File Copy

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Washington, D.C.

June 17-19, 1993

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
WASHINGTON, D.C.
JUNE 17-19, 1993

I. Remarks of the Chairman.

II. Approval of Minutes.

III. Proposed revisions governing technical rules amendments and conformance of local rules with national rules of procedure.

IV. Discussion of Proposed Guidelines on Filing by Facsimile.

V. Report of the Advisory Committee on Bankruptcy Rules.

A. Proposed amendments to Bankruptcy Rules 8002 and 8006 for approval.

VI. Report of the Advisory Committee on Criminal Rules.

A. Proposed amendments to Criminal Rules 16, 29, 32, and 40 for approval.
B. Proposed amendments to Criminal Rules 5, 10, 43, and 53 for publication.

VII. Report of the Advisory Committee on Evidence.

A. Proposed amendments to Evidence Rule 412 for approval.

VIII. Report of the Advisory Committee on Appellate Rules.

A. Proposed amendments to Appellate Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 32, 33, 35, 38, 40, 41, and 48 for approval.
B. Proposed amendments to Appellate Rules 4, 8, 10, 21, 25, 32(b), 35, 41, 47, and 49 for publication.

IX. Report of the Subcommittee on Long Range Planning.

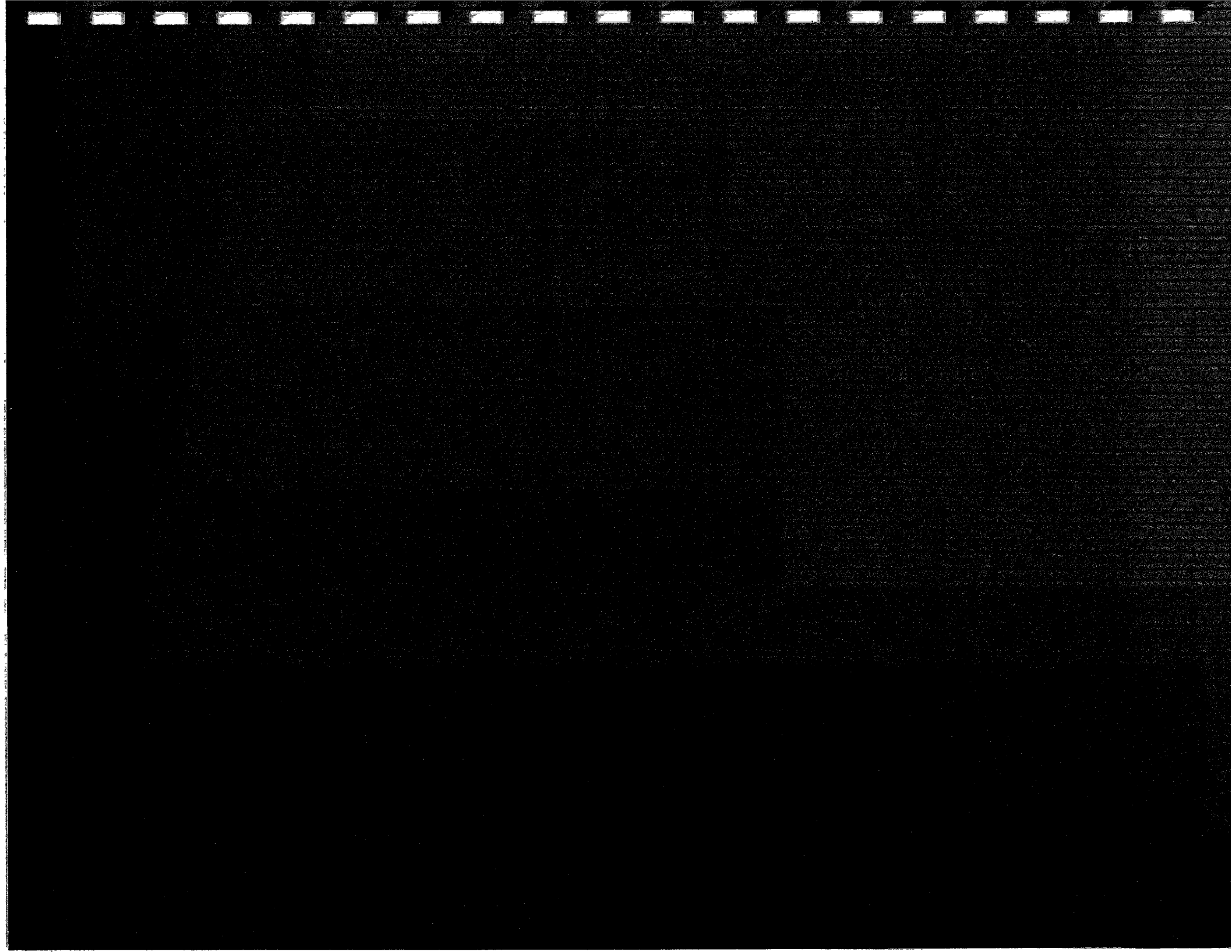
X. Philosophy of the Task of the Rules Committees. (Continuation of discussion initiated by Judge Stotler.)

XI. Report of the Advisory Committee on Civil Rules.

A. Proposed amendments to Civil Rules 23, 26(c), 43, 50, 52, 59, 83, and 84 for publication.

XII. Report of the Subcommittee on Style.

XIII. Next Meeting.



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 6/4/93

(Standing Committee)

Chairman:

Honorable Robert E. Keeton United States District Judge Room 306, John W. McCormack Post Office & Courthouse Boston, Massachusetts 02109	Area Code 617 223-9242 FAX-617-223-9241

Members:

Honorable Dolores K. Sloviter Chief Judge, U.S. Court of Appeals 18614 United States Courthouse Independence Mall West 601 Market Street Philadelphia, Pennsylvania 19106	Area Code 215 597-1588 FAX-215-597-2371
Honorable George C. Pratt United States Circuit Judge Uniondale Avenue at Hempstead Turnpike Uniondale, New York 11553	Area Code 516 485-6510 FAX-516-485-6582
Honorable Frank H. Easterbrook United States Circuit Judge 219 South Dearborn Street Chicago, Illinois 60604	Area Code 312 435-5808 FAX-312-435-7543
Honorable William O. Bertelsman United States District Judge P.O. Box 1012 Covington, Kentucky 41012	Area Code 606 655-3800 FAX-606-431-0296
Honorable Thomas S. Ellis, III United States District Judge P.O. Box 21449 200 South Washington Street Alexandria, Virginia 22320	Area Code 703 557-7817 FAX-703-557-2830
Honorable Alicemarie H. Stotler United States District Judge 751 West Santa Ana Boulevard P.O. Box 12339 Santa Ana, California 92701	Area Code 714 836-2055 FAX-714-836-2062

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Honorable Edwin J. Peterson
Chief Justice, Supreme Court
of Oregon
Supreme Court Building
1163 State Street
Salem, Oregon 97310

Area Code 503
378-6026
FAX-503-373-7536

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

Area Code 512
471-5151
FAX-512-477-8149

Professor Thomas E. Baker
Texas Tech University
School of Law
18th & Hartford, Box 40004
Lubbock, Texas 79409-0004

Area Code 806
742-3992
FAX-806-742-1629

William R. Wilson, Esquire
Wilson, Engstrom, Corum & Dudley
809 West Third Street
Little Rock, Arkansas 72201

Area Code 501
375-6453
FAX-501-375-5914

Alan W. Perry, Esquire
Forman, Perry, Watkins & Krutz
188 East Capitol Street, Suite 1200
P.O. Box 22608
Jackson, Mississippi 39225-2608

Area Code 601
960-8600
FAX-601-960-8613

Alan C. Sundberg, Esquire
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
5th Floor, First Florida Bank Bldg.
P.O. Drawer 190
Tallahassee, Florida 32302

Area Code 904
224-1585
FAX-904-222-0398

Attorney General (ex officio)
U.S. Dept. of Justice
10th & Constitution Ave., N.W.
Washington, D.C. 20530

Reporter:

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

Area Code 617
552-4340
FAX-617-552-2615

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Liaison Member:

Honorable Wilfred Feinberg
United States Circuit Judge
United States Courthouse
Foley Square
New York, New York 10007

Area Code 212
791-0901

FAX-212-791-8738

Consultants:

Joseph F. Spaniol, Jr.
Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

Mary P. Squiers, Asst. Prof.
Boston College Law School
885 Centre Street
Newton, Massachusetts 02159

Area Code 617
552-8851

FAX-617-552-2615

Bryan A. Garner
LawProse, Inc.
Sterling Plaza, 5949 Sherry Lane
Suite 1280, L.B. 115
Dallas, Texas 75225

Area Code 214
691-8588

FAX-214-691-9294
358-5380

Secretary:

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

Area Code 202
273-1820

FAX-202-273-1826

ADVISORY COMMITTEE ON APPELLATE RULES

Chairman:

Honorable Kenneth F. Ripple
United States Circuit Judge
208 Federal Building
204 South Main Street
South Bend, Indiana 46601

Area Code 219
236-8744

FAX-219-236-8784

Members:

Honorable E. Grady Jolly
United States Circuit Judge
James O. Eastland Courthouse Bldg.
245 E. Capitol St., Room 202
Jackson, Mississippi 39201

Area Code 601
965-4165

FAX-601-965-5436

Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66061

Area Code 913
782-9293

FAX-913-782-9855

Honorable Stephen F. Williams
United States Circuit Judge
United States Courthouse
3rd & Constitution Avenue, NW
Washington, DC 20001

Area Code 202
273-0638

FAX-202-273-0976

Honorable Danny J. Boggs
United States Circuit Judge
220 Gene Snyder U.S. Courthouse
6th & Broadway
Louisville, Kentucky 40202

Area Code 502
582-6492

FAX-502-582-6500

Honorable Cynthia H. Hall
United States Circuit Judge
125 South Grand Avenue
P.O. Box 91510
Pasadena, California 91109-1510

Area Code 818
405-7300

FAX-818-405-7126

Honorable Arthur A. McGiverin
Chief Justice, Supreme Court of Iowa
State Capitol
Des Moines, Iowa 50319

Area Code 515
281-5174

FAX-515-242-6164

Solicitor General (ex officio)
(Robert E. Kopp, Esquire
Director, Appellate Staff,
Civil Division)
United States Department
of Justice
Washington, DC 20530

Area Code 202
514-3311

FAX-202-514-8151

ADVISORY COMMITTEE ON APPELLATE RULES (CONTD.)

Donald F. Froeb, Esquire
Mitten, Goodwin & Raup
3636 North Central Avenue
Suite 1200
Phoenix, Arizona 85012

Area Code 602
650-2012

FAX-602-264-7033

Luther T. Munford, Esquire
Phelps Dunbar
2829 Lakeland Drive
Jackson, Mississippi 39208

Area Code 601
939-3895

FAX-601-932-6411

Reporter:

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, Indiana 46556

Area Code 219
631-5866

FAX-219-631-6371

Liaison Member:

Honorable Dolores K. Sloviter
Chief Judge, U.S. Court of Appeals
18614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Area Code 215
597-1588

FAX-215-597-2371

Secretary:

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

Area Code 202
273-1820

FAX-202-273-1826

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chairman:

Honorable Edward Leavy
United States Circuit Judge
216 Pioneer Courthouse
555 S.W. Yamhill Street
Portland, Oregon 97204-1396

Area Code 503
326-5665

FAX-503-326-5718

Members:

Honorable Alice M. Batchelder
United States Circuit Judge
143 West Liberty Street
Medina, Ohio 44256

Area Code 216
722-8852

FAX-216-723-4410

Honorable Harold L. Murphy
United States District Judge
P.O. Drawer 53
Rome, Georgia 30162-0053

Area Code 706
291-5626

FAX-404-291-5688

Honorable Joseph L. McGlynn, Jr.
United States Senior District Judge
16614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Area Code 215
597-3622

FAX-215-597-2134

Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Area Code 504
589-2795

FAX-504-589-4479

Honorable James J. Barta
United States Bankruptcy Judge
One Metropolitan Square
211 North Broadway, Seventh Floor
St. Louis, Missouri 63102-2734

Area Code 314
425-4222,Ext.321

FAX-314-425-4753

Honorable James W. Meyers
Chief Judge, United States
Bankruptcy Court
940 Front Street
San Diego, California 92189

Area Code 619
557-5622

FAX-619-557-5536

Honorable Paul Mannes
Chief Judge, United States
Bankruptcy Court
451 Hungerford Drive
Rockville, Maryland 20850

Area Code 301
443-7023

FAX-301-227-6452

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Professor Charles J. Tabb University of Illinois College of Law 504 East Pennsylvania Avenue Champaign, Illinois 61820	Area Code 217 333-2877 FAX-217-244-1478
Ralph R. Mabey, Esquire LeBouef, Lamb, Leiby and MacRae 1000 Kearns Building 136 South Main Street Salt Lake City, Utah 84101	Area Code 801 355-6900 FAX-809-359-8256
Herbert P. Minkel, Jr., Esquire Fried, Frank, Harris, Shriver and Jacobson One New York Plaza, Suite 2500 New York, New York 10004-1980	Area Code 212 820-8035 FAX-212-747-1525
Henry J. Sommer, Esquire Community Legal Services, Inc. 3207 Kensington Avenue, 5th Floor Philadelphia, Pennsylvania 19134	Area Code 215 427-4898 FAX-215-427-4895
Kenneth N. Klee, Esquire Stutman, Treister & Glatt 3699 Wilshire Boulevard, Suite 900 Los Angeles, California 90010	Area Code 213 251-5100 FAX-213-251-5288
Gerald K. Smith, Esquire Lewis and Roca 40 North Central Avenue Phoenix, Arizona 85004-4429	Area Code 602 262-5348 FAX-602-262-5747

Reporter:

Professor Alan N. Resnick Hofstra University School of Law Hempstead, New York 11550	Area Code 516 463-5930 FAX-516-481-8509

Liaison Member:

Honorable Thomas S. Ellis, III United States District Judge P.O. Box 21449 200 South Washington Street Alexandria, Virginia 22320	Area Code 703 557-7817 FAX-703-557-2830

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Bankruptcy Clerk:

Richard G. Heltzel
Clerk, United States Bankruptcy Court
8038 United States Courthouse
650 Capitol Mall
Sacramento, California 95814

Area Code 916
551-2678

FAX-916-551-2569

Representative from Executive Office for United States Trustees:

John E. Logan, Esquire
Director
Executive Office for
United States Trustees
901 E Street, NW, Room 700
Washington, DC 20530

Area Code 202
307-1391

FAX-202-307-0672

Secretary:

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

Area Code 202
273-1820

FAX-202-273-1826

ADVISORY COMMITTEE ON CIVIL RULES

Chairman:

Honorable Sam C. Pointer, Jr.
Chief Judge, United States
District Court
882 United States Courthouse
1729 5th Avenue North
Birmingham, Alabama 35203

Area Code 205
731-1709

FAX-205-731-2243

Members:

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Area Code 215
597-0859

FAX-215-597-6913

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

Area Code 410
962-4210

FAX-410-962-2277

Honorable David S. Doty
United States District Judge
609 United States Courthouse
110 South 4th Street
Minneapolis, Minnesota 55401

Area Code 612
348-1929

FAX-612-348-1820

Honorable Stewart A. Newblatt
United States District Judge
140 Federal Building
600 Church Street
Flint, Michigan 48502

Area Code 313
766-5040

FAX-313-766-5027

Honorable Richard W. Holmes
Chief Justice, Supreme Court of Kansas
Kansas Judicial Center
301 West Tenth Street
Topeka, Kansas 66612

Area Code 913
296-4898

FAX-913-296-1863

Honorable Wayne D. Brazil
United States Magistrate Judge
U.S. District Court
450 Golden Gate Avenue, P.O. Box 36008
San Francisco, California 94102

Area Code 415
556-2442

FAX-415-556-6147

Attorney General (ex officio)
(Dennis G. Linder, Esquire
Director, Federal Programs Branch,
Civil Division), U.S. Dept. of Justice
Washington, DC 20530

Area Code 202
514-3314

FAX-202-616-8202

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Dean Mark A. Nordenberg University of Pittsburgh School of Law 3900 Forbes Avenue Pittsburgh, Pennsylvania 15260	Area Code 412 648-1401 FAX-412-648-2647
Carol J. Hansen Fines, Esquire Giffin, Winning, Cohen & Bodewes, P.C. One West Old State Capitol Plaza Suite 600 P.O. Box 2117 Springfield, Illinois 62705	Area Code 217 525-1571 FAX-217-525-1710
Mark O. Kasanin, Esquire McCutchen, Doyle, Brown & Enersen Three Embarcadero Center San Francisco, California 94111	Area Code 415 393-2144 FAX-415-393-2286
Francis H. Fox, Esquire Bingham, Dana & Gould 150 Federal Street Boston, Massachusetts 02110	Area Code 617 951-8000 FAX-617-951-8736
Phillip A. Wittmann, Esquire Stone, Pigman, Walther, Wittmann & Hutchinson 546 Carondelet Street New Orleans, Louisiana 70130-3588	Area Code 504 581-3200 FAX-504-581-3361

Reporter:

Edward H. Cooper Associate Dean University of Michigan Law School 312 Hutchins Hall Ann Arbor, Michigan 48109-1215	Area Code 313-764-4347 FAX-313-764-8309

Liaison Member:

Honorable William O. Bertelsman United States District Judge P.O. Box 1012 Covington, Kentucky 41012	Area Code 606 655-3800 FAX-606-431-0296

Secretary:

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

ADVISORY COMMITTEE ON CRIMINAL RULES

Chairman:

Honorable William Terrell Hodges
United States District Judge
United States Courthouse, Suite 512
311 West Monroe Street
Jacksonville, Florida 32202

Area Code 904
232-1852

FAX-904-232-2245

Members:

Honorable W. Eugene Davis
United States Circuit Judge
556 Jefferson Street, Suite 300
Lafayette, Louisiana 70501

Area Code 318
264-6664

FAX-318-264-6685

Honorable Sam A. Crow
United States District Judge
430 U.S. Courthouse
444 SE Quincy Street
Topeka, Kansas 66683-3501

Area Code 913
295-2626

FAX-913-295-7615

Honorable D. Lowell Jensen
United States District Judge
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Area Code 415
556-9222

FAX-415-556-2625

Honorable George M. Marovich
United States District Judge
United States District Court
219 South Dearborn Street
Chicago, Illinois 60604

Area Code 312
435-5590

FAX-312-435-7578

Honorable Joseph H. Rodriguez
United States District Judge
418 United States Courthouse
and Post Office
401 Market Street
Camden, New Jersey 08101

Area Code 609
757-5002

FAX-609-757-5175

Honorable B. Waugh Crigler
United States Magistrate Judge
United States District Court
255 West Main Street, Room 328
Charlottesville, Virginia 22901

Area Code 804
296-7779
FAX-804-296-5585

Attorney General (ex officio)
(Roger Pauley, Esquire
Director, Office of Legislation)
U.S. Department of Justice
Criminal Division, Room 2244
Washington, DC 20530

Area Code 202
514-3202

FAX-202-514-4042

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Professor Stephen A. Saltzburg George Washington University National Law Center 720 20th Street, NW, Room 308 Washington, DC 20052	Area Code 202 994-7089 FAX-202-994-9446
John Doar, Esquire Doar, Devorkin, & Rieck 233 Broadway, 10th Floor The Woolworth Building New York, New York 10279	Area Code 212 619-3730 FAX-212-962-5037
Tom Karas, Esquire Tom Karas, Ltd. 101 North First Avenue, Suite 2470 Phoenix, Arizona 85003	Area Code 602 271-0115 FAX-602-271-0914
Rikki J. Klieman, Esquire Klieman, Lyons, Schindler, Gross & Pabian 21 Custom House Street Boston, Massachusetts 02110	Area Code 617 737-4777 FAX-617-737-4778
Edward F. Marek, Esquire Federal Public Defender 1660 West 2nd Street, Suite 750 Cleveland, Ohio 44113	Area Code 216 522-4856 FAX-216-522-4321

Reporter:

Professor David A. Schlueter St. Mary's University of San Antonio School of Law One Camino Santa Maria San Antonio, Texas 78284	Area Code 210 436-3308 FAX-210-436-3717

Liaison Member:

William R. Wilson, Esquire Wilson, Engstrom, Corum & Dudley 809 West Third Street Little Rock, Arkansas 72201	Area Code 501 375-6453 FAX-501-375-5914

Secretary:

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

ADVISORY COMMITTEE ON EVIDENCE RULES

Chairman:

Honorable Ralph K. Winter, Jr.
United States Circuit Judge
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511

Area Code 203
773-2353

FAX-203-773-2415

Members:

Honorable Jerry E. Smith
United States Circuit Judge
12621 United States Courthouse
515 Rusk Avenue
Houston, Texas 77002-2698

Area Code 713
250-5101

FAX-713-250-5719

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
556-4971

FAX-415-556-9291

Honorable Milton I. Shadur
United States District Judge
United States District Court
219 South Dearborn Street
Room 2388
Chicago, Illinois 60604

Area Code 312
435-5766

FAX-312-435-7578

Honorable James T. Turner
United States Court
of Federal Claims
717 Madison Place, NW
Washington, DC 20005

Area Code 202
219-9574

FAX-202-219-9997

Honorable Harold G. Clarke
Chief Justice
Supreme Court of Georgia
Room 572
244 Washington Street, SW
Atlanta, Georgia 30334

Area Code 404
656-3472

FAX 404-656-2253

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

Area Code 919
962-4112 (a.m.)
and
968-2714 (p.m.)
FAX-919-962-1277

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Gregory P. Joseph, Esquire Fried, Frank, Harris, Shriver & Jacobson One New York Plaza New York, New York 10004-1980	Area Code 212 820-8052 FAX-212-820-8584
James K. Robinson, Esquire Honigman Miller Schwartz & Cohn 2290 First National Building Detroit, Michigan 48226	Area Code 313 256-7534 FAX-313-962-0176
John M. Kobayashi, Esquire Kobayashi & Associates, P.C. 1775 Sherman Street, Suite 2100 Denver, Colorado 80203	Area Code 303 861-2100 FAX-861-1944

Liaison Members:

Honorable Wayne D. Brazil United States Magistrate Judge United States District Court 450 Golden Gate Avenue P.O. Box 36008 San Francisco, California 94102	Area Code 415 556-2442 FAX-415-556-6147
Professor Stephen A. Saltzburg George Washington University National Law Center 720 20th Street, NW, Room 308 Washington, DC 20052	Area Code 202 994-7089 FAX-202-994-9446

Reporter:

Margaret A. Berger Associate Dean and Professor of Law Brooklyn Law School 250 Joralemon Street Brooklyn, New York 11201	Area Code 718 780-7941 FAX-718-780-0368

Secretary:

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

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

Judith W. Krivit
Staff Assistant, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

Anne Rustin
Secretary, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

Patricia S. Channon
Deputy Assistant Chief, Bankruptcy
Division
Administrative Office of the
United States Courts
Washington, DC 20544

Area Code 202
273-1900

FAX-202-273-1917

AGENDA I
Washington, D.C.
June 17-19, 1993

ORAL PRESENTATION

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of December 17-19, 1992
Asheville, North Carolina

The winter 1992 meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Asheville, North Carolina on Thursday, Friday, and Saturday, December 17-19, 1992. The following members were present:

Judge Robert E. Keeton (chairman)
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Alan W. Perry, Esquire
Chief Justice Edwin J. Peterson
Judge George C. Pratt
Judge Dolores K. Sloviter
Judge Alicemarie H. Stotler
William R. Wilson, Esquire

Also present were Dean Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, and John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office. Judge Thomas S. Ellis, III, Professor Charles Alan Wright and Deputy Attorney General George J. Terwilliger, III, were unable to attend. Paul Cappuccio attended the meeting to represent the Department of Justice in the absence of Paul Terwilliger.

Representing the advisory committees in attendance were:

Advisory Committee on Appellate Rules - Judge Kenneth F. Ripple, chairman, and Professor Carol Ann Mooney, reporter;

Advisory Committee on Bankruptcy Rules - Judge Edward Leavy, chairman, and Professor Alan N. Resnick, reporter;

Advisory Committee on Civil Rules - Judge Sam C. Pointer, Jr., chairman, and Dean Edward H. Cooper, reporter; and

Advisory Committee on Criminal Rules - Judge William Terrell Hodges, chairman, and Professor David A. Schlueter, reporter.

Also participating in the meeting were Joseph F. Spaniol, Jr. and Brian R. Garner, consultants to the committee, Mary P. Squiers, project director of the local rules project, and William B. Eldridge, director of the Research Division of the Federal Judicial Center.

INTRODUCTION

Judge Keeton reported that the Judicial Conference at its September 1992 meeting had approved all the rule amendments submitted by the standing committee, with the exception of civil rule 56. He noted that some members of the Conference had argued that the summary judgment rule was working well in its present form and that judges had become familiar with the language of the rule and the current case law. He also detected a criticism by some Conference members that too many changes were being proposed in the rules. Judge Pointer added that some members seemed not to like the case law on Rule 56 and might not have wanted to enshrine it in the rule.

Judge Keeton reported that the Advisory Committee on the Rules of Evidence had just been reactivated and that the Chief Justice had named Judge Ralph K. Winter as chairman. The other committee members and cross-members from the other advisory committees had not yet been named, however. Judge Keeton added that he and Judge Winter had made initial plans for the first meetings and public hearings of the new committee.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Ripple presented the report of the advisory committee, as set forth in his memorandum of December 1, 1992. (Agenda Item II). He recommended that the standing committee: (1) approve the proposed amendments to Fed.R.App.P. 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 32, 33, 35, and 41, plus a proposed new rule 49, (2) join these amendments with amendments to rules 25, 28, 38, and 40 approved by the standing committee in June 1992, and (3) include all the above in a single package for publication and public comment.

Judge Ripple opened his remarks with two points regarding the amendments proposed by his committee:

(1) Most of the proposed amendments were derived from the work of the local rules project.

(2) Some of the proposed amendments were technical in nature, dealing with the form of papers on appeal.

The standing committee proceeded to consider and approve the package of proposed amendments, making the changes described in the following paragraphs.

Fed.R.App.P. 26.1

At the suggestion of Mr. Wilson, Judge Ripple agreed to substitute the word "different" for the words "greater or lesser" in the committee note to rule 26.1. The change would conform the note to the usage in the text of rule 26.1 and rule 30.

Fed.R.App.P. 9

The committee discussed in detail the language of rule 9, focusing in large part on the interrelationship between its subdivisions (a) and (b) (dealing with appellate review of release orders before and after judgment, respectively). The committee voted: (1) to eliminate the words "of conviction" in the heading of subdivision (a); (2) to eliminate the words "the terms of" on line 19; (3) to insert the words "a copy of the judgment of conviction" on lines 20-21 in lieu of "a record of the offense or offenses of which the defendant was convicted and the date and terms of the sentence"; (4) to place the heading to subdivision (c) in italics; (5) to eliminate the third sentence of the paragraph of the committee note; and (6) to insert a comma before the words "if possible" at the end of the second sentence of that paragraph.

The committee considered whether it was advisable to delete the words "a copy of" in line 6. Judge Easterbrook pointed out that the legal distinctions between originals and copies were no longer meaningful. While considerable support was expressed for the general principle of eliminating the word "copy" throughout the rules, the committee decided that elimination of the term at this time might create confusion and inconsistencies. By a vote of 6-2, the committee voted to retain the term "copy" in the text of the proposed amendment to rule 9, at lines 6 and 20-21, and to refer the matter of usage of the term to the style revision project.

The committee also considered whether the term "shall" should be changed to "must" in rule 9 to conform with the current usage of the style subcommittee. Concern was expressed, however, that the text of other amendments distributed for public comment had not yet been "stylized," and that confusion could be created because of different usages in the different packages. By a vote of 4-1, with several abstentions, the committee decided not to make the change from "shall" to "must." Judge Pointer advised that the word "must" in line 20 was in fact consistent with prior usage of the style subcommittee (i.e., that the papers "must" include a copy of the judgment).

General support was expressed by the members for a suggestion of Judge Sloviter that the first sentence of rule 9, which requires a district judge to state the reasons for an order regarding release or detention of a criminal defendant, would be more effective if placed in the Federal Rules of Criminal Procedure (or perhaps in both the appellate and criminal rules). Judge Hodges agreed to place the matter on the agenda of the next meeting of the Advisory Committee on Criminal Rules.

Fed.R.App.P. 21

The proposed amendments to rule 21 would: (1) prescribe that a petition for mandamus not bear the name of the lower court judge, (2) presume that the trial judge would not wish to appear before the court of appeals, and (3) require that the judge be represented pro forma by counsel for the party opposing the relief. General support was expressed by the members regarding the essential purposes of the amendments. Professor Mooney pointed out, moreover, that six of the circuits currently have local rules in place similar to the proposed rule 21.

Considerable discussion ensued as to the manner in which the revised rule would operate in an individual case, particularly where a district judge wished to appear in the action. Judge Bertelsman argued that a district judge should have the right to appear in the exceptional case where the parties are not inclined to support a judge's procedural rulings.

Judge Easterbrook suggested that there was no reason for treating mandamus actions differently from appeals. He recommended that rule 21 be recast to reflect the reality that:

(1) The district judge is not a party in a mandamus action, as it is really akin to an appeal.

(2) The parties should represent themselves.

(3) If the judge wishes to be a party, the judge may ask the court of appeals to participate.

Judge Ripple agreed to withdraw the proposed amendments to rule 21(a) and (b) and take the matter back to his advisory committee because the changes discussed by the standing committee would represent a substantial change from the advisory committee draft. Rule 21(d), however, would remain in the package for publication.

Fed.R.App.P. 32 and 33

The committee voted to delete the words "not exceeding" on line 17 of rule 32, dealing with the size of pages in briefs.

Judge Ripple agreed to withdraw the last sentence of the proposed amendments to rule 33, addressing the confidentiality of statements made in settlement discussions and their non-disclosure to judges of the court. He stated that the sentence was not necessary since the court of appeals is given sufficient authority in the preceding

sentence to enter orders controlling the course of proceedings or implementing settlement agreements.

The standing committee voted unanimously to publish the proposed amendments to the appellate rules -- together with the amendments in rules 25 and 38 approved in June 1993 -- and to seek public comment during a period that would end on April 15, 1993.

ACCELERATED PUBLIC COMMENT PERIOD

Judge Keeton stated that the committee needed to make a specific finding of need for an accelerated public comment period with regard to each of the sets of rules. He pointed out that the Procedures for the Conduct of Business by the Rules Committees specify that the public comment period should be at least six months unless a shorter period is approved by the standing committee or its chairman when they determine that "the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period." The procedures then require that whenever such an exception to the comment period is made, the standing committee must advise the Judicial Conference of the exception and the reasons for it.

Judge Keeton stated that some history was in order. In October, in the closing days of the last Congress, proposals had been advanced in the House Judiciary Committee to change the rules of evidence to include new proposals dealing with violence against women. Judge Marcus, chairman of the Federal-State Jurisdiction Committee, attended the House hearings and coordinated his remarks with Judge Geary, chairman of the Executive Committee, and Judge Keeton. Judge Marcus pledged that the proposed rule changes would be placed before the rules committees of the Judicial Conference for handling on an accelerated basis.

The committee thereupon approved the following resolution formulated by Judge Easterbrook:

> The standing committee is shortening the normal time period for public comment because representations were made to the Congress that the Judicial Conference would proceed on an accelerated basis to consider appropriate revisions to the rules of evidence regarding the admissibility of evidence of a victim's past sexual behavior or predisposition.

On the suggestion of Judge Sloviter, the committee adopted the following resolution with regard to the need to consider the proposed revisions in the appellate rules on an accelerated basis:

> It is in the public interest to shorten the time for public comment with respect to these rules so that they can be considered along with other proposed rules, which together constitute a comprehensive package of proposed rules directed to the Federal Rules of Appellate Procedure.

The committee subsequently adopted the same resolution with regard to the other sets of rules to be published for public comment.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Pointer presented the report of the advisory committee, as set forth in his memorandum of November 20, 1992. (Agenda Item IV) He offered three items for consideration:

(1) A brief status report on the style revisions being made to the civil rules (for information purposes only).

(2) A request for authority to publish proposed revisions to rules 83 and 84, noting that: (a) these two rules had been before the standing committee before, and (b) they directly affected the work of the other advisory committees.

(3) A joint proposal, with the Advisory Committee on Criminal Rules, to rewrite evidence rule 412, governing evidence of past sexual behavior or predisposition of an alleged victim of sexual misconduct.

Style Revisions

Judge Pointer noted that the style subcommittee, chaired by Professor Wright, had just completed a proposed redraft of the Federal Rules of Civil Procedure that included all the civil rules other than the amendments currently pending before the Supreme Court. He reported that the advisory committee had considered the redraft at its November meeting and was very positive about the changes. The committee devoted its attention to the proposed style conventions and concepts adopted by the style subcommittee and did not attempt to approve actual changes in language.

Judge Pointer added that he had prepared a style redraft of the amendments pending before the Supreme Court. His redraft would first be sent to three ad hoc subgroups of his advisory committee for detailed analysis and markup and then to the full committee. Judge Pointer stated that the advisory committee preferred not to make these draft revisions public at this point in order to avoid confusion, since different text is pending before the Court. He argued that when the style revisions are complete, they should be published with a 9-month public comment period.

Judge Keeton suggested that it might be preferable to send Judge Pointer's redraft first to the style subcommittee before consideration by the subgroups. Judge Pointer responded that he preferred to expedite the process by having Brian Garner make a quick review of the document, rather than pass it through the style subcommittee. He added that the subcommittee could best use its scarce time in redrafting the admiralty rules.

Fed.R.Civ.P. 83 and 84

In discussing the proposed amendments to rule 83, the standing committee engaged in considerable discussion regarding the undesirability of local standing orders. Judge Easterbrook pointed out that there are two problems with standing orders. First, no notice is given to the parties to enable them to protect themselves against local procedural traps. Second, standing orders do not comply with the local rules approval process, as prescribed in statute and national rule.

Several members argued that attorneys are entitled either: (1) to publication of procedures in the local rules of a court, or (2) to service of an order on them in each individual case.

The committee decided to have the advisory committee chairs and reporters get together during the Friday lunch break to prepare common rules for consideration by the standing committee. The rules would then be sent back to the various advisory committees for consideration.

Fed.R.Evid. Rule 412

Judge Pointer stated that the primary impetus for amending evidence rule 412 was essentially to forestall action by the Congress and to avoid a bypass of the Rules Enabling Act process. He pointed out that the Advisory Committee on Civil Rules had considered a draft of rule 412 prepared by the Advisory Committee on Criminal Rules and had offered certain changes in the text of both the rule and the advisory note. He added that there were only three remaining, non-substantive differences between the two committee versions:

(1) The criminal committee draft was based on the current two-part structure of rule 412, which begins with a general rule that evidence of past sexual behavior or predisposition is not admissible. The draft then proceeded to state the exceptions to the rule in a separate subdivision. The civil committee draft, on the other hand, collapsed the two statements into one as a matter of style and conciseness.

(2) The criminal committee version provided that evidence must not be "admitted" unless there is a sealed motion. The civil committee version provided that evidence must not be "offered."

(3) There were minor differences between the respective committee notes.

Judge Pointer recommended the alternate formulation for subdivision (a)(4) found in footnote 1 of his draft, but he pointed out that it had not been considered by his advisory committee.

Judge Easterbrook expressed concern that subdivisions (b)(3) and (b)(4) of the distributed draft, when read together, might create an implication that one may violate constitutional rights in civil cases, but not in criminal cases. He suggested that (3) and (4) could be merged to provide that evidence be admitted in both civil and criminal cases if essential to a fair and accurate determination. Judge Pointer responded that this solution would be politically unacceptable to the supporters of the pending legislation. He added that the constitutional standard found in (3) could be added to (4), but the advisory committee consciously decided to adopt a more lenient standard of admissibility in civil cases.

Judge Ripple echoed Judge Easterbrook's concern about the different standards that would apply in civil and criminal cases. He suggested that the public comments might well be enlightening on this point and expressed concern that the comment period would be less than the usual six months. Judge Keeton agreed that the short period was a problem, but he stated that the Judicial Conference had made a clear representation to the Congress that the rules committees would consider evidence rule 412 on a fast track basis.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Hodges noted that the proposed amendments to rules 16 and 29 had been approved previously by the standing committee for publication. He directed the committee's attention to proposed amendments to evidence rule 412 and criminal rules 32 and 40. (Agenda Item X)

Fed.R.Evid. 412

Professor Schlueter stated that a subcommittee of the advisory committee had been working on potential changes in the evidence rules for a year and a half. The proposed reformulation of rule 412 had been prepared as an alternative to pending Congressional proposals. It was superseded by later drafts, prepared in consultation with the Advisory Committee on Civil Rules. Professor Schlueter informed the committee that his remarks would be directed to the "Fall 1992 Draft" version of rule 412 circulated to the committee earlier in the meeting.

He reiterated Judge Pointer's observation that the two advisory committee drafts before the standing committee were virtually identical except for style. The criminal committee's version contained separate subdivisions (a) and (b) in order to emphasize the strong policy of excluding evidence of sexual behavior. In this respect, the criminal committee draft was closer to the Congressional intent, although it took more words to say the same thing as the civil committee draft.

In consultation with Judge Hodges, Professor Schlueter agreed to adopt the civil committee's use of the word "offered," rather than "admitted" on line 50 of the draft, since it would strengthen the general policy of exclusion. The committee agreed to the change.

Professor Schlueter stated that the few remaining differences between the respective committee notes could be worked out readily.

Judge Sloviter recommended eliminating the words "including evidence in the form of reputation of opinion" from lines 43-44 of the draft. She urged caution in drafting because the committee could in effect be writing the first explicit rule sanctioning the admissibility of reputation evidence regarding sexual behavior. Presently, the matter is left to ad hoc determination by the courts. She added that her concern related only to criminal cases because reputation evidence was appropriate in a civil case where reputation itself is an issue. Professor Schlueter added that evidence may be excluded by a judge under rules 402 and 403 as irrelevant or prejudicial.

Dean Cooper pointed out that rule 412 currently does not apply in civil cases. What subdivision (4) would do is first expand the exclusion of evidence to civil cases and then make exceptions to the exclusion for civil cases involving reputation. Thus, the amended rule would in effect create a new exclusion for civil cases. He suggested that it would be better to delete the words "including evidence in the form of reputation or opinion," as recommended by Judge Sloviter. Judge Hodges agreed, but added that it was necessary to retain the committee note's reference to reputation and opinion evidence.

Mr. Garner suggested that the antecedent of the phrase "when offered" in line 45 of the draft was ambiguous. He recommended adding the words "either type of evidence is" before the word "offered." Mr. McCabe recommended inserting a comma in line 43 before the words "or other evidence."

Judge Keeton suggested eliminating the words "of the victim" on line 45, and Judge Sloviter recommended eliminating the word "the" on line 44. Mr. Cappuccio suggested adding the word "alleged" before the word "victim" on line 36.

Judge Sloviter recommended that on lines 60-62 the rule should give the trial court discretion to decide whether to impound a motion and record of a hearing, rather

than require that they be sealed. She further suggested adding the words ", unless otherwise ordered," on line 61 and deleting the words "in the trial and appellate courts" on line 62.

These various changes were approved by the committee. It thereupon voted to approve the text of rule 412, as amended, and to authorize an expedited comment period to end April 15, 1993. It was further agreed that the reporters for the standing, civil, and criminal committees would work out the final language of the advisory committee note.

Fed.R.Crim.P. 32

Judge Hodges noted that the advisory committee's proposed reformulation of rule 32 would accomplish two results:

(1) It would incorporate elements of the 1987 model rule approved by the Criminal Law Committee of the Judicial Conference.

(2) It would reorganize the rule to place its provisions in a more logical and sequential order.

He pointed out that the rule had some new features:

(1) It would establish a 70-day time period from a finding of guilt to imposition of sentence whenever a presentence investigation and report were ordered. The probation office must complete the report in 35 days, and the report must be given to the court 7 days before imposition of sentence.

(2) Rule 32(d)(2) would require the presence of counsel at the interview of the defendant by the probation officer.

(3) Rule 32(b)(5) would require the probation officer to provide the report to the parties with time for them to file and resolve objections. The probation officer would be given the right to conduct a conference and require the presence of the defendant and counsel to resolve objections.

(4) Rule 32(b)(5)(D) would provide that the court may accept the findings contained in the presentence report if there were no objection.

Judge Hodges stated that the advisory committee, after considerable debate over the course of two meetings, had voted not to include a provision in the rule giving a right of victim allocution at the sentence hearing and certain other explicit victim rights.

Judges Easterbrook and Keeton inquired as to whether 35 days was sufficient time for the probation office to complete the report. Judge Hodges responded that the Probation and Pretrial Services Division of the Administrative Office and other persons had informed the committee that the time period was adequate.

Judge Bertelsman insisted that the rule should make it clear that the 70-day time limit was for the guidance of the court and was not intended to create any new rights for the defendant.

Mr. Wilson argued that victim allocution should be included in the rule. He stated that even though allocution may cause some problems and would rarely be used, it makes victims feel much better about the criminal justice system. No other member of the committee expressed agreement, and several pointed out that a district judge presently has discretion to allow or not allow victim allocution in a given case. Judge Sloviter suggested that the committee note highlight this fact.

Mr. Wilson suggested that there may be an inconsistency in subdivision (d)(2), in that line 194 refers to "property," while line 196 refers to "interest and property." Judge Hodges pointed out that the language came from the present rule, and Judge Keeton advised that the usage should be referred to the style subcommittee.

Judge Stotler stated that subdivision (c)(5) contained outdated provisions regarding the court's requirement to advise the defendant of the right of appeal. She pointed out that the defendant has the right to appeal any sentence. Accordingly, the committee agreed to eliminate the sentence beginning on line 177 regarding the right of appeal and the words "in a case which has gone to trial on a plea of not guilty" on lines 172-173.

During the lunch break, Judge Hodges and Mr. Garner made additional changes in the language of the rule, most of them addressing the language of the existing, unchanged portions of the rule. Mr. Garner suggested that further changes could be made overnight to improve the syntax and style of the entire rule and to remove all ambiguities. Professor Schlueter argued that the additional changes should be made promptly to avoid another year's delay in promulgating the revisions. Judge Stotler added strongly that it was most important to complete the revisions during the meeting and not wait another year for an improved rule 32.

Judge Keeton stated that the committee note should specify that the committee had considered, but rejected a provision requiring the district court to permit the victim's allocution at sentence.

The committee then approved, with one dissent, a motion by Judge Easterbrook to approve the recommendation of the advisory committee not to make victim allocution compulsory.

Judge Hodges agreed to add a sentence to the last paragraph of the committee note that would read as follows: "Under present practice, the court may permit, but is not required to hear, victim allocution before imposing sentence."

Following overnight drafting with Mr. Garner, Judge Hodges presented a final version of proposed rule 32 for consideration on Saturday morning. The committee then voted to approve for publication the draft submitted by Judge Hodges with one minor change suggested by Judge Pratt to change the word "proceeding" to the plural in the title on line 13 of page 4.

Fed.R.Crim.P. 40

The committee approved the change proposed in rule 40 that would make it clear that a magistrate judge has the authority to set conditions of release in cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction over the defendant.

The committee then approved publishing all four proposed rules (16, 29, 32, and 40) on an accelerated basis in a package with the other proposed rule amendments.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Leavy presented the report of the advisory committee, as set out in his memorandum of November 16, 1992. (Agenda Item IX) He proposed amendments to rules 8002 and 8006.

The changes in Rule 8002 would permit a post-trial motion for relief from a judgment or order to toll the time for appeal. (Bankruptcy rule 9024 generally incorporates civil rule 60.) The changes were intended by the advisory committee to conform to the 1993 amendments to appellate rules 4(a)(4) and 6(b)(2)(ii) and eliminate the "trap" of rule 4, which requires appellants to file a new notice of appeal if certain post-trial motions are filed.

The change in rule 8006 would suspend the 10-day period to designate the record if a timely post-judgment motion is made and the notice of appeal is superseded by operation of rule 8002.

Professor Resnick pointed out that the bankruptcy rules specify a short 10-day appeal period, compared to the 30-day appeal period of the civil rules. He stated that in appeals from the district court to the court of appeals there is little practical difference between filing and service. In bankruptcy, however, the appealing party must act quickly and be certain as to whether a post-trial motion has been filed. He added that the Advisory Committee on Bankruptcy Rules would consider amending rule 9023 at its February 1993 meeting.

Judge Keeton expressed concern over having to amend the rules piecemeal and asked whether there was a way to take care of the problem of the notice of appeal "trap" at one time. Professor Resnick responded that the better way to solve the problem would be to amend civil rule 59 and not amend the bankruptcy rules at all.

The members then noted several inconsistencies in current usage in the civil rules, e.g., rules 50, 59, and 60, a number of which are incorporated by the bankruptcy rules. Some refer to motions being "made," while others speak in terms of service, or filing, or both. Accordingly, the standing committee decided to ask the Advisory Committee on Civil Rules to conduct a general review of the inconsistent usage of these terms in the current rules.

The committee then approved bankruptcy rules 8002 and 8006 and voted to include them in the same package as the other rules, with an accelerated public comment period to end April 15, 1993. The committee further agreed that the proposed changes in the bankruptcy official forms be made without public comment because they consist merely of conforming amendments required by a recent statute, clarification of instructions to the forms, and changes to facilitate the processing of cases.

REPORT OF THE STYLE SUBCOMMITTEE

Mr. Garner reported that the style subcommittee had prepared a complete revision of the Federal Rules of Civil Procedure and had achieved an 18% reduction in the number of words. (Agenda Item V) In the process, the subcommittee had discovered a number of ambiguities in the language of the rules that merit attention by the advisory committee.

Judge Keeton stated that the new draft was much more readable and clear. He added that neither the advisory committee nor the style subcommittee was ready to submit any style changes for public comment at this point.

REPORT OF THE SUBCOMMITTEE ON SUBSTANTIVE AND NUMERICAL INTEGRATION OF THE RULES

Judge Pratt reported on the activity of his subcommittee to consider integration of the federal rules. The subcommittee's report laid out four potential options to achieve this goal. (Agenda Item VII)

Judge Pratt stated that the subcommittee was concerned that with all the matters pending before the standing committee, and in light of the potential criticism that the rules committees were tinkering too much with the rules, it would be best not to take formal action on integration at this time. Instead, the subcommittee decided to send the matter back to Dean Coquillette and Mary Squiers for a long range report and the development of new ideas. The subcommittee, however, retained as a conscious guide

the eventual removal of inconsistencies throughout the rules and other eventual improvements in the rules.

The committee voted unanimously to accept Judge Pratt's report and recommendations. Judge Keeton ruled that the subcommittee would not be dissolved, but would not be expected to perform any functions by the next meeting.

UNIFORM NUMBERING OF LOCAL RULES

Dean Coquillette reported that two competing, mutually exclusive forces were at work. On the one hand, the district judges of the Fourth Circuit recently had voted to oppose uniform numbering of local rules, stating that numbering should be left exclusively to local prerogative. On the other hand, representatives of the bar had criticized local court rules strongly for their lack of uniformity. He pointed out that uniform numbering of local rules was essential because it offered the only practical way for out-of-state lawyers to learn about local court procedures without exhaustive research. He added that a good deal of success had been achieved by the district courts on a voluntary basis in adopting the recommended uniform numbering system. He estimated an acceptance level of about 30%.

Several members suggested sending a letter to the courts seeking progress reports on their local rule renumbering efforts. The consensus of the committee, however, was for Dean Coquillette and Professor Squiers to make telephone calls to the circuit executives and present a progress report to the committee at its June meeting, coupled with any recommendations they wish to make.

PROPOSED UNIFORM RULE ON TECHNICAL AMENDMENTS

The five reporters, plus the chairmen of the appellate and bankruptcy advisory committees and staff, convened as an ad hoc subcommittee during the Friday lunch break and agreed upon common language for the various sets of rules regarding:

(1) the authority of the Judicial Conference to make technical changes in the rules,

(2) the authority of the Judicial Conference to prescribe a common numbering system for local court rules, and

(3) the authority of local courts to regulate proceedings before them through local rule and procedure.

With regard to a common rule on technical changes, the subcommittee adopted the proposed draft of Appellate Rule 50, making changes in it to: (1) narrow the rule by

removing the words "inconsistencies in grammar," (2) change the word "nonsubstantive" to "technical," and (3) remove the words "or to make other similar technical changes."

With regard to a common rule on uniform numbering of local rules, the subcommittee decided to propose Option 1 of Dean Coquillette's draft. (Agenda Item VI B) It provided that local rules must conform to any uniform numbering system prescribed by the Judicial Conference.

With regard to a common rule on the authority of local courts to regulate practice before them, the subcommittee decided that there had to be some differences in wording among the different sets of rules. The bankruptcy committee participants, for example, favored a reference to "these rules," rather than a specific statutory reference, as preferred in the civil rules. They also pointed to the need to make a special reference to the bankruptcy official forms. The appellate committee participants pointed out that the appellate rules needed to adopt a modified version of the common language because a court of appeals does not act by individual judges. Moreover, the circuit courts do not have a problem of standing orders because they have internal operating procedures.

It was agreed that the proposed common rules be returned to the respective advisory committees for consideration.

REPORT OF THE SUBCOMMITTEE ON LONG RANGE PLANNING

Judge Easterbrook presented the subcommittee's report on behalf of Professor Baker, who was absent. He stated that several documents regarding planning were presently available and should form the starting point for the committee's long range planning efforts. The documents, which explore improvements in court procedures, are: (1) the report of the Federal Courts Study Committee, (2) the report of the Council on Competitiveness, i.e., the Quayle or Starr committee report, (3) the ABA blueprint to improve the civil justice system, (4) the ongoing work of the ALI complex litigation project, and (5) the report of Subcommittee No. 3 of the Long Range Planning Committee of the Judicial Conference. He recommended that the advisory committees review these documents.

Two members of the committee expressed the view that the communication from the Long Range Planning Committee (Agenda Item XI) was too vague to be of guidance. Others pointed out, however, that the planning committee was merely initiating the process of soliciting the views of the other Judicial Conference committees as to what were the appropriate long range planning issues for the Judiciary and which committees should develop them.

Judge Keeton recommended that the reporter and chair of each advisory committee write back to him and to Dean Coquillette by January 4, 1993 with their identification of: (1) which of the issues identified by the Long Range Planning

Committee were presently on their agenda, and (2) which longer range issues were likely to be part of their future agendas.

THE COMMITTEE'S ROLE AND PROCEDURES

The committee discussed Judge Stotler's letter of July 31, 1992 regarding the philosophy of the task of the standing committee. (Agenda Item VIII) At the chairman's request, Mr. Spaniol presented a history of the rules committee process, including background on the drafting of the 1958 rules enabling legislation and the composition and work of the rules committees from 1960 to the present.

There was widespread agreement among the members that Judge Stotler's points regarding the role of the committee were well taken and should be discussed in further depth at future committee meetings.

Judge Keeton observed that the rules process had become more "political" than in the past, as more individuals and organizations had become interested in the outcome of rules amendments. Accordingly, the rules committees needed to be more alert to the political process. He also stated that the rules process had now become so active that concern had been expressed that there were too many changes and too frequent adjustments in the rules.

Judge Easterbrook stated that the prescribed 6-month public comment period, coupled with the normal January and June meeting dates of the standing committee, created serious operational difficulties. He suggested that the work of the committee could be streamlined either by changing the dates of the committee meetings or shortening the normal public comment period.

Judge Stotler suggested that the committee needed more automation assistance at its meetings, such as computers and a projecting screen so the members could review drafts on the spot.

Judge Easterbrook noted his concern regarding the interaction of style and substance. He argued that the standing committee was spending too much time on drafting and should spend more time on substance, rather than style.

Judge Hodges stated that he was concerned about last-minute, sometimes hectic rewriting of rules in order to meet pressing publication deadlines. He suggested that the advisory committee chairs might wish to address the problem jointly.

Judge Bertelesman pointed out that the agenda of the standing committee was very heavy and produced fatigue. He suggested exploring the advisability of more than two standing committee meetings a year to avoid fatigue.

Judge Keeton suggested that the standing committee might meet in September, after the Judicial Conference has acted on pending proposals and before new members are appointed. The public comment period might be shortened to four months, from November 1 through February 28, subject to a longer comment period for certain complex or controversial rules.

Judge Keeton added that he might consider appointing a subcommittee to review the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure and present recommendations at the June committee meeting. He invited the members to submit suggestions for improvements to Dean Coquillette for consideration at the June meeting.

ATTORNEY GENERAL BARR'S LETTER

The committee considered a letter from Attorney General Barr to the Chief Justice asking for assistance in eliminating the requirement in several court rules requiring government attorneys to pay local attorney admission fees.

At the suggestion of Judge Keeton, the committee decided to refer the letter to the civil, criminal, and appellate advisory committees, with an information copy to be sent to the bankruptcy advisory committee.

NEXT COMMITTEE MEETING

The committee decided to hold its next meeting on Thursday, Friday, and Saturday, June 17-19, 1993, at the Administrative Office in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

AGENDA III
Washington, D.C.
June 17-19, 1993

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF RULES COMMITTEE
SUPPORT OFFICE

June 3, 1993

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: Agenda Item III

The attached material compares the drafts proposed by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules on amendments concerning local rules and technical amendments with the draft provisions suggested at the Asheville meeting contained in the February 5, 1993 memorandum from Dean Daniel R. Coquillette to Judge Robert E. Keeton.

John K. Rabiej

Attachments

COMPARISON OF DRAFTS OF UNIFORM PROVISIONS PROPOSED BY THE ADVISORY RULES COMMITTEES

I. Technical and Conforming Amendments

A. February 5, 1993 Asheville Draft

"The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes."

1. Appellate Rules Committee Draft

Same as February 5 Asheville draft except it would substitute the word "amendments" for "changes" at the end of the sentence.

2. Bankruptcy Rules Committee Draft

Opposes February 5, 1993 Asheville draft. In the alternative, recommends that the rule stop after the word "typography."

3. Civil and Criminal Rules Committee Drafts

Same as February 5 Asheville draft.

II. Uniform Numbering of Local Rules

A. February 5, 1993 Asheville Draft

"Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States."

1. Appellate, Bankruptcy, and Criminal Committees Drafts

Same as February 5 Asheville draft.

2. Civil Rules Committee Draft

Incorporates February 5 Asheville draft into existing language, i.e. "A local rule must be consistent with Acts of Congress, consistent with -- but not duplicative of -- rules adopted under 28 U.S.C. §§ 2072 and 2075, and conform to any uniform numbering system prescribed by the Judicial Conference of the United States."

III. Procedure When There Is No Controlling Law

A. February 5 , 1993 Asheville Draft

"A judge may regulate practice in any manner consistent with federal ~~statutes~~ laws, these rules, [official forms - bankruptcy rules only], and ~~with~~ local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal ~~statutes~~ laws, these rules, [official forms - bankruptcy rules only], or the local district rules unless the alleged violator has had actual notice of the requirement."

1. Appellate Rules Committee Draft

A ~~judge~~ court of appeals may regulate practice in any manner consistent with federal ~~statutes~~ laws, rules, and ~~with~~ local rules of the ~~district~~ circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal statutes, rules, or the local ~~district~~ circuit rules unless the alleged violator has actual notice of the requirements.

2. Bankruptcy Rules Committee Draft

Bankruptcy Rule 8018

A bankruptcy appellate panel or district judge may regulate practice in any manner consistent with federal ~~statutes~~ laws, these rules, Official Forms, and ~~with~~ local rules of the circuit council or district court. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal ~~statutes~~ laws, rules, Official Forms, or the local ~~district~~ rules of the circuit council or district court unless the alleged violator has actual notice of the requirement.

Bankruptcy Rule 9029

A judge may regulate practice in any manner consistent with federal ~~statutes~~ laws, these rules, Official Forms, and ~~with~~ local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal ~~statutes~~ laws, rules, Official Forms, or the local ~~district~~ rules of the district unless the alleged violator has actual notice of the requirement.

3. Civil Rules Committee Draft

A judge may regulate practice in any manner consistent with federal ~~statutes~~ laws, rules adopted under 28 U.S.C. §§ 2072 and 2075, and ~~with~~ local rules ~~of the district~~. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal ~~statutes~~ laws, federal rules, or the local ~~district~~ rules unless the alleged violator has had actual notice of the requirement.

In addition, the Civil Rules Committee draft includes the following: "A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the requirement."

4. **Criminal Rules Committee Draft**

Same as February 5, 1993 Asheville draft.

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

Memorandum

TO: Chairmen and Reporters of the Advisory Committees

FROM: Daniel R. Coquillette, Reporter
Mary P. Squiers, Consultant

RE: Federal Rules Amendments Concerning Local Rules and Technical Amendments, Including Committee Notes

DATE: February 5, 1993

At our lunch meeting in Asheville, North Carolina, last month, the Chairmen and Reporters of the Advisory Committees agreed on precise language for rule amendments concerning local rules and technical amendments. The need for uniform committee notes on these rules was also discussed. We have set out the language for the proposed rules below. We have also set out committee notes that we believe accurately reflect the views of those present at the lunch meeting.

It is our understanding that each of the Advisory Committees will consider these rules and notes at their respective winter or spring 1993 meetings.

If you have any questions or comments about this material, please feel free to contact either one of us (Dan: (617) 552-4340; Mary: (617) 552-8851).

Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

Committee Note

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

Uniform Numbering of Local Rules

Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

Committee Note

This rule requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Procedure When There is No Controlling Law

A judge may regulate practice in any manner consistent with federal statutes, rules, [official forms],* and with local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal statutes, rules, [official forms],* or the local district rules unless the alleged violator has actual notice of the requirement.

* Bankruptcy Rules only

Committee Note

This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under [insert appropriate enabling legislation], [in bankruptcy cases: with Official Forms,] and with the district's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. This can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, this Rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violation has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices--or attaching instructions to a notice setting a case for conference or trial--would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

AGENDA IV
Washington, D.C.
June 17-19, 1993

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

May 21, 1993

MEMORANDUM TO CHAIRMEN AND REPORTERS OF ADVISORY COMMITTEES ON APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL RULES

SUBJECT: Proposed Filing by Facsimile Guidelines

On behalf of Judge Keeton, I am requesting your assistance in preparing a report to the Standing Committee regarding the Filing by Facsimile Guidelines proposed by the Committee on Court Administration and Case Management. The guidelines were originally submitted to the Judicial Conference for consideration at the March 1993 session. In response to our request, however, the chairman of that committee withdrew the guidelines from the Judicial Conference's consideration to allow the Rules Committees adequate time to study it. The guidelines will be resubmitted to the Judicial Conference for consideration at its September session.

The potential effects of the guidelines may be significant and Judge Keeton would like your input in reporting the respective positions of the advisory committees on this issue to the Standing Committee. In particular, Judge Keeton is interested in what, if any, changes to the proposed Filing by Facsimile Guidelines the Standing Committee should recommend to the Judicial Conference.

Please send your comments directly to Dean Daniel Coquillette, Reporter to the Standing Committee. A copy of the proposed guidelines are attached for your information.

Peter G. McCabe
Secretary

Attachments

cc: Honorable Robert E. Keeton

Agenda F-7 (Appendix C)
Court Administration/Case Mngt.
March 1993

GUIDELINES FOR FILING BY FACSIMILE

I. *Definitions:*

(1) "Facsimile transmission" means the transmission of a copy of a document by a system that encodes a document into electronic signals, transmits these electronic signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(2) "Facsimile filing" or "filing by fax" means the facsimile transmission of a document to a court or fax filing agency [1] for filing with the court.

(3) "Fax" is an abbreviation for "facsimile" and refers, as indicated by the context, to a facsimile transmission or to a document so transmitted.

(4) "Transmission record" means the document printed by the sending facsimile machine stating the telephone number of the receiving machine, the number of pages sent, the transmission time, and an indication of errors in transmission.

II. *Transmission does not constitute filing*: Electronic transmission of a document via facsimile machine or other electronic means does not constitute filing; filing is complete when the document is filed by the clerk.

---

[1] A "fax filing agency" is a private entity (business, law firm, etc.) that receives facsimile transmissions of documents to be filed with the court. The fax filing agency acts similar to a messenger service, filing a hard copy facsimile transmission as if it were the original with the court. The court does not have to maintain facsimile machines, establish mechanisms to accept filing fees via fax, or make copies of filed documents. [See Section VII.]

III. *Technical requirements:*

For purposes of these guidelines, in order for courts to accept the filing of papers by facsimile on a routine basis, the following technical requirements must be met. [2]

(1) Facsimile Standards for Courts: "Facsimile machine" means a machine that can send a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution. "Facsimile machine" also means a receiving unit meeting the standards specified in this subdivision that is connected to and prints through a printer using xerographic technology, or a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. Only plain paper (no thermal paper) facsimile machines may be used.

(2) Facsimile Standards for Senders:

(a) Each sender must have the following equipment standards:

(i) CCITT Compatibility - Group 3 [3]

(ii) Modem Speed - 9600-2400 bps (bits per second) with automatic stepdown

(iii) Image Resolution - Standard 203 x 98

(b) A facsimile machine used to send documents to a court shall be able to produce a transmission record, as proof of transmission at the time transmission is completed.

---

[2] The Administrative Office will monitor technological advances and will recommend modifications to these guidelines when necessary.

[3] Group 3 fax machines are currently the most common, accounting for 97% of the devices on the market. Group 3 compatibility is mandatory for public applications at the present time. Group 3 fax can utilize the public telephone network (voice grade lines) and does not require special data lines. Group 3 fax devices transmit at under 1 minute per page, may have laser printing capability, and use various standard data compression techniques to increase transmission speed.

IV. *Resource Availability:* No additional personnel (FTEs) or funds for equipment will be made available due to a court's adoption of a fax filing policy. Courts should be aware of the potential burdens on the clerk's office and should examine thoroughly the potential impact on the court before adopting a fax policy.

V. *Original Signature:* The court shall make provisions to meet the requirements under the Federal Rules for court documents to bear an original signature [4] in one of the following ways:

(1) The date the clerk files the fax copy will be the date of filing, subject to receipt by the court of a signed original within three days; or

(2) The image of the original manual signature on the fax copy will constitute an original signature for all court purposes. The original signed document shall not be substituted, except by court order. The original signed document shall be maintained by the attorney of record or the party originating the document, for a period no less than the maximum allowable time to complete the appellate process.

VI. *Transmission record:* The sending party is required to maintain a transmission record in the event fax filing later becomes an issue.

VII. *Fax filing agency as intermediary:* A fax filing agency may file pleadings on behalf of the parties or their counsel. The court should set standards to be met by any fax filing agency seeking to act in this capacity. The fax filing agency must also meet the requirements of all applicable statutes and regulations. In addition, the following requirements shall apply:

(1) The fax filing agency acts as the agent of the filing party and not as agent of the court. A document shall be deemed to be filed when it is submitted by the fax filing agency, received in the clerk's office, and filed by the clerk. Mere transmission or receipt by the fax filing agency will not be construed as filing.

(2) The fax filing agency must meet all technical requirements under "Part III" of these guidelines.

(3) Duties of the fax filing agency: The fax filing agency will:

(a) ensure that additional copies necessary for filing shall be reproduced;

---

[4] Rule 11, Federal Rules of Civil Procedure; Rule 9011, Federal Rules of Bankruptcy Procedure.

(b) take the document(s) to the court and file the document(s) with the court;

(c) on behalf of the client, attorney or litigant, pay any applicable filing fee; and

(d) ensure that all documents to be filed with the court shall be on size 8 1/2 x 11 inch bond.

VIII. *Cover sheet:*

(1) Each document transmitted to the court shall be accompanied by a cover sheet, which shall include the following:

(a) court in which the pleading is to be filed;

(b) type of action, e.g., civil, criminal, bankruptcy, or adversary proceeding

(c) case title information

(d) case number identification

(e) title of document(s)

(f) sender's name, address, telephone number, and fax number

(g) number of pages transmitted including cover sheet

(h) billing or charge information for court fees

(i) date and time of transmission

(2) The cover sheet shall be the first page transmitted. The cover sheet shall not be filed in the case, nor shall it be counted toward any page limit established by the court.

(3) The facsimile cover sheet is not intended to replace any cover sheet which the court may require. It is for use by the clerk's office in identifying the document and identifying any applicable fees.

IX. *Prohibited documents:* The court is free to accept for filing any documents subject to the local rules, except that bankruptcy courts are prohibited from accepting petitions or schedules by facsimile transmission.

X. *Fees:*

Payment of filing fees and any additional charges prescribed by the Judicial Conference for the use of the facsimile filing option shall be paid in a manner determined by the court.

(1) Filing Fee:

Courts which accept the filing of papers by facsimile on a routine basis must ensure that filing fees are paid.

Courts may decide not to allow the filing of complaints by facsimile [see Section XII(6)], thus alleviating the issue of collecting a filing fee. If a court does allow the filing of complaints by fax, the fee may be paid in person, by mail, by credit card, [5] or through use of an escrow account or advance deposit method, as follows:

(a) The filing fee, accompanied by a copy of the facsimile filing cover sheet, shall be deposited with the court not later than three days after the filing by fax.

(b) If the filing fee is not received by the court within three days after the filing by fax, the court shall proceed in the same manner as required for returned checks, except that no further notice need be given any party. The bad check fee shall not be assessed.

(c) A three day grace period will be allowed for receipt of direct (non-credit card or escrow account) payments. Non-receipt of payments will result in suspension of facsimile privileges, the striking of pleadings for which fees were not tendered, and any other penalties deemed appropriate within the discretion of the court.

---

[5] Use of credit card payment for this purpose is allowed only if otherwise authorized.

(2) Fees for Filing by Fax [6]

(a) When documents are received on the court's fax equipment, the court shall collect the following fees, in addition to any other filing fees required by law:

For the first ten pages of the document, excluding the cover sheet and special handling instruction sheet . . . . . $ 5.00

For each additional page . . . . . $ .75

Any necessary copies to be reproduced by the court [see Section XII(5)], for each page [7] . . . . . $ .50

(b) No fees are to be charged for services rendered on behalf of the United States.

XI. *The following are among the issues to be addressed by the courts in local rules:*

(1) After hours filings: The court may make arrangements for acceptance of papers filed by fax after business hours, or the court may limit the acceptance of papers filed by fax to normal business hours. If the court accepts filings after normal business hours, then the court shall provide guidelines to determine time and date of filing.

(2) Page limits: The court may limit the number of pages that will be accepted by fax transmission. The court may consider increasing permitted document length after normal business hours.

(3) Exhibits: Certain exhibits may not lend themselves to fax filing, and the court should establish guidelines to handle such situations.

(4) Whether the sender will be notified of receipt or error in transmission: The court shall provide guidance as to whether it is the responsibility of the sender to confirm complete and legible transmission, or whether the court will notify sender of errors.

---

[6] These fees may be collected once the Judicial Conference approves amendments to the Miscellaneous Fee Schedules promulgated under 28 U.S.C. §§ 1913, 1914, and 1930.

[7] See Miscellaneous Fee Schedules.

(5) Number of copies to be filed: Whether the party must provide required number of copies or whether the court will reproduce required number of copies and charge a fee for reproduction. [See Section XI(2)(a).]

(6) Types of document: The court may limit the types of document that will be accepted for filing by fax. [See Sections X, XI(1).]

(7) Legibility: The court may decide how to address the problems associated with illegibility due to faulty transmission.

(8) Whether there are any circumstances under which an incomplete transmission would be sufficient to fix the filing date.

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

May 13, 1993

John K. Rabiej
Chief, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Dear John:

I enclose the following memoranda from Judge Edward Leavy to Judge Robert E. Keeton. Please distribute copies of these documents to Judge Keeton and to the members of the Standing Committee in advance of the June 17-18 meeting in Washington, D.C.:

(1) Memorandum dated May 10, 1993, regarding the proposed amendments to Bankruptcy Rules 8002 and 8006.

(2) Memorandum dated May 10, 1993, regarding the comments received from the bench and bar relating to the proposed amendments to Rules 8002 and 8006.

(3) Memorandum dated May 7, 1993, regarding amendments to rules relating to uniform rule numbering, technical amendments, and standing orders.

These documents constitute the report of the Advisory Committee on Bankruptcy Rules to the Standing Committee for the June meeting.

If I could be of any further assistance to you or the Standing Committee, please let me know.

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee on
Bankruptcy Rules

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

May 10, 1993

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

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendments to Rules 8002(b) and 8006 of the Federal Rules of Bankruptcy Procedure

On behalf of the Advisory Committee on Bankruptcy Rules, I have the honor to transmit proposed amendments to Bankruptcy Rules 8002(b) and 8006 for consideration by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The preliminary draft of proposed changes to the rules was circulated to members of the bench and bar in December, 1992. Comments were received from three respondents after publication of the preliminary draft. A summary of the comments received after publication of the preliminary draft is enclosed. A public hearing was scheduled to be held in Washington, D.C. on April 2, 1993, but was cancelled because of the lack of witnesses requesting to testify. The proposed amendments to Rules 8002(b) and 8006 are not the subject of substantial controversy.

The Advisory Committee considered the three written comments received from the bench and bar, as well as the recommendations of the Style Subcommittee. Except for several stylistic changes, and the deletion of a sentence in the committee note to Rule 8002, the Advisory Committee has not made any changes to the proposed amendments subsequent to publication of the preliminary draft. The change to the committee note is explained below.

A summary of the proposed amendments to Rules 8002(b) and 8006 is provided for your convenience:

(1) Rule 8002(b). Time for Filing Notice of Appeal.

This rule is amended to conform to the proposed amendments to F.R.App.P. 4(a)(4) in two respects: (1) to add a motion for relief from a judgment or order pursuant to F.R.Civ.P. 60 (made applicable by Bankruptcy Rule 9024) to the list of postjudgment motions that toll the time for filing a notice of appeal, and (2) to provide that a notice of appeal filed prior to disposition of a postjudgment motion does not become a nullity, but is suspended until such disposition.

The proposed amendments to Rule 8002(b) differ from the proposed amendments to F.R.App.P. 4(a)(4) in one respect. Instead of requiring that the motion for relief from a judgment under Rule 9024 be "served" within 10 days after entry of the judgment in order to toll the appeal time, the proposed amendment to Rule 8002(b) requires that the motion be "filed" within that 10-day period. The reason for recommending that filing be required within the 10-day period is to achieve greater certainty for parties in interest who want to determine whether the motion has been made. Greater certainty is more important in bankruptcy cases, in which there is only a 10-day appeal period and parties often rely on finality of orders before closing transactions, then it is in district court civil actions where the time to appeal is 30 days.

In response to the public comment, the Advisory Committee deleted the following sentence that appeared in the published version of the committee note to Rule 8002: "This amendment eliminates the difficulty of determining whether a postjudgment motion made within 10 days after entry of the judgment is a Rule 9023 motion, which tolls the time for filing an appeal, or a Rule 9024 motion, which historically has not tolled the time." The Committee believes that this sentence is not entirely accurate in that, under the present rules, a Rule 9023 (Civil Rule 59) motion only has to be served within the 10-day period to toll the appeal time. If the motion is both served and filed within the 10-day period, under the amended rule there will be no need for the court to determine whether it is a Rule 9023 or a Rule 9024 motion. However, if a motion is served within the 10-day period, but not filed until after the 10-day period, it may be necessary for the court to determine whether it is a Rule 9023 or a Rule 9024 motion. The Advisory Committee understands that the need for the court to distinguish between Rule 9023 and Rule 9024 motions may be temporary in that the Civil Rules Committee is considering changes to require that Rule 59 motions be filed within the 10-day period.

(2) Rule 8006. Record and Issues on Appeal.

The proposed amendment to this rule is related to the proposed amendment to Rule 8002(b). The purpose of the amendment is to suspend the 10-day period for filing and serving a designation of the record and statement of the issues if a timely postjudgment motion is made that suspends the time for filing a notice of appeal under Rule 8002(b). The only changes that have been made subsequent to the publication of the proposed amendments to Rule 8006 are stylistic.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 8002. Time For Filing Notice of Appeal

* * * * *

(b) EFFECT OF MOTION ON TIME FOR APPEAL. If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion: ~~is filed by any party:~~

(1) ~~under Rule 7052(b)~~ to amend or make additional findings of fact under Rule 7052, whether or not ~~an alteration of~~ granting the motion would alter the judgment ~~would be required if the motion is granted~~;

(2) ~~under Rule 9023~~ to alter or amend the judgment under Rule 9023; ~~or~~

(3) ~~under Rule 9023~~ for a new trial under Rule 9023; or

(4) for relief under Rule 9024 if the motion is filed within 10 days after the entry of judgment.~~, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed.~~

A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last

such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001, to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees ~~shall~~ will be required for ~~such~~ filing an amended notice.

* * * * *

COMMITTEE NOTE

These amendments are intended to conform to the 1993 amendments to F.R.App.P. 4(a)(4) and 6(b)(2)(i).

