court rule be "furnished to the judicial council." This requirement is reflected in Rule 83(a)(1). For district court rules, compliance with this requirement can be made a condition of enforcement, just as the requirement that the rule be furnished to the Administrative Office.

All of these proposals reflect dissatisfaction with the burdens that local rules place on counsel. This dissatisfaction was reflected in a second proposal for study to limit the total number of local rules. This proposal failed in the Standing Committee by vote of 5 to 6; it is noted at the end of this note for informational purposes. The proposal and vote seemed calculated to spur more creative proposals to seize control of the local rules problem. Suggestions, even minimally creative ones, will be welcomed.

Uniform Effective Date

The first question to be addressed in specifying a uniform effective date by Civil Rule, Appellate Rule, or other Rule, arises from the enabling statute. Section 2071(b) states that a local

rule "shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order." The supersession clause of the Rules Enabling Act, § 2072(b), should authorize Rules amendments that defeat local authority to prescribe an effective date. Nonetheless it is wise to consider whether the need for change is so important and urgent as to justify deliberate reliance on this authority. There is an awkwardness in using one enabling act to supersede a companion enabling act.

The Appellate Rules Advisory Committee draft picks December 1 as the uniform effective date for local rules. The idea is that it will be easier for attorneys to keep up with local rules if changes can occur only on a predictable schedule, and not too often. Exceptions are permitted, however, because new legislation — or possibly other events — may require immediate response. As an example, recent habeas corpus reform legislation required the courts of appeals to move with speed to adapt to changes in the certificate of probable cause requirement for appeal and to govern proceedings for securing permission for successive petitions. The exception adopts "an immediate need for amendment" as the test by borrowing from § 2071(e), which allows a court to adopt a local rule without public notice or opportunity for comment if it "determines that there is an immediate need for a rule * * *."

December 1 was chosen as the uniform effective date for three reasons. National rules amendments ordinarily take effect on December 1. Adopting the same date for local rules means that lawyers need respond to only one common date for learning about new rules. The common date also prevents any gap between the effective date of a new national rule and the effective date of any local rule that implements it. "Finally, December 1 fits nicely with the deadlines of the two major legal publishers."

At least one member of the Appellate Rules Committee expressed a preference for January 1 as the effective date. Congress at times acts to amend a national rule in ways that cannot be anticipated in time to draft an implementing local rule by December 1, the effective date of the new national rule. It is better not to defer effective response for a full year. This concern was met by the response that such circumstances should qualify as an immediate need for the rule, allowing an effective date more flexible than simply picking January 1.

Concern also was expressed that it is too permissive to allow a special effective date on determination by a majority of a court's judges that there is an immediate need for the amendment. Words should be found the require a higher standard of emergency need. This concern was met by the response that it is better to adopt the language used in the statute, even though used in a different context.

The draft Rule 83 set out below follows the lead of the Appellate Rules Committee. It is easy, however, to set a different uniform effective date — whether January 1 or any other — and to draft language that seems to require a more urgent need for departure from the uniform date. The Appellate Rules model is followed because change is so easy, not because of any implied judgment that change is undesirable.

Furnishing to the Administrative Office and Judicial Council

Section 2071(d) requires that "[c]opies of rules prescribed * * * by a district court shall be furnished to the judicial council, and copies of all rules * * * shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public." The passive voice creates a possible ambiguity in determining whether it is the district court or the Administrative Office that is responsible for making local rules available to the public. Civil Rule 83(a)(1) is similarly passive: "Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public." Nothing in statute or rule makes compliance with these requirements a prerequisite to enforcing a local rule. The draft Appellate Rule 47 and draft Rule 83 do not attempt to specify which body is responsible for making a local rule available to the public, accepting the apparent assumption that this duty surely falls on the local court.

The Appellate Rules Committee has concluded that there has been "inconsistent" compliance with the requirement that a copy of a local rule be furnished to the Administrative Office. The draft rule prohibits enforcement until a copy is "received by" the Administrative Office. The drafting choice to make compliance a condition of enforcement, not a condition of effectiveness, is attractive. It would be easy to draft a rule that says a local rule takes effect on the first December 1 after the rule is adopted

and a copy is furnished to the Administrative office, but the price is rather high. It would not be difficult to draft a rule that says a local rule takes effect on the first December 1 after it is adopted, or on the later date when a copy is furnished to the Administrative Office. And it might seem more sensible to focus on a single effective date, rather than to create separate concepts for effective date and enforceability. But once permission to give a rule immediate effect is introduced, the distinction between effective date and enforceability takes on a certain drafting charm. The result is that a rule might be effective, but not enforceable — a party may comply, and likely would be wise to comply, but will not suffer any consequence for failing to comply. Once again, the Appellate Rules model is followed.

The Appellate Rules Reporter struggled with the task of making more precise the statutory requirement that a local rule copy be "furnished" to the Administrative Office. The choice was between the date a copy is "sent" and the date it is "received." Posting on the Internet also was considered, but not discussed further. The Administrative Office representative thought it undesirable to focus on receipt, for fear the Office would be swamped with calls from anxious lawyers intent on learning about local rules that cannot be discovered locally. Some sympathy was expressed for this fear, but it was generally discounted on the ground that the uniform effective date gives lawyers ample opportunity to track down local rules locally. Receipt was thought better because it is, in the same way as a filing requirement, a definite event that can easily be known. Sending may not be as clear. Although draft Rule 83 follows the Appellate Rule draft, the point clearly deserves discussion. And we should be prepared for the day when the Administrative Office can post the complete bodies of all local rules electronically, and it can be required that any amendment be transmitted for automatic incorporation.

The requirement that a district court rule be "furnished" to the circuit Judicial Council serves purposes distinct from those served by furnishing the rule to the Administrative Office. The Judicial Council has power to modify or abrogate a local rule. It would be possible to defer enforcement of a local rule for a stated period after it has been furnished to the Judicial Council, allowing an opportunity for review. This approach does not seem wise. There is little reason to suppose that many local rules are so clearly invalid, or unwise, as to stimulate effective review in

a pre-enforcement setting. Nor is there much reason to suppose that the Judicial Councils will be eager to undertake a routine review obligation. But there is good reason to treat the obligation to furnish a copy to the Judicial Council in the same way as the obligation to furnish a copy to the Administrative Office. This obligation is added to the Rule 83 draft (remember that the statute does not attach this obligation to local circuit rules).

The following draft of Civil Rule 83 is submitted to illustrate adaptation of the Appellate Rules model. Whatever substantive changes may be agreed upon, the Standing Committee will be concerned to achieve as much uniformity of style as possible among the several different sets of Rules.

Rule 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) **(A)** Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice.

(B) A local rule shall be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(C) A local rule or amendment takes effect on ~~the date specified by the district court~~ December 1 following adoption unless the [district] court specifies an earlier date to meet an immediate need, and remains in effect unless amended by the court or modified or abrogated by the judicial council of the circuit.

(D) Copies of rules and amendments shall, upon their ~~promulgation~~ adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. A rule or amendment must [may] not be enforced before it is received by the Administrative Office and [by] the judicial council.

[Subparagraph C could be brought closer to the style of draft Appellate Rule 47 like this:

(C) A local rule or amendment takes effect on the December 1 following its adoption, unless a majority of the court's judges in regular active service determines that there is an immediate need for the amendment, and remains in effect * * *.

There are two significant differences. This version repeats the majority of the judges requirement already set out in subparagraph (A), adding the "in regular active service" embellishment that is now stated in Appellate Rule 47 but not in present Civil Rule 83. It might be better to add this requirement to subparagraph (A) if it seems desirable. And this version seems to imply that the choice is between immediate effect and effect on the following December 1; perhaps it would be inferred that an "immediate need" can be met by specifying an effective date that is not immediate.]

Committee Note

A uniform effective date is required for local rules to facilitate the task of lawyers who must become aware of changes as they are adopted. Exceptions should be made to meet immediate needs when special circumstances arise that cannot be accommodated by other means during the period before the next December 1.

The present requirements of filing with the Administrative Office and circuit judicial council are bolstered by prohibiting enforcement of a local rule or amendment before a copy is received by the Administrative Office and the judicial council. This requirement need not entail any significant delay in enforcement. District courts should regulate their local rules activities in a way that allows ample time for transmitting copies before December

1; receipt well in advance of December 1 will be all to the good. If immediate effect is desired, the copies can be transmitted by means — including electronic means — that entail little or no delay.

New technology will help discharge the obligation to make local rules available to the public. Many courts have posted their local rules on the Internet. All courts should seek to make their local rules available in this form as resources become available. In addition, it is expected that the Administrative Office will place all local rules in a single easily accessible location, preferably the Internet, for the benefit of the bench, bar, and public.

A More Controlling Model

The draft based on the Appellate Rules draft will protect against unintended violations of local rules that were not known to the offender. It does not go as far as might be gone, however, toward ensuring any effective review of local rules. Greater control might be established by establishing an opportunity for comment or review before the effective date. It would be ideal to find a means to ensure that the local circuit judicial council reviews every local rule. Assuming that this ideal is not practicable, substantial good might flow from requiring the Administrative Office to review new rules or amendments and to notify the judicial council of potential problems. The following draft illustrates this approach:

Rule 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) Each district court, acting by a majority of its district judges, may~~, after giving appropriate public notice and an opportunity for comment,~~ make and amend rules governing its practice only as follows:

(A) A local rule shall be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to

any uniform numbering system prescribed by the Judicial Conference of the United States.

(B) At least 60 days before adopting or amending a local rule, the court shall give appropriate public notice of the proposed rule and an opportunity for comment.

(C) A local rule or amendment takes effect on ~~the date specified by the district court~~ December 1 following its adoption unless the court specifies an earlier date to meet an immediate need, and remains in effect unless amended by the court or modified or abrogated by the judicial council of the circuit. ~~Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.~~

(D) A local rule or amendment may not be enforced until the following requirements have been met:

(1) at least 60 days have run since the court gave notice of the rule or amendment to the judicial council of the circuit and to the Administrative Office of The United States Courts; and

(2) the court has made the rule or amendment available to the public by convenient means, including electronic means where feasible.

(E) The Administrative Office of the United States Courts shall promptly publish all local rules by means that provide convenient public electronic access. The

Administrative Office also shall review all new local rules or amendments, and shall report to the district court and the judicial council of the circuit if it finds that a rule or amendment does not conform to the requirements of this Rule. A district court may not enforce a local rule provision that has been reported by the Administrative Office until the judicial council of the circuit approves the provision.

Committee Note

Practicing attorneys continue to complain about the difficulty of complying with local rules of practice. The complaints address such matters as a lack of uniformity between districts, the difficulty of learning the meaning and even existence of local rules, and occasional inconsistency with the national rules. A careful examination of local rules by the Ninth Circuit Judicial Council, for example, uncovered several local rules that seem inconsistent with the national rules. Rule 83 already requires consistency with the national rules, and the present requirement that rules be filed with the judicial council is intended to provide some means of enforcement. More effective measures seem called for, but measures that do not create unnecessary roadblocks to effective adoption and enforcement of local rules.

Paragraph (B) implements the present requirements of Rule 83 by requiring at least 60-day public notice before adopting or amending a local rule.

A uniform effective date is provided in paragraph (C) to facilitate the task of lawyers who must become aware of changes as they are adopted. Exceptions can be made to meet immediate needs when special circumstances arise that cannot be accommodated by other means during the period before December 1. The material in paragraph (C) also is changed to reflect the provision in 28 U.S.C. § 2071(c)(1) that allows a judicial council to modify, rather than abrogate, a local rule.

Paragraph (D) prohibits enforcement of a local rule or amendment for 60 days after notice is given to the judicial council and the Administrative Office. It also prohibits enforcement

until the district court has made the rule or amendment available to the public.

Paragraph (E) imposes new duties on the Administrative Office. It is required to publish local rules on the Internet or whatever future system of readily accessible electronic communication proves convenient. In addition, the Administrative Office is required to review all new local rules or amendments and report to the district court and judicial council if the rule does not conform to Rule 83 requirements. The district court may not enforce a rule reported by the Administrative Office until the judicial council approves the reported provision.

Number and Effect of Local Rules

Returning to the Standing Committee's January actions, a motion was made to limit the permissible number of local rules, and to expand the reach of the provision that protects against loss of rights for failure to follow a local rule. The amendments in Civil Rule 83 would look something like this:

(a) Local Rules.

(1) Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend no more than 20 rules governing its practice. * * *

(2) A local rule ~~imposing a requirement of form shall~~ must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

The motion was made in a mood of avowed hostility to local rules. The proponent would prefer that all local rules be abolished, to be replaced by actual orders entered in each case. A limit on the number of words — shades of the Appellate Rules brief limits — also was suggested.

Discussion suggested that abolition of local rules would lead to standing orders, and abolition of standing orders would lead to uniform orders automatically duplicated and entered in each case. Local rules, published and (at least in theory) easily accessible to all, may be better than that. The limitation of Rule 81(a)(2) to requirements of form was deliberately considered and adopted; little if anything has changed since 1995 to justify revisiting the question.

It became apparent that this proposal is closely tied to the Standing Committee Local Rules Project. The discussion serves as a reminder that each advisory committee should remain sensitive to problems that arise from local rules, and ready to suggest such remedies as may seem possible. Indeed it may prove desirable to be

more aggressive. Protests about the proliferation and variety of local rules continue unabated. This Committee may wish to initiate a more formal dialogue with the Standing Committee on new ways to bring some order, if not yet to restore more truly national practices.

VI

Reporter's Memorandum: Copyright Procedure

Introduction

Most lawyers, including many copyright lawyers, do not know that an independent set of Copyright Rules of Practice, adopted under the 1909 Copyright Act, seems to persist to this day. This Committee first proposed abrogation of the Copyright Rules in 1964, but the question was put aside in deference to the copyright reform efforts that eventually led to the 1976 Copyright Act. Nothing has been done since then, despite grave constitutional doubts about the ex parte seizure provisions and about the actual life or accidental death of the rules. Several federal courts have recognized the problems that arise from these anachronistic rules, and have invented apparently successful means to overcome the problems. At least a few anecdotes suggest that some practitioners have continued to invoke the ex parte seizure remedies provided by the Copyright Rules, however, and in any event it is desirable to get our house in order. This memorandum renews the 1964 proposals to abrogate the 1909 Copyright Rules and to amend Civil Rule 65 to provide a secure foundation for all appropriate pretrial remedies.

These proposals are designed to ensure that federal courts can continue to do what they are doing now — providing effective remedies and procedures in copyright cases. As matters now stand, there is a plausible technical argument that there are no rules of procedure for copyright actions. Almost universally, federal courts ignore this potential problem and apply the Federal Rules of Civil Procedure. Beyond this general difficulty lies a more pointed problem. The prejudgment seizure provisions in the Copyright Rules of Practice, even if they apply to actions under the 1976 Copyright Act, probably are inconsistent with the Act and quite probably are unconstitutional. Here too the federal courts seem to have adapted by applying the safeguards of Civil Rule 65 procedure in ways that both satisfy constitutional requirements and provide effective protection against copyright infringements. Appropriate rule changes are more than thirty years overdue. It is time to make the rules conform to practice. Together, these changes not only will support present practice but also will ensure that the United States is meeting its international obligations to provide effective copyright remedies.

Congressional staff members have expressed some concern that the proposed action, although taken for the purpose of establishing

a secure foundation for effective copyright remedies, might be misunderstood in other countries. The United States is actively encouraging all countries to provide effective intellectual property schemes. If the Committee decides that these problems have lingered more than long enough, care must be taken to reassure the world that the purpose and effect are to bolster present effective practice, not to diminish it.

The Problems

No Procedure. Civil Rule 81(a)(1) presents the question whether there any procedural rules apply to copyright actions. It states that the Civil Rules "do not apply to * * * proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States." Rule 1 of the Copyright Rules of Practice reads:

> Proceedings in actions under section 25 of the Act of March 4, 1909, entitled "An Act to amend and consolidate the acts respecting copyright", including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, in so far as they are not inconsistent with these rules.

The problem is that all of the 1909 Copyright Act was superseded in 1976. On the face of Civil Rule 81 and Copyright Rule 1, there is no Supreme Court rule that makes the Civil Rules applicable to proceedings in copyright under present Title 17.

Courts have mostly reacted by ignoring this seeming problem. In Kulik Photography v. Cochran, E.D.Va.1997, 975 F.Supp. 812, 813, the court noted an unpublished opinion by a magistrate judge that apparently holds the Civil Rules inapplicable in a copyright action. The court observed that many courts continue to apply the Civil Rules, and then concluded that it need not decide whether to follow the Civil Rules because in any event it could grant the defendants' motion to dismiss for lack of personal jurisdiction. Otherwise, federal courts seem to follow the sensible course of applying the Civil Rules without further anguish. The Civil Rules nonetheless should be amended to securely establish this result.