This rule as amended provides that a notice of appeal filed before the disposition of a specified postjudgment motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the district court or bankruptcy appellate panel.

Because a notice of appeal will ripen into an effective appeal upon disposition of a postjudgment motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. The appeal may be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a postjudgment motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the rule does not require an additional notice of appeal in that situation.

The amendment provides that a notice of appeal filed before the disposition of a postjudgment tolling motion is sufficient to bring the judgment, order, or decree specified in the original notice of appeal to the district court or bankruptcy appellate panel. If the judgment is altered upon disposition of a postjudgment motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Subdivision (b) is also amended to include, among motions that extend the time for filing a notice of appeal, a motion under Rule 9024 that is filed within 10 days after entry of judgment. The addition of this motion conforms to a similar amendment to F.R.App.R. 4(a)(4) made in 1993, except that a Rule 9024 motion does not toll the time to appeal unless it is filed within the ten-day period.

Rule 8006. Record and Issues on Appeal

Within 10 days after filing the notice of appeal as provided in Rule 8001(a), ~~or~~ entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the appellant's statement ~~of the appellant~~ the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the cross appellant's statement ~~of the cross appellant~~, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense ~~of the party~~. If the record designated by

any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

COMMITTEE NOTE

The amendment to the first sentence of this rule is made together with the amendment to Rule 8002(b), which provides, in essence, that certain specified postjudgment motions suspend a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend the 10-day period for filing and serving a designation of the record and statement of the issues if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 8002(b). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered. The other amendments to this rule are stylistic.

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

May 10, 1993

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

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Report of the Comments Received Subsequent to the Publication of the Preliminary Draft of Proposed Amendments to Bankruptcy Rules 8002(b) and 8006

A preliminary draft of the proposed amendments to Bankruptcy Rules 8002(b) and 8006 was circulated to members of the bench and bar in December 1992. A public hearing was scheduled to be held in Washington, DC, on April 2, 1993, but was cancelled because of the lack of witnesses requesting to testify.

The Advisory Committee on Bankruptcy Rules received letters from three commentators. Listed below are the names and addresses of the commentators and a summary of each comment.

(1) Arnold P. Peter, Esq.
Chair, Committee on Federal Courts
of the State Bar of California
555 Franklin Street
San Francisco, CA 94102-4498
(April 13, 1993)

Mr. Peter reports that the California State Bar Committee on Federal Courts enthusiastically supports the proposed revisions to Rules 8002(b) and 8006. His letter does not contain any suggestions for further modifications.

(2) Hon. S. Martin Teel, Jr.
United States Bankruptcy Court for the
District of Columbia
United States Courthouse
Washington, DC 20001
(January 25, 1993)

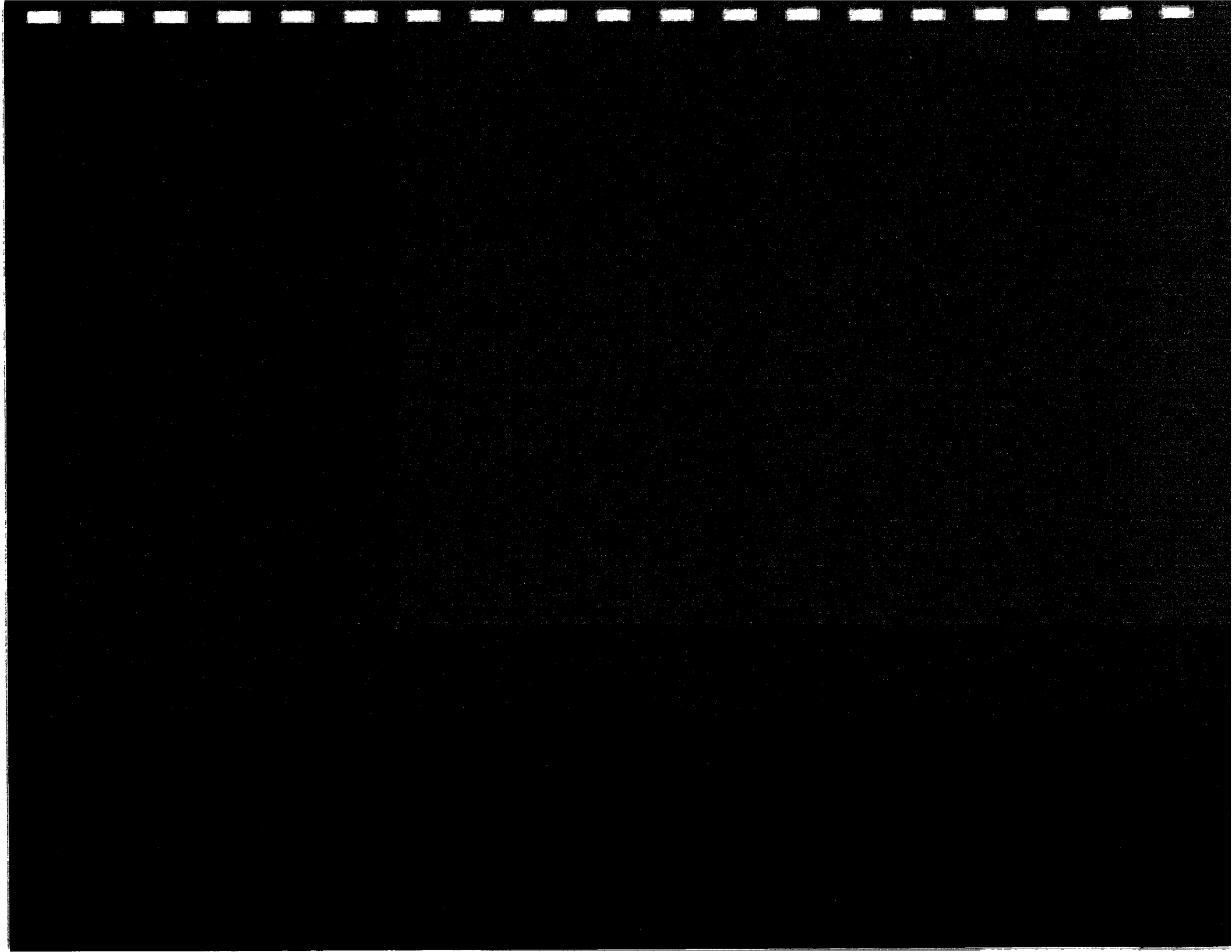
Judge Teel suggests that the amendment to Rule 8002(b) provide that a Rule 9024 motion tolls the time to file an appeal if "made within the time for filing and serving a motion under Rule 9023" (instead of the proposed language: "if the motion is filed within 10 days after the entry of judgment"). Judge Teel suggests that linking the time for the Rule 9024 motion to the time for a Rule 9023 motion would be preferable for two reasons. First, the Advisory Committee's language will create only an illusion of certainty. Although there will be greater certainty regarding the making of a Rule 9024 motion, there will remain uncertainty because a Rule 9023 motion may toll the appeal time even if it is not filed within the ten day period. Second, Judge Teel comments that the Advisory Committee proposal will continue to require courts to determine whether a motion to reconsider a judgment is a Rule 9023 or a Rule 9024 motion if the motion is served but not filed within the 10-day period.

Judge Teel states that "[t]he obvious way to achieve the goal of certainty desired would be to amend Rules 7005, 7052 and 9023 to require that motions under Rules 7052 and 9023 be served and filed on the tenth day."

(3) Honorable Robert J. Kressel
Chief Judge
United States Bankruptcy Court for the
District of Minnesota
600 Towle Building
330 Second Avenue South
Minneapolis, Minnesota 55401
(April 9, 1993)

Judge Kressel apparently agrees with the requirement that a Rule 9024 motion be filed in order to toll the time to appeal, but suggests that the amendment go further to also require that a Rule 7052 motion or Rule 9023 motion be filed within ten days.

Judge Kressel also suggests that Rule 8002(c) be amended to require that any motion to extend the appeal period be filed within ten days after the entry of the judgment in order to toll the appeal period. Judge Kressel recognizes that this change to Rule 8002(c) may be outside the scope of the pending amendments, and has asked that the Advisory Committee consider it at its next opportunity.



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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY
BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

May 7, 1993

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

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Amendments Regarding Uniform Local Rule Numbering, Technical Amendments and Standing Orders

At the request of the Standing Committee, the Advisory Committee on Bankruptcy Rules, at its meeting on February 18, 1993, considered several proposals for rule amendments dealing with uniform local rule numbering, standing orders, and technical amendments. The proposed amendments to the Bankruptcy Rules that were reviewed by the Advisory Committee were based on language that was drafted in Asheville on December 18, 1992, by the reporter to the Standing Committee and the chairs and reporters of four advisory committees (the "Asheville draft"). After the Asheville meeting, the language was amended pursuant to several style recommendations of Bryan Garner.

The Advisory Committee on Bankruptcy Rules makes the following recommendations:

I. Bankruptcy Rule 9029 should be amended as follows:

Rule 9029. Local Bankruptcy Rules; Procedure When There is No Controlling Law

(a) Local Bankruptcy Rules. Each district court by action of a majority of the judges

thereof may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make and amend rules of practice and procedure which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. ~~In all cases not provided for by rule, the court may regulate its practice in any manner not inconsistent with the Official Forms or with these rules or those of the district in which the court acts.~~

(b) Procedure When There is No Controlling Law. A judge may regulate practice in any manner consistent with federal laws, these rules,

Official Forms, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal laws, rules, Official Forms, or the local rules of the district unless the alleged violator has actual notice of the requirement.

COMMITTEE NOTE

This rule is amended to require [requires] that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with federal laws [Acts of Congress], with rules adopted under 28 U.S.C. § 2075, with Official Forms, and with the district's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. This can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or

attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

Discussion

The above draft differs from the "Asheville draft" in the following respects:

(1) The words "Acts of Congress" in subdivision (b) were used in the Asheville drafts. On Mr. Garner's recommendation, this phrase was changed to "federal statutes." The Advisory Committee on Bankruptcy Rules believes that "federal laws" is better so that case law is also included.

(2) The Asheville draft included the words "with Acts of Congress, with these rules, with Official Forms, and with local rules." Upon Mr. Garner's recommendation, the word "with" before "these rules" and "Official Forms" were deleted, but the word "with" was left before the words "local rules." The Advisory Committee believes that the word "with" also should be deleted before the words "local rules."

(3) In the last sentence of subdivision (b), the Asheville draft used the words "local rule," but that was subsequently changed to "local district rules." That change may work well for the Civil Rules, but could cause confusion in the Bankruptcy Rules. "Local district rules" could give the impression that it includes only local rules made by the district court, not the bankruptcy court. Therefore, the Advisory Committee recommends that the words "local rules of the district" be used.

(4) The words underlined in the Committee Note were added by the Advisory Committee to the text of the Committee Note drafted by Dean Coquillette. The bracketed words were deleted.

II. Bankruptcy Rule 8018 Should be Amended as Follows:

Rule 8018. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

(a) Local Rules by Circuit Councils and District Courts. Circuit councils which have

authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may by action of a majority of the judges of the council or district court make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court~~, not inconsistent~~ consistent with, but not duplicative of, the rules of this Part VIII. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Rule 83 F.R.Civ.P. governs the procedure for making and amending rules to govern appeals. ~~In all cases not provided for by rule, the district court or the bankruptcy appellate panel may regulate its practice in any manner not inconsistent with these rules.~~

(b) Procedure When There is No Controlling Law. A bankruptcy appellate panel or district judge may regulate practice in any manner consistent with federal laws, these rules, Official Forms, and local rules of the circuit council or district court. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal laws, rules, Official Forms, or the local rules of the circuit

counsel or district court unless the alleged violator has actual notice of the requirement.

COMMITTEE NOTE

The amendments to this rule conform to the amendments to Rule 9029. See Committee Note to the amendments to Rule 9029.

Discussion

The language of the proposed amendments to Rule 8018 set forth above contains the same variations from the "Asheville draft" that are contained in the proposed amendments to Rule 9029.

III. The Proposed Addition of a Rule on Technical Amendments Should Not be Adopted.

The Advisory Committee considered the following draft of a new rule on technical amendments:

Rule 9037. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

Recommendation

The Advisory Committee, by a unanimous vote, strongly urges that this rule, or any similar rule that would permit the promulgation of "technical amendments" without following the usual procedures under the Rules Enabling Act, not be adopted. Several reasons for this decision were expressed. Members are of the view that this rule is not necessary. True technical amendments (such as changing "magistrate" to "magistrate judge") are not urgent, could await the sending of a larger and more substantive package, and do not require any significant attention by the Supreme Court or Congress. For example, when the Bankruptcy Rules were amended to change "magistrate" to "magistrate judge," such changes were a very minor part of a large package of substantive changes. To use the words of the Committee Note, these technical amendments that are sent together with packages of substantive changes do not "burden the Supreme Court and Congress" in any significant way.

The Advisory Committee also is concerned that it is not always clear as to whether a certain change is "technical" or not. The Advisory Committee does not think that there is sufficient reason to depart from the usual rule-making procedures under the Rules Enabling Act, or for a delegation of rule-making power by the Supreme Court and Congress, merely because a proposed change may be viewed as "technical."

In the event that the Standing Committee does not adopt the recommendation of the Advisory Committee on Bankruptcy Rules, the alternative recommendation of the Advisory Committee is that the rule stop after the word "typography" so that it will state only the following: "The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography."

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

AGENDA VI
Washington, D.C.
June 17-19, 1993

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

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

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

DATE: May 14, 1993

I. INTRODUCTION

At its meeting in April 1993, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure. This report addresses those proposals and the recommendations to the Standing Committee. A GAP Report and copies of the Rules and the accompanying Committee Notes are attached along with a copy of the minutes of the Committee's April 1993 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

A. In General

In July 1992, the Standing Committee approved amendments to Rules 16 and 29 but directed publication for public comment be deferred pending a relocation of the Rules Committee Support Office. In December 1992, the Standing Committee approved amendments to Rules 32 and 40 and directed that all four rules (16, 29, 32, and 40) be published on an expedited basis with the comment period to end on April 15, 1993. Comments were received on the proposed amendments and were carefully considered by the

Advisory Committee at its April 1993 meeting in Washington, D.C. In addition, the Committee received the testimony of two witnesses at that same meeting.

The GAP Report provides a more detailed discussion of the changes made to the Rules since their publication. The following discussion briefly notes any significant changes and the Committee's recommended action:

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

The Committee made a minor change to the rule. The Committee changed the rule to reflect that the defense is entitled to discover the statements of persons, *whom the government contends*, were in a position to bind an organizational defendant. The Note was also changed to indicate that the rule does not require the defense to stipulate or admit that a particular person was in a position to bind the organization.

The Committee recommends that Rule 16(a)(1)(A), as amended be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

C. Rule 29(b). Delayed Ruling on Judgment of Acquittal.

Although the Committee made no changes to the rule, it did make a minor change to the Committee Note to reflect that on appeal of a delayed ruling on a motion for judgment of acquittal, the appellate court would also be limited to consideration of the evidence presented before the motion was made.

The Advisory Committee recommends that the Standing Committee approve Rule 29 and forward it to the Judicial Conference for its approval.

D. Rule 32. Sentence and Judgment.

The Advisory Committee has made several changes to the rule and the Committee Note. They are as follows:

1. Time Limits:

The Committee changed Rule 32(a) to retain the current language that sentencing should take place "without unnecessary delay." The rule continues to

provide, however, that the internal time limits in Rule 32(b)(6) will be followed unless the court advances or shortens them.

2. Presence of Counsel:

The Committee changed subdivision (b)(2) to provide that the defendant's counsel is "entitled to notice and a reasonable opportunity" to attend any interview. The Note was also changed to indicate that the burden should be on counsel, once notice is given, to respond. The Note was also modified to indicate that the Committee believed that the term "interview" should extend only to communications initiated by the probation officer for the purpose of obtaining information to be used in the presentence report.

3. Probation Officer's Determination of Applicable Sentencing Classification:

As published, subdivision (b)(4)(B) required the probation officer to include in the presentence report the classification of the offense which the probation officer "determines" to apply. In response to comments on the proposal, the Committee replaced the word "determines" with the word "believes."

4. Availability of Nonprison Programs

A minor change was made in Rule 32(b)(4)(E) to clarify that the presentence report need not include information about nonprison programs and resources except in appropriate cases.

5. Filing of Original Objections:

The Committee added a comment in the Note to indicate that nothing in the rule prohibits the court from requiring the parties to file their objections with the court or have them included in full as a part of the addendum to the presentence report. *See* Rule 32(b)(6)(B).

6. Probation Officer's Authority to Require Meeting:

In response to comments that Rule 32(b)(6)(B) might create incorrect perceptions about the probation officer's role in sentencing by authorizing the probation officer to "require" the parties to meet, the Committee modified the language to state that the

probation officer "may meet" with the parties to discuss their objections.

7. Additional Evidence at Sentencing Hearing:

In Rule 32(c)(1) the Committee modified the language addressing the court's discretion to permit the parties to present additional information at the sentencing hearing. The words "to introduce testimony or other evidence on the objections," were changed to read, "to introduce evidence." The modification gives the court the discretion to decide if the offered evidence, in whatever form, should be admitted. The Committee Note was expanded to recognize that in appropriate cases, due process might require the court to hear the offered evidence.

8. Disclosure of Information Not Included in the Presentence Report:

Rule 32(c)(3)(A) was changed to provide that if the court had received information which has been excluded from the presentence report under (b)(5) because it is confidential, etc., the court must create a written summary of that information and provide it to the parties -- if the court intends to rely on the information in sentencing. As published, the court had the option of summarizing that information orally or in writing. The language was also modified slightly to require the court to give the defense a reasonable opportunity to comment on the information. The Committee Note was amended to recognize that the reasonable opportunity requirement might necessitate a continuance.

9. Notification of Right to Appeal:

Rule 32(c)(5) was changed to reflect the differences in the right to appeal, depending on whether the defendant has entered a guilty or not guilty plea.

The Advisory Committee recommends that Rule 32, as amended, be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

E. Rule 40(d). Conditional Release of Probationer.

The Committee received no comments on, and made no changes in, the proposed language of Rule 40(d) or the

Committee Note.

The Advisory Committee recommends that Rule 40(d) be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

A. In General.

The Advisory Committee at its April 1993 meeting in Washington, D.C. considered proposed amendments to several Rules. It recommends that the following amendments be approved for publication and comment from the bench and bar. Copies of the proposed amendments and the proposed Advisory Committee Notes are attached.

B. Rule 5. Exemption of Persons Arrested for Unlawful Flight to Avoid Prosecution.

At the Advisory Committee's October 1992 meeting in Seattle, a subcommittee was tasked with studying possible problems resulting from the requirement that persons arrested for violating 18 U.S.C. § 1073, Unlawful Flight to Avoid Prosecution (UFAP) appear before a magistrate under Rule 5. The subcommittee reported at the April 1993 meeting that its study indicated that several scenarios are possible where state officials may or may not be involved in the arrest of a UFAP defendant and that the Rule 5 requirement of prompt appearance may not be essential where the U.S. attorney has no intent to prosecute. The Committee therefore recommended that Rule 5 be amended to exempt UFAP defendants from Rule 5 where the United States does not intend to prosecute. The proposed Rule and Committee Note are attached. The Advisory Committee recommends that the amendment be published for public comment.

C. Rule 10. In Absentia Arraignments; Use of Video Teleconferencing.

Pursuant to a proposal from the Bureau of Prisons, the Committee considered a proposal to amend Rules 10 and 43 to permit video arraignments at its October 1992 meeting. A subcommittee was appointed and recommended to the Committee at its April 1993 meeting that Rule 10 be amended to provide for video arraignments, where the defendant waives the right to be present in court. Its recommendation was based, in part, on the Judicial Conference's recent approval of a

pilot program in the Eastern District of North Carolina. That program permits use of video conferencing technology to conduct competency hearings between the court and a corrections facility. The Committee contemplates that the Rule will simply permit the court, in its discretion, to use such technology.

The Advisory Committee recommends that the proposed amendment, which is attached, be approved for publication and comment.

D. Rule 43. In Absentia Pretrial Sessions; Use of Video Teleconferencing; In Absentia Sentencing.

The Advisory Committee considered two different amendments to Rule 43. The first focused on use of video teleconferencing for pretrial sessions and the second focused on in absentia sentencing for defendants who become fugitives after their trial has begun.

1. Video Teleconferencing for Pretrial Sessions:

In conjunction with its consideration of an amendment to Rule 10 regarding video arraignments, supra, the Committee also addressed an amendment to Rule 43 which would permit use of video teleconferencing technology for other pretrial sessions, where the defendant waives the right to be present in court. Both rules generated extensive discussion and as with the amendment to Rule 10, the amendment to Rule 43 grants the court the discretion to use video teleconferencing. It does not mandate such use.

The Advisory Committee recommends that this proposed amendment to Rule 43 be approved for publication and public comment.

2. In Absentia Sentencing

The Department of Justice has proposed that Rule 43 be amended to permit in absentia sentencing for defendants who flee after their trial has begun. Currently, Rule 43 permits the trial itself to continue, but makes no specific reference to the ability of the court to continue with sentencing. As the Department of Justice explained, this can create a gridlock on the system. The amendment would make it clear that once the trial has begun, the defendant may not only waive the right to be present at trial but also the right to be present at sentencing.

The Committee recommends that the the Standing

Committee approve this amendment for publication and public comment.

E. Rule 53. Permitting Cameras in Courtroom; Broadcasting of Proceedings.

Pursuant to a request from the American Society of Newspaper Editors and others, the Advisory Committee considered an amendment to Rule 53 which would permit photographs and broadcasting of judicial proceedings, under guidelines adopted by the Judicial Conference. The Committee's discussion focused on the pending report on a three-year pilot program for cameras and audio coverage of civil proceedings, which was approved by the Judicial Conference in 1990. The Committee, following an extended discussion of this proposal, believed that it was appropriate to propose an amendment to Criminal Rule 53 and seek public comment. In making that decision, the Committee considered both the absence of horror stories in those courts which permit photographs and broadcasting and the positive features of such coverage.

Attachments:

GAP Report
Proposed Amendments
Minutes of April 1993 Meeting

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

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

SUBJECT: GAP Report: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 16, 29, 32 and 40

DATE: May 15, 1993

At its July 1992 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 29 and at its meeting in December 1992 approved the circulation for public comment of proposed amendments to Rules 32 and 40.

All four rules were published on an expedited basis in January 1993 with a deadline of April 15, 1993 for any comments. At its meeting on April 22, 1993 in Washington, D.C., two witnesses presented testimony to the Committee on the proposed amendments. The Advisory Committee has considered the written submissions of members of the public as well as the two witnesses. Summaries of any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

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

The Committee made a minor change to the rule. As originally published, and as reflected in the original Committee Note, the rule did not address the question of what showing the defense would have to make to demonstrate that the requested statements were made by a person associated with an organizational defendant. After additional discussion on that point, the Committee changed the rule to reflect that the defense is entitled to discover the statements of persons, *whom the government contends*, were in a position to bind an organizational defendant. The Note was also changed to indicate that the rule does not require the defense to stipulate or admit that a particular person was in a position to bind the organization.

2. Rule 29(b). Delayed Ruling on Judgment of Acquittal.

The Committee made no changes to the rule. But it did make a minor change to the Committee Note to reflect that on appeal of a delayed ruling on a motion for judgment of acquittal, the appellate court would also be limited to consideration of the evidence presented before the motion was made.

3. Rule 32. Sentence and Judgment.

In response to public comments on the published version of Rule 32, the Advisory Committee has made several changes to the rule and the Committee Note. The changes, other than minor clarifying changes in wording, are as follows:

Time Limits: In response to a significant number of commentators who expressed concern about codifying a specific time limit for sentencing, the Committee changed Rule 32(a) to retain the current language that sentencing should take place "without unnecessary delay." The rule continues to provide, however, that the internal time limits in Rule 32(b)(6) will be followed unless the court advances or shortens them.

Presence of Counsel: Although most commentators agreed that the defense counsel should be entitled to attend the probation officer's interviews of the defendant, there was concern that providing that right might unnecessarily delay the sentencing process. The Committee agreed and changed subdivision (b)(2) to provide that the defendant's counsel is "entitled to notice and a reasonable opportunity" to attend any interview. In the Note, the Committee indicated that the burden should be on counsel, once notice is given, to respond. The Note was further changed to indicate that the Committee believed that the term "interview" should extend only to communications initiated by the probation officer for the purpose of obtaining information to be used in the presentence report.

Probation Officer's Determination of Applicable Sentencing Classification: A number of commentators expressed concern about language in subdivision (b)(4)(B) which required that the presentence report should contain the sentencing classification which the probation officer "determines" is applicable. Some commentators indicated that that language perpetuates the view that the probation officer determines that appropriate sentence. In

response to that concern the Committee changed the word "determines" to "believes."

Availability of Nonprison Programs: In response to the suggestion of at least one commentator, Rule 32(b)(4)(E) was modified slightly to clarify that information about nonprison programs and resources need not be included in the presentence report except in appropriate cases.

Filing of Original Objections: Several commentators raised the question of whether the court would ever see counsel's original objections to the presentence report, as noted in subdivision (b)(6)(B). Although the Committee made no change in the rule, it did add a comment in the Note to indicate that nothing in the rule prohibits the court from requiring the parties to file their objections with the court or have them included in full as a part of the addendum to the presentence report.

Probation Officer's Authority to Require Meeting: As published, subdivision (b)(6)(B) authorized the probation officer to require the parties to meet and discuss their objections to the presentence report. In response to comments that that provision might create incorrect perceptions about the probation officer's role in sentencing, the Committee modified the language to indicate that the probation officer may meet with the parties to discuss their objections.

Additional Evidence at Sentencing Hearing: In subdivision (c)(1) the Committee modified the language addressing the court's discretion to permit the parties to present additional information at the sentencing hearing; in lieu of the words "to introduce testimony or other evidence on the objections," the Committee changed the rule to read, "to introduce evidence," thus leaving it to the court to decide in its discretion if the offered evidence, in whatever form, should be admitted. The Committee Note was expanded slightly to recognize that in appropriate cases, due process might require the court to hear the offered evidence.

Disclosure of Information Not Included in the Presentence Report: The Committee modified subdivision (c)(3)(A) to provide that if the court had received information which has been excluded from the presentence report under (b)(5) because it is confidential, etc., the court must prepare a written summary of that information and provide it to the

parties -- if the court intends to rely on the information in sentencing. As originally published (and as it exists currently in Rule 32) the court had the option of summarizing that information orally or in writing. The language was also modified slightly to require the court to give the defense a reasonable opportunity to comment on the information. The Committee Note was amended to indicate that the reasonable opportunity requirement might necessitate a continuance.

Notification of Right to Appeal: The language in subdivision (c)(5) was changed to reflect the differences in the right to appeal, depending on whether the defendant has entered a guilty or not guilty plea.

4. Rule 40(d). Conditional Release of Probationer.

The Committee received no written comments addressing the proposed change to Rule 40(d) and has made no changes in the proposed language of the rule or the Committee Note.

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

Rule 16. Discovery and Inspection

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) Information Subject to Disclosure.

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

RULES OF CRIMINAL PROCEDURE*

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

* * * * *

COMMITTEE NOTE

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

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

The amendment defines defendant in a broad, nonexclusive, fashion. See also 18 U.S.C. § 18 (the term "organization" includes a person other than an individual). And the amendment recognizes that an organizational defendant could be bound by an agent's statement, see, e.g., Federal Rule of Evidence 801(d)(2), or be vicariously liable for an agent's actions. The amendment contemplates that, upon request of the defendant, the Government will disclose any statements within the purview of the rule and made by persons whom the government contends to be among the classes of persons described in the rule. There is no requirement that the defense stipulate or admit that such persons were in a position to bind the defendant.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

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

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

The Committee has received three written (3) comments on the proposed amendment to Rule 16(a)(1)(A)(statements by organizational defendants). All three commentators support the amendment but focus on the issue of what showing, if any, the defendant organization must make in order to obtain disclosure. One suggests a change in the Committee Note to the effect that the organizational defendant should not be required to show that an individual was able to legally bind the defendant. Another advocates an automatic disclosure provision. And the third indicates that the disclosure should also extend to those who the government contends were in a position to bind the defendant organization.

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

1. David P. Bancroft, Esq.,San Francisco, CA, 4-2-93

2. William J. Genego & Peter Goldberger, NADCL, Wash., D.C., 4-14-93.

3. Myrna Raeder, Prof., Los Angeles, CA, 4-12-93.

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

David P. Bancroft, Esq.
Private Practice
San Francisco, CA,
April 2, 1993

Mr. Bancroft states that the reference in the Committee Note to the process of showing that a particular individual had the ability to bind the organizational defendant is not practical; an entity often does not know which agents the government believes can bind it. He advocates an automatic disclosure provision -- based on the government's claim that an individual was in a position to bind the entity.

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Crim. Defense Lawyers
Washington, D.C.
April 14, 1993

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, endorses the amendment to Rule 16. But they suggest that the rule be further modified to require disclosure for statements by persons who the government contends were in a position to bind the defendant organization. They note that in some cases the organization may disclaim that the person was in such a position but the government will take the opposite position; the entity, they suggest, should be able to obtain the statement even if it disagrees with the government's position.

Myrna Raeder
Professor of Law
Southwestern Univ. School of Law
Los Angeles, CA
April 12, 1993

Professor Raeder, on behalf of the American Bar Association, supports the amendment to Rule 16, noting that in February 1992, the ABA approved a similar amendment. She believes, however, that the Committee Note should be changed to reflect what, if any, burden. might rest on the organizational defendant to show that the requested statements were made by a person able to bind the organization. The Note as currently written does not specifically address that question but instead leaves it for the court and the parties to determine that issue. Professor Raeder indicates that the comment is entirely too ambiguous to ensure that organizational defendants will routinely receive the statements. She recommends that the Note reflect that upon request, the government should routinely produce statements and testimony of individuals who it may contend at trial bind the organizational defendant. This change, she suggests would be simple to apply and avoid interpretive issues.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 29. Motion for Judgment of Acquittal

* * * * *

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

COMMITTEE NOTE

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

The amendment also permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in proceeding to a verdict thereby preserving its right to appeal in the event a verdict of guilty is returned but is then set aside by the granting of a judgment of acquittal. Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Thus, the government's right to appeal a rule 29 motion is only preserved where the ruling is reserved until after the verdict.

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

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

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

Reserving a ruling on a motion made at the end of the government's case does pose problems, however, where the defense decides to present evidence and run the risk that such evidence will support the government's case. To address that problem, the amendment provides that the trial

court is to consider only the evidence submitted at the time of the motion in making its ruling, whenever made. And in reviewing a trial court's ruling, the appellate court would be similarly limited.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 29

I. SUMMARY OF COMMENTS: Rule 29

The Committee has received two comments on the proposed amendment to Rule 29. One comment merely welcomes the amendment which would make it clear that the court's decision on a reserved motion must be based on the evidence introduced prior to the motion. The other comment suggests that either the Rule itself or the Committee Note contain a notation that the "waiver rule" does not apply; that rule indicates that if a defendant presents evidence after denial of a judgment of acquittal at the close of the government's case, he waives his objection to the denial.

II. LIST OF COMMENTATORS: Rule 29

1. William J. Genego & Peter Goldberger, NADCL, Wash., D.C., 4-14-93.

2. Robert L. Weinberg, Esq., Washington, D.C., 4-14-93.

III. COMMENTS: Rule 29

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Crim. Defense Lawyers
Washington, D.C.
April 14, 1993

Mr. Genego and Mr. Goldberger, on behalf of the NADCL, endorse the amendment which makes it clear that a court's reserved ruling may be based only the evidence introduced prior to the motion for judgment of acquittal.

Mr. Robert L. Weinberg, Esq.
Private Practice
Washington, D.C.
April 14, 1993

Mr. Weinberg discusses the "waiver rule" which has been adopted by all of the circuits. That rule provides that if a defendant proceeds with his case after an unsuccessful motion for a judgment of acquittal following the government's case-in-chief, he has waived his objection to the denial of his motion and the court may consider all of

the evidence presented at trial. Mr. Weinberg suggests that either the amendment or the Committee Note should be amended to indicate that the waiver rule will not apply where the ruling is reserved. Where the trial court reserves ruling on a Rule 29 motion, the defendant would not have chosen to proceed after knowing that the government's case was sufficient. Any appellate ruling on the motion, according to the rule as proposed, will be based on the evidence as it stood at the close of the government's case; thus the appellate review is not focused on all of the evidence at the close of the trial, as it is when the defendant proceeds with his case following a denial. Thus, he recommends that the Committee specifically address the point that on appeal, by either side, the appellate court may only consider the evidence as it existed at the time of the motion.

[Rule 32 is deleted and replaced with the following]

Rule 32. Sentence and Judgment

(a) IN GENERAL; TIME FOR SENTENCING. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either advanced or continued for good cause.

(b) PRESENTENCE INVESTIGATION AND REPORT.

(1) *When Made*. The probation officer shall make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. 3553; and

(B) the court explains this finding on the record.

(2) *Presence of Counsel.* On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) *Nondisclosure.* The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) *Contents of the Presentence Report.* The presentence report must contain --

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. 994 (a)(1); and the probation officer's explanation of any factors that may suggest a different sentence -- within or without the applicable guideline -- that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the

Sentencing Commission under 28 U.S.C. 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. 3552(b); and

(G) any other information required by the court.

(5) Exclusions. The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and Objections.

(A) Not less than 35 days before the sentencing hearing -- unless the defendant waives this minimum period -- the probation officer shall furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct the probation officer, in disclosing the presentence report, to

withhold the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer shall submit the presentence

report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer shall furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the sentencing hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) SENTENCE

(1) *Sentencing Hearing*. At the sentencing hearing, the court shall afford

counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and shall rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce evidence on the objections. For each matter controverted, the court shall make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) *Production of Statements at Sentencing Hearing.* Rule 26.2(a)-(d), (f) applies at a sentencing hearing under this

rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) *Imposition of Sentence.* Before imposing sentence, the court shall:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court -- in lieu of making that information available -- shall summarize it in writing, if the information will be relied on in determining sentence. The court shall also give the defendant and the defendant's counsel a reasonable

opportunity to comment on that information.

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence; and

(D) afford the attorney for the Government an equivalent opportunity to speak to the court.

(4) *In Camera Proceedings*. The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear in camera the statements -- made under subdivision (c)(3)(B), (C), and (D) -- by the

defendant, the defendant's counsel, or the attorney for the Government.

(5) *Notification of Right to Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the right to appeal. After imposing sentence in any case, the court shall advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall immediately prepare and file a notice of appeal on behalf of the defendant.

(d) JUDGMENT.

(1) *In General.* A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to

be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture.* When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.

(e) PLEA WITHDRAWAL. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. 2255.

COMMITTEE NOTE

The amendments to Rule 32 are intended to accomplish two primary objectives. First, the amendments incorporate elements of a "Model Local Rule for Guideline Sentencing" which was proposed by the Judicial Conference Committee on Probation Administration in 1987. That model rule, and the accompanying report, were prepared to assist trial judges in implementing guideline sentencing mandated by the Sentencing Reform Act of

1984. See Committee on the Admin. of the Probation Sys., Judicial Conference of the U.S., Recommended Procedures for Guideline Sentencing and Commentary: Model Local Rule for Guideline Sentencing, Reprinted in T. Hutchinson & D. Yellen, Federal Sentencing Law and Practice, app. 8, at 431 (1989). It was anticipated that sentencing hearings would become more complex due to the new fact finding requirements imposed by guideline sentencing methodology. *See* U.S.S.G. 6A1.2. Accordingly, the model rule focused on preparation of the presentence report as a means of identifying and narrowing the issues to be decided at the sentencing hearing.

Second, in the process of effecting those amendments, the rule was reorganized. Over time, numerous amendments to the rule had created a sort of hodge podge; the reorganization represents an attempt to reflect an appropriate sequential order in the sentencing procedures.

Subdivision (a). Subdivision (a) retains the general mandate that sentence be imposed without unnecessary delay thereby permitting the court to regulate the time to be allowed for the probation officer to complete the presentence investigation and submit the report. The only requirement is that sufficient time be allowed for completion of the process prescribed by subdivision (b)(6) unless the time periods established in that subdivision are shortened or lengthened by the court for good cause. Such limits are not intended to create any new substantive rights for the defendant or the Government which would entitle either to relief if a time limit prescribed in the rule is not kept.

The remainder of subdivision (a), which addressed the sentencing hearing, is now located in subdivision (c).

Subdivision (b). Subdivision (b) (formerly subdivision (c)) which addresses the presentence investigation, has been modified in several respects.

First, subdivision (b)(2) is a new provision which provides that, on request, defense counsel is entitled to notice and a reasonable opportunity to be present at any interview of the defendant conducted by the probation officer. Although the

courts have not held that presentence interviews are a critical stage of the trial for purposes of the Sixth Amendment right to counsel, the amendment reflects case law which has indicated that requests for counsel to be present should be honored. See, e.g., United States v. Herrera-Figureroa, 918 F.2d 1430, 1437 (9th Cir. 1990)(court relied on its supervisory power to hold that probation officers must honor request for counsel's presence); United States v. Tisdale, 952 F.2d 934, 940 (6th Cir. 1992)(court agreed with rule requiring probation officers to honor defendant's request for attorney or request from attorney not to interview defendant in absence of counsel). The Committee believes that permitting counsel to be present during such interviews may avoid unnecessary misunderstandings between the probation officer and the defendant. The rule does not further define the term "interview." The Committee intended for the provision to apply to any communication initiated by the probation officer for the purpose of obtaining information from the defendant which will be used in preparation of the presentence report. Spontaneous or unplanned encounters between the defendant and the probation officer would normally not fall within the purview of the rule. The Committee also believed that the burden should rest on defense counsel, having received notice, to respond as promptly as possible to enable timely completion of the presentence report.

Subdivision (b)(6), formerly (c)(3), includes several changes which recognize the key role the presentence report is playing under guideline sentencing. The major thrust of these changes is to address the problem of resolving objections by the parties to the probation officer's presentence report. Subdivision (b)(6)(A) now provides that the probation officer must present the presentence report to the parties not later than 35 days before the sentencing hearing (rather than 10 days before imposition of the sentence) in order to provide some additional time to the parties and the probation officer to attempt to resolve objections to the report. There has been a slight change in the practice of deleting from the copy of the report given to the parties certain information specified in (b)(6)(A). Under that new provision (formerly subdivision (c)(3)(A)), the court now has the discretion (in an individual case or in accordance with a local rule) to decide whether to direct the probation officer to disclose any final recommendation concerning the

officer to disclose any final recommendation concerning the sentence. But the prior practice of not disclosing confidential information, or other information which might result in harm to the defendant or other persons, is retained in (b)(5).

New subdivisions (b)(6)(B), (C), and (D) now provide explicit deadlines and guidance on resolving disputes about the contents of the presentence report. The amendments are intended to provide early resolution of such disputes by (1) requiring the parties to provide the probation officer with written objections to the report within 14 days of receiving the report; (2) permitting the probation officer to meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss objections to the report, conduct an additional investigation, and to make revisions to the report as deemed appropriate; (3) requiring the probation officer to submit the report to the court and the parties not later than 7 days before the sentencing hearing, noting any unresolved disputes; and (4) permitting the court to treat the report as its findings of fact, except for the parties' unresolved objections. Although the rule does not explicitly address the question of whether counsel's objections to the report are to be filed with the court, there is nothing in the rule which would prohibit a court from permitting, or requiring, the parties to file their objections or have them included in full as a part of the addendum to the presentence report.

This procedure, which generally mirrors the approach in the Model Local Rule for Guideline Sentencing, supra, is intended to maximize judicial economy by providing for more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing. Under the amendment, the parties would still be free at the sentencing hearing to comment on the presentence report, and in the discretion of the court, to introduce evidence concerning their objections to the report.

Subdivision (c). Subdivision (c) addresses the imposition of sentence and makes no major changes in current practice. The provision consists largely of material formerly located in subdivision (a). Language formerly in (a)(1) referring to the

court's disclosure to the parties of the probation officer's determination of the sentencing classifications and sentencing guideline range is now located in subdivisions (b)(4)(B) and (c)(1). Likewise, the brief reference in former (a)(1) to the ability of the parties to comment on the probation officer's determination of sentencing classifications and sentencing guideline range is now located in (c)(1) and (c)(3).

Subdivision (c)(1) is not intended to require that resolution of objections and imposition of the sentence necessarily occur at the same time or during the same hearing. It requires only that the court rule on any objections before sentence is imposed. In considering objections during the sentencing hearing, the court may in its discretion, permit the parties to introduce evidence. The rule speaks in terms of the court's discretion, but the Sentencing Guidelines specifically state that the court must provide the parties with a reasonable opportunity to offer information concerning a sentencing factor reasonably in dispute. *See* U.S.S.G. § 6A1.3(a). Thus, it may be an abuse of discretion not to permit the introduction of additional evidence. Although the rules of evidence do not apply to sentencing proceedings, *see* Fed. R. Evid. 1101(d)(3), the court clearly has discretion in determining the mode, timing, and extent of the evidence offered. *See, e.g.*, United States v. Zuleta-Alvarez, 922 F.2d 33, 36 (1st Cir. 1990)(trial court did not err in denying defendant's late request to introduce rebuttal evidence by way of cross-examination).

Subdivision (c)(1) (formerly subdivision (c)(3)(D)) indicates that the court need not resolve controverted matters which will "not be taken into account in, or will not affect, sentencing." The words "will not affect" did not exist in the former provision but were added in the revision in recognition that there might be situations, due to overlaps in the sentencing ranges, where a controverted matter would not alter the sentence even if the sentencing range were changed.

The provision for disclosure of a witness' statements, which was recently proposed as an amendment to Rule 32 as new subdivision (e), is now located in subdivision (c)(2).

Subdivision (c)(3) includes a minor change. First, if the court intends to rely on information otherwise excluded from the presentence report under subdivision (b)(5), that information is to be summarized in writing and submitted to the parties. Under the former provision in (c)(3)(A), such information could be summarized orally. Once the information is presented, the defendant and the defendant's counsel are to be given a reasonable opportunity to comment; in appropriate cases, that may require a continuance of the sentencing proceedings.

Subdivision (d). Subdivision (d), dealing with entry of the court's judgment, is former subdivision (b).

Subdivision (e). Subdivision (e), which addresses the topic of withdrawing pleas, was formerly subdivision (d). Both provisions remain the same except for minor stylistic changes.

Under present practice, the court may permit, but is not required to hear, victim allocution before imposing sentence. The Committee considered, but rejected, a provision which would have required the court to permit victim allocution at sentencing. Although the Committee was sensitive to the interest of some victims in the sentence to be imposed, it also recognized a number of difficulties which the Committee ultimately concluded outweighed any value to the victim in personally addressing the court. First, under guideline sentencing (which takes victim impact into account), the court has very limited sentencing discretion once the applicable guideline range has been determined, and the guideline range is usually below the maximum sentence allowed by statute. In most cases, therefore, the views of the victim would have little or no impact upon the sentence thereby producing a likelihood of victim frustration rather than victim satisfaction. Additionally, if the victim's allocution persuaded the court to consider a possible departure from the guideline sentencing range, due process might require notice and an opportunity to contest that result under Burns v. United States, ____ U.S. ____, 111 S.Ct. 2182 (1991). This could substantially complicate and delay the sentencing hearing. There is also a problem in the federal system in identifying victims who would have the right to allocution. While a single victim of a violent crime is easily identified, federal criminal law covers

a broad range of violent as well as non-violent conduct which often results in numerous victims. In such cases, it simply would not be feasible to extend the right of allocution to all of the victims. Finally, the Committee also took into account existing law and procedure which keeps victims informed of the progress of the case, *see, e.g.*, 42 U.S.C. 10601, et seq. (enumerated "victims' rights include, inter alia, the right to be notified of court proceedings, the right to be present at all public court proceedings, and the right to confer with the attorney for the Government) and Rule 32 itself which provides an opportunity for direct input in the preparation of the presentence report. *See* Rule (b)(4)(D).

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 32

I. SUMMARY OF COMMENTS: Rule 32

The Advisory Committee received twenty-nine (29) written comments and heard the testimony of two (2) witnesses on the proposed amendments to Rule 32. Approximately one-half of the comments were filed by Probation Officers and most of the remainder were filed by judges. Almost all of the commentators were very critical of the 70-day time limit for imposing sentence in Rule 32(a). Many of those favored retention of the more generalized language in Rule 32 as it currently exists. While several were also critical of the internal time limits for completing certain tasks incident to preparation of the Presentence Report, at least one favored the internal time limits.

Approximately one-third of the commentators expressed concern for potential delays in requiring counsel's presence at any presentence interview with the defendant in (b)(2); several recommended that the right for counsel to be present not be absolute, but instead be conditioned on counsel's reasonable availability. At least one was strongly opposed to providing the right for counsel to even be present.

Several commentators recognized the debate over whether the probation officer's recommendation regarding a sentence should remain confidential. They recommended that the presumption of confidentiality should prevail rather than the proposed amendment which reflects the opposite presumption. See proposed Rule 32(b)(6)(A).

Several comments addressed concerns about extending Rule 26.2 (disclosure of witness statements) to the sentencing proceeding. There was particular concern that the probation officer's files would be subject to disclosure. It should be noted that that particular provision has already been approved by the Supreme Court and would become part of Rule 32 even if no other amendments were made.

Additional comments addressed: the potential interplay with the computation of time in Rule 45(a); whether the court has discretion to hear additional evidence at sentencing; whether there is any need to nationalize what is now local practice in approximately one-half of the courts; who has the burden of proof on controverted matters; the need for the court to see counsel's objections to the PSR; whether the provision concerning disclosure of the reasons

for the sentence in the judgment itself; and counsel's ability to make last minute objections to the PSR. There were also a number of comments on minor technical changes or corrections.

II. LIST OF COMMENTATORS: Rule 32

1. Rudi M. Brewster, Judge, San Diego, CA, 3-18-93.
2. Vincent L. Broderick & Mark L. Wolf, Judges, White Plains, N.Y., 4-14-93
3. Leonard J. Bronec, Prob. Off., Kansas City, Kan. 2-11-93.
4. Loren A. N. Buddress, Prob. Off., San Francisco, CA, 3-19-93.
5. Avern Cohn, Judge, Detroit, Mich., 4-2-93.
6. Julian Able Cook, Jr., Judge, Detroit, Mich., 3-19-93.
7. J. Robert Cooper, Esq., Atlanta, Ga., 2-4-93.
8. Barbara B. Crabb, Judge, Madison, Wisc., 2-2-93
9. Joseph P. Donohue, Prob. Off., Scranton, PA., 4-9-93.
10. James W. Duckett, Jr., Prob. Off., Columbia, S.C., 2-2- 93.
11. William J. Genego & Peter Goldberger, Esq., NACDL, Wash, D.C., 4-15-93.
12. T.A. Hummel, Prob. Off., Boise, Idaho, 2-2-93.
13. George P. Kazen, Judge, Laredo, Tex., 2-18-93.
14. Sim Lake, Judge, Houston, Tex., 2-24-93.
15. Robert B. Lee, Prob. Off., Seattle, Wash., 3-23-93.
16. Robert P. Longshore, Prob. Off., Montgomery, Ala., 2-10-93.

17. Robert M. Latta, Prob. Off., Los Angeles, CA, 2-16-93.

18. Thomas E. McKemey, Prob. Off., Philadelphia, Pa. 4-15-93.

19. Allen L. Noble, Prob. Off., Little Rock, Ark. 3-24-93.

20. Justin L. Quakenbush, Judge, Spokane, Wash., 2-2-93.

21. John D. Rainey, Judge, Houston, Tex., 3-22-93.

22. Lamont Ramage, Prob. Off., Austin, Tex., 2-11-93.

23. David F. Sanders, Prob. Off., Las Vegas, Nev., 2-8-93.

24. Frederick N. Smalkin, Judge, Baltimore, Md., 4-7-93.

25. Alan T. Solinsky, Prob. Off., Spokane, Wash., 4-16-93.

26. Joseph B. Steelman, Jr., Prob. Off., Winston-Salem, N.C., 4-13-93.

27. Thomas K. Tarr, Prob. Off., Concord, N.H., 4-2-93.

28. Charlie E. Vernon, Prob. Off., Sacramento, Cal., 2-4-93.

29. G. Wray Ware, Prob. Off., Roanoke, Va., 2-19-93.

III. LIST OF WITNESSES PRESENTING TESTIMONY: Rule 32

1. Thomas W. Hillier, Esq., Seattle, Wash., Testimony Before the Committee, 4-22-93.

2. Frederick N. Smalkin, Judge, Baltimore, Md., Testimony Before Committee, 4-22-93.

IV. COMMENTS: Rule 32

Hon. Rudi M. Brewster
U.S. Dist. Court
San Diego, California
March 18, 1993

Speaking on behalf of the Districts Guidelines Sentencing Committee, Judge Brewster requests that the outer time limits b increased to 84 days; their current practice is to set 77 days if conviction or plea occurs on a Monday, or 77 days from the Monday following a plea or conviction. Second, he recommends deletion of a requirement that the probation officer require a meeting with counsel. That matter should be left to the judge. He attached a copy of General Order 350 which shows their court's procedures along with a time chart for completing certain actions.

Hon. Vincent L. Broderick
Hon. Mark L. Wolf
Committee on Criminal Law, Jud. Conference
White Plains, N.Y.
Feb. 14, 1993

Judges Broderick and Wolf, on behalf of the Judicial Conference Committee on Criminal Law and its subcommittee on Sentencing Procedures, express several concerns about the proposed amendments to Rule 32. While it supports the stylistic reorganization of the rule, it believes that the changes will affect the work of the judges and probation officers. First, the Committee questions the wisdom of adopting strict time limits; citing a recent study by the Federal Judicial Center, the Committee believes that given the need for additional time to develop the PSR, the time limits will be routinely expanded, thus reducing the effectiveness of the rule. Second, the Committee believes that the procedures for dealing with objections to the PSR should remain a matter of local control; to that end they recommend a delay in amending Rule 32 until the FJC completes an empirical study of sentencing procedures. Third, the Committee believes that the provision regarding disclosure of statements should not be extended to probation officers. Fourth, noting that the Criminal Law Committee was sharply divided on the issue of confidentiality of the sentencing recommendation, it recommends that the rule be amended to presume confidentiality, rather than the reverse. Fifth, they recommend that an ambiguity in (b)(4)(B) be clarified; it is not clear just what the probation officer is to recommend concerning a different sentence within or

without the applicable guideline. Sixth, the commentators are concerned that the provision for the presence of counsel at interviews with probation officers may unduly delay the procedures; they suggest that either the Rule or the Committee Note make provision for counsel making themselves reasonably available for the interviews. Seventh, proposed subdivision (c)(1) indicates that the trial court may hear additional evidence; the commentators suggest applicable caselaw may require the court to hear such evidence. Finally, the commentators indicate that the reorganization of Rule 32 is a significant improvement; but they still recommend that most of the major revisions be deleted or delayed.

Leonard J. Bronec
Chief Probation Officer
Kansas City, Kansas
Feb. 11, 1993.

Mr. Bronec believes that Rule 32, as it currently exists is fine and that there is no need to amend it. He also questions the need to incorporate a model local rule into a national standard. He also expresses concerns about the provision dealing with disclosure of statements at sentencing hearings; he would oppose any amendment which would require disclosure of his investigative file. Secondly, he raises concern about the confidentiality of the PSR and opposes any amendment which would permit disclosure of his recommendations. He indicates that the Rule can be reorganized by simply moving around some of the provisions without including controversial amendments. He recommends that Rule 32 not be amended.

Loren A. N. Buddress
Chief Probation Officer
San Francisco, California
March 19, 1993

Citing statistical data concerning the amount of time needed to prepare a PSR, Ms. Buddress recommends deletion of the 70-day limit and a 35-day limit. She also notes the difficulties caused by scheduling interviews where defense counsel is not readily available. She notes that it is not unusual for a delay of 10 days to occur due to that problem.

Hon. Avern Cohn
U.S. Dist. Court
Detroit, Mich.

March 24, 1993

Judge Cohn endorses the view of Judge Cook, infra, that no change should be made in current Rule 32 regarding the role of the probation officer in computing the sentencing guideline.

Hon. Julian Able Cook, Jr.
Chief Judge, U.S. Dist. Court
Detroit, Michigan
March 19, 1993

Judge Cook offers the consensus opinions of the judges in his district. They are concerned about the 70-day limit in light of the diminished staffing available and other problems associated with the PSR. He also notes their reservations about requirement that counsel be present whenever the probation officer interviews the defendant. Although they have no problem with the requirement itself, they believe that it should be made clear that the court and the probation department retain scheduling authority. Finally, he notes the change in language concerning the probation officer's belief as to the applicable guideline range; it is imperative, he says, that the probation officer's calculation is only a recommendation to the judge who must determine the range.

J. Robert Cooper
Private Practice
Atlanta, Georgia
Feb. 4, 1993

Mr. Cooper, who limits his practice to "post-conviction" issues, suggests that the rule address the question of who has the burden of proof in going forward with offers of proof on controverted issues. Secondly, he recommends that the Committee address the issue of who has the authority to release the PSI.

Hon. Barbara B. Crabb
U.S. Dist. Court
Madison, Wisc.
Feb. 2, 1993

On behalf of the Committee on Criminal Rules for the Western District of Wisconsin, Judge Crabb believes the 70-day limit is too long. Although the Committee has no objection to the 10-day limit for review by counsel, it does object to the 14-day and 7-day limits. Secondly, the

Committee believes that the court should see drafts of the PSR as well as the objections presented by counsel; there is apparently some concern that what the court ultimately sees is only the probation officer's summary of the objections. Finally, the Committee questions the wisdom of filling the PSR with information about nonprison programs when the defendant is to be sentenced to 10 years or more.

Joseph P. Donohue
Chief Probation Officer
Scranton, PA.,
April 9, 1993

Mr. Donohue briefly expresses concern concerning the 70-day time limit and attaches a copy of his court's policy on guideline sentencing which details certain time limits and procedures.

James W. Duckett, Jr.
Chief Probation Officer
Columbia, S.C.
Feb. 2, 1993

Mr. Duckett expresses deep concern about the 70-day limit and encourages the Committee to retain the "without unnecessary delay" language and delete the other specific time limits as well.

Mr. William J. Genego, Esq.
Mr. Peter Goldberger, Esq.
National Assoc. of Criminal Defense Lawyers
Washington, D.C.
April 14, 1993

The commentators suggest that Rule 32 should not set a national time limit and observe that a court could set a longer time limit under a local rule. They welcome the provision for counsel' presence but question whether the rule should limit the PSR's discussion of the impact of an offense on an individual. They also recommend that the Rule should allow exclusion of the identities of the sources of information only where it appears that disclosure would likely result in harm, etc.; they recommend that (b)(5)(B) be deleted and merged with (b)(5)(C). While not taking a position on whether a probation officer should calculate applicable guidelines, they do express their concern about the proper role of the probation officers. They also take the position re (b)(6)(A) that the reference should be to

the "proposed sentence report" and make it clear that this draft is not to be disclosed to the court. The commentators also indicate that the probation officer should not have the authority to require the parties to meet for discussion of unresolved issues. They also indicate that (c)(1) may be too limited in that the court may wish to hear additional evidence. Additionally, (c)(1) should explicitly require that a copy of the PSR be sent to the Bureau of Prisons whenever confinement is assessed. Finally, the suggest that (c)(3)(A) is out of order and should be in (c)(1) and that in the order of things, the defendant should have the final opportunity to speak at the sentencing hearing.

T.A. Hummel
Chief Probation Officer
Boise, Idaho
Feb. 2, 1993

Mr. Hummel believes the time frames are too rigid. In his district, the courts are on a 45 or 60 day cycle. Given the practice of interviewing defendants twice, the difficulty of arranging counsel's presence, the probation officer should be permitted to prepare the report regardless of counsel's availability. He also notes that inclusion of information about non-prison programs may be useful in some cases but where it is not, it places an undue burden on the court. Finally, he believes that the details of Rule 32 should be left up to local rules.

Hon. George P. Kazen
U.S. Dist. Court
Laredo, Tex.
Feb. 18, 1993.

Judge Kazen strongly urges deletion of the 70-day time limit; he believes that defendants will argue that they have a substantive right to make an issue of it. He notes that in his district, probation officers often have to obtain information from other jurisdictions and that the requirement that the PSR be prepared in 35 days is totally unrealistic; he does indicate agreement with the time limits in (b)(6). He adds that there should be some consideration of adding language in 32(b)(2) that a probation officer may proceed with interviewing the defendant if counsel has not been able comply with a reasonable time limit. Judge Kazen strongly opposes the implied requirement in (b)(6)(A) that the probation officer's recommendation should be disclosed; he believes that more and more officers are opting out of the PSR field because of fear of the courtroom. He also

questions the "realism" of the requirement in (b)(6)(B) that the probation officer may require the defendant and counsel to discuss any unresolved issues. He asks whether the language in (c)(1), "or will not affect sentencing," is intended to change current practice; he notes the increasing problems of correcting minute details in the PSR which may have an impact on choice of facility, parole eligibility, etc. Finally, he questions how Rule 32(c)(2) would work and is concerned that it might limit the Jencks Act.

Robert M. Latta
Probation Officer
Los Angeles, CA
Feb. 16, 1993.

Mr. Latta expresses concern about the 70-day limit; he notes that that rule requires optimum efficiency. He also notes that requiring counsel to be present creates an adversarial process. He adds that requiring production of the PSR 35 days before sentencing has the most dramatic impact on the Probation office. Finally, he indicates that the time frame imposed by the rule has been used in his district and that in some cases the average guideline report takes seven days from dictation to disclosure; that leaves only three and one-half weeks for the entire investigation.

Hon. Sim Lake
U.S. Dist. Court
Houston, Texas
Feb. 24, 1993.

Judge Lake wholeheartedly concurs in the observations made by Judge Kazen, supra.

Robert B. Lee
Chief Probation Officer
Seattle, Wash.
March 23, 1993

Mr. Lee states that the provision in Rule 32(b)(4)(E) concerning information on nonprison programs is often not necessary. He also expresses concern about the adoption of specific time lines; the process might be detailed in Rule 32 but the specific timeliness issues should be left to local rules. Mr. Lee additionally notes that the reference in (b)(6)(C) should be to "revised" PSR's and not revisions. Finally, he believes that some provision should be made for keeping the PSR confidential.

Robert P. Longshore
Chief Probation Officer
Montgomery, Alabama
Feb. 10, 1993.

Mr. Longshore points out that under Rule 45(a), any time limit less than 11 days requires exclusion of weekends, holidays., etc in calculating the deadline. He notes that in a disclosure prior to a weekend with the holiday, the probation officer would have to produce the PSR 11 calender days prior to the scheduled sentencing date. He recommends that the seven day period in Rule 32 be exempted from the Rule 45 computation.

Thomas E. McKemey
Deputy Chief Probation Officer
Philadelphia, Pa.
April 15, 1993

Mr. McKemey expresses objection to the timing requirements in the proposed rule and the provision addressing counsel's presence at any interview with the defendant. While he agrees that counsel should be permitted to attend, he recommends that practical limits be attached; counsel should be made aware of the need to complete the report promptly. He also expressed opposition to the provision which requires disclosure of the probation officer's recommendation re sentence unless a local rule provides otherwise. He believes that that rule will create an inertia for disclosure in all cases. In his view, no changes to the present Rule 32 need to be made.

Allen L. Noble
Deputy Chief Probation Officer
Little Rock, Ark.
March 24, 1993

Mr. Noble recommends that the Committee reconsider the 70-day limit for preparation of the PSR. He notes that in his district they have 78 days and that that is often not enough time. He is concerned that if the 70-day limit is imposed his office will not enough time to prepare a quality PSR.

Hon. Justin L. Quakenbush
Chief Judge, US Dist. Court
Spokane Washington

Feb. 2, 1993

Judge Quakenbush expresses specific concern about the time limit in proposed Rule 32(b)(6) for the probation officer to submit the PSR. In his district they use a 70-day rule of thumb limit but require submission of the Report at least 20 days prior to sentencing; this gives the probation officer 50 days to complete the report. He encourages the Committee to consult with the Judicial Conference on probation matters.

Hon. John D. Rainey
U.S. Dist. Court
Houston, Texas
March 22, 1993

Judge Rainey indicates that he is in complete agreement with the views expressed by Judge Kazen, supra.

Lamont Ramage
Supervising Probation Officer
Austin, Tex.
Feb. 11, 1993.

Mr. Lamont points out that the last sentence in Rule 32(c)(1) should be deleted and the first sentence in (d)(1) should be changed to read, "A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, the sentence, and the reasons for which the sentence was imposed." Addition of a "Statement of Reasons" page to the Judgment and Commitment Order made it unnecessary to attach a separate findings form to the PSI. With regard to the presence of counsel, he suggests that the rule be changed to recognize local restraints. He suggests several alternatives: eliminate the rule; provide for those cases where defendants are in custody; or require US Marshals to produce defendants for the PSI interview. Finally, he notes that the production of statements provision seems inconsistent with the Jencks Act.

David F. Sanders
Probation Officer
Las Vegas, Nev.
Feb. 8, 1993

Mr. Sanders indicates that the time frame contemplated in Rule 32 for completion of the PSR is too short. In support of his position he catalogs all of the tasks that go

into preparing the report. Although he notes that the proposed amendment seems to make sense "intellectually," the press of other duties, computer problems, slow witnesses, and busy counsel create problems. He is troubled by the fact that the attorneys have as much time to read and object to the report as the officer has to do the investigation and prepare the report. He suggests that if the Committee decides to keep the 70-day rule, that it eliminate the attorney conference. Instead, by the 14th day following disclosure, attorneys must file their objections. Ideally, a 90-day rule would be better; that would give the probation officer 40 days.

Hon. Frederick N. Smalkin
U.S. Dist. Court
Baltimore, Md.
April 7, 1993

Judge Smalkin, in his capacity as Chairman of the Probation Committee of the District of Maryland, is strongly opposed to two aspects of the amendment: First, the entitlement of counsel to attend interviews of the defendant conducted by the probation officer. He is concerned that counsel's presence will create a mini-adversarial proceeding and trigger the inevitable request that government counsel be present. Until the Constitution requires counsel's presence, the rule should remain silent. Second, Judge Smalkin indicates that the court is strongly opposed to the setting of time limits for various stages of the sentencing process. Finally, he expresses question the wisdom of condoning disclosure of the probation officer's recommendation to the parties. Some vestige of confidentiality should remain.

Alan T. Solinsky
Probation Officer
Spokane, Washington
April 16, 1993

Probation Officer Solinsky was one of six probation officers signing a letter indicating their deep concern about the time limits in the proposed rule change. They point out the difficulties of obtaining the necessary information for the presentence report in a short period of time. To impose a 35-day rule would downgrade the quality under an already stressed system.

Joseph B. Steelman, Jr.
Deputy Chief Probation Officer
Winston-Salem, N.C.
April 9., 1993

Mr. Steelman recommends an overall time frame of 90 days rather than 70 days and that the rule specify whether the reference to 14 days refers to 14 calendar days or 14 work/court days. He also indicates that the rule should be changed to reflect some additional flexibility in the 7-day time frame for submission to the court. Mr. Steelman also suggests that the rule reflect that defense counsel should not unduly delay the proceedings by not being available for conferences.

Thomas K. Tarr
Chief Probation Officer
Concord, N.H.
April 2, 1993

Mr. Tarr recounts his office's experiences with a local rule similar to the proposed Rule 32 time limits; in his court, however, the overall time limit is 90 days. Citing tremendous problems with workloads, etc., he recommends that the Committee allow at least 49 days, rather than 35 days, to complete the initial PSR. He also recommends an overall time frame of at least 84 or 91 days.

Charlie E. Vernon
Chief Probation Officer
Sacramento, California
Feb. 4, 1993

Mr. Vernon notes that his comments on the proposed amendments are based on his experiences in the Eastern Dist. of California, where the local rules contain time limits almost identical to those in the proposed rule. His chief complaint is with Rule 32(b)(2) which provides for presence of counsel; he urges the Committee to modify the language to require counsel's presence only where the defendant requests such. This would free the probation officer from attempting to locate elusive lawyers before making any contact with the defendant. He assumes that failure to have counsel present will result in suppression motions at sentencing. Turning to (b)(4)(B) he strongly endorses the proposed language which addresses the probation officer's advice regarding guideline classifications. He urges retention of the language. Finally, he expresses concern about the language

in (b)(6)(D) regarding the ability of defense counsel to raising new objections at any time before sentencing. The experience in his district is that counsel use the first draft of the PSR as a discovery device; although the procedures for dealing with objections is virtually identical to the proposed rule, many objections are raised for the first time at sentencing. Their local rule, which seems to work, states: "Except for good cause shown, no objections may be made to the presentence report other than those previously submitted to the probation officer pursuant to Paragraph 6 [same as (b)(6)(B)] and those relating to information contained in the presentence report that was not contained in the proposed presentence report." This provision has not eliminated last minute objections, but has reduced their incidence and the continuances needed to investigate the objections.

G. Wray Ware
Chief Probation Officer
Roanoke, Va.
Feb. 19, 1993

Mr. Wray believes that because the amendments to Rule 32 will make it more like a speedy trial act, the control of time limits should rest with local rules which seem to be working well. He notes that the Probation Department is staffed at 79% of formula and that strictly enforced time limits would have an adverse impact. He indicates that he has discussed the amendments with Judge James Turk and Judge Jackson Kiser, who share his concerns. He recommends that the current generalized language concerning time limits be retained and that the specific time tables be eliminated.

V. TESTIMONY OF WITNESSES: Rule 32

Thomas W. Hillier, Esq.
Federal Public Defender
Seattle, Washington
Testimony on April 22, 1993

Mr. Hillier testified that although the structure of Rule 32 has been improved there are a number of practical problems which must be addressed. First, he stated that the time limits are workable but that there will be problems with the time limits in the rule and that flexibility should be insured. Second, he expressed concern over the role of the probation officer who should really be limited to being an information gatherer. In particular he anticipated problems if the probation officer is given the authority to

require meetings with the parties; the probation officer's task should be to organize the material and information for the court. Third, it is important that the court see the original objections filed with the probation officer. Fourth, defense counsel should be permitted to be present at any meeting between the probation officer and the defendant. Fifth, he encouraged the Committee to consider adding a requirement in the Rule that the prosecution must disclose all relevant sentencing evidence to the defense. Sixth, he recommended that the Committee delete the "local" option provision which presumes that the probation officer's recommendation on sentence will be disclosed unless a local rule provides otherwise; he concerned that the rule will not make any real difference. Seventh, he recommended that the words "in its discretion" be eliminated from subdivision (c)(1) vis a vis the court's decision to hear additional evidence. He noted the trend toward requiring courts to hear such evidence if offered. Finally, he urged the Committee to include a provision requiring that the parties be put on notice that the court intends to depart from the sentencing range.

Hon. Frederick N. Smalkin
U.S. Dist. Court
Baltimore, Md.
Testimony on April 22, 1993

Judge Smalkin's testimony focused on the problem of providing counsel with a right to be present at any interview between the probation officer and the defendant. He noted that currently in his district the defense counsel is permitted to be present if the probation officer and the attorney for the Government agree. He expressed concern that routinely permitting counsel to be present would turn the process into an adversarial hearing, with the U.S. Attorney also desiring to be present so as to avoid ex parte contacts. Judge Smalkin was also opposed to any amendment which would provide counsel notice and a reasonable opportunity to be present. He recommended that the Committee wait for the case law to develop in this area.

Rule 40(d) Amendment
Criminal Rules Advisory Committee
Fall 1992

Rule 40. Committment to Another District

* * * * *

(d) ARREST OF PROBATIONER OR SUPERVISED RELEASEE. If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate judge. The person may be released under Rule 46(c). The federal magistrate judge shall:

(1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district having jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate is the person named in the warrant.

* * * * *

Rule 40(d) Amendment
Criminal Rules Advisory Committee
Fall 1992

COMMITTEE NOTE

The amendment to subdivision (d) is intended to clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction. As written, there appeared to be a gap in Rule 40, especially under (d)(1) where the alleged violation occurs in a jurisdiction other than the district having jurisdiction.

A number of rules contain references to pretrial, trial, and post-trial release or detention of defendants, probationers and supervised releasees. Rule 46, for example, addresses the topic of release from custody. Although Rule 46(c) addresses custody pending sentencing and notice of appeal, the rule makes no explicit provision for detaining or releasing probationers or supervised releasees who are later arrested for violating terms of their probation or release. Rule 32.1 provides guidance on proceedings involving revocation of probation or supervised release. In particular, Rule 32.1(1) recognizes that when a person is held in custody on the ground that the person violated a condition of probation or supervised release, the judge or United States magistrate judge may release the person under Rule 46(c), pending the revocation proceeding. But no other explicit reference is made in Rule 32.1 to the authority of a judge or magistrate judge to determine conditions of release for a probationer or supervised releasee who is arrested in a district other than the district having jurisdiction.

The amendment recognizes that a judge or magistrate judge considering the case of a probationer or supervised releasee under Rule 40(d) has the same authority vis a vis decisions regarding custody as a judge or magistrate proceeding under Rule 32.1(a)(1). Thus, regardless of the ultimate disposition of an arrested probationer or supervised releasee under Rule 40(d), a judge or magistrate judge acting under that rule may rely upon Rule 46(c) in determining whether custody should be continued and if not, what conditions, if any, should be placed upon the person.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 40(d)

I. SUMMARY OF COMMENTS: Rule 40(d)

The Committee received no written comments on the proposed amendment to Rule 40(d).

II. LIST OF COMMENTATORS: Rule 40(d).

None

III. COMMENTS: Rule 40(d).

None

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial Appearance Before the Magistrate

(a) IN GENERAL. Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), must be promptly filed ~~shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the show of probable cause~~. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule. An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney

FEDERAL RULES OF CRIMINAL PROCEDURE

for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.

COMMITTEE NOTE

The amendment to Rule 5 is intended to address the interplay between the requirements for a prompt appearance before a magistrate judge and the processing of persons arrested for the offense of unlawfully fleeing to avoid prosecution under 18 U.S.C. § 1073, when no federal prosecution is intended. Title 18 U.S.C. § 1073 provides in part:

> "Whoever moves or travels in interstate or foreign commerce with intent...to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees...shall be fined not more than $5000 or imprisoned for not more than five years, or both.
>
> * * * * *
>
> Violations of this article may be prosecuted...only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated."

In enacting § 1073, Congress apparently intended to provide assistance to state criminal justice authorities in an effort to apprehend and prosecute state offenders. It also appears that by requiring permission of high ranking officials, Congress intended that prosecutions be limited in number. In fact, prosecutions under this section have been rare. The purpose of the statute is fulfilled when the person is apprehended and turned over to state or local authorities. In such cases the requirement of Rule 5 that any person arrested under a federal warrant must be brought before a federal magistrate judge becomes a largely meaningless exercise and a needless demand upon federal judicial resources.

In addressing this problem, one of several options are commonly used by federal authorities when no federal prosecution is intended to ensue after the arrest. First, once federal authorities locate a fugitive, they may contact local law enforcement officials who make the arrest based upon the underlying out-of-state warrant. In that instance, Rule 5 is not implicated and the United States Attorney in the district issuing the § 1073 complaint and warrant can take action to dismiss both. In a second scenario, the fugitive is arrested by federal authorities who, in compliance with Rule 5, bring the person before a federal magistrate judge. If local law enforcement officers are present, they can take custody, once the United States Attorney informs the magistrate that there will be no prosecution under § 1073. Depending on the availability of state or local officers, there may be some delay in the Rule 5 proceedings; any delays following release to local officials, however, would not be a function of Rule 5. In a third situation, federal authorities arrest the fugitive but local law enforcement authorities are not present at the Rule 5 appearance. Depending on a variety of practices, the magistrate may calendar a removal hearing under Rule 40, or order that the person be held in federal custody pending further action by the local authorities.

Under the amendment, officers arresting a fugitive charged only with violating § 1073 need not bring the person before a magistrate under Rule 5(a) if there is no intent to actually prosecute the person under that charge. Two requirements, however, must be met. First, the arrested fugitive must be transferred without unnecessary delay to the custody of state officials. Second, steps must be taken in the appropriate district to dismiss the complaint alleging a violation of § 1073. The rule continues to contemplate that persons arrested by federal officials are entitled to prompt handling of federal charges, if prosecution is intended, and prompt transfer to state custody if federal prosecution is not contemplated.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 10. Arraignment

Arraignment, which must ~~shall~~ be conducted in open court, and ~~shall~~ consists of:

(a) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and

(b) calling on the defendant to plead to the indictment or information ~~thereto~~.

The defendant must ~~shall~~ be given a copy of the indictment or information before being called upon to enter a plea ~~plead~~. Video teleconferencing technology may be used to arraign a defendant not physically present in court, if the defendant waives the right to be arraigned in open court.

COMMITTEE NOTE

Read together, Rules 10 and 43 require the defendant to be present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990)(Rules 10 and 43 are broader in protection than the Constitution). The amendment to Rule 10, in addition to several stylistic changes, creates an exception to that rule and provides that the court may permit arraignments through video teleconferencing if the defendant waives the right to be present in court. Similar amendments have also been made to Rule 43 to cover other pretrial sessions.

In amending the rule, and Rule 43, the Committee was very much aware of the argument that permitting video arraignments could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see, and experience first-hand the formal

impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially where there is a real question whether the defendant really understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if the two are in separate locations, connected only by audio and video linkages.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment where the defendant is in visual and aural contact with the court, but in a different location. Use of video technology might be particularly appropriate, for example, where an arraignment will be pro forma but the time and expense of transporting the defendant to the court are great. In some districts, defendants have to be transported long distances, under armed guard, to an arraignment which may take only minutes to complete.

A critical element to the amendment is that no matter how convenient or cost effective a video arraignment might be, the defendant's right be present in court stands unless he or she waives that right. As with other rules including an element of waiver, whether a defendant voluntarily waived the right to be present in court during an arraignment will be measured by the same standards. An effective means of meeting that requirement in Rule 10 would be for the court to obtain the defendant's views during the arraignment itself or require the defendant to execute the waiver in writing.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 43. Presence of Defendant.

(a) **Presence Required.** The defendant ~~shall~~ must be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) **Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will ~~shall~~ not be prevented and the defendant will ~~shall~~ be considered to have waived the right to be present whenever a defendant, initially present at trial,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), ~~or~~

(2) in a noncapital case, is voluntarily absent at the imposition of sentence, or

~~(2)~~(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

FEDERAL RULES OF CRIMINAL PROCEDURE

(c) Presence Not Required. A defendant need not be present in the following situations:

(1) ~~**A corporation**~~ An organization, as defined in 18 U.S.C. § 18, may appear by counsel for all purposes.

(2) In prosecution for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a pretrial session in which the defendant can participate through video teleconferencing and waives the right to be present in court.

~~(4)~~(5) At a reduction of sentence under Rule 35.

COMMITTEE NOTE

The revisions to Rule 43 focus on three areas and reflect in part similar changes in Rule 10, which governs arraignments. First, the amendments make clear that a defendant who, initially present at trial but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia. Second, the court may use video technology to conduct pretrial sessions with the defendant absent from the courtroom, where the defendant waives the right to be present. Third, the rule is amended to extend to organizational defendants. In addition, some stylistic changes have been made.

FEDERAL RULES OF CRIMINAL PROCEDURE

Subdivision (a). The changes to subdivision (a) are stylistic in nature and the Committee intends no substantive change in the operation of that provision.

Subdivision (b). The changes in subdivision (b) are intended to remedy the situation where a defendant voluntarily flees before sentence is imposed. Without the amendment, it is doubtful that a court could sentence a defendant who had been present during the entire trial but flees before sentencing. Delay in conducting the sentencing hearing under such circumstances may result in difficulty later in gathering and presenting the evidence necessary to formulation of a guideline sentence.

The right to be present at court, although important, is not absolute. The caselaw, and practice in many jurisdictions, supports the proposition that the right to be present at trial may be waived through, inter alia, the act of fleeing. *See generally Crosby v. United States*, 113 S.Ct. 748, ____ U.S. ____ (1993). The amendment extends only to noncapital cases and applies only where the defendant is voluntarily absent after the trial has commenced. The Committee envisions that defense counsel will continue to represent the interests of the defendant at sentencing.

The words "at trial" have been added at the end of the first sentence to make clear that the trial of an absent defendant is possible only if the defendant was previously present at the trial. *See Crosby v. United States*, *supra*.

Subdivision (c). There are two changes to subdivision (c). The first is technical in nature and replaces the word "corporation" with a reference to "organization," as that term is defined in 18 U.S.C. § 18 to include entities other than corporations.

The second change to subdivision (c) is more significant. New subdivision (c)(4), which parallels a similiar amendment in Rule 10, provides that the court may use video teleconferencing technology to conduct pretrial sessions with the defendant at another location -- if the defendant waives the right to be personally present in court. The Committee balanced the concern that this might dehumanize the judicial process against the fact that some pretrial sesssions can be very brief, pro forma, proceedings. As noted above, the right to be present in court is not an absolute right, and may be voluntarily

waived by the defendant. It is important to note that the amendment does not require the court to use such technology; the rule simply recognizes that the court may, under appropriate conditions, and in full respect of the defendant's rights, use such technology.

Although the Committee did not attempt to further define the term pretrial sessions, the rule could logically extend to sessions such as Rule 5 proceedings, arraignments (as specifically provided for in the amendment to Rule 10), preliminary examinations under Rule 5.1, competency hearings, pretrial conferences, and motions hearings not already within the purview of subdivision (c)(3). The Committee does not contemplate that the amendment would extend to guilty plea inquiries under Rule 11(c).

FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 53. Regulation of Conduct in the Court Room

The taking of photographs in the court room during the progress of judicial proceedings or ~~radio~~ broadcasting of judicial proceedings from the court room ~~shall~~ must not be permitted by the court except as such activities may be authorized under guidelines promulgated by the Judicial Conference of the United States.

COMMITTEE NOTE

The amendment to Rule 53 marks a shift in the federal courts' regulation of cameras in the court room and the broadcasting of judicial proceedings. The change does not require the courts to permit such activities in criminal cases. Instead, the rule authorizes the Judicial Conference to do so under whatever guidelines it deems appropriate.

The debate over cameras in the court room has subsided due to several developments in the last decade. First, the Supreme Court's decision in *Chandler v. Florida*, 448 U.S. 560 (1981) made clear that it is not a denial of due process to permit cameras at criminal trials. Second, a large majority of the state courts now permit photographic and broadcasting coverage of criminal trials, without significant interruption in the proceedings or adverse impact on the participants. Third, developments in video and audio technology have enabled coverage of judicial proceedings to be accomplished with little or no interruption; some courts have adopted rules requiring pooling of coverage, which seems to even further reduce the liklihood of disruption.

In 1990 the Judicial Conference approved a three-year pilot program with audio coverage and photographic coverage of civil proceedings in selected trial and appellate courts. The Conference declined to apply the program to criminal proceedings -- because of the absolute ban of such activities in Rule 53.

FEDERAL RULES OF CRIMINAL PROCEDURE*

In adopting the amendment the Committee was persuaded, in part, by the fact that despite the wide, and almost common, presence of cameras in court rooms there has not been a long list of complaints or a parade of horrible experiences. To the contrary, the Committee believed that judicial decorum might be enhanced if the media is able to observe, and record, the proceedings from a location outside the court room. The Committee also recognized that the criminal justice system might be better understood, and appreciated, if criminal proceedings are made readily avaiable to the public at large. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)(vital role of print and electronic media are surrogates for the public supports opening of courts to audio and camera coverage).

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 22 & 23, 1993
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on April 22 and 23, 1993. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges, Chair of the Committee, called the meeting to order at 9:00 a.m. on Thursday, April 22, 1993 at the Federal Judiciary Building in Washington, D.C. The following persons were present for all or a part of the Committee's meeting.

Hon. Wm. Terrell Hodges, Chair
Hon. Sam A. Crow
Hon. W. Eugene Davis
Hon. John F. Keenan
Hon. George M. Marovich
Hon. Joseph H. Rodriguez
Hon. Harvey E. Schlesinger
Hon. D. Lowell Jensen
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Ms. Rikki J. Klieman, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designate of Mr. John Keeney, Acting Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were Judge Robert Keeton and Mr. Bill Wilson, chairman and member respectively of the Standing Committee on Rules of Practice and Procedure; Mr. Peter McCabe, Mr. David Adair, and Mr. John Rabiej of the Administrative Office of the United States Courts. Magistrate Judge Crigler was not able to attend.

I. INTRODUCTION AND COMMENTS

Judge Hodges welcomed the attendees and noted that Judges Keenan and Schlesinger were attending their last meeting and thanked them for their many years of faithful

service to the Committee. He also introduced the new members of the Committee: Judges Davis, Marovich, and Rodriguez, and Ms. Klieman.

II. HEARING ON PROPOSED AMENDMENTS

The Chair also noted that a number of Criminal Rules had been published for public comment and that originally, a hearing on those proposed amendments had been set for March 29th in San Francisco and May 6, 1993 in Washington. Due to lack of witnesses, the San Francisco hearing had been cancelled. In order to consolidate travel, the May 6th hearing had been moved forward to coincide with the Committee's meeting. The Committee heard testimony from two witnesses: Mr. Thomas W. Hillier, Jr., a Federal Public Defender from Seattle, Washington and Hon. Frederick N. Smalkin,1 from the United States District Court in Baltimore, Maryland. Mr. Hillier addressed the proposed amendments to Rules 16 and 32 and Judge Smalkin addressed the proposed amendments to Rule 32.

III. SPECIAL ORDER OF BUSINESS

As a special order of business the Chair recognized four persons who had indicated an interest in testifying about proposed amendments to Rule 16: Hon. Donald E. O'Brien, Hon. William G. Young, Hon. John A. Jarvey, and Professor Charles W. Ehrhardt. Each presented testimony to the Committee on the need for an amendment to Rule 16 which would either require the government to identify written materials which directly name the defendant, or in the alternative, require the government to make available to the defendant any existing index or cross referencing system or program which would assist the defense in identifying materials relating to the defendant. The witnesses offered the two options in language drafted by Professor Ehrhardt. They pointed out that there is a compelling financial need to save defense counsel time in sorting through massive amounts of material in preparing for trial. In response to questions from the Committee they recognized that the government might have an interest in protecting its work product but that some system should be devised to expedite criminal discovery, where time and resources are becoming more scarce.

Judge Hodges thanked the witnesses for their insights and indicated that in the due course of discussing possible

---

1. Due to scheduling conflicts, Judge Smalkin was not able to appear before the Committee until the afternoon session on April 22.

amendments to Rule 16, the proposal would again be considered.

IV. APPROVAL OF MINUTES

Judge Crow moved that the minutes of the Committee's October 1992 meeting in Seattle be approved. Mr. Karas seconded the motion which carried unanimously.

V. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Forwarded to Congress

The Reporter informed the Committee that the Supreme Court was in the process of approving a number of proposed amendments to the Criminal Rules and forwarding them to Congress for action under the Rules Enabling Act. The Rules amended by the Court are as follows:

1. Rule 12.1, Production of Statements.
2. Rule 16(a), Discovery of Experts.
3. Rule 26.2, Production of Statements.
4. Rule 26.3, Mistrial.
5. Rule 32(f), Production of Statements.
6. Rule 32.1, Production of Statements.
7. Rule 40, Commitment to Another District.
8. Rule 41, Search and Seizure.
9. Rule 46, Production of Statements.
10. Rule 8, Rules Governing § 2255 Proceedings.
11. Technical Amendments to other Rules.

B. Rules Approved by the Standing Committee and Circulated for Public Comment on an Expedited Basis

The Reporter informed the Committee that at its December 1992 meeting the Standing Committee approved for public comment proposed amendments to Rules 32 and 40(d), two amendments approved by the Committee at its Seattle meeting in October 1992. In addition, the Standing Committee authorized publication and comment on two Rules it had earlier approved: Rules 16(a)(1)(discovery of experts) and Rule 29(b)(delayed rulings on motions for judgment of acquittal). All four rules were approved for expedited consideration; the comment period ended on April 15, 1993.

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

Judge Hodges provided a brief background on the proposed amendment to Rule 16 which would require the government to disclose to the defense certain statements by individuals associated with organizational defendants.

Mr. Karas moved that the proposed amendment be sent forward to the Standing Committee with the recommendation that it be approved. Mr. Marek seconded the motion.

Judge Hodges noted that several written comments had been received on the proposed change and that he thought that there was merit in recognizing in the rule and the accompanying note the fact that the parties may disagree as to whether a particular person was in a position to bind the organizational defendant. Following comments by Judge Marovich concerning that problem, Judge Keeton recommended that the rule be changed slightly to require the government to disclose the statements of persons "the government contends" were in a position to bind the organizational defendant. Judge Hodges in turn suggested appropriate language for the note which would recognize that the defense would not be required to stipulate or admit that a particular individual was in a position to bind the defendant.

Judge Keenan moved that the amending language be added to the rule. Judge Rodriguez seconded the motion which carried by a vote of 10 to 0 with one abstention. The main motion to forward the amendment to the Standing Committee carried by a vote of 10 to 0 with one abstention.

2. Rule 29(b), Delayed Ruling on Judgment of Acquittal

The Reporter briefly reviewed the background of the proposed amendment to Rule 29(b) and noted that one commentator, Mr. Weinberg, had suggested that the rule or the note reflect that on appeal of a delayed ruling of a motion for judgment of acquittal the court is not free to consider any evidence submitted after the motion was made at trial. Following additional brief discussion during which several members indicated that that position was clear from the wording of the rule itself, Mr. Pauley moved that the rule be forwarded to the Standing Committee. Judge Crow seconded the motion which carried by vote of 10 to 0 with two abstentions.

3. Rule 32, Sentence and Judgment

The discussion of the amendments to Rule 32 began with Judge Hodges giving a brief overview of the amendments and listed ten issues the Committee should address in deciding what, if any, further changes should be made to Rule 32. Mr. Pauley, Mr. Marek, and the Reporter suggested several additional topics. Mr. Karas moved that the Committee discuss the amendments. Following a second by Judge Marovich, the Committee voted unanimously to discuss the proposed amendments.

Turning first to the issue of timing of sentencing, Judge Hodges noted that almost all of the approximately 30 individuals submitting written comments on the proposed amendments questioned the wisdom of imposing a 70-day deadline for sentencing. He indicated that one possible solution would be to retain the current language in Rule 32, "without unnecessary delay," but to also retain from the proposed, amended rule as published for comment specific incremental deadlines for submission of the presentence report, etc. Mr. Pauley indicated that he had informally polled United States Attorneys' offices and that some had suggested including a specific deadline of 84, 90, or 91 days. Judge Davis expressed general agreement with Judge Hodges' concerns about a specific deadline and Judge Crow questioned whether there was any need for a national rule governing the timing of sentencing proceedings. Mr. Karas ultimately moved that Rule 32(a)2 be revised to require sentencing to take place without "unnecessary delay" but that the participants would be required to comply with the internal time limits for preparation of the report, filing of objections, etc. Judge Davis seconded the motion which carried by a unanimous vote.

Turning to Rule 32(b)(4), Judge Hodges noted that several commentators had questioned the proposed language which indicated that the probation officer would "determine" the appropriate sentencing classification for the defendant. After brief discussion the Committee agreed that the Rule should require the probation officer to provide information concerning the classification which he or she "believes" to be applicable to the defendant.

Regarding Rule 32(b)(4)(E), Judge Hodges noted that several commentators had questioned whether any reference should be made in the presentence report to the availability of nonprison programs. The Committee generally agreed that

---

2. The references are to Rule 32 as it was published for public comment.

the language should be changed and subsequently Judge Jensen recommended that the rule be amended to read: "in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant." The proposed language was approved by a unanimous vote.

Judge Hodges indicated that a number of commentators had focused on Rule 32(b)(6)(A) which addresses disclosure and objections to the presentence report. They were split on the issue of whether the probation officer's recommendation on sentence should be disclosed. As published, the rule created a presumption that the recommendation should be disclosed, unless a local rule provided otherwise. Mr. Marek briefly reviewed the debate on this particular issue and ultimately moved that the language as published should be retained. Mr. Pauley seconded the motion which carried unanimously.

The Committee next addressed Rule 32(b)(6)(B) and the question whether the probation officer should be granted the authority to "require" counsel and the defendant to meet with him or her. Judge Hodges noted that several commentators questioned the wisdom of granting that authority. Judge Marovich indicated that he believed the probation officer should have that authority. In response to a question from Ms. Klieman whether the Committee had considered the possibility of using some word other than require, Mr. Marek reviewed what he believed to be the role of the probation officer and that the Committee, in his view, had not intended to change drastically the role of the probation officer. Mr. Pauley expressed the view that perhaps local rules could address this point but Judge Marovich questioned whether that would accomplish the desired result of early resolution of the issues. He noted that the role of the probation officer has changed and that they have become in some cases one of the adversaries. Mr. Wilson expressed deep concern about the role of probation officers but that the rule reflects the reality of that role.

Both Judges Hodges and Schlesinger indicated that the local rule in the Middle District of Florida includes language authorizing the probation officer to require meetings with the defense counsel and that it has worked well. Judge Davis indicated that the word "require" promotes the perception that the probation officer's role has expanded. Following additional comments, the Chair summarized the various options: leaving the rule as published; deleting the provision altogether, or amending the rule to provide that the probation could request counsel to meet. The Committee voted 8 to 2 to amend the rule to

read: ""the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government, to discuss those objections."

With regard to Rule 32(b)(2), which entitles defense counsel to be present at any interview between the probation officer and the defendant, Judge Hodges informed the Committee that a number of commentators expressed concern about the ability of counsel to unreasonably delay preparation of the presentence report. After a brief discussion of the options available, the Committee voted unanimously to change the language to read: "On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation." Mr. Pauley expressed concern, however, about the definition of the word "interview" and suggested that the Committee Note indicate that the Committee did not intend for the rule to apply to every conversation between the probation officer and the defendant. Mr. Marek suggested that the issue should be left to the courts for resolution. Professor Saltzburg moved that the Note should read to the effect that the word interview extends to any communication initiated by the probation officer where he or she is seeking information to be used in the presentence investigation. He added that the burden should be on the defense counsel to respond promptly to notice of an intent to interview the defendant. Mr. Karas seconded the motion which carried by a 9 to 4 vote.

Following additional discussion about the respective roles of the probation officer, the defense counsel, and the court in insuring that counsel is given an opportunity to be present, without unduly delaying the process, Professor Saltzburg moved that the words "upon request" be deleted from the rule. Mr. Marek seconded the motion which failed by a vote of 3 to 9.

Turning to Rule 32(b)(6)(D), Judge Hodges noted that the word "presentencing" should read "sentencing."

Judge Hodges indicated that with regard to Rule 32(c)(1), at least one commentator questioned the choice of language dealing with controverted matters which would not be "taken into account or will not affect sentencing." He noted that that the phrase "will not affect" was not in the original Rule 32 and the commentator expressed concern that the new language would invite litigation. Judge Hodges explained that due to overlapping ranges in the in the sentencing guidelines, there might be situations in which a controverted matter would not alter the sentence even if the sentencing range is changed. Mr. Wilson commented that as

published, a judge's statement that the controverted matter will not be considered in any way, will avoid the litigation. Mr. Adair agreed that there might be factual disputes about a matter which would affect the classification but not the sentence imposed.

Ultimately, a minor change was made in the wording of the provision to read "the controverted matter will not be taken into account in, or will not affect, sentencing." The Chair added that the Note should include some reference to the change in wording.

Judge Hodges noted that some commentators had suggested removing language in proposed Rule 32(c)(1) which indicates that the court has discretion to consider additional evidence or testimony, language which exists in the current rule. Mr. Marek noted that one commentator had indicated that the granting of discretion may be problematic. He noted that the caselaw is still developing and ultimately moved that the Committee Note be amended to indicate that developing caselaw reflects the possibility that due process might require the court to consider additional evidence or testimony, and that it might be an abuse of discretion not to consider additional evidence. Judge Marovich seconded the motion which carried by a vote of 8 to 4 with one abstention.

Judge Keeton noted a potential ambiguity in the language which apparently distinguishes between testimony and evidence and that use of the word "testimony" could be problematic. He noted that counsel now argue that they have a right to present oral testimony. Judge Hodges observed that perhaps the Committee Note could be changed to indicate that use of the phrase "or other evidence" should indicate to the trial court that it had the discretion to determine the form of the evidence. He added that the current rule seems to have a broader sweep; under proposed (c)(1), the additional evidence would be considered to the extent that it affected unresolved objections.

The Reporter indicated that a number of the concerns raised in the discussion might be covered in the Committee Note, i.e., the fact that the Rules of Evidence do not apply, and that the trial court has the discretion to determine the form of the evidence to be received.

After some additional discussion on the point, Mr. Doar moved that the words "testimony or other" be deleted from subdivision (c)(1). Professor Saltzburg seconded the motion which carried by a unanimous vote.

With regard to Rule 32(b)(6)(B), Judge Hodges noted a suggestion raised in several written comments to the effect that the probation officer, or counsel, should provide copies of the original objections to the court. Mr. Marek moved, and Professor Saltzburg seconded, a motion to amend the Committee Note to indicate that nothing in the rule prohibits the court from requiring the parties to file their original objections or have them included as a part of the addendum in the presentence report. The motion carried by a unanimous vote.

Mr. Marek recommended that the Committee reconsider the provisions in Rule 32(b)(5) regarding exclusion of certain information. In particular, he expressed concern that such information, although not included in the report, might nonetheless be relied upon by the court in assessing a sentence. Following some preliminary discussion of the issue, Mr. Marek moved that the language in Rule 32(c)(3)(A) be amended to require that any information excluded under (b)(5) be summarized in writing if the information will be relied upon in sentencing. Mr. Karas seconded the motion. Judge Keeton expressed opposition to the change to the extent that it would require the court to prepare a written summary and not have the option of doing so orally from the bench. He suggested that perhaps the language in subdivision (c)(3)(A) concerning a summary of excluded information should be moved into Rule 32(6)(A). Mr. Marek agreed, and changed his motion.

Judge Hodges suggested some language to accomplish the intent of the motion which generated additional discussion. Ms. Klieman expressed concern for even a summary of confidential information in the presentence report would be problematic. The Reporter then offered alternative language.

Professor Saltzburg expressed concern that the proposed changes would be considered a major revision to the Rule as it was published for comment and questioned whether the proposed language might encourage probation officers to err on the side of including more confidential information. Judge Keenan stated the current rule seems to work and that no changes were required. Judge Schlesinger indicated that even assuming confidential information were disclosed, it would normally not make a major difference in the sentence.

Additional discussion focused on the practical problems of transmission of the summary and appellate review of the information. Judge Jensen suggested that the real issue was whether the defense counsel would have enough time to review the summary. Mr. Marek agreed and believed that the best solution would rest in making provision for counsel to

respond to whatever confidential information was relied upon in sentencing. Mr. Marek restated his motion, with the consent of Mr. Karas, to amend (c)(3)(A) to require a written summary and to require the court to provide counsel with a reasonable opportunity to comment on the summary. That motion carried by a unanimous vote.

Mr. Pauley drew the Committee's attention to Rule 32(c)(5) concerning the court's advice to the defendant regarding the right to appeal In particular he pointed out earlier language in the 1974 Advisory Committee Notes which indicated that advising a defendant of the right to appeal after he had pleaded guilty might be confusing. He moved that the rule be amended to reflect the differences which exist in the defendant's right to appeal in a contested case and in a case where the defendant has entered a guilty plea. Judge Davis seconded the motion which passed with a unanimous vote.

Mr. Karas moved that Rule 32, as amended, be forwarded to the Standing Committee. Judge Keenan seconded the motion which passed unanimously.

4. Rule 40(d), Conditional Release of Probationer

Judge Hodges informed the Committee that no written comments had been received on the proposed amendment to Rule 40(d). Mr. Karas moved that the rule be forwarded to the Standing Committee and Judge Rodriguez seconded the motion. It passed with a unanimous vote.

C. Other Criminal Procedure Rules Under Consideration by the Committee

1. Rule 5: Proposal to Exempt UFAP Arrestees from Rule

The Chair briefed the Committee on the background of proposed amendments to Rule 5 and informed them that at the Seattle meeting in October 1993, he had appointed a subcommittee composed of Judge Jensen (Chair), Judge Schlesinger, Magistrate Judge Crigler, Mr. Karas, and Mr. Pauley to study the proposals. Judge Jensen indicated that his subcommittee had attempted to obtain as much information as possible concerning what actually happens when a person charged with the offense Unlawful Flight to Avoid Prosecution (UFAP) is arrested by federal authorities. Under Rule 5, such persons are to be presented to a magistrate even if prosecution for the offense is not contemplated.

Mr. Pauley moved that Rule 5 be amended to provide that persons arrested for violating 18 U.S.C. § 1073 (UFAP) may be turned over to appropriate state or local authorities provided that the Government promptly moves, in the district in which the warrant was issued, to dismiss the complaint. Professor Saltzburg seconded the motion.

Judge Jensen indicated that he favored the motion but Mr. Karas spoke against the proposal noting that a person charged with UFAP might be placed in custody indefinitely without the benefit of appearing before a magistrate. Mr. Pauley expressed the view that the federal system should not provide a backstop for state criminal justice problems or procedures. And Mr. Marek responded that the federal system is involved if a UFAP charge has been filed. The Committee ultimately voted 11 to 2 to make the proposed changes and forward them to the Standing Committee with a recommendation to publish the amended rule for comment by the bench and bar.

2. Rules 10 and 43: In Absentia Appearances

Judge Hodges provided a brief background to the proposal to permit use of video technology to arraign defendants, not present in court. He noted that at the Committee's Seattle meeting he had appointed a subcommittee composed of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg to study the issue and report back to the Committee. Judge Keenan indicated that the subcommittee had studied the issue and believed that the Rules should be amended. He then moved that Rules 10 and 43 be changed to permit use of teleconferencing technology where the defendant waives the right to be physically present in court. Mr. Doar seconded the motion.

Mr. McCabe of the Administrative Office, informed the Committee that at its Spring 1993 meeting, the Judicial Conference had approved a pilot teleconferencing program in the Eastern District of North Carolina for competency hearings where the defendant is not present in court. Judge Davis questioned whether a defendant would really be waiving the right to be present and Judge Keenan indicated that the waiver provision was a major compromise within the subcommittee's consideration of the issue.

Mr. Karas opposed the rule changes, stating that he viewed the amendments as one more step down the slippery slope. He noted that the waivers will come from those defendants with appointed counsel and that Arizona had scrapped a similar program of video arraignments. Mr. Marek

also opposed the amendments. He was concerned that there would be inevitable questions whether the defendant actually waived appearance in court, adding that defendants often do not fully grasp the significance of initial appearances. He joined Mr. Karas in questioning the wisdom of starting down the path of video teleconferencing.

Judge Marovich indicated that the amendment sends the message that arraignments are not that important and Mr. Wilson questioned the practical problems of defense counsel effectively communicating with a client who may not be present in court with counsel.

After some additional discussion the original motion was withdrawn and replaced with a motion to forward the proposed amendment without provision for waiver.

Mr. Marek expressed greater concern for the new proposal and Professor Saltzburg indicated that the proposal would squeeze the humanity out of the justice system. He noted that there was something fundamental about bringing defendants forward and putting them before a judge. Concerning the waiver provision, he stated that that issue could be addressed in the Committee Note. Additional comments by Judge Hodges, Mr. Marek, and Mr. Wilson focused on the problems of counsel being present with the defendant. Judge Crow commented that there might be a problem with the definition of arraignment, which is covered in Rule 10. But Rule 43 might not be as limited. Judge Marovich indicated that if teleconferencing were limited to only arraignments, it might not be as objectionable.

Judge Keenan indicated that perhaps the best way to proceed would be to treat Rule 10 separately and go forward with that rule alone. On a vote whether to amend Rule 10 without a waiver provision, the motion failed by a vote of 6 to 7. Judge Keenan thereafter moved that Rule 10 be amended to permit video teleconferencing if the defendant waived personal appearance. Professor Saltzburg seconded the motion which carried by a vote of 10 to 3.

Turning to Rule 43, Judge Jensen noted that the issue of waiver would also be a key point in any change to the rule. Mr. Marek expressed concern that any counsel who recommended that a defendant waive personal appearance might be guilty of ineffective assistance of counsel.

Judge Keenan moved that Rule 43 be amended to permit teleconferencing of pretrial sessions if the defendant waives personal appearance. Judge Crow seconded the motion which carried by a vote of 9 to 3 with one abstention.

3. Appointment of Subcommittee to Consider Problems Associated with Proposals to Amend Rules

Judge Hodges noted the problems often associated with unsuccessful proposals to amend rules. He queried what response, if any, the Committee should give to individuals or groups who request permission to appear personally before the Committee to propose rule changes or to address the Committee before it votes on a particular amendment. He appointed a subcommittee consisting of Judge Crow (Chair), Judge Jensen, Mr. Marek, Ms. Klieman, and Mr. Pauley to consider the issue and whether the Committee should adopt any policies or standard procedures for dealing with those issues. Later in the meeting, at the suggestion of Mr. Pauley, Judge Hodges asked the subcommittee to consider the issue of whether a particular proposal should be considered indefinitely tabled if it is rejected by the Committee.

4. Rule 12: Proposal to Amend Rule to Require Defense to Raise Entrapment Defense as Motion

Judge Hodges indicated that Judge M. Real had proposed that Rule 12 be amended to require defendants to raise the entrapment defense as a pretrial motion and drew the Committee's attention to materials in the agenda book supporting that proposal. No motion was made regarding the proposal.

5. Rule 16: Proposal to Require Government Disclosure of Witnesses

The Chair indicated that at its October 1992 meeting the Committee had indicated an interest in revisiting possible amendments to Rule 16 which would require the government to disclose its witnesses to the defense. Mr. Wilson and Professor Saltzburg had agreed to draft a possible amendment, and had done so. But he added that Attorney General Reno had sent a letter to the Committee asking it to defer consideration of that amendment until she had a chance to review it.

Judge Schlesinger then moved to defer consideration of the amendment. Judge Keenan seconded the motion.

Judge Keenan indicated that it would be important to respect the request of the new Attorney General and give the Department of Justice an opportunity to consider more fully the proposed amendment. Judge Hodges indicated that there has been almost continuous consideration of amendments to

Rule 16 and that the heart of that rule rested in the proposal from Mr. Wilson and Professor Saltzburg.

Mr. Wilson acknowledged the request of the Attorney General but was concerned about continued delays in addressing what is a vital issue in federal criminal discovery. Professor Saltzburg acknowledged that the issue raised political questions and that if the Committee did not defer it might be viewed as a snub to the Attorney General. He suggested a middle ground -- the Committee could defer the matter but continue to pursue the amendment. Mr. Pauley indicated that after reviewing the proposal, the Attorney General might be in a position to suggest an alternative solution or amendment.

Following additional brief discussion of possible solutions, the Committee vote unanimously to defer the proposed amendment to Rule 16 until its next meeting.

There was also a brief discussion about the proposal from Judge O'Brien that Rule 16 be amended to require the government to identify the materials implicating the defendant. Several members expressed concern about the process of reconsidering proposals which had already been rejected; this proposal in particular had been considered and rejected by the Committee at is October 1993 meeting. Judge Hodges recommended that the subcommittee on procedures consider the issue. Any further action on Judge O'Brien's proposal was deferred.

6. Rule 24(b): Proposal to Reduce Number of Peremptory Challenges

The Chair pointed out a proposal from several individuals that the Committee consider amending Rule 24 to reduce or equalize peremptory challenges -- in an effort to reduce court costs. He provided background information on the Committee's past attempts to amend Rule 24(b) to equalize the number of peremptory challenges and observed that perhaps Congressional interest in the matter might spur the Committee to reconsider that issue. No motion was made to amend Rule 24.

7. Rule 43: Proposal to Permit In Absentia Sentencing

The Reporter provided a brief introduction to the Department of Justice's proposal to amend Rule 43 to permit in absentia sentencing. Mr. Pauley moved that Rule 43 be so amended and Judge Davis seconded that motion.

Mr. Pauley provided additional background information and reasons for the amendment. He pointed out that caselaw recognizes that the government can be prejudiced by the absence of a defendant. Judge Hodges questioned what would happen to the right of appeal if the defendant was sentenced in absentia. Judge Marovich indicated that it is a matter of waiver. He noted that in Illinois there is considerable caselaw indicating that if the defendant leaves after being admonished about the consequences of doing so, he or she has waived whatever right they had to be present or to appeal.

Professor Saltzburg opposed the motion noting that trial judges might wish to wait to hear the defendant's reasons for not being present. He added that there did not appear to be any real data or evidence suggesting that there is need for the changing the rule. Judge Hodges observed that a presentence report could be prepared even if the defendant were absent and thus preserve some of the evidence for later use. Judge Marovich stated that defendant's should not be permitted to create a gridlock on the system by not showing up for sentencing. Mr. Pauley added that there has been an increase of "fugitivity" and that it seems anomalous that the entire trial could proceed without the defendant being present but that sentencing could not take place in the same circumstances.

Judge Keeton expressed agreement with Judge Marovich's views and the problems of wasting judicial resources by having to wait for the defendant's return. Mr. Pauley indicated that amending the rule would not require the court to sentence in absentia; it would simply permit the court to do so. Professor Saltzburg questioned whether the percentage of "fugitivity" had actually decreased in light of the increase in the number of cases. Judge Keenan questioned the potential impact on Rule 35 motions. Mr. Marek stated that once sentence is imposed, there is no way to correct it and Judge Hodges indicated that if the defendant's absence was involuntary, the sentence would probably be void. He added that sentencing in absentia would permit orders of restitution for victims, a view shared by Judge Jensen.

Judge Hodges questioned whether a guilty plea would be considered part of the trial and Mr. Pauley indicated that it would be. Mr. Marek expressed concern with that view and stated that the rule should be limited to those trials where the defendant has entered a not guilty plea; he questioned the constitutionality of a rule permitting in absentia sentencing after a guilty plea. Judge Marovich suggested that perhaps the rule should include a provision requiring the defendant to be admonished of the risk of flight before

sentencing. Judge Hodges and Mr. Marek raised the question of whether the change would violate the Sixth Amendment and Mr. Pauley responded that the amendment assumed that counsel would be present. Only the defendant's presence would be waived.

Ultimately, the Committee voted in favor of the proposed amendment to Rule 43 by a margin of 7 to 5.

Later in the meeting, Mr. Pauley moved that the word "corporation" in Rule 43(c) should be changed to the word "organization" as defined in 18 U.S.C. § 18. Judge Davis seconded the motion which carried by a unanimous vote.

8. Rule 53: Permitting Cameras in the Courtroom

Judge Hodges provided a brief background on the proposal to permit the broadcasting of criminal trials. Mr. McCabe informed the Committee that the Judicial Conference had approved a pilot program for civil trials; five courts had been authorized to permit cameras in the courtroom where the trial judge felt that it was appropriate to do so. The program would eventually be evaluated by the Conference.

Judge Davis noted that there seemed to be an absence of "horror stories" coming from that test program and Ms. Klieman spoke in favor of amending Rule 53 to permit broadcasting. She indicated that in her experience cameras in the courtroom tended to keep everyone honest; the media tends not to come into the courtroom because they can watch the proceedings from another location. It also serves as an asset to the administration of justice. Mr. Marek observed that the proposed amendment defers to the Judicial Conference to set the appropriate guidelines.

Mr. Pauley moved that Rule 53 be amended by deleting the reference to "radio" in the current rule. Judge Davis seconded the motion which carried by a vote of 12 to 1. Judge Schlesinger then moved that Rule 53 be amended to permit broadcasting the judicial proceedings under guidelines determined by the Judicial Conference. Professor Saltzburg seconded the motion which carried.

D. Rules and Projects Pending Before the Standing Committee and the Judicial Conference

1. Rule 57: Proposed Amendments Concerning Local Rules

The Reporter indicated, as a matter of information, that the Standing Committee was currently considering standardized language for amending the various procedural

rules concerning promulgation of local rules. In the case of the criminal rules, the amendment would be effective for Rule 57.

2. Rule 59: Proposed Amendments Concerning Technical Amendments

The Reporter also informed the Committee of pending amendments to Rule 59 which would authorize the Judicial Conference to make technical changes to the rules without the necessity of going through the entire rule-making process.

3. Admission of United States Attorneys Under Local Rules

Judge Hodges informed the Committee of a concern raised by then Attorney General Barr in a letter to Chief Justice Rehnquist concerning the question of whether the Courts of Appeals and the District Courts have the authority to require United States Attorneys to join their bars. Judge Keeton indicated that the Standing Committee was interested in hearing the views of the various advisory committees on that issue. He recognized that there is no "rule" in any of the procedural rules addressing the point; admission requirements are left to the local courts. Judge Hodges questioned whether, as Attorney General pointed out, the local admission requirements might conflict with statutory provisions governing the authority of the Attorney General to assign attorneys to represent the United States.

Judge Keeton added that it would be helpful to hear the views of the Department of Justice as to whether it believed the answer rested in promulgation of a rule, and if so, the extent of the rule. He noted that the present view is that the Judicial Conference does not have the authority to promulgate a rule governing bar admissions and he questioned who would have the authority. Mr. Pauley reminded that the Attorney General's letter noted that the problem of bar admissions existed in both the appellate and trial courts and disagreed that the best course would be to send the issue back to the Department of Justice.

Judge Hodges indicated that he would be inclined to write a letter to the Standing Committee indicating that the Committee had considered the issue and determined that the issue of bar admission did not appear in the criminal rules and that although the Committee had doubts about the appropriateness of such a rule it would be receptive to specific proposals for addressing the problem.

4. Filing by Facsimile

Mr. Rabiej informed the Committee that the Judicial Conference was considering the issue of promulgating guidelines for implementation of facsimile filing of documents. He added that issue was still pending and that there appeared to be no urgency for the Committee to address possible amendments to the Criminal Rules.

5. Renumbering and Integration of Rules

As a point of information, the Reporter pointed out that the Standing Committee had been, and would be, considering proposals to integrate all of the appellate, civil, and criminal rules of procedure rules into one unified numbering system. He noted that to date, no specific action had been taken on that proposal other than to chart out how the new system might work.

VI. RULES OF EVIDENCE UNDER CONSIDERATION

The Reporter informed the Committee that the Chief Justice had appointed an Evidence Advisory Committee and that it would handling any amendments to Federal Rule of Evidence 412, which had been approved by the Committee at its October 1992 meeting and published for comment. He added that Professor Saltzburg had been designated as the Committee's liaison to the new Evidence Committee.

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

After a brief discussion about possible meeting dates and places, the Committee voted unanimously to hold its next meeting in San Diego, California on October 11 and 12, 1993.

The meeting adjourned at 11:15 a.m. on Friday, April 23, 1993.

AGENDA VII
Washington, D.C.
June 17-19, 1993

REPORT

OF THE

ADVISORY COMMITTEE

ON

EVIDENCE RULES

Rule 412. Admissibility of Victim's Sexual Behavior or Alleged Sexual Predisposition

(a) Evidence Generally Inadmissible. Evidence of the following types is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) evidence that, or offered to prove that, any alleged victim engaged in other sexual behavior; and

(2) evidence of, or offered to prove, any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case, proof of the following types is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that another person 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 to prove consent; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In civil cases, evidence of, or offered to prove, sexual behavior or alleged sexual predisposition of any

alleged victim is admissible if it is otherwise admissible under these rules, and if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Proof may be made by evidence of reputation or evidence in the form of an opinion only if reputation has been placed in controversy by the alleged victim.

(c) Procedure to Determine Admissibility.

A party offering evidence under subdivision (b) of this rule must make a motion for admission, specifically describing the evidence and stating the purposes for which it is offered. The motion must be served upon the alleged victim and the parties and must be filed no later than 14 days before trial unless the court directs an earlier filing or, permits a later filing, including during trial, for good cause shown. The motion, all related papers, and the record of any hearing must be and remain under seal unless otherwise ordered by the court. Before admitting such evidence, the court must hold a hearing in camera and afford the alleged victim as well as the parties the right to be present and an opportunity to be heard.

RULE 412. ADMISSIBILITY ~~SEX OFFENSE CASES; RELEVANCE~~ OF VICTIM'S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION

(a) Evidence Generally Inadmissible. ~~Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.~~ Evidence of the following types is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) evidence that, or offered to prove that, any alleged victim engaged in other sexual behavior; and

(2) evidence of, or offered to prove, any alleged victim's sexual predisposition.

(b) Exceptions. ~~Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is~~

(1) In a criminal case, proof of the following types is admissible, if otherwise admissible under these rules:

~~(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or~~

~~(2) admitted in accordance with subdivision (c) and is evidence of~~

(A) ~~past~~ evidence of specific instances of sexual behavior by the alleged victim ~~with persons other than the accused,~~ offered to prove ~~by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim,~~ ~~that another person was~~ the source of semen, ~~or~~ injury~~,~~ or other physical evidence; ~~or~~

(B) ~~past~~ evidence of specific instances of sexual behavior by the alleged victim with respect to the ~~accused~~ person accused of the sexual misconduct ~~and is~~ offered ~~by the accused upon the issue of whether the alleged victim consented to the sexual behavior to with respect to which such offense is alleged.~~ to prove consent; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In civil cases, evidence of, or offered to prove, sexual behavior or alleged sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules, and if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Proof may be made by evidence of reputation or evidence in the form of an opinion only if reputation has been placed in controversy by the alleged victim.

(c) Procedure to Determine Admissibility.

~~(c)~~(1) ~~If the person accused of committing an offense under~~

~~chapter 109A of title 18, United States Code intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.~~

~~(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.~~

May 24, 1993

~~(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.~~

A party offering evidence under subdivision (b) of this rule must make a motion for admission, specifically describing the evidence and stating the purposes for which it is offered. The motion must be served upon the alleged victim and the parties and must be filed no later than 14 days before trial unless the court directs an earlier filing or, permits a later filing, including during trial, for good cause shown. The motion, all related papers, and the record of any hearing must be and remain under seal unless otherwise ordered by the court. Before admitting such evidence, the court must hold a hearing in camera and afford the alleged victim as well as the parties the right to be present and an opportunity to be heard.

~~(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which an offense under chapter 109A of title 18, United States Code is alleged.~~

COMMITTEE NOTE

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the witness. The rule further regulates the form of proof, the inferences that may be drawn, and the procedural protections that apply when evidence is proffered pursuant to the specified exceptions.

The revised rule applies in all cases involving sexual misconduct in which there is evidence that someone was a victim, without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to "pattern" witnesses in both criminal and civil cases whose testimony about

other instances of sexual misconduct by the person accused is relevant and otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred, and not to connote any requirement that the misconduct be alleged in the pleadings. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation, neither Rule 404 nor this Rule will operate to bar the evidence; Rules 401 and 403 will continue to control. Rule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

The reference to a person "accused" is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. Evidence offered to prove allegedly false prior claims by the victim can raise troublesome issues as to whether the prior claim was in fact "false" as

compared to "unsubstantiated" or "withdrawn," and whether the circumstances of the earlier charges are probative with regard to the present complaint. Because evidence of false claims does not on its face constitute evidence barred by Rule 412, and because the court will often have to determine whether the evidence proves something more than mere propensity in ruling on admissibility, these claims fall more appropriately within the framework of Rule 404 than Rule 412.

Subdivision (a). As amended, Rule 412 bars evidence of offered to prove the victim's sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rrule 412 so requires. The word "other" is used to suggest some flexibility in admitting evidence "intrinsic" to the alleged sexual misconduct. Cf. Committee Note to 1991 amendment to Rule 404(b).

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. See, e.g., United States v. Galloway, 937 F.2d 542 (10th Cir. 1991), cert. denied, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); United States v. One Feather, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); State v. Carmichael, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include

activities of the mind, such as fantasies or dreams. See Charles A. Wright & Kenneth A. Graham, Jr., Federal Practice and Procedure, §5384 at p. 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove or to imply a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life style will not be admissible.

The amendment eliminates the confusing introductory phrase, ("(n)otwithstanding any other provision of law"); the limitation of the rule to "a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code;" and the absolute statement that "reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible." The Committee believes that these eliminations will promote clarity without reducing unnecessarily

the protection afforded to alleged victims.

The introductory phrase in subdivision (a) was deleted because it lacked clarity and contained no explicit reference to the other provisions of law that were intended to be overridden. The reason for extending the rule to all criminal cases is obvious. If a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim, the need to protect the victim is as great as it would be in a prosecution for sexual assault. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. Although a court might well exclude sexual history evidence under Rule 403 in a kidnapping or similar case, the Advisory Committee believes that Rule 412 should be extended so that it explicitly covers all criminal cases in which a claim is made that a person is the victim of sexual misconduct.

The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies

in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

The conditional clause, "except as provided in subdivisions (b) and (c)" is intended to make clear that evidence of the types described in subdivision (a) is admissible only under the strictures of those sections. Subdivision (b) notes that the exceptions only apply if the evidence is otherwise admissible under other rules of evidence. For example, in determining admissibility, the court must consider Rules 402 and 403, and perhaps other Rules such as Rules 404 and 405. In addition, the evidence must satisfy the procedural requirements for admissibility contained in subdivision (c).

Subdivision (b). Subdivision (b) spells out the specific circumstances in which some evidence may be admissible that would otherwise be barred by the general rule expressed in subdivision (a). As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. A new exception has been added for civil cases.

In a criminal case, subdivision (b)(1) may admit evidence pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403. Subdivisions (b)(1)(A) and (b)(1)(B) require proof in the form of specific

instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion.

Under subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. See United States v. Begay, 937 F.2d 515, 523 n. 10 (10th Cir. 1991). Evidence offered for the specific purpose identified in this subdivision may still be excluded if it does not satisfy Rules 401 or 403. See, e.g., United States v. Azure, 845 F.2d 1503, 1505-06 (8th Cir. 1988) (10 year old victim's injuries indicated recent use of force; court excluded evidence of consensual sexual activities with witness who testified at in camera hearing that he had never hurt victim and failed to establish recent activities).

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual

intercourse with the accused, or voiced sexual fantasies involving the specific accused. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim had expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent. Recognition of this basic principle was expressed in subdivision (b)(1) of the original rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988) (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias).

Subdivision (b)(2) governs the admissibility of otherwise prescribed evidence in civil cases. It employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.

The balancing test requires the proponent of the evidence to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent; it raises the threshold for admission by requiring that the probative value of the evidence substantially outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

Reputation and character evidence may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. Cf. Fed.R.Civ.P. 35(a).

Subdivision (c). Amended subdivision (c) is more concise and understandable than the subdivision it replaces. The requirement of a motion before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the

court may take into account the conditions previously included in the rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The rule recognizes that in some instances the circumstances that justify an application to introduce evidence otherwise barred by Rule 412 will not become apparent until trial.

The amended rule requires that all papers connected with the motion and any record of a hearing on the motion be kept and remain under seal during the course of trial and appellate proceedings unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.

The amended rule provides that before admitting evidence that falls within the prohibition of Rule 412(a), the court must hold a hearing in camera at which the alleged victim and any party must be afforded the right to be present and an opportunity to be heard.

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed. R. Civ. P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed.

R. Civ. P. 26 (c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. Cf. Burns v. McGregor, ___F.2d ____ (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). Confidentiality orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accursed seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers schedules for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur.

Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. See 1 S. SALTZBURG & M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL, 396-97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

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

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

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

DATE: May 28, 1993

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

1. Proposed amendments to Federal Rules of Appellate Procedure 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 32, 33, 35, 38, 40, 41 and 48 approved by the Advisory Committee on Appellate Rules at its April 20 & 21, 1993 meeting. All of these proposed amendments, except the amendments to Rule 1, were published in January 1993. A public hearing was scheduled for February 17, 1993, in Chicago, Illinois but was canceled for lack of interest.

   The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments. The Advisory Committee requests that the Standing Committee approve for transmittal to the Judicial Conference all of the published rules, as amended, except Rule 32. The Advisory Committee also requests that amended Rule 1 be included in this packet even though it has not been published. The change to Rule 1 is technical. Rule 1 is amended by adding a subdivision to it; the new subdivision includes the caption and text of existing Rule 48. The Advisory Committee suggests that change so that new rules can be added at the end of the existing set of appellate rules without "burying" the "title" provision currently found at Rule 48.

Because the post-publication alterations to Rule 32 are substantial, the Advisory Committee requests that the Standing Committee republish the proposed amendments to Rule 32 for a new period of comment. This report includes two drafts of Rule 32. The first draft, found at pages 23 through 28 of this memorandum, was approved by a majority of the Advisory Committee. The second draft, found at pages 29 through 34 of this memorandum, is favored by two members of the Committee. For a discussion of the Committee's concerns, *see* pp. 49-50 of this memorandum.

The Advisory Committee's report on the rules published in January is organized as follows:

- Part A of this report includes the amended rules.
- Part B identifies and discusses the changes made in the text or notes after publication and it discloses any disagreement among the Advisory Committee members concerning the changes.
- Part C is a summary of the written comments received.

2. Proposed amendments to Federal Rules of Appellate Procedure 4, 8, 10, 21, 25, 32, 35, 41, and 47, and proposed Rule 49. These proposals were approved at the Advisory Committee's April 20 & 21 meeting and the Advisory Committee requests the Standing Committee's approval of them for publication.

- Part D of this report contains the draft amendments.

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

Rule 1. Scope of Rules and Title*

(a) *Scope of Rules.*-- These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

(b) *Rules Not to Affect Jurisdiction.*-- These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

(c) *Title.*-- These rules may be known and cited as the Federal Rules of Appellate Procedure.

Committee Note

Subdivision (c). A new subdivision is added to the rule. The text of new subdivision (c) has been moved from Rule 48 to Rule 1 to allow the addition of new rules at the end of the existing set of appellate rules without burying the title provision among other rules. In a similar fashion the Bankruptcy Rules combine the provisions governing the scope of the rules and the title in the first rule.

---

* Shaded material has been added or altered after publication.

Rule 3. Appeal as of Right - How Taken

(a) *Filing the Notice of Appeal.*-- An appeal permitted by law as of right from a district court to a court of appeals ~~shall~~ must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy ~~shall~~ must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

* * * * *

Committee Note

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

Rule 5. ~~Appeals~~ Appeal by Permission under 28 U.S.C. § 1292(b)

* * * * *

(c) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

* * * * *

Committee Note

Subdivision (c). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 5.1. Appeal by Permission Under 28 U.S.C. § 636(c)(5)

* * * * *

(c) *Form of Papers; Number of Copies*.-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

* * * * *

Committee Note

Subdivision (c). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

~~Rule 9. Release in criminal cases~~

~~(a) *Appeals from orders respecting release entered prior to a judgment of conviction.* An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the district court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending the appeal.~~

~~(b) *Release pending appeal from a judgment of conviction.* Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the~~

~~release of the appellant pending disposition of the motion.~~

~~(c). *Criteria for release.* -- The decision as to release pending appeal shall be made in accordance with Title 18, U.S.C. § 3143. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial rests with the defendant.~~

Rule 9. Release in a Criminal Case

(a) *Appeal from an Order Regarding Release Before Judgment of Conviction*. -The district court must state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, must file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order must file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require.

Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(b) *Review of an Order Regarding Release After Judgment of Conviction.* -- A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). In addition, the papers filed by the applicant for review must include a copy of the judgment of conviction.

(c) Criteria for Release. The decision regarding release must be made in accordance with applicable provisions of Title 18 U.S.C. §§ 3142, 3143 and 3145(c).

Committee Note

Rule 9 has been entirely rewritten. The basic structure of the rule has been retained. Subdivision (a) governs appeals from bail decisions made before the judgment of conviction is entered at the time of sentencing. Subdivision (b) governs review of bail decisions made after sentencing and pending appeal.

Subdivision (a). The subdivision applies to appeals from "an order regarding release or detention" of a criminal defendant before judgment of conviction, *i.e.*, before sentencing. See Fed. R. Crim. P. 32(b). The old rule applied only to a defendant's appeal from an order "refusing or imposing conditions of release." The new broader language is needed because the government is now permitted to appeal bail decisions in certain

circumstances. 18 U.S.C. §§ 3145 and 3731. For the same reason, the rule now requires a district court to state reasons for its decision in all instances, not only when it refuses release or imposes conditions on release.

The rule requires a party appealing from a district court's decision to supply the court of appeals with a copy of the district court's order and its statement of reasons. In addition, an appellant who questions the factual basis for the district court's decision must file a transcript of the release proceedings, if possible. The rule also permits a court to require additional papers. A court must act promptly to decide these appeals; lack of pertinent information can cause delays. The old rule left the determination of what should be filed entirely within the party's discretion; it stated that the court of appeals would hear the appeal "upon such papers, affidavits, and portions of the record as the parties shall present."

Subdivision (b). This subdivision applies to review of a district court's decision regarding release made after judgment of conviction. As in subdivision (a), the language has been changed to accommodate the government's ability to seek review.

The word "review" is used in this subdivision, rather than "appeal" because review may be obtained, in some instances, upon motion. Review may be obtained by motion if the party has already filed a notice of appeal from the judgment of conviction. If the party desiring review of the release decision has not filed such a notice of appeal, review may be obtained only by filing a notice of appeal from the order regarding release.

The requirements of subdivision (a) apply to both the order and the review. That is, the district court must state its reasons for the order. The party seeking review must supply the court of appeals with the same information required by subdivision (a). In addition, the party seeking review must also supply the court with information about the conviction and the sentence.

Subdivision (c). This subdivision has been amended to include references to the correct statutory provisions.

Rule 13. Review of a Decisions of the Tax Court

(a) *How Obtained; Time for Filing Notice of Appeal.*-- Review of a decision of the United States Tax Court ~~shall~~ must be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after ~~the decision of the Tax Court is entered.~~ entry of the Tax Court's decision. At the time of filing the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after ~~the decision of the Tax Court is entered.~~ entry of the Tax Court's decision.

* * * * *

Committee Note

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

* * *

(d) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may direct that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 25. Filing and Service

(a) *Filing.* - ~~Papers~~ A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used. Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the ~~date of~~ filing date and thereafter give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by

these rules or by any local rules or practices.

* * * * *

(d) *Proof of Service.*-- Papers presented for filing ~~shall~~ must contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, ~~and~~ of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but ~~shall~~ must require such to be filed promptly thereafter.

(e) *Number of Copies.*-- Whenever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Several circuits have local rules that authorize the office of the clerk to refuse to accept for filing papers that are not in the form required by these rules or by local rules. This is not a suitable role for the office of the clerk and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this rule. This provision is similar to Fed. R. Civ. P. 5(e) and Fed. Bankr. R. 5005.

The Committee wishes to make it clear that the provision prohibiting a clerk from refusing a document does not mean that a clerk's office may no longer screen documents to determine whether they comply with the rules. A court may delegate to the clerk authority to inform a party about any noncompliance with

the rules and, if the party is willing to correct the document, to determine a date by which the corrected document must be resubmitted. If a party refuses to take the steps recommended by the clerk or if in the clerk's judgment the party fails to correct the noncompliance, the clerk must refer the matter to the court for a ruling.

Subdivision (d). The amendment requires that the certificate of service must state the addresses to which the papers were mailed or at which they were delivered. The Federal Circuit has a similar local rule, Fed. Cir. R. 25.

Subdivision (e). Subdivision (e) is a new subdivision. It makes it clear that whenever these rules require a party to file or furnish a number of copies a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

A party must consult local rules to determine whether the court requires a different number than that specified in these national rules. The Committee believes it would be helpful if each circuit either: 1) included a chart at the beginning of its local rules showing the number of copies of each document required to be filed with the court along with citation to the controlling rule; or 2) made available such a chart to each party upon commencement of an appeal; or both. If a party fails to file the required number of copies, the failure does not create a jurisdictional defect. Rule 3(a) states: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate . . ."

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 ~~shall~~ must file a statement identifying all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public. The statement ~~shall~~ 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 ~~shall~~ must be included in the front of the table of contents in a party's principal brief even if the statement was previously filed.

Committee Note

The amendment requires a party to file three copies of the disclosure statement whenever the statement is filed before the party's principal brief. Because the statement is included in each copy of the party's brief, there is no need to require the filing of additional copies at that time. A court of appeals may require the filing of a different number of copies by local rule or by order in a particular case.

Rule 27. Motions

* * * * *

(d) *Form of Papers; Number of Copies.*-- All papers relating to a motions may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 28. Briefs

(a) *Appellant's Brief*.-- The brief of the appellant must contain, under appropriate headings and in the order here indicated:

* * * * *

(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

~~(5)~~ (6) An argument. ~~The argument may be preceded by a summary.~~ The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

~~(6)~~ (7) A short conclusion stating the precise relief sought.

(b) *Appellee's Brief*.--The brief of the appellee must conform to the requirements of paragraphs (a)(1)-~~(5)~~ (6) , except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the standard of review.

* * * * *

(g) *Length of briefs.*-- Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.

Committee Note

Subdivision (a). The amendment adds a requirement that an appellant's brief contain a summary of the argument. A number of circuits have local rules requiring a summary and the courts report that they find the summary useful. *See*, D.C. Cir. R. 11(a)(5); 5th Cir. R. 28.2.2; 8th Cir. R. 28A(i)(6); 11th Cir. R. 28-2(i); and Fed. Cir. R. 28.

Subdivision (b). The amendment adds a requirement that an appellee's brief contain a summary of the argument.

Subdivision (g). The amendment adds proof of service to the list of items in a brief that do not count for purposes of the page limitation. The concurrent amendment to Rule 25(d) requires a certificate of service to list the addresses to which a paper was mailed or at which it was delivered. When a number of parties must be served, the listing of addresses may run to several pages and those pages should not count for purposes of the page limitation.

Rule 30. Appendix to the Briefs

(a) *Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies.*-- The appellant ~~shall~~ must prepare and file an appendix to the briefs which ~~shall~~ must contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant ~~shall~~ must serve and file the appendix with the brief. Ten copies of the appendix ~~shall~~ must be filed with the clerk, and one copy ~~shall~~ must be served on counsel for each party separately represented, unless the court ~~shall~~ requires the filing or service of a different number by local rule or by order in a particular case ~~direct the filing or service of a lesser number~~.

* * * * *

Committee Note

Subdivision (a). The only substantive change is to allow a court to require the filing of a greater number of copies of an appendix as well as a lesser number.

Rule 31. Filing and Service of a Briefs

* * * * *

(b) *Number of Copies to Be Filed and Served.*-- Twenty-five copies of each brief ~~shall~~ must be filed with the clerk, ~~unless the court by order in a particular case shall direct a lesser number,~~ and two copies ~~shall~~ must be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies ~~shall~~ must be filed with the clerk, and one copy ~~shall~~ must be served on counsel for each party separately represented.

* * * * *

Committee Note

Subdivision (b). The amendment allows a court of appeals to require the filing of a greater, as well as a lesser, number of copies of briefs. The amendment also allows the required number to be prescribed by local rule as well as by order in a particular case.

COMMITTEE APPROVED DRAFT**

Rule 32. Form of a Briefs, ~~the~~ an Appendix, and Other Papers

(a) *Form of a Briefs and ~~the~~ an Appendix.*

(1) ~~Briefs and appendices~~ A brief or appendix may be produced by standard typographic printing or by any duplicating or copying process ~~which~~ that produces a clear black image on white paper. The text must be on opaque, unglazed paper. Carbon copies of ~~briefs and appendices~~ a brief or appendix may not be ~~submitted~~ used without the court's permission ~~of the court~~, except ~~in behalf of parties allowed to proceed~~ by pro se persons proceeding in forma pauperis. ~~All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches. Those produced by any other process shall be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

(2) A brief or appendix produced by standard typographic printing must be in 11 point type or larger. Such a brief or

---

** For discussion of the Advisory Committee's concerns about Rule 32, please see this memorandum at pp. 49-50.

appendix must be bound in volumes having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches.

(3) A brief or appendix produced by any other process must not exceed on average the same content per page (including footnotes and quotations) as a brief produced by standard typographic printing and must include a certification of compliance with this requirement. The Administrative Office of the United States Courts will, from time to time, publish a list of typefaces and other information needed to meet this standard. Lines of text must be separated by double spacing. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. No attempt should be made to reduce or condense the typeface or to use footnotes in a manner that would increase the content of a document. Such a brief or appendix must be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches.

(4) Quotations and footnotes must appear in the same size type as the text.

(5) Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

(6) ~~If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be~~

~~described are available,~~ Except for pro se parties, the cover of the appellant's brief ~~of the appellant should~~ must be blue; ~~that of the appellee~~ the appellee's, red; ~~that of~~ an intervenor's or amicus curiae's, green; ~~that of~~ and any reply brief, gray. The cover of ~~the appendix, if separately printed, should~~ a separately printed appendix must be white. The front ~~covers of the briefs and of appendices, if separately printed, shall~~ cover of a brief and of a separately printed appendix must contain:

(i) the number of the case centered at the top;

~~(1)~~ (ii) the name of the court ~~and the number of the case~~;

~~(2)~~ (iii) the title of the case (see Rule 12(a));

~~(3)~~ (iv) the nature of the proceeding in the court (*e.g.*, Appeal, Petition for Review) and the name of the court, agency, or board below;

~~(4)~~ (v) the title of the document identifying the party or parties for whom the document is filed ~~(*e.g.*, Brief for (Appellant, Appendix)~~; and

~~(5)~~ (vi) the ~~names~~ name, ~~and~~ office addresses~~s~~ , and telephone number of counsel representing the party ~~on whose behalf~~ for whom the document is filed.

(7) A brief or appendix must be stapled or bound in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open.

(b) *Form of Other Papers*.--~~Petitions~~

(1) A petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion must ~~shall~~ be produced in a manner prescribed by subdivision (a) with a cover the same color as the party's principal brief. ~~Motions and other papers~~

(2) A motion or other paper may be produced in like manner, or ~~they~~ it may be typewritten ~~upon~~ on opaque, unglazed paper 8-1/2 by 11 inches in size. Lines of typewritten text ~~shall~~ must be double spaced. Consecutive sheets ~~shall~~ must be attached at the left margin. Carbon copies may ~~be used for filing and service if they are legible~~ not be used without the court's permission except by pro se persons proceeding in forma pauperis. A motion or other paper addressed to the court ~~shall~~ need not have a cover but must contain a caption ~~setting forth~~ that includes the case number, the name of the court, the title of the case, ~~the file number,~~ and a brief descriptive title indicating the purpose of the paper and identifying the party or parties for whom it is filed.

Committee Note

Subdivision (a). A number of stylistic and substantive changes have been made in subdivision (a). New paragraphs have been added governing the printing of a brief or appendix. The old rule simply stated that a brief or appendix produced by the standard typographic process must be printed in at least 11 point type or, if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computers. The availability of computer fonts in a variety of

sizes and styles has given rise to local rules limiting type styles. D.C. Cir. R. 11(a); 5th Cir. R. 32.1; 7th Cir. R. 32; 10th Cir. R. 32.1; 11th Cir. R. 32-3; and Fed. Cir. R. 32(a). The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to ensure that the documents are easily legible. The standard adopted in this rule for documents produced by any method other than standard typographic printing is that the text, including quotations and footnotes, must not exceed on average the same content per page as a brief produced by standard typographic printing. The brief must include a certification of compliance with this requirement. To implement this standard, the Administrative Office of the United States Courts will issue a list of acceptable typefaces, including computer fonts. To add flexibility, the rule also authorizes the Administrative Office to augment the list with other information. For example, in order to meet the standard using certain fonts, the line length may need to be shorter than the usual 6-1/2 inches. The rule permits the Administrative Office to list a typeface as acceptable only if such additional restrictions are followed.

While the rule generally requires that a brief or appendix produced by a method other than standard typographic printing must be double spaced, the rule permits single spaced and indented quotations and single spaced footnotes. There is, however, an admonition that footnotes should not be used to attempt to increase the content of the document.

Because photocopying is inexpensive and widely available, the exception allowing a person to file carbon copies has been limited to pro se persons proceeding in forma pauperis.

The rule requires a brief or appendix to be bound or stapled in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open. Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is significantly more convenient. The Federal Circuit already has such a requirement, Fed. Cir. R. 32(b) and the Fifth Circuit rule states a preference for it, 5th Cir. R. 32.3. While a spiral binding would comply with this requirement, it is not intended to be the exclusive method of binding.

The rule requires that the number of the case be centered at the top of the front cover of a brief or appendix. This will aid in identification of the document and again the idea was drawn from a local rule. 2d Cir. R. 32. The rule also requires that

the title of the document identify the party or parties on whose behalf the document is filed. When there are multiple appellants or appellees, this information is necessary to the court. If, however, the document is filed on behalf of all appellants or all appellees it may so indicate. Further, it may be possible to identify the class of parties on whose behalf the document is filed. Otherwise, it may be necessary to name each party. The rule also requires that attorneys' telephone numbers appear on the front cover of a brief or appendix.

Having amended the national rule to provide additional detail, the Committee foresees little need for local variation and suggests that the existing local rules be repealed. It is the Committee's further suggestion that before a circuit adopts a local rule governing the form or style of papers, the circuit will carefully weigh the value of the proposed local rule against the difficulties and inefficiencies local variations create for national practitioners.

Subdivision (b). The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix. The new rule also requires that a suggestion for rehearing in banc and a response to either a petition for panel rehearing or a suggestion for rehearing in banc be prepared in the same manner with a cover the same color as the parties principal brief.

With regard to motions or other papers, the only substantive changes are to restrict the use of carbon copies to pro se parties who are proceeding in forma pauperis and to require that the title identify the party or parties for whom it is filed. These changes parallel the changes in subdivision (a).

DRAFT PREFERRED BY TWO MEMBERS OF THE ADVISORY COMMITTEE***

Rule 32. Form of a Briefs, ~~the~~ an Appendix, and Other Papers

(a) *Form of a Briefs and ~~the~~ an Appendix.*

(1) ~~Briefs and appendices~~ A brief or appendix may be produced by standard typographic printing or by any duplicating or copying process ~~which~~ that produces a clear black image on white paper. The text must be on opaque, unglazed paper. Carbon copies of ~~briefs and appendices~~ a brief or appendix may not be ~~submitted~~ used without the court's permission ~~of the court~~, except ~~in behalf of parties allowed to proceed~~ by pro se persons proceeding in forma pauperis. ~~All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches. Those produced by any other process shall be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

(2) A brief or appendix produced by standard typographic printing must be bound in volumes having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches. Such a brief or appendix

*** This draft differs from the committee draft at subparagraphs (a)(2) & (3).

must be in 11 point type or larger.

(3) A brief or appendix produced by any other process must be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches. Lines of text must be separated by double spacing. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. Any such brief must i) be typed or printed with no more than 11 characters per inch or ii) be in 11 point type or larger and contain on average no more than 300 words per page, including footnotes and quotations, and include a certificate of compliance with this requirement. The Administrative Office of the United States Courts will, from time to time, publish a list of typefaces and other information needed to meet this standard. No attempt should be made to reduce or condense the typeface or to use footnotes in a manner that would increase the content of a document.

(4) Quotations and footnotes must appear in the same size type as the text.

(5) Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

(6) ~~If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be~~

~~described are available,~~ Except for pro se parties, the cover of the appellant's brief ~~of the appellant should~~ must be blue; ~~that of the appellee~~ the appellee's, red; ~~that of~~ an intervenor's or amicus curiae's, green; ~~that of~~ and any reply brief, gray. The cover of ~~the appendix, if separately printed, should~~ a separately printed appendix must be white. The front ~~covers of the briefs and of appendices, if separately printed, shall~~ cover of a brief and of a separately printed appendix must contain:

(i) the number of the case centered at the top;

~~(1)~~ (ii) the name of the court ~~and the number of the case~~;

~~(2)~~ (iii) the title of the case (see Rule 12(a));

~~(3)~~ (iv) the nature of the proceeding in the court (*e.g.*, Appeal, Petition for Review) and the name of the court, agency, or board below;

~~(4)~~ (v) the title of the document identifying the party or parties for whom the document is filed ~~(e.g., Brief for (Appellant, Appendix)~~; and

~~(5)~~ (vi) the ~~names~~ name, ~~and~~ office addresses~~s~~ , and telephone number of counsel representing the party ~~on whose behalf~~ for whom the document is filed.

(7) A brief or appendix must be stapled or bound in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open.

(b) *Form of Other Papers.*--~~Petitions~~

(1) A petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion must ~~shall~~ be produced in a manner prescribed by subdivision (a) with a cover the same color as the party's principal brief. ~~Motions and other papers~~

(2) A motion or other paper may be produced in like manner, or ~~they~~ it may be typewritten ~~upon~~ on opaque, unglazed paper 8-1/2 by 11 inches in size. Lines of typewritten text ~~shall~~ must be double spaced. Consecutive sheets ~~shall~~ must be attached at the left margin. Carbon copies may ~~be used for filing and service if they are legible~~ not be used without the court's permission except by pro se persons proceeding in forma pauperis. A motion or other paper addressed to the court ~~shall~~ need not have a cover but must contain a caption ~~setting forth~~ that includes the case number, the name of the court, the title of the case, ~~the file number,~~ and a brief descriptive title indicating the purpose of the paper and identifying the party or parties for whom it is filed.

Committee Note

Subdivision (a). A number of stylistic and substantive changes have been made in subdivision (a). New paragraphs have been added governing the printing of a brief or appendix. The old rule simply stated that a brief or appendix produced by the standard typographic process must be printed in at least 11 point type or, if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computers. The availability of computer fonts in a variety of

sizes and styles has given rise to local rules limiting type styles. D.C. Cir. R. 11(a); 5th Cir. R. 32.1; 7th Cir. R. 32; 10th Cir. R. 32.1; 11th Cir. R. 32-3; and Fed. Cir. R. 32(a). The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to ensure that the documents are easily legible. For documents produced by any method other than standard typographic printing, the rule provides two options. The text can be prepared using a standard typwriter or word processor which uses no more than 11 characters per inch. Alternatively, the rule allows use of other typefaces providing that the typeface is 11 point type or larger and the brief does not contain, on the average, more than 300 words per page. The brief must include a certification of compliance with this second requirement. To implement this standard, the Administrative Office of the United States Courts will issue a list of acceptable typefaces, including computer fonts. To add flexibility, the rule also authorizes the Administrative Office to augment the list with other information. For example, in order to meet the standard using certain fonts, the line length may need to be shorter than the usual 6-1/2 inches. The rule permits the Administrative Office to list a typeface as acceptable only if such additional restrictions are followed.

While the rule generally requires that a brief or appendix produced by a method other than standard typographic printing must be double spaced, the rule permits single spaced and indented quotations and single spaced footnotes. There is, however, an admonition, that footnotes should not be used to attempt to increase the content of the document.

Because photocopying is inexpensive and widely available, the exception allowing a person to file carbon copies has been limited to pro se persons proceeding in forma pauperis.

The rule requires a brief or appendix to be bound or stapled in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open. Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is significantly more convenient. The Federal Circuit already has such a requirement, Fed. Cir. R. 32(b) and the Fifth Circuit rule states a preference for it, 5th Cir. R. 32.3. While a spiral binding would comply with this requirement, it is not intended to be the exclusive method of binding.

The rule requires that the number of the case be centered at the top of the front cover of a brief or appendix. This will aid

in identification of the document and again the idea was drawn from a local rule. 2d Cir. R. 32. The rule also requires that the title of the document identify the party or parties on whose behalf the document is filed. When there are multiple appellants or appellees, this information is necessary to the court. If, however, the document is filed on behalf of all appellants or all appellees it may so indicate. Further it may be possible to identify the class of parties on whose behalf the document is filed. Otherwise, it may be necessary to name each party. The rule also requires that attorneys' telephone numbers appear on the front cover of a brief or appendix.

Having amended the national rule to provide additional detail, the Committee foresees little need for local variation and suggests that the existing local rules be repealed. It is the Committee's further suggestion that before a circuit adopts a local rule governing the form or style of papers, the circuit will carefully weigh the value of the proposed local rule against the difficulties and inefficiencies local variations create for national practitioners.

Subdivision (b). The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix. The new rule also requires that a suggestion for rehearing in banc and a response to either a petition for panel rehearing or a suggestion for rehearing in banc be prepared in the same manner with a cover the same color as the parties principal brief.

With regard to motions or other papers, the only substantive changes are to restrict the use of carbon copies to pro se parties who are proceeding in forma pauperis and to require that the title identify the party or parties for whom it is filed. These changes parallel the changes in subdivision (a).

~~**Rule 33. Prehearing conference**~~

~~The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.~~

Rule 33. Appeal Conferences

The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys shall consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course

of the proceedings or implementing any settlement agreement.

Committee Note

Rule 33 has been entirely rewritten. The new rule makes several changes.

The caption of the rule has been changed from "Prehearing Conference" to "Appeal Conferences" to reflect the fact that occasionally a conference is held after oral argument.

The rule permits the court to require the parties to attend the conference in appropriate cases. The Committee does not contemplate that attendance of the parties will become routine, but in certain instances the parties' presence can be useful. The language of the rule is broad enough to allow a court to determine that an executive or employee (other than the general counsel) of a corporation or government agency with authority regarding the matter at issue, constitutes "the party."

The rule includes the possibility of settlement among the possible conference topics.

The rule recognizes that conferences are often held by telephone.

The rule allows a judge or other person designated by the court to preside over a conference. A number of local rules permit persons other than judges to preside over conferences. 1st Cir. R. 47.5; 6th Cir. R. 18; 8th Cir. R. 33A; 9th Cir. R. 33-1; and 10th Cir. R. 33.