The failure to amend Copyright Rule 1 in 1976 may reflect the obscurity of the Copyright Rules. Although it is embarrassing to have waited so long, it would be easy to adopt a technical

amendment that substitutes an appropriate reference to the 1976 Act in Copyright Rule 1.

The reason for inquiring beyond this simple technical correction is revealed on examining the balance of the Copyright Rules. Rule 2, which imposed special pleading requirements, was abrogated in 1966. The remaining Rules 3 through 13 deal with one subject only — the procedure for seizing and holding, before judgment, "alleged infringing copies, records, plates, molds, matrices, etc., or other means of making the copies alleged to infringe the copyright." These rules require a bond approved by the court or commissioner, but do not appear to require any particular showing of probable success. The marshal is to retain the seized items and keep them in a secure place. The defendant has three days to object to the sufficiency of the bond. The defendant also may apply for the return of the articles seized with a supporting "affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing * * *." Rule 10 provides that "the court in its discretion, after such hearing as it may direct, may order such return" if the defendant files a bond in the sum directed by the court.

Since the Copyright Rules deal only with prejudgment seizure, and have not been reviewed for many years, it seems appropriate to ask whether they continue to reflect evolving concepts and practices that have transformed the due process constraints on prejudgment remedies.

Due Process. In 1964, the Civil Rules Advisory Committee considered the Copyright Rules and published for comment a proposal to abrogate the Copyright Rules. The proposal was driven in part by a belief that all civil actions should be governed by the Civil Rules, and in part by grave doubts about the wisdom of the prejudgment seizure provisions in Rules 3 through 13. The seizure procedure:

> is rigid and virtually eliminates discretion in the court; it does not require the plaintiff to make any showing of irreparable injury as a condition of securing the interlocutory relief; nor does it require the plaintiff to give notice to the defendant of an application for impounding even when an opportunity could feasibly be provided.

Opposition was expressed by the American Bar Association and by the Ninth Circuit Judicial Conference, who apparently relied on the same advisers. The opponents expressed satisfaction with the working of the Copyright Rules. The Reporters were not swayed; they suggested that alleged infringers were not likely to be heard in the rulemaking process. In the end, the Advisory Committee concluded that its proposals were sound, but that the final decision whether to recommend adoption should be made by the Standing Committee in light of the needs of sound relations with Congress while the process of revising the Copyright Act was going on. The Standing Committee recommended that only the special pleading requirements embodied in Rule 2 be abrogated.

For more than thirty years, the Copyright Rules of Practice have been published in U.S.C.A. with the following Advisory Committee Notes appended to each remaining rule:

> * * * The Advisory Committee has serious doubts as to the desirability of retaining Copyright Rules 3-13 for they appear to be out of keeping with the general attitude of the Federal Rules of Civil Procedure * * * toward remedies anticipating decision on the merits, and objectionable for their failure to require notice or a showing of irreparable injury to the same extent as is customarily required for threshold injunctive relief. However, in view of the fact that Congress is considering proposals to revise the Copyright Act, the Advisory Committee has refrained from making any recommendation regarding Copyright Rules 3-13, but will keep the problem under study.

The line of contemporary decisions revising due process requirements for prejudgment remedies began soon after this paragraph was written. See *Sniadach v. Family Fin. Corp.*, 1969, 395 U.S. 337, 89 S.Ct. 1820; *Fuentes v. Shevin*, 1972, 407 U.S. 67, 92 S.Ct. 1983; *Mitchell v. W.T. Grant Co.*, 1974, 416 U.S. 600, 94 S.Ct. 1895; *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 1975, 419 U.S. 601, 95 S.Ct. 719; *Connecticut v. Doehr*, 1991, 501 U.S. 1, 111 S.Ct. 2105. These decisions do not establish a crystal-clear formula for evaluating the process required to support no-notice prejudgment remedies. But they do make it clear that the procedures established by the Copyright Rules have at best a very low chance of passing constitutional muster. It seems to be accepted that no-notice preliminary relief continues to be

available on showing a strong prospect that notice will enable the opposing party to defeat the opportunity for effective relief. But it is almost certainly required that this showing be made in ex parte proceedings before a judge or magistrate judge. A mere affidavit filed with a court clerk will not do. The Copyright Rules do not approach this standard.

In addition to the due process problem, the Copyright Rules also seem inconsistent with the interim impoundment remedy established by the 1976 Copyright Act. 17 U.S.C. § 503(a) provides:

> At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

This provision gives the court discretion whether to order impoundment, and discretion to establish reasonable terms. Apart from the terms of the bond posted by the plaintiff, discretion seems to enter the Copyright Rules only at the Rule 10 stage of an order to return the seized items.

An early reaction to these difficulties was provided by Judge Harold Greene in *WPOW, Inc. v. MRLJ Enterprises*, D.D.C.1984, 584 F.Supp. 132, 134-135. Judge Greene concluded that § 503(a) makes prejudgment impoundment discretionary, and that an exercise of discretion requires "procedures which are other than summary in character." Decisions under the pre-1976 Act Copyright Rules no longer control. Instead, the normal injunction requirements of Civil Rule 65 apply. A later decision by Judge Sifton provides a strong statement that the Copyright Rules are inconsistent with § 503(a), and an equally strong suggestion that they probably are unconstitutional. *Paramount Pictures Corp. v. Doe*, E.D.N.Y.1993, 821 F.Supp. 82. The reasoning of these decisions was found persuasive in *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, N.D.Cal.1995, 923 F.Supp. 1231, 1260-1265, where the court adopted Civil Rule 65 procedures. The doubts expressed by the WPOW and Paramount Pictures courts are reflected, without need for resolution, in *First Technology Safety Systems,*

Inc. v. Depinet, 6th Cir.1993, 11 F.3d 641, 648 n. 8. *Columbia Pictures Indus. v. Jasso*, N.D.Ill.1996, 927 F.Supp. 1075, 1077, may seem to look the other way by stating that the Copyright Rules govern impoundment, but the court then proceeds through all of the appropriate steps for a court-determined temporary restraining order under Civil Rule 65. *Century Home Entertainment, Inc. v. Laser Beat, Inc.*, E.D.N.Y.1994, 859 F.Supp. 636, is similar to the Columbia Pictures decision.

If there is room for significant doubt, it is whether even the Civil Rule 65(b) temporary restraining order procedures may support no-notice seizures. The Supreme Court decisions are not as clear as could be wished. There is room to argue that even after an ex parte hearing, free use of a defendant's property can be restrained without notice only if the plaintiff's claim falls into a category that is easily proved and that gives the plaintiff some form of pre-existing interest in the property. A secured creditor can qualify, as with the vendor's lien in Mitchell v. W.T. Grant. A tort claimant does not qualify, as in Connecticut v. Doehr. A copyright owner is asserting a property interest that might, for this purpose, be found to attach to an infringing item. But the claim of infringement often will be difficult to establish. The Court emphasized the risk of error in Connecticut v. Doehr, and there is a genuine risk of error in making many claims of copyright infringement.

These doubts cannot be completely dispelled, but they can be satisfactorily met. There is strong appellate authority justifying no-notice seizure of counterfeit trademarked goods. The consensus classic decision is Matter of Vuitton et Fils S.A., 2d Cir.1979, 606 F.2d 1. Vuitton showed that it had initiated 84 counterfeit goods actions, and filed affidavits detailing experience with notices of requested restraints. The defendants regularly arranged to transfer the infringing items. The court found this showing sufficient to establish

> why notice should not be required in a case such as this one. If notice is required, that notice all too often appears to serve only to render fruitless further prosecution of the action. This is precisely contrary to the normal and intended role of "notice," and is surely not what the authors of the rule [65(b)] either anticipated or intended."

Congress reacted to continuing trademark infringement problems with the Trademark Counterfeiting Act of 1984, which establishes an elaborate temporary-restraining-order-like procedure for no-notice seizure. 15 U.S.C. § 1116(d). This procedure was explored and approved in Vuitton v. White, C.A.3d, 1991, 945 F.2d 569.

The analogy to trademark problems is bolstered by the relative frequency of proceedings that combine copyright and trademark claims. The Time Warner Entertainment case, for example, involved both copyright and trademark rights in Looney Tunes and Mighty Morphin Power Rangers figures.

The most significant question raised by the trademark analogy is whether it would be better to shape the Enabling Act response to the prospect that Congress may wish to enact a copyright analogue to the trademark statute. The attached letter from the American Intellectual Property Law Association, which otherwise supports the changes proposed below, reports a division of opinion on the desirability of supplemental legislation. Supplemental legislation indeed should be welcomed if Congress concludes that a new statute would usefully give more pointed guidance than a combination of the copyright impoundment statute, § 503(a), and Civil Rule 65(b). But there is little indication that courts have encountered any special difficulties in adapting Rule 65(b) to copyright impoundment. It seems better to supplement repeal of the Copyright Rules and amendment of Rule 81(a)(1) by a revision that expressly applies Civil Rule 65 to copyright impoundment. This revision was first proposed in 1964, and continues to make sense.

International Obligations

The TRIPS provisions of the Uruguay Round of GATT require that effective remedies be provided "against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements." Article 41(1). "Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims." Article 42. "The judicial authorities shall have the authority to order a party to desist from an infringement * * *." Article 44(1). Provisional measures are covered in Article 50:

> 1. The judicial authorities shall have the authority to order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring * * *; (b) to preserve relevant

evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed. * * *

These procedures can be implemented fully under Civil Rule 65, and as suggested above the ex parte — inaudita altera parte — provisions seem compatible with due process requirements. Abrogating the Copyright Rules and amending Civil Rule 65 to expressly govern impoundment proceedings will help ensure that we are in compliance with TRIPS by removing the doubts surrounding current practice and provisions.

Rule 65. Injunctions

(f) Copyright impoundment. This rule applies to copyright impoundment proceedings under Title 17, U.S.C. § 503(a).

Committee Note

New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, 17 U.S.C. § 503(a). Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. See, e.g., *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, 923 F.Supp. 1231, 1260-1265 (N.D.Cal.1995); *Paramount Pictures Corp. v. Doe*, 821 F.Supp. 82 (E.D.N.Y.1993); *WPOW, Inc. v. MRLJ Enterprises*, 584 F.Supp. 132 (D.D.C.1984).

A common question has arisen from the experience that notice of a proposed impoundment may enable an infringer to defeat the court's capacity to grant effective relief. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. Such no-notice procedures are authorized in trademark infringement proceedings, see 15 U.S.C. § 1116(d), and courts have provided clear illustrations of the kinds of showings that support ex parte relief. See *Matter of Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir.1979); *Vuitton v. White*, 945 F.2d 569 (3d Cir.1991). In applying the tests for no-notice relief, the court should ask whether impoundment is necessary, or whether adequate protection can be had by a less intrusive form of no-notice relief shaped as a temporary restraining order.

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7561-7681~~.~~ or ~~They do not apply~~ to proceedings in bankruptcy ~~or to proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia~~. * * *

Committee Note

Former Copyright Rule 1 made the Civil Rules applicable to copyright proceedings except to the extent the Civil Rules were inconsistent with Copyright Rules. Abrogation of the Copyright Rules by the Order of leaves the Civil Rules fully applicable to copyright proceedings. Rule 81(a)(1) is amended to reflect this change.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. 91-358, 84 Stat. 473, transferred mental health proceedings formerly held in the United States District Court for the District of Columbia to local District of Columbia courts. The provision applying the Civil Rules to these proceedings is deleted as superseded.

Rule 81. Applicability in General

(a) ~~To What~~ Proceedings to which the Rules Apply~~icable.~~

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7561-7681~~.~~ or ~~They do not apply~~ to proceedings in bankruptcy, except as the Federal Rules of Bankruptcy Procedure make them applicable ~~or to proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia~~. * * *

Committee Note

Former Copyright Rule 1 made the Civil Rules applicable to copyright proceedings except to the extent the Civil Rules were inconsistent with Copyright Rules. Abrogation of the Copyright Rules by the Order of leaves the Civil Rules fully applicable to copyright proceedings. Rule 81(a)(1) is amended to reflect this change.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. 91-358, 84 Stat. 473, transferred mental health proceedings formerly held in the United States District Court for the District of Columbia to local District of Columbia courts. The provision applying the Civil Rules to these proceedings is deleted as superseded.

ORDER OF _____

1. That the Rules of Practice for proceedings in actions brought under section 25 of the Act of March 4, 1909, entitled "An Act to amend and consolidate the acts respecting copyright," be, and they hereby are, abrogated.

2. That the abrogation of the forementioned Rules of Practice shall take effect on December 1, ____.

3. That the Chief Justice be, and hereby is, authorized to transmit to the Congress the foregoing abrogation in accordance with the provisions of Section 2072 of Title 28, United States Code.

[Explanatory Note]

The Copyright Rules of Practice were adopted under the final, undesignated, paragraph of the Act of March 4, 1909, c. 320, § 25, 35 Stat. at 1081-1082:

§ 25 That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: * * *

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright; * * *

(e) * * *

Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States.

This final paragraph of § 25 was repealed in 1948, apparently on the theory that it duplicated the general Enabling Act provisions. Act of June 25, 1948, c. 646, § 39, 62 Stat. 992, 996 & n. 31. See Historical Notes, 17 U.S.C.A., following Copyright Rule 1. It seems appropriate to rest abrogation on § 2072, for want of any other likely source of authority.

VII

Rule 51: Requests Before Trial and More

Rule 51 was considered briefly at the March, 1998 meeting, in response to a memorandum that was substantially the same as the version set out below. The immediate impetus was provided by the Ninth Circuit proposal to legitimate local rules that require that proposed instructions be filed before trial. The Committee agreed with the suggestion that the question should not be left to disposition by local rules — there should be a uniform national practice, whatever may prove to be the best practice. The Committee also concluded that if the rule is changed to allow a pretrial deadline for requests, there must be provision for supplemental requests to reflect new issues that first appear at trial. Finally, the Committee concluded that further thought should be given to other possible changes in Rule 51. There was no commitment to any change, but the topic was held for further study.

The Criminal Rules Advisory Committee earlier took up the same issue and published for comment a revised Criminal Rule 30 that would provide for instruction requests "at the close of the evidence, or at any earlier time that the court reasonably directs." The Committee Note said: "While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57." In an attempt at coordination, a copy of the Civil Rules memorandum was provided to the Criminal Rules Committee. At their October, 1998 meeting, they expressed an interest in the broader questions addressed to Civil Rule 51 and suggested that the Civil Rules Committee take the lead in considering these questions. It also was earnestly suggested by several members of the Criminal Rules Committee that it would be desirable to require that instructions always be given before final arguments.

There is no indication that the Criminal Rules Committee feels an urgent need for prompt revision of the rules on jury instructions. There is a real question whether it is wise for this Committee to take up consideration of Civil Rule 51 now, in face of the prospect that consideration of comments and testimony on the proposed discovery amendments may monopolize the time available at the spring meeting. It may be helpful, however, to begin the discussion of Rule 51. The most important question is whether the time has come to rewrite the rule so that it more nearly reflects current practices. The draft rule illustrates the kinds of issues that would be considered if the task is attempted. Other issues almost certainly will arise, and of course the best resolutions of the issues remain to be identified.

The Ninth Circuit Beginning

In the wake of its review of local rules, the Ninth Circuit Judicial Council has recommended that Civil Rule 51 be amended "to authorize local rules requiring the filing of civil jury instructions before trial." This recommendation raises at least three distinct questions. The most obvious is whether it is good policy to require that requests for instructions be filed before trial in some cases or in all cases. If pretrial request deadlines are desirable, it must be decided whether this matter should be confided to local rules or instead should be approached in a national rule. On the face of it, there is no apparent reason to relegate this matter to local option. It is difficult to imagine variations in local circumstances that make this policy more desirable in some parts of the country but less desirable in other parts. No more will be said about this second question. The third and least obvious question is whether a general change in the Rule 51 request deadline should be the only change proposed for Rule 51. Rule 51 notoriously "does not say what it means, and does not mean what it says." If some part of the request-objection-review question is to be addressed, perhaps the rule should be approached as an integrated whole.

Pretrial Instruction Requests

The first sentence of Rule 51 now reads:

> At the close of the evidence or at such earlier time during trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.

This sentence seems to limit the court's authority to directing that requests filed before the close of the evidence be filed "during trial," not before trial. It is difficult to find anything in the generalities of Rule 16 that can be read as an implicit license to direct earlier requests. Local rules that require pretrial requests are at great risk of being held invalid as inconsistent with Rule 51.

Three principal advantages seem to underlie the interest in pretrial jury requests. Pretrial requests will help the court if it wishes to provide preliminary instructions at the beginning of

the trial. All parties will have a better idea of the instructions likely to be given, and can shape trial presentations accordingly; this advantage would be enhanced if the court were required to make at least preliminary rulings on the requests before trial. The court will have more time to consider the requests, particularly if it is not required to make final rulings before trial. There may be incidental advantages as well. The competing requests may focus the dispute in ways that support renewed consideration of motions to dismiss or for summary judgment. The better focus may instead suggest that potentially dispositive issues be tried first, cf. Rules 16(c)(14) and 50(a), or be designated for separate trial. Advantages of this sort are most likely to be realized if the instruction requests are made part of the pretrial conference procedure.

The potential disadvantages of pretrial instruction requests arise from inability to predict just what the evidence will reveal. In smaller part, the problem is that wishful parties may request instructions on issues that will not be supported by trial evidence. In larger part, the problem is that even wishful parties may not anticipate all of the issues that will be supported by trial evidence. It will not do to prohibit requests as untimely when there was good reason to fail to anticipate the evidence that supports the request.

The simplest way to accommodate these conflicting concerns would be to strike the limiting language from Rule 51:

> At the close of the evidence or at such earlier time ~~during the trial~~ as the court reasonably directs, any party may file written requests * * * .

The Committee Note could point to the reasons that may justify a direction that requests be filed before trial, particularly in complex cases. The reasons for caution also should be pointed out. One of the cautions might be a reflection on the meaning of Rule 51's fourth sentence: "No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict * * *." This sentence does not mean that it is enough to make a request for the first time, couched as an "objection," before the jury retires. The objection works only if there was a duty to request, and there is a duty to request only if a timely request is made.

The reason for considering Rule 51 in more general terms is

suggested by the cautionary observation that might be written to explain the difference between a request and an objection. It is easy for the uninitiated to misread Rule 51. It can be revised to convey its messages more clearly.

General Rule 51 Revision

Rule 51 can be read easily only by those who already know what it means. A party who wants an issue covered by instructions must do both of two things: make a timely request, and then separately object to failure to give the request as made. The cases that explain the need to renew the request by way of objection suggest that repetition is needed in part to ensure that the court has not simply forgotten the request or its intention to give the instruction, and in part to show the court that it has failed in its attempt to give the substance of a requested instruction in better form. An attempt to address an omitted issue by submissions to the court after the request deadline fails because it is not an "objection" but an untimely request. Many circuits, moreover, recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is explicit in the general "plain errors" provision of Criminal Rule 52; the contrast between this general provision and Rule 51 has led some circuits to reject the plain error doctrine for civil jury instructions.

Although unlikely, it also is possible that the formal requirements of Rule 51 may discourage the timid from making untimely requests that would be granted if made. Requests framed as objections may well be given, despite the risk that tardy requests will seduce the court into error, confuse the jury, or at least unduly emphasize one issue.

Present Rule 51 is set out as a prelude to a revised draft, adding only numbers to indicate the points at which distinct thoughts emerge in the text:

> [*1: Requests*] At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. [*2: Instructions*] The court, at its election, may instruct the jury before or after argument, or both. [*3:*

Objections] No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The following draft Rule 51 is only an approximation that suggests many of the issues that might be addressed by a comprehensive attempt to adopt a rule that better guides parties and courts:

Rule 51. Instructions to Jury: Objection

(a) Requests. A party may file written requests that the court instruct the jury on the law as set forth in the requests at the close of the evidence or at an earlier reasonable time directed by the court. [Permission must be granted to file supplemental requests at the close of the evidence on issues raised by evidence that could not reasonably be anticipated at the time initial requests were due.] The court must inform the parties of its proposed action on the requests before jury arguments. {The court may, in its discretion, permit an untimely request [to be] made at any time before the jury retires to consider its verdict.}

(b) Objections. A party may object to an instruction or the failure to give an instruction before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity must be given to make the objection out of the jury's hearing.

(c) Instructions. The court may instruct the jury at any time after trial begins. Final instructions must be given to the jury immediately before or after argument, or both.

(d) Forfeiture; plain error

(1) A party may not assign as error a mistake in an instruction actually given unless the party made a proper objection under subdivision (b).

(2) A party may not assign as error a failure to give an

instruction unless the party made a proper request under subdivision (a), and — unless the court made it clear that the request had been considered and rejected — also made a proper objection under subdivision (b).

(3) A court may set aside a jury verdict for error in the instructions that has not been preserved as required by paragraphs (1) or (2), taking account of the obviousness of the error, the importance of the error, the costs of correcting the error, and the importance of the action to nonparties.

Committee Note

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(3), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial. Particularly in complex cases, pretrial requests can help the parties prepare for trial. In addition, pretrial requests may focus the case in ways that invite reconsideration of motions to dismiss or for summary judgment. Trial also may be shaped by severing some matters for separate trial, or by directing that trial begin with issues that may warrant disposition by judgment as a matter of law; see Rules 16(c)(14) and 50(a). The rule permits the court to further support these purposes by informing the parties of its action on their requests before trial. It seems likely that the deadline for pretrial requests will often be connected to a final pretrial conference.

The risk in directing a pretrial request deadline is that unanticipated trial evidence may raise new issues or reshape issues the parties thought they had understood. The need for a pretrial

request deadline may not be great in an action that involves well-settled law that is familiar to the court. Courts should avoid a routine practice of directing pretrial requests.

Untimely requests are often accepted, at times by acting on an objection to the failure to give an instruction on an issue that was not framed by a timely request. The revised rule expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising discretion is the importance of the issue to the case — the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(3), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered — the earlier the request deadline, the more likely it is that good reason will appear for failing to recognize an important issue. Courts also must remain wary, however, of the risks posed by tardy requests. Hurried action in the closing minutes of trial may invite error. A jury may be confused by a tardy instruction made after the main body of instructions, and in any event may be misled to focus undue attention on the issues isolated and emphasized by a tardy instruction.

Objections. No change is intended in the requirements for making objections.

Instructions. Subdivision (c) expressly authorizes preliminary instructions at the beginning of the trial, a device that may be a helpful aid to the jury. In cases of unusual length or complexity, interim instructions also may be made during the course of trial.

Forfeiture and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. An objection, on the other hand, is sufficient only as to matters actually stated in the instructions. Even if framed as an objection, a request to include matter omitted from the instructions is just that, a request, and is untimely after the close of the evidence. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. This doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. The authority to act on an untimely request despite a

failure to object is established in subdivision (a). Subdivision (d)(2) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made clear its consideration and rejection of the request.

Many circuits have recognized the power to review errors not preserved under Rule 51 in exceptional cases. The foundation of these decisions is that a district court owes a duty to the parties, to the law, and to the jury to give correct instructions on the fundamental elements of an action. This duty is shaped by at least the four factors enumerated in subdivision (d)(3).

The obviousness of the error reduces the need to rely on the parties to help the court with the law, and also bears on society's obligation to provide a reasonably learned judge. Obviousness turns not only on how well the law is settled, but also on how familiar the particular area of law should be to most judges. Clearly settled but exotic law often does not generate obvious error.

The importance of the error must be measured by the role the issue plays in the specific case; what is fundamental to one case may be peripheral in another. Importance is independent of obviousness. The most obvious example involves law that was clearly settled at the time of the instructions, only to be overruled by the time of appeal.

The costs of correcting an error are affected by a variety of factors. If a complete new trial must be had for other reasons, ordinarily an instruction error at the first trial can be corrected for the second trial without significant cost. A Rule 49 verdict may enable correction without further proceedings.

In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties. Common examples are provided by actions that attack government actions or private discrimination.

Other Possible Revisions

The revisions set out above reflect issues frequently encountered in present practice. At least in large part, they reflect what most courts do. Other possible changes can also be noted:

Serve Requests: Rule 51 does not require that instruction requests be served on all parties. It seems likely that exchange is routine, and that courts will require exchange if the parties fail to do it. It might be helpful to adopt an express requirement that all requests be served on all parties, particularly if the requests are filed before trial.

Make Objections on the Record: It has been held that specific objections made during "extensive discussions off the record in chambers concerning the jury instructions" are not sufficient — that "to preserve an argument concerning a jury instruction for appellate review, a party must state distinctly the matter objected to and the grounds for the objection on the record." Dupre v. Fru-Con Engineering Inc., 8th Cir.1997, 112 F.3d 329, 333-334. Is this a trap for the unwary that should be set out on the face of Rule 51?

Who Must Object: Rule 51 says that a party may not assign as error the giving or the refusing to give an instruction "unless *that* party objects thereto * * *." This requirement is preserved in the draft revision. But why should it not be enough that any party has complied with Rule 51? Particularly when there are coparties, should it not be enough that the matter urged on appeal was properly raised by any party?

Direction to Request: Illinois Supreme Court Rule 239(b) provides: "At any time before or during the trial, the court may direct counsel to prepare designated instructions. * * * Counsel may object at the conference on instructions to any instruction prepared at the court's direction, regardless of who prepared it * * *." Is there any reason to adopt a similar provision for Rule 51?

Anything Else: ?

Agenda Note: 97-CV-R: Answer to Complaint in Prisoner Suit

97-CV-R, received November 24, 1997, was submitted by John J. McCarthy. One of the questions raised by Mr. McCarthy arises from 42 U.S.C. § 1997e(g), a provision added to the Civil Rights of Institutionalized Persons Act by the Prison Litigation Reform Act of 1995, P.L.104-134, 110 Stat. 1321 {[165], [183-184]}.

Subsection (g) reads as follows:

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other federal law. Notwithstanding any other law *or rule of procedure*, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

This is a rather peculiar provision. It does not address the apparently common practice of dismissing before the defendant is served — it calls for some undefined act of the defendant that waives the right to "reply." If the defendant does waive the right to reply, the defendant wins unless the court examines the action, concludes that the plaintiff has a reasonable opportunity to prevail on the merits, and orders a reply. This puts the court in the awkward position of doing the work that customarily is done by adversary presentation, whether through answer or motion to dismiss. Perhaps courts will respond by requiring an answer in all but the cases that most clearly must fail.

The question for the Civil Rules Committee, however, is not whether this indeed is peculiar or desirable. This statute does not seem an occasion to explore the possible use of the Enabling Act and its supersession clause to attempt to repeal the statute by rule. The question is whether there should be some adjustment to the Civil Rules to reflect the statute. The statutory term "reply" manifestly has a different meaning than the limited meaning used in the Civil Rules, see Rule 7(a). But it probably includes the ordinary obligation to file an answer, imposed explicitly by Rule 12(a) and implicitly by Rule 8(d). Rules 7(a) and 8(b) also bear examination.

It is possible to construe Rules 12(a) and 8(d) to avoid any inconsistency with § 1997e(g). Putting aside the elaborations in the succeeding provisions, the basic command of Rule 12(a) is set out in paragraph (1)(A): "Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer (A) within 20 days after being served with the summons and complaint * * *." It might be argued that § 1997e(g) "prescribes" "a different time" — to wit, never. If this construction is accepted, then Rule 8(d) poses no problem. Rule 8(d) says only that "[a]verments in a pleading to which a responsive pleading is required * * * are admitted when not denied in the responsive pleading." If Rule 12(a) does not require a responsive pleading, then Rule 8(d) is ousted. And these reasonably explicit provisions should preempt the possible implications from the Rule 8(b) command that "[a] party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies."

The need for apparently strained interpretation suggests consideration of amendments that recognize the statute. It might be enough to amend Rule 12(a)(1) to read something like this:

> Unless a statute of the United States prescribes a different time or [excuses the need to answer]{allows a defendant to waive the right to reply}, a defendant must serve an answer * * *

Two other rules might also be changed, in part because of the separation between Rule 8(b) — which seems to assume a duty to answer without explicit statement — and Rule 12(a). Rule 8(b) could be amended most simply by adding a preface taken from amended Rule 12(a)(1): "Unless excused by statute, a party shall state * * *," or "Unless a statute of the United States allows a party to waive an answer, a party shall state * * *." Rule 7(a) might be amended as well: "There shall be a complaint and — unless excused by statute — an answer; * * * ."

The Committee Note to each amendment — however many are adopted — would be the same, and blessedly brief: "Rule _ is amended to reflect the provision in 42 U.S.C. § 1997e(g) that allows a defendant to waive the right to reply in an action brought by a prisoner under 42 U.S.C. § 1983 or any other federal law. If the court requires the defendant to reply under § 1997e(g)(2), the ordinary obligation to answer is revived. Failure to answer after

a reply is ordered operates as an admission under Rule 8(d)."

Thought also should be given to amending the Form 1 summons. The first sentence of Form 1 states that the defendant is required to serve an answer. The second sentence states that judgment by default will be taken if the defendant fails to answer in time. The considerations that bear on amending Form 1 are somewhat different than those that bear on amending the rules. It could easily do more harm than good to inform all defendants that they must timely answer unless excused by statute. And the alternative of providing a full description of § 1997e(g) in all summonses could prove even worse — that much more language could confuse anyone who does not immediately take the summons and complaint to a lawyer. There is a real prospect that some defendants would latch onto the information that a defendant can waive the right to reply, particularly if the form advises them that no relief can be granted unless the defendant replies. On balance, it may be better to leave Form 1 unchanged, relying on the expectation that most defendants sued by prisoners under § 1983, or even under "any other federal law," will be represented by counsel who are familiar with § 1997e(g).

In the end, this seems to be one of those pesky little problems. Yes, the rules would be better if amended to reflect the statute. Amendment would accommodate the rules to any similar legislation that might be enacted. And it is always better to avoid the need to strain at present language to maintain a somewhat fictive integrity of the rules. Amendment and the accompanying Committee Note, further, would alert some defendants to an opportunity that otherwise might be overlooked. Finally, although this seems a highly specialized corner of the law, the sheer number of prisoner actions under § 1983 is important. Cumulatively, all of these considerations suggest that it may be desirable to adjust the Rules to reflect the waiver-of-reply statute.

XI

AGENDA DOCKET PENDING FURTHER ACTION

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 1/98 — Stg. Com. approves publication at regularly scheduled time 8/98 — Published for comment **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**
[Admiralty Rule C(4) — Amend to satisfy constitutional concerns regarding default in actions *in rem*	Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Subc 5/97 — Discussed in reporter's memo. 8/98 — Published for comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV5(b)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV5(d)] — Whether local rules against filing of discovery documents should be abrogated or amended to conform to actual practice	Gregory B. Walters, Cir. Exec., for District Local Rules Review Cmte of Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc 8/98 — Published for comment **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 **PENDING FURTHER ACTION**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by committee **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 5/97 — Reporter recommends rejection **PENDING FURTHER ACTION**
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97 (97-CV-R)	12./97 — Referred to reporter, chair, and Agenda Subc **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**
[CV12(b)] - 60 days for officer or employee of the U.S. sued in individual capacity	DOJ	8/98 - Published for Comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by 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] — Standards and guidelines for litigating and settling consumer class actions	Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Subc **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] — 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 8/96 — Published for comment **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. 5/97 — Reporter recommends that it be considered part of discovery project **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(d)(2)]- presumptive limit of 1 day of 7 hours for depositions	Discovery subcommittee	8/98 — Published for comment **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	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study 5/97 — Reporter recommends that it be considered part of discovery project **PENDING FURTHER ACTION**
[CV34(b)] Cost-bearing	Discovery Subcommittee	8/98 - Published for comment **PENDING FURTHER ACTION**
[CV44 — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Subc. **PENDING FURTHER ACTION**
[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**

Proposal	Source, Date, and Doc #	Status
[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 5/97 — Reporter recommends consideration of comprehensive revision **PENDING FURTHER ACTION**
[CV51] — Jury instructions filed before trial	Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Subc 5/97 — Reporter recommends rejection **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**
[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 5/97 — Reporter recommends continued monitoring **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to committee's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring **PENDING FURTHER ACTION**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Committee should handle the issue **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**
[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 5/97 — Reporter recommends consideration as part of a technical amendment package **PENDING FURTHER ACTION**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package **PENDING FURTHER ACTION**
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	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**

Proposal	Source, Date, and Doc #	Status
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte **PENDING FURTHER ACTION**

Rulemaking Process

The discussion of the rulemaking process will rely mostly on oral presentations. It may help, however, to have in mind the statutory framework within which the advisory committees operate.

The Rules Enabling Act is copied below.

The role of the Judicial Conference is described in 28 U.S.C. § 331:

> The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.
>
> The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such review.

In addition to the Enabling Act, the Procedures for the Conduct by the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure are published in the pamphlets that set out proposed rules amendments.

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

JUDGE WM. TERRELL HODGES
Chairman, Executive Committee

TELEPHONE:
(904) 232-1852

February 25, 1998

Honorable Alicemarie H. Stotler
United States District Court
United States Courthouse
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Dear Judge Stotler:

From time to time the Committee on Rules of Practice and Procedure has recommended that the terms of its members be extended because the Rules Enabling Act process is such a lengthy one. The Executive Committee is sympathetic to that concern and has recommended that the Chief Justice consider longer terms for members of the Standing and Advisory Rules Committees.