The rule requires an attorney to consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case. An attorney can never settle a case without his or her client's consent. Certain entities, especially government entities, have particular difficulty obtaining authority to settle a case. The rule requires counsel to obtain only as much authority "as feasible."

Rule 35. Determination of Causes by the Court in Banc

* * *

(d) *Number of Copies.*-- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

Committee Note

Subdivision (d). Subdivision (d) is added; it authorizes the courts of appeals to prescribe the number of copies of suggestions for hearing or rehearing in banc that must be filed. Because the number of copies needed depends directly upon the number of judges in the circuit, local rules are the best vehicle for setting the required number of copies.

Rule 38. Damages and Costs for ~~delay~~ Frivolous Appeals

If a court of appeals ~~shall~~ determines that an appeal is frivolous, it may, after notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Committee Note

The amendment requires a court of appeals to give notice and opportunity to respond before imposing sanctions. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. The form of the notice and opportunity purposely are left to the court's discretion. However, the amendment requires that the court notify a party that it is contemplating sanctions. Requests, either in briefs or motions, for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures.

Rule 40. Petition for Rehearing

(a) *Time for Filing; Content; Answer; Action by Court if Granted.*-- A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition ~~shall~~ must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and ~~shall~~ must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

Committee Note

Subdivision (a). The amendment lengthens the time for filing a petition for rehearing from 14 to 45 days in civil cases

involving the United States or its agencies or officers. It has no effect upon the time for filing in criminal cases or for nongovernmental parties in civil cases. The amendment makes nation-wide the current practice in the District of Columbia and the Tenth Circuits, *see* D.C. Cir. R. 15(a), 10th Cir. R. 40.3. This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing. In a case in which a court of appeals believes it necessary to restrict the time for filing a rehearing petition, the amendment provides that the court may do so by order. Although the first sentence of Rule 40 permits a court of appeals to shorten or lengthen the usual 14 day filing period by order or by local rule, the sentence governing appeals in civil cases involving the United States purposely limits a court's power to alter the 45 day period to orders in specific cases. If a court of appeals could adopt a local rule shortening the time for filing a petition for rehearing in all cases involving the United States, the purpose of the amendment would be defeated.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) *Date of Issuance.* -- The mandate of the court ~~shall~~ must issue ~~21~~ 7 days after the ~~entry of judgment~~ expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate ~~shall~~ must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) *Stay of Mandate Pending ~~Application~~ Petition for Certiorari.* ~~--A stay of mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties.~~ A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay ~~shall~~ cannot exceed 30 days unless the period is extended for cause shown ~~. If~~ or unless during the period of the

stay ~~there is filed with the clerk of the court of appeals~~, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ ~~in that court~~, in which case the stay ~~shall~~ will continue until final disposition by the Supreme Court. ~~Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately.~~ The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security ~~may be required~~ as a condition to the grant or continuance of a stay of the mandate.

Committee Note

Subdivision (a). The amendment conforms Rule 41(a) to amendment made to Rule 40(a). The amendment keys the time for issuance of the mandate to the expiration of the time for filing a petition for rehearing, unless such a petition is filed in which case the mandate issues 7 days after the entry of the order denying the petition. Because the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring the mandate to issue 21 days after the entry of judgment would cause the mandate to issue while the government is still considering requesting a rehearing. Therefore, the amendment generally requires the mandate to issue 7 days after the expiration of the time for filing a petition for rehearing.

Subdivision (b). The amendment requires a party who files a motion requesting a stay of mandate to file, at the same time, proof of service on all other parties. The old rule required the party to give notice to the other parties; the amendment merely requires the party to provide the court with evidence of having done so.

The amendment also states that the motion must show that a

petition for certiorari would present a substantial question and that there is good cause for a stay. The amendment is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will stay a mandate. See Robert L. Stern et al., Supreme Court Practice § 17.19 (6th ed. 1986).

~~Rule 48. Title~~

~~These rules may be known and cited as the Federal Rules of Appellate Procedure.~~

Rule 48. Masters

A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.

Committee Note

~~The text of the existing Rule 48 concerning the title was moved to Rule 1.~~

This new Rule 48 authorizes a court of appeals to appoint a special master to make recommendations concerning ancillary matters. The courts of appeals have long used masters in contempt proceedings where the issue is compliance with an enforcement order. *See Polish National Alliance v. NLRB*, 159 F.2d 38 (7th Cir. 1946); *NLRB v. Arcade-Sunshine Co.*, 132 F.2d 8

(D.C. Cir. 1942); *NLRB v. Remington Rand, Inc.*, 130 F.2d 919 (2d Cir. 1942). There are other instances when the question before a court of appeals requires a factual determination. An application for fees or eligibility for Criminal Justice Act status on appeal are examples.

Ordinarily when a factual issue is unresolved, a court of appeals remands the case to the district court or agency that originally heard the case. It is not the Committee's intent to alter that practice. However, when factual issues arise in the first instance in the court of appeals, such as fees for representation on appeal, it would be useful to have authority to refer such determinations to a master for a recommendation.

ISSUES AND CHANGES
Proposed Amendments to the Federal Rules of Appellate Procedures
Published January 1993

Number of Copies

The amendments to Rules 3, 5, 5.1, 13, 21, 25(e), 26.1, 27, 30, 31, and 35 deal with the number of copies of documents that must be filed with a court of appeals. The Local Rules Project noted that a number of circuits have local rules requiring a party to file a different number of copies of a document than the national rules require. The Local Rules Project also pointed out that the Appellate Rules are inconsistent regarding the authority of a court of appeals to alter the number by local rule or by order in an individual case. The Project suggested that the rules be amended either to require a uniform number in all circuits, or to consistently authorize local rulemaking. The Advisory Committee decided to authorize local variations and to make the language in the national rules consistent.

No comments were received concerning these amendments. No changes were made in either the text of the rules or the committee notes except to change "shall" to "must" in the text of Rules 26.1 and 30.

Rule 1

The proposed amendment to Rule 1 was not published but it is a companion amendment to the proposed new rule on special masters that was published. A new subdivision is added to Rule 1. The text of new subdivision (c) has been moved from Rule 48 to Rule 1 to allow the addition of new rules at the end of the existing set of appellate rules without burying the "title" provision among other rules. The title provision is combined with the scope provision in the Bankruptcy Rules.

The Advisory Committee believes that the change is technical in nature and does not require publication.

Rule 9

The amended rule published in January was a complete rewriting of Rule 9. The amended rule recognizes the government's ability to appeal release decisions. The amendments also require a party seeking review to supply the court with certain basic documents: a copy of the district court's order regarding release and its statement of reasons; and, if the appellant questions the factual basis for the district court's order, a transcript of the release proceedings in the district court. In addition, subdivision (b) clarifies those instances in which review may be sought by motion rather than by notice of appeal.

Only two comments were submitted. One commentator notes that subdivision 9(c) should also refer to 18 U.S.C. § 3145(c). The other commentator suggests that all statutory references be omitted from subdivision (c). Because subdivision (c) and the statutory references were added to the rule by Congress, the Committee decided that it should not delete them but should add the reference to § 3145(c).

The second commentator, the National Association of Criminal Defense Lawyers (NACDL), also made other suggestions. It suggests that the captions of subdivision (a) and (b) should be coordinated to clarify whether (a) or (b) applies after a finding of guilt but before sentencing. In response to that comment the Committee approved several changes:

1. it amended the caption of subdivision (a) to read: "Appeal from an Order Regarding Release Before Judgment of Conviction";
2. on line 57 the Committee inserted a period after the word "conviction" and deleted the words "or the terms of the sentence";
3. it amended the first paragraph of the Committee Note, in line three after the word "before" the Committee inserted "the judgment of conviction is entered at the time of";
4. following the first sentence of the Committee Note explaining subdivision (a), the Committee added a citation to Fed. R. Crim. P. 32(b); and
5. in the second paragraph of the Committee Note accompanying subdivision (b), the Committee inserted a period at line 4 after the word conviction and deleted the words "or from the terms of the sentence".

NACDL also suggests that the rule should be amended to make it clear whether a motion for release must be filed in the district court after a notice of appeal has been filed. In response to that suggestion, the Committee decided to omit the second sentence of the Committee Note accompanying subdivision (b). That sentence stated: "Implicit in the first sentence, but less clear than in subdivision (a), is the requirement that the initial decision regarding release after sentencing must be made by the district court." The deletion was

intended to remove any inference that a motion for release must in all instances be made first in the district court. The rule deals only with review of a release decision made by a district court and not with release decisions that may be sought initially in a court of appeals. Therefore, the Committee decided that it would be inappropriate to include any language stating categorically either that a motion must be made, or need not be made, first in a district court.

NACDL also suggests that the rule be amended to allow a party to supplement the district court's bail record with evidentiary material. The Committee decided that it would ordinarily be inappropriate to allow a party to supplement the bail record in the court of appeals so no change was made in the rule.

Rule 25(a)

The published amendment provides that a clerk may not refuse to file any paper solely because the paper is not presented in the proper form. The amendment parallels similar language in Civil Rule 5(e) and Bankruptcy Rule 5005. No formal comments were submitted but the clerks, through their representative who attends the Advisory Committee meetings, expressed opposition to the change.

The Advisory Committee made no post-publication changes in the proposed amendments.

Rule 25(e)

The published amendment to Rule 25(e) provides that whenever service is accomplished by mailing, the proof of service must include the addresses to which the papers were mailed. No comments were submitted; the Committee decided, however, to expand the change to require that a proof of service must also include the addresses at which papers were hand delivered. When a document is hand delivered, the document is usually delivered to office personnel rather than to the party or the party's counsel personally. Therefore, questions about service can arise even when a document has been hand delivered. The Committee consensus was that the change is not substantial and that republication would not be necessary.

In cases involving many parties inclusion of all the addresses could result in a lengthy certificate of service. The Committee agreed that the certificate of service should not count against the page limit for a brief. Therefore, the Committee approved a conforming amendment to Rule 28(g) which provides that the "proof of service" should be included in

that subdivision that among the other items that do not count for purposes of the page limit. The Committee agreed that the change could be treated as technical and would not require publication.

Rule 28

The published amendment to Rule 28 requires that a brief include a summary of argument.

Three comments were submitted. Two commentators suggest that there should not be a national rule requiring a summary of argument. The third commentator suggests that a summary should be required only when the argument exceeds 25 pages.

The Committee believes that a summary of argument would be useful in a variety of ways and decided not to make any changes in the proposed amendments. The Committee discussion further noted that a number of circuits have local rules requiring a summary of argument, that those circuits report satisfaction with the requirement, and that including the requirement in the national rule would eliminate the need for those local rules.

For a discussion of the change to subdivision (g), see the discussion of Rule 25(e) above.

Rule 32

Rule 32 governs the form of documents. Four commentators remarked on the proposed amendments and substantial changes were made after the close of the comment period.

The major changes in the rule involve an effort to standardize type styles. The published rule provided that any brief not produced by standard typographic printing must be prepared using not more than 11 characters per inch. Although only one commentator formally objected to that approach, the Committee decided that it would be undesirable to use that standard because it does not permit the use of proportional typefaces.

Having decided that the rule should permit proportional typeface, the Committee had difficulty formulating a standard that would accomplish its objectives without unduly complicating the rule. The Committee has two basic objectives: that all litigants have equal opportunity to present their arguments, and that briefs be easily legible.

The first objective requires parity between commercially printed briefs and those produced by some other method. It also requires parity among non-printed briefs produced by a variety of office machines and software programs.

Legibility, the Committee's second objective, hinges upon the interplay of several factors. The type size, the style of type, and the page format (meaning line length, spacing between lines, and number of lines per page) all affect legibility.

The task of formulating such a rule is made more difficult by the need for a rule that is sufficiently general that it will not require constant amendment to keep pace with rapid changes in the computer industry.

The majority of the Committe approves of the approach used in draft one, found at pages 23 through 28. That draft provides that a brief produced by a method other than standard typographic printing cannot exceed on average the same content per page as a printed brief. The Committee realizes that practitioners will need additional information to assist them in implementing that standard. Therefore, the rule provides that the Administrative Office will from time to time publish a list of acceptable typefaces and any other information necessary to assist a person to comply with the standard established in the rule. The list prepared by the Administrative Office should include only typefaces and formats that are legible.

Because the rule itself establishes the standard, the Advisory Committee does not believe that the task delegated to the Administrative Office creates any problems under the Rules Enabling Act.

Two members of the Committee believe that a more concrete standard is needed. They suggest draft two, found at pages 29 through 34. Because draft two is a very recent suggestion, it is uncertain whether 300 words per page is the appropriate number although cursory review suggests that it is.

If the Standing Committee approves either draft for publication, the Advisory Committee requests that special efforts be made to elicit comments from the printing and software industries. Their comments may be key to the final development of a stable and precise rule.

In addition to changing the provisions governing typefaces, the Committee considered a number of other suggestions made by the commentators and made several minor changes in the proposed amendments.

Part B
Rules published January 1993
Issues and changes

Three commentators object to double spacing footnotes. The Committee agrees that the rule should permit single spaced footnotes but added a caution, modeled on language drawn from Sup. Ct. R. 33.1(b), that no attempt should be made to use footnotes in a manner that would increase the content of a brief.

Two commentators object to the requirement that a brief be bound so that it will lie flat when open. A third commentator favors the change but suggests that the rule specifically require spiral binding. The Committee decided to make no change in the proposal.

Two commentators object to the requirement that the case number be centered at the top of the cover. One of them suggests that if the requirement is retained that the rule be reorganized so that the requirements are arranged in the rule in order corresponding to the items' location on the cover page, *i.e.*, from top to bottom. In response to that suggestion, the Committee approved rearranging the list of items that must appear on a cover so that the items are listed in the order of their location. One commentator objects to the requirement that the attorney's telephone number be included on the cover. The requirement was retained. One commentators also notes that the proposed amendment requires a petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion be produced in the same manner as a brief, but that the rule does not prescribe the cover color. The Committee approved an amendment requiring such documents to have "a cover the same color as the party's principal brief."

One commentator suggests that the rule should be amended so that a petition for rehearing may be in the form either of a brief or a motion, or that it should be in the form of a brief unless local rules provide otherwise. The Committee decided to make no change in the proposed rule.

Rule 33

The published amendments to Rule 33 made several changes in the existing rule. The published amendments provide: 1) the court may require parties to attend an appellate conference in appropriate cases; 2) settlement of the case is a possible conference topic; 3) persons other than judges may preside over a conference; and 4) an attorney must consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case.

Only one comment was submitted. The commentator does not remark generally about the amendments but suggests specifically that the language be changed to make it clear that the choice of an in-person or telephone conference is the court's choice, not the parties'. The Committee decided to make no changes in the proposed amendments. The Committee thought that any statement to the effect that the "court" decides the nature of the conference might suggest that judges are involved in the process. Because circuits that currently use settlement conferences have adopted practices aimed at keeping the judges distanced from the process, the Committee did not adopt the suggestion.

The Solicitor General's office had requested that changes be made to the Committee Note and the Committee approved those changes. The Solicitor's office thought that as published the Committee Note could give rise to an inference that suits against government official should be treated differently than suits against agencies. The redrafting is intended to make it clear that a government official may be represented at an appeal conference by an employee. The specific changes are:
1) the Committee deleted the third sentence of the third paragraph of the Committee Note (that sentence stated: "The Committee realizes that when the party is a corporatin or government agency, the party can attend only through agents.");
2) the fourth sentence of the third paragraph of the Note was amended by inserting "of a corporation or government agency" after the parenthetical; and
3) in that same sentence the word "regarding" was substituted for the word "over."

Rule 38

The published amendment to Rule 38 requires a court to give an appellant notice and opportunity to respond before damages or costs are assessed for filing a frivolous appeal.

Two comments were received. NACDL strongly supports the proposal and the NLRB suggests deleting the requirement that the notice come "from the court." The Committee decided to make no substantive changes in the proposed amendments. The only

post-publication change is a language change, changing "shall determine" to "determines."

Rule 40

The published amendments to Rules 40 and 41 lengthen the time for filing a petition for rehearing in a civil case involving the United States.

Two comments were submitted. One commentator states that the additional time for requesting a rehearing should be extended only to the United States and not to other parties to a civil appeal that involves the United States. The Committee decided to make no change in the published rule. A rule giving an extension only to the government would leave the clerk's office in the position of trying to determine whether the government might want to petition for rehearing or whether the mandate should issue. The Committee decided that an evenhanded approach would be preferable.

The NLRB opposes the amendment because it may delay the effectiveness of enforcement orders. The NLRB believes that an enforcement order becomes effective only upon issuance of the mandate. Because the extension of the time for petitioning for rehearing will delay the issuance of the mandate, the effective date of an enforcement order will also be delayed. The Committee decided to make no change in the proposed amendment because when necessary the court can direct that the mandate issue forthwith.

Rule 41

The published amendments to subdivision (a) provide that the mandate will not issue until 7 days after expiration of the time for filing a petition for rehearing. This is a conforming amendment to the change being made in Rule 40(a). Because the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring the mandate to issue 21 days after the entry of judgment would cause the mandate to issue while the government is still considering whether to request a rehearing. Therefore, the amendment generally requires the mandate to issue 7 days after the expiration of the time for filing a petition for rehearing.

One comment was received. The commentator suggests that the rule should state that the mandate must issue within 7 days after the time for seeking rehearing expires. The Committee decided to make no change in the proposed amendment. The Committee discussed the possibility that 7 days may even be too short a time period to seek a stay of mandate if the party intends to petition for a writ of certiorari. The Committee also

preferred to have a day certain on which the mandate will issue. The NLRB's comment on Rule 40 is also pertinent here. See the discussion of Rule 40 above.

The published amendments to subdivision (b) provide that a motion for a stay of mandate pending petition for certiorari must show that a petition for certiorari would present a substantial question and that there is good cause for a stay.

One comment was submitted and it does not bear directly upon the proposed amendment. NACDL suggests that the 30 day period for a stay is anachronistic because the period for filing a petition for certiorari is now 90 days in both civil and criminal suits. The Committee decided to make no change in the proposed amendment but placed the suggestion on its docket for later discussion.

When the Advisory Committee voted to approve the amendments as published there was one dissenting vote. That members wanted the record to reflect his belief that the rule should require a motion to show that a petition for ceritorari would present a substantial question or that there is good cause for a stay. In short, that the two should be disjunctive not conjunctive. The Committee's position is that the rule does not create a substantive standard that the circuits are bound to follow but instead that the rule provides notice of the issues that should be addressed in such a motion. To remove the inference that the rule establishes a substantive standard for granting a stay, the Committee decided to delete from the Committee Note the citation to Justice Scalia's chambers opinion in the Barnes case and to substitute therefor a citation to the § 17.19 of Stern & Gressman's treatise on Supreme Court Practice.

Rule 48

Rule 48 is a proposed new rule authorizing the use of special masters in the courts of appeals. Only one comment was received, the NLRB voiced strong support for the proposed rule. The only change made after publication was to change the number of the proposed rule from 49 to 48 (and the consequent moving of the provisions in existing Rule 48 to Rule 1(c)).

SUMMARY OF COMMENTS ON THE PROPOSED AMENDMENTS TO THE FED. R. APP. P. PUBLISHED JANUARY, 1993

1. There are no comments concerning the proposed amendments to Rules 3, 5, and 5.1.

2. With regard to the proposed amendments to Rule 9, there are two comments. One commentator notes that proposed Rule 9(c) should also refer to 18 U.S.C. § 3145(c). The other commentator makes several suggestions: a) clarify which subdivision applies after finding of guilt but before sentencing; b) clarify whether a motion for release must always be filed first in a district court; c) omit the statutory references in subdivision (c); and d) allow a party to supplement the district court's bail record.

3. There are no comments concerning the proposed amendments to Rule 13.

4. There is one comment concerning the proposed amendments to Rule 21. The comment is occasioned by the cover memorandum accompanying the published rules and need not concern the committee.

5. There are no comments on the proposed amendments to Rules 25, 26.1, and 27.

6. There are three comments concerning the proposed amendments to Rule 28. Two commentators suggest that there should not be a national rule requiring a summary of argument. The third commentator suggests that a summary should be required only when the argument exceeds 25 pages.

7. There are no comments on the proposed amendments to Rules 30 and 31.

8. Four commentators submitted remarks on the proposed amendments to Fed. R. App. P. 32.

   One commentator supports the effort to standardize type styles but suggests several changes:

   a. Normal text should be in roman font.
   b. For non-typographic processes, the "11 characters per inch" standard is not clear enough. If the effort is to prohibit proportional fonts, the rule should say so and give an example such as "courier."
   c. Requiring all briefs produced by non-typographic processes to be double-spaced may have unintended consequences. Word processors can produce text

that is visually indistinguishable from standard typographic process. A brief prepared by such a technique should be subject to the same rules that govern the standard typographic process.

As to all three of the preceding points, the commentator suggests review of the new Second Circuit local rule.

Three commentators object to double spacing footnotes.

Two commentators object to the requirement that a brief or appendix be bound so that it will lie flat when open. One of them bases his objection on the fact that coil bindings take extra space and become entangled with other documents. A third commentator favors the change but suggests that the language be more specific and require spiral binding.

Two commentators object to the requirement that the case number be positioned at the top of the cover. One of them suggests that if the requirement is retained that the rule be reorganized so that the requirements are arranged in the rule in order corresponding to the items' location on the cover page, i.e., from top to bottom.

One commentator suggests that the committee consider a uniform rule as to whether briefs produced in any manner other than standard typographic process use only one side of each sheet or both.

One commentator objects to the requirement that the attorney's telephone number be included on the cover.

One commentator suggests that the rule be amended so that a petition for rehearing may be in the form of either a brief or a motion, or that it should be in the form of a brief unless local rule provides otherwise.

9. One comment was received concerning the proposed amendments to Rule 33. The commentator does not remark generally about the amendments but suggests specifically that the language be changed to make it clear that the choice of an in-person or telephone conference is the court's choice, not the parties'.

10. There are no comments on the proposed amendments to Rule 35.

11. There are two comments on the proposed amendments to Rule 38. One commentator strongly endorses the notice provision. The other commentator believes that requiring the court to give notice unduly burdens the court and that notice from the other party

that the party has requested sanctions should be sufficient.

12. There are two comments on the proposed amendments to Rule 40. One commentator states that it is unwise to build a one-month delay into all civil appeals in which the government is a party in order to accommodate the small number of cases in which the government seeks rehearing. The additional time should be extended only to the United States or an agency of officer thereof. The other commentator opposes the extension of time because it will delay the issuance of the mandate and thus delay the effective date of an enforcement order.

13. There are three comments on the proposed amendments to Rule 41. Two of the comments relate to the delay of issuance of the mandate in civil cases involving the United States. One commentator states that there is no need to delay the issuance of the mandate for seven days after the time for seeking rehearing expires. The courts should be free to issue the mandate immediately. The other commentator opposes the delay in issuance of the mandate because it will delay the effective date of an enforcement order. The third comment is not directly relevant to any of the proposed amendments but suggests that the 30 day presumptive period for a stay pending certiorari should be changed to 90 days.

14. There is one comment on proposed Rule 49. The commentator strongly supports the proposed rule.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 9

1. Honorable Peter C. Dorsey
United States District Judge
141 Church Street
New Haven, Connecticut 06510

Judge Dorsey makes no general comment about the proposed amendments to Rule 9 but suggests that subdivision (c) should refer to 18 U.S.C. § 3145 (c). He states that the difficulty of resolving the interrelation between §§ 3142 and 3143 with § 3145(c) suggests that the rule should also refer to § 3145(c).

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL makes four suggestions. First, it suggests that the captions of subdivisions (a) and (b) should be coordinated to clarify whether (a) or (b) applies after a finding of guilt but before sentencing. Second, it suggests that the rule should be amended to make it clear whether a motion for release must be filed first in the district court even after a notice of appeal has been filed. Third, it suggests omitting the statutory references in subdivision (c) and, if necessary, moving them to the Committee Note. Fourth, it suggests amending the rule to allow a party to supplement the district court's bail record with evidentiary material.

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 21

1. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman notes that the transmittal letter accompanying the published rules reports an amendment concerning use of the judge's name and *pro forma* representation and that the published text omits those changes. The transmittal letter included in the published materials is the letter from the Advisory Committee to the Standing Committee requesting publication of a packet of rules. The Standing Committee did not approve the changes noted by Judge Newman, therefore, they were not published for comment. A different letter should have accompanied the published rules.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 28

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Suggests that a summary of argument should be required only when the argument exceeds 25 pages.

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

Recommends that the decision whether to include a summary of argument be left to the judgment of the lawyer.

3. Honorable Jon. O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman states that requiring a brief to contain a summary of the argument is ill-advised. He does not believe that it is useful; a judge must still read the main argument. He doubts that an argument is clearer because a summary is provided. He suggests that the choice should be left to each court and to the parties in courts that do not require a summary.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 32

1. Charles D. Cole, Jr., Esquire
Meyer, Suozzi, English & Klein, P.C.
1505 Kellum Place
Mineola, New York 11501-4824

Mr. Cole agrees with the amendment requiring a brief or appendix to be stapled or bound so that it will lie flat when open. He suggests, however, that the rule be made more specific and require spiral binding. He also suggests that the committee create uniformity on the question of whether a brief or appendix, produced by the any process other than standard typographic process, should use only one side of a sheet of paper or both.

2. Gordon P. MacDougall, Esquire
1026 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall voices several objections to the proposed amendments. First, he objects to double spacing of footnotes. Second, he objects to the requirement that briefs be bound so that they will lie flat when open. Third, he objects to the requirement that the case number be positioned at the top of a cover and that the attorney's telephone number be included on the cover.

3. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL objects to double spacing of footnotes. NACDL also questions the need for a national rule to specify the location of the case number on a brief cover but suggests that if the rule does specify the location, the rule be reorganized so that requirements are arranged in the rule in order corresponding to the items' location on the cover page, i.e., from top to bottom. NACDL suggests that the rule be amended so that a petition for rehearing may be in the form of either a brief or a motion, or that it should be in the form of a brief unless local rule provides otherwise.

4. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman supports the effort to standardize type styles but suggests several changes:

a. Normal text should be in roman font.

b. For non-typographic processes, the "11 characters per inch" standard is not clear enough. If the effort is to prohibit proportional font, the rule should say so and give an example such as "courier."

c. Textual footnotes should not be double spaced; requiring that they be in the same size type is adequate.

d. Requiring all briefs produced by non-typographic processes to be double-spaced may have unintended consequences. Word processors can produce text that is visually indistinguishable from standard typographic process. A brief prepared by such a technique should be subject to the same rules that govern the standard typographic process.

As to all four of the proceeding points, Judge Newman suggests that the Committee review of the new Second Circuit local rule.

e. The rule should not require all briefs and appendices to be bound as to permit them to lie flat because coil bindings take extra space and become entangled with other documents.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 33

1. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman does not comment generally on the proposed amendments but suggests specifically that the language be amended to make it clear that the choice of an in-person or telephone conference is the court's not the parties. He suggests adding ", as the court directs," after the word telephone on line 24 of the published rule.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 38

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter believes that the proposed amendment requiring a court to give notice would place unwarranted burdens on the court. He suggests deleting the words that require notice to come "from the court." He suggests that the rule should state: "after notice and reasonable opportunity to respond."

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL strongly endorses the notice provision.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 40

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter opposes the amendment because it lengthens the time for filing a petition for rehearing in a civil case involving the United States. That change may delay the effectiveness of an order enforcing an administrative order. An enforcement order becomes effective upon issuance of the mandate which will issue later under the proposed amendments.

2. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman states that it is unwise to build a one-month delay into all civil appeals in which the government is a party. He suggests that the added time should be extended only to the United States or an agency or officer thereof.

Part C
Rules Published January 1993
Summary of Comments

COMMENTS ON THE PROPOSED AMENDMENT OF FED. R. APP. P. 41

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter opposes the amendment because it lengthens the time for filing a petition for rehearing in a civil case involving the United States. That change may delay the effectiveness of an order enforcing an administrative order. An enforcement order becomes effective upon issuance of the mandate which will issue later under the proposed amendments.

2. National Association of Criminal Defense Lawyers (NACDL)
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005

NACDL suggests that the 30 day presumptive period for a stay pending certiorari should be changed to 90 days. NACDL notes that the 30 day period was written into the rule when the period for filing a petition for a writ of certiorari in a federal criminal case was 30 days. Because a party now has 90 days to file a petition for a writ of certiorari even in a criminal case, NACDL suggests that the presumptive period should be 90 days.

3. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Judge Newman states that there is no need to delay the issuance of the mandate until 7 days after the time for seeking rehearing has expired. He believes that a court should be able to issue a mandate immediately.

COMMENTS ON THE PROPOSED NEW RULE 49

1. Jerry M. Hunter, Esquire
General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. Hunter expressed complete agreement with the advent and overall thrust of proposed Rule 49. He states that the Board has regularly called upon the courts of appeals to appoint special masters in contempt cases and the proposed rule would appear to codify existing practice.

NEW PROPOSALS

At the Advisory Committee's April 20 and 21, 1993, meeting, the Committee approved proposed amendments to several additional rules.

1. A technical amendment to Rule 4(a)(4) is proposed. Amendments to Rule 4(a)(4) are currently before Congress. This technical amendment provides that a party who wants to obtain review of an alteration or amendment of a judgment must either file a notice of appeal or amend a previously filed notice.

2. A technical amendment to Rule 8(c) is proposed. The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim. P. 38. Subdivision 8(c) currently provides that a stay in a criminal case shall be had in accordance with the provisions of Rule 38(a). When Rule 8(c) was adopted Criminal Rule 38(a) provided procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and it now treats each of those topics in a separate subdivision. Subdivision 38(a) now addresses only stays of death sentences. The proper cross reference is to all of Criminal Rule 38, so the reference to paragraph (a) is deleted.

3. An amendment to Rule 10(b)(1) is proposed to conform that subparagraph to the amendments to Rule 4(a)(4). The purpose of this amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4).

4. Amendments to Rule 21 governing petitions for mandamus are proposed. The rule is amended so that the trial judge is not named in the petition and is not treated as a respondent. The amendments also provides that the judge shall be represented *pro forma* by counsel for the party opposing the relief. The judge is, however, permitted to appear to oppose issuance of the writ if the judge chooses or if the court of appeals orders the judge to do so. Although the proposed amendments were unanimously approved by the Advisory Committee, two members wanted the record to relfect that they preferred another approach. They would permit a trial court judge to participate only if ordered to do so by the court of appeals and would authorize a court of appeals to invite an amicus curiae to defend the order in question.

5. A proposed amendment to Rule 25 provides that in order to file a brief using the mailbox rule, the brief must be mailed by first-class mail.

Part D
New proposals June 1993

6. Proposed amendments to Rules 32, 35 and 41 treat a request for a rehearing in banc like a petition for a panel rehearing so that a request for a rehearing in banc will also suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The term "petition" for rehearing in banc is substituted for the term "suggestion" for rehearing in banc to reflect the Committee's intent to treat the two requests similarly.

7. Amendments to Rule 47 are proposed. These amendments, and the proposed Rule 49, are the result of collaborative efforts by the chairs and reporters of the various advisory committees. The amendments to Rule 47 require that local rules be consistent not only with the national rules but also with Acts of Congress and that local rules be numbered according to a uniform numbering system. The amendments also allow a court to regulate practice in a variety of ways but prohibit a court from imposing sanctions or any other disadvantage for failure to follow the court's directives unless the violator has actual notice of the requirements. The Advisory Committee voted to delete the last sentence of the proposed Committee Note because it could be read to permit imposition of sanctions when a party only has constructive notice of a court directive.

8. Proposed Rule 49 allows the Judicial Conference to make technical amendments to the rules without the need for Supreme Court or Congressional review of the amendments.

Rule 4. Appeal as of Right - When Taken

(a) *Appeal in a Civil Case.*

* * * * *

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

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

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59:

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

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above

motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment ~~shall~~ must file ~~an~~ a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

* * * * *

Committee Note

The amendment is technical in nature and is intended simply to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment.

Rule 8. Stay or Injunction Pending Appeal

* * * * *

(c) Stays in a Criminal Cases. ~~Stays~~ A stay in a criminal cases shall be had in accordance with the provisions of Rule 38~~(a)~~ of the Federal Rules of Criminal Procedure.

Committee Note

Subdivision (c). The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim P. 38. This amendment strikes the reference to subdivision (a) of Fed. R. Crim. P. 38 so that Fed. R. App. P. 8(c) refers instead to all of Criminal Rule 38. When Rule 8(c) was adopted Fed. R. Crim. P. 38(a) included the procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and now addresses those topics in separate subdivisions. Subdivision 38(a) now addresses only stays of death sentences. The proper cross reference is to all of Criminal Rule 38

Rule 10. The Record on Appeal

(a) *Composition of the Record on Appeal.* The record on appeal consists of the ~~The~~ original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court. ~~shall constitute the record on appeal in all cases.~~

(b) *The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.*

(1) Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 4(a)(4), whichever is later, the appellant ~~shall~~ must order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order ~~shall~~ must be in writing and within the same period a copy ~~shall~~ must be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order ~~shall~~ must so state. If no such parts of the proceedings are to be ordered, within the same period the appellant ~~shall~~ must file a certificate to that effect.

* * * * *

Committee Note

Paragraph (b)(1). The amendment conforms this rule to amendments being made in Rule 4(a)(4). The amendments to Rule 4(a)(4) provide that certain postjudgment motions have the effect of suspending a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered.

Rule 21. Writs of Mandamus and Prohibition ~~Directed to a Judge or Judges~~ and Other Extraordinary Writs

(a) *Mandamus or Prohibition ~~to a Judge or Judges~~; Petition for Writ; Service and Filing.* - ~~Application~~ A party applying for a writ of mandamus or of prohibition ~~directed to a judge or judges shall be made by filing~~ must file a petition ~~therefor~~ with the clerk of the court of appeals with proof of service on ~~the respondent judge or judges and on~~ all parties to the action in the trial court. The party must also transmit a copy to the clerk of the trial court for the information of the trial judge and certify to the court of appeals that such transmission has been made. The petition must be titled simply, In re [name of petitioner] , Petitioner. All parties to the action in the trial court other than the petitioner are respondents for all purposes. The petition ~~shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of~~ must state the issues presented and ~~of~~ the relief sought; state the facts necessary to understand the issues presented by the application; ~~a~~ state~~ment of~~ the reasons why the writ should issue; and include copies of any order or opinion or parts of the record ~~which~~ that may be essential to ~~an~~ understand~~ing of~~ the matters set forth in the petition. ~~Upon receipt of~~ When the clerk receives the prescribed docket fee, the clerk ~~shall~~ must docket the petition and submit it to the

court.

(b) *Denial, Order Directing Answer.* - ~~If the court is of the opinion that the writ should not be granted, it shall deny the petition.~~ The court may deny the petition without an answer. Otherwise, it ~~shall~~ must order that the respondent ~~an~~ answer ~~to the petition be filed by the respondents~~ within the time fixed by the order. ~~The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court.~~ The clerk must serve the order on all respondents and send a copy to the clerk of the trial court. Two or more respondents may answer jointly. ~~All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~ The trial court judge need not respond unless the court of appeals orders the trial court judge to do so; however, the trial court judge may respond if the judge chooses to do so. If briefs or oral argument are required, ~~T~~ the clerk shall advise the parties. ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.~~ The proceeding ~~shall~~ must be given preference over ordinary civil cases.

Committee Note

In most instances, a writ of mandamus or of prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, *e.g., Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (1971). In order to change the tone of the rule and of mandamus proceedings generally, the Rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to a writ of mandamus or prohibition as being "directed to a judge or judges."

Subdivision (a) is also amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. Another amendment requires the clerk of the court of appeals to send a copy of the petition to the clerk of the trial court. Although most petitions for mandamus are actually adversarial proceedings, there are instances in which a petition for mandamus complains about a judge's conduct which is extrinsic to the merits of a decision or in which both parties support the mandamus. In such instances, the judge may wish to appear to oppose issuance of the writ. In order to make the judge aware of the filing of the petition, a trial court may instruct its clerk to provide a judge involved in a mandamus with a copy of the petition.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge shall be represented *pro forma* by counsel for the party opposing the relief who appears in the name of the party and not of the judge. That is, arguments made on behalf of the party opposing the relief are treated as if also made on behalf of the judge. However, this provision does not create an attorney client relationship between the attorney and the judge, nor does it give rise to any right to compensation from the judge. A judge who wishes to appear may do so, and if the court desires to hear from the judge, the court may order the judge to respond. Once again, so that the judge is aware of the time for responding, the amendment requires the clerk of the court of appeals to send the trial court a copy of the order requesting an answer.

Rule 25. Filing and Service

(a) *Filing*.-- A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the paper within the time fixed for filing, except that a briefs ~~and~~ or appendixes ~~are treated as filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is used~~ is timely filed if it is mailed to the clerk by first-class mail, postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing. ~~Papers~~ A paper filed by an inmate confined in an institution ~~are~~ is timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of ~~papers~~ a paper by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge ~~shall~~ must note thereon the filing date and thereafter give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the

Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

* * * * *

Committee Note

Subdivision (a). The amendment deletes the language requiring a party to use "the most expeditious form of delivery by mail, excepting special delivery" in order to file a brief using the mailbox rule. The amendment substitutes therefor a requirement that a brief be mailed by first-class mail and bear a postmark showing that the brief was mailed on or before the last day for filing.

Rule 32. Form of a Brief, an Appendix, and Other Papers

* * * * *

(b) Form of Other Papers.--

(1) A petition for rehearing, a ~~suggestion~~ petition for rehearing in banc, and any response to such petition ~~or suggestion~~ must be produced in a manner prescribed by subdivision (a) with a cover the same color as the party's principal brief.

* * * * *

Committee Note

This amendment is made to conform this rule to concurrent changes in Rule 35. Amendments to Rule 35 substitute the term "petition for rehearing in banc" for "suggestion for rehearing in banc."

Rule 35. Determination of Causes by the Court in Banc

* * * * *

(b) ~~*Suggestion*~~ *Petition of a Party for Hearing or Rehearing in Banc.*-- A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing in banc. No response ~~shall~~ should be filed unless the court ~~shall so~~ orders a response. The clerk ~~shall~~ must transmit any such ~~suggestion~~ petition to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause ~~shall~~ will be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote. ~~on such a suggestion made by a party.~~

(c) *Time for ~~Suggestion~~ Petition of a Party for Hearing or Rehearing in Banc ~~; Suggestion Does Not Stay Mandate~~.*-- If a party desires to ~~suggest that~~ petition for an appeal to be heard initially in banc, the ~~suggestion~~ petition must be made by the date on which the appellee's brief is filed. A ~~suggestion~~ petition for a rehearing in banc must be ~~made~~ filed within the time prescribed by Rule 40 for filing a petition for rehearing. ~~, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.~~

25

Committee Note

The purpose of the amendments is to treat a request for a rehearing in banc like a petition for panel rehearing so that a request for a rehearing in banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari.

Subdivision (b). The term "petition for rehearing in banc" is substituted for the term "suggestion for rehearing in banc." The change from suggestion to petition is not necessary to accomplish the Committee's objective, but it reflects the Committee's intent to treat the two requests similarly.

Because of the discretionary nature of the in banc procedure, the filing of a suggestion for rehearing in banc has not required a vote; a vote is taken only when requested by a judge. It is not the Committee's intent to change the discretionary nature of the procedure or to require a vote on a petition for rehearing in banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari.

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing in banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. The deletion of that sentence does not affirmatively accomplish the goal of extending the period for filing a petition for writ of certiorari; it simply sets the stage for such an amendment. In order to affirmatively accomplish that objective, Sup. Ct. R. 13.4 must be amended.

Second, the language permitting a party to include a request for rehearing in banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) *Date of Issuance.* The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition, or a petition for rehearing in banc, is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs ~~shall~~ constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing, or of a petition for rehearing in banc, will stay the mandate until disposition of the petitions unless ~~otherwise ordered by~~ the court orders otherwise. If the petition ~~is~~ or petitions are denied, the mandate must issue 7 days after entry of the order denying the last such petition unless the time is shortened or enlarged by order.

* * * * *

Committee Note

Subdivision (a). The amendment is a companion to the amendment to Rule 35. This amendment provides that the filing of a petition for rehearing in banc stays the issuance of the mandate until disposition of the petition unless otherwise ordered by the court. Once again, this amendment advances the Committee's objective of tolling the time for filing a petition for writ of certiorari only indirectly. Amendment of Sup. Ct. R. 13.4 is also necessary. Because the filing of a petition for rehearing in banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

Rule 47. Rules ~~by~~ of a Courts of Appeals

(a) *Local Rules.* -- Each court of appeals ~~by action of~~ acting by a majority of ~~the circuit~~ its judges in regular active service may, after giving appropriate public notice and opportunity to comment, ~~from time to time~~ make and amend rules governing its practice. A local rule must be ~~not in~~consistent with, but not duplicative of, Acts of Congress and ~~these~~ rules adopted under 28 U.S.C. § 2072. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. The clerk of each court of appeals must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~

(b) *Procedure When There Is No Controlling Law.* -- A court of appeals may regulate practice in any manner consistent with federal laws, rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal statutes, rules, or the local circuit rules unless the alleged violator has actual notice of the requirements.

Committee Note

Subdivision (a). The amendment requires that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules. Repetition of a national rule in the text of a local rule makes the additional local requirement or variation less apparent.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Subdivision (b). The rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. § 2072, and with the circuit's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. Failure to include directives in local rules can result in lack of notice. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, this Rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements.

Rule 49. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory amendments.

Committee Note

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

REPORT TO THE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FROM THE

SUBCOMMITTEE ON LONG RANGE PLANNING

JUNE 1993

Introduction: This is the second annual Report from the Subcommittee on Long Range Planning. In the first part of this Report, the Subcommittee offers three Action Items for consideration by the Standing Committee: (1) a referral of the Carnegie Commission Report on Science and Technology to the Advisory Committee on the Rules of Evidence; (2) a request that the Advisory Committee on the Rules of Evidence consider the feasibility of drafting "Rules of Trial Management"; and (3) a proposal that the Subcommittee prepare a self-study of the overall rulemaking procedures for review by the Standing Committee. The second part of this Report is informational, with two purposes. First, the Subcommittee will identify long range proposals currently being considered by the Standing Committee and the several Advisory Committees. Second, the Subcommittee will describe its own ongoing efforts.

The Subcommittee has three action items for consideration by the Standing Committee and, for the sake of convenience, they are placed at the beginning of this Report. Brief discussion follows each item and background materials are attached as Appendices to this Report.

> **Action Item #1: The Subcommittee recommends that the Standing Committee request that the new Advisory Committee on the Rules of Evidence review the Report of the Carnegie Commission on Science, Technology, and Government, Science and Technology in Judicial Decision Making -- Creating Opportunities and Meeting Challenges (March 1993). The Advisory Committee should be asked to report back to the Standing Committee with recommendations for rules or procedures, if deemed appropriate. Additionally, the Advisory Committee might suggest how the Standing Committee, in turn, might respond to the Carnegie Commission Report more generally within the context of the committee structure of the Judicial Conference.**

The Carnegie Commission on Science, Technology, and Government was formed in 1988 to address the changes needed in organization and decision-making at all levels of government to

deal effectively with the transforming effects of science and technology. The next year the Commission formed a Task Force on Judicial and Regulatory Decision Making. The Task Force participated in the work of the Federal Courts Study Committee and its follow-on efforts culminated in the March Report. For general information on these long-term issues, a copy of the Executive Summary of the Report is attached as Appendix A.

One of the principal findings of the Carnegie Commission Report is "[a] judge has adequate authority under the present Federal Rules of Civil Procedure and of Evidence to manage [science and technology] issues effectively. . . ." p. 36. While this is the most relevant finding related to our task of federal rulemaking, the Subcommittee believes it is appropriate for the Standing Committee to undertake some comprehensive evaluation of the Carnegie Commission Report. The Report has a great deal to say about how the federal courts ought to approach issues of science and technology and the Standing Committee is the entity within the Third Branch that has the chief responsibility for proposing national practices and procedures. The Subcommittee also believes that the Advisory Committee on the Rules of Evidence is the appropriate forum for the initial review of the Carnegie Commission Report as well as any available background papers. Of course, consultation with the other Advisory Committees is appropriate and should be expected prior to the presentation of any proposal for consideration by the Standing Committee.

> **Action Item #2: The Subcommittee recommends that the Standing Committee request that the Advisory Committee on the Rules of Evidence coordinate a joint effort among the various Advisory Committees to study Judge Keeton's concept of "Rules of Trial Management."**

In his memorandum of September 1, 1992, Judge Keeton wrote Judge Pratt (Subcommittee on Numerical and Substantive Integration) and Professor Baker (Subcommittee on Long Range Planning) to suggest the idea of formulating "rules of proof" that would incorporate "rules of evidence" but would go beyond them to include other aspects of trial management. His suggestion was tied to the ABA Standards for Trial Management adopted in February 1992, although Judge Keeton has been an advocate of the approach at least as long as he has been the Chair of the Standing Committee. A copy of his memorandum is attached as Appendix B.

The Subcommittee suggests that the new Advisory Committee on the Rules of Evidence be asked to coordinate a joint effort with the Advisory Committee on the Civil Rules and the Advisory Committee on the Criminal Rules to study this idea and, if it is determined to have merit, to bring forward appropriate recommendations. This is a recommendation for study. The

Subcommittee does not endorse or reject the concept of "megarules." The Subcommittee is persuaded, however, that one of the Advisory Committees ought to be designated to take the lead so that the proposal is not left to languish in rules limbo.

> **Action Item #3: The Subcommittee requests authorization from the Standing Committee to undertake a thorough evaluation of the federal court rulemaking procedures that will include: (1) a descriptive narrative of existing procedures; (2) a summary of the extant criticisms of the existing procedures; and (3) an assessment of the existing procedures and the criticisms, with recommendations how federal court rulemaking might be improved.**

There are a number of reasons why the Subcommittee believes that this proposed study is appropriate and timely.

Each year, the Standing Committee is obliged to undertake a self-evaluation for the Judicial Conference. This is rendered somewhat pro forma by the statutory mandate that the Judicial Conference appoint the Standing Committee. 28 U.S.C. § 2073(b). But the point is that the Standing Committee purportedly is under some obligation to evaluate the general rulemaking procedures apart from specific rules of procedure.

Since its creation in 1991, the Judicial Conference's Committee on Long Range Planning has sought to encourage long range planning in all aspects of judicial administration, including rulemaking. The Standing Committee has assigned primary responsibility for long range planning in rulemaking to this Subcommittee. The January 1992 Report from the Standing Committee to the Committee on Long Range Planning described "the chief functions of the Subcommittee" to include "serv[ing] as a focus for taking the long range view in rules and procedures" as well as "gather[ing] proposals that go beyond the rulemaking norm[s] in terms of breadth or time frame." A general inquiry into the rulemaking procedures meets both these criteria.

It is difficult to overstate the long term significance for rulemaking of the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-105, 104 Stat. 5089-98 (1990). Professor Mullenix may or may not be guilty of exaggeration, but she has provocatively insisted that the implications of this legislation "will be dramatic and widespread for years to come":

> The central importance of the Civil Justice Reform Act is this: the Act has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch. Congress has taken procedural rulemaking power away from judges and their expert advisors and delegated it to local lawyers. By the expedient of declaring

> procedural rules to be substantive law, Congress has effectively repealed the Rules Enabling Act. Congress has by fiat stripped the judicial branch of a power that uniquely bears on the judicial function: the power to prescribe internal rules of procedure for federal courts. By legislative stealth in enacting the Civil Justice Reform Act, Congress is continuing to transform the Advisory Committee on Civil Rules into a quaint, third-branch vestigial organ.

Linda S. Mullenix, The Counter-Reformation in Procedural Justice, 77 Minn. L. Rev. 375, 379 (1992). Professor Mullenix is on the faculty at the University of Texas School of Law and serves as the co-reporter and legal counsel to the Civil Justice Advisory Group for the Southern District of Texas. A copy of her article is attached as Appendix C. Others have made similar, dark predictions about the future of judicial rulemaking. The Subcommittee believes that this legislation and its aftermath of local rulemaking, at the very least, oblige the Standing Committee to consider how best to monitor developments, identify promising innovations, and propose national rule improvements. Indeed, even the innovations that fail at the local level will offer valuable data for would be reformers of the rules. See Carl Tobias, Judicial Oversight of Civil Justice Reform, 140 F.R.D. 49 (1992) (suggesting that the Judicial Conference must somehow "completely and carefully evaluate the reports and the plans developed and make appropriate suggestions for change." Id. at 56). This consideration is best undertaken in the larger context of a study of rulemaking procedures.

Each of you has received a copy of the April 22, 1993, transmission from the Supreme Court to the Congress of the most recent rules amendments. Justice White's separate statement expressed a high Court discomfort on the part of some Justices with the present rulemaking procedures and described a preference that "the enabling statutes be amended 'to place the responsibility upon the Judicial Conference rather than on this Court.'" Statement of Justice White at 3 (April 22, 1993). One reading of the Dissenting Statement by Justice Scalia, filed on behalf of himself and Justices Souter and Thomas, is that those three Justices may implicitly agree with Justice White's general apprehension about the Supreme Court's role in rulemaking. Dissenting Statement of Justice Scalia at 7 (April 22, 1993). The Dissenting Statement did explicitly question the effect on judicial rulemaking procedures from the Civil Justice Reform Act: "Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress . . . ." Id. at 6. A general study of rulemaking procedures would be expected to respond to these concerns.

While a process purportedly based on disinterested expertise should not be expected to be governed by public opinion, there is

no denying the reality that during recent periods of public comment many prominent judges, lawyers, and commentators expressed frustration over specific rule proposals and have protested the way rules are being made under present procedures. The controverted public commentary over the recently proposed changes in Fed. R. Civ. Pro. 11, which was noted in Justice Scalia's Dissenting Statement, is but one example. To refresh your memory, Appendix D contains some articles critical of the existing rulemaking procedures and an editorial from the National Law Journal suggesting that national rulemaking ought to defer to the local rulemaking under the Civil Justice Reform Act. Not that long ago, Senior District Judge John L. Kane, District of Colorado, addressed the American Corporate Counsel Association's annual meeting to say:

> To my knowledge, a brand new conceptualization of what procedure should do and should be has yet to be attempted. . . . Accordingly, I propose that judges, legislators and lawyers of today undertake to abolish all rules of civil, criminal and appellate procedure and the attendant rules of evidence. I suggest in their place a unified system which eliminates the entire concept of responsive pleading as well as its accompanying pervasive discovery and scenario trials followed by totality of circumstances appeals.

John L. Kane, Procedural Reform and the Costs of Litigation, A.C.C.A. Docket 36, 38 (Fall 1990) (A copy was distributed to all members of the Standing Committee in November 1990). These calls for reform of federal court rulemaking from those outside the process provide another justification for undertaking a thorough self-evaluation.

Those directly involved with rulemaking likewise have raised questions concerning rulemaking procedures. In his December 17, 1992, letter to Judge Keeton previously distributed, the Chair of the Advisory Committee on Civil Rules characterized as worthy of the "highest priority" a list of issues that included: "Maintaining the independence of the federal rules process and streamlining the process to make it more effective." For additional relevant expressions of concern, see Appendix E which contains: (1) an interview from the Third Branch with Judge Keeton describing the procedures and expressing "concern[] that bills continue to be introduced in Congress to amend federal rules directly by statute, bypassing the Rules Enabling Act process"; (2) a letter dated March 8, 1993, from Judge Easterbrook to Reporter Coquillette analyzing the rulemaking sequence and suggesting changes in the scheduling process; (3) a letter dated July 31, 1992, from Judge Stotler to Judge Keeton entitled "Philosophy of Task" raising broad issues about how the rulemaking procedures ought to be conducted; (4) a letter dated January 20, 1993, from former Reporter Carrington to Professor Baker discussing the respective roles of the Standing Committee

and the Advisory Committees. What these items have in common is a concern about the rulemaking process as a process. These are the kind of concerns that are not fully addressed in the consideration of specific rules changes. These are the kind of concerns that would be best addressed in a self-study of rulemaking.

The self-study being proposed will ask the questions: What are the goals of federal judicial rulemaking procedures? How well do the existing procedures accomplish those goals? What are the criticisms of the way federal rules are made? Are the criticisms valid in terms of the goals of rulemaking? How might rulemaking procedures be improved?

The proposed report would be in three parts: (1) a descriptive narrative of existing rulemaking procedures, including some institutional history as background; (2) a summary of the extant criticisms of the existing procedures, including the views of participants and non-participants alike; and (3) an assessment of the existing procedures and the criticisms, specifying how federal court rulemaking might be improved. The immediate audience for the Subcommittee report would be the Standing Committee, which would review the report and make any recommendations to the Judicial Conference. It is anticipated that a draft report could be prepared by the June 1994 meeting of the Standing Committee.

Of course, before the Subcommittee would undertake this task, the Standing Committee must agree that it would be worthwhile.

The remaining items in this Report are informational items only, although the Subcommittee welcomes suggestions and comments from the Standing Committee and the Advisory Committees.

Long range matters pending before the Standing Committee. The most noteworthy development since the last report of the Subcommittee was the creation of a new Advisory Committee on the Rules of Evidence. The new Advisory Committee is chaired by Judge Ralph K. Winter and the Reporter is Professor Margaret A. Berger.

Last year the Standing Committee created two new subcommittees: the Subcommittee on Style and the Subcommittee on Long Range Planning. These subcommittees have become fully operational. The Subcommittee on Style has undertaken the formidable task of reviewing all of the Federal Rules for clarity and consistency in style. The Subcommittee has developed standards for its use, as well as for the consideration by the various Advisory Committees. It has reviewed all proposed amendments to the Federal Rules and is in the process of reviewing all of the existing Federal Rules of Civil Procedure.

The Subcommittee on Long Range Planning convenes regularly to articulate those issues that deserve discussion and review over the long term. It continues to work with the Long Range Planning Committee of the Judicial Conference to coordinate planning efforts and to utilize resources most effectively.

One of the suggestions developed over the course of several memoranda by Judge Keeton was the formation of a new Subcommittee on Substantive and Numerical Integration of the Federal Rules of Procedure. This Subcommittee, chaired by Judge Pratt, reviewed several alternative proposals on integration of the rules and met to discuss future plans. The Subcommittee intends to remain in existence but has decided to table its efforts for the short term, given the development of the district court plans pursuant to the Civil Justice Reform Act and other activities of the Advisory Committees and the Standing Committee.

Upon the recommendation of the Subcommittee on Long Range Planning, at the December 1992 meeting, the Standing Committee referred four recent comprehensive studies for evaluation by the various Advisory Committees: (1) Federal Courts Study Committee Report; (2) A.L.I. Complex Litigation Project; (3) A.B.A. Blueprint to Improve the Civil Justice System; and (4) President's Council on Competitiveness Plan to Improve the Civil Justice System. Additionally, the Standing Committee formally referred the Report of Subcommittee #3 of the Long Range Planning Committee to the various Advisory Committees for comment and study. These documents are currently under review.

Several other pending proposals may be described as long range. The Standing Committee may be interested in examining the rules and standards concerning professional responsibility and admission to the bar to determine the advisability of developing one uniform set of guidelines for all attorneys practicing before the federal courts. The Local Rules Project continues to strive for the implementation of its final report. Specifically, it seeks to obtain uniform numbering of all local rules and the rescission of those rules that simply duplicate existing law as well as those that directly conflict with existing law. The Project also intends to monitor these developments in light of the Civil Justice Reform Act.

Long range matters pending before the Advisory Committee on Appellate Rules. In December 1992, the Advisory Committee responded in detail to the request from the Judicial Conference Committee on Long Range Planning and that letter was distributed previously to members of the Standing Committee. Three areas of long range and broad scope consideration may be highlighted. First, the Advisory Committee continues its work with the Local Rules Project. The majority of the circuits have renumbered their rules to correspond to the national rules and several circuits have reviewed their rules and eliminated language that

merely duplicated the national rules. The Advisory Committee has advanced several proposals for change in the national rules based upon successful local rules. Related proposals will be presented at the June 1993 meeting of the Standing Committee. Second, the Advisory Committee is studying how best to respond to the Congressional amendment to the Rules Enabling Act that authorizes rulemaking to define the jurisdictional requirement of an appealable final judgment and to expand the instances of permissible interlocutory appeals. Third, the Rules of Appellate Procedure are next on the agenda of the Subcommittee on Style, as part of the effort to simplify and clarify the language of the entire body of rules. Other miscellaneous items currently under consideration by the Advisory Committee include: procedures related to prisoners' mail; procedures for panel and en banc rehearing; the effects of wordprocessing technology on figuring costs; mandamus procedures; motions practice; study of intercircuit and intracircuit conflicts; and reconsideration of the mail-box rule.

Long range matters pending before the Advisory Committee on Bankruptcy Rules. One of the Advisory Committee's most significant long-range planning initiatives has to do with advances in technology. Three years ago, the Advisory Committee formed a Subcommittee on Technology to study ways to improve the administration of bankruptcy cases by using technological advances. For example, the most recent package of rules changes included new Rule 9036 which provided for electronic noticing to parties instead of traditional mailing of paper notices. Other technological advances currently being considered include the use of facsimile machines for filing documents and the use of electronic scanners and compact disk technology to read and store documents. Another long range matter currently is pending before the Advisory Committee's Subcommittee on Local Rules. The Subcommittee and the Bankruptcy Division of the Administrative Office are working to develop a uniform numbering system for local rules. Another long range effort is to achieve a greater uniformity among the various sets of federal rules that deal with analogous issues. For example, the Advisory Committee recently redrafted Bankruptcy Rule 8002 to make it conform to amendments to Appellate Rule 4. Finally, the Advisory Committee is monitoring a comprehensive bankruptcy bill now pending before Congress (S. 540) that, among other things, would create a new experimental chapter 10 to cover small business organizations and would establish a commission to review and make recommendations for revisions to the Bankruptcy Code.

Long range matters pending before the Advisory Committee on Civil Rules. In its December 1992 report to the Long Range Planning Committee of the Judicial Conference, the Advisory Committee identified six long-term goals: achieving the proper balance between national uniformity and local variation; improving federal rulemaking and maintaining its independence;

improving the organization, integration, consistency, and style of the Civil Rules; proposing amendments to accommodate advances in technology; enhancing procedures to encourage settlement and to facilitate alternative dispute resolution; and refining procedures to facilitate the disposition of complex litigation. Two particular examples are timely. First, the Advisory Committee and the Subcommittee on Style are currently working together on a comprehensive re-styling of the entire set of Civil Rules. Much progress has been made. Second, as part of the ongoing effort to accommodate technological advances, the Advisory Committee is considering amendments to Rule 43 to allow the contemporaneous transmission of testimony from a witness off-site from the courtroom.

Long range matters pending before the Advisory Committee on the Rules of Evidence. This newly-established Advisory Committee is organizing itself and establishing procedures and an agenda.

Long range matters pending before the Advisory Committee on Criminal Rules. The Advisory Committee reports that recent developments in several areas of criminal procedure portend long-range consideration in rulemaking. The long-range agenda includes reconsideration of criminal discovery, sentencing procedures and jury selection procedures. Among these, criminal discovery may be one of the most controversial and likely will occupy the Advisory Committee. Currently, Rule 16 is being re-examined. The Advisory Committee is preparing, along with the Subcommittee on Style, to conduct a complete review of the Rules of Criminal Procedure in their entirety, as part of the overall re-styling of each of the different sets of federal rules.

Liaison with the Long Range Planning Committee of the Judicial Conference. In a letter dated October 26, 1992, and distributed in the materials for the December 1992 meeting of the Standing Committee, Judge Otto R. Skopil, Jr., Chair of the Committee on Long Range Planning of the Judicial Conference wrote Judge Keeton requesting a review of a list of planning issues and recommendations from the Standing Committee. Judge Keeton solicited comments from the Chairs and Reporters of the various Advisory Committees. In a letter dated January 8, 1993, and distributed to all members of the Standing Committee, Judge Keeton transmitted those comments and offered his own reactions and suggestions. This detailed correspondence need not be rehearsed here, except to note that the effort at liaison continues at this level.

In a letter dated November 25, 1992, and distributed to the Standing Committee with the materials for the December 1992 meeting, Judge Becker, Chairman of Subcommittee #3 of the Long Range Planning Committee offered some follow-up on the letter from Judge Skopil mentioned in the preceding paragraph. Judge Becker's letter included a report listing issues and related

possibilities for long range consideration. As noted above, at the December 1992 meeting the Standing Committee referred this letter and list directly to the various Advisory Committees for comment and study.

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

(a) There have been some developments with the proposed "paperless court" concept. The Committee on Automation and Technology of the Judicial Conference has approved a recommendation for developing one or more prototype in-court experiments of electronic document processing technology. The purposes are to determine the feasibility of allowing attorneys to file pleadings and associated documents electronically and to determine the usefulness and desirability of relying on electronic files in judges' chambers. Previously, the Committee's Chairman, District Judge J. Owen Forrester, suggested that rule changes likely will be proposed. Now the Committee has approved a recommendation that the Standing Committee consider the desirability of amending Fed. R. Civ. Pro. 5 to permit filing "by other electronic means" [besides facsimile]. The Committee on Judicial Improvements has appointed a subcommittee to begin drafting guidelines on electronic filing. These efforts are being monitored. (Keeton)

(b) The Article III Judges Division of the Administrative Office is developing guidelines and standards for an "automated courtroom" for testing the integration of computer-aided transcription software and exhibit imaging software. Some districts already have implemented real-time court reporting and at least one district has an imaging system for exhibits. The Ninth Circuit expects to establish automated courtroom capacity in every district where volume and complexity of court business would justify the expenditures. These developments are being monitored. (Baker)

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

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

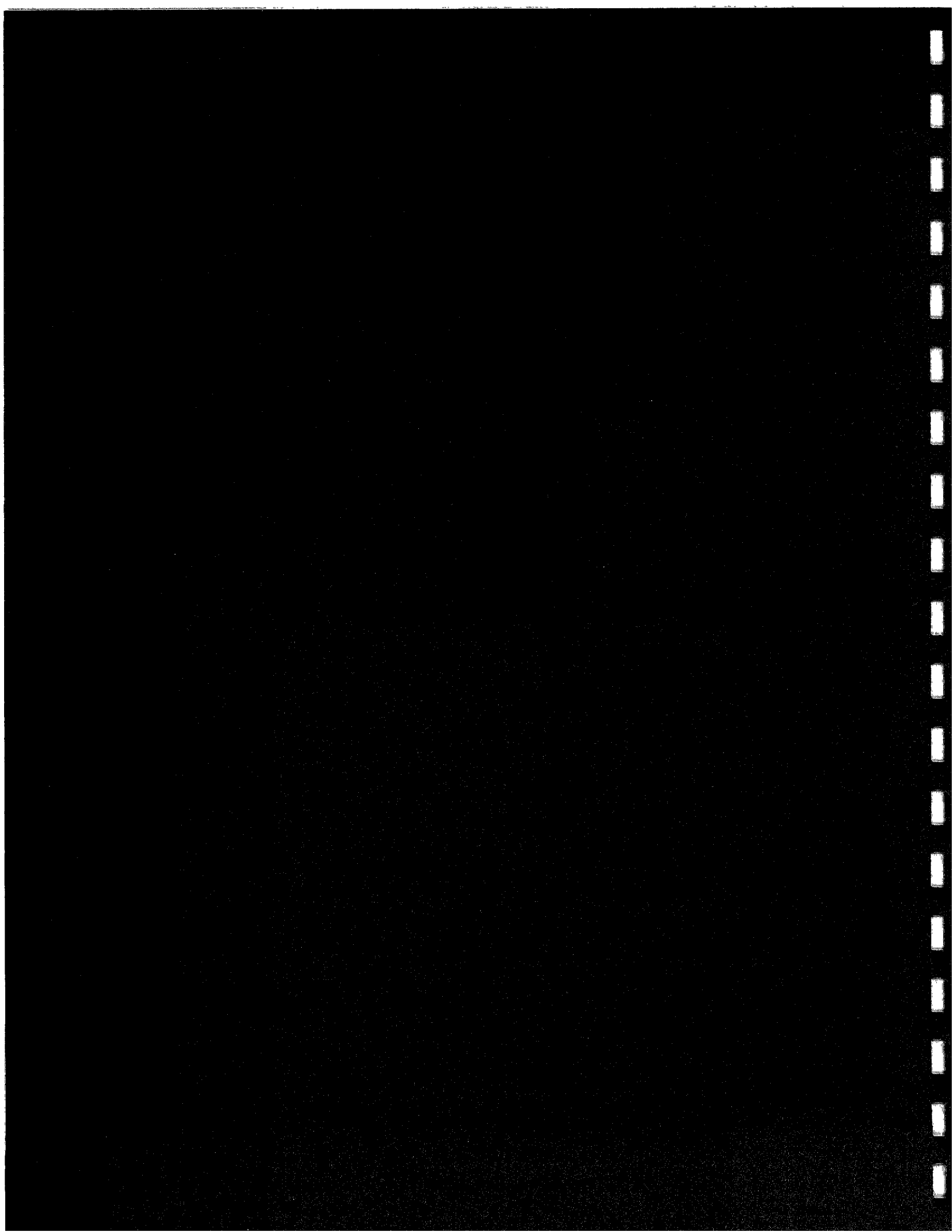
(e) The Civil Justice Reform Act of 1990, Pub. L. No. 101-640, 104 Stat. 5089, began a new experiment in local rulemaking aimed at reducing the expense and delay in civil litigation. Congressional and judicial expectations are that some of the experimental procedures may be developed into national rules changes. The Committee on Court Administration and Case Management of the Judicial Conference was delegated primary oversight responsibility to conduct the statutory duty of review and evaluation in anticipation of the Judicial Conference's report to Congress. The Subcommittee is attempting to monitor these developments. (Baker & Coquillette)

Respectfully submitted,

Subcommittee on Long Range Planning

Thomas E. Baker, Chair
Frank H. Easterbrook
Edwin J. Peterson

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



APPENDIX A

for judges. An advisory committee of leading experts from various scientific disciplines, judicial educators, and representatives of the judiciary should be established to consider what judges need to know about science. It should also collaborate with academic communities in the fields of law and science to improve S&T programs and materials. The judicial S&T education clearinghouse should "package" high-quality science education programs for easy use and access.

■ **An independent nongovernmental Science and Justice Council of lawyers, scientists, and others outside the judiciary should be established to monitor changes that may have an impact on the ability of the courts to manage and adjudicate S&T issues; it should also initiate improvements in the courts' access to and understanding of S&T information, including judicial education and communication between the judicial and scientific communities.**

A continuing examination of the interaction between science and the courts is essential to efforts to improve judicial decision making concerning S&T issues. An interdisciplinary "Science and Justice Council" similar in mission to the Task Force should be created to continue the initiatives that the Task Force has begun.

Located outside existing institutions, the Council would be able to offer more strategic and long-range criticism and suggestions than existing groups with defined roles. The Science and Justice Council should also monitor changes in law, in science, and in society generally that may have an impact on the ability of courts to handle S&T issues.

Some judges are frustrated by their inability to obtain timely, nonadversarial explanations of the scientific and technical matters at issue in a case. Unlike the judiciary, when faced with unclear S&T information, Congress can consult the Office of Technology Assessment, and the Executive can consult the Office of Science and Technology Policy. The Council should undertake further study on the host of issues raised by the Task Force's proposal to create an institutional support mechanism for the judiciary, the form that such an advisory institution should take, sources of compensation for those providing assessments to the court, and permissible use of the information generated for the court.

Other areas that the Council might explore include data collection and alternatives to judicial resolution. Long-range efforts to improve the quality of judicial decision making with regard to S&T issues are hampered by the lack of adequate data about the incidence and management of scientific issues in the courts. Information is also necessary for appropriate allocation of judicial resources. In addition, little empirical information is currently available about the costs of handling S&T issues. And further study of how the judicial system copes with S&T issues and a comparison with

administrative schemes such as the National Childhood Vaccine Injury Act would provide valuable information about the desirability and feasibility of pursuing the use of alternative forums.

We live in an ever-changing world to which a dynamic judicial system must be responsive. Unless reliable data are obtained so that changes can be anticipated, monitored, and evaluated, the ability of the courts to handle complex scientific and technological issues is compromised. The kinds of cases in which S&T issues occur are often those of the utmost social significance, and the decisions in them have major consequences for many people's lives. The way in which our society in general and the judiciary in particular will respond to the S&T issues of the future is of concern to many different constituencies whose views can best be heard, evaluated, and integrated at meetings of a broad-based heterogeneous group that is free of formal political ties. The Task Force believes, therefore, that it is important that an independent group, like the proposed Science and Justice Council, be created to monitor and develop further the recommendations outlined in this report.

CONCLUSION—A NOTE OF OPTIMISM

Unlike some recent critics, we end our survey of science in the courts on a note of optimism. The Task Force found that numerous innovative, highly motivated, and highly skilled judges and lawyers are working hard to improve judicial decision making with regard to S&T issues. That many problems remain is hardly remarkable, considering the magnitude of the legal and scientific issues that are presented to American courts for resolution. While the difficulty and novelty of the questions these cases pose preclude an instantaneous magical cure, we observe that the legal system is actively pursuing solutions.

Nevertheless, the Task Force believes that the handling of S&T evidence would be improved if more data were available on how the system works, if information about successful innovations were more widely disseminated, if judges were given more educational and institutional support, and if scientists, judges, and lawyers had greater opportunities to communicate with each other. At the moment, the parallel paths of scientists and lawyers usually obey the rules of Euclidian geometry—they do not intersect—even though both disciplines not infrequently ponder the same subjects. And when their paths do cross, the result is often misunderstanding, rather than constructive communication. At the very least, we hope that the Task Force's work will provide a starting point for a more fruitful interaction between the worlds of science and the law.

APPENDIX B

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

MEMORANDUM

TO: Judge Pratt
Professor Baker

DATE: September 1, 1992

SUBJECT: Providing a Place in a Unified Numbering System for Rules of Trial Management

Attached is a copy of an article by Susan Abbott-Schwartz, Associate Editor of Litigation (A Publication of the ABA Section of Litigation), "ABA Adopts Nine Standards for Trial Management," published in Vol. 17, No. 5, June 1992, p. 11.

Also attached is a copy of "ABA Trial Management Standards," which I obtained from ABA headquarters in Chicago.

As you will recall, I have been interested in the possibility of formulating "rules of proof" that incorporate "rules of evidence" but go beyond them to include other matters trial judges control in practices that are less formal and probably less consistent than rulings on objections to evidence. There is a considerable overlap between the subject matter of "rules of proof" as I have been thinking of them and the ABA "Trial Management Standards."

Might your respective subcommittees consider whether we should be thinking about (1) reserving a place in any unified numbering system for Rules of Trial Management (broadly conceived to include rules of proof, rules about time management, and other things included in the ABA "standards," as well as rules of evidence), and (2) whether and when one or more Advisory Committee(s) should be asked to undertake drafting or a study of part or all of this subject matter?

Will Bryan Garner insist that we call them "Trial Management Rules" to get rid of another prepositional phrase?

Enclosure

Robert E. Keeton

cc: Members and Staff of the Standing Committee

ABA Adopts Nine Standards for Trial Management

by Susan Abbott-Schwartz
Associate Editor

New Trial Management Standards, supported by the Section of Litigation, focus on the fair and efficient administration of justice in the trial court.

The standards recognize "that trial time is the court's most valuable and scarce resource," says Judge Robert M. Summitt, Chattanooga, TN, Chair of the ABA National Conference of State Trial Judges, which proposed them.

The ABA's adoption of the Trial Management Standards effectively acknowledges that a vast number of lawyers are in favor of more active judicial participation in the trial process. "For a long time, the judges have felt the need to bring time management and control into the courtroom. The passing of these standards shows that the lawyers want it as well," says Summitt.

"I am heartened by the passing of these standards," said Judah Best, Washington, DC, former Section Chair and one of the Section's delegates to the House of Delegates. "They will result in a heightened awareness that the ABA and the Litigation Section encourage our trial judges continuously to seek ways to fulfill their responsibility for the efficient administration of justice in this country."

The nine standards are:

1. *The trial judge has the responsibility to manage the trial proceedings. The judge shall be prepared to preside and take appropriate action to ensure that all parties are prepared to proceed, the trial commences as scheduled, all parties have a fair opportunity to present evidence, and the trial proceeds to conclusion without unnecessary interruption.*

This standard encourages the judge to be a trial manager. It acknowledges the judge's wide exercise of discretion, but encourages direct communication in advance of trial regarding the court's expectations and procedures.

2. *The trial judge and trial counsel should participate in a trial management conference before trial.*

Perhaps the most innovative feature of these standards is the trial management conference. Its purpose is not to settle the case, but to prepare the counsel for trial and the judge to preside. It is suggested the court hold this conference 10 to 20 days before trial to resolve all issues relating directly to the trial itself.

3. *After consultation with counsel, the judge shall set reasonable time limits.*

4. *The trial judge shall arrange the court's docket to start trial as scheduled and provide parties the number of hours set each day for the trial.*

Interestingly, studies have shown there is a discrepancy between the time the court believes it devotes to trial and the hours actually spent. This standard encourages the judge to determine exactly what time he or she will devote to trial alone and to manage his or her court so that the judge may delegate or otherwise manage the caseload.

5. *The judge shall ensure that once trial has begun, momentum is maintained.*

This standard encourages the court to develop protocol and rules to govern the efficient use of time during trial, including such matters as keeping witnesses on call and limiting interruptions in examination.

6. *The judge shall control voir dire.*

This standard does not endorse or reject the common federal system practice where the judge "does it all." Rather, the concept is to manage voir dire effectively and fairly. A divided voir dire approach is gaining popularity in which the judge conducts "standard" questioning and allows counsel to question on issue-oriented matters or for a specific time period. It is believed that some judicial control over the voir dire process results in more focused juror questioning.

7. *The judge's ultimate responsibility to ensure a fair trial shall govern any decision to intervene.*

Arguably, this standard is capable of being misunderstood. It is given that lawyers have discretion in presenting evidence and argument to a jury. However, the trial judge does have a responsibility to ensure a fair trial and the judge should not hesitate to intervene during counsel's presentation when necessary to meet that goal. This standard encourages the court not to act as a referee who sits back and waits until a party requests a ruling, but to participate actively in the trial if, in his or her judgment, it is necessary to promote fairness and justice.

8. *Judges shall maintain appropriate decorum and formality of trial proceedings.*

This standard notes the importance of formality and decorum in maintaining the court's ability to exercise authority to control the conduct of spectators, witnesses, parties or counsel.

9. *Judges should be receptive to using technology in managing the trial and the presentation of evidence.*

For additional information about the Trial Management Standards contact Stephen Goldspiel, Staff Director for the National Conference of State Trial Judges, ABA, 750 N. Lake Shore Dr., Chicago, IL 60611.

ABA
Trial Management Standards

American Bar Association
Judicial Administration Division

The Court Delay Reduction and Discovery Reform Committee of the National Conference of State Trial Judges

Deirdre O'Meara Ahr
St. Louis, Missouri

C. A. Ball
Chevy Chase, Maryland

William H. Barrick
Rockford, Illinois

John C. Brooks
Raleigh, North Carolina

Victoria Cashman
Dayton, Ohio

Jules P. Filcik
Cincinnati, Ohio

Bob L. Geltzer
New York, New York

Robert D. Halstead, Jr.

Norman Jay Itzkoff
New York, New York

Bruce A. Kaufman
Baltimore, Maryland

Harold E. Kohn
Philadelphia, Pennsylvania

Lawrence Okinaga
Honolulu, Hawaii

Charles E. Patterson
Los Angeles, California

Hon. Jerry L. Salyer
Oklahoma City, Oklahoma

Norbert A. Schlei
Los Angeles, California

Bill L. Thompson

Judicial Administration Division
American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611

Produced by the ABA/JAD
National Conference of State Trial Judges

Trial Management Standards

Recommended by
National Conference Of State Trial Judges
American Bar Association
Judicial Administration Division

February, 1992

___ Approved by the House of Delegates of the American Bar Assn.

Introduction

This proposal complements the ABA *Court Delay Reduction Standards* which focus on court management of the pretrial phase. It recognizes that trial time is the court's most valuable and scarce resource, and is premised on the belief that an effective and efficient presentation of admissible evidence and applicable law is the responsibility of both bench and bar.

These proposed *Trial Management Standards* address presenting an "effective" trial without diminishing the fairness or the perceived fairness of the trial. One of the major features or basic premises of this proposal is the concept of a "Trial Management Conference" which is designed to prepare both a judge and attorney to participate in the trial.

These recommendations have been distilled from numerous sources as further discussed in the following preface, but mainly are the reflection of what trial judges have put into practice in courts across the country.

Respectfully submitted,

Phillip R. Roth
Chair 1990-91
National Conference of
State Trial Judges

Preface / Acknowledgement

Chairman Roth has distinctly stated the purpose and importance of these proposed standards. It is difficult to give credit or recognize the many persons who have contributed to this work. For example, the word "effective" was chosen carefully to describe the type of trial that was deemed appropriate by a group of lawyers, judges and educators who developed a course under a grant from the State Justice Institute. Effective connotes quality rather than an approach emphasizing efficiency for the purpose of speeding up the trial process. The title of that course is "*Managing Trials Effectively*" and has been presented both at the National Judicial College and in numerous states by the Institute for Court Management/National Judicial College with proven success. While the materials developed for that course are reflected in the standards, the response and input of judges who participated in those programs have had an equal impact on this work.

The motivation for this project and the other publications and studies in the area of trial management was the work of the National Center for State Courts as reflected in its publication: *On Trial: The Length of Civil and Criminal Trials*. This research for the first time examined what actually was occurring in trial courts and concluded that: "trial length can be shortened without sacrificing fairness by increasing continuity in trial days and by judicial management of each phase of the trial". These standards not only cite the conclusion or opinions of *On Trial* and its principal author Dale Sipes, but draw upon the wisdom of Monterrey, California Superior Court Judge Richard Silver, Dean V. Robert Payant of the National Judicial College, Professor Ernest C. Friesen and Barry Mahoney/Linda Ridge of the National Center for State Courts/Institute for Court Management.

Another resource was the work of the ABA Lawyers Conference Modernizing Trial Techniques Committee which is summarized in an article by Harry J. Zeliff: "Hurry Up and Wait: A Nuts and Bolts Approach to Avoiding Wasted Time in Trial", published in the summer of 1989, *The Judges' Journal*. Also the Fall 1990 issue of *The Judges' Journal* discusses trial management from varying viewpoints and explains the importance of judicial management.

As you read the standards, you will note the importance of the judge and attorneys who actually try the case participating in a Trial Management Conference. While numerous persons have contributed ideas to this concept, credit must be given to Professor Ernest C. Friesen, who has published numerous articles addressing the importance of pretrial preparation by both the judge and the lawyer.

The timeliness and the need to adopt these standards is appropriately described by the following excerpt from the conclusion of *On Trial*:

> The time has arrived for judicial management of all phases of trial. Judicial control is the single factor that distinguishes courts in which similar cases are tried more expeditiously than elsewhere. Attorneys desire, and may in the foreseeable future demand more judicial control of the trial process. The following statement is in our judgment a fair reflection of current citizen expectation:
>
> Nobody wants summary justice. That, however, need not be the alternative. The alternative should be reasonable dispatch, without dilatory tactics and self-indulgence by lawyers, and with judges who are able—and want to— keep things moving. Why is that too much to ask for? It ought to be taken for granted.

Our endorsement of trial management by judges rests first upon the demonstrated effectiveness of judicial management in expediting case processing at both the pretrial and trial states and the fact that all steps in the trial process are amenable to some judicial control. The conclusion is further supported by the favorable effect upon time consumed in trial which courts protect trial continuity; define areas of dispute in advance of the trial; conduct the examination of prospective jurors; set reasonable time limits; and prohibit evidence that is repetitive, cumulative, unnecessary, or needlessly lengthy. And greater judicial control does not appear in fact or perception to impair the fairness of trials.

William F. Dressel

Chair Court Delay Reduction Committee
National Conference State Trial Judges

Trial Management Standards

1. Judicial trial management – general principle: the trial judge has the responsibility to manage the trial proceedings. The judge shall be prepared to preside and take appropriate action to ensure that all parties are prepared to proceed, the trial commences as scheduled, all parties have a fair opportunity to present evidence, and the trial proceeds to conclusion without unnecessary interruption.

Commentary: Trial time on a court's docket is its most valuable and scarce resource. It is the *joint* responsibility of bench and bar to use that time wisely and effectively! The objective of "managing" a trial is to effectively and efficiently present to the trier of fact the admissible evidence and applicable law relevant to the issues to be decided. The goal is not simply to reduce the number of trial hours or make a trial move faster, although very often trials do conclude in fewer hours when managed.

A trial is the ultimate event in our system of justice, and certainly is one of the most visible and expensive for all concerned. It is thus important that trial proceedings be conducted without unnecessary delay or disruption and kept focused on the legitimate purpose of the trial. While a trial may be sought for political, economic or unrelated personal reasons, the trial should be maintained as the opportunity for litigants to present evidence upon which the trier of fact decides specific issues. The trial judge is the individual in the best position to see that this occurs. Counsel's role is that of advocate and, while counsel are officers of the court, they do act in an adversary role and often have other objectives or priorities. The time when the judge acted the role of a referee who sat back and waited until someone asked for a ruling is past. The judge is responsible for determining not only the appropriateness but the extent of the evidence presented to the trier of fact. Judges not only have the authority and the responsibility to manage individual trials, but the responsibility to those who desire access to the court to have an opportunity to present their case. Also, the availability of trial time is often a variable that moves a case toward resolution.

The 7th Circuit Court of Appeals in *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081 (certiorari denied by the U.S. Supreme Court) in 1983 on the subject of the trial judge's ability to impose limits on evidence presented for time allowed stated:

> Litigants are not entitled to burden a court with an unending stream of cumulative evidence.... As Wigmore remarked, "it has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment and whim.... The rule should merely declare the trial court empowered to enforce a limit when in its discretion the situation justifies this." Accordingly, Federal Rule of Evidence 403 provides that evidence, although relevant, may be excluded when its probative value is outweighed by such factors as its cumulative nature, or the "undue delay" and "waste of time" it may cause. Whether the evidence will be excluded is a matter within the district court's sound discretion and will not be reversed absent a clear showing of abuse.... The circumstances of each individual case must be weighed by the trial judge, who is in the best position to determine how long it may reasonably take to try the case. (p.1171)

The trial judge, in performing the responsibility of a trial manager, is not only responding to the public's expectations, but to the litigants'. There is no rule or formula that applies to all trials. The judge must exercise discretion addressing the

specific needs or issues of each case which requires consultation with counsel. The judge must know the factual basis of the case, understand the issues to be determined, and be prepared to apply the law. However, while each case may be different, all cases require management in some respects, and certain concepts can be appropriately modified and applied to each case, as discussed herein. It is also important that the judge communicate in advance of trial his or her expectations regarding trial procedures to counsel and consider counsel's expectations and needs in determining how best to manage the trial.

There is no doubt that it is the judge's responsibility to see that all parties receive a "fair" trial. The following excerpts from *On Trial* address *fairness:*

> The major conclusion is that trial length can be shortened without sacrificing fairness by increasing continuity in trial days and by judicial management of each phase of the trial.
>
> Assessing whether fairness suffers on the way to expedite trials is complicated by the fact that fairness in this context is in the eye of the beholder. Unlike the overall pace of litigation, there are no national norms of reasonable time for trial duration.

In this study, we learn that the great majority of judges and attorneys perceive neither lack of fairness nor injustice in those courts where trials are conducted more rapidly than elsewhere. . . The time has arrived for judicial management of all phases of trial. Judicial control is the single factor that distinguishes courts in which similar cases are tried more expeditiously than elsewhere. Attorneys desire, and may in the foreseeable future demand, more judicial control of the trial process. The following statement is in our judgment a fair reflection of current citizen expectation:

> Nobody wants summary justice. That, however, need not be the alternative. The alternative should be reasonable dispatch, without dilatory tactics and self-indulgence by lawyers, and with judges who are able—and want to—keep things moving. Why is that too much to ask for? It ought to be taken for granted. (Edwin Newman "The Law's Delay," San Francisco Chronicle, June 3, 1987).

Our endorsement of trial management by judges rests first upon the demonstrated effectiveness of judicial management in expediting case processing at both the pretrial and trial stages and the fact that all steps in the trial process are amenable to some judicial control. The conclusion is further supported by the favorable effect upon time consumed in trial when courts protect trial continuity; define areas of dispute in advance of the trial; conduct the examination of prospective jurors, set reasonable time limits; and prohibit evidence that is repetitive, cumulative, unnecessary, or needlessly lengthy. And greater judicial control does not appear in fact or perception to impair the fairness of trials.

2. The trial judge and trial counsel should participate in a trial management conference before trial.

Commentary: There is no one agreed upon and preferred method for insuring that a case is ready to be tried. A simple case with two experienced counsel may require nothing more than the setting of a trial date. A more complex case will require a series of conferences or hearings addressing a variety of legal or factual issues as well as lengthy formal conferences. In between these two examples are the bulk of cases whose trial readiness can be addressed through what can best be called a "trial management conference". It is the purpose of the trial management conference to insure that counsel are prepared, but the conference also allows the trial judge to prepare to preside.

Optimally, the trial management conference should be held 10 - 20 days before trial commences. Counsel should have prepared their case for trial by this time, and this conference gives counsel additional incentive to prepare for trial. Given this lead time if problems do arise, court and counsel have the time to fashion appropriate remedies or take steps at the conference to resolve conflicts. It is understood that some judges and lawyers believe there is no need for such a conference in a simple case, which may be true. However, in those cases which are indeed totally prepared for trial, the conference will only take a few minutes and is an opportunity for both the court and counsel to review trial procedures and assure trial readiness.

The order setting a trial management conference shall require counsel to confer before the conference to review the matters that will be

covered and accomplish certain tasks. This reduces the time needed for a conference and allows court and counsel to confirm those subjects not in controversy and address matters requiring the court's attention.

Some have voiced concern that such a conference is not feasible for a master docket, a judge that "rides a circuit" holding trials in various locations, or a court that sets a large number of cases for trial and chooses a "trial date" on the day of trial.

Courts utilizing "master dockets" have adopted procedures for assigning cases to the trial judge in advance of the scheduled trial date, so that a trial management conference can be scheduled and held. Some master docket courts have adopted systems whereby a number of cases are assigned to a particular judge a month ahead of the anticipated trial date to accommodate case and trial management. In those courts that set a number of cases for trial on a particular day, pretrial procedures can help determine which case will go to trial. Often it is a "review" or the setting of a trial management conference that resolves the case. If a "trial case" must be chosen the morning of trial, it is recommended that the trial be scheduled to start later in the morning so that the trial management conference may be held. Circuit riding judges can hold the conference in a convenient location, at a time close to the trial, or (while not preferred) by telephone conference with counsel at the courthouse.

Each jurisdiction has its own form of a document litigants must file to disclose issues, witnesses, exhibits, etc., (pretrial statements, trial readiness certificates or trial disclosure statements), and those documents often set the framework for this conference. It is critical to emphasize that the trial management conference is not a "settlement conference." It is a conference devoted to trial issues. While any opportunity to achieve or encourage a settlement should not be ignored, counsel must understand that negotiation should be consummated before the conference.

"Hurry Up and Wait; a Nuts and Bolts Approach to Avoiding Wasted Time in Trial" by Harry Zeliff published in the Summer, 1989 *The Judges' Journal*, discusses the concept of a trial conference and the subjects to be covered. The following are examples of important matters:

- (1) EXHIBITS: confirm that they have been appropriately marked, each counsel has reviewed, stipulations as to authenticity and admissibility obtained; verify that the exhibits are appropriately organized to be presented at trial; and discuss how they will be used and presented to the jury during trial;
- (2) WITNESSES: review the scheduling of witnesses to insure that there will not be a break in the presentation of testimony; address any legal problems or conflicts with the potential witnesses; review the nature of the testimony to avoid duplication or determine what can be presented by stipulation, offer of proof, etc.;
- (3) ISSUES: determine what issues of law or fact are really in dispute and those which are not a part of the litigation;
- (4) TIME LIMITS: review time needed for each segment of the trial and set such time limits as appropriate after consultation with counsel to allow preparation within limits set;
- (5) PENDING MOTIONS: review all pending motions and make formal rulings as appropriate or defer until trial those which require evidence, etc.;
- (6) JURY INSTRUCTIONS AND VERDICT: review to determine which instructions the parties agree are appropriate; rule on any objection to those which deal with matters of law; and clarify the parties' position on those instructions which will have to be ruled upon after evidence has been received. Judges who have followed this procedure indicate that most of the instructions can be settled at this conference, leaving the trial judge free to concentrate on those which pose questions of fact or law. The same is true for the form of the verdict, leaving only the determination of whether to include or exclude a few issues;
- (7) SPECIAL TRIAL NEEDS: this is the time to determine whether or not an interpreter is needed, how to utilize technology and who will supply the necessary equipment, whether written or video depositions are appropriately edited, whether offers of proof or stipulations to be submitted have been reduced to writing, and determine any issues that need to be addressed in an en camera hearing or special proceeding that need to take place during trial, including how and when such hearings will be held;
- (8) VOIR DIRE: the procedure to be followed during voir dire can be reviewed, along with questions the court will ask and any special

areas that counsel wish to review so court can determine the appropriateness of such questions, etc.; and

- (9) MISCELLANEOUS: while this is not a settlement conference, it is an opportunity to determine the status of settlement negotiations, insuring that all appropriate methods or approaches to resolution have been pursued, and determine whether or not the parties still wish to proceed to a jury trial and obtain a waiver of jury if appropriate, and to verify that the number of hours set for the trial are sufficient.

This conference is the opportunity for the trial judge to discuss with counsel how the judge conducts the trial, particular procedures and expectations regarding counsel's conduct as well as any concerns of counsel regarding potential trial problems. The length of the conference depends on the particular case and the various areas that need to be addressed. Those judges who are fortunate enough to have "law clerks" or other qualified staff can delegate to him or her certain portions of the trial conference (marking of exhibits, review of courtroom and procedures, use of technology in the courtroom, etc.).

A trial management conference is not only for a jury trial. In a trial to the court, in addition to the benefits discussed above, the trial management conference allows the judge to identify the issues to be covered in the court's opinion. Some judges require counsel to submit "verdict forms" or "proposed findings of fact and law" at the conference. This prepares the judge to rule from the bench at the conclusion of the trial in some cases or provides the groundwork for issuing a timely written opinion.

Lastly, it may be helpful to have the judge's "protocol" or statement of trial procedures reduced to writing and provided to counsel before the trial management conference, as this can shorten the conference and give counsel an opportunity to seek clarification.

3. After consultation with counsel the judge shall set reasonable time limits.

Commentary: The purpose of time limits is to set expectations and determine the appropriate time needed for various segments of trial. Time limits allow the court to plan the trial date and allow counsel to plan their presentations. While time limits are often interpreted negatively as a limit on counsel rights, one could substitute "expectations" for "limits" and perhaps avoid the concern. However, trial time is scarce, and time limits are useful in determining how that time is allocated. Further, the judicial system operate on the concept of "time limits". Statutes of limitations define the time period in which a type of action can be brought. Rules of procedure set forth times in which lawyers must file certain documents, and setting the trial involves a time limit as the case is placed on a calendar for a certain number of days.

Many courts already informally impose such limitations by discussing their expectations with counsel or by subtle references to how long it usually takes for a certain presentation and obtaining counsel's agreement.

The *On Trial* research found support for imposing limits on the time allowed for various segments of trial as long as they were based upon the particular case, made in advance of trial to allow for preparation, and sufficiently flexible to allow for exceptional circumstances.

There are a number of appellant decisions analyzing the use of time limits in which the following general statements are made:

- TRIAL LENGTH: The circumstances of each individual case must be weighed by the trial judge, who is in the best position to determine how long it may reasonably take to try the case.... The time limits should be sufficiently flexible to accommodate adjustment if it appears during the trial that the court's initial assessment was too restrictive.
- VOIR DIRE: The trial court may impose reasonable restrictions on the exercise of voir dire examination... The trial court has broad discretion to determine the scope of voir dire. The trial court should not unreasonably and arbitrarily impose limitations without regard to the time and information reasonably necessary to accomplish the purposes of voir dire. Limitations in terms of *time* or *content* must be reasonable in light of the total circumstances of the case.
- ARGUMENT OF COUNSEL: The trial judge has considerable discretion to set limitations

on arguments in the management of a trial. (1) In a relatively simple prosecution it is not unreasonable for counsel to anticipate that the trial judge will assume, unless advised to the contrary, that an extended closing argument is not required. Obviously it would be preferable for the trial judge to alert counsel as early as possible of any time limitations on closing argument. In the absence of such warning, counsel may be at a disadvantage if unable to change plans instantly, and there fore unable to make as effective an argument to the jury. (2) It is a generally recognized principle of law that the trial court has the power, *in its discretion*, to limit counsel's time for argument. No rule or formula can be applied to all cases. Each case must turn on its own facts. The following factors generally determine the appropriateness of a given time limitation: length of trial, number of witnesses, amount of evidence, number and complexity of issues; instructions, amount involved, gravity of the offense, etc.

Judges are encouraged to review court rules, rules of evidence and case law in their particular state, as it appears that most states have addressed in some form or another the authority or discretion of the trial judge to impose limits. It should be kept in mind that the judge does need information and input from counsel, and the limitation must be reasonable, related to the particular case, and *adjusted to meet circumstances which may arise*. The judge can address concerns as well as protect the record by simply stating in setting time limits that "additional time will be granted if the need arises".

It is also important that the judge "fairly" enforce the limitations and require that all parties comply. Time limits are not a cure-all for lengthy trials but (1) a tool for setting expectations on how a trial will be conducted, (2) emphasize the importance of maintaining momentum, (3) avoid unnecessary and inappropriately long presentations, (4) encourage self-imposed limits on cumulative witnesses or evidence, (5) discourage other "delay", and (6) instills the attitude that the trial will be efficiently presented on the part of both court and counsel.

As discussed in standard six on momentum, it is important that judge and counsel periodically review the progress of the trial to note whether presentations will indeed be made within the limitations set or if there is a need for imposing limitations. During a trial it may be appropriate to set time or subject matter limitations on presentations to address a variety of situations (i.e.: failure of counsel to respond to court orders, repetitive or irrelevant questioning, inappropriate behavior, witness availability problems, etc.).

It is also very useful and appropriate to advise the jury of the time "agreed upon" and set. For example, after the judge concludes his or her voir dire, the court should advise the jury of the amount of time that each counsel will have for questions. A similar approach can be followed before opening or closing statements and other segments of the trial when limitations have been imposed.

4. The trial judge shall arrange the court's docket to start trial as scheduled and provide parties the number of hours set each day for the trial.

Commentary: *On Trial* noted the difficulty of getting a trial started on time. Other matters on the court's docket, getting prospective jurors to the courtroom, obtaining the presence of defendants in custody, addressing last minute "problems" and a variety of other reasons or excuses are often cited. The real problem may be the judge's calendar or unrealistic expectations as to when the court or parties can be ready to start. If the problem rests with another entity (sheriff or local official), then the judges in that circuit or district need to raise the matter with the responsible party. The trial conference, as discussed in these standards, is a good opportunity to anticipate, review and address these potential problems and set the expectations that the trial will begin at the scheduled time. Once the expectations have been set and the case called for trial, the judge must accept his or her responsibility to "deliver" and start the trial on time and provide the appropriate hours.

Judges, counsel and court personnel believe there is usually a minimum of 5 hours devoted each day to a trial. The *On Trial* study revealed that often only 3 to 3 1/2 hours were actually being devoted to trial. There are many reasons for the differences in perception and reality, and these can often only be determined after a judge analyzes how time is actually spent. Judges are urged to keep track of the hours *actually* devoted

to a trial and note events which take time away from a trial. A judge must be cognizant of the various demands on time and willing to monitor what actually occurs if trial time expectations are to be met.

It is important that the judge communicate expectations to court staff as to what will occur during each court day. Court staff can assist the judge in maintaining the desired schedule.

If a court has difficulty in either beginning at a certain time or providing the desired number of hours, the judge needs to review the method of scheduling matters on the calendar. Usually the problem arises when a judge attempts to do too much or does not analyze the types of matters to be handled and adjust the calendar accordingly.

Finally, the responsibility of counsel is not being ignored but the judge must communicate to counsel when court sessions will be held and respond appropriately if counsel fail to comply. While one immediately thinks of imposing sanctions, it is submitted that other "subtle" responses such as having the parties in court and waiting for the "tardy" counsel to arrive will suffice.

5. The judge shall ensure that once trial has begun, momentum is maintained.

Commentary: Standards four and five are related but really address different situations. Standard four stresses starting on time and providing a certain number of hours, whereas maintaining momentum means managing what is done during those hours.

"Momentum" is consistently acknowledged as the most important concept in trial management. It involves and incorporates part or all of each of the standards set forth herein: such matters as having court staff handle or defer requests for conferences with the judge; cooperation by a multi-judge court to take hearings or handle other matters when needed; the clerk's responsibility for the length of recesses, advising the jury to be ready to return to court, getting counsel back in court, and advising the judge that it is time to reconvene.

However, momentum addresses more than these matters. During a trial, a judge should periodically review with counsel the progress of the case, availability of witnesses, etc. While no one likes to inconvenience witnesses, it is often better to have witnesses waiting and available when needed than to have the jury, parties and counsel in court wait. When necessary, witnesses can be taken out of order or parties can even present their cases out of order.

When they begin their questioning, counsel should be instructed and prepared to proceed to conclusion. Excessive requests for time to consult with co-counsel, parties, or other such interruptions should not be tolerated. The court can address such problems through a friendly suggestion or brief side-bar conference, or if need be, at a recess on the record with clear instructions from the court on how to proceed in the future. If at all possible, the court should set recesses at the conclusion of the examination of a witness and advise the jury what will occur when court reconvenes after the recess (i.e.; counsel will call new witness, counsel has finished direct examination and opposing counsel will commence their cross, etc.!) If the examination is going to carry over after the recess, the court should confirm the next area of questioning and upon reconvening remind the jury where the questioning had ceased, announce the next area of inquiry and instruct counsel to proceed with questions in that area. This prevents counsel from repeating previous questions and once again reminds counsel of what is expected.

Objections by counsel are often a source of interruption, but are a legitimate activity that requires a prompt ruling by the court. Counsel should be aware of the court's requirement that objections be concise and in appropriate legal terms so that the court can summarily rule. It is submitted that there is no need for frequent side-bar conference or recess to argue matters outside the presence of the jury, as counsel often request. If the judge believes he or she is sufficiently informed on the issue, the ruling can be made, giving counsel the opportunity to supplement their record at the next recess.

There should be a designated place in the courtroom for exhibits. Counsel should be requested to obtain the exhibits they need for the upcoming presentations and then return them after they are used. If counsel is going to use a number of exhibits with a witness, they should appropriately arrange all the exhibits and place

them before the witness. This prevents counsel from perpetually pacing up to the witness stand and back each time he wishes to have a witness review an exhibit. It is important that at the trial management conference, the use of exhibits during the trial be reviewed with appropriate instructions to counsel. Large exhibits should be located where the jurors can see them, and instead of taking the time to view individual exhibits during the presentations, the jury can review them during a recess, under direction not to discuss the exhibits among themselves. If counsel has prepared individual packets of exhibits for jurors, the jurors should be told when to pick up the packet and directed to review the specific exhibits and, when finished, close their exhibit books and put them down so as not to distract the jurors during presentation.

6. The judge shall control voir dire.

Commentary: This standard does not endorse or reject the idea that the trial judge should exclusively conduct the voir dire, as is common to federal courts. The trial judge should analyze the purpose of voir dire and determine how best to conduct it. The approach that appears to be finding favor with most courts has the judge conduct a substantial part of the questioning, covering many standard areas of inquiry, while counsel is either granted a certain period of time or allowed to question on certain issues. Many courts at the trial management conference do review with counsel special areas of inquiry, and often counsel will request the court to cover certain subjects, and the court can then decide not only the length but the content of the voir dire. Some judges believe that time limits of 15 to 30 minutes for each side *does* control content and results in "focused" voir dire examinations.

It is the judge's duty to ensure that voir dire does elicit information from the prospective jurors whereby challenges for cause can be identified and ruled upon; and that counsel obtain information to exercise their peremptory challenges. Counsel may have other goals and should be reminded that the purpose of jury selection is to seat the required number of persons to act as fair and impartial jurors. Questioning is appropriate to discover and discuss effects of any bias, prejudice or experience of the proposed jurors. The judge's voir dire should not only develop expectations on the part of jurors but orient them to the trial process and obtain their commitment to follow the instructions of law and court's admonitions.

Judges should also be aware that there are different methods of calling and seating jurors. In a civil case to a jury of six, courts usually call a sufficient number of jurors that after passing for cause each side can exercise its challenges, leaving the appropriate number of jurors (e.g., 14 where each side has 4 challenges). This method has been gaining favor in criminal cases. For example, to pick a 12-person jury for which each side has five pre-emptories, 22 jurors would initially be seated. If any of the jurors are excused for cause, then a replacement juror is brought into the panel. If an alternate is being chosen and additional challenges are granted, then three additional jurors would be seated. At the conclusion of the questioning, the prosecution would exercise the challenge to the first twelve seated, and the thirteenth member would then become a part of the initial twelve, with defense counsel making its challenge. This process would be repeated until the parties either pass twelve or the challenges are exhausted. Following this procedure, one can see how a jury could be picked easily in an hour and a half. It is important that the method, whatever it may be, is discussed prior to trial and a record made, especially if the court agrees or stipulates to a lesser number of jurors or an unusual procedure. A judge should determine what the rules or procedures on this subject are in their particular state or jurisdiction. Some of these rules are mandatory, and others are only suggested. It does appear that unless judges become directly involved and begin controlling the voir dire process that legislatures will legislate control on voir dire, as recently occurred in the state of California. While some judges believe that this is an area of the trial that should be strictly left to counsel's prerogative, it is submitted the Court has a responsibility beyond merely listening to counsel's questions. The court can participate in the voir dire process in a manner that leaves sufficient flexibility and discretion to counsel to pursue relevant areas of questioning.

The use of questionnaires and juror orientation before voir dire have become increasingly popular. Most courts have some form of video or slides to show to prospective jurors before trial. It may also be appropriate for a court to develop a

written introduction for the jury panel to read when it arrives at the courtroom to further orient the prospective jurors as well as to occupy the few minutes that pass between a jury being seated and proceedings beginning.

Questionnaires are usually of two types. One seeking basic information can be sent to all jurors along with a summons to report or filled out as they report for service. The second is a special questionnaire related to a specific trial, one usually involving sensitive issues or a serious criminal case. If these questionnaires are going to be used, it is imperative that they be completely reviewed at the trial management conference and decisions made as to the questions to be included, when the jurors will fill out the questionnaires, and when counsel will have access to the responses. Some courts will review the completed questionnaires with counsel and, upon stipulation, excuse certain jurors. The questionnaires may also be used to determine which jurors may need to be questioned out of the presence of the others. If this type of questionnaire is used, counsel should be required to return their copies to the court with the originals appropriately sealed for any required appellate review and the jurors so advised that their answers will not be disseminated for any other use than in the voir dire process. However, there are some states, such as California, that hold that such questionnaires are a matter of public record and available for inspection. In those jurisdictions, court and counsel should consider drafting questions that have prospective jurors identify areas of concern and not require a juror to put in specific information and then conduct appropriate en camera questioning of jurors who have identified concerns. The court will have to determine how to advise the jury about public disclosures of the information provided. Whether or not the questionnaires promote a better voir dire by eliciting more information or even shorten the process is open to debate. It is one method to consider, depending upon the particular case.

It is important that not only each judge but judges within a district and state evaluate how jury selection occurs and whether or not there can be an agreed upon common system or similar approaches to voir dire.

7. The judge's ultimate responsibility to ensure a fair trial shall govern any decision to intervene.

Commentary: This standard has invoked considerable debate and has the potential to be misunderstood. It is *understood* that counsel have discretion in presenting evidence. The court should defer to counsel's belief as to the type of evidence and manner of presenting evidence to the trier of fact. Likewise, it is agreed that the trial judge does have a responsibility to insure a fair trial and should not hesitate to intervene during counsel's presentation when necessary. It is defining "When Necessary" that fosters debate! It may well be a standard that "speaks for itself" and is not subject to further definition other than in the context of a specific fact situation.

If a judge decides to intervene, he or she should do so in a manner that does not indicate any bias for or against any party or issue in the case.

There are some judges and lawyers who believe that judges should not intervene except in response to an objection by a lawyer. While counsel have the responsibility to object, often strategy considerations, lack of ability, etc., may prevent them from objecting or requesting direction from the court. If one accepts the premise that a judge presides over a trial and is not a referee who sits back and waits until a party requests a ruling, there are situations which call for a judge to intervene, and, after appropriate inquiry, limit counsel's presentation or direct counsel to proceed in a certain way. This is not to imply that a judge should be advising counsel how to try their case or present their evidence; but that the judge does have a role in insuring that both parties receive a "fair trial." Thus, there are those who believe that a judge, after careful consideration, should intervene to address inappropriate conduct, repetitive questioning, introduction of unnecessary or unduly repetitive evidence, or other abuses by counsel. It is further submitted that such activity needs to be addressed before the trial judge is faced with a mistrial or several years later receives an appellate decision determining that a party did not receive a fair trial or due process. Of course some appellate courts might find a denial of due process due to the judge's intervention, which makes this is one of the most difficult areas of trial management. However, the responsibility to address inappropriate activity or proceedings

is placed squarely on the shoulders of the trial judge and cannot be ignored!

This is an area in which judges could benefit from appropriate "judicial education." Certainly this subject ought to be placed before a bench-bar committee. If a bench-bar committee does undertake analysis of this area, a good starting point would be the report of the American Bar Association Committee on Professionalism chaired by former ABA President Justin Stanley. Regrettably, this standard may raise more questions than it gives answers or guidance, but it is also an area that a judge must be prepared to address.

8. Judges shall maintain appropriate decorum and formality of trial proceedings.

Commentary: Formality lends credibility to the proceedings and emphasizes to counsel and jurors the important functions they perform. This is not to say that humor does not have its place in the courtroom, but to emphasize that the judge may be called on to exercise authority to control the conduct of spectators, witnesses, parties or counsel. There isn't a judge or attorney who, at some time during court proceedings, has not witnessed inappropriate behavior. The judiciary and bar alike are concerned by the "decline in professionalism," and the A.B.A. and individual states alike continue to seek solutions. It has been noted that the "perception of what occurs during the trial" is as important as what actually occurs. Hence the dignity of the proceedings and appropriate behavior on the part of both court and counsel are of paramount importance. Judges should heed how they are perceived and perhaps discuss this matter with other judges, counsel or other individuals within the legal community. The trial management conference, once again, is an appropriate time to review the court's concern, especially if the court has developed "trial procedures or guidelines" that not only cover trial matters but also discuss behavior of counsel. It is submitted that judges do have a responsibility to address counsel's behavior. One only has to read the decision in *Dondi Properties Corp. v. Commerce Sav. & Loan Asn'n*, 121 F.R.D. 284 (N.D. Tex. 1988), to understand this concern. Individual judges, districts or states may well wish to adopt the "standards of practice" that this court felt should be observed by attorneys. While all of the "standards of practice" are important, the following specifically apply to this discussion:

(A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.

(B) A lawyer owes to the judiciary candor, diligence and utmost respect.

(C) A lawyer owes to opposing counsel a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

(D) A lawyer unquestionably owes to the administration of justice the fundamental duties of personal dignity and professional integrity.

(E) Lawyers should treat each other, the opposing party, the court, and the members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

(F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.

(G) In adversary proceedings, clients are litigants and though ill feelings may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

(H) Lawyers should be punctual in scheduled appearances and recognize that tardiness is demeaning to the lawyer and to the judicial system.

(I) Effective advocacy does not require antagonistic or obnoxious behavior, and members of the bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

9. Judges should be receptive to using technology in managing the trial and the presentation of evidence.

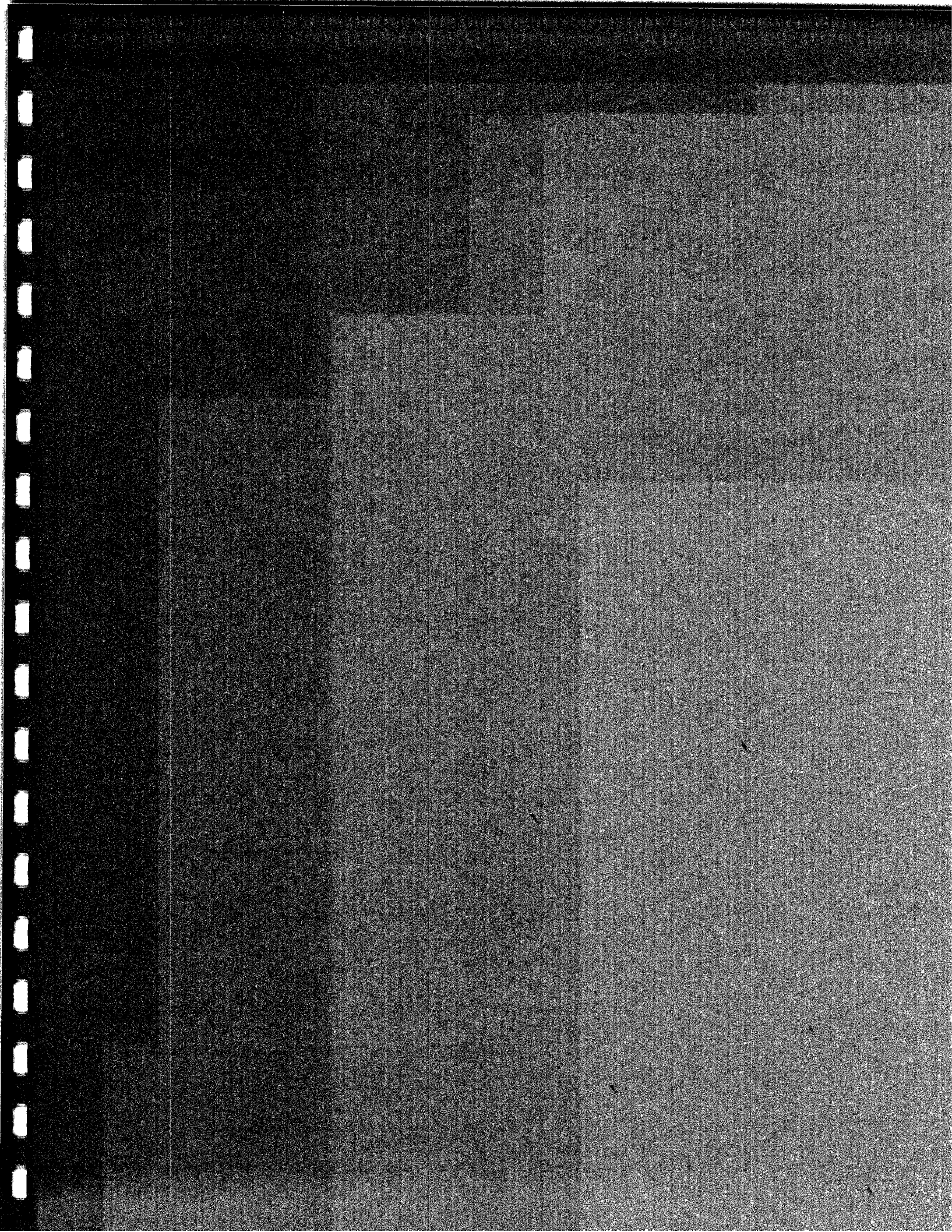
Commentary: There have been numerous technological advances available to assist court and counsel in the effective and expeditious presentation of evidence. Testimony can be presented by video tape, witnesses can testify by telephone or microwave television hookups, and exhibits can likewise be produced in court through electronic means! Future technology will be able to assist in presenting complicated testimony and hopefully solve many problems of witness availability as we know them today. Computer aided transcript displays testimony on a screen which can be read by a "deaf" party, juror, or witness. Similar equipment can be used to translate testimony into a foreign language or allow a handicapped individual to present testimony. Translators perform "simultaneous translation," which is transmitted to many individuals. The court can often delegate to counsel in advance of trial the responsibility of obtaining the necessary equipment.

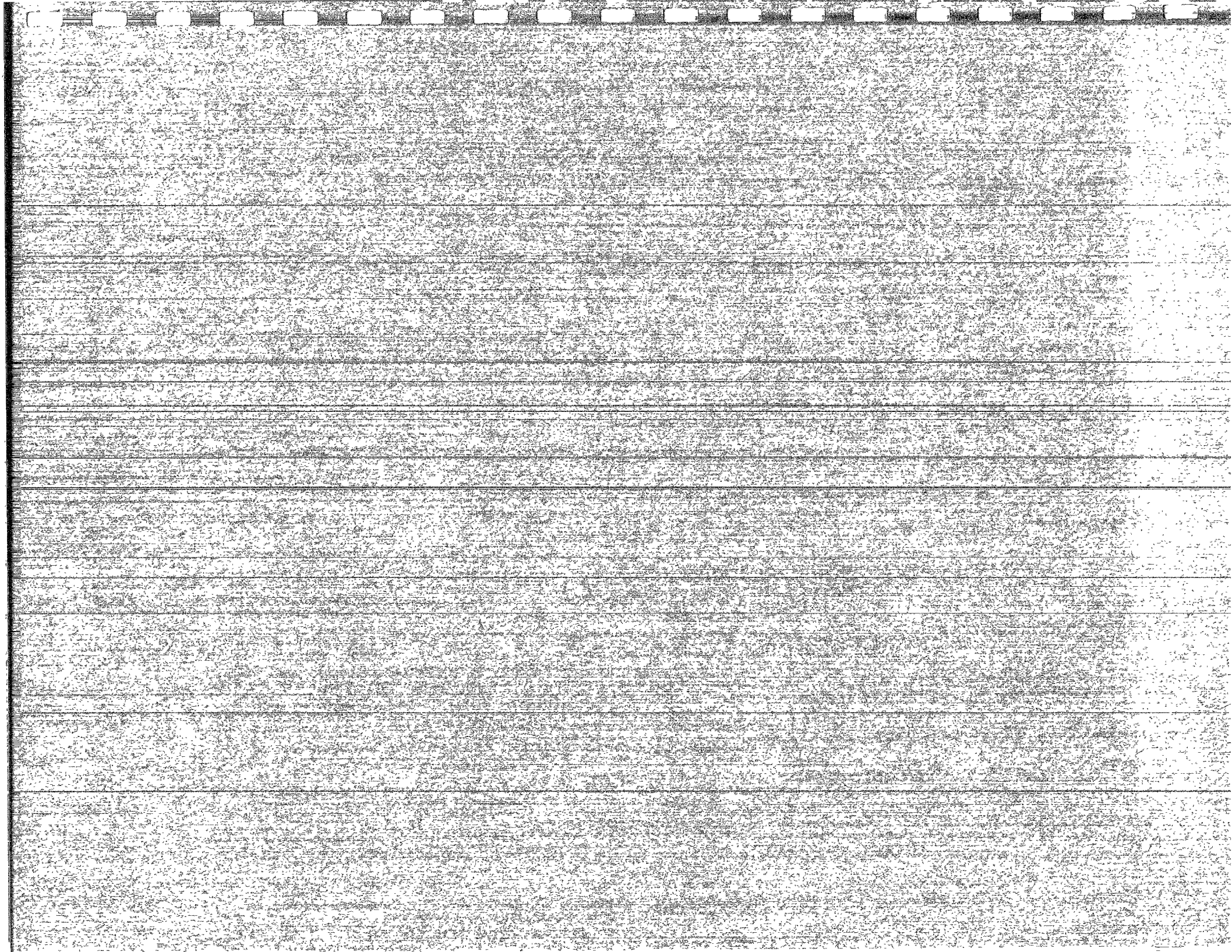
There is no doubt the The method or manner of recording trial proceedings will change. Judges should insist that any changes or advances enhance their ability to conduct trial proceedings and give them appropriate flexibility in being able to conduct trial proceedings.

There are judges who are computer literate and use computers in the courtroom to take notes, obtain legal research, and access jury instructions from other courts. In the future more and more judges will be able to use computers and other equipment to advance the purpose of a trial and the role of a judge as a trial manager in ways not imagined at this time.

It is difficult to describe particular equipment, uses or even predict advances that may occur in the future. It is important, however, that as such developments occur, the technology serve the purpose of conducting an effective trial. Evolving technology will require continuous review and exchange of information among judges; and may become one of the most important areas of judicial education.

Another area of concern is "evidence" that is being artificially produced through the use of technology. Judges will have to become informed in order to make decisions as to the reliability or admissibility of this evidence. Thus, while technology may provide some options to solve court problems, there is no doubt it will also create new and different issues for the court to address in the future.





APPENDIX C

The Counter-Reformation in Procedural Justice

Linda S. Mullenix[1]

TABLE OF CONTENTS

1. Bernard J. Ward Centennial Professor of Law, the University of Texas School of Law. The author served as Co-Reporter and Legal Counsel to the Civil Justice Advisory Group of the United States District Court for the Southern District of Texas. *See* CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., REPORT AND PLAN, (Oct. 18, 1991). The opinions expressed in this Article are the author's and do not reflect the views, opinions, or conclusions of the Advisory Group or the judges of the Southern District of Texas.

INTRODUCTION

> That is a novel method of amending rules of procedure. It subverts the plans and hopes of the profession for careful, informed study leading to the adoption and to the amendment of simple rules which shall be uniform throughout the country.
>
> Judge Charles E. Clark, dissenting in *Arnstein v. Porter*[2]

Judge Clark must be rolling over in his grave.

In 1990, Congress enacted the Judicial Improvements Act,[3] an omnibus bill that created ninety-four amateur rulemaking groups throughout the entire federal judicial system. In Title I, the Civil Justice Reform Act,[4] Congress commanded these advisory groups to formulate civil justice expense and delay reduction plans by the end of 1993.[5] In addition, Congress ordered the Judicial Conference to designate ten federal courts as pilot districts, which were required to expedite their reform plans and complete them by December 31, 1991.[6] In the Judicial Improvements Act, Congress served notice that it was going to have civil justice reform and have it immediately.

The Civil Justice Reform Act of 1990 is fomenting a nationwide procedural revolution that is probably unparalleled since the enactment of the Federal Rules of Civil Procedure in 1938.[7] The Act mandates local, grassroots rulemaking by civilian advisory groups, a novel process that essentially circumvents the usual judicial advisory committee system for civil procedure rule reform that has been in place since 1938.[8] In this respect alone the Act is revolutionary.

It would be difficult to overstate the Act's importance. Superficially, the various local rule reforms that individual districts recommend will be of great interest and significance to litigants, their lawyers, and the general public. The civil justice reform plans published and implemented by the various districts will generate a large body of commentary and debate.[9]

2. 154 F.2d 464, 479 (2d Cir. 1946) (Clark, J., dissenting). Judge Clark was referring to the majority decision, which reversed an order granting defendant's motion for summary judgment in a copyright infringement case. *Id.* at 475. Judge Clark was the Reporter of the Committee that drafted the Federal Rules of Civil Procedure, promulgated in 1938. He subsequently served as the first Reporter to the Advisory Committee on the Civil Rules. *See generally* Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976) (describing Judge Clark's participation in the drafting and promulgation of the Federal Rules).

3. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified in scattered sections of 28 U.S.C.); *see also* S. REP. NO. 416, 101st Cong., 2d Sess. 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6852; H.R. REP. NO. 732, 101st Cong., 2d Sess. 11 (1990).

4. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-105, 104 Stat. 5089-98 (1990) (codified at 28 U.S.C. §§ 471-482 (Supp. II 1990)). The Judicial Improvements Act also created seventy-seven new federal district and circuit court judgeships. 28 U.S.C. § 133 (Supp. II 1990).

5. Civil Justice Reform Act § 103(b), 28 U.S.C. § 471 note (Supp. II 1990).

6. *See id.* at § 105(b)(1); *see also* Memorandum from The Hon. William B. Schwarzer to All Chief Judges, U.S. District Courts (Jan. 16, 1991) (on file at the Federal Judicial Center and the *Minnesota Law Review*). The Judicial Conference's Committee on Court Administration and Case Management has primary oversight responsibility for implementation of the Act and a subcommittee developed criteria for selection of the ten pilot district courts. The full committee met on January 3-4, 1991, and approved the subcommittee's recommendations for ten pilot districts. The statute required that at least five of the ten designated pilot districts encompass metropolitan areas. *See* Civil Justice Reform Act § 105(b)(2), 28 U.S.C. § 471 note (Supp. II 1990). The ten designated pilot districts are: the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin. JUDICIAL CONFERENCE OF THE U.S., CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS 1 (June 1, 1992) [hereinafter CIVIL JUSTICE REFORM ACT REPORT].

7. *See* Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing a Cost and Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 REV. LITIG. 165, 167 (1992). Portions of the ensuing text are adapted from this article and reprinted by permission.

8. For a description of the rulemaking process, see generally *The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117 (1958); WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 1-35 (1981); Howard Lesnick, *The Federal Rule-Making Process, A Time For Re-examination*, 61 A.B.A. J. 579 (1975); Judge Albert B. Maris, *Federal Procedural Rulemaking: The Program of the Judicial Conference*, 47 A.B.A. J. 772 (1961); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 797-802, 830-43 (1991); Russell R. Wheeler, *Broadening Participation in the Courts Through Rule-Making and Administration*, 66 JUDICATURE 280 (1979).

9. There is already a significant amount of commentary on various plans. *See, e.g., Federal District Court Names Advisory Group*, MASS. L. WKLY., Feb. 4, 1991, at 3 (discussing creation of Massachusetts Advisory Group under Civil

The true significance of the Civil Justice Reform Act, however, does not lie in the nuts and bolts of procedural reform. It is not in whether local districts enact a mandatory disclosure rule,[10] institute early neutral evaluation programs,[11] or require recourse to alternative dispute resolution (ADR) techniques.[12]

Justice Reform Act); Mary Hull, *"Jiffy Justice" May Become The Norm*, TEX. LAW., July 22, 1991, at 1 (discussing impact of the Civil Justice Reform Act on Texas's four judicial districts); Adrienne C. Locke, *Civil Justice Reform Bill Expected to Cut Costs*, BUS. INS., Nov. 5, 1990, at 2 (discussing Civil Justice Reform Act and creation of pilot districts); Carl Tobias, *Justice Stays Civil in Montana*, LEGAL TIMES, Nov. 25, 1991, at 20 (discussing Civil Justice Reform Act report and plan in Montana); Daniel Wise, *Eastern District Panel Proposes Measures to Speed Civil Cases*, N.Y. L.J., Sept. 4, 1991, at 1 (discussing report and plan for the Eastern District of New York).

10. *See* 28 U.S.C. § 473(a)(2)(C) (Supp. II 1990). For examples of mandatory disclosure rules see ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF CAL., REPORT AND PLAN (1991) (rule requiring exchange of core information); U.S. DIST. COURT FOR THE DIST. OF DEL., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 23, 1991) (automatic disclosures in personal injury, malpractice, RICO, and employee civil rights cases); CIVIL JUSTICE ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF ILL., REPORT AND PLAN (1991) (automatic disclosures prior to discovery in all cases); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE E. DIST. OF N.Y., REPORT TO HON. THOMAS C. PLATT, CHIEF JUDGE (Oct. 22, 1991) (automatic disclosure prior to discovery for all filings for 18 month test period; new rule to correspond with proposed Federal Rule 26); SOUTHERN DIST. OF N.Y. CIVIL JUSTICE REFORM ACT ADVISORY GROUP, REPORT AND RECOMMENDATIONS (Nov. 1, 1991) (mandatory discovery in pro se prisoner cases); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE W. DIST. OF OKLA. APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, REPORT (Oct. 21, 1991) (mandatory disclosure for all cases; new rule to correspond with proposed Federal Rule 26); U.S. DIST. COURT FOR THE E. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 (Dec. 20, 1991) (duty of disclosure under three delineated management tracks); and CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, and CIVIL JUSTICE ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., COST AND DELAY REDUCTION PLAN UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (Oct. 24, 1991) (voluntary disclosure modelled on proposed Federal Rule 26 on trial basis in 10-20 cases per judge).

11. *See* 28 U.S.C. § 473(b)(4) (Supp. II 1990). For examples of such programs see ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF CAL., *supra* note 10 (court-annexed early neutral evaluation program); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE E. DIST. OF N.Y., *supra* note 10 (court-annexed early neutral evaluation; pro bono); and ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF OHIO, REPORT AND PLAN (1991) (court-annexed early neutral evaluation, mediation, non-binding arbitration).

12. *See* 28 U.S.C. § 473(a)(6) (Supp. II 1990). For examples see ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF CAL., *supra* note 10 (court-annexed non-binding arbitration); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF GA., REPORT AND PLAN (1991) (court-annexed arbitration); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE W. DIST. OF MICH., REPORT AND PLAN (1991) (arbitration referrals); ADVISORY GROUP OF

Commentators who analyze and debate the narrow merits of specific local reform measures will miss the crucial importance of the Act. To date, almost everyone who has considered the Act has mistakenly focused on the nuts and bolts.[13]

The central importance of the Civil Justice Reform Act is this: the Act has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch. Congress has taken procedural rulemaking power away from judges and their expert advisors and delegated it to local lawyers. By the expedient of declaring procedural rules to be substantive law, Congress has effectively repealed the Rules Enabling Act.[14] Congress has by fiat stripped the judicial branch of a power that uniquely bears on the judicial function: the power to prescribe internal rules of procedure for the federal courts. By legislative stealth in enacting the Civil Justice Reform Act, Congress is continuing to transform the Advisory Committee on Civil Rules into a quaint, third-branch vestigial organ.[15]

The implications of this unheralded revolution will be dramatic and widespread for years to come. At the most pragmatic level, the grassroots local advisory groups are destined to create problematic local rules, measures, and programs. Although this "bottom up" approach to rulemaking is theoretically laudable, it can also be viewed as a politically cynical way of magically conferring a democratic patina on a rulemaking process that is not truly locally inspired, but federally orchestrated by Washington.[16] Furthermore, local amateur rulemaking groups, how-

THE U.S. DIST. COURT FOR THE E. DIST. OF N.Y., *supra* note 10 (court-annexed arbitration and mediation); SOUTHERN DIST. OF N.Y. CIVIL JUSTICE REFORM ACT ADVISORY GROUP, *supra* note 10 (mandatory court-annexed mediation for all expedited cases and sample of other cases pro bono); ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF OHIO, *supra* note 11 (extensive ADR program with ADR administrator to oversee program); and CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE U.S. DIST. COURT FOR THE W. DIST. OF TENN., REPORT (Sept. 26, 1991) (local rule amended to authorize ADR referrals).

13. *See, e.g.*, sources cited *supra* note 9.

14. *See* 28 U.S.C. § 2072 (1988 & Supp. II 1990).

15. *See* Mullenix, *supra* note 8, at 801-02 (predicting demise of the Advisory Committee on Civil Rules's influence on the rulemaking process for reasons unrelated to the Civil Justice Reform Act).

16. *See* 28 U.S.C. § 473 (Supp. II 1990). This section provides a detailed list of recommended procedural innovations that the local advisory groups are instructed to consider in developing the content of their civil justice reform plans. In addition, local advisory groups have received multiple memoranda from the Federal Judicial Center with proposals for procedural rules. *See, e.g.*, Memorandum from The Hon. William B. Schwarzer to All Chief Judges, U.S.

ever intelligent, diligent, and well-intentioned, are ill-equipped to perform the basic tasks the Act requires, such as conducting docket assessments[17] and evaluating the reasons for cost and delay in the district.[18] Bad social science will form the basis for bad rulemaking.

This vast experiment in local rulemaking will undermine the procedural reform that promulgation of the federal rules effected in 1938. Judge Clark aptly captured the aesthetic[19] of that first procedural reformation in his *Arnstein* dissent: careful, informed study that leads to the adoption and amendment of simple rules that are uniform throughout the country. The reforms the Civil Justice Reform Act mandates are not conducive to careful, informed study of the Federal Rules of Civil Procedure. Further, it is doubtful that the Act's requirements will lead advisory groups to recommend simple rules. Instead, with its statutory emphasis on increased judicial management of litigation, the Act encourages (if not requires) a proliferation of increasingly complex and specific local rules.

The Civil Justice Reform Act is at war with the concept of uniform procedural rules throughout the federal district courts. The Act instead directly contributes to an increased balkanization of federal civil procedure, a process that began with Federal Rule of Civil Procedure 83, which authorizes the creation of local rules.[20] What began as an aesthetic of procedural simplicity has been transformed, over fifty years, into a reigning reality of procedural complexity. Today, federal practice and procedure is impossibly arcane.

A federal practitioner must now know, in addition to the Federal Rules of Civil and Appellate Procedure, the existing local rules of ninety-four district courts and eleven federal circuits.[21] The practitioner simply cannot know the procedures of any other federal district without looking them up, just as an out-of-state practitioner must research the rules of a foreign jurisdiction. As a consequence of the Act, the practitioner's life will now be further complicated by the overlay of new rules, measures, and programs promulgated and implemented on the recommendation of ninety-four local advisory groups.

Incredibly, in addition to all this procedural babel,[22] the Federal Advisory Committee on Civil Rules remains in existence, currently drafting further revisions to the general federal rules,[23] a task that parallels the work of the local advisory groups. With regard to the proliferation of rulemakers, one is reminded of the old Abbott and Costello joke "Who's on first?" Whatever may be said for the democratic process, it should be abundantly clear to any observer of the rulemaking scene that there are now too many procedural cooks. What the relationship among all these rulemaking bodies and their resulting rules will be poses an interesting academic question. For the average lawyer and potential federal litigant, however, what procedural rules govern in any given federal court is a pointed real-life dilemma. Procedural rules govern court access, shape

District Courts *supra* note 6; Memorandum from the Judicial Conference of the United States to Chief Judges, United States District Courts (March 4, 1991) (on file with the *Minnesota Law Review*). The Advisory Group for the Southern District of Texas also received copies of Vice President Quayle's A REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA [Hereinafter AGENDA FOR CIVIL JUSTICE REFORM] (Gov. Printing Office, Aug. 1991), during the course of their deliberations. See *infra* notes 33-37 and accompanying text discussing Vice President Quayle's Report.

17. 28 U.S.C. § 472(c)(1) (Supp. II 1990). The advisory groups have been directed to assess the condition of both civil and criminal dockets.

18. *Id.* § 472(c)(1)(C), (D).

19. *See generally* Janice Toran, *'Tis A Gift To Be Simple: Aesthetics And Procedural Reform*, 89 MICH. L. REV. 352 (1990) (describing the underlying philosophy of the Federal Rules of Civil Procedure as enacted in 1938).

20. *See* FED. R. CIV. P. 83.

21. *See generally* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989) (discussing history and current state of local rules). As Professor Subrin and his colleagues have demonstrated, local rules may or may not be consistent with the general federal rules of civil procedure. *Cf.* A. Leo Levin, *Local Rules As Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991) (approving of Rule 83's creation of "local laboratories" for new rules).

22. Professor Maurice Rosenberg, in congressional testimony, was apparently the first to use the Tower of Babel metaphor for local rules. *See* Levin, *supra* note 21, at 1569 n.5 (citing HOUSE COMM. ON THE JUDICIARY, RULES ENABLING ACT OF 1985, H.R. REP. NO. 422, 99th Cong., 1st Sess. 15 n.55 (1985)).

23. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF EVIDENCE (Aug. 1991); *see also* Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time For Reform?*, 138 F.R.D. 155 (1991) (questioning desirability of proposed discovery rule revisions); Ann Pelham, *Judges Make Quite a Discovery; Litigators Erupt, Kill Plan to Reform Federal Civil Rules*, LEGAL TIMES, Mar. 16, 1992, at 1 (discussing withdrawal of proposed discovery rule modifications); Economic Studies Program and the Center for Public Policy Education, Project Proposal, The Future of Jury-Based Litigation in the United States (July 1991) (joint proposal of the Brookings Institution and the Litigation Section of the American Bar Association to reform the jury trial system) (on file with the *Minnesota Law Review*).

the structure of lawsuits, and significantly influence the course of pretrial proceedings.

Finally, the Act authorizes unconstitutional rulemaking, violates the separation of powers doctrine, and arrogates to Congress unprecedented authority over federal procedure. The Civil Justice Reform Act should be understood as an alarming intrusion by Congress—made without adequate legal or empirical foundation—into the judiciary's internal housekeeping affairs. This intrusion strips the judicial branch of its important function of procedural rulemaking. Unless and until the Civil Justice Reform Act is challenged as an unconstitutional delegation of rulemaking authority, federal courts will be subjected to varying popular local whims relating to court access and procedure.

My thesis is simple: The Civil Justice Reform Act revokes the Rules Enabling Act and authorizes unconstitutional rulemaking. The Act violates the separation of powers doctrine and substantially impairs the ability of the federal courts to control their internal processes and the conduct of civil litigation. Congress is simply wrong in declaring that it has exclusive federal rulemaking power. What Congress has taken from the judiciary in the rulemaking process the federal courts should take back, before federal rulemaking and civil litigation become irretrievably balkanized and politicized.

The legal dimensions of this thesis, dealing with the constitutional basis of the Civil Justice Reform Act, the statutory limits of the Rules Enabling Act, and separation of powers doctrine, are developed in a companion article that appears later in this Volume of the *Minnesota Law Review*.[24] The present Article, which lays the factual groundwork for demonstrating the legal insufficiency of the Act, has a two-fold purpose: it captures the Act's radical nature and the counter-reformation in procedural justice it represents, and describes the legislative process that led to its enactment.

This Article is divided into three Parts. Part One, which briefly narrates recent efforts at civil justice reform throughout all branches of the federal government, views the Act as one dimension of a political agenda which seeks to impose a certain vision of procedural justice at the federal level. This portion of the Article describes the Civil Justice Reform Act, its empirical

24. Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, planned for 77 MINN. L. REV. __ (June, 1993).

and political foundations, and the requirements it imposes for accomplishing civil justice reform in all federal district courts. It also assesses the potential impact of the procedural innovations that local advisory groups must consider under the Act in formulating civil justice reform plans and evaluates whether their resulting implementation will accomplish the civil justice goals Congress envisioned.[25]

Part One also describes the Act's various requirements to show the extensive rulemaking authority that Congress delegated to local advisory groups and the kinds of tasks the Act requires the advisory groups to accomplish in formulating their plans. This demonstrates the widespread dispersal of procedural rulemaking to local amateur groups and the serious effects this dispersal is likely to have on access to federal courts and on federal litigation practice. In addition to setting forth the Act's varied requirements, this Part also indicates the haste with which Congress acted on this major piece of legislation and reveals the lack of reasoned debate surrounding its enactment. The purpose of this discussion is to illustrate the paucity of meaningful discussion surrounding the Act's drafting and to display how Congress debates, or rather fails to debate, important issues of constitutional law.

Part Two examines the legislative history relating to Congress's consideration of its constitutional authority to enact the Civil Justice Reform Act and further delegate the procedural rulemaking function to local advisory groups. Part Two focuses on the lack of serious, considered discussion of the constitutional and statutory limits of congressional rulemaking authority. Despite opposition from the Judicial Conference of the United States Courts and skepticism of the American Bar Association and the Department of Justice, Congress concluded that it had exclusive rulemaking authority. This Part argues that

25. This section focuses on the legislation, rather than providing a detailed analysis of the plans and reports. For examples of articles addressing plans and reports, see Robert Elder, Jr., *Congress Catches Heat For Federal Court Woes; Texas Districts Want More Money, Less Meddling*, TEX. LAW., Jan. 27, 1991, at 4 (detailing reports and plans of Texas district courts under Civil Justice Reform Act); Gordon Hunter, *Judges Clog Federal Docket; Bench Trial Rulings, Pending Motions Pile Up in Texas Courts*, TEX. LAW., Nov. 18, 1991, at 1 (early assessment of district court judicial performance statistics required under Civil Justice Reform Act); and Christine E. Sherry, *Section Forms Task Force on Civil Justice Reform Act*, 17 LITIG. NEWS, Dec. 1991, at 1 (reporting on ABA litigation section's creation of task force to study and evaluate civil justice reports and plans completed under the Civil Justice Reform Act). *See also* sources cited *supra* note 9.

Congress usurped procedural rulemaking authority, transgressed the Rules Enabling Act, and ignored the separation of powers doctrine.

Part Three discusses the sources of congressional authority articulated by the Senate Judiciary Committee to enact the Civil Justice Reform Act. This Part questions the strength of each rationale as a matter of legal theory, practice, and policy. It suggests that congressional arguments based on the ideological rhetoric of participatory democracy do not support the delegation of rulemaking authority to local, non-expert advisory groups.

Using this Article's factual background, the companion Article will address constitutional and statutory problems relating to the Civil Justice Reform Act. It will discuss the underlying theory of rulemaking allocation embodied in the Rules Enabling Act and the doctrinal precedents construing that statute. It will also analyze the separation of powers doctrine as it relates to the allocation of substantive and procedural rulemaking authority between the legislative and judicial branches.

The combined thesis of this Article and the companion piece is that the Rules Enabling Act must be read to allocate procedural rulemaking authority to the judicial branch. Under no circumstances can that Act be read to confer procedural rulemaking authority exclusively on Congress. Congress, therefore, has overruled, *sub silentio*, the Rules Enabling Act through the Civil Justice Reform Act. The Senate's interpretation of the Rules Enabling Act inverts the usual understanding of that Act, and transforms it from enabling to disabling legislation. Further, this attempt to strip the judicial branch of its procedural rulemaking authority under the guise of "substantive effects" violates the separation of powers doctrine, which commits control over internal court housekeeping affairs, including the promulgation of procedural rules, to the judiciary.

Although this Article centers on the factual bases underlying the Civil Justice Reform Act and its companion Article deals with constitutional and statutory arguments relating to allocation of civil procedure rulemaking authority, this Article ends with some brief observations as to why, as a matter of policy, procedural rulemaking authority ought to be vested in the judicial, rather than the legislative, branch. It therefore revisits the overarching theory of the Federal Rules of Civil Procedure, as well as the debate surrounding the relative fairness, competency, and efficiency of the respective bodies to promulgate procedural rules.

This Article concludes that the Act ought to be repudiated as a noble but ill-conceived piece of legislation that will produce more harm than good for civil justice in this country. Civil procedural rulemaking ought not to be in the hands of ninety-four local amateur rulemaking groups who are destined to wreak mischief, if not havoc, on the federal court system. Procedural rulemaking should be restored to the federal judiciary, to be accomplished in slow and deliberative fashion by procedural experts through the existing Advisory Committee system.

I. UNDERSTANDING THE CIVIL JUSTICE REFORM ACT OF 1990[26]

The Civil Justice Reform Act must be understood against a backdrop of the civil justice reform efforts that percolated through all three branches of the federal government during the late 1980s. This understanding is important because one of the Act's stated purposes, according to its legislative history, is to achieve justice from the "bottom up," from the "users" of the system.[27] The Act, as a matter of public relations, carries with it a strong gloss of participatory democracy and civic do-goodism that is belied by a highly centralized effort to impose a certain set of procedural reforms onto the civil justice system. Thus, it is but one piece of an entire federal civil justice reform agenda, consisting of virtually identical proposals, that has been advanced in all three branches of government. Rather than coming from the bottom up, this forced effort to accomplish speedy civil justice reform is actually being pushed from the top down.[28]

---

26. *See supra* note 7.

27. *See* S. REP. NO. 416, *supra* note 3, at 14, *reprinted in* 1990 U.S.C.C.A.N. at 6817.

> The broad membership of the planning groups and the overall planning group mechanism outlined in the legislation will ensure that the entire litigating community share in the development of the plans. As Judge Enslen pointed out, "if the user committee assists in drafting the plan, the users of the system are going to be all the more interested in following it."

Id. at 15, *reprinted in* 1990 U.S.C.C.A.N. at 6818 (citation omitted); *see also* 136 CONG. REC. S416 (daily ed. Jan. 25, 1990) (statement of Sen. Biden); Jeffrey J. Peck, *"Users United": The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS., Summer 1991, at 105, 109-10 (discussing Sen. Biden's statement). Mr. Peck is the staff director for the Senate Judiciary Committee and played a major role in shepherding the Civil Justice Reform Act into law.

28. *Compare* Deborah R. Hensler, *Taking Aim at the American Legal Sys-*

The legislative branch, through the Civil Justice Reform Act, is requiring seemingly precipitous and urgent reform based on a largely assumed crisis in the civil justice system.[29] The Act reflects congressional frustration with the glacial pace of procedural reform as accomplished through deliberative judicial rulemaking,[30] and demonstrates congressional demand for immediate procedural justice reform without regard to statutory niceties or constitutional separation of powers problems.[31]

tem: The Council on Competitiveness's Agenda for Legal Reform, 75 JUDICATURE 244 (1992) (criticizing the centralized reform movement) *with* Gregory B. Butler & Brian D. Miller, *Fiddling While Rome Burns: A Response to Dr. Hensler*, 75 JUDICATURE 251 (1992) (supporting Vice President Quayle's reform proposals).

29. *See* Civil Justice Reform Act § 102, 28 U.S.C. § 471 note (Supp. II 1990) (congressional findings). It is significant to note that the six "findings" reported by Congress rest on the unproven assumption that cost and delay is a problem in all federal district courts. In none of its findings did Congress ever document that there actually is a threshold problem of cost and delay. Thus, Congress declared:

> (1) The problems of cost and delay in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the district court's resources by both civil and criminal matters.
>
> (2) The courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties.
>
> (3) The solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch.
>
> (4) In identifying, developing, and implementing solutions to problems of cost and delay in civil litigation, it is necessary to achieve a method of consultation so that individual judicial officers, litigants, and litigants' attorneys who have developed techniques for litigation management and cost and delay reduction can effectively and promptly communicate those techniques to all participants in the civil justice system.
>
> (5) Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles . . . .
>
> . . . .
>
> (6) Because the increasing volume and complexity of civil and criminal cases imposes increasingly heavy workload burdens on judicial officers, clerks of court, and other court personnel, it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction principles and techniques.

Id.

30. *See* Peck, *supra* note 27, at 114-16.

31. *See id.* Mr. Peck writes:

> Regrettably, . . . this battle over turf *should* not and need not have occurred. It should not have occurred because the view that court reform is somehow within the exclusive province of the courts is erroneous as a matter of law and mistaken as a matter of policy when, as here, the rulemaking process had not fully responded to the range of civil litigation problems that existed. . . .
>
> . . . .
>
> . . . What largely remained, then, was an objection to the congressional involvement in procedural reform that the bill represented. As a matter of constitutional law, this argument, which is often cloaked in separation of powers terms, is without merit.

Id. at 114.

The executive branch, not content with the pace of reform through congressional legislation, simultaneously pushed various procedural reform initiatives. An October 1991 Presidential Executive Order imposed reforms similar to those of the Civil Justice Reform Act on all executive branch departments and agencies.[32] Vice President Quayle's infamous August 1991 attack on the legal profession[33] was based on a report from the

32. *See* Exec. Order No. 12,788, 56 Fed. Reg. 55,195 (1991); *see also* Marshall J. Breger, *Lawyers Must Lead the Way*, NAT'L L.J., Nov. 18, 1991, at 15 (commenting on Exec. Order No. 12,788 as it relates to civil justice reform in federal agencies); Theodore Olson, *Top-Down Civil Justice Reform*, TEX. LAW., Feb. 17, 1992, at 16 (discussing Exec. Order No. 12,788).