In discussions at the Executive Committee's February 1998 meeting, the question was raised whether the Rules Enabling Act time frames could be shortened without doing violence to the rulemaking process. The Executive Committee would appreciate the Rules Committee's consideration of this issue. If appropriate, a legislative proposal could then be made to the Judicial Conference.

I look forward to seeing you at the Judicial Conference session in March.

Sincerely,

Wm. Terrell Hodges

bc: Mr. Peter McCabe
Mr. John Rabiej

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

June 4, 1998

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Shortening the Rulemaking Process*

At their respective spring meetings the advisory committees considered the request of Judge Wm. Terrell Hodges, chair of the Executive Committee, to explore shortening the rulemaking process. A general consensus developed that supported shortening the process, but only if the present vetting procedures would not be significantly undercut. No specific suggestions were made. The advisory committees considered the question only on a preliminary basis, and the full benefits of the present vetting procedures were not debated at length. Nonetheless, several members commented that the process contained some "dead time" that should be eliminated.

There are many conceivable ways to shorten the rulemaking process. I have attached time charts illustrating the operation of the suggestions that have been mentioned most often in the past. The charts show how each scenario would operate and how much time each would take. These charts may be useful to the committee as a starting point for further discussions.

The time charts are relatively rough. For example, sufficient time must be reserved for the meeting of five advisory committees within a short time period and adequate time might not have been set aside in the charts in each instance. Particular charts might need to be refined once the committee begins to focus its considerations on one or several of the scenarios sketched out in this memorandum.

Charts "A" through "H" are based on the present December 1 statutory effective date. To make some of these options work, however, amendments would have to be forwarded by the Judicial Conference at its March, instead of its September, session. Transmitting amendments at the March session, however, would impose a workload burden on the Supreme Court. One way to alleviate such problems might be to delay the statutory effective date of the amendments. Although a statutory change could be sought to delay the Supreme Court's transmission to Congress, for example, from May 1 to June 1, the Supreme Court clerk anticipated problems with the suggestion because of the Court's heavy workload burden during these months. For scheduling purposes, the fall of a year is much better for the Court. Accordingly, Charts "I" and "J" include some of the options contained in the earlier scenarios but use an effective date of August 15. Under these circumstances, the Court would transmit the rules to Congress in

January after receiving them from the Conference after its September session. Statutory changes would be necessary.

The ten charts include the following:

1. Scenario A: Present Practice (32 to 38 Months)

2. Scenario B: Two 6-Month Publication Periods (26 to 32 Months)

3. Scenario C: No Formal Standing Committee Approval for Publication[1]/One Publication Period (26 to 32 Months)

4. Scenario D: No Formal Standing Committee Approval for Publication/Two Publication Periods (21 to 26 Months)

5. Scenario E: Eliminate Supreme Court Approval/Two Publication Periods (26 to 32 Months)

6. Scenario F: Eliminate Supreme Court Approval/No Formal Standing Committee Approval for Publication/Two Publication Periods (21 to 24 Months)

7. Scenario G: 3-Month Publication Periods/Two Publication Periods (21 to 26 Months)

8. Scenario H: 3-Month Publication Periods/No Formal Standing Committee Approval for Publication/Two Publication Periods (21 to 27 Months)

9. Scenario I: Effective Date Scheduled for August 15/No Formal Standing Committee Approval for Publication/Two 5-Month Publication Periods (24 to 29 Months)

10. Scenario J: Effective Date Scheduled for August 15/Two 5-Month Publication Periods (29 to 35 Months)

For your information, I have also attached a copy of the current "Procedures Governing the Rulemaking Process" and an excerpt from the Standing Committee's "Self-Study Report" dealing with the duration of the rulemaking process.

John K. Rabiej

Attachments

---

[1] Alternatively, the Standing Committee could be polled electronically or by fax immediately after the advisory committee meets. The committee could exercise a veto power.

§ 2043. Deposit of other moneys

Except for public moneys deposited under section 2041 of this title, each clerk of the United States courts shall deposit public moneys that the clerk collects into a checking account in the Treasury, subject to disbursement by the clerk. At the end of each accounting period, the earned part of public moneys accruing to the United States shall be deposited in the Treasury to the credit of the appropriate receipt accounts.

(Added Pub.L. 97–258, § 2(g)(4)(E), Sept. 13, 1982, 96 Stat. 1061.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1982 Acts

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
28:2043 ..	31:725v(b) (related to clerks).	June 26, 1934, ch. 756, § 23(b) (related to clerks), 48 Stat. 1236; restated Dec. 21, 1944, ch. 631, § 1, 58 Stat. 845.

The words "Except for public moneys deposited under section 2041 of this title ... public moneys" are substituted for "All fees and other collections other than moneys referred to in subsection (a) of this section" for consistency and because 31:725v(a) is superseded by 28:2041 and is not part of the revised title contained in section 1 of the bill. The word "Treasury" is substituted for "Treasurer of the United States" because of section 1 of Reorganization Plan No. 26 of 1950 (eff. July 31, 1950, 64 Stat. 1280), restated as section 321 of the revised title contained in section 1 of the bill. The text of 31:725v(b) (last sentence) is omitted as obsolete.

§ 2044. Payment of fine with bond money

On motion of the United States attorney, the court shall order any money belonging to and deposited by or on behalf of the defendant with the court for the purposes of a criminal appearance bail bond (trial or appeal) to be held and paid over to the United States attorney to be applied to the payment of any assessment, fine, restitution, or penalty imposed upon the defendant. The court shall not release any money deposited for bond purposes after a plea or a verdict of the defendant's guilt has been entered and before sentencing except upon a showing that an assessment, fine, restitution or penalty cannot be imposed for the offense the defendant committed or that the defendant would suffer an undue hardship. This section shall not apply to any third party surety.

(Added Pub.L. 101–647, Title XXXVI, § 3629(a), Nov. 29, 1990, 104 Stat. 4966.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. House Report Nos. 101–681(Parts I and II) and 101–736, Senate Report No. 101–460, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 6472.

Effective Dates

1990 Acts. Section to take effect 180 days after Nov. 29, 1990, see section 3631 of Pub.L. 101–647, set out as a note under section 3001 of this title.

CHAPTER 131—RULES OF COURTS

§ 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) 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.

(f) No rule may be prescribed by a district court other than under this section.

(June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 102, 63 Stat. 104; Nov. 19, 1988, Pub.L. 100–702, Title IV, § 403(a)(1), 102 Stat. 4650.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 219, 263, 296, 307, 723, 731, and 761, and section 1111 of Title 26, U.S.C., 1940 ed., Internal Revenue Code (R.S. §§ 913, 918; Mar. 3, 1887, c. 359, § 4, 24 Stat. 506; Mar. 3, 1911, c. 231, §§ 122, 157, 194, 291, 297, 36 Stat. 1132, 1139, 1145, 1167, 1168; Mar. 3, 1911, c. 231, § 187(a), as added Oct. 10, 1940, c. 843, § 1, 54 Stat. 1101; Feb. 13, 1925, c. 229, § 13, 43 Stat. 941; Mar. 2, 1929, c. 488, § 1, 45 Stat. 1475; Feb. 10, 1939, c. 2, § 1111, 53 Stat. 160; Oct. 21, 1942, c. 619, Title V, § 504(a), (c), 56 Stat. 957).

Sections 219, 263, 296, 307, 723, and 731 of Title 28, U.S.C., 1940 ed., gave specified courts, other than the Supreme Court, power to make rules. Section 761 of such title related to rules established in the district courts and Court of Claims. Section 1111 of Title 26, U.S.C., 1940 ed., related to Tax Court. This section consolidates all such provisions. For other provisions of such sections, see Distribution Table.

Recognition by Congress of the broad rule-making power of the courts will make it possible for the courts to prescribe complete and uniform modes of procedure, and alleviate, at least in part, the necessity of searching in two places, namely in the Acts of Congress and in the rules of the courts, for procedural requisites.

Former Attorney General Cummings recently said: "Legislative bodies have neither the time to inquire objectively into the details of judicial procedure nor the opportunity to determine the necessity for amendment or change. Frequently such legislation has been enacted for the purpose of meeting particular problems or supposed difficulties, but the results have usually been confusing or otherwise unsatisfactory. Comprehensive action has been lacking for the obvious reason that the professional nature of the task would leave the legislature little time for matters of substance and statesmanship. It often happened that an admitted need for change, even in limited areas, could not be secured."—The New Criminal Rules—Another Triumph of the Democratic Process. American Bar Association Journal, May 1945.

Provisions of sections 263 and 296 of Title 28, U.S.C., 1940 ed., authorizing the Court of Claims and Customs Court to punish for contempt, were omitted as covered by H.R. 1600, § 401, 80th Congress, for revision of the Criminal Code.

Provisions of section 1111 of Title 26, U.S.C., 1940 ed., making applicable to Tax Court Proceedings "the rules of evidence applicable in the courts of the District of Columbia in the type of proceeding which, prior to Sept. 16, 1938, were within the jurisdiction of the courts of equity of said District," were omitted as unnecessary and inconsistent with other provisions of law relating to the Federal courts. The rules of evidence in Tax Court proceedings are the same as those which apply to civil procedure in other courts. See *Dempster Mill Mfg. Co. v. Burnet*, 1931, 46 F.2d 604, 60 App.D.C. 23.

For rule-making power of the Supreme Court in copyright infringement actions, see section 25(e) of Title 17, U.S.C., 1940 ed., Copyrights. See, also, section 205(a) of Title 11, U.S.C., 1940 ed., Bankruptcy, authorizing the Supreme Court to promulgate rules relating to service of process in railroad reorganization proceedings.

Senate Revision Amendment

By Senate amendment, all provisions relating to the Tax Court were eliminated. Therefore, section 1111 of Title 26, U.S.C., Internal Revenue Code, was not one of the sources of this section as finally enacted. However, no change in the text of this section was necessary. See 80th Congress Senate Report No. 1559.

1949 Acts. This amendment clarifies section 2071 of Title 28, U.S.C., by giving express recognition to the power of the Supreme Court to prescribe its own rules and by giving a better description of its procedural rules.

1988 Acts. House Report No. 100–889, see 1988 U.S. Code Cong. and Adm. News, p. 5982.

Effective Dates

1988 Acts. Section 407 of Title IV of Pub.L. 100–702 provided that: "This title [enacting sections 332(d)(4), 604(a)(19) [redesignated (a)(20)], 2071(b)–(f), and 2072–2074 of this title; amending sections 331, 332(d)(1), 372(c)(11), 636(d), 2071(a) [formerly designated 2071], and 2077(b) of this title and sections 460n–8 of Title 16, Conservation and 3402 of Title 18, Crimes and Criminal Procedure; redesignating as 604(a)(23) former section 604(a)(18) of this title; repealing former section 2072 and section 2076 of this title and sections 3771 and 3772 of Title 18; and enacting provisions set out as notes under this section] shall take effect on December 1, 1988."

1983 Acts. Pub.L. 97–462, § 4, Jan. 12, 1983, 96 Stat. 2530, provided: "The amendments made by this Act [which amended Rule 4 of the Federal Rules of Civil Procedure, added Form 18–A, Appendix of Forms, enacted provisions set out as notes under this section, and amended section 951 of Title 18, Crimes and Criminal Procedure] shall take effect 45 days after the enactment of this Act [Jan. 12, 1983]."

Savings Provisions

Section 406 of Title IV of Pub.L. 100–702 provided that: "The rules prescribed in accordance with law before the effective date of this title [Dec. 1, 1988] and in effect on the date of such effective date [Dec. 1, 1988] shall remain in force until changed pursuant to the law as amended by this title [see Effective Dates of 1988 Amendments note under this section]."

Short Title

1983 Acts. Pub.L. 97–462, § 1, Jan. 12, 1983, 96 Stat. 2527, provided: "That this Act [which amended Rule 4 of the Federal Rules of Civil Procedure, enacted Form 18–A, Appendix of Forms, enacted provisions set out as notes under this section, and amended section 951 of Title 18, Crimes and Criminal Procedure] may be cited as the 'Federal Rules of Civil Procedure Amendments Act of 1982'."

Admiralty Rules

The Rules of Practice in Admiralty and Maritime Cases, promulgated by the Supreme Court on Dec. 20, 1920, effective Mar. 7, 1921, as revised, amended, and supplemented, were rescinded, effective July 1, 1966, in accordance with the general unification of civil and admiralty procedure which became effective July 1, 1966. Provision for certain distinctively maritime remedies were preserved however in the Supplemental Rules for Certain Admiralty and Maritime Claims, Rules A to F, Federal Rules of Civil Procedure.

Tax Court Rulemaking Not Affected

Section 405 of Title IV of Pub.L. 100–702 provided that: "The amendments made by this title [see Effective Dates of 1988 Amendments note set out under this section] shall not affect the authority of the Tax Court to prescribe rules under section 7453 of the Internal Revenue Code of 1986 [section 7453 of Title 26, Internal Revenue Code]."

COMMENTARIES

See 28 U.S.C.A. § 2071, for Commentary by David D. Siegel.

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(Added Pub.L. 100–702, Title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4648, and amended Pub.L. 101–650, Title III, § 315, Dec. 1, 1990, 104 Stat. 5115.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1988 Acts. House Report No. 100–889, see 1988 U.S. Code Cong. and Adm. News, p. 5982.

1990 Acts. Senate Report No. 101–416, House Report Nos. 101–123, 101–512, 101–514, 101–734, and 101–735, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 6802.

Effective Dates

1988 Acts. Section effective Dec. 1, 1988, see section 407 of Pub.L. 100–702, set out as a note under section 2071 of this title.

Change of Name

United States magistrate appointed under section 631 of this title to be known as United States magistrate judge after Dec. 1, 1990, with any reference to United States magistrate or magistrate in this title, in any other Federal statute, etc., deemed a reference to United States magistrate judge appointed under section 631 of this title, see section 321 of Pub.L. 101–650, set out as a note under section 631 of this title.

Prior Provisions

A prior section 2072, Acts June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158; July 7, 1958, Pub.L. 85–508, § 12(m), 72 Stat. 348; Nov. 6, 1966, Pub.L. 89–773, § 1, 80 Stat. 1323, which authorized the Supreme Court to prescribe rules of civil procedure, was repealed by Pub.L. 100–702, Title IV, §§ 401(a), 407, Nov. 19, 1988, 102 Stat. 4648, 4652, effective Dec. 1, 1988.

Admiralty Rules

The Rules of Practice in Admiralty and Maritime Cases, promulgated by the Supreme Court on Dec. 20, 1920, effective Mar. 7, 1921, as revised, amended, and supplemented, were rescinded, effective July 1, 1966, in accordance with the general unification of civil and admiralty procedure which became effective July 1, 1966. Provision for certain distinctively maritime remedies were preserved however, in the Supplemental Rules for Certain Admiralty and Maritime Claims, Rules A to F, Federal Rules of Civil Procedure, this title.

Applicability to Virgin Islands

Rules of civil procedure promulgated under this section as applicable to the District Court of the Virgin Islands, see section 1614 of Title 48, Territories and Insular Possessions.

COMMENTARIES

See 28 U.S.C.A. § 2072, for Commentary by David D. Siegel.

§ 2073. Rules of procedure and evidence; method of prescribing

(a)(1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.

(2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.

(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence under subsection (a) of this section. Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.

(c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under

this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.

(2) Any meeting for the transaction of business under this chapter, by a committee appointed under this section, shall be preceded by sufficient notice to enable all interested persons to attend.

(d) In making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

(e) Failure to comply with this section does not invalidate a rule prescribed under section 2072 or 2075 of this title.

(Added Pub.L. 100–702, Title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4649, and amended Pub.L. 103–394, Title I, § 104(e), Oct. 22, 1994, 108 Stat. 4110.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1988 Acts. House Report No. 100–889, see 1988 U.S. Code Cong. and Adm. News, p. 5982.

1994 Acts. House Report No. 103–835, see 1994 U.S. Code Cong. and Adm. News, p. 3340.

Effective Dates

1994 Acts. Amendment by Pub.L. 103–394 effective on Oct. 22, 1994, and not to apply with respect to cases commenced under Title 11 of the United States Code before Oct. 22, 1994, see section 702 of Pub.L. 103–394, set out as a note under section 101 of Title 11, Bankruptcy.

1988 Acts. Section effective Dec. 1, 1988, see section 407 of Pub.L. 100–702, set out as a note under section 2071 of this title.

Separability of Provisions

If any provision of or amendment made by Pub.L. 103–394 or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remaining provisions of and amendments made by Pub.L. 103–394 and the application of such provisions and amendments to any person or circumstance shall not be affected thereby, see section 701 of Pub.L. 103–394, set out as a note under section 101 of Title 11, Bankruptcy.