33. *See* Text of Address by Vice President Dan Quayle at the Annual Meeting of the American Bar Association, Atlanta, Georgia, FED. NEWS SERVICE, Aug. 13, 1991 *available in* LEXIS, Nexis library, Fednew file. Vice President Quayle's speech has permeated the media. *See, e.g.*, *Bashing Lawyers. Also Justice*, N.Y. TIMES, Feb. 15, 1992, at 22 (responding negatively to Quayle's speech); Andrew Blum, *ABA Takes Softer Stand on Quayle; Upset Staffers*, NAT'L L.J., Oct. 14, 1991, at 3 (discussing reaction to Quayle's ABA speech on civil justice reform); Steven Brostoff, *Push by Bush Urges on Tort Reform Movement*, PROP. & CASUALTY/EMPLOYEE BENEFITS EDITION, Sept. 2, 1991, at 5 (discussing reaction to Quayle's speech and tort reform movement); Dawn Ceol, *Quayle Urges Reform of Civil Justice System*, WASH. TIMES, Aug. 14, 1991, at A4 (reporting Quayle's speech); Rupert Cornwell, *U.S. Plans Radical Legal Reforms*, THE INDEPENDENT, Aug. 14, 1991, at 10 (reporting Quayle's speech); *The Costs of Lawyering*, CHRISTIAN SCI. MONITOR, Aug. 19, 1991, at 20 (reacting positively to Quayle's speech); *First, Sock the Lawyers*, 23 NAT'L J. 2041 (Aug. 17, 1991) (reporting on Quayle's speech); Mary Jane Fisher, *Civil Justice Reform Plan Introduced by VP Quayle*, PROP. & CASUALTY/EMPLOYEE BENEFITS EDITION, Aug. 19, 1991, at 1 (discussing reaction Quayle's speech and support from insurance groups); *For the Record*, WASH. POST., Aug. 15, 1991, at A20 (quoting excerpts from Quayle's speech to ABA); Milo Geyelin, *Quayle's Data in Proposed Reform of Legal System Called Misleading*, WALL ST. J., Feb. 4, 1992, at B7 (discussing criticism of empirical data in Quayle's speech); Milo Geyelin, *Quayle Faces Powerful Foes on Law Reform*, WALL ST. J., Dec. 12, 1991, at B1 (reporting on the emerging corporate opponents of Quayle's proposals); Geoffrey C. Hazard Jr., *Bush Report Not All That Controversial*, NAT'L L.J., Dec. 16, 1991, at 13 (commenting on the limited scope of Quayle's proposals); Julie Johnson, *Do We Have Too Many Lawyers?*, TIME, Aug. 26, 1991, at 54 (noting pro-business bias of proposed Quayle's reform efforts); David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, at A1 (reporting on Quayle's speech and opposition to proposals); *Quayle Outlines Recommendations for Reforming*

President's Council on Competitiveness, entitled *Agenda for Civil Justice Reform in America*,[34] that contained substantially the same package of procedural reforms set forth in both the Civil Justice Reform Act and the President's Executive Order on civil justice reform.[35]

Indeed, it is striking that similar, if not identical, recommendations concerning civil litigation had been advanced in all three branches of government in the early 1990s. The proposals focus on tighter managerial control over pre-trial proceedings, curbing discovery abuse, and mandatory recourse to alternative dispute resolution techniques; some make recommendations regarding further control over attorneys' fees and punitive damages.[36] These proposals raise interesting problems relating to party autonomy, managerial judging, access to federal courts, and the right to adversarial dispute resolution.[37]

A. BACKGROUND AND POLICY

Two signal events occurred in 1990 regarding the delivery of civil justice in the United States federal court system. First, the Federal Courts Study Committee, a group of lawyers and lay persons Chief Justice Rehnquist appointed at the direction of Congress to study the problems of the federal courts, issued the *Report of the Federal Courts Study Committee*.[38] At the outset, the *Report* noted that in authorizing the study, Congress was responding to "mounting public and professional concern with the federal courts' congestion, delay, expense, and expansion."[39] The product of fifteen months work, the *Report* comprehensively described the state of the federal judiciary, analyzed problems besetting the federal court system, and proposed a set of detailed recommendations for reforming judicial administration and federal procedure.[40]

Second, the Brookings Institution Task Force on Civil Justice Reform issued its report, *Justice for All: Reducing Costs and Delays in Civil Litigation*.[41] At Senator Joseph R. Biden, Jr.'s request, the Brookings Institution had assembled a seemingly diverse task force[42] that met over a two-year period to discuss problems of civil justice. In contrast to the Federal Court Study Committee's *Report*, the Brookings-Biden report focused more narrowly on civil litigation. It contained a series of sweeping recommendations for reform of the civil justice system.

The Brookings-Biden report provided the basis for Title I of the Judicial Improvements Act of 1990,[43] the Civil Justice Reform Act of 1990.[44] The Act requires every federal district

Product Liability, 53 WKLY. BUS. AVIATION, Aug. 19, 1991, at 74 (reporting on Quayle's speech and products liability tort reform); Greg Rushford, *Touting Tort Reform*, LEGAL TIMES, Sept. 2, 1991, at 5 (reporting on favorable responses to Quayle's speech); Martin Scram, *Call it Danforth in the Lawyers' Den*, NEWSDAY, Aug. 29, 1991, at 126 (reacting favorably to Quayle's speech); *Taking the Lead*, NAT'L L.J., Nov. 4, 1991, at 12 (reacting positively to Quayle's speech); Roush Vance, *New Bar Chief Wants to Boost Image of Attorneys and Promote Professionalism*, MICH. L. WKLY., Sept. 23, 1991, at S3B (reporting comments at Michigan State Bar meeting on Quayle's speech and decline in professionalism).

34. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 16; *see also* Avern Cohn, *Civil-Justice Report Flawed*, LEGAL TIMES, Sept. 23, 1991, at 28 (letter to the editor criticizing Quayle's speech and the AGENDA FOR CIVIL JUSTICE REFORM).

35. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 16.

36. *See e.g.*, *id.* at 32 (discussing punitive damages); Exec. Order No. 12,788, 56 Fed. Reg. 55,197 (1991) (discussing fees and expenses in § 1(h)).

37. These important topics are largely outside the scope of this Article. For a description of some of the problems with the Quayle proposals, see Hensler, *supra* note 28.

38. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (Apr. 2, 1990).

39. *Id.* at 3.

40. *Id.* at 3-28 (overview); *cf.* Civil Justice Reform Act § 102, 28 U.S.C. § 471 note (Supp. II 1990) (findings); 28 U.S.C. § 473 (Supp. II 1990) (content of civil justice expense and delay reduction plans).

41. BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION (1989).

42. The task force represented varying interests within the civil justice system, including "plaintiff's and defense bar, civil and womens' rights lawyers, attorneys representing consumer and environmental organizations, representatives of the insurance industry, general counsels of major corporations, former judges and law professors." *Id.* at vii; *see also* S. REP. NO. 416, *supra* note 3, at 13, *reprinted in* 1990 U.S.C.C.A.N. at 6816 (discussing the task force). Despite the apparent diversity of the task force, its membership was heavily weighted with corporate and insurance interests. *See* BROOKINGS INST., *supra* note 41, at 45-49 (listing members of the task force and their affiliations).

43. *See supra* note 3.

44. Civil Justice Reform Act of 1990, Pub. L. No. 101-650 §§ 101-105, 104 Stat. 5089-98 (1990) (codified at 28 U.S.C. §§ 471-482 (Supp. II 1990)). *See generally* Mark Ballard, *Bill to Add U.S. Judges Shortchanges Texas by 6; Legislation Would Add 3 New Courts in Southern District, 1 in Western District*, TEX. LAW., June 18, 1990, at 4 (commenting on earlier version of the bill); *Biden Introduces Court Reform Bill*, WASH. TIMES, Jan. 26, 1990, at A2 (announcing of Civil Justice Reform Act); David Bauman, *Biden Unveils Litigation Bill*, GANNETT NEWS SERVICE, Jan. 25, 1990, *available in* LEXIS, Nexis Library, GNS File (discussing Biden bill); Marcia Coyle & Marianne Lavelle, *Conference O.K.'s Plan to Cut Court Costs, Delays*, NAT'L L.J., May 21, 1990, at 5 (noting Judicial Conference opposition to Civil Justice Reform Act and setting forth conference's own proposals); Marcia Coyle & Fred Strasser, *Senate Sets its Sights on Delays in Civil Trials*, NAT'L L.J., July 23, 1990, at 5 (discussing Biden bill and noting opposition from the Judicial Conference of the United States Courts and the American Bar Association); Stephen Labaton,

across the country to develop and implement a civil justice plan to reduce costs and delay within the district.[45] The legislative history indicates that the central purpose of the Civil Justice Reform Act is to accomplish the often stated but frequently unachieved goal of Rule 1 of the Federal Rules of Civil Procedure: to ensure the "just, speedy, and inexpensive determination" of civil disputes in federal courts.[46] The legislative history notes that "[h]igh costs, long delays and insufficient judicial resources all too often leave this time-honored promise unfulfilled. By improving the quality of the process of civil litigation, this legislation will contribute to improvement of the quality of justice that the civil justice system delivers."[47]

Congress suggested that the federal courts "are suffering today under the scourge of two related and worsening plagues."[48] The first—high costs of litigation and delays that contribute to high costs—limits access to federal courts to only the wealthy and lessens the ability of American corporations to compete at home and abroad.[49] The second—a scarcity of financial resources dedicated to the federal court system—results in a shortage of federal judges. This shortage, in turn, increases costs and results in delay, especially in federal courts with congested criminal dockets and high drug-related caseloads.[50]

Business and the Law; Biden's Challenge to Federal Courts, N.Y. TIMES, Apr. 16, 1990, at D2 (reporting on Civil Justice Reform Act and opposition from Federal judges); *Legislation: Mixed Bag of Changes Designed to Improve Federal Practice*, 59 U.S.L.W. 2419 (January 15, 1991) (describing provisions of Judicial Improvements Act of 1990); Peck, *supra* note 27, at 107-09 (discussing the history of the Act); *Proceed with Caution*, NAT'L L.J., Mar. 8, 1990, at 6 (criticizing Brookings Report and Civil Justice Reform Act); Richard A. Rothman, *Civil Justice Reform Act: Too Little, Too Fast*, N.Y. L.J., Apr. 17, 1990, at 2 (noting early criticism of Civil Justice Reform Act).

45. Civil Justice Reform Act § 103(b), 28 U.S.C. § 471 note (Supp. II 1990).

46. FED. R. CIV. P. 1. Echoing this trilogy of values, the Senate legislative history of the Civil Justice Reform Act states that the purpose of the legislation "is to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes in our Nation's Federal courts." S. REP. NO. 416, *supra* note 3, at 1, *reprinted in* 1990 U.S.C.C.A.N. at 6804.

Although Congress, in the legislative history, identified three fundamental values, the Civil Justice Reform Act itself focuses exclusively on two: cost and delay. The independent value of justice is absent from the statutory mandate, and by inference, it must be assumed that Congress equated reducing cost and delay with achieving justice.

The lack of a definition of justice, or any further reference to justice in the legislation supplying the framework for civil justice reform disturbed some members serving on advisory groups, as well as judges interviewed during the course of evaluating conditions in the districts. *See* Mullenix, *supra* note 7, at 199; *see also* CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at B-5.

47. *See* S. REP. NO. 416, *supra* note 3, at 1, *reprinted in* 1990 U.S.C.C.A.N. at 6804.

48. *Id.*

49. *Id.* at 1-2, *reprinted in* 1990 U.S.C.C.A.N. at 6804. The theme that civil justice reform is needed to combat decreased American competitiveness in the global economy underlies Vice President Quayle's address to the American Bar Association and the AGENDA FOR CIVIL JUSTICE REFORM. *See supra* notes 33-34.

50. *See* S. REP. NO. 416, *supra* note 3, at 1-2, *reprinted in* 1990 U.S.C.C.A.N. at 6804.

51. *Id.*

52. *Id.* at 14, *reprinted in* 1990 U.S.C.C.A.N. at 6817; *see also* Peck, *supra* note 27, at 109-12 (describing the cornerstone principles of the legislation and their translation into statutory mandates to the advisory groups).

53. *See* Civil Justice Reform Act § 102, 28 U.S.C. § 471 note (Supp. II 1990).

54. 28 U.S.C. § 471 (Supp. II 1990).

55. 136 CONG. REC. S416 (daily ed. Jan. 25, 1990) (statement of Sen. Biden). This policy decision was based on a recommendation from the Brookings Institution, cited in the Act's legislative history: "[T]he wide participation of those who use and are involved in the court system in each district will not only maximize the prospects that workable plans will be developed, but will also stimulate a much-needed dialogue between the bench, bar, and client

The Civil Justice Reform Act is intended to address these two problems in what Congress deemed a "comprehensive and straightforward fashion."[51] Six cornerstone principles animate this legislative program:

> (1) building reform from the 'bottom up';
> (2) promulgating a national, statutory policy in support of judicial case management;
> (3) imposing greater controls on the discovery process;
> (4) establishing differentiated case management systems;
> (5) improving motions practice and reducing undue delays associated with decisions on motions; and
> (6) expanding and enhancing the use of alternative dispute resolution.[52]

The Senate Judiciary Committee ultimately recast these six principles as the findings supporting Title I of the Civil Justice Reform Act.[53] As a result of these findings, Congress has required each federal district court to promulgate a "civil justice expense and delay reduction plan."[54]

Congress made two key policy decisions regarding civil justice reform within the federal system. The first was that reform is to be accomplished locally, based on the recommendations of district-wide community advisory groups, including not only federal court personnel, but also lawyers and clients—"those who must live with the civil justice system on a regular basis."[55] This decision recognized the "remarkable

number of gifted and talented" personnel within the local federal districts, as well as the idea that people involved in reform efforts will have a greater interest in carrying out the reform.[56]

The second decision, tied to decentralized reform, was to promulgate a national, statutory policy in support of judicial case management more extensive than what the current federal rules require.[57] This decision was predicated on the conclusion that early and increased judicial supervision over litigation results in more expeditious and less costly disposition of civil cases. Thus, the Act's legislative history states, "[a]s the number of cases has increased and the cases themselves have become increasingly complex, judges, court administrators, and other civil justice system experts have recognized the importance of courts exercising early, active, and continuous control over case progress."[58]

The other guiding principles for civil justice reform flow from this congressional directive to formulate a nationwide program of vigorous civil case management. The Act's legislative history stresses the importance of early judicial pretrial involvement, setting early and firm trial dates, enhancing use of magistrates, imposing greater controls on the discovery process, establishing differentiated case management systems, reforming motions practice, and expanding and enhancing the use of alternative dispute resolution techniques.[59]

B. Statutory Tasks for the Advisory Groups

The Civil Justice Reform Act requires each federal district court to implement a civil justice expense and delay reduction plan within three years of the statute's enactment.[60] In addition, the legislation designates three categories of courts to participate in accomplishing this reform: pilot districts,[61] early

communities about methods for streamlining litigation practice." S. REP. NO. 416, *supra* note 3, at 14, *reprinted in* 1990 U.S.C.C.A.N. at 6817 (quoting BROOKINGS INST., *supra* note 41, at 12).

56. *See* S. REP. NO. 416, *supra* note 3, at 15, *reprinted in* 1990 U.S.C.C.A.N. at 6817-18; *see also supra* note 27 (discussing planning group membership and process).

57. *See, e.g.*, FED. R. CIV. P. 16 (describing judicial pretrial management techniques).

58. *See* S. REP. NO. 416, *supra* note 3, at 16, *reprinted in* 1990 U.S.C.C.A.N. at 6819.

59. *Id.* at 18-30, *reprinted in* 1990 U.S.C.C.A.N. at 6821-33.

60. Civil Justice Reform Act § 103(b), 28 U.S.C. § 471 note (Supp. II 1990).

61. *Id.* § 105.

implementation districts,[62] and demonstration districts.[63]

The statute requires the Judicial Conference of the United States to designate ten "Pilot Districts," at least five of which had to encompass metropolitan areas.[64] The courts for these districts were required to write expense and delay reduction reports and plans that conform to the Act's requirements and to implement the plans by December 31, 1991. The statute instructs the pilot districts to include the "six principles and guidelines" identified in the Act[65] in their civil justice reform plans. That statute also requires the plans to remain in effect for at least three years.[66] As of December 31, 1991, the ten pilot districts, in compliance with the Act, had completed their reports and plans.[67]

Early implementation districts consist of other federal district courts that voluntarily undertook to formulate and implement a civil reform plan by December 31, 1991 under the statutory guidelines.[68] The Act provides that any district seeking early implementation status could apply to the Judicial

62. *Id.* § 103(c).

63. *Id.* § 104.

64. *Id.* § 105(b)(2).

65. *Id.* § 105 (b)(1).

66. *Id.* § 105(b)(3).

67. *See* ADVISORY COMM. OF THE U.S. DIST. COURT FOR THE S. DIST. OF CAL., REPORT AND PLAN (Oct. 18, 1991); ADVISORY GROUP APPOINTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 TO THE U.S. DIST. COURT FOR THE DIST. OF DEL., FINAL REPORT (Oct. 1, 1991), and U.S. DIST. COURT FOR THE DIST. OF DEL., *supra* note 10; ADVISORY GROUP FOR THE U.S. DIST. COURT FOR THE N. DIST. OF GA. APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT, REPORT (Sept. 30, 1991), and U.S DIST. COURT FOR THE N. DIST. OF GA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 (Dec. 17, 1991); SOUTHERN DIST. OF N.Y. CIVIL JUSTICE REFORM ACT ADVISORY GROUP, *supra* note 10; ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE W. DIST. OF OKLA. APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, *supra* note 10; ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE E. DIST. OF PA. APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, REPORT (Aug. 1, 1991), and U.S. DIST. COURT FOR THE E. DIST. OF PA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 31, 1991); CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE U.S. DIST. COURT FOR THE W. DIST. OF TENN., *supra* note 12; CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, and U.S. DIST. COURT FOR THE S. DIST. OF TEX., COST AND DELAY REDUCTION PLAN UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (Oct. 24, 1991); ADVISORY GROUP FOR THE U.S. DIST. COURT FOR UTAH, REPORT AND PLAN (1991), U.S. DIST. COURT FOR THE E. DIST. OF WIS., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN ADOPTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 (Dec. 1991).

68. *See* Civil Justice Reform Act § 103(c), 28 U.S.C. § 471 note (Supp. II 1990).

Conference for additional resources to implement the plans.[69] Twenty-four districts had qualified as early implementation districts by December 31, 1991.[70]

The statute designates five demonstration districts.[71] The statute assign courts in two of these districts the task of experimenting with "differentiated case management" systems and the courts in three of the districts the task of experimenting with alternative dispute resolution mechanisms.[72] The statute indicates that any designated demonstration district could also seek to qualify as an early implementation district.[73] Four of the five demonstration districts qualified as early implementation districts by December 31, 1991.[74]

The Civil Justice Reform Act requires each district court, within ninety days of the statute's enactment, to appoint an advisory group charged with carrying out the statute's mandates.[75] The Act requires that this group be balanced by the inclusion of "attorneys and other persons who are representative of major categories of litigants"[76] in the court; the statute designates the district's United States Attorney as the only permanent advisory committee member.[77] The statute grants continuing existence of the advisory groups after they complete their statutory tasks of writing a report and civil justice reform plan.[78] The statute did not, however, describe in detail what continuing functions the advisory groups are to perform for the district courts.[79]

The Civil Justice Reform Act confers three basic tasks on the advisory groups: assessing the condition of the district's civil and criminal dockets,[80] evaluating the reasons for the district's litigation cost and delay,[81] and formulating recommendations addressing case backlog and the expense of civil litigation.[82] The ten pilot district advisory groups proceeded under the legislative mandate not only to comply with all the statute's provisions for creation of civil justice expense and delay reduction plans, but additionally to include as part of their plans "the [six] principles and guidelines of litigation management and cost and delay reduction"[83] identified in the Act.[84]

69. *Id.* § 103(c)(2). The statute also requires the Judicial Conference to prepare, within eighteen months after enactment of the law, a report on the plans "developed and implemented" in the early implementation districts. *See id.* § 103(c)(3).

70. CIVIL JUSTICE REFORM ACT REPORT, *supra* note 6, at 2. These are United States district courts for Alaska, the Eastern District of Arkansas, the Eastern and Northern Districts of California, the Southern District of Florida, the District of Idaho, the Southern District of Illinois, the Northern and Southern Districts of Indiana, Kansas, Massachusetts, the Western District of Michigan, Montana, New Jersey, the Eastern District of New York, the Northern District of Ohio, Oregon, the Eastern District of Texas, the Virgin Islands, the Eastern District of Virginia, the Northern and Southern Districts of West Virginia, the Western District of Wisconsin, and the District of Wyoming. The ten pilot districts are also considered early implementation districts. *Id.* at 1. The Western District of Texas adopted and submitted a Report to the Administrative Office of the United States Courts after December 31, 1991.

71. Civil Justice Reform Act § 104(b), 28 U.S.C. 471 note (Supp. II 1990) These districts are the Western District of Maryland, the Northern District of Ohio, the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri. *Id.*

72. *Id.* Congress requires the Judicial Conference to study and evaluate the merits of these demonstration districts' programs and to report to it no later than December 31, 1995. *Id.* § 104(c)-(d).

73. *Id.* at § 104(a)(2).

74. CIVIL JUSTICE REFORM ACT REPORT, *supra* note 6, at 23. These districts are the Northern District of Ohio, the Northern District of California, the Northern District of West Virginia, and the Western District of Michigan. *Id.* at app. I.

75. 28 U.S.C. § 478(a) (Supp. II 1990). The statute authorizes the chief judge of each district court to choose the members of the advisory groups, after consultation with the other judges of the court. *Id.* In the Southern District of Texas, each judge nominated a candidate for the advisory group.

76. *Id.* § 478(b).

77. *Id.* § 478(d) (requiring the United States Attorney for each judicial district, or his or her designee, to be a permanent member of the advisory group). In some districts, the presence of the United Attorney on the advisory group created contention over issues relating to the state of the criminal docket and prosecutorial discretion. *See, e.g.*, Garry Sturgess, *Another Clash Over Criminal Caseload*, LEGAL TIMES, April 1, 1991, at 7 (discussing tensions within the Advisory Group for the District of Columbia with regard to prosecution of criminal drug offenses). The District of Columbia was not one of the ten pilot district courts, but had begun its work as an advisory group. *Id.*

78. *See* 28 U.S.C. § 478(d) (Supp. II 1990) (providing that no member of an advisory group shall serve for longer than four years).

79. Section 475 is the only section of the Act that addresses this issue. It provides that advisory groups should be consulted when the district conducts mandatory periodic assessments of their civil and criminal dockets. *Id.* § 475.

80. *Id.* § 472(c)(1).

81. *Id.* § 472(c)(1)(C)-(D).

82. *Id.* § 473. This section of the Act recommends in detail, procedural innovations for the Advisory Groups to consider in developing their civil justice reform plans. *Id.*

83. Civil Justice Reform Act § 105(b)(1), 28 U.S.C. 471 note (Supp. II 1990).

84. *See* 28 U.S.C. § 473 (Supp. II 1990) (detailing recommended and required content of civil justice expense and delay reduction plans). This section, the heart of the Act, delineates a long list of recommended and required procedural innovations. Subsections (a) and (b) indicate that the advisory groups "shall consider and may include" a variety of procedural techniques to manage litigation and reduce cost and delay. The techniques include differential case management; undertaking early and ongoing pretrial judicial case management; setting early, firm trial dates; controlling and closely monitoring

The statute assigns two distinct tasks to the advisory groups: writing reports that set forth the conditions in the district,[85] and formulating civil justice reform plans to address those conditions.[86] To date, most pilot and early implementation districts have issued separate reports and plans.[87] The plans typically distill new local rules, measures, or programs that districts are implementing to reduce cost and delay.[88]

C. WHILE AMERICA SLEPT: OF PROBLEMATIC SOCIAL SCIENCE AND RULEMAKING

> Procedure has always been a whipping boy upon which those anxious to secure prompt, sometimes summary, adjudication of rights vent their spleen over so-called delays.
>
> Justice Stanley Reed[89]

Writing in laudatory terms regarding the speed with which Congress enacted the Civil Justice Reform Act, the Senate Judiciary Committee's staff director noted:

> The process by which this legislation became the law of the land is equally significant. . . . Less than twelve months passed between the introduction of the Act and its enactment—a rather remarkable feat, even the critics of the Act must concede, in an area of the law in which reform has been both incremental in scope and languid in pace. Action that typically occupies several years and multiple Congresses took only one year and only one session of a single Congress.[90]

the scope and extent of discovery; setting timetables for disposition of motions; managing complex cases; providing for voluntary disclosure; and referring parties to alternative dispute resolution mechanisms.

85. *Id.* § 472(b) (requiring advisory groups to submit reports to their district courts and that these reports be available to the public). The legislation indicates that the advisory committee reports must include an assessment of the docket, the basis for the advisory committee's recommendations, recommended measures, rules, and programs, and an explanation of the way in which the recommended measures, rules and programs comply with § 473, which dictates the contents of civil justice reform plans. *Id.*

86. *Id.* §§ 471, 472(a).

87. *See, e.g., supra* notes 10-12, 67, 70 (reports and plans). Some districts have issued combined reports and plans.

88. *See, e.g., supra* notes 10-12, 67.

89. *The Rule-Making Function and The Judicial Conference of the United States, supra* note 8, at 133.

90. Peck, *supra* note 27, at 106. Mr. Peck attributed the expedited passage of the law to three factors: "(1) careful and deliberate study [that] preceded legislative action; (2) consensus . . . with common opponents forging an unprecedented alliance;" and "(3) under Senator Biden's stewardship reasonable compromise outlasted stubborn resistance." *Id.*

The "careful and deliberate study" refers to the Louis Harris survey that supplied the empirical basis for the Brookings-Biden report. This report was completed in a very short time-frame, and is subject to methodological challenge. As was true throughout this legislative reform effort, the Harris survey questions assumed the problem it was seeking to define. *See* LOUIS HARRIS AND ASSOCIATES, INC., PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM, A STUDY CONDUCTED FOR: THE FOUNDATION FOR CHANGE, INC. (March 1989), *reprinted in The Civil Justice Reform Act of 1990 and The Judicial Improvements Act of 1990: Hearings Before The Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 91-184 (1990) [hereinafter *Senate Hearings*].

The "unprecedented alliance" that was forged in support of the legislation was actually an alliance that was forged in support of the Brookings-Biden task force and report; the same people who worked for the task force reappeared to support the legislation. Notwithstanding the self-description of diversity by that task force and the Senate Judiciary Committee, the Brookings-Biden Task force was heavily weighted with corporate and insurance interests. *See supra* note 42 (discussing task force membership).

As to the "reasonable compromise" that outlasted the "stubborn resistance," the questions the Judicial Conference of the United States Courts raised in its testimony can hardly be characterized as "stubborn resistance." *See* discussion *infra* Part II.B. If anything, the questions the Conference presented regarding basic constitutional authority were rather weakly asserted and not vigorously pursued by the Conference's representatives to the legislative hearings. The Judicial Conference's objections simply were disregarded, belying the notion that Senator Biden and his staff forged a compromise that saved the day. *See* discussion *infra* Part II.

91. *Senate Hearings, supra* note 90, at 55 (testimony of Mr. Patrick Head)

92. *See supra* note 90 (discussing the Harris survey).

93. *See Senate Hearings, supra* note 90, at 329 ("[N]o active judicial officer was asked to serve on the task force") (statement by Judge Robert F. Peckham, Chief Judge, U.S. Dist. Court for the N. Dist. of Cal., on behalf of the Judicial Conference, regarding Title I of S. 2648 Civil Justice Expense and Delay Reduction Plans).

94. *See Senate Hearings, supra* note 90 at 2, 307 (hearings held on March 6 and June 26, 1990); *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong , 2d Sess. (1990) [hereinafter *House Hearing*].

Of the ten witnesses who appeared before the two Senate hearings, only six witnesses supported the bill, and five of the six were members of the Brookings-Biden task force. *See infra* note 95. Only one federal judge, Judge Richard A. Enslen, testified in support of the bill. *See Senate Hearings, supra*

At least one witness before the Senate Judiciary Committee noted that the Civil Justice Reform Act was the "sleeper" legislation of the year.[91] This is an apt metaphor: while America slept, Congress pressed into law an Act that fundamentally affects procedural and substantive justice in the federal courts. The Act was stealth legislation, swiftly following the Brookings-Biden task force report, a report based on a questionable empirical study[92] commissioned by reform proponents whose task force included no sitting federal judges.[93]

The Senate and House held three legislative hearings with witnesses who were largely predisposed to accept the Brookings-Biden report and its recommendations.[94] Indeed, task

force members appeared at the hearings to endorse their own previous efforts and proposals.[95] The Senate and House committees called few witnesses from the broader community of those interested in federal practice and procedure. The Act's legislative record is devoid of any contributions from other organizations interested in problems of judicial administration,[96] or from the scholarly community that regularly teaches and writes about federal practice and procedure.[97]

In addition, the Act was drafted without consultation from a variety of constituencies that might have been interested in the legislation, including organizations devoted to the study of judicial administration, public interest groups,[98] state attorney generals' organizations, public defender services, the criminal bar, and the Department of Justice.[99] The Senate also proceeded without initial consultation with the judicial branch and completely ignored the judicial rulemaking bodies until the Judicial Conference raised a significant protest.[100]

The lack of congressional responsiveness to the concerns of the judiciary is striking.[101] Judicial Conference representatives found it necessary to appear three times to question the haste with which the Senate drafted the legislation, to question the Senate Judiciary subcommittee's exclusion of federal judges from a process that intimately affected their courts' internal affairs, and to question Congress's presumed general authority to enact a bill so intricately involved with procedural rulemaking.[102] Six federal judges wrote to oppose the legislation,[103]

note 90, at 227-84 (testimony and prepared statement of Judge Richard A. Enslen).

Three disfavoring witnesses were federal judges, none of whom had been members of the Brookings-Biden task force. *See id.* at 360-76 (testimony, prepared statement, letter, and response to written questions of Judge Diana E. Murphy, president of the Federal Judges Association); *id.* at 319-48, 397-404 (testimony, prepared statement, and response to written questions of Judge Robert F. Peckham, representing the Judicial Conference of the United States); *id.* at 208-25, 288-305 (testimony, prepared statement, and response to written questions of Judge Aubrey E. Robinson Jr., representing the Judicial Conference of the United States). A fourth witness, Judge Walter T. McGovern, testified only in support of the additional judgeships proposed in Title II of S. 2648 as essential in achieving any improvements in the handling of the civil docket. *See id.* at 349-60, 405 (testimony and prepared statement of Judge Walter T. McGovern, representing the Judicial Conference of the United States).

95. *See, e.g., Senate Hearings, supra* note 90, at 8-28, 45-46, 82-84, 202-07 (testimony, prepared statement, and response to written questions of Mr. Patrick Head, vice president and general counsel of the FMC Corporation, and former general counsel of Montgomery Ward); *id.* at 29-32, 196-97 (testimony and response to written questions of Mr. Gene Kimmelman, legislative director of the Consumer Federation of America); *id.* at 377-90 (testimony and written statement of Mr. Carl Liggio, general counsel of Ernst & Young and former chairman of the Board of the American Corporate Counsel Association); *id.* at 41-44, 50-53, 189-95 (testimony, prepared statement, and response to written questions of Mr. Stephen Middlebrook, senior vice president and general counsel of Aetna Life & Casualty and member of the Executive Committee of the American Corporate Counsel Association); *id.* at 36-41 (testimony of Mr. Bill Wagner, personal injury and wrongful death trial attorney and president of the Association of Trial Lawyers of America). Several of these witnesses also appeared in the *House Hearing, supra* note 94.

96. Other possible groups that might have been consulted during the drafting stages include: the Advisory Commission on Intergovernmental Relations, the American Bankruptcy Institute, the Lawyers Conference of the American Bar Association, the Section of Individual Rights and Responsibilities of the American Bar Association, the Section of Litigation of the American Bar Association, the Section of Tort and Insurance Practice of the American Bar Association, the American College of Trial Lawyers, the American Judicature Society, the Conference of State Court Administrators, the Council of Chief Judges of Intermediate Appellate Courts, the National Association for Court Management, the National Association of Attorneys General, the National Association of Criminal Defense Lawyers, the National Association of Women Judges, the National Bankruptcy Conference, the National Bar Association, the National Conference of Commissioners on Uniform State Laws, the National Conference of State Legislators, the National District Attorneys Association, and the National Legal Aid and Defender Association.

By defining the crisis of civil justice as one concerned with making the American business community more competitive, the Senate Judiciary committee formulated a narrow concept of the civil justice problem which excluded the insights of the diverse communities generally concerned with judicial administration. The Senate's narrow perspective failed to comprehend civil justice reform as part of a larger picture of justice reform that includes problems of criminal justice administration and the relationship between state and federal courts.

97. *Cf. Court Reform and Access to Justice Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st and 2d Sess. III-IV (1987, 1988) [hereinafter *Court Reform and Access to Justice Act Hearings*] (witnesses and additional materials submitted in relation to proposed legislation).

98. *But see Senate Hearings, supra* note 90, at 474-77 (letter from Alan B. Morrison, Public Citizen Litigation Group).

99. *See id.* at 81 (statement of Sen. Charles E. Grassley, commenting on severity of criminal docket and the lack of Justice Department consultation and participation in drafting and testifying on the legislation).

100. *See id.* at 208-210.

101. *But see* S. REP. No. 416, *supra* note 3, at 4, *reprinted in* 1990 U.S.C.C.A.N. at 6806 (asserting that "[t]he Judicial Conference . . . was involved extensively with the committee as it considered the Civil Justice legislation . . . . [M]any of the Conference's specific suggestions have been incorporated into S.2648 as amended.").

102. *See, e.g., Senate Hearings, supra* note 90, at 91-184, 319-76, 208-25; *House Hearing, supra* note 94, at 103-44 (testimony and prepared statement of Judge Robert F. Peckham, on behalf of the Judicial Conference).

103. *See House Hearing, supra* note 94, at 372-83 (letter from Judge J.

while only two wrote in support.[104]

The sniping between the legislative and judicial branches forms a troubling undercurrent to the Act that makes interesting reading in the legislative history.[105] This dispute is symptomatic of the tension relating to the allocation of procedural rulemaking authority between these branches.[106] Apart from the inherent interest in the spectacle of a senator venting irritation at a Judicial Conference representative,[107] the exchanges between congressional committee members and Judicial Conference representatives suggest the lack of seriousness Congress accorded the statutory and constitutional questions involved in promulgating the Act.[108]

The haste with which Congress acted in passing the legislation, as well as the haste the Act itself demands for accomplishing its mandated reforms, are destined to bedevil Congress's stated goal of improving federal civil justice administration. The immediate result of this haste is a bad piece of legislation, based on questionable social science, lobbied through Congress at the behest of a small group of reformists with a particular civil justice agenda. This legislative haste has set in motion ninety-four amateur advisory groups that, without any previous rulemaking experience, are performing tasks they are ill-equipped to handle. In the ten pilot districts, the expedited schedule for filing the required reports and plans has in some instances encouraged hurried empirical studies accompanied by dubious analysis and conclusions.[109] In the long-term, the rush to reform will contribute to poorly-drafted, problematic rules

Fredrick Motz, Dist. of Md.); *id.* at 384-91 (letter and memorandum from Judge William L. Hungate, E. Dist. of Mo.); *id.* at 393-97 (memorandum from Judge William M. Hoeveler, Chair, National Conference of Federal Trial Judges); *id.* at 417-25 (comments of Chief Judge William J. Bauer on behalf of the United States Court of Appeals for the Seventh Circuit); *id.* at 431-33 (letter from Judge G. Thomas Eisele on behalf of the Eighth Circuit Judicial Conference); *id.* at 434-437 (letter from Chief Judge Barefoot Sanders, N. Dist. of Tex.).

104. *See Senate Hearings*, *supra* note 90, at 478 (letter of Chief Judge John F. Gerry, Dist. of N.J., reporting the unanimous support of the New Jersey District Court Judges for the revised version of the bill); *id.* at 479 (letter from Judge Dickinson R. Debevoise, Newark, New Jersey).

105. *See id.* at 309-11 (statement of Sen. Biden regarding negotiations on the legislation).

106. *Id.* at 309-11; *see also* S. REP. NO. 416, *supra* note 3, at 4-5, 9, *reprinted in* 1990 U.S.C.C.A.N at 6807, 6811.

107. *See Senate Hearings*, *supra* note 90, at 309 (statement of Sen. Biden).

108. *See infra* text accompanying notes 138-48.

109. *See* CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1.

that will be easily challenged, thereby defeating Congress's overarching goal of reducing cost and delay in the federal courts.

With pluralistic zeal, Congress sought to confer rulemaking power on local citizens' groups and the system's so-called "users."[110] In hindsight, it now seems absurd that Congress created ninety-four miniature social-science think-tanks throughout the federal judiciary and entrusted these groups with tasks that lay groups cannot perform with any intellectual rigor. For example, Congress ordered the advisory groups to "promptly complete a thorough assessment of the state of the court's civil and criminal docket."[111] In so doing, Congress required the advisory groups to

> determine the condition of the civil and criminal dockets . . . to identify trends in case filings and in the demands on the court's resources . . . [to] identify the principal causes of cost and delay in civil litigation . . . [and to] examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.[112]

It is even more startling that Congress failed to discuss adequately the impact of crowded criminal dockets on the flow of civil litigation in relation to reforming the civil justice system.[113] In many districts, the major reason for the backlog of the civil docket is the Speedy Trial Act requirement that criminal cases be heard expeditiously.[114] Thus, Congress chose not to recognize that increased numbers of criminal prosecutions are a major cause of cost and delay in civil litigation, something that is not necessarily an intrinsic part of the civil litigation process.[115]

For this reason the solution to the civil justice "crisis" may

110. *Cf.* Peck, *supra* note 27, at 117 (citing derisively to the "near-mystical reverence of the rulemaking authority exercised by the Judicial Conference").

111. 28 U.S.C. § 472(c)(1) (Supp. II 1990).

112. *Id.* §§ 472(c)(1)(A)-(D).

113. The absence of any mention of criminal cases is striking. *See generally* S. REP. NO. 416, *supra* note 3 at 1-72, *reprinted in* 1990 U.S.C.C.A.N. 6802-60.

114. 18 U.S.C. § 3162(a)(2) (1988), which provides: "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." *See also* CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at 22-25 (discussing the criminal docket's impact on the civil docket).

115. *See Senate Hearings*, *supra* note 90, at 83 (containing written response of Mr. Patrick Head reflecting lack of research and consideration of impact of increased criminal cases); *id.* at 211 (containing statement of Judge Aubrey E. Robinson, Jr. relating to criminal docket as contributing factor to civil delay).

lie in reducing criminality and the consequent crushing load of criminal prosecutions in American courts, rather than the wholesale reform of civil procedure. The Civil Justice Reform Act speaks to the burdens of civil litigation on corporations and middle class Americans, but the legislation says nothing about the burdens of criminal offenses on the courts and society. The Act requires civilian advisory groups to seek out the root causes of cost and delay in civil cases, but it says nothing about a congressional duty to seek out the root causes of criminality and the backlog of criminal prosecutions.

Although Congress required the advisory groups to conduct docket assessments, the statute and its legislative history provided the advisory groups with neither normative goals nor guidance for performing the assessments. The Act offered the district advisory groups no instructions to ensure uniform docket assessments across all ninety-four district courts.[116] Instead, the Act simply instructed groups to accomplish this task. The Act did not indicate what time frame the groups should use to assess the docket condition nor what baseline period to provide a comparative measure, nor did the legislation supply any other parameters to facilitate a statistical docket analysis. Definitional problems therefore, will plague advisory groups because the Act and its legislative history simply do not offer adequate guidance for the tasks the law requires of them.[117]

The pilot advisory groups also received little direction. After the groups were created, the Federal Judicial Center and the Administrative Office of the United States Courts supplied the groups with some materials and advice relating to court statistics,[118] but the groups were not given any technical guidance or support for data collection and interpretation. Instead, much of the technical advice consisted of negative descriptions of improper docket assessment methods.[119] Furthermore, some advisory groups, because of the short statutory deadlines for preparing the reports and plans, had to rely on the statistics the Administrative Office of the United States Courts and the Federal Judicial Center supplied.[120] These circumstances severely constrained, if not compromised, each group's ability to conduct an independent docket assessment.

As a result, the pilot districts' advisory groups used different methods to assess their dockets. Some performed their own docket assessments,[121] in others court clerks performed this task,[122] and in some the advisory groups hired independent consultants to evaluate the dockets.[123] These varying, locally-inspired approaches guaranteed that docket assessments would be conducted in non-uniform fashion, using different data bases, assumptions, and social science methodologies.[124] If there were any intention on Congress's part to develop a national profile of

116. At a seminar-workshop for the pilot courts under the Civil Justice Reform Act of 1990, held August 1-2, 1991, it became apparent that the pilot districts were adopting different methodologies to conduct their docket assessments, and that there was no agreement among the advisory group members and their advisors concerning the proper or most appropriate methodology for accomplishing this statutory task. (Author present at this meeting).

117. In conducting a docket assessment, for example, the advisory groups have no standards to determine whether the docket condition is "good," "bad," or otherwise.

118. *See* Memorandum to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990 (May 29, 1990) (including questionnaires and forms developed by the Southern District of Florida and the Research Division of the Federal Judicial Center) (on file with the *Minnesota Law Review* and the author).

119. *See* Examples and Materials Prepared for the Seminar-Workshop for the Pilot Courts Under the Civil Justice Reform Act of 1990 (Kansas City, Kan., Aug. 1-2, 1991) (Federal Judicial Center) (on file with author and with the *Minnesota Law Review*).

120. *Compare* CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at 26 (identifying such statistics in measuring civil docket) and ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF IND., REPORT AND PLAN (Dec. 20, 1991) (relying on provided court management statistics and interviews) *with* ADVISORY GROUP FOR THE U.S. DIST. COURT FOR THE S. DIST. OF N.Y., *supra* note 10, (conducting extensive survey of practicing attorneys and judges).

121. *See* ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF CAL., *supra* note 10, (hoping to obtain funding to engage a consultant); ADVISORY GROUP APPOINTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 TO THE U.S. DIST. COURT FOR THE DIST. OF DEL., *supra* note 67 ("The district conducted a survey").

122. *See* CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at APPENDIX C: REPORT OF THE CLERK ON THE STATUS OF THE DOCKET FOR THE U.S. DIST. COURT, S. DIST. OF TEX., (APR. 29, 1991). The clerk's report formed a preliminary assessment of the docket. A consulting statistician assisted in preparing the final docket assessment which used longer statistical trends. *Id.* at 26-31.

123. *See* ADVISORY GROUP APPOINTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 TO THE U.S. DIST. OF DEL., *supra* note 67; SOUTHERN DIST. OF N.Y. CIVIL JUSTICE REFORM ACT ADVISORY GROUP, *supra* note 67; CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1.

124. *Compare* ADVISORY GROUP APPOINTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 TO THE U.S. DIST. COURT FOR THE DIST. OF DEL., *supra* note 67, (attorney survey and judicial officer interview) and ADVISORY GROUP FOR THE U.S. DIST. COURT OF THE DIST. OF WYO., REPORT AND RECOMMENDED PLAN (survey and invited testimony) *with* ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE N. DIST. OF IND., *supra* note 120 (court management statistics and interviews).

the state of the federal docket, the statute's undefined directives to the advisory groups will fail to achieve this goal.[125]

Similar criticisms may be directed at the other tasks Congress assigned to the local advisory groups. The mandate to "identify trends in case filings and in the demands being placed on the court's resources,"[126] for example, is likewise open-ended and ill-defined, and thus leaves the advisory groups in a methodological lurch. At the most obvious level, the failure to designate an appropriate baseline leaves advisory groups with the free-form task of spotting and determining "trends." Congress provided no hints as to whether the advisory groups are to assess trends solely in the districts, or in comparison with other districts, or nationwide. Similarly, Congress did not define "demands on the court's resources," raising questions about the type and severity of the "demands" and the nature of the "resources."

One can only conclude that the Act's docket-assessment requirement is mere window-dressing. Congress, in requiring the advisory groups to "identify the principal causes of cost and delay in civil litigation,"[127] assumed the very problem it is attempting to identify. Congress did not ask the advisory groups to determine, through their docket assessment, whether there *actually are* problems with cost and delay in the civil justice system.[128] Rather, the Civil Justice Reform Act simply stated

125. The Report for the Southern District of Texas recommends that the judicial system consider improved methods of data collection that will assist advisory groups in their future function of monitoring the district docket. ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at 77. Congress apparently had no such intention to generate a useful and uniform set of data from the reports written pursuant to the Act.

126. 28 U.S.C. § 472(c)(1)(B) (Supp. II 1990).

127. *Id.* § 472(c)(1)(C).

128. *See Senate Hearings*, *supra* note 90, at 37 (statement of Mr. Bill Wagner, using testimony by anecdote); *id.* at 83 (written response of Mr. Patrick Head indicating absence of any examination of impact of increased criminal cases and noting the strain of social security appeals); *id.* at 227 (statement of Judge Enslen that Brookings-Biden task force did not spend much time identifying the problem because it already knew what it was); *see also House Hearings*, *supra* note 94, at 214 (testimony of Mr. Stuart Gerson relating to litigation explosion "canards" and that these "myths" ought to be explored); *id.* at 394 (memorandum from William M. Hoevler, Chair, National Conference of Federal Trial Judges noting "undocumented premises"); *id.* at 407 (joint statement of various New York bar associations in opposition to the Civil Justice Reform Act, noting "little or no empirical data on the benefits of the new procedures"); *id.* at 431 (letter from Judge G. Thomas Eisele, noting no statistical evidence of failure to process civil caseloads expeditiously and efficiently).

that there is a problem with cost and delay and the Act's requirements for reform flow from this assumption.

The task of "identify[ing] the principal causes of cost and delay in civil litigation" is similarly futile and is virtually impossible for a lay advisory group to accomplish.[129] Social scientists have studied these problems for years and have produced competing analyses and conclusions.[130] Opponents of the Act repeatedly cited competing studies that refuted Congress's findings relating to crisis in the federal courts.[131] The citation of competing studies, however, had little effect in slowing the congressional reform juggernaut. Existing studies, if anything, teach that conducting empirical research relating to litigation cost and delay is exceedingly difficult, complex, and time-consuming.[132]

The Federal Judicial Center realized the difficulty of this particular statutory task and attempted to assist advisory groups in the pilot and early implementation districts in conducting a survey of civil litigation in the districts.[133] The Judicial Center intended this survey to supply some empirical basis to allow the advisory groups to assess the principal causes of cost and delay. The Judicial Center provided the groups with a

129. Unless, of course, Congress was not serious about this endeavor, either. Arguably, asking the advisory groups to identify the principal causes of cost and delay was some more window-dressing to support the pre-ordained procedural reforms that Congress demanded the local district courts implement.

130. *Compare Senate Hearings*, *supra* note 90, at 91-184 (Louis Harris Survey analyzing and documenting major problems of cost and delay in civil litigation; basis for BROOKINGS INST., *supra* note 41), *with* TERENCE DUNGWORTH & NICHOLAS M. PACE, RAND, THE INSTITUTE FOR CIVIL JUSTICE 1990, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS (pointing to the paucity of empirical data and concluding that the rate of disposition of civil cases in 1986 was similar to that in 1971).

131. *See Senate Hearings*, *supra* note 90, at 35 (letter from Consumer Federation of America stating it did not find data indicating any "relationship between competitiveness and the federal judicial process"); *id.* at 190 (response of Mr. Middlebrook indicating lack of data on impact of civil litigation on American business competitiveness in the global market); *see also House Hearing*, *supra* note 94, at 84-85, 101 (testimony of Mr. Bryant relating to lack of data and contrary Rand study); *id.* at 115-16 (written statement by Judge Robert F. Peckham referring to contrary Rand study); *id.* at 163 (statement of Judge Diana Murphy, noting Rand study); *id.* at 179 (exchange between Rep Kastenmeier and Judge Diana E. Murphy on competing statistical analysis in Rand study); *id* at 431 (letter from Judge G. Thomas Eisele, citing Rand study).

132. *See, e.g.*, Hensler, *supra* note 28; Geyelin, *supra* note 33.

133. *See* Memorandum to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990, *supra* note 118.

proposed questionnaire and advice on composing a statistically valid survey sample, thereby transforming pilot advisory groups into amateur survey-researchers.

Various methodological problems with both the questionnaire and the sampling technique are readily apparent.[134] The deficiencies in this attempted empirical research undermined the ability of some advisory groups to draw reasonably supportable conclusions concerning the principal reasons for cost and delay in the district.[135] At best, these efforts at amateur social science may have enabled advisory groups to assemble some raw data and anecdotal commentary concerning the conduct of civil litigation. But unless and until advisory groups conduct responsible empirical studies, hard data relating to the "principal causes of cost and delay" will remain elusive.

Undoubtedly it is both premature and unfair to anticipate wholesale ill-effects of the Civil Justice Reform Act, especially when conscientious lawyers, judges, and citizens currently are volunteering hundreds of hours to serve on advisory groups across the country. It may take years under the new local reform plans to assess whether Congress was wise in requiring speedy civil justice reform. More immediately, however, there is something troubling about the haste with which Congress passed this broad-sweeping reform package and the lack of meaningful congressional consultation with significant constituencies. For legislation so self-consciously concerned with "users" of the system, Congress, in its own deliberative processes, did not consult a sufficiently broad cross-section of people interested in the problems of judicial administration.

Further, something "insiderish" permeates the Civil Justice Reform Act which contrasts with the democratic rhetoric extolled in the legislative hearings[136] and congressional reports.[137] Despite the rhetoric in the Act's legislative history about the inclusiveness of the Brookings-Biden task force, business, corporate, and insurance industry litigators were heavily represented in comparison to other constituencies with interests in the federal courts.[138] The subsequent congressional hearings on the Act were stacked with Brookings-Biden task force members who had a vested interest in their own work product and the reform movement. There is nothing democratic about vesting power in an unelected group of elite lawyers who are not responsible to any constituency or elected official. Significantly, the Brookings-Biden task force had proceeded under predetermined conclusions about crisis in the federal courts, as did the Senate Judiciary subcommittee staff that drafted the Act.

For years to come, the Act will create a massive, semi-permanent, amateur reform bureaucracy as an adjunct to the federal courts. These advisory groups will now sit, uneasily, along with the federal judicial-branch rulemaking bodies. Further, as the analysis above suggests, the legislation is poorly drafted and ill-defined, and sets implausible (if not impossible) tasks for lay advisory groups. Viewed cynically, the Civil Justice Reform Act amounts to a superficial layer of local pluralism that disguises what is essentially congressionally-dictated civil justice reform.

II. TURF BATTLES: CONGRESSIONAL CONSIDERATION OF THE CIVIL JUSTICE REFORM ACT'S CONSTITUTIONAL AND STATUTORY UNDERPINNINGS

Writing in 1991 about the negotiations between the Senate Judiciary Committee and the Judicial Conference concerning the Civil Justice Reform Act, the Judiciary Committee's staff director suggested that "[r]egrettably, . . . this battle over turf should not and need not have occurred."[139] The staff director saw the "turf battle" as a tempest in a teapot because the judicial branch held a mistaken view of its rulemaking prerogatives and Congress had the right to perform rulemaking duties when it felt the judiciary was moving too slowly.[140]

134. *See, e.g.*, CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., *supra* note 1, at 44 n.62.

135. *Id.* at 46 (advisory group did not have adequate statistical base to draw conclusions relating to costs of litigation and was unable to draw conclusions from data to "principal causes of costs").

136. *See, e.g.*, *Senate Hearings*, *supra* note 90, at 1-3 (statement of Sen. Biden); *id.* 29-30 (exchange between Mr. Kimmelman and Sen. Hatch).

137. *See* S. REP. NO. 416, *supra* note 3, at 3-4, 6-9; *reprinted in* 1990 U.S.C.C.A.N. at 6805-06, 6808-12.

138. *See supra* notes 42, 90, 95 (discussing participants in the Brookings-Biden task force).

139. Peck, *supra* note 27, at 114; *see also* note 31 (quotation from Peck, *supra* note 27).

140. *Id.* at 114. The staff director's conclusion was based upon his belief that the judicial branch was mistaken in its understanding that it had rulemaking power. In addition, Mr. Peck perceived the legislative process as allowing the "judiciary a substantial role in shaping the final bill." *Id.* Mr. Peck's rendition of events is, perhaps, skewed in that the Judicial Conference

The staff director's self-justifying—but inaccurate—description of the congressional debate over the bill reflects the lurking turf battle embodied in the separation of powers issue. This insufficiently developed issue proved to be a fundamentally troubling dimension of the Act. The staff director stated that:

> [m]uch of the debate over the . . . [Civil Justice Reform Act] centered not on the merits of the underlying proposals, but on the appropriate source of the proposals themselves. Many within the judiciary framed the debate in this fashion: should the reform proposals encompassed within the . . . [Act] originate in Congress, or should they—indeed, must they—originate within the judiciary by virtue of the Rules Enabling Act or, more broadly, because of the doctrine of separation of powers.[141]

The Senate Judiciary Committee's staff director's statement disingenuously suggests that much of the debate centered on the source of congressional authority for the Act. This reflects a distortion of the legislative hearings and the staff negotiations that resulted in the legislation. Actually, little "debate" took place over the underlying constitutional questions relating to the respective allocation of rulemaking authority, the separation of powers doctrine, or the general constitutional authority of Congress to enact the Act. There was also little meaningful discussion of the Rules Enabling Act and that statute's requirements and limits. In fact, most of the laudatory testimony in support of the bill centered on the specific merits of the legislative proposals; the parade of reform advocates did not discuss the rulemaking problems unless prompted to do so.[142] If anything, the opposite of the staff director's assertion is true.

Enamored of the reform movement, the bill's proponents never paused to question congressional authority to legislate

representatives stated, in successive hearings, that active federal judges had not been part of the Brookings-Biden task force which had laid the groundwork for the Civil Justice Reform Act, nor had any judicial representative been consulted by the Senate subcommittee drafting of the bill. The testimony from Judicial Conference representatives suggests, if anything, that the introduction of the Civil Justice Reform Act took the judicial branch by surprise and that the Judicial Conference scurried to form its judicial subcommittee to analyze and respond to provisions in the legislation. *See Senate Hearings*, *supra* note 90, at 217-18 (prepared statement of Judge Aubrey F. Robinson Jr.); *id.* at 329-31 (statement of Judge Robert F. Peckham); *House Hearing*, *supra* note 94, at 121-25 (same). Mr. Peck's remarks are also noteworthy for the suggestion that, as a matter of policy, Congress is justified in usurping rulemaking power when the judicial branch moves too slowly in effecting rule reform.

141. Peck, *supra* note 27, at 114.

142. *See, e.g.*, *supra* note 95 (testimony of favorable witnesses).

speedily to achieve its identified goals of civil justice reform. Even the Judicial Conference representatives, the bill's most vocal opponents, who had expressed grave reservations about the constitutionality of congressional authority to pass the legislation, devoted the bulk of their testimony to specific provisions pertaining to particular procedural reforms.[143]

Ultimately, the Civil Justice Reform Act is crucially important because of the way it reallocates the rulemaking function from the judiciary to Congress, a reallocation that is likely to have continuing consequences. The paucity of considered debate surrounding this congressional usurpation of authority is significant in itself. Perhaps symptomatic of legislative hearings in general, the hearings on the Civil Justice Reform Act did not provide a forum for close examination of the fundamental constitutional questions relating to the bill, the Rules Enabling Act, or the separation of powers problems inherent in the legislation.

As will be seen, various bill proponents did not raise the statutory and constitutional issues and, when questioned about rulemaking authority, offered superficial, muddled answers. The Judicial Conference representatives hesitantly but repeatedly suggested the statutory and constitutional issues relating to the bill, but they did not press their points. Similarly, a Justice Department representative also flagged potential constitutional problems while maintaining the executive branch's commitment to the doctrine of separation of powers, but he lamely raised and inadequately pursued the constitutional question. American Bar Association witnesses noted a split in their ranks on the constitutional questions and expressed some doubts about Congress's rulemaking authority, but ultimately this organization's representatives did not press the issues either. Therefore, in view of these tepid challenges, the Senate subcommittee simply asserted congressional rulemaking authority based not on reasoned legal theory but on legislative fiat.

A. THE LEGISLATION'S PROPONENTS

The Senate and House held three days of hearings on revised versions of the Civil Justice Reform Act.[144] These hearings reflected sparse discussion of the fundamental statutory

143. *See Senate Hearings*, *supra* note 90, at 208-25, 314-60 (testimony of Judicial Conference representatives).

144. *See id.* at 2, 307; *House Hearing*, *supra* note 94, at 1.

and constitutional questions surrounding the Act, especially from the sponsors and proponents of the bill. Two examples illustrate the low level of discussion and concern. On the first day of hearings, Senator Orrin Hatch broached the separation of powers issues only in the most generalized terms:

> The rationale of the doctrine of separation of powers counsels the legislative branch to be extremely cautious when it considers intrusions into the other two branches. And I dare say that Federal judges who review the meaning of many of the laws we enact probably have several detailed and choice ideas on how we can better conduct our business. I am equally confident that the Congress would not look too kindly on having the judiciary's ideas imposed on us. As a matter of fact, we have not looked very kindly on some of their ideas from time to time, both conservatives and liberals, believe it or not.[145]

Obviously, this rhetorical statement does little to elucidate the statutory and constitutional problems implicated in the Civil Justice Reform Act. An even more telling colloquy occurred between Senator Biden, chair of the Senate Judiciary Committee and the bill's sponsor, and Mr. Patrick Head, Vice President and General Counsel of the FMC Corporation.[146] Mr. Head was a member of Senator Biden's Brookings task force who testified in support of the Act.[147] At the conclusion of Mr. Head's testimony, Senator Biden posed the separation of powers question concerning the rulemaking authority of the respective branches. Mr. Head's muddled response anticipated the general, superficial, confused consideration Congress afforded the entire issue of the proposed statute's constitutional underpinnings.

> THE CHAIRMAN: Mr. Head, would you be willing to speak for a moment to this separation of powers issue? Do you see any conflict?
>
> Mr. HEAD: I don't really. This is essentially a procedural system. This is not a substantive system. I was impressed, again, when Chief Judges [Robert F.] Peckham and [Carl B.] Reaben [sic] attended because the chief judge of a district does not have any power today. The chief judge can't move a case. We can't go to the chief judge and say this judge is sitting on this motion now for 10 months, do something about it. They can't do that.
>
> This system would allow a lot more activity in the district than can happen today, and it is of a procedural nature. None of these get into the substance of a case, but there [sic] impingement on the actual result in a case by some of these procedures. And I believe in the long run the Federal judges will welcome this when they take a close look at it, as did Judges Peckham and Reuben in that 4-hour session.
>
> THE CHAIRMAN: Would anyone else like to comment on that issue?
>
> [NO RESPONSE].[148]

145. *Senate Hearings*, *supra* note 90, at 5. Senator Hatch returned to the hearings at various junctures to express his deep skepticism about the legislation. *See, e.g.*, *House Hearing*, *supra* note 94, at 585-86 (containing additional views of Mr. Hatch).

146. *See Senate Hearings*, *supra* note 90, at 8-9, 54-58 (testimony of Mr. Patrick Head).

147. *Id.* at 10.

With all due respect, Mr. Head's response did not address the import of Senator Biden's question. Therefore, ironically, Mr. Head's answer nicely made the case for the judiciary's rulemaking authority over the procedural reforms that Congress usurped for itself in the Act. Apparently there was no fooling Mr. Head: he knew a package of procedural reforms when he saw them. If it is true, as he twice asserted, that the Act proposed a procedural system rather than a substantive system, then that division describes the rulemaking allocation of the Rules Enabling Act: procedural rulemaking belongs to the judicial branch, substantive lawmaking to the legislative. In quite innocently getting it wrong for the legislative subcommittee, Senator Biden's witness actually got it right for the judiciary.

Senator Hatch's statement and the exchange between Senator Biden and Mr. Head constitute the entire discussion by the bill's proponents of the separation of powers issue. Senator Biden did include, as part of the written legislative record, a conclusory staff memorandum asserting that Congress possessed exclusive power to enact the Civil Justice Reform Act.[149] During the hearing's remaining three days, Judicial Conference representatives, witnesses from various judicial organizations, the American Bar Association, and the Justice Department raised statutory and constitutional arguments pertaining to the Rules Enabling Act and separation of powers issues, but the Senate paid little heed.

B. THE JUDICIAL CONFERENCE

Representatives of the Judicial Conference of the United States Courts[150] appeared three times to oppose enactment of

148. *Id.* at 58.

149. Senator Biden requested that a memorandum prepared by his staff, summarizing the constitutional questions, be entered in the record "for the benefit or the criticism of my colleagues who will read the record." *Id.* at 59. The Memorandum to Senator Biden concerning the Civil Justice Reform Act appears in the *Senate Hearings*. *Id.* at 60-75.

150. *See* 28 U.S.C. § 331 (Supp. II 1990) (defining the membership and functions of the Judicial Conference).

the Civil Justice Reform Act, to raise statutory and constitutional issues concerning Congress's authority to promulgate the legislation, and to recommend modifications of various technical provisions.[151] Perhaps because of the awkwardness of the judiciary's taking a definitive position on the legislation's constitutionality in advance of its enactment, the Judicial Conference did not press its case concerning the possible problematic bases of the Act. Indeed, the Conference raised its concerns in vague terms and instead focused on persuading the Senate subcommittee to modify, amend, or eliminate specific provisions in the Act. Although the Senate subcommittee ultimately incorporated many of the Conference's recommendations with regard to specific provisions,[152] it rejected the Conference's statutory and constitutional concerns.[153]

The speed with which the Senate Judiciary Committee drafted and proposed the legislation caught the Judicial Conference unaware of, and unprepared for, the Civil Justice Reform Act.[154] The Conference hurriedly set up a subcommittee to study, analyze, and respond to the legislation. However, by the first legislative hearing on March 6, 1990, the Conference had only partially formed its response. Indeed, the Judicial Conference's initial problem in responding to the bill was that it did not meet until March 13, 1990, a week after the first legislative hearing.[155] The Conference hastily impressed Judge Aubrey E. Robinson Jr., Chief Judge of the United States District Court for the District of Columbia, into service to present the Conference's opposition to the proposed bill.

The Conference fundamentally objected to the Act as an unprecedented congressional intrusion into judicial rulemaking prerogatives. Although asserting this objection only generally at the first hearing, the Conference further elaborated its position in written testimony at successive hearings.[156] For the judges, the Rules Enabling Act transgression was apparent and troubling. During the first day's testimony, Judge Robinson

151. *See* Peck, *supra* note 27, at 117. *But see supra* note 140 (criticizing Mr. Peck's rendition of events).

152. *See supra* note 94 (identifying the three hearings).

153. *See* S. REP. NO. 416, *supra* note 3, at 9-13, *reprinted in* 1990 U.S.C.C.A.N. at 6811-6816.

154. *See Senate Hearings*, *supra* note 90, at 329 (statement by Judge Robert F. Peckham describing the evolution of the Judiciary's position on the proposed Title I of S. 2648 (Civil Justice Expense and Delay Reduction Plans)).

155. *Id.* at 329-30.

156. *Id.* at 333-35; *House Hearings*, *supra* note 94, at 125-27.

perceptively pursued the inapt answer supplied in Mr. Head's earlier testimony in response to Senator Biden's question:[157]

> There is inherent in this also the suggestion that conceding, as some of your former persons who testified this morning did, that this is basically a procedural matter that the bill is dealing with. Why then, why then, we ask, should the congressionally mandated rules enabling act be bypassed?[158]

Judge Robinson's rhetorical question is similar to the brief but pointed challenge in his written submission to the Senate subcommittee on behalf of the Judicial Conference:

> In addition, there has been a strong reaction that the bill is extraordinarily intrusive into the internal workings of the Judicial Branch. These are procedural matters which should be handled through the normal, Congressionally-mandated Rules Enabling Act process. Many thoughtful Federal judges are very, very uneasy about the signals this bill sends of legislative incursion—albeit well-meaning—in the judicial arena and what it portends for the future.[159]

157. *See supra* text accompanying note 148.

158. *See Senate Hearings*, *supra* note 90, at 212 (statement of Judge Aubrey E. Robinson, Jr.). Judge Robinson's testimony also set forth the concern of the Judicial Conference with the unusual method Congress employed to confer upon itself the rulemaking function:

> Then, of course, it has been alluded to, there is a concern about the extent to which this is at least perceived in its initial phase as being intrusive into the internal workings of the judiciary. We recognize our place. You know, we know that there are certain rules and regulations, et cetera, that we have to abide by. But by the same token, there is the perception when, as has been indicated, that we shall, we shall, we shall, and it goes on what we shall do, that this is getting into micromanagement, even though there is the appearance that you are going to do it with the advice and consent of advisory committees.

Id. at 212 (referring to the mandatory requirements the Civil Justice Reform Acts places upon the federal courts through the advisory groups).

159. *Id.* at 221 (prepared statement of Judge Aubrey E. Robinson, Jr. on behalf of the Judicial Conference). Judge Robinson's written responses to questions submitted by members of the Judiciary subcommittee were equally brief on the separation of powers problems inherent in the bill. *See id.* at 289-90. Judge Robinson's written answers also expressed concern over the short time that the Civil Justice Reform Act provided for promulgating plans in the pilot and early implementation districts. *Id.* The suggestion was that this short time period would violate Federal Rule of Civil Procedure 83, which requires public notice and comment periods for new local rules. *See id.* Judge Robinson wrote:

> The appropriateness of both the Congressional mandate and the period for implementation are questionable. First, it would be far more appropriate to follow the Rules Enabling Act process provided by Congress. Second, twelve months is an insufficient period of time to implement a mandatory plan as proposed by the bill. The bill contemplates a great deal of input from the bar and public but it does not provide enough time to allow effective participation by these groups. In many cases a complete revision of local rules and practices would

Between March and June 1990, the Judicial Conference, through its subcommittee on the Civil Justice Reform Act, regrouped and strengthened its statutory and constitutional arguments against the legislation.[160] Senator Biden, cognizant of the increasingly strained relations between the judicial branch and his subcommittee concerning the Act, opened the second day of hearings in June by chiding the judiciary for its churlish stance on the bill.[161] His opening remarks capture the flavor of the ensuing debate between the two branches over the Act: that of two co-equal branches talking past one another.[162]

Senator Biden simply refused to acknowledge the importance of the judiciary's overriding concern with the proper allocation of rulemaking authority, and its future consequences. Instead, he cast the judiciary as the implacable enemy, waging inflammatory rhetorical warfare, unappeased by legislative compromises on specific substantive provisions of the legislation.[163] The Judicial Conference, meanwhile, continued to raise

be required and such revisions are normally accomplished after much effort and a longer period of time than provided for in the bill. . . .

It is clearly appropriate for each district court to have a specific civil case management plan. It is our unequivocal belief that if such a plan is to be a requirement, it is best for the Judicial Conference to formulate and impose the requirement.

Id. at 289-90.

160. *See id.* at 330-33; *House Hearing*, *supra* note 94, at 121-25.

161. Senator Biden stated:

Unfortunately, despite my best efforts and the work of my staff night and day for more than 5 months in negotiating with the task force that the Chief Justice specifically designated to work with us, we will hear today that the Judicial Conference, quote "disfavors the bill."

Given the overwrought response that greeted the legislation initially, I do not find the Conference's position surprising. Of course, I had hoped that by modifying the substance of the bill to meet many, many of the concerns of the Conference, I might persuade them to reexamine their rhetoric.

Regrettably, it now appears that the Conference's objections remain, regardless of the changes in the substance of the bill. I know that we will hear today that there are remaining objections to the bill which will be used to justify the Conference's "disfavor." I think it is time to lay these arguments to rest as well.

Senate Hearings, *supra* note 90, at 309-10.

162. *Id.* at 307-11.

163. *See id.* at 310. Senator Biden, criticizing the judiciary for using exaggerated rhetoric in its objections, stated:

First, some argue that even though the ideas in the bill are worthy of support on the merits, it is inappropriate for Congress to be legislating them because procedural reform is within the exclusive province of the judiciary. This argument is often cloaked in terms of separation of power.

As a matter of constitutional law, the argument is without merit.

its statutory and constitutional concerns, all the while negotiating for the least intrusive civil justice reform. If it could not win the constitutional rulemaking war, the Conference was determined at least to mitigate the substantive rulemaking damage.

Between the March and June hearings, the Judicial Conference continued to consider the legislation, to present its objections to the Senate subcommittee staff, and to offer its own alternative fourteen-point program for reform.[164] During this period, however, the Senate subcommittee refused to abandon its legislation.[165] When Judge Peckham appeared to testify in June, he again asserted the Conference's two objections: that the Conference's fourteen-point program was a superior way to achieve civil justice reform, and that the Civil Justice Reform Act violated the letter and spirit of the Rules Enabling Act.[166]

As the Supreme Court said nearly 50 years ago, quote, "Congress has undoubted power to regulate the practice and procedures of the Federal courts," end of quote.

As a policy matter, the separation of powers argument fairs little better. The users of the Federal court system have no means other than through their democratically-elected representatives to express their dissatisfaction with the civil justice system and to demand reform for that system. For too long, we have ignored these cries for change, and this bill finally—and properly, in my view—acts upon their desires.

Id.

164. *See id.* at 330-31 (statement of Judge Robert F. Peckham, on behalf of the Judicial Conference). Judge Peckham indicated that the Conference continued to have two basic concerns:

(1) responsibility for the kinds of procedural matters covered by S. 2027 should remain in the judiciary, and (2) the most constructive course was not to superimpose nationally one uniform and unproven new system, but to ask each district to assess its own needs and to tailor appropriate responses to them, while simultaneously committing the Judicial Conference to conducting, in a limited number of volunteer courts, carefully designed experiments that would assess the effectiveness of a range of different approaches.

Id. at 330.

165. *Id.* at 331.

166. *See id.* at 316-17 (statement of Judge Robert F. Peckham, on behalf of the Judicial Conference). Judge Peckham stated:

[T]he executive committee fears that the statute would circumvent the procedures established and recently reendorsed by Congress in the Rules Enabling Act, and set a precedent for unwise departures from the rulemaking process.

We feel that there is a great balance in the provisions of the Rules Enabling Act, that it took 10 years in gestation from 1924 to 1934. And as I indicated, it has been revisited and recently reendorsed. It allows deliberative process at the beginning. It allows comment from judges and scholars and lawyers.

But in the end, of course, the ultimate power is with the Con-

The Judicial Conference's June presentation was tactically interesting. The Conference stressed that Congress itself had only two years earlier revised and strengthened the Rules Enabling Act to require a more open process in judicial rulemaking.[167] Congress had, therefore, recognized and reaffirmed the basic allocation of procedural rulemaking authority to the judicial branch. In addition, the Conference acknowledged that Congress has the power to veto such procedural rules that originate in the third branch, a nod to Congress's democratic, majoritarian function. Perhaps sensing Senator Biden's pique at the Conference's lack of enthusiasm for the bill, the Conference paid due deference to the coordinate legislative branch.

> gress, as it should be in a democratic society, to accept the rule, to reject the rule, or to modify the rule, and judges feel very strongly about that, particularly when it relates to procedural matters that go to the core of the performance of their judicial function. And I think that that more than anything else lies at the root of the response of the executive committee and the Conference to the legislation in this way. . . .

Id.

167. *See generally* Judicial Improvements Act and Access to Justice Act of 1988, Pub. L. No. 100-702, tit. IV, 102 Stat. 4642, 4648-52 (1988) (amending Rules Enabling Act, 28 U.S.C. §§ 2072-2074 (1988)). In making this point, the Judicial Conference could not resist the temptation to point out that while Congress had two years earlier required a more open process and participation in the judicial rulemaking arena, the Senate subcommittee had drafted the Civil Justice Reform Act with even less consultation than Congress required of third-branch rulemaking:

> We fear that enactment of this statute could result in real harm to the rule-making process that has served both Congress and the courts so well for so long. As you fully appreciate, Congress recently reviewed and re-codified that process, taking care to build into it procedures that assure that before nationally applicable rules of procedure are imposed they are considered most deliberately by thoughtful and experienced judges, lawyers, and law professors over a substantial period of time, and that the lawyers and litigants into whose world the new rules would intrude are given ample opportunity to articulate their reactions, point out potential problems, and add suggestions. As we who have sat on the bench for some time have discovered, sometimes painfully, procedural matters are extraordinarily complex. They can not only influence, but fix, the outcome of litigation. New rules can have a great many unforeseen consequences. And it takes the most considered deliberation to be sure that the dynamic between new programs and established practices is constructive. Thus it is crucial that inputs from all affected quarters be sought before procedural change is imposed. For reasons we do not understand, Title I of S. 2648 has not been drafted through such a process. Thus one of the primary bases for our opposition to the statute is our belief that nationally applicable procedural norms should be imposed only through that rule-making process.

Senate Hearings, *supra* note 90, at 333-44 (statement of Judge Robert F. Peckham, on behalf of the Judicial Conference).

Most striking, however, the Conference tip-toed around the separation of powers problem. In its June statement submitted to the Senate Judiciary subcommittee, the Conference delicately raised the issue without marshalling constitutional, statutory, or doctrinal arguments to defend its position.[168] The strongest objections the Conference raised at the June 1990 hearing were reduced to two highly generalized points: first, "[t]he legislation would represent unwise legislative intrusion into procedural matters that are properly the province of the judiciary"; and second "[t]he statute would circumvent the procedures established and recently re-endorsed by Congress in the Rules Enabling Act."[169]

The Judicial Conference did little to shore up its opposition to the Act between the Senate hearings in June and the House hearing in September. Indeed, the Conference submitted the statement prepared for the Senate to the House subcommittee record.[170] In addition, Judge Peckham simply renewed the Conference's vague, generalized statutory and constitutional opposition to the bill during his appearance before the House subcommittee.[171]

At the House hearing, Representative Robert W. Kastenmeier, the subcommittee chairman, made one last attempt

168. The Judicial Conference stated:

> Some thoughtful judges also have suggested that when Congress considers enactment of legislation that covers the kinds of procedural matters that are at the core of the judicial function, it ventures into areas of constitutional sensitivity. Rather than explore the constitutional arguments that are raised by this suggestion, we wish to emphasize our view that simply as a matter of wisdom of policy it would not be sensible to pass legislation that could deprive judges of the discretion they need to determine in individual cases how best to use procedural tools to reduce delay and litigant expense.