Prior Provisions

A prior section 2073, Acts June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 104, 63 Stat. 104; May 10, 1950, c. 174, § 3, 64 Stat. 158, which empowered the Supreme Court to prescribe, by general rules, the practice and procedure in admiralty and maritime cases in the district courts, was repealed by Pub.L. 89–773, § 2, Nov. 6, 1966, 80 Stat. 1323, which provided in part that the repeal of section 2073 should not operate to invalidate or repeal rules adopted under the authority of such section prior to the enactment of Pub.L. 89–773, which rules should remain in effect until superseded by rules prescribed under the authority of former section 2072 of this title as amended by Pub.L. 89–773. See sections 2071 to 2074 of this title.

COMMENTARIES

See 28 U.S.C.A. § 2073, for Commentary by David D. Siegel.

§ 2074. Rules of procedure and evidence; submission to Congress; effective date

(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.

(Added Pub.L. 100–702, Title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4649.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1988 Acts. House Report No. 100–889, see 1988 U.S. Code Cong. and Adm. News, p. 5982.

Effective Dates

1988 Acts. Section effective Dec. 1, 1988, see section 407 of Pub.L. 100–702, set out as a note under section 2071 of this title.

Prior Provisions

A prior section 2074, Act July 27, 1954, c. 583, § 1, 68 Stat. 567, which empowered the Supreme Court to prescribe rules for review of decisions of the Tax Court of the United States, was repealed by Pub.L. 89–773, § 2, Nov. 6, 1966, 80 Stat. 1323, which provided in part that the repeal of section 2074 of this title should not operate to invalidate or repeal rules adopted under the authority of such section prior to the enactment of Pub.L. 89–773, which rules should remain in

effect until superseded by rules prescribed under the authority of former section 2072 of this title as amended by Pub.L. 89–773. See sections 2071 to 2074 of this title.

Amendments to Criminal Rules Proposed April 29, 1994

Pub.L. 103–322, Title XXIII, § 230101, Sept. 13, 1994, 108 Stat. 2077, provided that:

"**(a) Modification of proposed amendments.**—The proposed amendments to the Federal Rules of Criminal Procedure which are embraced by an order entered by the Supreme Court of the United States on April 29, 1994, shall take effect on December 1, 1994, as otherwise provided by law, but with the following amendments:

"**(b) In general.**—Rule 32 of the Federal Rules of Criminal Procedure is amended by—

"**(1)** striking 'and' following the semicolon in subdivision (c)(3)(C);

"**(2)** striking the period at the end of subdivision (c)(3)(D) and inserting '; and';

"**(3)** inserting after subdivision (c)(3)(D) the following:

" '**(E)** if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.';

"**(4)** in subdivision (c)(3)(D), striking 'equivalent opportunity' and inserting in lieu thereof 'opportunity equivalent to that of the defendant's counsel';

"**(5)** in the last sentence of subdivision (c)(4), striking 'and (D)' and inserting '(D), and (E)';

"**(6)** in the last sentence of subdivision (c)(4), inserting 'the victim,' before 'or the attorney for the Government.'; and

"**(7)** adding at the end the following:

" '**(f) Definitions.**—For purposes of this rule—

" '**(1)** "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by—

" '**(A)** a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or

" '**(B)** one or more family members or relatives designated by the court if the victim is deceased or incapacitated;

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

" '**(2)** "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.'

"**(c) Effective date.**—The amendments made by subsection (b) [amending Rule 32 of the Federal Rules of Criminal Procedure] shall become effective on December 1, 1994."

Amendments to Civil Rules Proposed April 30, 1991

Pub.L. 102–198, § 11, Dec. 9, 1991, 105 Stat. 1626, provided that:

"**(a) Technical amendment.**—Rule 15(c)(3) of the Federal Rules of Civil Procedure for the United States Courts, as transmitted to the Congress by the Supreme Court pursuant to section 2074 of title 28, United States Code [this section], to become effective on December 1, 1991, is amended by striking 'Rule 4(m)' and inserting 'Rule 4(j)'.

"**(b) Amendment to Forms.**—Form 1–A, Notice of Lawsuit and Request for Waiver of Service of Summons, and Form 1–B, Waiver of Service of Summons, included in the transmittal by the Supreme Court described in subsection (a), shall not be effective and Form 18–A, Notice and Acknowledgment for Service by Mail, abrogated by the Supreme Court in such transmittal, effective December 1, 1991, shall continue in effect on or after that date."

Amendments to Civil Rules Proposed April 28, 1982

Pub.L. 97–462, § 5, Jan. 12, 1983, 96 Stat. 2530, provided: "The amendments to the Federal Rules of Civil Procedure [Rule 4], the effective date [Aug. 1, 1982] of which was delayed [to Oct. 1, 1983] by the Act [Pub.L. 97–227] entitled 'An Act to delay the effective date of proposed amendments to rule 4 of the Federal Rules of Civil Procedure', [proposed by the Supreme Court of the United States and transmitted to the Congress by the Chief Justice on Apr. 28, 1982], approved August 2, 1982 (96 Stat. 246), shall not take effect."

Pub.L. 97–227, Aug. 2, 1982, 96 Stat. 246, provided: "That notwithstanding the provisions of section 2072 of title 28, United States Code, [section 2072 of this title] the amendments to rule 4 of the Federal Rules of Civil Procedure as proposed by the Supreme Court of the United States and transmitted to the Congress by the Chief Justice on April 28, 1982, shall take effect on October 1, 1983, unless previously approved, disapproved, or modified by Act of Congress.

"**Sec. 2.** This Act shall be effective as of August 1, 1982, but shall not apply to the service of process that takes place between August 1, 1982, and the date of enactment of this Act [Aug. 2, 1982]."

Amendments to Criminal Rules and Rules of Evidence Proposed April 30, 1979; Postponement of Effective Date

Pub.L. 96–42, July 31, 1979, 93 Stat. 326, provided: "That notwithstanding any provision of section 3771 or 3772 of title 18 of the United States Code [section 3771 or 3772 of Title 18, Crimes and Criminal Procedure] or of section 2072, 2075, or 2076 of title 28 of the United States Code [sections 2072, 2075 and 2076 of this title] to the contrary—

"(1) the amendments proposed by the United States Supreme Court and transmitted by the Chief Justice on April 30, 1979, to the Federal Rules of Criminal Procedure affecting rules 11(e)(6), 17(h), 32(f), and 44(c), and adding new rules 26.2 and 32.1, and the amendment so proposed and transmitted to the Federal Rules of Evidence affecting rule 410, shall not take effect until December 1, 1980, or until and then only to the extent approved by Act of Congress, whichever is earlier; and

"(2) the amendment proposed by the United States Supreme Court and transmitted by the Chief Justice on April 30, 1979, affecting rule 40 of the Federal Rules of Criminal Procedure shall take effect on August 1, 1979, with the following amendments:

"**(A)** In the matter designated as paragraph (1) of subdivision (d), strike out 'in accordance with Rule 32.1(a).'

"**(B)** In the matter designated as paragraph (2) of subdivision (d), strike out 'in accordance with Rule 32.1(a)(1)'."

Approval and Effective Date of Amendments Proposed November 20, 1972 and December 18, 1972

Pub.L. 93–595, § 3, Jan. 2, 1975, 88 Stat. 1949, provided that: "The Congress expressly approves the amendments to the Federal Rules of Civil Procedure [Rules 30(c), 32(c), 43 and 44.1] and the amendments to the Federal Rules of Criminal Procedure [Rules 26, 26.1 and 28], which are embraced by the orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, and such amendments shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act [Jan. 2, 1975]."

Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings for United States District Courts

Pub.L. 94–426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94–349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code [sections 2254 and 2255 of this title] filed on or after February 1, 1977."

Amendments to Rules of Evidence Proposed on April 29, 1994

Pub.L. 103–322, Title IV, § 40141, Sept. 13, 1994, 108 Stat. 1918, provided that:

"**(a) Modification of proposed amendment.**—The proposed amendments to the Federal Rules of Evidence that are embraced by an order entered by the Supreme Court of the United States on April 29, 1994, shall take effect on December 1, 1994, as otherwise provided by law, but with the amendment made by subsection (b).

"**(b) Rule.**—Rule 412 of the Federal Rules of Evidence is amended to read as follows:

" '**Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition**

" '**(a) Evidence generally inadmissible.**—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

" '(1) Evidence offered to prove that any alleged victim engaged in her sexual behavior.

" '(2) Evidence offered to prove any alleged victim's sexual predisposition.

" '**(b) Exceptions.**—

" '(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

" '(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

" '(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

" '(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

" '(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

" '**(c) Procedure to determine admissibility.**—

" '(1) A party intending to offer evidence under subdivision (b) must—

" '(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

" '(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

" '(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.'

"**(c) Technical amendment.**—The table of contents for the Federal Rules of Evidence is amended by amending the item relating to rule 412 to read as follows:

" '**412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition:**

" '(a) Evidence generally inadmissible.

" '(b) Exceptions.

" '(c) Procedure to determine admissibility.' "

Congressional Approval Requirement for Proposed Rules of Evidence for United States Courts and Amendments to Federal Rules of Civil Procedure and Criminal Procedure; Suspension of Effectiveness of Such Rules

Pub.L. 93–12, Mar. 30, 1973, 87 Stat. 9, provided: "That notwithstanding any other provisions of law, the Rules of Evidence for United States Courts and Magistrates, the Amendments to the Federal Rules of Civil Procedure, and the Amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on Monday, November 20, 1972, and Monday, December 18, 1972, shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress."

Postponement of Effective Date of Proposed Rules and Forms Governing Proceedings Under Sections 2254 and 2255 of this Title

Pub.L. 94–349, § 2, July 8, 1976, 90 Stat. 822, provided: "That, notwithstanding the provisions of section 2072 of title 28 of the United States Code [section 2072 of this title], the rules and forms governing section 2254 [section 2254 of this

title] cases in the United States district courts and the rules and forms governing section 2255 [section 2255 of this title] proceedings in the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, and which were transmitted to the Congress on or about April 26, 1976, shall not take effect until thirty days after the adjournment sine die of the 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier."

COMMENTARIES

See 28 U.S.C.A. § 2074, for Commentary by David D. Siegel.

§ 2075. Bankruptcy rules

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law.

(Added Pub.L. 88–623, § 1, Oct. 3, 1964, 78 Stat. 1001, and amended Pub.L. 95–598, Title II, § 247, Nov. 6, 1978, 92 Stat. 2672; Pub.L. 103–394, Title I, § 104(f), Oct. 22, 1994, 108 Stat. 4110.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1964 Acts. Senate Report No. 1561, see 1964 U.S. Code Cong. and Adm. News, p. 3804.

1978 Acts. Senate Report No. 95–989 and House Report No. 95–595, see 1978 U.S. Code Cong. and Adm. News, p. 5787.

1994 Acts. House Report No. 103–835, see 1994 U.S. Code Cong. and Adm. News, p. 3340.

Effective Dates

1994 Acts. Amendment by Pub.L. 103–394 effective on Oct. 22, 1994, and not to apply with respect to cases commenced under Title 11 of the United States Code before Oct. 22, 1994, see section 702 of Pub.L. 103–394, set out as a note under section 101 of Title 11, Bankruptcy.

1978 Acts. Amendment by Pub.L. 95–598 effective Nov. 6, 1978, see section 402(d) of Pub.L. 95–598, set out as a note preceding section 101 of Title 11, Bankruptcy.

Separability of Provisions

If any provision of or amendment made by Pub.L. 103–394 or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remaining provisions of and amendments made by Pub.L. 103–394 and the application of such provisions and amendments to any person or circumstance shall not be affected thereby, see section 701 of Pub.L. 103–394, set out as a note under section 101 of Title 11, Bankruptcy.

Additional Rulemaking Power

Pub.L. 95–598, Title IV, § 410, Nov. 6, 1978, 92 Stat. 2687, provided that: "The Supreme Court may issue such additional rules of procedure, consistent with Acts of Congress, as may be necessary for the orderly transfer of functions and records and the orderly transition to the new bankruptcy court system created by this Act [see Tables for complete classification of Pub.L. 95–598]."

Applicability of Rules to Cases Under Title 11

Pub.L. 95–598, Title IV, § 405(d), Nov. 6, 1978, 92 Stat. 2685, provided that: "The rules prescribed under section 2075 of title 28 of the United States Code and in effect on September 30, 1979, shall apply to cases under title 11, to the extent not inconsistent with the amendments made by this Act, or with this Act [see Tables for complete classification of Pub.L. 95–598], until such rules are repealed or superseded by rules prescribed and effective under such section, as amended by section 248 of this Act."

Rules Promulgated by Supreme Court

Pub.L. 98–353, Title III, § 320, July 10, 1984, 98 Stat. 357, provided that: "The Supreme Court shall prescribe general rules implementing the practice and procedure to be followed under section 707(b) of title 11, United States Code [section 707(b) of Title 11, Bankruptcy]. Section 2075 of title 28, United States Code [this section], shall apply with respect to the general rules prescribed under this section."

[§ 2076. Repealed. Pub.L. 100–702, Title IV, § 401(c), Nov. 19, 1988, 102 Stat. 4650]

HISTORICAL AND STATUTORY NOTES

Section, added Pub.L. 93–595, § 2(a)(1), Jan. 2, 1975, 88 Stat. 1948, and amended Pub.L. 94–149, § 2, Dec. 12, 1975, 89 Stat. 806, related to Federal Rules of Evidence prescribed by the Supreme Court and amendment thereof. See sections 2072 to 2074 of this title.

Effective Date of Repeal

Section repealed effective Dec. 1, 1988, see section 407 of Pub.L. 100–702, set out as a note under section 2071 of this title.

COMMENTARIES

See 28 U.S.C.A. § 2076, for Commentary by David D. Siegel.

§ 2077. Publication of rules; advisory committees

(a) The rules for the conduct of the business of each court of appeals, including the operating procedures of such court, shall be published. Each court of appeals shall print or cause to be printed necessary copies of the rules. The Judicial Conference shall

prescribe the fees for sales of copies under section 1913 of this title, but the Judicial Conference may provide for free distribution of copies to members of the bar of each court and to other interested persons.

(b) Each court, except the Supreme Court, that is authorized to prescribe rules of the conduct of such court's business under section 2071 of this title shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of such court and, in the case of an advisory committee appointed by a court of appeals, of the rules of the judicial council of the circuit. The advisory committee shall make recommendations to the court concerning such rules and procedures. Members of the committee shall serve without compensation, but the Director may pay travel and transportation expenses in accordance with section 5703 of title 5.

(Added Pub.L. 97–164, Title II, § 208(a), Apr. 2, 1982, 96 Stat. 54, and amended Pub.L. 100–702, Title IV, § 401(b), Nov. 19, 1988, 102 Stat. 4650; Pub.L. 101–650, Title IV, § 406, Dec. 1, 1990, 104 Stat. 5124.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1982 Acts. Senate Report No. 97–275, see 1982 U.S. Code Cong. and Adm. News, p. 11.

1988 Acts. House Report No. 100–889, see 1988 U.S. Code Cong. and Adm. News, p. 5982.

1990 Acts. Senate Report No. 101–416, House Report Nos. 101–123, 101–512, 101–514, 101–734, and 101–735, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 6802.

Effective Dates

1990 Acts. Amendment by section 406 of Pub.L. 101–650 effective 90 days after Dec. 1, 1990, see section 407 of Pub.L. 101–650, set out as a note under section 332 of this title.

1988 Acts. Amendment by Pub.L. 100–702 effective Dec. 1, 1988, see section 407 of Pub.L. 100–702, set out as a note under section 2071 of this title.

1982 Acts. Section effective Oct. 1, 1982, see section 402 of Pub.L. 97–164, set out as a note under section 171 of this title.

COMMENTARIES

See 28 U.S.C.A. § 2077, for Commentary by David D. Siegel.

CHAPTER 133—REVIEW—MISCELLANEOUS PROVISIONS

Sec.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1949 Acts. This section inserts in the chapter analysis of chapter 133 of Title 28, U.S.C., a new item "2111", in view of the insertion in such title, by another section of this bill, of a new section 2111.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the

Long-Term Agenda

A number of substantial topics remain on the agenda, in various states of development and with variable prospects of future action. This note lists the leading examples.

Rule 23. The Advisory Committee began to study the class-action rule, Rule 23, in 1991. Between adoption of the 1966 version of Rule 23 and 1991, the Committee had deliberately chosen not to undertake this chore. The Judicial Conference, prompted by the report of the ad hoc asbestos committee, suggested that the topic be taken on. Several successive drafts were prepared, and informal conferences were held. In 1996, the Committee published several proposed amendments, holding back several other proposals that — at least in theory — remained open for further study. Witnesses packed the three public hearings, and there were many written comments. The testimony and comments showed a bar deeply divided on class-action practice. Only one of the proposals has so far been adopted, the permissive interlocutory appeal provision to take effect on December 1 as new Rule 23(f). The Committee voted to abandon some of the 1996 published proposals, and has held others for further consideration. One reason for deferring action has been the desire to await the report of the Mass Torts Working Group. Rule 23 remains formally on the agenda for further action.