Id. at 334-35.

169. *Id.* at 348 (statement of Judge Robert F. Peckham, on behalf of the Judicial Conference). The Judicial Conference also noted that it was "presently implementing a program which will accomplish the purposes of Title I of S. 2648" and argued that the bill would "tend to defeat the aims of cost and delay reduction." *Id.* at 348.

170. There are only slight differences between the statements submitted to the Senate and House. *Compare House Hearing*, *supra* note 94, at 109-44 *with Senate Hearings*, *supra* note 90, at 319-48.

171. Judge Peckham stated:

> Now, a second reason why the Judicial Conference does not endorse S. 2648 is our concern that the legislation will circumvent the procedures established and recently reendorsed by Congress in the rules enabling act and set a precedent for unwise departures from the rulemaking process. We feel that the provisions of the rules enabling act bring a proper balance between the roles of Congress and the judiciary. It is a deliberative process that begins by allowing the appropri-

to clarify the respective rulemaking roles of Congress and the judiciary. Judge Peckham maintained that the judiciary has authority over procedural rulemaking:

> Mr. KASTENMEIER. The primary basis, it appears, for your opposition to the act as a general proposition is that, as you state, nationally applicable procedural norms should be imposed only through, really, the Judicial Conference rulemaking process, rather than legislating court procedures. But aren't there times when it indeed is appropriate for the Congress to legislate court procedures? One case that comes to mind is the mass torts area where the judiciary has in fact supported a legislation process by this committee streamlining the procedures for the consolidation of mass accident cases. Wouldn't that be an exception?
>
> Judge PECKHAM. That relates to the jurisdiction of Federal courts, and we are not contending that through the rulemaking process we can grant jurisdiction, so I would make that distinction.
>
> I think we are talking about purely procedural matters that go to the heart of how a judge conducts his business. That it is most important that the judges have an opportunity to discuss those changes so that they can be harmonized with the entire body of procedural rule. And, as I indicated and as we all know, the process ends in Congress where the ultimate power is.[172]

While this congressional testimony demonstrates the low level of public debate on major legislation, the Judicial Conference's critique of the Civil Justice Reform Act and the Senate's reply suggest the tension between the two branches concerning power and prerogative. Congress's stance, counterpoised with the Judicial Conference's delicate replies, highlight a portrait of separation of powers problems between these two branches. In these exchanges, the legislature and the judiciary do not appear as co-equal branches. Rather, the Conference's testimony was nothing more than a highly deferential minuet with the branch that defines federal court jurisdiction and that can, if it desires, abolish the lower federal courts altogether.[173]

ate advisory committee to propose rules and receive comments from judges, scholars, and lawyers concerning proposed rules.

In the end, the ultimate power is with the Congress to accept, reject, or modify the rule. Judges feel very strongly about judicial involvement in the process, particularly when the subject relates to procedural matters that go to the core of the performance of the judicial function.

I think that as much as anything the bypassing of the rulemaking process lies at the root of the intensely negative response of most Federal judges to the original version of this legislation.

House Hearing, supra note 94, at 105-06.

172. *Id.* at 177.

173. U.S. CONST. art. 1, § 8, cl. 9 (granting Congress the power "[t]o constitute Tribunals inferior to the Supreme Court.").

C. THE DEPARTMENT OF JUSTICE

The Justice Department wavered in its support of the Civil Justice Reform Act.[174] In so doing, it drew Representative Kastenmeier's ire for opposing portions of the parallel Federal Courts Study Committee Implementation legislation.[175] Although the Department supported the "tenor" of the Act and its broad reforms, its representative expressed concern with the same constitutional issues raised by the Judicial Conference.[176] In this instance, however, the executive branch seemed somewhat more sensitive to the judicial branch's prerogatives than to the legislature's. The Justice Department specifically identified a separation of powers problem if only to make the additional point that the doctrine required the executive branch to defer to the superior legal interpretation of the judiciary.[177]

The Justice Department's written statement repeated its polite questioning of the Act's constitutional basis.[178] Stuart Gerson, the Department's representative, testified that the major problem with the Civil Justice Reform Act was "manda-

174. *See House Hearing, supra* note 94, at 182-214 (testimony and prepared statement of Stuart Gerson, Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice).

175. *Id.* at 211.

176. *See infra* note 178 (quoting Mr. Gerson).

177. Some of the things we have had to say relating to imposing management systems upon the judiciary I think have been adequately and exemplarily covered by Judge Peckham, who I think has it about right on the constitutional basis, and we largely defer because of our concerns about separation of powers to what the judiciary has to say about the management of the judiciary. I think Judge Peckham had it exactly right when he answered the chairman with respect to the difference between management controls and jurisdictional perimeters. Hence, as the chairman is aware, we greatly support the proposal with respect to the consolidation of multiparty, multidistrict mass tort cases. That is a jurisdictional matter. We think it is appropriate. . . . And that is the reason we can support it while we oppose on separation of powers grounds the mandation of certain management controls upon the Federal district and courts of appeals, though we think they are a pretty good idea, and that with the participation of the Judicial Conference and others they will be adopted at least in spirit and probably in significant detail.

House Hearing, supra note 94, at 183 (testimony of Mr. Gerson).

178. *See id.* at 187-210. The written statement applied also to H.R. 5381, the Federal Courts Study Committee Implementation Act of 1990. *Id.* at 187. Again, the written statement suggested possible constitutional problems only in generalized terms:

> As I describe the Department's views on these important pieces of legislation, and renew our commitment to working with the Judiciary and the Congress on judicial reform legislation, I must reiterate an important Administration policy. We are guided by a healthy respect for the Constitution's separation of powers. This respect leads

tion." Mr. Gerson stated, "We are in favor of many of those things. Some of them constitutionally can be mandated. Some of them can't, and I think where we have objection, it is in that. It is of constitutional concern."[179] Finally, Representative Kastenmeier directly raised the constitutional issue:

> Mr. KASTENMEIER. Do you think there are constitutional concerns with the original bill?
>
> Mr. [STUART] GERSON. Yes.[180]

Similar to the Judicial Conference, the Justice Department raised the constitutional separation of powers issue but neither developed the argument nor pursued the point. During three days of hearings and open record, only the American Bar Association made an attempt to supply some content to the constitutional objection to the Civil Justice Reform Act.

D. THE AMERICAN BAR ASSOCIATION

During spring 1990, the American Bar Association formed

us to refrain from commenting on a number of provisions in these bills that we regard as internal and native to the Judicial Branch. . . .

We similarly believe that it is unwise to impose detailed statutory controls on the internal operations of the Judicial Branch in the exercise of its constitutional authority. Congress, however, may wish to adopt measures that facilitate the exercise of that authority by extending to the courts additional tools or resources with which to improve the administration of justice.

Id. at 188-89.

179. *Id.* at 213 (responding to Rep. Kastenmeier's question whether the Justice Department was supporting the Biden bill, the Civil Justice Reform Act). Mr. Gerson's response is interesting because it reiterates the constitutional objection:

> We are in accord with much that is stated in that bill, as it has been improved and now exists, and I have covered many of those things in the written testimony. We very much subscribe to its tenor. Our trouble is with mandation. For example, we support the idea of the district plan. We think it is good, and that it would be beneficial to have nationwide uniformity. There ought to be deference to the Federal Rules of Civil Procedure. We think that the district courts ought to have a central advisory group to deal with such issues. We are in favor of case-tracking systems. The Attorney General has testified in favor of them before the Federal Courts Study Committee.
>
> . . . We don't think that the legislature can manage the cases and dockets of the Federal district courts directly. We think that they do a great deal in defining their jurisdiction, in defining venue, in defining the rules under which cases are decided, but we think also that most of the ideas that are incorporated in that bill are laudable. Some of them ought to be modified.

Id. at 213 (omitted portions quoted in text).

180. *Id.* at 213. That was the end of the colloquy. Mr. Gerson did not elaborate further on the Justice Department's views on the constitutional problems with the bill.

a "Civil Justice Coordinating Committee" to study and analyze the Civil Justice Reform Act in order to recommend to the ABA Board of Governors what portions of the Act to support or oppose.[181] The committee's memorandum to the ABA Board of Governors, incorporated into the Senate record, reflected the committee's discussion of and division over the statutory and constitutional authority of Congress to implement the legislation.[182]

In this memorandum, the ABA supplied the only doctrinal support in the record for the theory that the Act was a questionable assertion of congressional legislative rulemaking power.[183] While no ABA representatives appeared during the spring Senate hearings, they appeared in September 1990 to testify before the House subcommittee considering the Act and

181. *See* Memorandum from The Civil Justice Coordinating Committee to the Board of Governors of the American Bar Association (June 9, 1990), *reprinted in Senate Hearings*, *supra* note 90, at 481-91 [hereinafter ABA Memorandum].

182. There were, however, two broader constitutional and philosophical issues where there was no solid consensus of our Committee. Rather than deciding them by narrow margins, or identifying which individual members held a particular view, we thought it would be more helpful to the Board in its deliberations to simply acknowledge them . . . . The first issue was the constitutional, or philosophical, question of whether Congress can, or should, pass legislation that mandates a particular form of case management, or should instead leave details of case management to the discretion of the courts within the framework of the Federal Rules of Civil Procedure. On this issue a majority of the Committee did not believe that we could determine whether the revised bill was constitutional or unconstitutional on its face. While several members were firm in their views on each side of the question, a majority concluded the issue was too complex for easy resolution given the time constraints for our deliberations. All recognize, however, that legislation mandating procedures implicates separation of power[s] concerns.

Id. at 483-84.

The second issue raised by the ABA was whether it should oppose the legislation if Congress did not make the language modifications, intended to address the separation of powers problem, suggested in Part III of the ABA's memorandum. *See id.* at 488-89.

183. We recognize that for the Congress to express its concern and to require the development of cost and delay reduction plans is appropriate. However, while it is within the power and province of the Congress to enact rules and proscribe jurisdiction of the federal courts, to dictate to the courts how they should conduct their internal business—as distinguished from establishing rules of procedure—implicates the separation of powers doctrine. . . . Moreover, sound public policy suggests that the rule-making process should be in accordance with the Rules Enabling Act.

Id. at 489 (citations omitted).

the Federal Courts Study Implementation legislation.[184] At this hearing, the ABA renewed its constitutional objections to the Act by stating the separation of powers problem and arguing that Congress overstepped its rulemaking authority delineated in the Rules Enabling Act.[185]

E. OBSERVATIONS ON THE LEGISLATIVE TESTIMONY

Congressional discussion of the statutory and constitutional issues relating to the Civil Justice Reform Act was embarrassingly superficial, ill-informed, and trivial. It is sobering to realize that almost everyone who testified before the Senate and House subcommittees was a lawyer or judge, that the staffers who drafted the legislation were lawyers, and that the chief

184. *See House Hearing*, *supra* note 94, at 241-47 (statement of Robert Landis, Former Chair, ABA Standing Committee on Federal Judicial Improvements, and statement of George C. Freeman, Jr., Chair, ABA Business Law Section).

185. *Id.* at 266-70 (prepared statement of George C. Freeman, Jr., on behalf of the ABA). Mr. Freeman stated:

> Public policy suggests that the rule-making process should be carried out in accordance with the Rules Enabling Act. The orderly process established by the Act, which has functioned extraordinarily well, leaves the details of case management to the discretion of the courts, within the framework of the Federal Rules of Civil Procedure.

Id. at 267.

The exchange between Representative Kastenmeier and Mr. Freeman revealed that the ABA committee was prompted by its member judges to consider further the separation of powers problem.

> Mr. KASTENMEIER. Mr. Gerson suggested that there could be constitutional problems with the original concept presented. We do not know that legislation regulating procedures by which cases are litigated in the Federal courts have survived a constitutional challenge in the courts. Why do you think that legislation regulating the procedures by which cases are scheduled for litigation in the courts presents more serious problems, more serious separation of powers problems than this?
>
> Mr. FREEMAN. Well, I will explain that, sir. In the ABA when we found ourselves at odds over this, the president of the ABA appointed an eight-person committee, and for some strange reason he made me the chairman of it. I suddenly found that I was one of the four practicing lawyers of that committee and the other four members were sitting judges. At our initial meetings I think I observed, not having done my homework, that at least we don't have a constitutional problem here. The judges took me to task, and I said, "Well, why don't you all send us cases which you think raise these concerns?" They do, and they are cited in my testimony. And I will simply in a sentence or two explain their relevance and why I think there is a question. I don't think that these cases are dispositive, but they urge caution.

Id. at 282 (subsequent description of cases omitted).

congressional sponsors were lawyers. Surely they all knew better.

The Act's record demonstrates the debasement of public policy discourse at the national level. The Act is a major piece of legislation mandating massive procedural reform throughout the entire United States, but its legislative hearings reflect a paucity of considered reflection on its impact and on congressional authority to order such reform. What the legislative record does reflect is the single-minded determination of Senator Biden, his Senate subcommittee, and his staff to enact this legislation, despite repeated (albeit half-hearted) statutory and constitutional challenges from the other two branches of government and the leading organization of American lawyers.

The record also reflects little efficient opposition to the Act. The Judicial Conference, the Justice Department, and the American Bar Association weakly asserted and poorly developed their statutory and constitutional challenges. Other witnesses, most notably federal judges testifying individually or on behalf of various judicial organizations, appeared at the Senate and House subcommittee hearings to raise questions about the Act's constitutional basis.[186] These individuals, however, merely suggested that the Act constituted an unusual incursion into third branch affairs.[187]

Typically, the federal judges appeared shy about developing an extended constitutional argument that opposed the bill. Because the judges may someday be called upon to construe the Act's constitutionality,[188] the Act raised the specter of the federal judiciary offering Congress an advisory opinion on legislation affecting judicial branch affairs. Apart from the statutory and constitutional questions relating to the allocation of rulemaking authority, the Act's legislative hearings highlight the general problems that the judicial branch faces when testifying on pending legislation.[189]

186. *See id.* at iii (listing witnesses); *Senate Hearings*, *supra* note 90, at iii (same).

187. *See supra* note 94 (witnesses testifying in the *Senate Hearings*).

188. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989) (construing constitutionality of the United States Sentencing Commission Guidelines).

189. *See, e.g.*, *Court Reform and Access to Justice Act Hearings*, *supra* note 97, at 3-52 (testimony and prepared statement of Judge Elmo B. Hunter, Committee on Court Administration, Judicial Conference of the United States); *id.* at 312 (testimony and prepared statement of Judge Abner J. Mikva); *id.* at 312 (testimony and prepared statement of Judge Patrick Higginbotham); *id.* 901-82 (letters from various judges); *see also The Multiparty, Multiforum Jurisdiction Act of 1989: Hearing on H.R. 3406 Before the Subcomm. on Courts, Intel-*

The American Bar Association arguably supplied the most thoughtful presentation of the constitutional problems relating to the bill, but even its analysis was thin and tentative. When the legislative record for the Civil Justice Reform Act closed during fall 1990, there was very little explication either of the Rules Enabling Act limitations or the separation of powers arguments as they related to the ability of Congress to enact the bill. Congress passed the Act on this weak record and the official legislative history asserted the exclusive rulemaking authority of Congress enact this law.[190]

III. SENATE JUSTIFICATIONS FOR EXCLUSIVE CONSTITUTIONAL AUTHORITY TO ENACT THE CIVIL JUSTICE REFORM ACT OF 1990

The Senate repeated its justification for Congress's statutory and constitutional authority to enact the Civil Justice Reform Act in three different sources: a Senate Judiciary subcommittee staff memorandum to Senator Biden which was included in the first Senate hearing record,[191] the official Senate Report accompanying the final bill,[192] and a subsequent law review commentary by the staff director for the Senate Judiciary subcommittee.[193] These sources contain essentially the same broad arguments to justify the Act—one based in statutory and constitutional law, the other on public policy.

The Senate's basic position is that Congress, as a matter of statutory and constitutional law, has exclusive rulemaking authority. As a policy matter, Congress asserted that it has the ability, if not the duty, to act when the judicial branch is not moving quickly enough to achieve civil justice reform. Despite the simple structure of these arguments, the Senate's official report attacked the Judicial Conference's objection based on the Rules Enabling Act as an argument "cloaked in separation

lectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 17-20 (prepared statement of Judge William W. Schwarzer representing the Judicial Conference of the United States).

190. S. REP. NO. 416, *supra* note 3, at 10-11, *reprinted in* 1990 U.S.C.C.A.N. at 6813.

191. *See supra* note 149 and accompanying text.

192. S. REP. NO. 416, *supra* note 3, *reprinted in* 1990 U.S.C.C.A.N. 6802. "The House bill was passed in lieu of the Senate bill after amending its language to contain much of the text of the Senate bill." 1990 U.S.C.C.A.N. at 6802.

193. Peck, *supra* note 27, at 114-17.

of powers terms."[194] The fact that the Senate repeated this derogatory characterization in the official Senate Report indicates the dismissive treatment afforded this argument in the legislative hearings and in the final committee report.[195] Alternatively, the Senate's repeated negative characterization of the Judicial Conference's objection may reveal the powerful challenge that the separation of powers argument presented to Congress.

This Part sets out the Senate's view of the allocation of rulemaking authority and provides the basis for a critical examination of Congress's arguments.[196] It argues that the Senate's position consists of selective quotations from case precedent, distorted statutory construction, and argumentative *non sequiturs*. This Part ultimately assesses whether Congress reasonably concluded that the separation of powers argument regarding rulemaking was a diversionary argument without merit, and that the Rules Enabling Act prohibited the judiciary from promulgating civil justice reform through its own rulemaking powers.

A. THE SENATE VERSION OF THE ALLOCATION OF RULEMAKING AUTHORITY

The Senate's position relating to its rulemaking authority centered on five basic points. First, the Senate contended that Congress's historical delegation of rulemaking authority to the Supreme Court did not lessen its own rulemaking authority, and furthermore, that the Supreme Court cases construing rulemaking authority have affirmed congressional power to regulate practice and procedure in the federal courts. Second, the Senate argued that only the Constitution, and not the Rules Enabling Act, limited congressional power to enact procedural rules. Third, the Senate offered numerous examples of when Congress has exercised rulemaking power, and, fourth, argued that the Rules Enabling Act barred the Supreme Court from proposing the Civil Justice Reform Act. Fifth, the Senate contended that its spending powers justified the legislation. As

194. S. REP. NO. 416, *supra* note 3, at 9, *reprinted in* 1990 U.S.C.C.A.N. at 6811.

195. In a subsequent law review commentary, the staff director for the Senate Judiciary Committee also characterized the objectives as "cloaked in separation of powers terms." Peck, *supra* note 27, at 114.

196. This discussion is based on the Senate Report, *supra* note 3, with occasional parallel citations to the same or similar assertions in the staff memorandum and the staff director's commentary.

this Article suggests, the Senate's position consisted of an odd melange of debating points that stood the Rules Enabling Act on its head and changed this statute from an "Rules Enabling Act" to a "Rules Disabling Act."

1. Historical Delegation of Rulemaking Power to the Judicial Branch

Although the Senate acknowledged that Congress has "delegated some rulemaking authority to the courts," it also steadfastly maintained that this delegation did "not lessen the rulemaking power conferred on Congress by the Constitution."[197] The Senate cited as support for this proposition two Supreme Court cases, *Sibbach v. Wilson & Co.*[198] and *Hannah v. Plumer*,[199] and a quotation from a federal district court judge.[200]

The Senate's sources are unconvincing on the rulemaking allocation issue. The excerpted sources merely state that while Congress has the power to regulate federal practice and procedure, it can exercise that power by delegating it to the courts.[201] The delegation point is a rhetorical red herring because it says nothing about the allocation of rulemaking authority with reference to exercise of the delegation, particularly with reference to rule content. It is true that Congress may delegate rulemaking power without lessening its ability to exercise *some* rulemaking authority. That Congress may delegate its rulemaking power, however, does not lessen the ability of the federal judiciary to exercise its own statutorily assigned rulemaking authority delineated in the Rules Enabling Act.

Delegation power really reveals nothing, unless one construes it to mean that whatever Congress can delegate it can deny altogether. If this is so, then Congress must repeal its own Rules Enabling Act, which statutorily sets forth the relative spheres of rulemaking authority between Congress and the federal courts. The Senate's argument is flawed because it establishes a principle of rulemaking allocation without reference to rulemaking content. Thus, the Senate's position fails to recognize that the Rules Enabling Act has clearly assigned *substantive* rulemaking power to Congress and *procedural* rulemaking power to the federal courts. In essence, then, the Rules Enabling Act governs and limits congressional rulemaking power.

Further, that federal courts have for more than fifty years recognized joint rulemaking authority and Congress's delegation power, says nothing about Congress's superior rulemaking authority absent any reference to rule content. Without an outright repeal of the Rules Enabling Act, the delegation power of Congress certainly does not support its claim to exclusive rulemaking authority.

Finally, the Senate's reliance on a 1926 report[202] concerning the then-proposed Rules Enabling Act undercuts, rather than supports, its position. The earlier report states:

> [T]he bill proposed [the Rules Enabling Act] will not deprive Congress of the power, if an occasion should arise, to regulate court practice, for it is not predicated upon the theory that the courts have inherent power to make rules of practice beyond the power of Congress to amend or repeal. * * * It gives to the court the power to initiate a reformed [f]ederal procedure without the surrender of the legislative power to correct an unsatisfactory exercise of that power.[203]

The 1926 Rules Enabling Act report suggests that the Act's drafters did not expect Congress to relinquish its "constitutional" role. The report, however, also specifies what that role was: exercising a legislative veto over the judicial branch's proposed rule reforms.[204] The report states that federal procedural

197. S. REP. NO. 416, *supra* note 3, at 9, *reprinted in* 1990 U.S.C.C.A.N. at 6812.

198. *Id.* (citing Sibbach v. Wilson & Co., 312 U.S. 1 (1941)).

199. *Id.* (citing Hannah v. Plummer, 380 U.S. 460 (1964)).

200. *Id.* at 10, *reprinted in* 1990 U.S.C.C.A.N. at 6812 (citing JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 90 (1977)) Although the Senate Report states that "[t]he Supreme Court's consistent and long-standing recognition of congressional rulemaking authority has produced broad agreement on this point among leading scholars in the field," the Senate report cites no other scholar for this proposition other than Judge Jack Weinstein. *See id.*

201. *See* S. REP. NO. 416, *supra* note 3, at 9-10, *reprinted in* 1990 U.S.C.C.A.N. at 6812 (quotations from *Sibbach* and *Hannah*).

202. *Id.* at 9-10, *reprinted in* 1990 U.S.C.C.A.N. at 6812 (citing S. REP. NO. 1174, 69th Cong., 2d [sic] Sess. 7 (1926)).

203. *Id.* (quoting S. REP. NO. 1174, 69th Cong., 2d [sic] Sess. 7 (1926)). *See infra* note 204 for correct citation.

204. *See id.* (quoting S. REP. NO. 1174, 69th Cong., 2d [sic] Sess. 7 (1926) to support the argument that Congress retained the power to "amend," "repeal," or "correct" the judiciary's reforms). The Senate Report for the Civil Justice Reform Act omitted important language from the 1926 report. This Report states that Congress retained the power to "revise rules proposed by the Supreme Court, or by legislation . . . modify or entirely withdraw the delegation of power to that body." *See* S. REP. NO. 1174, 69th Cong., 1st Sess. 7 (1926). The 1926 report continues on to explain:

> But it is proper in this connection to say that where the entire responsibility for formulating rules of procedure has been delegated

reform, under the Rules Enabling Act, was to "initiate" in the judicial branch. The Senate's 1990 interpretation of its rulemaking authority, as well as its reading of the 1926 legislative history of the Rules Enabling Act, is inconsistent with the actual 1926 version of rulemaking allocation.[205]

2. The Rules Enabling Act and Congressional Authority to Promulgate Rules

The Senate's next argument in support of its assertion of exclusive rulemaking authority consisted of three statements[206] together forming an unconvincing, if not illogical, syllogism. First, the Senate stated that the Supreme Court's authority to enact rules of procedure was far more limited than that of Congress because the Court only has the authority delegated to it in the Rules Enabling Act. Second, the Senate stated that the Court had the power to propose only procedural rules—*i.e.*, those with no substantive effect.[207] Third, the Senate stated that congressional authority to prescribe procedural rules was limited only by the Constitution, and not by the Rules Enabling Act. The Senate concluded that Congress could enact procedural rules to advance its substantive policy goals.[208]

The Senate stated these contentions in two passages in the legislative history of the Civil Justice Reform Act. The Senate relied on a House report that accompanied the 1988 congressional revisions to the Rules Enabling Act to describe the scope of its exclusive rulemaking authority: "[the Rules Enabling Act] is intended to allocate to Congress, as opposed to the Supreme Court exercising delegated legislative power, lawmaking choices that necessarily and obviously *require consideration*

> to the courts, the tendency has been to allow such rules to stand without amendment by legislative bodies. The reason for this is that it is convenient for the legislature to refer proposed changes to the courts because they are found to be better equipped to consider them.

Id. The Report than provides a historical context for this "tendency," citing experiences in several states and England. *See id.*

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

206. *See* S. REP. NO. 416, *supra* note 3, at 10, *reprinted in* 1990 U.S.C.C.A.N. at 6813.

207. Non-procedural rules run afoul of the Rules Enabling Act by "abridg[ing], enlarg[ing,] or modify[ing] substantive right[s]." *Id.* (quoting 28 U.S.C. § 2072).

208. *Id.* (noting that "[s]uch rules define the area of court rulemaking that is allowed to Congress, but prohibited to the Supreme Court.").

of policies extrinsic to the business of the courts."[209] Further, the Senate stated that "[i]mportantly, the report also refers to Congress['s] exclusive power to enact procedural rules that *'affect its constituencies in their out-of-court affairs.'* "[210]

These two crucial passages in the Civil Justice Reform Act's legislative history completely redefined the rulemaking allocation between the two branches. Prior to the Act, the crucial conceptual distinction relating to the allocation of rulemaking authority was between substantive and procedural matters.[211] However difficult this distinction has proven in theory and application, it nonetheless has been the conceptual paradigm for defining each branch's rulemaking authority.[212]

The Senate's legislative history to the Civil Justice Reform Act articulated new glosses on the Rules Enabling Act that empowered Congress to promulgate procedural rules in new situations. This novel interpretation allows Congress to enact procedural rules where any rulemaking choice "requires consideration of policies extrinsic to the business of the courts" or "affect[s] its constituencies in their out-of-court affairs."[213] These formulations are different and more expansive than the existing substance/procedure distinction and obviate any notion of a purely procedural rule. Stated differently, it is difficult to think of a purely housekeeping procedural rule that could not be construed to require consideration of some policy extrinsic to the business of the courts or that may not affect some Congressperson's constituency in out-of-court affairs. With these two operative definitions, then all rulemaking is within the Congress's province (which is exactly the Senate's point). By definitional fiat, the Senate has thus arrogated to Congress all procedural rulemaking authority.

209. *Id.* at 10-11, *reprinted in* 1990 U.S.C.C.A.N. at 6813 (*citing* H.R. REP. NO 422, 99th Cong., 1st Sess. 22 (1985) (emphasis added)).

210. *Id.* (citing H. R. REP. NO. 422, 99th Cong., 1st Sess. 22 (1985)) (emphasis added).

211. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 386-87 (1989); Hannah v. Plumer, 380 U.S. 460 (1965).

212. *See supra* notes 198-99.

213. *See Mistretta*, 488 U.S. 361. *See generally* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281 (examining the meanings of "substance" and "procedure" in evaluating the effect of the supercession clause of the Rules Enabling Act); Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012 (1989) (response to Professor Carrington).

3. Past Congressional Exercises of Rulemaking Authority

The third argument the Senate advanced to support its contention that Congress has exclusive rulemaking authority relies on circular logic: the Senate contended that Congress must have that power because it had on previous occasions exercised that power. Each example of the use of such authority, such as the Speedy Trial Act,[214] the Federal Rules of Evidence, and the multi-district litigation statute,[215] however, is problematic and hardly supports the Senate's categorical claim to exclusive procedural rulemaking authority.

The Speedy Trial Act is arguably the Senate's best example of the plenary exercise of congressional "procedural" rulemaking authority.[216] Nonetheless, the Speedy Trial Act is not a compelling example because that Act's intrusion into the federal courts' internal affairs is minimal compared to those the Civil Justice Reform Act requires.[217] The Speedy Trial Act concerned only the timing of criminal cases and did not mandate that prosecutors, defense lawyers, victims, and criminals, the system's "users," effect complete reform of the federal criminal procedure system. Moreover, the Speedy Trial Act, which deprives federal courts of jurisdiction over criminal cases that are not prosecuted after a certain length of time, is essentially jurisdictional in nature.[218]

In addition, as the Senate itself concedes, Federal Rule of Criminal Procedure 50(b), proposed by the Supreme Court, preceded the Speedy Trial Act. Congress's dissatisfaction with the Supreme Court's rule prompted Congress to enact its own version,[219] an exercise of power that is within the scope of Con-

214. S. REP. NO. 416, *supra* note 3, at 11, *reprinted in* 1990 U.S.C.C.A.N. at 6813 (citing 18 U.S.C. § 3152).

215. *Id.*, *reprinted in* 1990 U.S.C.C.A.N. at 6814 (citing 28 U.S.C. § 1407). The original Senate staff memorandum in support of the constitutionality of the Civil Justice Reform Act did not refer to the multidistrict litigation statute; it only cited the Speedy Trial Act and the Federal Rules of Evidence. *See supra* note 149 and accompanying text (Memorandum to Sen. Joseph R. Biden).

216. The Senate would have a better example of the exercise of independent congressional rulemaking authority in the 1983 enactment of the revised Federal Rule of Civil Procedure 4. *See* Mullenix, *supra* note 8, at 844-46.

217. *See, e.g.*, 18 U.S.C. § 3161(c)(1) (1988) (providing that criminal defendant must be brought to trial within seventy days from the filing of an information or indictment, or from the date defendant has appeared before a judicial officer of the court in which the charge is pending).

218. *See supra* note 114.

219. Seeking to press the analogy to the Civil Justice Reform Act even further, the Senate legislative history suggests that Congress enacted its own version of the Speedy Trial Act because implementation of the Act might have required additional court resources in the form of new judges, clerks, and computers. *See* S. REP. NO. 416, *supra* note 3, at 11, *reprinted in* 1990 U.S.C.C.A.N. at 6814 (citing to H.R. REP. NO. 1508, 93rd Cong., 2d Sess. (1974)).

gress's authority to "amend," "repeal," or "correct" a pre-existing Court-proposed rule.[220] The Speedy Trial Act illustrates the exercise of a congressional legislative veto over a Court-proposed rule revision; it does not illustrate congressionally-initiated wholesale reform of an entire procedural system.

The enactment of the Federal Rules of Evidence, falling as it does somewhere in the "twilight area" between substance and procedure, is an even more problematic illustration of Congress's alleged exclusive rulemaking authority.[221] Significantly, between the legislative hearings on the Civil Justice Reform Act and the final Senate report, the Judiciary Committee's arguments based on enactment of the Federal Rules of Evidence disappeared from the official legislative record. Perhaps this is in no small part because the Senate staff memorandum quotes Justice Douglas dissenting from the Supreme Court's proposed Rules of Evidence regarding the relative allocation of rulemaking authority:

> I can find no legislative history that rules of evidence were to be included in 'practice and procedure' as used in [the Rules Enabling Act] . . . . The words 'practice and procedure' in the setting of the Act seem to me to exclude rules of evidence. They seem to me to be words of art that describe pretrial procedures, pleadings, and procedures for preserving objections and taking appeals.[222]

Justice Douglas suggests in his dissent that evidentiary rules relate more to the substantive elements of a claim than to pure procedure. Although his statement takes the rules of evidence outside the purview of judicial promulgation, it quite precisely makes the definitional case that procedural rulemaking belongs within the scope of judicial authority. Since the Civil Justice Reform Act is almost exclusively concerned with pretrial procedures, Justice Douglas's statement undercuts the

220. *See supra* note 204. Similarly, when Congress was dissatisfied with the Civil Rules Advisory Committee's 1983 proposed amendment of Federal Rule of Civil Procedure 4, relating to service of process, it substituted its own version. This unprecedented, unilateral congressional amendment of a Federal Rule of Civil Procedure subsequently turned out to be a poor revision, necessitating further remedial amendment by the Advisory Committee on Civil Rules. *See* Mullenix, *supra* note 8, at 845.

221 *See* Mistretta v. United States, 488 U.S. 361, 386 (1989).

222. *Senate Hearings*, *supra* note 90, at 67 (quoting Letter from Justice Douglas dissenting from the Supreme Court's proposed Rules of Evidence (October Term 1972)).

very position the Senate advances in support of Congress's exclusive rulemaking authority.

Finally, the multi-district litigation statute is an equally dubious illustration of exclusive congressional rulemaking authority. The multi-district litigation statute is a federal transfer provision, concerned with venue and consolidation. Although it is not technically a jurisdictional provision, the multi-district litigation statute is jurisdiction-like in that it confers temporary jurisdiction on a federal forum to conduct consolidated pretrial proceedings in specially-designated multidistrict litigation cases.[223] Even the federal judges appearing on behalf of the Judicial Conference conceded that Congress has exclusive authority to enact jurisdictional legislation.[224] In addition, like the Speedy Trial Act, the multi-district litigation statute did not effect an entire wholesale revision of the Federal Rules of Civil Procedure.

4. The Rules Enabling Act, the Supreme Court, and the Civil Justice Reform Act of 1990

The Senate's fourth argument for its superior rulemaking authority was that the Rules Enabling Act, in addition to affirmatively requiring Congress to enact the Civil Justice Reform Act, barred the Supreme Court from proposing such legislation.[225] The Senate, in support of this position, relied on two of its own definitions of the scope of congressional rulemaking authority: initiatives that affect "constituencies in their out-of-court affairs" and those that involve "policies extrinsic to the business of the courts."[226]

The Senate then characterized the Civil Justice Reform Act as having the "substantive goals" of increasing access to the

223. *See* 28 U.S.C. § 1407 (1988).

224. *See House Hearing*, *supra* note 94, at 105-06. Indeed, the proposed Multi-Party, Multiforum Jurisdiction Acts of 1989, 1990 and 1991 all were proposed revisions of the multidistrict litigation act. One of the specific purposes of the proposed new Multi-Party, Multiforum statutes was to correct the jurisdictional deficiencies inherent in the existing multi-district litigation statute, in order to supply a minimal diversity concept to transfers. *See supra* note 189.

225. The legislative history states this proposition by way of conclusion: "The Civil Justice Reform Act is within the exclusive rulemaking authority of Congress. Indeed, the limitations of the Rules Enabling Act would bar the Supreme Court from proposing this legislation." S. REP. NO. 416, *supra* note 3, at 11, *reprinted in* 1990 U.S.C.C.A.N. at 6814.

226. *See supra* notes 209-10.

federal courts[227] and improving the efficiency and competitiveness of American business.[228] These substantive goals, according to the Senate, affect constituencies in their out-of-court affairs and involve policies extrinsic to the business of the courts. Hammering home its final nail, the Senate's legislative history declared: "A proposal intended to increase access to the courts and to improve the productivity and competitiveness of American business cannot fairly be described as purely procedural."[229]

This argument is conclusory, circular, and illogical. Whatever may be the "substantive" goals of any congressional legislation, these goals say little about whether the content of the legislation is substantive or procedural. The Senate asserted a power to enact the Civil Justice Reform Act by simply formulating an entirely new and expansive definition of "substantive" matters and then miraculously transformed matters that previously were understood as purely procedural into substantive matters and goals.[230] One must concede the Senate's recasting of the substance/procedure distinction in order to conclude that the Rules Enabling Act affirmatively prohibits the Supreme Court from enacting like legislation.

The Senate's reasoning represents a peculiar inversion of the long-standing interpretation of the Rules Enabling Act[231]

227. A controversial aspect of the Civil Justice Reform Act is whether it will actually increase access to the federal courts, as the legislative history asserts, or whether it will impede the access for certain litigants and types of cases. Certainly, with a strong emphasis on implementation of case tracking systems and alternative dispute resolution mechanisms, *see supra* notes 10-12, the Civil Justice Reform Act is arguably intended to shunt certain cases and litigants out of federal courts.

228. *See* S. REP. NO. 416, *supra* note 3, at 12, *reprinted in* 1990 U.S.C.C.A.N. at 6814. This portion of the legislative history is also subject to challenge and debate on empirical grounds. *See supra* notes 129-31.

229. S. REP. NO. 416, *supra* note 3, at 12 *reprinted in* 1990 U.S.C.C.A.N. at 6815.

230. The Senate Report adds that the standards governing legislative initiatives like the Civil Justice Reform Act require "the accountability and give and take of the legislative process." *See id.* (citing Mary K. Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671, 691 (1988) (recommending "legislative solutions" when "political interests demand intervention")). It is a thesis of this Article that the politicization of the federal procedural rulemaking process is highly undesirable and is contrary to the longstanding ethos of the federal rules. *See* Mullenix, *supra* note 8, at 855-57.

231. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941) (stating that the Rules Enabling Act "was purposely restricted in its operation to matters of pleading and court practice and procedure"); Hannah v. Plumer, 380 U.S. 460,

and its allocation of rulemaking authority between the two branches. The Senate's analysis changes the statute from one that, by congressional delegation, *enables* the judiciary to promulgate federal rules of practice and procedure into an Act that *disables* the federal courts from performing this function. Congress, by obliterating any meaningful distinction between substance and procedure in the Civil Justice Reform Act's legislative history, usurps procedural rulemaking authority.

5. The Funding Theory of Congressional Authority

The Senate based its final claim to exclusive authority to enact the Civil Justice Reform Act on in its authority to fund the measure. The Senate stated that this authority "is found in the bill's authorization of funding to accomplish its purposes,"[232] and argued that its authorization of $25 million dollars to provide resources to early implementation districts "necessarily require[s] considerations uniquely within the province of Congress."[233]

This is a bootstrap argument. That Congress may, through a bill, authorize funding to accomplish its purposes cannot also be used as the basis of its authority to enact the legislation. Stated differently, Congress cannot legitimize every assertion of legislative power through a funding provision. Congressional power to authorize funds to carry out properly enacted statutes says nothing about its power to enact that legislation in the first place, or about constitutional and statutory allocation of rulemaking authority. Although Congress can condition the spending of funds authorized for a lawful purpose, it cannot imply the lawfulness of an authorization from the fact of its existence.

B. The Senate Version of the Separation of Powers Doctrine and Rulemaking Authority

Significantly, the entire legislative history of the Civil Justice Reform Act says nothing about the separation of powers doctrine. The Senate only referred to the doctrine in passing

471 (1965) (stating that the Rules Enabling Act generally directs federal courts to apply state "substantive" law and federal "procedural" law).

232. *See* S. REP. NO. 416, *supra* note 3, at 12 *reprinted in* 1990 U.S.C.C.A.N. at 6815 (characterizing this as "[a]nother clear indication that the Civil Justice Reform Act is within the exclusive rulemaking authority of Congress . . . .").

233. *Id.* The Senate advanced a similar funding argument in support of congressional authority to enact the Speedy Trial Act. *See supra* note 149 and accompanying text (Memorandum to Sen. Joseph R. Biden, Jr.).

when it briefly mentioned that any Rules Enabling Act challenges to the Civil Justice Reform Act were "most often cloaked in separation of powers terms" and were without merit.[234] Further, the Senate report, even though it counters the Rules Enabling Act theory with two Supreme Court citations,[235] fails to address the separation of powers argument that the American Bar Association presented in the last legislative hearing.[236] Thus, while the Senate's Rules Enabling Act analysis is paltry, its separation of powers discussion is nonexistent.[237]

The Senate's dereliction is interesting for at least three reasons. First, it suggests the inability of the Senate to distinguish the Rules Enabling Act question, as a matter of statutory allocation and delegation, from the more fundamental question of a constitutional separation of the legislative and judicial branches.

Second, the Senate Report's characterization of the separation of powers doctrine as a "cloaked" argument is a transparent rebuke of the Judicial Conference, the chief institutional group that opposed the legislation and repeatedly raised the argument. The Senate's blatant reproach of the judiciary, its heavy-handed usurpation of procedural rulemaking authority, and its dismissive attitude toward a fundamental constitutional question, embody the very tension that the principles of constitutional separation of powers seek to resolve.

Third, the failure of the Senate to address the separation of powers problem suggests either an act of omission or commission. On the one hand, the failure to analyze the separation of powers problem could be interpreted as ignorance or disregard. Stated somewhat differently, perhaps the Senate just did not get it. On the other hand, a more disturbing possibility is that the Senate did get it, but did not like the consequences for procedural rulemaking and speedy civil justice reform.

234. *See* S. REP. NO. 416, *supra* note 3, at 9, *reprinted in* 1990 U.S.C.C.A.N. at 6811.

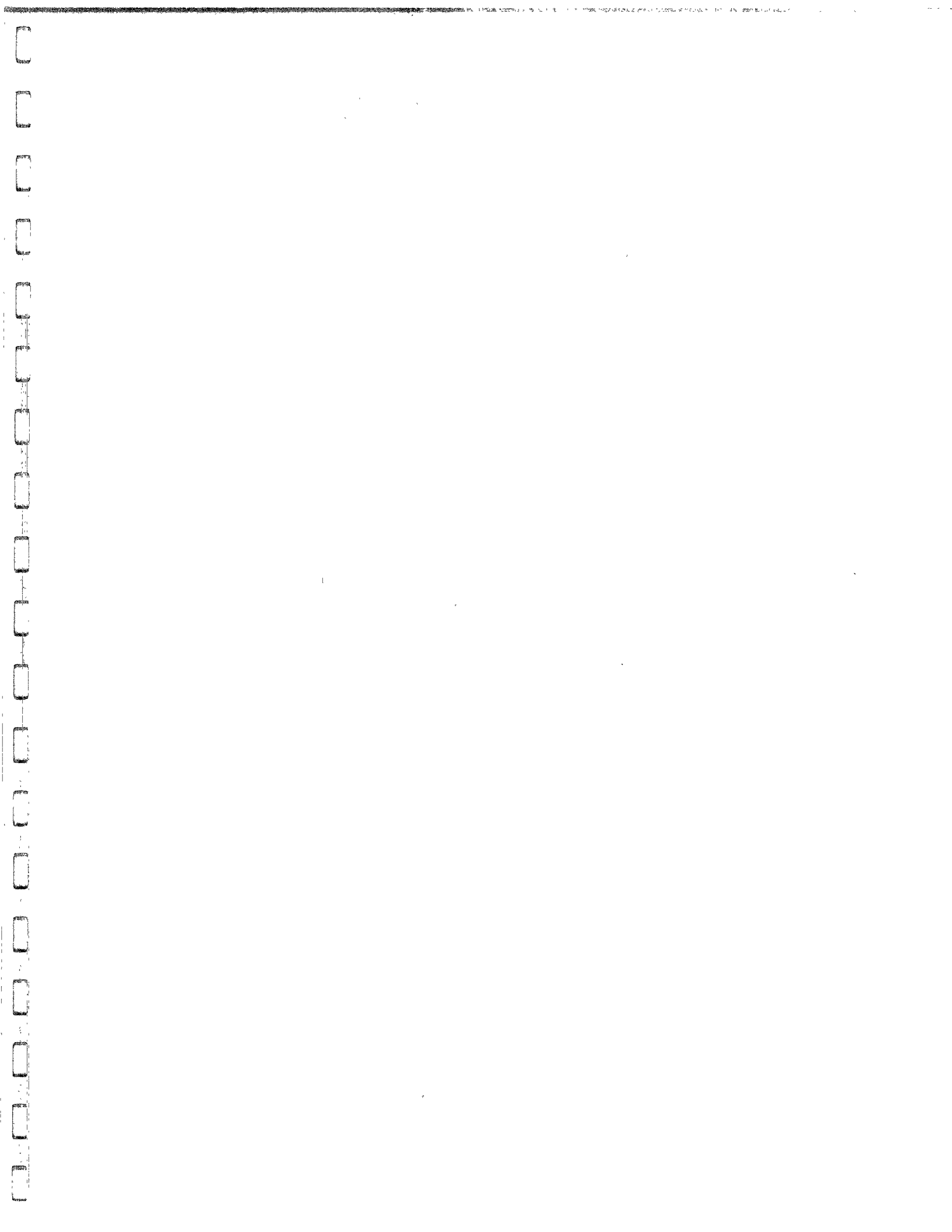
235. *See supra* notes 198-200.

236. *See supra* notes 181-85 and accompanying text.

237. This Article's companion piece discusses whether the separation of powers argument has any independent legal merit apart from the statutory Rules Enabling Act problem. Whatever the weight of that theory, the separation of powers problem is nonetheless present in the basic question of whether Congress has the ability to enact the Civil Justice Reform Act. The official legislative history tells us that the Senate simply chose to ignore and dismiss this issue. *See* Mullenix, *supra* note 24.

In a sense, the recent politicization of the rulemaking process has inspired a kind of parity debate as to relative legislative competencies of the branches of federal government to promulgate procedural rules. Congress's version of democracy, although speciously attractive, in the end will prove to be anti-democratic. A Congress that defines civil justice reform in terms of cost and delay, but leaves out justice, is surely suspect on the subject of democratic rulemaking.

Finally, the public and the legal community should keep in mind that Congress, in asserting an exclusive right over the rulemaking function, has declared all procedural rules to have substantive effect. All rules are, therefore, now legitimately within the ambit of congressional authority. Congress has, through the Civil Justice Reform Act, abolished the twilight area that existed between substance and procedure, and has perhaps ended civil procedure as we have known it for the past fifty years.



APPENDIX D

Podium

Rulemakers Should Be Litigators

By Laura A. Kaster
and Kenneth A. Wittenberg
Special to The National Law Journal

IF THE RECENT proposed amendments to the Federal Rules of Civil Procedure are approved, the nature of the attorney-client relationship will be fundamentally altered. Yet neither attorneys nor clients will have been involved in the debate. The driving force behind these new proposed rules is the Advisory Committee on Civil Rules of the Federal Judicial Conference. Because practicing private litigators are barely represented on the advisory committee, they have been virtually excluded from the reform process.

Thus, those who are most sensitive to the impact of the rules on the attorney-client relationship have been excluded from the rules reform debate. It is time to examine the advisory committee's regulation without representation.

Leading members of the litigating bar once guided the advisory committee. From 1960 to 1970, approximately 50 percent of the committee was composed of prestigious, practicing private litigators. Among the attorneys on the committee during that time were John P. Frank, now senior partner at Lewis and Roca in Phoenix; the late Albert E. Jenner Jr., name partner of Jenner & Block and minority counsel to Senate Republicans during the Watergate hearings; and Supreme Court Justice Byron White, who was then a practicing member of the bar.

In 1981, 41 percent of the advisory committee were private litigators, including Earl W. Kintner, name partner of Arent Fox Kintner Plotkin & Kahn in Washington, D.C.; Arthur L. Liman of New York's Paul, Weiss, Rifkind, Wharton & Garrison; J. Vernon Patrick Jr. of Birmingham, Ala.'s Patrick & Lacy; and 9th U.S. Circuit Court Judge Charles Wiggins, also then a practicing litigator.

However, by the late 1980s, the composition of the advisory committee had changed dramatically. It is now dominated by judges. Today, of the committee's 12 members, six are judges, three are law professors, one is a representative of the Justice Department and only two are private practitioners. While the advisory committee was passing what The National Law Journal correctly called "the most substantive amendments to the Federal Rules of Civil Procedure since they were adopted in 1938," litigators in private practice had only two voices on the committee. (NLJ, May 4.)

Some commentators view the lack of representation of the bar as salutary. Indeed, the present reporter of the committee, Prof. Paul Carrington of Duke Law School, has written that judges are more fit to be the rulemakers because judges, unlike lawyers, "are not advancing personal agendas." But judges have a vested interest in reducing the workload of the courts, and they may attempt to advance that agenda without sensitivity to the impact on the system as a whole, particularly the impact on the attorney-client relationship.

Changed Relationship

It is clear that the newly proposed revisions to the rules will de facto alter the attorney-client relationship. Whether intentionally or unintentionally, the advisory committee has elevated attorneys' institutional obligations as officers of the court over their ethical obligations to provide zealous advocacy and protect work product and client confidences. The proposed rules changes, including changes to Rules 11 and 26, will provide disincentives to meeting these ethical obligations and place the highest priority on rules that presumably will move cases efficiently through the system.

For example, revised Rule 26 will, if adopted, require attorneys to disclose, without request or definition by their opponents, all potential witnesses and all potentially relevant documents, whether or not supportive of their cause. What the attorney considers relevant (work product) and what the client directs the attorney to consider (attorney-client privilege) will have to be disclosed.

Failure to make sufficient disclosures will result in the imposition of monetary sanctions against the attorney. Ethical rules and long-held assumptions fostered by Supreme Court opinions about the importance of the attorney-client privilege have been sacrificed to the judicial agenda without any airing of the issues.

Those most sensitive to the rules' impact have been excluded from the debate.

Indeed, one of the practicing litigators on the advisory committee, Carol J. Hansen Fines from Springfield, Ill., dissented from the amended rules, asked, "by putting the attorney in the posture of having to disclose early on favorable and adverse information, are we encouraging clients to be less than forthcoming with their counsel?" But her voice and her vote are insufficient to stay the tide. Experienced and respected private practitioners, who historically were heavily represented on this body, have had no opportunity meaningfully to debate the important issues at stake.

Balanced Representation

In 1985, Congress took note of the lack of representation of the practicing bar on the advisory committee. A provision in H.R. 3550, an amendment to the Rules Enabling Act, would have mandated that the advisory committee consist of "a balanced cross section of bench and bar, and trial and appellate judges." This provision was deleted because the Judiciary Committee "expect[ed]" that the Judicial Conference would voluntarily "act promptly to rectify the concerns about representativeness of the committees." The result anticipated was that the advisory committees would "not be dominated by any single perspective or interest group."

That expectation has not been fulfilled. Mr. Frank, who served on the Advisory Committee from 1960 to 1970, recently charged that it "has gotten way too much out of touch with the bar."

The new proposed rules result from widespread feelings of dissatisfaction with the present state of the justice system. But these changes have not been the product of a grass-roots effort by those in the trenches. Unless and until there are more practicing attorneys on the advisory committee, important decisions that will define litigation practice and affect professional ethics as we enter the next century will be imposed on the bar without its representation in the process. At a minimum, fundamental changes in the ethical obligations and relationships between attorneys and clients deserve debate. That debate cannot occur when the decision-makers are not attuned to the issues.

Ms. Kaster is a partner at the law firm of Jenner & Block in Chicago and one of the authors of the Bench-Bar Proposal to Revise Civil Procedure Rule 11. Mr. Wittenberg is an associate at Jenner & Block.

Bench-Bar Alternative For Rule 11

By George Cochran
Special to The National Law Journal

FOR THOSE WHO have committed a significant portion of their professional time to litigating Rule 11 cases, it has been clear for quite some time that the rule is incapable of a lawyer-sensitive judicial construction. The dynamics of satellite litigation premised on base allegations designed to produce serious professional and economic harm, the use of the rule as a tactical weapon and the futility of all attempts

The proposed revision is a good-faith attempt to deal with a volatile issue.

to give substantive content to the word "frivolous" were but three of the many issues raised by those contending that the rule — as amended in 1983 — was defective.

Efforts to have the rule further amended have proved successful. It is my position that the proposed revision reflects a good-faith attempt to deal effectively and constructively with what is now a volatile issue with both the bench and bar. Those demanding change gathered with those supporting the rule in October 1990 at a conference sponsored by New York University School of Law and organized by Alan Morrison of Public Citizen. Two days were allocated in which more than 40 lawyers, judges and academics set forth their views of the rule's impact on litigation throughout the United States.

Shortly thereafter, the Advisory Committee on Civil Rules of the Federal Judicial Conference solicited comments, held hearings and issued a proposed revision. Symptomatic of just how volatile the matter had become, an independent group, led by John P. Frank of Phoenix's Lewis and Roca, challenged the committee and developed what is now known as the "bench-bar" alternative.

Thereafter, the Standing Committee on Rules of Practice and Procedure, displaying what some may characterize as Solomonic wisdom, made further modifications and issued what can now be referred to as the "final" version. Absent action by the Judicial Conference, the Supreme Court or Congress, it takes effect in December 1993.

Employing language similar to that found in the current Rule 11, it proscribes filings made for either an improper purpose or without a "reasonable inquiry" into law or fact. Factual contentions that cannot be derived from a reasonable inquiry — for example, cases in which relevant information is under the control of the defendant — may be alleged on information and belief.

Leaving no doubt that the rule is designed to apply equally to the defense bar, a new provision is inserted imposing similar requirements for denials of factual contentions. In addition to covering all allegations contained in any filing, a "continuing obligation" requirement imposes liability for advocating positions that an attorney knows have ceased to have merit.

Expanded Liability

Unlike the current rule, which punishes only the signatory counsel involved in filings, the proposed version imposes liability upon attorneys and law firms that violate Rule 11 or are "responsible for the violation." Save for violations of the reasonable-inquiry-into-law requirement, parties also may be held liable under the "responsibility" standard. Expansion of potential liability, while dramatic, is accompanied by changes that establish disincentives for the filing by attorneys of non-meritorious Rule 11 motions for the purpose of tactical harassment and significantly limit the potential for abuse of the sanctioning power. These changes reflect significant improvements.

Lawyers will have to think twice before filing motions for tactical reasons.

District courts are given authority to impose fees for "presenting or opposing" Rule 11 motions. Thus, in direct contrast to the high level of tolerance implicit under the present rule, lawyers must think twice before filing motions for tactical reasons. There is also the "safe-harbor" provision: Rule 11 motions may only be filed 21 days after service of a motion describing the specific conduct at issue and if no corrective action is taken in the interim. The Standing Committee's further decision to substitute "may" for "shall" relieves the district court of the obligation to impose sanctions for every violation.

Equally important, the revision sets forth clear, definite standards designed to reduce, to the maximum extent possible, the *in terrorem* effect of the present rule. District court judges are directed to insure that sanctions "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." They are to consider penalties of a non-monetary nature, such as admonitions, reprimands and continuing education.

If the court determines that a monetary sanction is appropriate, the Committee Notes specifically provide that "it should ordinarily be paid into court as a penalty." If found "warranted for effective deterrence," however, liability may be imposed for "some or all" of the fees and costs limited to that amount "incurred as a *direct* result of the violation." The Notes stress that this alternative is to be used only in the most "unusual" circumstances, for example, filings made for an improper purpose. Finally, the power of district courts to sanction on their own initiative is limited to orders to show cause before a voluntary dismissal or settlement of the claims at issue.

Remaining Doubts

I had serious reservations as to whether the efforts of the Advisory and Standing committees would produce a proposal that dealt with the multitude of abuses generated by the existing rule. I remain concerned with the overlap between many provisions of the code and rules and the fact that no real attempt has been made to codify a uniform, easily understood set of sanctioning standards acceptable to the bench and bar.

The fact that the scope of due process protections to be afforded lawyers is given limited consideration is also troubling. Even in light of these concerns, however, I believe that the proposed revision will, if not eliminate, significantly curtail misuse by the bar, minimize use of the rule as a punitive measure by district judges and, most important, re-establish the proposition that lawyers litigating in good faith do not practice law at their own professional and financial peril.

If the experience of the past two years means anything, it is that, although the rules process does have institutional problems, the views of a significant segment of the bar were heard and incorporated into the final product. Prof. Paul Carrington, the reporter for the Advisory Committee, made himself available to listen to the full spectrum of views presented at the NYU conference. The committee then took the extraordinary step of calling for comments and holding hearings before drafting a revision. The call for comments alone resulted in more than 125 responses, the overwhelming majority of which bolstered the conclusion that the rule did suffer from serious systemic problems.

After a proposed rule was issued, further constructive pressure was exerted by the bench-bar proposal that was supported by nine state bars and organizations as diverse as the National Association of Securities & Commercial Law Attorneys and the American Civil Liberties Union. The Standing Committee responded with several changes, the most important of which drastically altered the tone of the rule by relieving district judges of the obligation to impose sanctions for a violation. While not total, the proposed amendment must be considered a victory for the bar, won thanks to the interest and constructive criticism proffered during the amending process.

Study Needed

ALTHOUGH CONGRESS HAS empowered the U.S. Supreme Court to prescribe rules of practice and procedure for the federal courts, the court, as Justice Byron R. White commented recently, "does not itself draft and initially propose these rules." The court's role, he added, has been to send rules drafted by judicial committees to Congress "without change and without careful study."

But the sweeping revision of the Federal Rules of Civil Procedure, including discovery reforms and a softening of Rule 11 sanctions, requires careful scrutiny as the amendments move closer to becoming law on Dec. 1. Efforts to reduce litigation cost and delay are commendable, but there is danger that the reforms merely add another layer to the process. Congress already has made reducing litigation cost and delay a political issue by mandating local reform experiments. Now it must decide whether to block the judicial proposals while local plans are tested or to join the judiciary's push to hasten uniform national reform.

VOL. 15—NO. 38 PRICE $3.00 MONDAY, MAY 24, 199

Terry Ashe/Gamma Liaison

U.S. Sen. Joseph Biden, flanked by Sens. Ted Kennedy, right, and Strom Thurmond, is among those members of the Senate Judiciary Committee who will be considering the Biden Bill, which could change discovery rules dramatically.

Derailing the Rules

By Randall Samborn
National Law Journal Staff Reporter

A DIVERSE COALITION of lawyers is preparing to lobby Congress in a last-ditch effort to derail unpopular discovery reform proposals. But it's an open question whether legislators — facing the budget deficit and health care reform — will have any appetite for overriding the judiciary's proposed amendments to the Federal Rules of Civil Procedure.

Unless Congress decides to take some action, the most comprehensive amendments since the civil rules were adopted in 1938 automatically take effect Dec. 1. (NLJ, May 3.) Most of the controversy that flared over several proposals — including softening Rule 11's judicial sanctioning powers — has waned as the five-step rules-making process, begun in 1991, nears completion. But opposition from both plaintiffs' and defense lawyers remains strong to amending Rule 26 to require that litigants exchange basic information before beginning discovery.

If Congress chooses to exercise its authority to intervene, it may find itself embroiled in a thorny technical debate, partly of its own making. Some observers, including Prof. Carl Tobias of the University of Montana School of Law, say that the judicially sponsored rules amendments are on a "collision course" with overlapping reforms mandated by Congress under the Civil Justice Reform Act of 1990, known as the Biden Bill. (NLJ, 2-2-92.)

All three branches of government have advanced competing proposals to revamp civil litigation in recent years — including the Bush administration's lawyer-bashing rhetoric — with the goal of reducing costs and delays. The reform movement is sparking difficult questions over separation of powers, and the need for uniform national rules vs. the so-called Balkanization of procedures to accommodate local legal cultures.

With mandatory disclosure experiments under way in nearly two dozen districts via the Biden Bill, a cadre of prominent defense lawyers — concerned, in part, about overlapping reform efforts — is leading the charge to block the Rule 26 amendments. The changes would mandate a mutual duty to disclose so-called core information, including adverse material, soon after a lawsuit is filed without waiting for formal pretrial discovery requests.

Intended to streamline pretrial discovery, the amendment would require parties to automatically disclose such core information as the names of potential witnesses, including experts, documentary evidence, and data regarding damages and insurance.

Another voice expected to be heard in Congress is that of the 23,000-member National Court Reporters Association, which vehemently objects to amending Rule 30(b), to allow attorneys to record depositions with audio or video tape instead of stenography.

It is too soon yet to know how Congress might respond to these pleas for intervention. Spokesmen for the Senate Judiciary Committee, chaired by Sen. Joseph Biden, D-Del.; its Subcommittee on Courts and Administrative Practice, chaired by Sen. Howell Heflin, D-Ala., and the House Judiciary Committee's Subcommittee on Intellectual Property and Judicial Administration, chaired by Rep. William J. Hughes, D-N.J., say no decision has been made whether to conduct hearings. The senators, of course, will soon be preoccupied with Supreme Court and other judicial nominations.

The Opponents

Despite the presumption at this stage that the rules will be enacted, the unusual coalition of opponents presents a powerful alignment, according to some observers, that gives them a fighting chance of persuading Congress to provide the relief they were unable to win from the judiciary.

Leading the opposition is the Committee on Procedural Reform of Lawyers for Civil Justice, a Washington,

D.C.-based defense consortium. Samuel Witt III, of Womble Carlyle Sandridge & Rice in Winston-Salem, N.C., chairs the committee. Supporting organizations are: American Legislative Exchange Council, Association of Defense Trial Attorneys, Business Roundtable Lawyers' Committee, U.S. Chamber of Commerce, Federation of Insurance and Corporate Counsel, International Association of Defense Counsel, District of Columbia Bar Litigation Section, Defense Research Institute and Public Citizen Litigation Group, a defense bar adversary.

The defense groups opposing mandatory disclosure argue that instead of streamlining discovery, it merely adds another pretrial layer. Some favor a system of consensual or sequential disclosure, in which the plaintiff would show his or her evidence first.

Former Solicitor General Erwin N. Griswold, senior counsel in the D.C. office of Jones, Day, Reavis & Pogue, in Febuary wrote a memorandum to the Supreme Court on behalf of all of these groups asking the justices to reject mandatory disclosure.

After the Supreme Court rebuffed his arguments, Mr. Griswold said, "I don't think that practicing lawyers, including those in Congress, will be very charmed by the idea that regardless of the attorney-client privilege, lawyers will have to volunteer information that otherwise would be confidential between them and their clients."

'The Back Burner'

The opponents are floating several options. They are considering asking Congress to simply defer implementation of amended Rule 26 or delete its disclosure provisions and allow the remaining amendments to be approved, according to Mr. Witt and Alfred W. Cortese Jr., of the D.C. office of Chicago's Kirkland & Ellis.

The deletion option appears to be "the cleanest and most effective for Congress, in effect, to follow the view of most litigants," says Mr. Cortese, an executive committee and board member of Lawyers for Civil Justice.

The U.S. Justice Department, the largest single user of the federal courts, has yet to take a position under the Clinton administration, says a department spokesman.

The 65,000-member American Bar Association Litigation Section, composed of both plaintiffs' and defense lawyers, which opposed an earlier version of the mandatory disclosure requirement, is scheduled to consider continuing its opposition at a governing council meeting in June, says David C. Weiner, section vice chair of Cleveland's Hahn Loeser & Parks. "We hope Congress puts this on the back burner," says Mr. Weiner, who with two colleagues unsuccessfully petitioned the Supreme Court to block the discovery reforms.

The largest plaintiffs' attorneys bar, the Association of Trial Lawyers of America, is scheduled to decide whether to continue its opposition at a board of governors meeting this month, according to ATLA President Roxanne Barton Conlin, a Des Moines, Iowa, sole practitioner. Although many of the objections that ATLA made previously have been resolved, the revised disclosure provision still presents problems, says Ms. Conlin.

"We don't get what's there [now] through discovery," she says. "The idea that [defendants] are just going to tell us everything we need to know to win our lawsuits just doesn't seem very practical."

Arthur H. Bryant, executive director of D.C.-based Trial Lawyers for Public Justice, a national public-interest law firm, also opposes the Rule 26 amendments, as well as proposed discovery Rules 30, 31 and 33, which presumptively limit parties to 10 depositions and 25 interrogatories each. Mandatory disclosure without unlimited discovery won't work, he says. "We don't think people will fully disclose information that will hurt them voluntarily unless they know it will be discovered eventually."

Virtually the only bar group that endorsed the Rule 26 amendments is the exclusive American College of Trial Lawyers, which has no plans to join the debate unless asked by Congress, says Ken Sherk, head of ACTL's federal civil rules committee.

Lawyers should focus their arguments before the rules-writing committees and "not have them think you will go over their heads and fight to the ends of the earth," says Mr. Sherk, of Phoenix's Fennemore Craig P.C. In addition, he says Arizona recently has adopted a mandatory disclosure rule even more stringent than the proposed federal rule, and there do not appear to be any major problems.

U.S. District Chief Judge Sam C. Pointer Jr., chair of the U.S. Judicial Conference Advisory Committee on Civil Rules, says "certainly some deference [by Congress] is appropriate given the thoughtful and intensive consideration that went into changing the rules." But it is part of the process, he adds, for Congress "to review and perhaps take action on the rules changes."

Clashing Acts

Probably the biggest dilemma for Congress is how to mesh the rules amendments with the 1990 Civil Justice Reform Act. The act requires committees in each of the 94 court districts to adopt a plan for reducing litigation expense and delay — asserting Congress' interest in managing the courts.

Although the act does not mandate experimentation with automatic disclosure, 22 of the 38 districts currently operating under such plans chose voluntarily to incorporate various forms of mandatory disclosure, according to the Administrative Office of the U.S. Courts. The remaining 56 districts must have plans ready for implementation by Dec. 1.

Most of the districts experimenting with disclosure adopted the language of the Judicial Advisory Committee's initial Rule 26 proposal in 1991, which called for broad automatic release of information that "bears significantly on any claim or defense." But after being bombarded by written and verbal opposition in February 1992, the committee backed down from any prediscovery disclosure requirement.

Then, two months later, led by Judge Ralph K. Winter Jr. of the 2d U.S. Circuit Court of Appeals, the committee reversed itself and adopted a reformulated Rule 26, — the version pending — requiring disclosure of "discoverable information relevant to disputed facts alleged with particularity in the pleadings." (NLJ, 5-4-92.)

"I don't think that we've done anything that is anywhere near as radical as some think it is," says Prof. Paul D. Carrington of Duke University School of Law, who was the Advisory Committee reporter until last year. Committee members said at the time they felt compelled to act for two key reasons: If they waited until 1995 for evaluation of the Biden Bill plans, it would be 1998 before any new federal rule could be promulgated; and a local exemption in the mandatory disclosure provision allows the district courts to adopt or reject the requirement or continue working with a variation.

Some Districts Experiment

In the Eastern District of New York, the Biden Bill committee has asked the court to extend an 18-month experiment with mandatory disclosure for another year, says chairman Edwin J. Wesley of New York's Winthrop, Stimson, Putnam & Roberts. Mr. Wesley says more time is needed because too few lawyers have complied to make a meaningful evaluation.

In the Northern District of California, experimentation with automatic disclosure appears to be working smoothly, says Prof. Richard L. Marcus of the University of California, Hastings College of Law. "Congress could wound the existing rules process by getting into this problem, and it's not likely that it will improve on the proposal. It may kill it," he says.

Mr. Griswold, in his court memorandum on behalf of the defense coalition, argued that adoption of amended Rule 26 "will undermine the vitality of the experimental plans," adding it is unlikely that the federal rule later would be superseded by a better system after experimentation.

Prof. Judith Resnik of the University of Southern California Law Center says the tension between the Civil Justice Reform Act and the pending rules amendments may result in either "chaos or creative conversation." There are benefits to creative conversation, she adds, but "litigants will have to absorb the cost of lawyers' knowledge of rules from variation to variation."

And, Professor Resnik cautions, "You have to build in a lot of judicial patience for lawyers' learning curves."

Reports: Little Discovery Abuse

By Randall Samborn
National Law Journal Staff Reporter

TWO NEW STUDIES of civil discovery — the first in a decade — conclude that for most cases, "formal discovery is not out of control," and the bench and bar can correct problems that do exist without adopting major changes in the rules governing discovery.

Often bound by tradition, lawyers do not favor the radical discovery reforms envisioned by the proposed amendments to the Federal Rules of Civil Procedure, according to the studies, which also show that discovery is conducted less often than some reform advocates have estimated.

Researchers at the National Center for State Courts, based in Williamsburg, Va., have just completed two studies — a survey of 260 attorneys and an analysis of 2,190 cases in five selected state courts. The new findings corroborate some of the earlier data and provide ammunition to opponents of some procedural reforms pending before Congress. (NLJ, May 24.)

The NCSC's finding that no formal discovery is filed in 42 percent of the contested tort, contract and property cases that it examined (compared to 48 percent in a 1978 Federal Judicial Center study of federal cases) strikes at the heart of a judiciary proposal to amend Rule 26 to require opposing counsel to exchange basic information before beginning formal discovery. The mandatory disclosure provision aims to minimize discovery costs and delays by requiring parties to exchange names of witnesses and experts, documents and damages and insurance information.

An unusual coalition of plaintiffs' and public-interest lawyers and defense counsel is rallying opposition to the U.S. Supreme Court's rubber-stamping of the proposal on April 22, along with setting new limits on the number of depositions and interrogatories. The amendments take effect Dec. 1 unless Congress intervenes.

"Disclosure requirements will force parties to bear the costs of formally exchanging information in many cases that otherwise would not involve discovery," says Susan Keilitz, senior staff attorney at the NCSC and one of the principal authors of the companion reports. "Whether or not these increased costs at the front end of litigation will have an overall salutary effect on litigation costs and delays certainly remains an open question," she says, adding, "the reach of the disclosure rules could be great because many states pattern their rules on the federal rules."

Creating More Problems

Alfred W. Cortese Jr., of the Washington, D.C., office of Chicago's Kirkland & Ellis and a spokesman for Lawyers for Civil Justice, which is leading opposition to the discovery reforms, says the reports "really confirm the points we've been making over the last couple of years — that disclosure imposes an additional burden on the courts and creates more problems than it would solve."

The reports are based on data collected between 1987 and 1989 from Massachusetts Superior Court in Boston; Jackson County Circuit Court in Kansas City, Mo.; Connecticut Superior Court in New Haven; Mason County Superior Court in Shelton, Wash.; and King County Superior Court in Seattle. The courts were chosen because, in addition to their diversity in population, geography, economy and culture, at the time they required all discovery documents to be filed.

"Attorneys value the participation of judges in preventing and redressing discovery abuse, but they prefer close attention by judges to individual cases rather than the imposition of broad and rigid rules," states a report containing the attorney survey results.

"If the uncooperative behaviors and inexperience of attorneys are the primary causes of discovery problems, rules governing the discovery processes are not likely in and of themselves to redress those problems," it adds.

Says Roger Hanson, an NCSC senior staff associate and co-author of the reports: "That [inexperience and uncooperative behavior] suggests that the solution lies not in rule changes but points to the importance of education, training and almost the monitoring of attorneys."

Question of Economics

The case study concludes that mandatory disclosure, rather than reducing costs and easing court access, "may put further restraints on litigants whose disputes are on the edge of being economical to pursue." Increased front-end costs also leave less money for settlement and may encourage defendants to hold out longer, it adds. And, rather than alleviate the burden of discovery motions on judges, it could generate collateral motions over non-compliance or disagreements about what information must be exchanged.

But, the study says, automatic disclosure might reduce litigation if parties settle before a suit is filed to avoid the costs of early disclosure. And, if compliance is high, courts may see a decrease in discovery motions and "costs to litigants may eventually level off at a lower rate."

Prof. Linda Mullenix, of the University of Texas School of Law, also on the center advisory committee, says, "lacking good empirical support for the proposition that there's massive or pervasive discovery abuse, the discovery rules should not be amended at all."

One NCSC report, "Attorneys' Views of Civil Discovery," is scheduled to appear in the spring issue of the Judges' Journal, an American Bar Association publication. The other, "Is Civil Discovery in State Trial Courts Out of Control?" will appear in the summer issue of the NCSC's State Court Journal.

APPENDIX E

INTERVIEW

Judge Robert E. Keeton: A Look at Rule-making in the Federal Judiciary

Judge Robert E. Keeton was appointed to the U.S. District Court for the District of Massachusetts in 1979. He is chairman of the Judicial Conference Committee on Rules of Practice and Procedure and has served on several other Conference committees.

Q: What is the role of the Judicial Conference in rule-making?

A: The Conference is required by law to conduct "a continuous study of the operation and effect of the general rules of practice and procedure." It is also responsible for recommending changes in the federal rules to promote "simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."

The Conference's Committee on Rules of Practice and Procedure, commonly known as the Standing Committee, coordinates the rule-making process and transmits all proposed rules amendments to the Conference. The Conference has five advisory committees, on appellate, bankruptcy, civil, criminal, and evidence rules. The five advisory committees consider all proposed rules changes, conduct public hearings, consider public comments, and draft amendments.

Q: What is the process for enacting amendments to the rules?

A: Anyone may initiate a proposal to amend or add a rule by sending a letter to Peter McCabe, secretary to the committees. The secretary sends each comment to the appropriate advisory committee for consideration.

The reporter to that committee analyzes the suggestions and, where appropriate, drafts proposed amendments to the rules and prepares explanatory advisory committee notes. The proposals are then discussed in detail by the members at committee meetings. When an advisory committee is ready to proceed with proposed amendments to the rules, and the Standing Committee approves publication, the secretary mails the proposed amendments and advisory committee notes to more than 10,000 individuals and organizations across the country, seeking their comments. Also, the advisory committee holds public hearings.