Rule 50(b). The rules surrounding post-verdict motions for judgment as a matter of law ("judgment n.o.v.") were revised in 1991. Some courts have encountered some uncertainties in administering the rule. Although questions have been raised, it seems a bit early yet to revisit the rule. It is particularly early if there is any disposition to revise the requirement that there be a close-of-the-evidence motion, a requirement studied and deliberately retained in the 1991 amendments. This topic is likely to be deferred for some time.

Rule 53. Prompted by some relatively minor suggestions that emerged from committees preparing local CJRA plans, the Committee undertook to consider the use of special masters. The main impetus for revising Rule 53 is that Rule 53 speaks only to the use of trial masters. Courts have been admonished that trial masters should be used only in truly exceptional circumstances, and have heeded the admonitions. Masters seem to be used much more frequently for pretrial and for decree-enforcement purposes, uses that are not covered by Rule 53 or any other rule. A comprehensive draft has been prepared, but never really studied by the committee.

There are at least two grounds for reticence. It is not clear that the largely unregulated use of special masters creates any real problems. And it is far from clear whether an attempt to regularize present practices will manage to capture so much of present reality as to do more good than harm. This topic may be ready for a close look as a basis for deciding whether to press ahead or delay indefinitely.

XII-XIII

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
U.S. COURTHOUSE, ROOM 3108
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, D.C. 20001-2866

JUDGE CAROL BAGLEY AMON
JUDGE PETER W. BOWIE
JUDGE JERRY L. BUCHMEYER
JUDGE GERALD B. COHN
JUDGE JOSEPH A. DiCLERICO
JUDGE DAVID M. EBEL
JUDGE J.L. EDMONDSON
JUDGE DANIEL M. FRIEDMAN
JUDGE JAMES H. JARVIS
JUDGE STEPHEN N. LIMBAUGH
JUDGE DANIEL A. MANION
JUDGE THOMAS N. O'NEILL, JR.
JUDGE WILLIAM L. OSTEEN
JUDGE MARY M. SCHROEDER
JUDGE SPENCER M. WILLIAMS

JUDGE A. RAYMOND RANDOLPH
CHAIRMAN

TELEPHONE
(202) 273-0425

MARILYN J. HOLMES
COUNSEL
(202) 273-1100

September 23, 1998

The Honorable Alicemarie H. Stotler
Chair, Committee on Rules of
Practice and Procedure
United States District Court
United States Courthouse
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Dear Judge Stotler:

I am writing to request the assistance of the Committee on Rules of Practice and Procedure in a project initiated by the Committee on Codes of Conduct to improve the judiciary's system of recusal. The Codes Committee plans to undertake a number of initiatives in this area. One particular initiative is to consider appropriate revisions to the federal rules in order to ensure that judges receive timely and, where necessary, updated information about the corporate interconnections of parties before them. We hope to enlist your assistance in this latter effort.

By way of background, I am enclosing a copy of the Codes Committee's September 1998 report to the Judicial Conference. As the report describes, a series of news articles published in April of this year focused our attention on judges' recusal obligations. The articles addressed two main issues: (1) alleged participation by some judges in cases involving parties in which the judges (or close family members) owned a financial interest; and (2) asserted difficulties in gaining access to judges' financial disclosure reports, which might reveal judges' financial interests in parties

before them. This Committee has significant authority in the first of these areas and has been examining steps that can be taken by the Committee and the judiciary to assist judges in meeting their recusal obligations.

Under Canon 3C(1)(c) of the Code of Conduct for United States Judges and 28 U.S.C. § 455, judges are required to disqualify themselves when they (or certain close relatives) have a financial interest in a party. To meet this obligation, judges must have accurate and complete financial information about the parties before them. The Committee is examining various methods to assist judges in identifying financial interests that necessitate recusal. One important element is ensuring that judges are aware of any corporate interconnections in their financial holdings.

As you know, Rule 26.1 of the Federal Rules of Appellate Procedure requires non-governmental corporate parties to identify their parents and affiliates. There are no corresponding provisions in the federal rules governing civil, criminal, and bankruptcy proceedings at the trial level. Our Committee has concluded that provisions of this nature could be of great benefit to judges. We also believe that disclosures made at both the appellate and trial levels may need to be updated periodically, so that judges receive notice of acquisitions or mergers that may present new conflicts of interest concerns.

In our recent report to the Judicial Conference, this Committee proposed to pursue a number of efforts relating to recusal, including revisions to the federal rules that would require corporate parties to disclose their parents and affiliates and also to update their affiliations periodically. The Committee further proposed to coordinate with the Rules Committee in this effort. We are seeking the assistance of your Committee to this end. We ask that you review Appellate Rule 26.1 and consider extending its applicability to federal civil, criminal, and bankruptcy proceedings. We also ask that you consider whether and how to require corporate parties to file updated statements reflecting any changes in corporate relationships that may result in new conflicts of interest.

Should you have any questions about these issues, please don't hesitate to call me or my successor as chairman of the Committee (effective October 1, 1998), the Honorable Carol Bagley Amon of the Eastern District of New York. Also, Marilyn Holmes, Counsel to the Codes Committee, has discussed these issues with Peter McCabe, Secretary to the Rules Committee, and I expect they will continue

to work together on this project. Thank you for your assistance in this important area.

Sincerely yours,

A. Raymond Randolph
Chairman

Enclosure

cc: Honorable Carol Bagley Amon
Peter G. McCabe
Marilyn J. Holmes

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE

ON CODES OF CONDUCT

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

The Committee on Codes of Conduct met from July 9 to 11, 1998. All members were present except Judge Daniel M. Friedman, who could not attend for personal reasons. The Administrative Office was represented by Marilyn J. Holmes, Associate General Counsel, and Jeffrey N. Barr, Assistant General Counsel.

REVISIONS TO FEDERAL PUBLIC DEFENDER EMPLOYEES CODE

Earlier this year, the Committee received an inquiry from a federal public defender seeking advice about the permissibility of accepting the voluntary services of an attorney on paid sabbatical from a law firm in the defender's district. The Committee responded that Canon 6 of the Code of Conduct for Federal Public Defender Employees did not allow this arrangement. Canon 6 provides:

> [a] defender employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States.

While considering this inquiry, the Committee learned that similar volunteer arrangements are permitted in U.S. attorneys' offices. The executive branch provisions corresponding to

The Chairman asked Committee Counsel to review all of the advisory opinions in order to identify and revise the citations of any opinions that have been withdrawn or modified. After this final review, the Committee expects the revised opinions to be published in the Guide this fall.

JUDGES' RECUSAL OBLIGATIONS

A series of news articles published this spring focused the attention of the judiciary on judges' recusal obligations. The articles addressed two main issues: (1) alleged participation by some judges in cases involving parties in which the judges (or close family members) owned a financial interest; and (2) asserted difficulties in gaining access to judges' financial disclosure reports, which might reveal judges' financial interests in parties before them. The Committee on Codes of Conduct has significant authority in the first of these areas and has been examining steps that can be taken by the Committee and the judiciary to assist judges in meeting their recusal obligations. Judge Wm. Terrell Hodges, Chair of the Judicial Conference Executive Committee, asked that this subject be placed on the agenda for the Codes Committee's July 1998 meeting. The Committee on Financial Disclosure plans to focus on the second issue at its August 1998 meeting.

Canon 3C(1)(c) of the Code of Conduct for United States Judges requires judges to disqualify themselves when "the judge knows that . . . the judge or the judge's spouse or minor child residing in the household, has a financial interest in the subject matter in controversy or in a party to the proceeding." Nearly identical language appears in the federal recusal statute, 28 U.S.C. § 455(b)(4). Each judge bears the responsibility of ensuring his or her compliance with these financial conflict of interest rules. In order to fulfill their recusal obligations, judges must be knowledgeable about their ethical responsibilities and they must

have accurate and complete financial i[illegible]. During the last two years, the judiciary has intensified its efforts to provide judges [illegible]s education, including training that focuses on recusal and conflicts of interest considerations. The following informational materials have been disseminated:

- the Code of Conduct for United States Judges, published in pamphlet form and distributed to all judges (March 1997);

- a memorandum from the Administrative Office alerting judges about critical news articles on the subject of recusal and recommending that all judges review their screening mechanisms for financial conflicts of interest, sent to all judges (February 27, 1998);

- an urgent memorandum from the chairs of the Committees on Codes of Conduct and Financial Disclosure advising judges to develop recusal lists and offering suggestions about managing financial interests and avoiding conflicts, sent to all judges (May 7, 1998); and

- a series of articles focusing on recusal, including an article suggesting that judges review their recusal obligations when preparing their annual financial disclosure reports, published in the Federal Judges Association In Camera newsletter and distributed to all judges (August 1997, January 1998, May 1998).

The Codes of Conduct Committee has also undertaken the following educational efforts:

- the Chairman delivered speeches and answered questions at the 7th Circuit Judicial Conference (October 1997); the Federal Judicial Center-sponsored 4th Circuit Judges Workshop (March 1998); and the 11th Circuit Judges Workshop (April 1998), regarding the ethical responsibilities of federal judges, including their recusal obligations;

- representatives of the Codes of Conduct Committee appeared at the Chief District Judges Conference (May 1998) to review judges' recusal obligations and to answer questions about financial interests;

- a segment on ethics was added to the FJC's Washington, D.C., orientation seminars for new district judges, beginning with the June 1998 session; this supplements the ethics videotapes used at regional video orientations, which were updated in 1997;

- a segment on ethics was added to the FJC's three national workshops for bankruptcy judges (April, August, and November 1998);

- representatives from the Codes Committee made ethics presentations at various judicial meetings and conferences (1997 to 1998); and

- judicial nominees continue to be briefed by Committee Counsel, following their confirmation hearings in Washington, D.C., about their recusal obligations and any questions pertaining to their financial interests.

At its July 1998 meeting, the Committee reviewed the foregoing activities and determined to continue and intensify the Committee's efforts to help judges understand their ethical duties, especially regarding financial conflicts of interest. Recent experience suggests that the distinctions between mandatory and waivable recusal situations have not been consistently applied by all judges; some judges may not regularly update the financial information they use for recusal purposes; and the size, complexity, and fluidity of modern dockets makes it difficult for judges to identify all conflicts on their own.

The Committee examined various methods of addressing these problems. First, the Committee considered whether it could assist judges in identifying financial and other interests that necessitate recusal and in keeping this information current. Second, the Committee sought to determine whether there were more effective ways in which recusal lists could be used to flag cases presenting potential conflicts of interest. Third, the Committee examined ways of enlisting the technical and administrative assistance of others to enable judges to avoid conflicts. The following options were reviewed:

- amending the Federal Rules of Civil Procedure to require corporate parties to disclose all parent companies, subsidiaries and affiliates that have issued shares to the public, as they now must do in the courts of appeals pursuant to Fed. R. App. P. 26.1;

- developing a model or standardized checklist for judges to use in drawing up recusal lists;
- distributing judges' recusal lists to parties or the public;
- using the information in judges' financial disclosure reports to develop judges' recusal lists;
- developing automated systems to compare judges' recusal lists to their court dockets;
- providing judges with better access to lists of attorneys and parties to assist in recusal determinations; and
- modifying the system for new case assignments in some districts to better facilitate recusal determinations.

The Committee discussed the potential benefits and drawbacks of the foregoing options. It was agreed that the Committee should focus its efforts on assisting judges in meeting their recusal responsibilities. The Committee did not believe that any ethical principles required judges to make their recusal lists available to the public at their courthouse. The Committee also believed that the public financial disclosure reports of judges are of limited utility in making recusal determinations. The reports were not designed for recusal purposes and the information they contain does not correspond well with the financial interests that trigger recusal (the reports are both over- and under-inclusive in this regard). Still, the nature of the recusal problems reported in recent news accounts suggests to the Committee that the following efforts would be beneficial:

(1) revising the Federal Rules of Civil Procedure or local district court rules to require corporate parties to disclose their parents and subsidiaries (along the lines of Fed. R. App. P. 26.1) and possibly also to require periodic updating of such affiliations;

(2) continuing efforts to inform and educate judges about their recusal responsibilities, including periodic reminders encouraging judges to create and

update recusal lists (*see* the section on Ethics Training Initiatives, set later in this report);

(3) developing a model or standardized checklist to be distributed to all judges for use in drawing up recusal lists, including advice about integrating relevant information from the judges' financial disclosure reports;

(4) developing automated systems, including software programs, budget and staff permitting, for use in chambers and/or clerks' offices to compare judges' recusal lists to their court dockets; and

(5) adjusting the system for new case assignments in some districts to better facilitate recusal determinations by ensuring that judges are not asked to enter even routine scheduling orders before recusal comparisons are completed.

The Committee agreed to take responsibility for the educational efforts and the model checklist described in items (2) and (3) above. In addition, the Codes Committee agreed to coordinate with other interested Judicial Conference Committees in pursuit of the efforts described in items (1), (4), and (5). Specifically, the Committee proposes to coordinate with the Rules Committee on possible inclusion of a corporate disclosure requirement in the federal rules (item (1)); with the Committees on Automation and Technology and Court Administration and Case Management on development of automated comparison systems (item (4)); and with the Committee on Court Administration and Case Management on any necessary alteration of case assignment systems in some districts (item (5)).

JUDGES' PARTICIPATION IN PRIVATE SEMINARS

At recent oversight hearings before the Subcommittee on Courts and Intellectual Property of the Judiciary Committee of the House of Representatives some questions were asked about judges attending seminars funded by private entities. This subject had been raised in a Washington Post article, picked up by other papers, and in oral and written congressional inquiries. The Post article focused in particular on judges attending private seminars run by

BACKGROUND INFORMATION
REGARDING
PROMULGATION OF ORIGINAL APPELLATE RULE 26.1

Rule 26.1. Corporate Disclosure Statement	Rule 26.1. Corporate Disclosure Statement
Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.	(a) **Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock. (b) **Time for Filing.** A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. (c) **Number of Copies.** If the statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is made, however, in subdivision (a).

Subdivison (a). The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation,

the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party lists all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

Subdivision (b). The language requiring inclusion of the disclosure statement in a party's principal brief is moved to this subdivision because it deals with the time for filing the statement.

Minutes of the Advisory Committee
Federal Rules of Appellate Procedure
April 27, 1988

Present were the Honorable Jon O. Newman, Chairman, and members Honorable Myron H. Bright, Honorable Peter T. Fay and Honorable E. Grady Jolly. James M. Spears, Esquire, Deputy Assistant Attorney General, attended on behalf of Solicitor General Charles Fried. Honorable Pierce Lively and Professor Charles A. Wright attended as liaisons from the Judicial Conference Standing Committee on Rules of Practice and Procedure. Professor Carol Mooney, Reporter, and Mr. William Eldrige of the Federal Judicial Center, were also in attendance.

Chairman Newman called the meeting to order at 9:00 a.m.

Organizational matters

Judge Newman began the meeting by addressing the following questions concerning organization and composition of the Committee:

1. Professor Rex Lee's term expires in October. Although the Chief Justice appoints members of the Committee, the Committee may suggest names of persons who might serve as practitioner representatives on the Committee. Judge Newman thinks it may be appropriate to have two members of the private bar rather than only one.

2. Clerks Thomas F. Strubbe of the Seventh Circuit and Robert D. St. Vrain of the Eighth Circuit wrote to Judge Newman concerning the clerks' opportunity to have input into the work of the Committee. Although both Judge Ripple, when he was Reporter to the Committee, and Carol Mooney, in her capacity as Reporter, have attended the clerks' meetings and have served as liaisons between the clerks and the Committee, Judge Newman suggested having the chairman of the clerk's Committee on the Federal Rules of Appellate Procedure attend the Advisory Committee meeting as an observer but not as a voting member. He observed that the presence of the clerks is at least as compelling as that of Congressional staff members. The Committee was in agreement.

3. With regard to the location of the next meeting, Judge Newman suggested that the Committee avoid esoteric locations and stated that given the convenience of the office space and support available in Washington the next meeting probably would be in Washington. The Committee was in agreement.

4. Judge Newman also expressed the opinion that a certain amount of the Committee's work could be conducted by mail; for example, tying up loose ends on an item might be handled by mail rather than waiting until the next meeting. The Committee concurred and also agreed that it might not be necessary to meet every six months.

Bankruptcy Rule

The first substantive matter addressed was the new bankruptcy rule - F.R.A.P. 6 - docket number 86-12. The reporter stated that the committee had approved the new rule at its last meeting and had sent the rule to the Bankruptcy Advisory Committee for its approval. The reporter also stated that the Bankruptcy Committee was scheduled to consider the rule at its May, 1988, meeting. Once the rule is approved by the Bankruptcy Committee, we will send it on to the Standing Committee.

Certificate of Interest

The next item considered was docket number 86-9 concerning a party's disclosure of its corporate affiliates so a judge can ascertain whether he or she has any interests in any of the party's related entities which would disqualify the judge from hearing the appeal. The Committee approved a rule at the last meeting but following the meeting Chief Justice McKusick offered suggestions for further amendment. Therefore, the Committee had before it Justice McKusick's suggestions.

Before discussing Justice McKusick's suggestions however, the Committee reviewed the development of this rule and the reason for proposing a national rule. The original request for development of a national rule came from Otis M. Smith, General Counsel of the General Motors Corporation. Mr. Smith cited two reasons for his request: first, the fact that the local rules in the circuits vary significantly causes inconvenience for those involved in a national practice; second, Mr. Smith stated that some of the rules are unnecessarily broad, for example some rules require disclosure of all of a corporation's subsidiaries which includes wholly-owned subsidiaries. Prior to its last meeting the Committee approved and circulated a draft rule to the circuits. Ten circuits responded to the draft rule. Five circuits approved of the draft, although three circuits suggested amendments. Five circuits disapproved. The principal objection to the circulated draft was the breadth of disclosure required. In light of the response to the circulated draft, the rule approved by the Committee at its last meeting was more narrowly drawn. The Committee decided that the rule it approved represented a minimum requirement which all circuits should meet, and if the circuits want to require additional information they may do so.

Since the composition of the Committee changed significantly between the last meeting and this one, Judge Newman first asked the Committee whether it was in agreement with the predecessor Committee that a national rule is desirable even though some of the circuits may continue to have local rules which require more disclosure than the FRAP rule. The Committee generally agreed that a uniform rule would be desirable. A uniform rule would allow corporations to develop a standard disclosure statement.

Although corporations would still need to check local rules to ascertain if additional information is needed, at least there would be a standard baseline procedure. Also, the Committee thought that the promulgation by the Supreme Court of a streamlined rule might prompt the circuits to winnow their own rules.

The Committee then turned to the precise language of the rule. The rule approved at the last meeting and as further amended by Chief Justice McKusick reads as follows:

Any corporate party to a civil or bankruptcy case or agency review proceeding and any corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of such corporation.

The Committee generally approved Justice McKusick's suggestions but had some questions concerning the content of the disclosure. Judge Newman questioned the need to disclose subsidiaries. He noted that if U.S. Steel is a party and owns 10% of a corporation and a judge owns two shares of that subsidiary, the judge does not have a financial interest that would be substantially affected by the outcome of the appeal. However, Judge Newman noted that most circuits require disclosure of subsidiaries, other than wholly owned subsidiaries, and that it is probably better for the Committee to go along with the approach adopted by most circuits.

Mr. Spear inquired whether government entities should be excluded from the rule. Mr. Spear noted that in earlier versions of the draft rule governmental parties were excluded and that the local rules in a number of circuits exclude governmental entities. The Committee concluded that there could not be any private shareholders of subsidiaries of a governmental body and thus the conflict of interest problem could not arise. Therefore, the Committee decided to insert the words "non-governmental" before the word "corporate" in both lines one and two.

Judge Bright was concerned that the rule does not require disclosure of partnership interests and of other non-corporate disqualifying interests under §455. Although §455 clearly states that a variety of non-corporate interests may require a judge to recuse himself or herself, the Committee noted that the Circuits opposed the originally circulated rule because of the breadth of disclosure required. The Committee felt that a narrower rule would be needed in order for the rule to gain acceptance. Of course some circuits may require additional disclosure and the uniformity hoped to be gained from a national rule could be eroded. However, the Committee felt it unwise to allow the most elaborate local rule to set the pattern. The Committee also concluded that the FRAP rule should set the minimum standard for disclosure.

Justice McKusick had suggested adding one more sentence stating: "A negative report is also due." The Committee decided not to include that sentence. The Committee felt that people should not be required to file papers that say nothing.

Professor Wright also urged the insertion of a comma in line 5 after the close of the parentheses. The Committee agreed.

The Committee then considered the timing of the disclosure statement. The suggested language, appearing in the memorandum at page eight, was as follows:

> The statement shall be filed with a party's main brief or upon filing a motion in the court of appeals, whichever first occurs. The statement shall be included in front of the table of contents in a party's main brief even if the statement was previously filed with a motion.

Judge Newman noted that some circuits may wish to have the information come sooner. He suggested inserting the following language on line 9 after the word occurs: "unless required by local rule to be filed earlier". Judge Newman pointed out that in general a FRAP rule can in effect be amended by a local rule which imposes greater requirements, and he did not want to suggest that a circuit cannot require more absent an express statement of authorization to do so. However, the draft language says a statement shall be filed upon the occurrence of A or B whichever first occurs. That language could support an argument that a circuit is not free to say that a statement must be filed earlier. Judge Newman compared the timing language with the language in the first part of the rule which says a party shall file a statement; that language does not imply that the party shall file only a statement. In contrast, the timing language says the statement shall be filed upon the first of two occurrences and may imply that a circuit cannot require the statement to be filed earlier. The Committee discussed the desirability of establishing a uniform time for filing the statement and the desirability of setting that time as early as possible. The Committee considered various options but ultimately decided that because of variation in local practice it would be difficult to set an earlier uniform time for the filing of the appellee's statement. The Committee decided to use the first sentence of the draft language with the amendment suggested by Judge Newman. The Committee also decided to strike the last three words of the last sentence. The Committee considered striking the last sentence entirely because some circuits may require the statement prior to the filing of the brief. However, the Committee decided that inclusion of the statement in the briefs acts as a fail safe. The judges related that upon occasion they have caught a conflict at the last minute and that inclusion of the statement in a party's main brief may prove useful.

The rule as approved by the Committee reads as follows:

Any non-governmental party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of such corporation. The statement shall be filed with a party's main brief or upon filing a motion in the court of appeals, whichever first occurs, unless required by local rule to be filed earlier. The statement shall be included in front of the table of contents in a party's main brief even if the statement was previously filed.

Jurisdictional Statement and Standard of Review

The Committee then turned its attention to docket item 86-20. Item 86-20 involves the suggestion that briefs include a jurisdictional statement and a statement of the standard of review. At its previous meeting the Committee decided that such statements were desirable and requested that the Reporter prepare language for consideration at this meeting. The Reporter drafted the following rules:

A. The Reporter suggested that the jurisdictional statement be treated as a separate requirement under F.R.A.P. 28(a) and be included as sub-paragraph 28(a)(2) and that the current sub-paragraphs (2) through (5) be renumbered as (3) through (6).

DRAFT RULE 28(A)(2)

(2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency whose action is the subject of review; (ii) a statement of the basis for jurisdiction in the Court of Appeals with citation to applicable statutory provisions and with reference to relevant filing dates establishing the timeliness of the appeal, (iii) a statement that the judgment or decree appealed from finally disposes of all claims with respect to all parties or, if it does not, a statement that the judgment or decree is properly reviewable on some other basis.

B. The Reporter also suggested that F.R.A.P. 28(b) should be amended. If the jurisdictional statement in the appellant's brief is complete and correct, there would be no need for the appellee to repeat the statement. On the assumption that the F.R.A.P. 28(a) sub-paragraphs would be renumbered as suggested in

Memorandum to the Advisory Committee
on the Federal Appellate Rules

Subj: FRAP Item #86-9

Report: Responses to the Work Draft of a Disclosure of Affiliates Rule and Additional Discussion Drafts

Section 455 of Title 28 of the United States Code defines the circumstances which require a federal judge to disqualify himself or herself from hearing a case. Possession of a financial interest that could be substantially affected by the outcome of the proceeding is such a circumstance. It is not always possible for a judge to determine from the names of the parties to an action whether the judge has such a financial interest. The names of the parties do not always reveal the identities of affiliated organizations which would be affected by the judgment in the case. For example, if a named party is a wholly owned subsidiary, the parent corporation is affected by outcome of the case. Unless the parties are required to disclose the identities of affiliates, a judge who owns stock in the parent corporation may be unaware of the relationship of the named party to the parent corporation and thus unaware of his disqualifying interest. Twelve of the thirteen circuits have local rules requiring parties to disclose the identity of interested persons. (The First Circuit has no rule on point.) The local rules differ in two primary areas: (1) which parties must comply with the rule, and (2) which types of affiliates or interested parties must be

disclosed. Copies of the local rules are attached to this memorandum.

For several years the FRAP Committee has been working to develop a national rule on divulging the identity of persons who are interested in the outcome of an appeal. At its April 1985 meeting, the committee considered and amended a draft rule which represented a distillation of the local rules then in force in the various circuits. The committee voted to circulate the amended draft to all of the courts of appeals and to ask each court for its reaction. The draft was circulated in December, 1985. A copy of the draft rule is attached to this memorandum.

Ten circuits responded to the draft rule; copies of the responses are also attached. Realizing that it is always dangerous to summarize another's statement, but believing that an overview of the reactions would be helpful, I have grouped the responses in four categories as follows:

1. Approve -- both the Eighth and the Eleventh Circuits approve the draft rule.

2. Approve with suggested amendments -- the Fifth, Sixth and Federal Circuits generally approve of the rule but suggest certain amendments:

(a) The Fifth Circuit would

-- not require a certificate in pro se cases where the identity of the parties is obvious from the briefs

-- not require governmental parties to file a certificate

-- apply the rule in agency review proceedings

-- require a certificate to be included in a party's principal brief and with all motions.

(b) The Sixth Circuit suggests

-- a stylistic change reconciling the language of lines three and four of the draft where reference is made to "disclosure statement" and "the certificate"

-- the certificate should be filed at the inception of the case on a form provided by the clerk.

(c) The Federal Circuit has neither bankruptcy nor criminal jurisdiction and thus for its internal purposes it would amend the draft rule to require a certificate of all parties to "an appeal" (rather than of all parties to "a civil or bankruptcy case and all corporate defendants in a criminal case").

3. Disapprove but see need for a national rule -- both the Fourth and the Seventh Circuits believe the draft rule is overly broad and would cause needless burdens for both litigants and courts, yet both are favorably disposed to having a national rule.

4. Disapprove -- the First, Second and Third Circuits all oppose adoption of the draft rule. The First Circuit believes there is no need for a rule which requires judges to go looking for conflicting interests. The Second Circuit believes the draft rule is too broad and the Third Circuit expressesa preference for its own rule.

In short, the responding circuits are equally divided; five of them approve the draft and five disapprove. Yet, two of the circuits which oppose adoption of this particular rule expressly endorse the notion of national rule.

The principal objection to the draft is the breadth of disclosure required. Not surprisingly, all of the circuits which oppose the draft rule have more narrowly drawn local rules, except the First Circuit which has no rule. With some narrowing of the rule, there may develop a consensus upon which to build a national rule. To that end, I have prepared two alternative drafts for discussion.

ALTERNATIVE A

DISCLOSURE OF INTERESTED PERSONS

(a) All parties to a civil or bankruptcy case or agency review proceeding and all corporate defendants in a criminal case shall file a certificate of interest. A negative report is also required.

(b) Whenever a corporation which is a party to an appeal or to a motion or other proceeding relating to an appeal, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation which is a party shall advise the Clerk in writing of the identity of the parent corporation or affiliate and the relationship between it and the corporation which is a party to the appeal.

(c) Whenever, by reason of franchise, lease, other profit sharing agreement, insurance or indemnity agreement, a publicly owned corporation, not a party to the appeal, has a financial interest in the outcome of litigation in which another person is a party to an appeal, or to a motion or other proceedings relating to an appeal, counsel for the person who is a party shall advise the Clerk in writing of the identity of the publicly owned corporation and the nature of its financial interest in the outcome of the litigation.

(d) Whenever a trade association is a party to an appeal, or an intervenor, it shall be the responsibility of counsel for the trade association to advise the Clerk in writing of the identity of each publicly owned member of the association.

(e) In addition, the names of all law firms whose partners or associates have appeared for the party in the lower tribunal or are expected to appear for the party in the court of appeals shall be identified in writing delivered to the Clerk.

The first three subdivisions of this rule draw heavily from the local rules in the third, fourth and sixth circuits. To increase the breadth of the rule subdivision (d), dealing with trade associations, was drawn from the fourth circuit rule and subdivision (e), regarding law firms, was drawn from the seventh, tenth, eleventh and federal circuit rules. In short, using the

existing circuit rules as a model, this draft is as broad as it can be, with certain exceptions noted below, without being as broad as the circulated draft.

The trade association provision in subdivision (d), however, is narrower than the parallel provision in the fourth circuit's rule 47. The fourth circuit rule requires counsel for a trade association "to identify each publicly owned member of the association in conformity with Section (a) through (c)." The apparent meaning of the rule is that the certificate must name not only the members of the trade association, but it must also name each member's parent corporation, if any, and other affiliates. Since the membership lists of some trade associations are quite lengthy, such a requirement could be a heavy burden and the interests of corporations affiliated with a member could be quite attenuated. In contrast to the fourth circuit's approach, D.C. Cir. R. 8(c) states that individual members of a trade association need not be listed. Although a list of an association's members can be lengthy, it should not be burdensome to compile and thus subdivision (d) of Alternative A takes a middle of the road approach requiring disclosure of members but not of their affiliates.

The draft rule is also narrower than the seventh and federal circuit's rules in one respect. Both circuits require an amicus curiae to file a disclosure statement. Alternative A does not require an amicus to file a statement since the circulated draft did not include such a requirement and none of the commentators

on the circulated draft were troubled by its absence.

Should the committee believe it appropriate, Alternative A could be narrowed in a variety of ways without departing from its basic approach.

1. Governmental parties could be exempted from compliance with the rule. Most circuits exclude at least some governmental parties from the coverage of their rules. (See local rules for the 2nd, 5th, 6th, 7th, 8th, 9th, 11th and D.C. Circuits.)
2. Subdivision (c) could be limited to require (like 6th Cir. R. 25(c)) disclosure only of corporations having a "substantial" interest in the outcome of the case. Unless the corporation has a substantial interest in the outcome, it is unlikely that the judge's investment in the corporation could be substantially affected, which is the standard for disqualification under §455(b)(4), (5).

ALTERNATIVE B

DISCLOSURE OF AFFILIATES

All corporate parties to a civil or bankruptcy case or agency review proceeding and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. The statement shall certify a complete list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation.

This alternative is the narrowest of the three drafts, yet still not as narrow as the 2nd Cir. R. §0.15 (requiring disclosure only of parent corporations) or 7th Cir. R. 5(b) (requiring disclosure of parent corporations, publicly held companies which own 10% or more of the stock in the party and law firms which have represented the party in the litigation). Alternative B is substantially the same as the disclosure statement required in Sup. Ct. R. 28.1 and similar to D.C. Cir. R. 8(c) and Fed. Cir. R. 8(c).

Alternative Drafts A and B basically require disclosure only of publicly owned corporations which, through an affiliation with a party, have an interest in the outcome of a case on appeal. Section 455 is much broader in scope. For example, if a judge's uncle owns a leasehold interest in property at issue in the litigation, §455 requires the judge to disqualify himself from the case. Yet under either Alternative A or B, the relative's name would not appear on the disclosure statement. When considering either of these alternatives, the committee must balance the burden imposed on a party to an appeal against the need to assist a judge in his efforts to comply with §455. It may be that a judge can realistically be expected to be familiar enough with family holdings to at least recognize those instances in which he should make further inquiry, whereas a judge cannot be expected to know of the interrelationships of corporations.

GUIDE TO JUDICIARY POLICIES AND PROCEDURES

VOLUME II

CODES OF CONDUCT FOR JUDGES AND JUDICIAL EMPLOYEES

November 1993

CHAPTER V.

COMPENDIUM OF SELECTED OPINIONS

Introduction

In 1979, the Committee on Codes of Conduct published Advisory Opinion No. 62, summarizing in a single document the published and unpublished opinions of the Committee as of that date. That opinion provides important guidance, but it should be read with caution because some of the advice contained therein has been superseded or qualified by changes in the Codes of Conduct, the Ethics Reform Act of 1989, and the subsequent published advisory opinions of the Committee. This Compendium contains a summary of selected published and unpublished opinions issued primarily subsequent to Advisory Opinion No. 62. Thus, in addressing an ethical issue, the reader should consult the current Codes of Conduct, the Ethics Reform Act of 1989, and the regulations promulgated thereunder, other relevant statutes such as 28 U.S.C. § 455, the published advisory opinions of this Committee, and this Compendium.

This Compendium contains summaries of the advice given in response to confidential fact-specific inquiries. While these summaries are intended to provide general guidance, the reader is encouraged to consult the Committee or one of its members with respect to any specific factual situation he or she is confronting. Each member of the Committee has a set of the Committee's unpublished opinions and can answer any questions the reader may have regarding a particular one, without, of course, disclosing the identity of the person who solicited the advice. The procedures for obtaining an advisory opinion from the Committee are set forth in the "Introduction" section of each code of conduct in Chapters I and II of this volume.

The Compendium has three Parts. Part One contains opinions interpreting the Code of Conduct for United States Judges, including some opinions interpreting the Codes that cover various judicial employees. Sections 1 through 7 of Part One correspond to Canons 1 through 7 of the Code of Conduct for United States Judges. It should be remembered that an activity which is permissible under a particular section may be subject to one of the more general caveats of the Canons (e.g., appearance of impropriety). Similarly, the Ethics Reform Act of 1989 and the regulations promulgated thereunder by the Judicial Conference impose additional restrictions, in particular with respect to the receipt of gifts or compensation.

Part Two contains opinions interpreting the Ethics Reform Act of 1989 concerning gifts, 5 U.S.C. §§ 7351 and 7353 and the regulations thereunder promulgated by the Judicial Conference. The headings and the chronology of Part Two follow generally that of the gift regulations. Activities that are said to be permissible in Part Two may nevertheless be subject to restriction under the Codes of Conduct.

Part Three contains opinions interpreting the Ethics Reform Act of 1989 concerning outside earned income, honoraria, and outside employment, 5 U.S.C. app., §§ 501-505, and the regulations thereunder promulgated by the Judicial Conference. The headings and chronology of Part Three follow generally that of the outside employment regulations. Activities that are said to be permissible in Part Three may nevertheless be subject to restriction under the Codes of Conduct.

This Compendium may be cited as follows: Compendium § ____ (1997).

at a fixed future date, or earlier at the issuing corporation's option but only upon paying a price which represents a significant capital appreciation.

§ 3.1-5 Convertible Securities

(a) Convertible securities are treated as stock for recusal purposes.

(b) Because depositary shares will automatically convert to common stock on a date certain, they are considered to be convertible debt securities. Therefore, a judge who owns depositary shares issued by a given corporation has a financial interest pursuant to Canon 3C(1)(c), and must recuse in any matter involving that corporation as a real party in interest. Depositary shares are a hybrid type of instrument. They are similar to debt securities since they contain a fixed rate of return until converted, and are automatically converted into common stock at a fixed future date, or earlier at the issuing corporation's option but only upon paying a price which represents a significant capital appreciation.

§ 3.1-6 Financial Interest in Party: Defining "Party"

§ 3.1-6[1] Amicus Curiae

(a) For purposes of recusal decisions on a financial interest, an amicus curiae is not regarded as a party to the litigation. Recusal is required if the interest of the judge could be substantially affected by the outcome of the proceedings or if the judge's impartiality might otherwise reasonably be questioned. Advisory Opinion No. 63.

(b) A judge should recuse from a case when judge's spouse is the executive director of an advocacy organization that has filed an amicus curiae brief before the court, unless the judge can obtain remittal of disqualification.

§ 3.1-6[2] Fiduciary Capacity

(a) A judge who owns stock in a bank is disqualified in litigation in which the bank is a party, even though the bank is acting in a fiduciary capacity in that litigation. Recusal is under Canon 3C(1)(c) and therefore the remittal provisions of Canon 3D are not available.

§ 3.1-6[3] Official Capacity Suits

(a) In some circumstances, an interest or personal relationship which would ordinarily be disqualifying is of no moment when a party is suing or being sued in his or her official capacity only.

(b) Where a judge's spouse is an associate and a partner in the law firm is sued in an official capacity unrelated to the law firm, recusal is not required.

§ 3.1-6[4] Class Actions

➢ Advisory Opinion No. 90 (judges' duty to inquire when relatives may be members of class action).

(a) All members of the class are parties, whether named or unnamed, so long as they have not opted out of the class. Advisory Opinion No. 68.

(b) A judge who is a member of the plaintiff class challenging the applicability of FICA to federal judges need not recuse from other cases to which the United States government or an agency thereof (including the Social Security Administration) is a party.

(c) If a judge or any person within the third degree of relationship remains a member of a class entitled to receive damages as a customer of a public utility, the judge should recuse. However, if the judge and such persons within the third degree of relationship opt out of the class, the judge is not required to recuse merely because of the judge's status as a utility customer, notwithstanding the possible beneficial effect on future utility bills, unless the savings as a customer might reasonably be considered to be substantial. In this case, 60 cents per month as of 1984 plus normal increases is not considered substantial. See Advisory Opinion Nos. 62, 78.

(d) A judge's inclusion as a class member in a Rule 23(b)(2) class action seeking only injunctive and declaratory relief, in which a substantial segment of the general public are also members, does not require recusal, unless the judge has an interest in the action unique from that of members of the general public included in the class.

(e) A judge who opts out of the class need not recuse from a class action. Nor must the judge recuse where the court is a member of the class but any recovery will go to the general treasury and not the court.

§ 3.1-6[5] Bankruptcy Proceedings

(a) For purposes of recusal decisions in bankruptcy proceedings, the following are deemed to be parties: the debtor, all members of a creditors committee, and all active participants in the proceeding; but merely being a scheduled creditor, or voting on a reorganization plan, does not suffice to constitute an entity a "party." Bankruptcy judges are expected to keep informed as to their investments in firms which are active participants in the proceeding, but ordinarily need not familiarize themselves with the scheduled creditors.

(b) In advice to rules committee of circuit court with respect to disclosure of interested parties, in context of bankruptcy appeals, appellate judges should know the identity of (1) the debtor; (2) the members of the creditor's committee; and (3) any entity which is an active participant in the proceeding before the judge. In addition, it was suggested that the rules

committee might consider requiring a fourth disclosure, any other entity known to declarant whose stock or equity value could be substantially affected by the outcome of the proceeding.

(c) Assistant United States Trustee appointed to bankruptcy judgeship required to recuse in all cases in which the Trustee's Office made an appearance or filed a disputed motion. Recusal not required for perfunctory administrative matters.

(d) Judge need recuse only in cases in which U. S. Trustee spouse or spouse's subordinates are actually litigating an appeal; judge need not recuse in cases in which the spouse has exercised supervisory control in a clerical manner, such as sending out pre-printed guidelines for debtors, but may need to recuse in cases in which the spouse has exercised supervisory discretionary control.

§ 3.1-6[6] Trade Associations

(a) The fact that a judge owns stock in or is doing business with a member of a trade association does not disqualify the judge from hearing a case in which the trade association is a party. Advisory Opinion No. 49.

(a-1) A judge is not required to recuse in a case involving the American Bar Association or some other open-membership bar association of which the judge is a member. Advisory Opinion No. 52.

(b) A union pension fund is not to be considered as a party to litigation merely because one of the constituent unions is a party.

§ 3.1-6[7] Criminal Victims

(a) If the sentencing judge owns stock or has any financial interest in a corporation which would be entitled to restitution from the defendant, the judge must recuse.

(b) Judge should recuse from bank robbery case where judge's spouse owns (or is beneficiary of trust that owns) stock in bank that may be entitled to restitution.

§ 3.1-7 Other Interests Which May Be Substantially Affected by the Outcome of Litigation

(a) A judge owning stock in a corporation named as a co-conspirator but which is not a party in the pending anti-trust case should recuse if the judge's interest could be substantially affected by the decision.

(a-1) A judge owning stock in a company that is not a party but produces the product that is the subject of litigation should recuse where the judge's award could

influence the initiation of subsequent claims against the company or otherwise affect the value of the company's stock; judge has "a financial interest in the subject matter in controversy . . . or any other interest that could be affected substantially by the outcome of the proceeding." Canon 3C(1)(c).

(b) A judge whose spouse owns shares of stock in a corporation is not disqualified in litigation in which the political action committee of that corporation is one of 11 such PACs whose election activities are being challenged.

(c) A judge who is a member of the American Bar Association but who is not insured under the American Bar Association endowment policy is not disqualified in litigation brought by the endowment to obtain a tax refund.

(d) A judge whose investment portfolio consists mainly of tax-free municipal bonds should recuse from litigation concerning the tax-exempt status of such bonds.

(e) The fact that a judge or a judge's spouse has an account with or owes money to a bank does not necessitate recusal in cases in which the bank is a party, absent some special circumstances (e.g., a pending, dubious, loan application; unusually favorable terms, loan in default, etc.).

(f) A judge who is a guarantor of the notes of a corporation should recuse in any case in which the corporation is a party.

(g) [deleted]

(h) A judge owning stock in a financial corporation which is not itself a party to bankruptcy proceedings need not recuse merely because it is owed money by the debtor or has other interests in the proceeding, unless the outcome of the proceeding could substantially affect the value of the judge's investment.

(i), (i-1) and (i-2) [deleted]

(j) A judge whose son is employed by a union pension fund need not recuse from a case in which one of the constituent unions, but not the pension fund, is a party.

(k) A judge who is a member of the plaintiff class challenging the applicability of FICA to federal judges need not recuse from other cases to which the United States government or an agency thereof (including the Social Security Administration) is a party.

(l) A judge has no financial interest in stock owned by judge's parent and should recuse only if judge knows that the parent's stock could be substantially affected by the outcome. Canon 3C(1)(d)(iii).

(l-1) Judge should recuse if he or she knows that a parent's interest in a trust owning stock in companies involved in a proceeding before the judge could be substantially affected by the outcome of the proceeding. Canon 3C(1)(d)(iii).

(m) A judge whose spouse owns AT&T stock need not recuse in cases involving AT&T ERISA plans where neither AT&T nor AT&T Information Systems is a named party or real party in interest (e.g., responsible for relief requested).

(n) A judge who owns a fractional mineral royalty interest does not have a "financial interest" in the purchaser of those minerals, and need not recuse when the purchaser is a party, as long as the case could not "substantially affect" the value of the judge's interest. Where the royalty interest is small, the judge's impartiality cannot reasonably be questioned. However, a judge who holds the executory rights to lease minerals for production must recuse subject to remittal when the lessee is a party, because the judge's impartiality could reasonably be questioned.

§ 3.1-7[1] Policyholder of Insurance; Utility Ratepayer; Taxpayer

(a) A judge who holds a life insurance policy need not recuse when the mutual insurance company appears unless the policy could be substantially affected by the outcome.

(b) A judge to whom an insurance policy has been issued by a mutual insurance company or other insurance company need not, for that reason alone, recuse in cases to which the insurance company is a party.

(b-1) A judge holding a Blue Cross policy need not for that reason alone recuse in an antitrust case in which a local Blue Cross organization is a party. Advisory Opinion Nos. 26 and 45.

(b-2) A judge insured under a Government-Wide Indemnity Plan written by Aetna Company need not for that reason alone recuse in a case in which Aetna is a party. Advisory Opinion No. 45.

(c) If a judge or any person within the third degree of relationship remains a member of a class entitled to receive damages as a customer of a public utility, the judge should recuse. However, if the judge and such persons within the third degree of relationship opt out of the class, the judge is not required to recuse merely because of the judge's status as a utility customer, notwithstanding the possible beneficial effect on future utility bills, unless the savings as a customer might reasonably be considered to be substantial. In this case, 60 cents per month as of 1984 plus normal increases is not considered substantial. See Advisory Opinion No. 78.

(d) A judge who holds a VA life insurance policy is not thereby disqualified from cases involving the VA or other federal agencies or instrumentalities.

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

November 4, 1998

MEMORANDUM TO THE CIVIL RULES COMMITTEE

SUBJECT: *Agenda Book for the November 12-13, 1998 Meeting in Charleston, South Carolina*

Attached is the agenda book for the Civil Rules Committee meeting on November 12-13, 1998. Please bring it with you to the meeting.

The meeting will be held at the Lodge Alley Inn, in the Courtyard III meeting room. The Inn is located at 195 East Bay Street. The meeting will start each day at 8:30 a.m., and juice, breakfast breads, coffee, and tea will be available each morning.

Two events have been arranged for Thursday evening, November 12. At 5:30 p.m., the Committee will tour the Calhoun Mansion, 16 Meeting Street, approximately two blocks from the Lodge Alley Inn. At 6:45 p.m, a dinner will be held at Magnolia's, which is located at 185 East Bay Street, between Queen and Market Streets, near the Inn.

I have also attached a memorandum on the Committee Docket Review from Justice Christine Durham, of the Agenda and Policy Subcommittee. Early next week, we will send by Federal Express Mail a draft of the Mass Torts Report and accompanying Federal Judicial Center materials.

John K. Rabiej

2 Attachments

Memo

To: Advisory Committee on Civil Rules

From: Christine Durham, Agenda Subcommittee

Subject: Committee Docket Review

Date: November 2, 1998

As the Committee has been dealing in recent years with major projects on mass torts, class actions, and discovery, numerous proposals and suggestions of lesser magnitude have been accumulating on our docket. A preliminary review of those items (most recently up-dated by John Rabiej in the August 19, 1998 Civil Rules Docket Sheet) suggests that the Committee's time would be well spent in discussing and prioritizing its responses to pending proposals. It might be particularly appropriate for us to identify those suggestions that are simply not suitable for further consideration or action, so that we can communicate our response to the "proposers" and clear those matters from our docket. With that end in mind, I offer the following list of matters not yet dealt with from the docket that could probably be fairly readily categorized as either:

1) Should be scheduled for Committee consideration, either immediately or longer-term;

2) Should be deferred indefinitely;

3) Should be rejected and removed from the docket.

I. Rule 4.

There are two minor pending proposals regarding Rule 4 - one to "clarify" 4(d) (from John J. McCarthy) and one to provide sanctions for the willful evasion of service (Judge Joan Humphrey Lefkow).

II. Rule 5. Service and Filing

We have several suggestions to deal with service (including service of notice to counsel) by electronic means or commercial carrier (from Michael Kunz, Clerk of E.D. PA., John Hank, and District Clerks Advisory Group).

III. Rule 11. Sanctions

Three unrelated proposals are pending: one would mandate sanctions for frivolous filings by prisoners, another would impose sanctions for improper advertising, and the last would limit the rule's use as a "discovery device."

IV. Rule 12. Defenses and Objections

Three miscellaneous proposals are pending. The first (to require filing of and ruling on dispositive motions before trial) was recommended for rejection by the Reporter in May of '97 but is still on the docket. The second proposal deals with changes required for conformity with The Prison Litigation Act of 1996, and the third calls for an expansion of the language of 12(b).

V. Rule 30. Depositions

Two proposals: one to allow the public to use audio tapes in the courtroom and one to permit deponents to seek judicial relief from "annoying or oppressive" questioning during depositions.

VI. Rule 36. Requests for Admission

A proposal to revise rule to "forbid false denials."

VII. Rule 47. Selection of Jurors

A proposal to eliminate peremptory challenges (from Judge William Acker). This would be a candidate to follow the discovery project when the Committee has solved all those problems.

VIII. Rule 50(b). Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

Judge Alicemarie Stotler has suggested the rule be amended to specify the time required for motions after declaration of a mistrial.

IX. Rule 51. Jury Instructions

The Report has recommended the Committee's consideration of a comprehensive revision of this rule. There are two proposals concerning the filing of jury instructions before trial (from Judge Stotler and Gregory Walters, 9th Circuit Judicial Council Executive). The Reporter has suggested that the Committee may wish to consider a general revision of this Rule.

X. Rule 56. Summary Judgment

There are currently three proposals: one to clarify time for service and grounds for summary adjudication (the Committee has already seen a draft in 1995 but has not acted), one to clarify the use of cross-motions for summary judgment, and one regarding timing that the reporter recommends the Committee reject. There is some "history" with the Judicial Conference on this rule.

XI. Rule 65.1. Security: Proceedings Against Sureties

Proposed amendment to avoid conflict between 31 U.S.C.§ 9396 and the Code of Conduct for Judicial Employees (from Judge Russell Holland).

XII. rule 77(d). Notice of Orders or Judgments

Two proposals (from Clerk Michael Kunz and District Clerks Advisory Group) to permit faxing of notices.

XIII. Rule 81.

- General:

  - to add injunctions to the Rule 81(a)(1)

* - Applicability to D. C. mental health proceedings

* - 81(c): conforming change deleting "petition"

* The Reporter recommends both of these changes be included in next technical amendment package, and/or that the Committee publish a group of Rule 81 proposals as a package.

XIV. Pro se Litigants

A proposal (supported by the Federal Magistrate Judges Association Rules Committee) to create a committee to look at special rules for pro se litigation.

XV. Miscellaneous

- Ed Cooper's suggestion for changes to Form 17.

- Interrogatories on Disk

The foregoing list does not include matters currently scheduled for discussion or follow up, or those for which the Reporter has recommended "monitoring" with no action.