The number of comments we receive is increasing substantially. Partly, this may be because recent proposed rule changes have dealt with such controversial subjects as attorney sanctions and reduction of costs and delays in civil cases.

After considering the written comments and testimony from bench and bar, the advisory committee makes a fresh decision on the proposed amendments. Proposed amendments are then sent to the standing committee for consideration and from there to the Judicial Conference. The Conference transmits the rule changes it approves to the Supreme Court, which passes on its proposed changes to Congress. The new rules become effective on December 1 of the same year, unless affected by congressional action.

Q: The process you have outlined is elaborate. Is it necessary?

A: The answer implicit in the Rules Enabling Act is YES, at least in general. The federal rules directly affect the daily business of all the district and circuit courts. They also serve as a pattern for many state procedural rules. The pervasive impact of the federal rules is good reason to make the process exacting and thorough.

The process is also very open. All meetings of the standing and advisory committees are open to the public. The minutes of these meetings and the papers of the committees are a matter of public record and may be obtained through the secretary.

Q: You have created subcommittees to review the rules as a whole and to study the integration of the rules. What is this about?

A: By statute the standing committee must review each recommendation of the advisory committees and recommend to the Judicial Conference such changes "as may be necessary to maintain consistency and otherwise promote the interest of justice." Some of the existing rules deal with the same or closely similar issues in different ways, in some instances just because they were drafted at different times by different drafters. Also, over time and with a succession of amendments, some rules have become unnecessarily complicated.

I have appointed a Style Subcommittee, chaired by Professor Charles Alan Wright, to identify inconsistencies and work toward clarifying and simplifying the language of the rules. Working with Judge Sam Pointer and the advisory committee on Civil Rules, the Style Subcommittee now has nearly completed a comprehensive first draft revision of the Federal Rules of Civil Procedure. It significantly reduces the number of words, resolves inconsistencies and ambiguities, and makes the rules much more readable. The committees must

do additional work before these style changes (along with the substantive changes essential to resolving ambiguities) are ready for public comment. The committees have made a good start on improving the quality and readability of the civil rules, and I hope a draft will be ready for publication soon.

In the long run, a closer integration of the five separate sets of rules could eliminate needless repetition, as well as inconsistencies, that leave a reader in doubt as to whether different meaning was intended and, if so, why. A subcommittee will continue to study the feasibility of closer integration of the different sets of rules.

Q. What is the status of the committee's project to review the local rules of court?

A. The local rules project began several years ago under Dean Daniel Coquillette and Professor Mary Squiers of Boston College Law School. At the request of the standing committee, they reviewed all the local rules of the district courts and the courts of appeals for consistency with the national rules.

The Administrative Office has distributed widely the findings of the Local Rules Project. One of the principal benefits has been to focus each court's attention on the numbering system for local rules. Out-of-state practitioners and local attorneys inexperienced with federal court practice have complained about not knowing where to locate the many procedural requirements set forth in local rules. Consistent numbering can help. The project has recommended a uniform numbering system for local court rules that is linked to the numbering of the national rules. Most of the courts of appeals now use the recommended uniform numbering system, and a growing number of district courts are adopting the system.

Q. Could you tell us something about proposed changes in the rules that have not yet taken place?

A. Two packages of rules changes are in the works. The first package, approved by the Judicial Conference last September, is now under consideration by the Supreme Court. Among other things, a number of significant and controversial changes have been proposed in the civil rules to reduce cost and delay in litigation and to recast Rule 11, governing attorney sanctions. If these amendments are approved by the court and not rejected by the Congress, they will take effect on December 1, 1993.

The second package, which contains proposed changes in the appellate, bankruptcy, criminal, and evidence rules, has just been sent to the bench and bar for public comment. Of particular interest, the proposals would rewrite Criminal Rule 32, concerning sentencing and judgment, and Evidence Rule 412, dealing with the admissibility of evidence of a victim's past sexual behavior or predisposition in a civil or criminal case. The period for public comment on these rules closes on April 15, 1993. The respective advisory committees will consider the comments this April and May. If amendments to the rules are approved through the five-step process (advisory committee, standing committee, Judicial Conference, Supreme Court, and Congress) without delay at any point, they will take effect on December 1, 1994.

Q. Do you have any concerns over the rule-making process?

A. Yes. There is some ongoing tension both about the process and about the substance of current proposals.

There is a perception that the federal rules are amended too quickly and too often. The standing committee and the advisory committees are very sensitive to this concern. Indeed, many thoughtful and valuable suggestions never reach the public comment stage because they are not considered critical enough by the committees to warrant the serious step of amending the rules.

On the other hand, some court rulings and new legislation inevitably require amendment of rules—and in a few instances, prompt amendment.

We are also very mindful of our statutory obligation to evaluate continuously the operation and effect of the federal rules and to recommend rules changes to promote simplicity and fairness in procedure and to eliminate unjustifiable expense and delay.

I am also concerned that bills continue to be introduced in Congress to amend federal rules directly by statute, bypassing the Rules Enabling Act process. We work closely with other Judicial Conference committees and the Administrative Office to persuade members of Congress to allow the Rules Enabling Act process to operate. Acceleration of the process, in particular instances, may be both feasible and appropriate. We believe, however, that the basic procedures for notice, comment, and meticulous care in drafting are especially appropriate for rules of procedure in the courts, and that the benefits of adhering to the process outweigh interests that might be served by quicker action that bypasses these safeguards.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
FRANK H. EASTERBROOK
CIRCUIT JUDGE

March 8, 1993

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

Dear Dan:

Rereading my notes from the last meeting of the Standing Committee, I realized that I might have an outstanding commitment to send you some ideas for the Committee's future schedule.

My thoughts have not changed since the final day of our meeting last December. We should move the meeting dates in order to shorten the gap between proposals by advisory committees and the final promulgation of rules by the Supreme Court.

Our current schedule ensures a long delay unless we abbreviate the time for comment—which we have taken to doing regularly, albeit without the justification nominally required by the rules of the Judicial Conference. New proposals from the advisory committees come up at our winter meetings. Unless we shorten the time for comment, the advisory committee cannot make its recommendations on final drafts in time for our summer meeting. Thus we cannot make a recommendation to the Judicial Conference for consideration that fall. That creates an entire year's additional delay.

We can combat this problem by moving the winter meeting of the Standing Committee into the fall. (Judge Keeton suggested September, which has the additional benefit of preceding the expiration of members' terms; in this way, persons knowledgeable about what is in the pipeline will be able to address pending issues.) Publication early in November, with four months as the normal comment period, would permit the advisory committees to meet in March and April to recommend final drafts. Then the Standing Committee could meet in June to consider these recommendations and make proposals to the Judicial Conference. This schedule would leave time for all of the participants in the process to act with due deliberation.

Although some bar groups would object to 4-month comment periods (they have their own problems with internal consultation), we could assuage these concerns by adopting a policy that substantial proposals—such as the recent changes in Rule 11 and the discovery rules—would have the benefit of longer comment periods. Indeed, because going beyond four months puts the whole schedule back a year, we could ensure 12-month comment periods on

substantial packages, while still giving the advisory committees additional time to deliberate on these proposals.

Still another way to proceed would be to return to the approach that Joe Spaniol described during the Maris Era: to publish the advisory committees' drafts on the say-so of the Standing Committee's chairman, without the elaborate procedure in which we now engage. I think that there is much to this, although this takes us deep into the territory of Judge Stotler's letter (and the impending discussion at our next meeting).

The Standing Committee's principal task ought to be structural—to consider what major changes in the rules are called for (see my letter to Tom Baker about long range planning), and to oversee the completion of the work in this direction. The members of the advisory committees are every bit as skilled as the members of the Standing Committee, which implies letting the advisory committees handle issues of detail, subject to suggestions from the Standing Committee. Once the Standing Committee has debated and resolved issues concerning the appropriate objectives of the rules, the advisory committees (with the Chairman's supervision) can proceed directly.

Suggestions on language and similar matters need not, and ideally should not, come at our formal meetings—and this for two reasons. First, the advisory committees inevitably make changes after receiving public comments, so that detailed drafting submissions squander our time. They get lost in the rewrite. Second, drafting in committee is both ungainly and in most instances unnecessary.

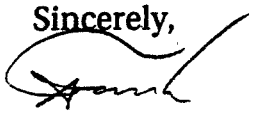
Recall how the discussion of Criminal Rule 32 proceeded at our winter meeting. Many members had detailed language suggestions. These were too many, and too diverse, to handle on the floor. But few of the suggestions were substantive, so that the Chairman and Reporter of the criminal advisory committee were able to redraft off the floor to achieve a satisfactory text. Meanwhile, however, Judge Bertelsman's genuinely substantive suggestions were lost in the shuffle. We spent so much (unnecessary) time on words that substance got slighted. Both kinds of substance: whether we should be trying to achieve Objective X, and whether the overall plan of the text would achieve Objective X without excessive damage to another valuable goal. Too bad that such things get submerged, for our job is, or ought to be, fundamentally substantive.

Suppose we were to adopt a rule that proposed changes in the text of a draft rule must be submitted to the advisory committee (and perhaps the Standing Committee's Chairman and subcommittee on style) three weeks before our meetings. I'll bet that 95% would be resolved without the need for anyone to say a word come our formal meeting. Then we could devote our time to questions of what the rules should be trying to achieve, rather than what form of words would achieve that objective. Sometimes form and substance are inseparable; that's the other 5%. But narrowing the discussion in this way would be a great improvement.

Perhaps a suggestion to refocus the attention of the Standing Committee on structure rather than technique also implies a change in its membership. Instead of a large Standing Committee with the chairman of the advisory committees as adjuncts, the Chief Justice might contemplate making the advisory committees' chairman full members of the Standing Committee, and having a (smaller) number of outside members of the Standing Committee, each with a simultaneous posting to one of the advisory committees. Such suggestions are beyond our province, although our long range planning subcommittee might engage in planning for the Standing Committee's structure as well as its agenda.

I hope these thoughts are helpful.

Sincerely,



Frank H. Easterbrook

cc: Hon. Robert E. Keeton
Hon. William O. Bertelsman
Hon. Alicemarie H. Stotler
Hon. Edwin J. Peterson
Prof. Thomas E. Baker

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

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
FTS / 799-2055

July 31, 1992

Judge Robert E. Keeton
U. S. District Court
Room 306, John W. McCormack
Post Office & Courthouse
Boston, Massachusetts 02109

Re: Standing Committee: Philosophy of Task

Dear Judge Keeton:

In light of June's three-day labor, I have reflected on the contribution the committee members are expected to make. Several times members referred to keeping their eye on the good of the order but then felt constrained to reflect the practices in their court or circuit.

Perhaps persons holding an established judicial philosophy already have a clear sense of mission as we traipse, sometimes broadly, sometimes nit-pickily, through the rules and, true to that philosophy, always know how their vote will be cast. As I commented to John Rabiej, this committee may be as close as I ever come to jury duty; and, as is reported from that experience, the deliberations are most troubling in the close calls.

Perhaps the December agenda will be too laden to engage in any discussion of the philosophy of this committee's task(s), but if time permits, I would like to see the members, or at least and especially you, Charlie Wright, and Joe Spaniol expound on how you view the following topics. (I would also enjoy hearing how the long term advisory committee chairs and their reporters also view the Standing Committee's role.)

1. Editing.

Presumably we all agree in the abstract that the standing committee meeting is not the place to re-write rules (or, not the place except when the disagreement can be fixed then and there).

On the other hand, these "amendments by consensus" leave me uncomfortable and unsure about what we have in fact voted for. Is there a cure, such as, longer meetings to allow for revision by staff or, with advanced technology, a way where we could view on an enlarged monitor the changes being proposed?

Along the same line, do the members view a rule proposed to be circulated for comment as requiring less care because it can be cleaned up later, or do they believe that greater care is required because the circulation itself sends an important message to the legal profession and must be well formulated in the first instance?

2. Deference to Advisory Committee.

My thought has been that these esteemed committees, their reporters, members, and commentators deserve a presumption of correctness. Don't they?

3. Constituency.

I note that the Committee Self-Evaluation report to Judge Gerry (cover letter of July 13) indicates "no" to the question about whether membership is "appropriately representative" and laments the absence of more practicing members of the bar. Do I have a duty to canvass the Article III district judges to ascertain their sentiments about the Rules and thus "represent" my constituency?

In keeping with the national craze (judicial) over Long Range Planning (LRP) (mind you, I leave in two days for the Ninth Circuit Judicial Conference to head the first day's program on --guess what -- LRP!), it occurs to me that my questions might more properly be directed to Professor Baker. Before you choose that course, however, I wish to call to mind the renewed interest among every minority group extant (and surely members of this committee constitute a distinct minority) in "story-telling." If there is worth in that endeavor from early civilization to now in the great places of learning, couldn't we indulge ourselves with some "oral history" about the philosophy, practices, and procedures of the Standing Committee? Maybe my letter all comes down to Judge Ellis' repeated references: "the memory of person runneth not to the contrary." (Say what?)

Please understand, I commit this interesting topic to your sound discretion and if we never hear a word from you about the philosophy and history of this outfit, then so be it!

Best regards.

Sincerely,

ALICEMARIE H. STOTLER
U. S. District Judge

cc: Professor Wright
Mr. Spaniol

PAUL D. CARRINGTON

DUKE UNIVERSITY SCHOOL OF LAW
BOX 90360, DURHAM NC 27708
919-684-5593
FAX: 919-684-3417

1616 PINECREST ROAD
DURHAM NC 27705
919-489-8668
FAX: 919-493-9888

January 20, 1993

Memo to Thomas E. Baker, Chair
Subcommittee on Long-Range Planning Committee
Standing Committee on Rules
Judicial Conference of the United States

Dear Tom:

Thank you for the invitation to make suggestions about the rulemaking process. I do have one.

In my judgment, the Standing Committee could usefully reconsider its role. In my opinion, obviously distorted by the role I have played, that committee has been too intrusive in reconsidering solutions worked out by the drafting committees.

Surely the Standing Committee should read the drafts carefully to make sure that as many glitches as possible have been removed. Drafting mistakes are like roaches that appear in the night; every time you turn on the light, there those rascals are. The Standing Committee can be enormously useful as a roach hotel.

The Standing Committee should also prevent a drafting committee from sending forward a proposal that is either politically hazardous to the rulemaking process or that is in the opinion of its members, plainly unsound. When acting for these reasons, the Committee should limit itself to squelching a proposal or remanding it back to the drafting committee with some advice or recommendations. It should on no account go forward with its own proposal, one that has not had the careful consideration of the drafting committee and has not been published for comment, and so forth.

In my appearances before the Standing Committee over seven years, it seemed without exception that the Committee was prepared, even eager, to substitute its judgment for that of the drafting committee. There are several hazards in this.

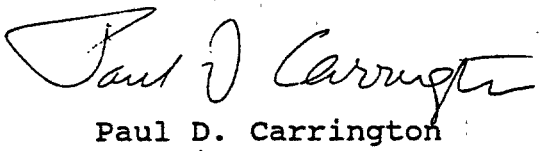
One is that the Standing Committee draft is not likely to receive the kind of careful consideration to which such texts should be subjected. For a single example, a serious technical blunder was introduced into Rule 11 by the Standing Committee when it substituted its judgment for that of the Civil Rules Committee on the applicability of the rule to non-signers. There have been other less harmful examples of this cost.

Secondly, the Standing Committee is not on the merits of the issues raised as likely to be well-informed. It cannot devote the time to any rule that the Civil Rules Committee does, through repititious consideration and reconsideration of drafts and through the hearing process.

Thirdly, substitution of judgment by the Standing Committee has a long-term demoralizing effect on the drafting committee, which is left to consider proposals not only on their merits but on the basis of what a virtually unknown Standing Committee might think about them. In short, the sense of responsibility of the drafting committee is over time diminished by this process. Morale would be higher if the Standing Committee made it plain that it adhered to a more modest role for itself. The considerations here are in many respects similar to those that animate a wise appellate court that constrains itself from second-guessing every close call by a trial court.

I hope that these thoughts may be useful. Best wishes.

Sincerely yours,

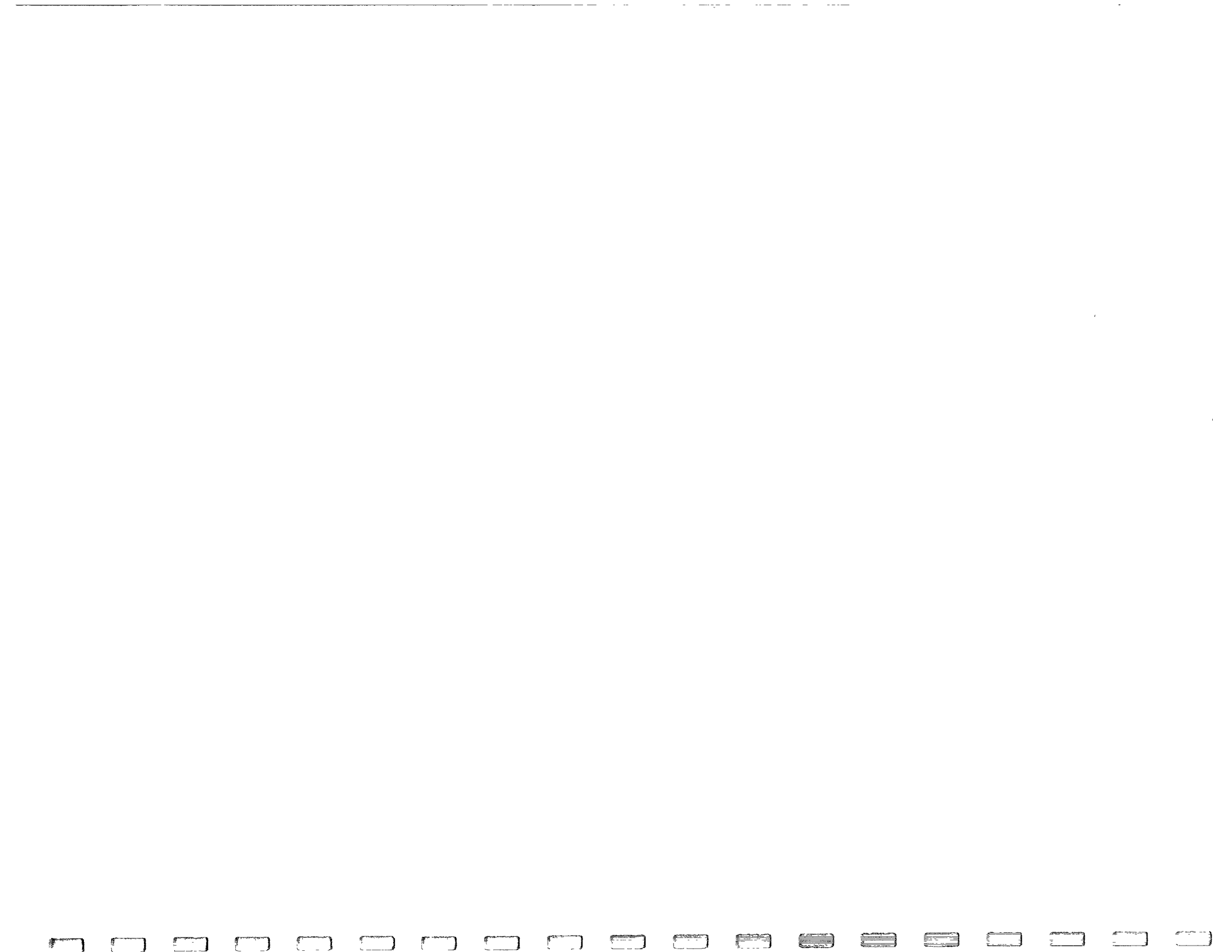


Paul D. Carrington
Chadwick Professor of Law

cc: E. Cooper
S. Pointer

AGENDA X
Washington, D.C.
June 17-19, 1993

ORAL PRESENTATION



AGENDA XI
Washington, D.C.
June 17-19, 1993

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

May 17, 1993

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

Enclosed are proposed amendments to Rules 23, 26(c), 43(a), 50(c)(2), 52(b), 59(b)-(e), 83, and 84. With the accompanying Committee Notes, these have been considered and approved by the Advisory Committee on Civil Rules for submission to the Standing Committee under rule 3c of the governing procedures. A summary of the proposals, briefly explaining the need for amendment and highlighting the more significant changes, is attached. The proposed revisions conform to the style conventions approved by the Advisory Committee in its undertaking to make the civil rules more concise, clear, and consistent; and a separate enclosure reflects how the rules with the proposed amendments would look in the new format that the Committee will be recommending.

Rules 83 and 84 were previously published and submitted to the Standing Committee, but have been reviewed for consistency with similar provisions being proposed in other federal rules. I call to your special attention proposed Rule 83(a)(2), which contains provisions not, as I understand it, being incorporated in the proposals from the other Advisory Committees. We do not assert that these provisions are merited by special circumstances unique in the Civil Rules; rather, we remain convinced that the principle contained in Rule 83(a)(2) would be generally appropriate as a limitation on enforcement of all local rules. We ask that this remaining difference in the views of the several Advisory Committees be resolved by the Standing Committee.

We request that the Standing Committee authorize publication of these proposals, affording the bench, bar, and public an opportunity to comment on the proposed amendments. Public hearings would also be needed. We suggest, however, that the Standing Committee consider postponing the time for publication, comments, and public hearings until after Congress has had time to evaluate the substantial changes in the Civil Rules adopted by the Supreme Court in April 1993. For that reason, we have not suggested any particular times or places for holding public hearings on the current proposals.

Sincerely,

Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules

cc: Secretary and Reporter, Standing Committee
Chairmen, other Advisory Committees
Reporter, Advisory Committee on Civil Rules

Proposed Amendments

Major controversy can be expected with respect to the proposed amendment of Rule 23, and there may be some controversy with respect to the proposed amendment in Rule 26(c). The others appear at this time to be largely non-controversial.

Where, for other reasons, changes in a rule are being proposed, the Committee has made language changes to conform to the stylistic conventions being used by the Committee in its review of all rules.

Fed. R. Civ. P. 23.

Numerous suggestions for changing Rule 23 were made following its last general revision in 1966, and ultimately the Advisory Committee declared a general moratorium on possible amendments to await further case law development.

More recently the Advisory Committee was requested by the Judicial Conference's Special Task Force on Asbestos Litigation to consider changes that might enable courts to use class action procedures in appropriate mass tort cases, at least in resolving particular issues affecting large numbers of actual and potential litigants.

Rule 23, in its 1966-form, has proved to be a useful tool in handling a wide variety of cases involving class claims, and one objective of the Advisory Committee has been to preserve the basic principles governing class actions. But the Committee also recognizes the desirability of addressing certain matters that from time to time have caused problems in cases certified for class action treatment or that have sometimes prevented class certification and in turn resulted in repeated litigation of the same issue, sometimes in hundreds of cases.

The proposed revision is drawn from a proposal submitted in the mid-80s by the Litigation Section of the American Bar Association, which in turn adopted an approach taken by the National Conference of Commissioners on Uniform State Laws. It incorporates, however, many suggestions made by others, including the special concerns when considering formation of defendant classes. The revision does not seek any changes in the jurisdictional requirements affecting class members; these matters are ones for Congressional action.

The principal changes may be summarized as follows:

(1) Elimination of the tripartite classification in current Rule 23(b), moving the requirement that a class action be superior to other available methods from Rule 23(b)(3) into Rule 23(a)(5), where it becomes a prerequisite for all class actions. The remaining provisions of Rule 23(b) become factors in deciding this essential issue of superiority.

(2) Flexibility for deciding, based on the circumstances of the case and due process, how and to whom notice should be given whenever a class is certified.

(3) Flexibility for deciding, based on the circumstances of the case and due process,

whether and under what conditions putative class members would be entitled to exclude themselves from, or join in, a class action.

(4) Highlighting the need to describe the matters certified for class resolution and the opportunity to limit class certification to specified claims, defenses, or issues while leaving others for individual resolution.

(5) Permit interlocutory review of rulings on class certification with leave of the appellate court, similar to current 28 U.S.C. § 1292(b). Particularly in view of the increased opportunity for discretion in the trial court, mandamus should not be the only option.

The Committee Note covers these changes extensively, and need not be restated here.

Some of the provisions may be viewed as "pro-plaintiff," and others as "pro-defendant." The Advisory Committee believes that a neutral balance has been struck which will improve Rule 23. The proposal, nevertheless, is likely to generate substantial controversy. It is time, however, to consider how Rule 23 can be made more responsive to the needs of litigation for the coming years. Comments following formal publication may well indicate other approaches would be preferable, and the Committee is prepared to consider other possible revision and republication.

Fed. R. Civ. P. 26(c).

Significant concern has been expressed during the past several years--leading to the introduction in Congress of proposed legislation--that protective orders sometimes have operated to conceal matters affecting the public interest or to increase the time and expense of other litigation involving similar issues. Others have noted the benefits such orders provide during the discovery process in facilitating the prompt and economical production of sensitive information relevant to particular litigation.

After study, the Committee concluded that this matter should be addressed not by changing the standards prescribed in Rule 26(c) for granting protective orders, but by adding explicit language regarding the alteration or dissolution of such orders. The addition of Rule 26(c)(3) dispels doubts respecting a court's power to alter or dissolve such orders, and lists certain basic factors--intentionally stated in broad terms in view of the competing interests that must be balanced--to be considered when exercising this power.

Fed. R. Civ. P. 43(a).

A minor change is proposed in the existing language of Rule 43(a): eliminating the requirement that testimony be given "orally," in order to assure that persons with speech impairments are not precluded from being witnesses.

A more significant change is that contained in the sentence to be added to Rule 43(a). This provision will provide a court with the flexibility to permit--for good cause shown--the testimony of a witness to be presented through satellite video or other contemporaneous transmissions from

another location. This provision will be helpful in eliminating the need for a continuance or suspension of trial when a witness who was expected to be available has some sudden emergency preventing attendance but is able to testify from a remote location. Pretrial depositions will continue to be the standard method for obtaining testimony if the potential unavailability of a witness can be reasonably anticipated.

An earlier published draft of Rule 43(a) had contained provisions dealing with a testifying witness's adoption of prepared written statements. These provisions have been eliminated from the current proposal to amend Fed. R. Civ. P. 43(a) in the belief Rule 611(a) of the Federal Rules of Evidence provides sufficient authority for using this procedure when appropriate.

Fed. R. Civ. P. 50(c)(2), 52(b), and 59(b)-(e).

These proposals were prompted by a suggestion from the Advisory Committee on Bankruptcy Rules. The existing civil rules are inconsistent as to when certain post-judgment motions must be filed. The proposed amendments eliminate the inconsistencies in the three rules and establish a uniform requirement; namely, that the motions be both served and filed no later than 10 days after entry of judgment. By requiring filing within a prescribed time--rather than the standard under Rule 5(d) for filing within a reasonable time after service--the rules recognize the important role these motions have on the finality of judgments, a matter that is frequently of concern to non-parties as well as to the litigants and the court.

Fed. R. Civ. P. 83.

The proposed amendments--which, for the most part, mirror similar changes being proposed by other Advisory Committees--incorporate applicable statutory language and direct that local rules conform to any uniform numbering system prescribed by the Judicial Conference and not merely duplicate national rules. Particularly with the increase in local rules generated under the Civil Justice Reform Act, it is important that litigants be able to locate local requirements readily and not risk overlooking significant requirements obscured through inclusion in unnecessarily long local rules.

Proposed Rule 83(a)(2) differs from the proposals coming from the other Advisory Committees. The Advisory Committee on Civil Rules believes that a negligent failure to comply with a local rule imposing a requirement of form should not be enforced in a manner to cause a party to lose any of its rights.

Similar concerns have prompted the proposed additional language in Rule 83(b), precluding sanctions for violating a judge's standing orders unless the litigant has had actual notice of the requirement. This language mirrors that being submitted by other Advisory Committees.

Fed. R. Civ. P. 84.

The proposed amendments, with the Committee Note, are self-explanatory. We believe that the process for changing rules will be improved if the Supreme Court and Congress are relieved of the burden of reviewing proposed changes in the forms or mere technical changes in the rules.

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

SUBMITTED TO

THE STANDING COMMITTEE ON

RULES OF PRACTICE AND PROCEDURE

BY

ADVISORY COMMITTEE
ON
CIVIL RULES

Caution: These proposals are being submitted to the Standing Committee with a request for publication and public hearings. They have not been approved by the Standing Committee.

MAY 1993

TABLE OF CONTENTS

Page

Proposed Amendments to the
Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) **~~Prerequisites to a Class Action~~.** One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if — with respect to the claims, defenses, or issues certified for class action treatment —

(1) the ~~class is~~ members are so numerous that joinder of all ~~members~~ is impracticable,

(2) ~~there are questions of law or fact~~ legal or factual questions are common to the class,

(3) ~~the claims or defenses of~~ the representative parties' positions typify those ~~are typical of the claims or defenses~~ of the class, ~~and~~

(4) the representative parties and their attorneys are willing and able to ~~will~~ fairly and adequately protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty; and.

(5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) **~~When~~ Whether a Class Actions ~~Maintainable~~ Is Superior.** ~~An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition~~ The matters pertinent in deciding under (a)(5) whether a class action is superior to other available methods include:

(1) the extent to which ~~the prosecution of~~ separate actions by or against individual members ~~of the class would create a risk of~~ might result in

(A) inconsistent or varying adjudications ~~with respect to individual members of the class which~~ that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications ~~with respect to individual members of the class which would~~ that, as a practical matter ~~be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede,~~ would dispose of the nonparty members' interests or reduce their ability to protect their interests; ~~or~~

~~(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief~~ the extent to which the relief may take the form of an injunction or ~~corresponding~~ declaratory ~~relief with respect to~~ judgment respecting the class as a whole; ~~or~~

(3) ~~the court finds that~~ the extent to which the common questions of law or fact ~~common to the members of the class~~ predominate over any questions affecting only individual members~~, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:~~;

(~~A~~4) the class members' interests ~~of members of the class~~ in individually controlling the prosecution or defense of separate actions;

(~~B~~5) the extent and nature of any related litigation ~~concerning the controversy~~ already ~~commenced~~ begun by or against members of the class;

(~~C~~6) the desirability or undesirability of concentrating the litigation ~~of the claims~~ in the particular forum; and

(~~D~~7) the likely difficulties ~~likely to be encountered~~ in ~~the management of~~ managing a class action which will be eliminated or significantly reduced if the controversy is adjudicated by other available means.

(c) **Determination by Order Whether Class Action to Be ~~Maintained~~ Certified;**

Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) As soon as practicable after ~~the commencement of an action brought as a class action~~ persons sue or are sued as representatives of a class, the court ~~shall~~ must determine by order whether and with respect to what claims, defenses, or issues ~~it is to be so maintained~~ the action should be certified for maintenance as a class action.

(A) An order certifying a class action must describe the class and determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include:

(i) the nature of the controversy and the relief sought;

(ii) the extent and nature of the members' injuries or liability;

(iii) potential conflicts of interest among members;

(iv) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and

(v) the inefficiency or impracticality of separate actions to resolve the controversy.

When appropriate, exclusion may be conditioned upon a prohibition against maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separate action of any judgment rendered in favor of the class from which exclusion is sought, and inclusion may be conditioned upon bearing a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be conditional, and may be altered or amended before ~~the~~ a decision on the merits.

(2) ~~In any class~~ When ordering that an action be ~~maintained~~ certified as a class action under ~~subdivision (b)(3)~~ this rule, the court ~~shall~~ must direct that appropriate notice be given to the ~~members of the~~ class under subdivision (d)(1)(B). The notice must concisely and clearly describe the nature of the action; the claims, defenses, or issues with respect to which the class has been certified; the persons who are members of the class; any conditions affecting exclusion from or inclusion in the class; and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider, in addition to the matters listed in (b) and (c)(1)(A), the expense and difficulties of providing actual notice to all class members and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice. ~~the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~

(3) The judgment in an action certified ~~maintained~~ as a class action ~~under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3)~~, whether or not favorable to the class, ~~shall include and~~ must specify or describe those ~~to whom the~~

~~notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds~~ who are ~~to be~~ members of the class or have, as a condition to exclusion, agreed to restrictions affecting any separate actions.

(4) When appropriate ~~(A)~~ an action may be ~~brought or maintained~~ certified as a class action with respect to particular claims, defenses, or issues~~, or (B)~~ by or against multiple classes or subclasses. Subclasses need not separately satisfy the requirements of subdivision (a)(1). ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.~~

(d) Orders in Conduct of Class Actions.

(1) In the conduct of actions to which this rule applies, the court may make appropriate orders that:

(~~1~~A) ~~determining~~ determine the course of proceedings or ~~prescribing~~ prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument, including pre-certification decision on a motion under Rule 12 or 56 if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

(~~2~~B) ~~requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that~~ require notice ~~be given in such manner as the court may direct~~ to some or all of the members or putative members of:

(i) any step in the action, including certification, modification, or decertification of a class, or refusal to certify a class ~~or of~~;

(ii) the proposed extent of the judgment,; or ~~of~~

(iii) the members' opportunity ~~of members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3C) ~~imposing~~ impose conditions on the representative parties, class members, or ~~on~~ intervenors;

(4D) ~~requiring~~ require ~~that~~ the pleadings be amended to eliminate ~~therefrom~~ allegations ~~as to~~ about representation of absent persons, and that the action proceed accordingly; or

(5E) deal~~ing~~ with similar procedural matters.

(2) ~~The orders~~ An order under Rule 23(d)(1) may be combined with an order under Rule 16, and may be altered or amended ~~as may be desirable from time to time~~.

(e) **Dismissal or Compromise.** An ~~class~~ action filed as a class action must ~~shall~~ not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for maintenance as a class action, or be compromised without the approval of the court~~, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs~~. An action certified as a class action must not be dismissed or compromised without the approval of the court, and notice of a proposed voluntary dismissal or compromise must be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of Rule 53(b).

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or

denying a request for class action certification under this rule upon application to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

COMMITTEE NOTE

PURPOSE OF REVISION. As initially adopted, Rule 23 defined class actions as "true," "hybrid," or "spurious" according to the abstract nature of the rights involved. The 1966 revision created a new tripartite classification in subdivision (b), and then established different provisions relating to notice and exclusionary rights based on that classification. For (b)(3) class actions, the rule mandated "individual notice to all members who can be identified through reasonable effort" and a right by class members to "opt-out" of the class. For (b)(1) and (b)(2) class actions, however, the rule did not by its terms mandate any notice to class members, and was generally viewed as not permitting any exclusion of class members. This structure has frequently resulted in time-consuming procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on the practicality of the case proceeding as a class action.

In the revision the separate provisions of former subdivisions (b)(1), (b)(2), and (b)(3) are combined and treated as pertinent factors in deciding "whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy," which is added to subdivision (a) as a prerequisite for any class action. The issue of superiority of class action resolution is made a critical question, without regard to whether, under the former language, the case would have been viewed as being brought under (b)(1), (b)(2), or (b)(3). Use of a unitary standard, once the prerequisites of subdivision (a) are satisfied, is the approach taken by the National Conference of Commissioners on Uniform State Laws and adopted in several states.

Questions regarding notice and exclusionary rights remain important in class actions--and, indeed, may be critical to due process. Under the revision, however, these questions are ones that should be addressed on their own merits, given the needs and circumstances of the case and without being tied artificially to the particular classification of the class action.

The revision emphasizes the need for the court, parties, and counsel to focus on the particular claims, defenses, or issues that are appropriate for adjudication in a class action. Too often, classes have been certified without recognition that separate controversies may exist between plaintiff class members and a defendant which should not be barred under the doctrine of claim preclusion. Also, the placement in subdivision (c)(4) of the provision permitting class actions for particular issues has tended to obscure the potential benefit of resolving certain claims and defenses on a class basis while leaving other controversies for resolution in separate actions.

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries--at least for some issues, if not for the resolution of the individual damage claims themselves. The revision is not however a unqualified license for certification of a class whenever there are

numerous injuries arising from a common or similar nucleus of facts, nor does the rule attempt to establish a system for "fluid recovery" or "class recovery" of damages. Such questions are ones for further case law development. Nor does the revision attempt to expand or limit the claims that are subject to federal jurisdiction by or against class members.

The major impact of this revision will be on cases at the margin: most cases that previously were certified as class actions will be so certified under this rule, and most that were not so certified will not be certified under the rule. There will be a limited number of cases, however, where the certification decision may differ from that under the prior rule, either because of the use of a unitary standard or the greater flexibility respecting notice and membership in the class.

Various non-substantive stylistic changes are made to conform to style conventions adopted by the Committee to simplify the present rules.

SUBDIVISION (a). Subdivision (a)(4) is revised to explicitly require that the proposed class representatives and their attorneys be both willing and able to undertake the fiduciary responsibilities inherent in representation of a class. The willingness to accept such responsibilities is a particular concern when the request for class treatment is not made by those who seek to be class representatives, as when a plaintiff requests certification of a defendant class. Once a class is certified, the class representatives and their attorneys will, until the class is decertified or they are otherwise relieved by the court, have an obligation to fairly and adequately represent the interests of the class, taking no action for their own benefit that would be inconsistent with the fiduciary responsibilities owed to the class.

Paragraph (5)--the superiority requirement--is taken from subdivision (b)(3) and becomes a critical element for all class actions.

The introductory language in subdivision (a) stresses that, in ascertaining whether the five prerequisites are met, the court and litigants should focus on the matters that are being considered for class action certification. The words "claims, defenses, or issues" are used in a broad and non-legalistic sense. While there might be some cases in which a class action would be authorized respecting a specifically defined cause of action, more frequently the court would set forth a generalized statement of the matters for class action treatment, such as all claims by class members against the defendant arising from the sale of specified securities during a particular period of time.

SUBDIVISION (b). As noted, subdivision (b) has been substantially reorganized. One element, drawn from former subdivision (b)(3), is made a controlling issue for all class actions and moved to subdivision (a)(5); namely, whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The other provisions of former subdivision (b) then become factors to be considered in making this determination. Of course, there is no requirement that all of these factors be present before a class action may be ordered, nor is this list intended to exclude other factors that in a particular case may bear on the superiority of a class action when compared to other available methods for resolving the controversy.

Factor (7)--the consideration of the difficulties likely to be encountered in the management of a class action--is revised by adding a clause to emphasize that such difficulties should be

assessed not in the abstract, but rather in comparison to those that would be encountered with individually prosecuted actions.

SUBDIVISION (c). Former paragraph (2) of this subdivision contained the provisions for notice and exclusion in (b)(3) class actions.

Under the revision, the provisions relating to exclusion are made applicable to all class actions, but with flexibility for the court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class. The court may also impose appropriate conditions on such "opt-outs"--or, in some cases, even require that a putative class member "opt-in" in order to be treated as a member of the class.

The potential for class members to exclude themselves from many class action remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion--the fact pattern described in subdivision (b)(1)(A)--a person might nevertheless be allowed to be excluded from the class upon the condition of agreeing to be bound by the outcome of the class action. The opportunity for imposition of appropriate conditions on the privilege of exclusion enables the court to avoid the unfairness that resulted when a putative class member elected to exclude itself from the class action in order to take advantage of collateral estoppel if the class action was resolved favorably to the class while not being bound by an unfavorable result.

Rarely should a court impose an "opt-in" requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid potential due process problems, such as with some defendant classes or in cases where an opt-out right would be appropriate but it is impossible or impractical to give meaningful notice of the class action to all putative members of the class.

Under the revision, some notice of class certification is required for all types of class actions, but flexibility is provided respecting the type and extent of notice to be given to the class, consistent with constitutional requirements for due process. Actual notice to all putative class members should not, for example, be needed when the conditions of subdivision (b)(1) are met or when, under subdivision (c)(1)(A), membership in the class is limited to those who file an election to be members of the class. Problems have sometimes been encountered when the class members' individual interests, though meriting protection, were quite small when compared with the cost of providing notice to each member; the revision authorizes such factors to be taken into account by the court in determining, subject to due process requirements, what notice should be directed.

The revision to subdivision (c)(4) is intended to eliminate the problem when a class action with several subclasses should be certified, but one or more of the subclasses may not independently satisfy the "numerosity" requirement.

Under former paragraph (4), some issues could be certified for resolution as a class action, while other matters were not so certified. By adding similar language to other portions of the rule, the Committee intends to emphasize the potential utility of this procedure. For example, in some mass tort situations it might be appropriate, incident to the case or controversy involving the

named plaintiffs, to certify some issues relating to the defendants' culpability and general causation for class action treatment, while leaving issues relating to specific causation, damages, and contributory negligence for potential resolution through individual lawsuits brought by members of the class.

SUBDIVISION (d). The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision when this will promote the fair and efficient adjudication of the controversy.

Inclusion in former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Revised subdivision (d)(1)(B) takes on added importance in light of the revision of subdivision (c)(2). Subdivision (d)(1)(B) contemplates that some form of notice to class members should be given in virtually all class actions. The particular form of notice, however, in a given case is committed to the sound discretion of the court, keeping in mind the requirements of due process. The language of (d)(1)(B)(i) calls the attention of the court and litigants to the possible need for some notice if the court declines to certify a class in an action filed as a class action or reduces the scope of a previously certified class. In such circumstances, particularly if putative class members have become aware of the case, some notice may be needed informing the class members that they can no longer rely on the action as a means for pursuing their rights.

SUBDIVISION (e). There are sound reasons for requiring judicial approval of proposals to voluntarily dismiss, eliminate class allegations, or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the former rule, courts have recognized the propriety of a judicially-supervised precertification dismissal or compromise without requiring notice to putative class members. *E.g., Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978). The revision adopts that approach. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the provisions of subdivision (d). While the provisions of subdivision (e) do not apply if the court denies the request for class certification, there may be cases in which the court will direct under subdivision (d) that notice of the denial of class certification be given to those who were aware of the case.

Evaluations of proposals to dismiss or settle a class action sometimes involve highly sensitive issues, particularly should the proposal be ultimately disapproved. For example, the parties may be required to disclose weaknesses in their own positions, or to provide information needed to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with the fiduciary obligations owed to members of the class or otherwise involve conflicts of interest. Accordingly, in some circumstances, investigation of these proposals conducted by independent counsel can be of great benefit to the court. The revision clarifies that the strictures of Rule 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement. The master, if not a Magistrate Judge, would be compensated as provided in Rule 53(a).

SUBDIVISION (f). The certification ruling is often the crucial ruling in a case filed as a class action. If denied, the plaintiff, in order to secure appellate review, may have to incur expenses wholly disproportionate to any individual recovery. If the plaintiff ultimately prevails on an appeal of the certification decision, postponement of the appellate decision raises the specter of "one way intervention." Conversely, if class certification is erroneously granted, a defendant may be forced to settle rather than run the risk of potentially ruinous liability of a class-wide judgment in order to secure review of the certification decision. These consequences, as well as the unique public interest in properly certified class actions, justify a special procedure allowing early review of this critical ruling.

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. As authorized by 28 U.S.C. § 2072(c), the rule has the effect of permitting the appellate court to treat as final for purposes of 28 U.S.C. § 1291 an otherwise conditional and interlocutory order.

It is anticipated that orders permitting immediate appellate review will be rare. Nevertheless, the potential for this review should encourage compliance with the certification procedures and afford an opportunity for prompt correction of error.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * *

(c) Protective Orders.

(1) ~~Upon~~ On motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, ~~and for good cause shown,~~ the court ~~in which~~ where the action is pending — and ~~or alternatively~~, on matters relating to a deposition, also the court ~~in the district~~ where the deposition ~~is to~~ will be taken — may, for good cause shown, make any order ~~which~~ that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(~~1~~A) ~~that~~ precluding the disclosure or discovery ~~not be had~~;

(~~2~~B) ~~that~~ specifying conditions, including time and place, for the disclosure or discovery ~~may be had only on specified terms and conditions, including a designation of the time or place~~;

(~~3~~C) ~~that the discovery may be had only by~~ prescribing a discovery method ~~of discovery~~ other than that selected by the party seeking discovery;

(~~4~~D) ~~that~~ excluding certain matters ~~not be inquired into~~, or ~~that the scope of the disclosure or discovery be limited~~ limiting the scope to certain matters;

(~~5~~E) ~~that discovery be conducted with no one~~ designating the persons who may be present while the discovery is conducted ~~except persons designated by the court~~;

(~~6~~F) directing that a sealed deposition~~, after being sealed,~~ be opened only ~~by~~ upon court order ~~of the court~~;

(~~7~~G) ordering that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(~~8~~H) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes, to be opened as ~~directed~~ the court directs by the court.

(2) If the motion for a protective order is wholly or partly denied ~~in whole or in part~~, the court may, on ~~such~~ just terms ~~and conditions as are just~~, order that any party or ~~other~~ person provide or permit discovery. ~~The provisions of~~ Rule 37(a)(4) ~~apply~~ applies to the award of expenses incurred in relation to the motion.

(3) On motion, the court may dissolve or modify a protective order. In ruling, the court must consider, among other matters, the following:

(A) the extent of reliance on the order;

(B) the public and private interests affected by the order; and

(C) the burden that the order imposes on parties seeking information relevant to other litigation.

* * * *

COMMITTEE NOTE

The existing provisions of subdivision (c) are divided into numbered paragraphs, and paragraph (3) is added to dispel any doubt that a court has the power to modify or vacate a protective order. This power should be exercised after carefully considering the conflicting policies that shape protective orders. Protective orders serve vitally important interests by ensuring that privacy is invaded by discovery only to the extent required by the needs of litigation. Protective orders entered by agreement of the parties also can serve the important need to

facilitate discovery without requiring repeated court rulings. A blanket protective order may encourage the exchange of information that a court would not order produced, or would order produced only under a protective order. Parties who rely on protective orders in these circumstances should not risk automatic disclosure simply because the material was once produced in discovery and someone else might want it.

Despite the important interests served by protective orders, concern has been expressed that protective orders can thwart other interests which also are important. Two interests have drawn special attention. One is the interest in public access to information that involves matters of public concern. Information about the conduct of government officials is frequently used to illustrate an area of public concern. The most commonly offered example focuses on information about dangerous products or situations that have caused injury and may continue to cause injury until the information is widely disseminated. The other interest involves the efficient conduct of related litigation, protecting adversaries of a common party from the need to engage in costly duplication of discovery efforts.

Courts have generally administered Rule 26(c) with sensitive concern for the interests that may justify dissolution or modification of a protective order. Recent studies have concluded that, in the light of actual practices, there is no need to amend the provisions of Rule 26(c) relating to entry of protective orders. See Report of the Federal Courts Study Committee, 102-103 (1990); Marcus, The Discovery Confidentiality Controversy, 1991 U.Ill.L.Rev. 457; and Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv.L.Rev. 427 (1991). Some dispute may be found, however, as to the approach that should be taken to requests for dissolution or modification. Some of the decisions are explored in *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990).

The addition of express provisions for dissolution or modification serves several purposes. Most important, the text of the rule provides forceful notice that, when faced with a discovery request for particularly sensitive information, parties should not rely on a protective order as an absolute shield against any further disclosure. Although this reminder may reduce the usefulness of blanket protective orders as a means of avoiding controversies during discovery, it is better to give notice than to risk exploitation of inadvertent reliance. The express provisions also serve to remind parties and courts of the major factors that must be considered. The public and private interests in disclosure must be weighed against the private interests that may defeat any discovery or sharply limit the use of discovery materials. These factors are not expressed in more precise terms because of the need to balance infinite degrees of the interests that weigh for or against discovery. Public and private interests in disclosure may be great or small, as may be the interests in preventing disclosure.

Rule 43. Taking of Testimony

(a) **Form.** In ~~all~~ every trials, the testimony of witnesses ~~shall~~ must be taken ~~orally~~ in open court, unless ~~otherwise provided by an Act of Congress or by~~ a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown and under appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

* * * *

COMMITTEE NOTE

The only substantive changes intended by this revision are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is unable to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted on showing good cause. Good cause can be shown for a variety of reasons. A particularly strong showing often can be made when a key witness, who had been expected to attend the trial, is unable to be present for unanticipated reasons, such as accident or illness, but remains able to testify from a different place. Expenses may be reduced by allowing remote transmission of testimony as to relatively formal or unimportant matters that cannot be covered by stipulation.

Good cause is not established simply by showing that a witness is beyond the subpoena power of the trial court. Depositions remain the primary means to obtain such testimony.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement, such as facsimile or other computer transmission of printed words, ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties

of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

Rule 50. Judgment as a Matter of Law in ~~Actions Tried by~~ Jury Trials; Alternative Motion for New Trial; Conditional Rulings

* * * *

(c) ~~Same: Conditional Rulings on Grant of~~ Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

* * * *

(2) ~~The~~ Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law ~~has been~~ is rendered ~~may~~ must be served and filed ~~a motion for a new trial pursuant to Rule 59~~ not later than 10 days after entry of the judgment.

* * * *

COMMITTEE NOTE

The only substantive change intended by this revision is to require that, when judgment as a matter of law is granted under this rule, any motion for a new trial must be filed, as well as served, no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. The Committee believes that, given the importance--often to third persons in addition to the parties and the court--these motions can have on the finality of a judgment, each of these rules should be modified to require both service and filing before end of the 10-day period. The phrase "no later than" is used--rather than "within"--to avoid problems when a post-judgment motion is filed before actual entry by the clerk of the judgment. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period.

Rule 52. Findings by the Court; Judgment on Partial Findings

* * * *

(b) Amendment. ~~Upon~~ On a party's motion ~~of a party made~~ served and filed not later than 10 days after entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may ~~be made with~~ accompany a motion for a new trial ~~pursuant to~~ under Rule 59. When findings of fact are made in actions tried ~~by the court~~ without a jury, the ~~question of the~~ sufficiency of the evidence ~~to support~~ supporting the findings may ~~thereafter~~ be later questioned ~~raised~~ whether or not in the district court the party raising the question ~~has made in the district court an objection to such~~ objected to the findings, moved ~~or has made a motion~~ to amend them ~~or a motion for judgment~~, or moved for partial findings.

* * * *

COMMITTEE NOTE

The only substantive change intended by this revision is to require that any motion to amend or add findings after a nonjury trial must be filed, as well as served, no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. The Committee believes that, given the importance--often to third persons in addition to the parties and the court--these motions can have on the finality of a judgment, each of these rules should be modified to require both service and filing before end of the 10-day period. The phrase "no later than" is used--rather than "within"--to avoid problems when a post-judgment motion is filed before actual entry by the clerk of the judgment. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period.

Rule 59. New Trials; Amendment of Judgments

* * * *

(b) Time for Motion. Any motion for a new trial ~~shall~~ must be served and filed not later than 10 days after ~~the~~ entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based ~~upon~~ affidavits, they ~~shall~~ must be served and filed with the motion. The opposing party has 10 days after ~~such~~ service ~~within which~~ to serve and file opposing affidavits, ~~which~~ but that period may be extended for ~~an additional period not exceeding~~ up to 20 days, either by the court for good cause ~~shown~~ or by the parties' ~~by~~ written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative ~~of Court~~; Notice; Specifying Grounds. ~~Not later than~~ Within 10 days after entry of judgment the court, on ~~of~~ its own, ~~initiative~~ may order a new trial for any reason ~~for which it might have granted a new trial on~~ that would justify granting one on a pary's motion ~~of a party~~. After giving the parties notice and an opportunity to be heard ~~on the matter~~, the court may grant a timely motion for a new trial, ~~timely served,~~ — even for a reason not stated in the motion. In either ~~case~~ event, the court ~~shall~~ must specify ~~in the order~~ the grounds in its order ~~therefor~~.

(e) Motion to Alter or Amend ~~a~~ Judgment. Any motion to alter or amend ~~the~~ a judgment ~~shall~~ must be served and filed not later than 10 days after entry of the judgment.

COMMITTEE NOTE

The only substantive changes intended by this revision are to add explicit time limits for filing motions for a new trial, motions to alter or amend a judgment, and affidavits opposing a new trial motion. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed as well as served during the prescribed period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. The Committee believes that, given the importance--often to third persons in addition to the parties and the court--these motions can have on the

finality of a judgment, each of these rules should be modified to require both service and filing before end of the 10-day period. The phrase "no later than" is used--rather than "within"--to avoid problems when a post-judgment motion is filed before actual entry by the clerk of the judgment. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period.

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

(a) Local Rules.

(1) Each district court ~~by action of~~, acting by a majority of ~~the~~ its judges ~~thereof~~, may ~~from time to time~~, after giving appropriate public notice and an opportunity ~~to~~ for comment, make and amend rules governing its practice. A local rule must be ~~not in~~consistent with Acts of Congress, consistent with -- but not duplicative of -- ~~these~~ rules adopted under 28 U.S.C. §§ 2072 and 2075, and conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule ~~so adopted shall~~ takes effect ~~upon~~ the date specified by the district court and ~~shall~~ remains in effect unless amended by the ~~district~~ court or abrogated by the judicial council of the circuit ~~in which the district is located~~. Copies of rules and amendments ~~so made by any district court shall~~ must, 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.

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

(b) Judge's Directives. ~~In all cases not provided for by rule, the~~ A ~~district~~ judges ~~and magistrates~~ may regulate ~~their~~ practice in any manner ~~not in~~consistent with ~~these~~ federal laws, rules adopted under 28 U.S.C. §§ 2072 and 2075, ~~or~~ and local rules ~~those of the district in which they act~~. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal laws, federal rules, or local rules unless the alleged violator has had actual notice of the requirement.

COMMITTEE NOTE

SUBDIVISION (a). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071 and also provides that local district court rules not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. Particularly in light of statutory and rules changes that may encourage experimentation through local rules on such matters as disclosure requirements and limitations on discovery, it is important that, to facilitate awareness within a bar that is increasingly national in scope, these rules be numbered or identified in conformity with any uniform system for such rules that may be prescribed from time to time by the Judicial Conference. Revised Rule 83(a) prohibits local rules that are merely duplicative or a restatement of national rules; this restriction is designed to prevent possible conflicting interpretations arising from minor inconsistencies between the wording of national and local rules, as well as to lessen the risk that significant local practices may be overlooked by inclusion in local rules that are unnecessarily long.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of--or forgetting--a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of the paragraph (2) is narrowly drawn--covering only violations attributable to negligence and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney contumaciously or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form--for example, a local rule requiring parties to identify evidentiary matters relied upon to support or oppose motions for summary judgment.

SUBDIVISION (b). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071, and also provides that a judge's orders should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. The rule continues to authorize--although not encourage--district and magistrate judges to enter orders that establish standard procedures in cases assigned to them (*e.g.*, through a "standing order") if the procedures are consistent with these rules and with any local rules. Subdivision (b) is, however, revised to provide that parties not be penalized for failing to adhere to some special procedure that is not contained in the local rules but is established by an individual judge unless they have received some notification of that procedure.

Rule 84. Forms; Technical Amendments

(a) Forms. The forms ~~contained~~ in the Appendix ~~of Forms are sufficient~~ suffice under these rules and ~~are intended to indicate~~ illustrate the simplicity and brevity ~~of statement which~~ that these rules contemplate. The Judicial Conference of the United States may authorize additional forms and may revise or delete forms.

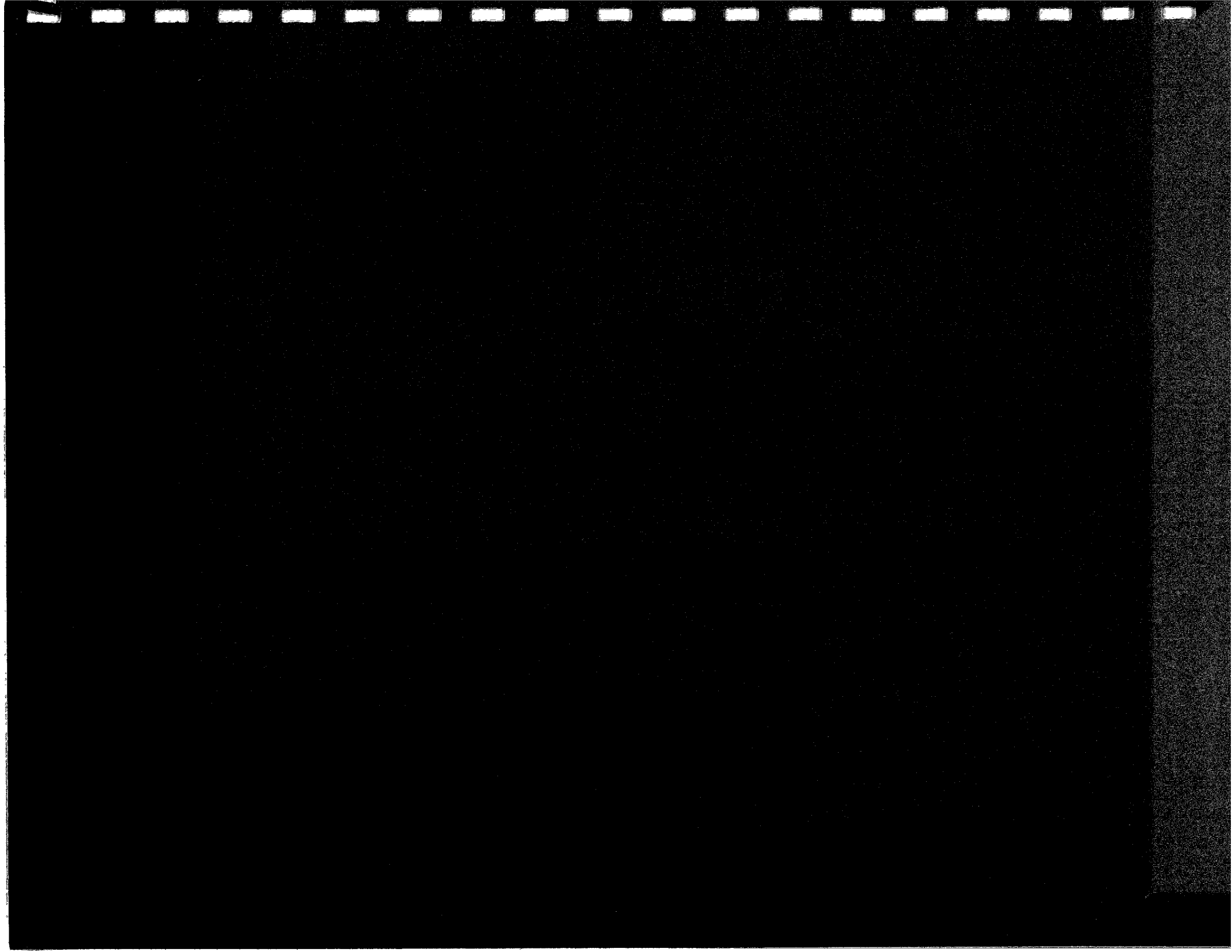
(b) Technical Amendments. The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to these changes, which would eliminate the requirement of Supreme Court approval and Congressional review in the limited circumstances indicated. The changes in subdivisions (a) and (b) are severable from each other, and from other proposed amendments to the rules.

The revision of subdivision (a) is intended to relieve the Supreme Court and Congress from the burden of reviewing changes in the forms prescribed for use in civil cases, which, by the terms of the rule, are merely illustrative and not mandatory. Rule 9009 of the Federal Rules of Bankruptcy Procedure similarly permits the adoption and revision of bankruptcy forms without need for review by the Supreme Court and Congress.

Similarly, the addition of subdivision (b) will enable the Judicial Conference, acting through its established procedures and after consideration by the appropriate Committees, to make technical amendments to these rules without having to burden the Supreme Court and Congress with such changes. This delegation of authority, not unlike that given to Code Commissions with respect to legislation, will lessen the delay and administrative burdens that can unnecessarily encumber the rule-making process on non-controversial non-substantive matters, at the risk of diverting attention from items meriting more detailed study and consideration. As examples of situations where this authority would have been useful, one might cite section 11(a) of P.L. 102-198 (correcting a cross-reference contained in the 1991 revision of Rule 15) and the various changes contained in the 1993 amendments in recognition of the new title of "Magistrate Judge" pursuant to a statutory change.



Rule 23. Class Actions

(a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all if — with respect to the claims, defenses, or issues certified for class action treatment —

(1) the members are so numerous that joinder of all is impracticable,

(2) legal or factual questions are common to the class,

(3) the representative parties' positions typify those of the class,

(4) the representative parties and their attorneys are willing and able to fairly and adequately protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty; and

(5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) **Whether a Class Action Is Superior.** The matters pertinent in deciding under (a)(5) whether a class action is superior to other available methods include:

(1) the extent to which separate actions by or against individual members might result in

(A) inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications that, as a practical matter, would dispose of the nonparty members' interests or reduce their ability to protect their interests;

(2) the extent to which the relief may take the form of an injunction or declaratory judgment respecting the class as a whole;

(3) the extent to which the common questions of law or fact predominate over any questions affecting only individual members;

(4) the class members' interests in individually controlling the prosecution or defense of separate actions;

(5) the extent and nature of any related litigation already begun by or against members of the class;

(6) the desirability or undesirability of concentrating the litigation in the particular forum; and

(7) the likely difficulties in managing a class action which will be eliminated or significantly reduced if the controversy is adjudicated by other available means.

(c) **Determination by Order Whether Class Action to Be Certified; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.**

(1) As soon as practicable after persons sue or are sued as representatives of a class,

the court must determine by order whether and with respect to what claims, defenses, or issues the action should be certified for maintenance as a class action.

(A) An order certifying a class action must describe the class and determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include:

(i) the nature of the controversy and the relief sought;

(ii) the extent and nature of the members' injuries or liability;

(iii) potential conflicts of interest among members;

(iv) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and

(v) the inefficiency or impracticality of separate actions to resolve the controversy.

When appropriate, exclusion may be conditioned upon a prohibition against maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separate action of any judgment rendered in favor of the class from which exclusion is sought, and inclusion may be conditioned upon bearing a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be conditional, and may be altered or amended before a decision on the merits.

(2) When ordering that an action be certified as a class action under this rule, the court must direct that appropriate notice be given to the class under subdivision (d)(1)(B). The notice must concisely and clearly describe the nature of the action; the claims, defenses, or issues with respect to which the class has been certified; the persons who are members of the class; any conditions affecting exclusion from or inclusion in the class; and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider, in addition to the matters listed in (b) and (c)(1)(A), the expense and difficulties of providing actual notice to all class members and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice.

(3) The judgment in an action certified as a class action, whether or not favorable to the class, must specify or describe those who are members of the class or have, as a condition to exclusion, agreed to restrictions affecting any separate actions.

(4) When appropriate, an action may be certified as a class action with respect to particular claims, defenses, or issues by or against multiple classes or subclasses. Subclasses need not separately satisfy the requirements of subdivision (a)(1).

(d) Orders in Conduct of Class Actions.

(1) In the conduct of actions to which this rule applies, the court may make appropriate

orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument, including pre-certification decision on a motion under Rule 12 or 56 if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

(B) require notice to some or all of the members or putative members of:

(i) any step in the action, including certification, modification, or decertification of a class, or refusal to certify a class ;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(C) impose conditions on the representative parties, class members, or intervenors;

(D) require the pleadings be amended to eliminate allegations about representation of absent persons, and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) An order under Rule 23(d)(1) may be combined with an order under Rule 16, and may be altered or amended.

(e) **Dismissal or Compromise.** An action filed as a class action must not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for maintenance as a class action, or be compromised without the approval of the court. An action certified as a class action must not be dismissed or compromised without the approval of the court, and notice of a proposed voluntary dismissal or compromise must be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of Rule 53(b).

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying a request for class action certification under this rule upon application to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * *

(c) **Protective Orders.**

(1) On motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, the court where the action is pending — and, on matters relating to a deposition, also the court where the deposition will be taken — may, for good cause shown, make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) precluding the disclosure or discovery;

(B) specifying conditions, including time and place, for the disclosure or discovery;

(C) prescribing a discovery methodother than that selected by the party seeking discovery;

(D) excluding certain matters, or limiting the scope to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) directing that a sealed deposition be opened only upon court order;

(G) ordering that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(H) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes, to be opened as the court directs by the court.

(2) If the motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(3) On motion, the court may dissolve or modify a protective order. In ruling, the court must consider, among other matters, the following:

(A) the extent of reliance on the order;

(B) the public and private interests affected by the order; and

(C) the burden that the order imposes on parties seeking information relevant to other litigation.

* * * *

Rule 43. Taking of Testimony

(a) **Form.** In every trial, the testimony of witnesses must be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown and under appropriate safeguards, permit presentation of testimony in open court by

contemporaneous transmission from a different location.

* * * *

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

* * * *

(c) **Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.**

* * * *

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be served and filed no later than 10 days after entry of the judgment.

* * * *

Rule 52. Findings by the Court; Judgment on Partial Findings

* * * *

(b) **Amendment.** On a party's motion served and filed no later than 10 days after entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

* * * *

Rule 59. New Trials; Amendment of Judgments

* * * *

(b) **Time for Motion.** Any motion for a new trial must be served and filed no later than 10 days after entry of the judgment.

(c) **Time for Serving Affidavits.** When a motion for new trial is based on affidavits, they must be served and filed with the motion. The opposing party has 10 days after service to serve and file opposing affidavits, but that period may be extended for up to 20 days, either by

the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) **On Court's Initiative; Notice; Specifying Grounds.** Within 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a pary's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial — even for a reason not stated in the motion. In either event, the court must specify the grounds in its order.

(e) **Motion to Alter or Amend Judgment.** Any motion to alter or amend a judgment must be served and filed no later than 10 days after entry of the judgment.

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

(a) **Local Rules**

(1) Each district court, acting by a majority of its judges , may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule must be consistent with Acts of Congress, consistent with -- but not duplicative of -- rules adopted under 28 U.S.C. §§ 2072 and 2075, and conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be available to the public.

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

(b) **Judge's Directives.** A judge may regulate practice in any manner consistent with federal laws, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal laws, federal rules, or local rules unless the alleged violator has had actual notice of the requirement.

Rule 84. Forms; Technical Amendments

(a) **Forms.** The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate. The Judicial Conference of the United States may authorize additional forms and may revise or delete forms.

(b) **Technical Amendments.** The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

NACDL
National Association of Criminal Defense Lawyers

1110 Vermont Avenue, NW
Suite 1150
Washington, DC 20005
Tel: 202-872-8688
Fax: 202-331-8269

9,28,32,38,
41

April 14

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Changes in Federal Rules of Evidence,
Federal Rules of Appellate Procedure,
and Federal Rules of Criminal Procedure
Request for Comments, Issued December 29, 1992

Dear Mr. McCabe:

As Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Rules of Procedure, we are pleased to submit the following comments on behalf of the 7500 members of our association, and its 40 state affiliates with a total membership of about 22,000.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

1. Corporate defendant statements

The amendment to subdivision (a)(1)(A) would require the government, in the case of a defendant which is an organization, to produce upon request a written statement of various persons (director, officer, employee or agent) who were so situated "as to have been able legally to bind the defendant in respect to the subject of the statement" or whose conduct would have been able legally to bind the defendant with respect to the conduct.

We endorse the amendment but would suggest that the provision be further modified to provide that it also applies to those persons who the government contends were in a position to bind the defendant. There may be situations where a defendant may not want to acknowledge, and may in fact dispute, that a particular person was able legally to bind it but the government may claim otherwise. If the government's position is that the person could

legally bind the defendant, the person's statement should be disclosable even if the defendant disagrees with the government's position.

2. Disclosure of information relevant to sentencing guidelines

While not included among the proposed amendments, we believe that it is appropriate to take this opportunity to recommend to the Committee that Rule 16 be amended to provide disclosure of certain information relevant to the application of the Sentencing Guidelines. Given the critical importance of the correct application of the guidelines in every case, even when evaluating a decision as to whether to proceed to trial or reach a plea disposition, the discovery rule should explicitly state the prosecution has an obligation to disclose to the defendant information in the possession of the government which may affect the defendant's offense level, role in the offense and mitigating circumstances under the Guidelines.

Rule 29. Motion for Judgment of Acquittal

We welcome and endorse the Committee's proposed amendment to Rule 29 which would make it clear that where the court reserves ruling on a motion for judgment of acquittal at the close of the government's case the court's later decision on the motion must be based only on the information introduced prior to the motion having been made.

Rule 32. Sentencing Procedure

NACDL generally endorses the concept of revising Fed.R.Crim.P. 32 to provide a procedure more in keeping with sentencing under the guidelines. (Either the revised Rule or the commentary should make clear, however, that "old" rule 32 should continue to be applied to "old law" sentencings when they arise.) We do have some suggestions to make and some concerns with the proposed draft.

1. Rule 32(a)

Conditions and caseloads vary sufficiently around the Nation that the federal Rule should not appear to set a standard time frame, even subject to a "good cause" waiver. It is not clear that, apart from individual cases, a local rule could set a different and longer presumptive period on account of local

conditions which the judges of that district consider to be "good cause" for a finding-to-sentencing period of more than 70 days. See also time limits set forth in proposed subsections (b)(6)(A), (B), and (C).

2. Rule 32(b)(2)

The confirmation of a defendant's right to have counsel attend the presentence interview is a welcome clarification.

3. Rule 32(b)(4)(D)

The Rule appears to limit the PSI's discussion of victim impact to the effect of the offense on "any individual." This is too limited in many cases, where the impact of the offense may be felt on a group of unidentified persons (such as consumers in a fraud case), or on a community or polity (as in certain governmental corruption cases, bankruptcy frauds, terrorist crimes, or civil rights offenses), or on a corporation.

4. Rule 32(b)(5)(B) & (C)

The proposed Rule would require withholding of the identity of any source of information to whom confidentiality had been promised, as well as any information which, if revealed, "might" result in harm, "physical or otherwise," to any person. These categories of nondisclosure are much too broad. Where the standard of proof is so lax and the consequences of error so great as in sentencing, the use of secret sources threatens to undermine the reliability of the result to an unacceptable extent. Under proposed (b)(5)(B), simply by "promis[ing]" confidentiality, even without any justification, the probation officer can create a PSI consisting of anonymous accusations, which in turn could result in Guidelines "relevant conduct" determinations, "role in the offense" adjustments, and the like, that could drive a sentence upward without any semblance of confrontation or due process. The PSI is already a confidential document. The only person being kept in the dark by this provision is the defendant. The Rule should allow exclusion of the identities of sources only upon an ex parte showing by the probation officer to the satisfaction of the Court that disclosure would likely result in physical harm to another person; the fact that such a determination has been made should then be required to be disclosed to the defense. (In other words, subsection (B) should be deleted and merged into subsection (C)). Information excluded for fear of psychological harm to the defendant should nevertheless be required to be disclosed, perhaps separately, to defense counsel.

5. Rule 32(b)(4)(B)

There is a strong sentiment within the federal criminal defense bar that the requirement that probation officers calculate the applicable guidelines, in light of the burgeoning case law, amendments, and inherent ambiguities, has placed the USPOs in the position of interpreting cases, constitutional provisions, and complex administrative rules, thus acting as untrained lawyers or even magistrate judges. Many among us feel that the presentence report should contain objective findings on all facts pertinent to a guideline calculation, without setting forth the calculation. Instead, each party should be required to submit a calculation based on the draft PSI, to be included as part of the addendum when the revised and corrected final version is forwarded to the Court. While NACDL does not formally take that position, we do wish to make our concern known to the committee for its further consideration. See also comment to Rule 32(b)(6)(B).

6. Rule 32(b)(6)(A)

The document disclosed to counsel at least 35 days prior to sentencing (but see comment to Rule 32(a) above) should be referred to as the "proposed presentence report." The rule should make clear that this draft is not yet to be disclosed to the court. The Rule should provide that during this period any materials, such as documents or reports of interviews, etc., disclosed to the USPO by any person to aid in preparation of the report must be made available to either counsel, upon request, for inspection.

7. Rule 32(b)(6)(B)

The probation officer should not have the power to "require" the defendant or counsel to meet to "discuss" any unresolved issues. The USPO may wish to suggest a conference, but the officer is not a judge and therefore should not exercise the coercive power of the Court. Enhancing the USPO's quasi-judicial powers in this way will only aggravate the current tendency toward an adversarial, hostile relationship between counsel and the probation office. As discussed above (under Rule 32(b)(4)), we are also concerned about the USPO's role in "resolving" or "ruling" upon "legal issues."

8. Rule 32(b)(6)(D), (c)(1)

Subsection (b)(6)(D) refers to a "presentencing hearing," which is a phrase not otherwise used or defined in the Rule. We

agree with the implication of this subsection, which we hope was intended, that it is generally a good practice for the Court to hold a presentencing hearing for the purpose of factfinding and resolution of disputes as to applicable guidelines, separate from the sentencing hearing at which the parties make their presentations as to the actual sentence to be imposed in light of that guideline determination. The litigious atmosphere of the presentencing hearing is quite inconsistent with the proper tone of a sentencing.

In addition, as presently drafted, subsection (c)(1) implies that the only testimony that may be heard in connection with a sentencing is evidence "on the objections." This is too limited; at many sentencing, family members and others have important information to present that may be pertinent to the selection of an appropriate sentence (whether within the guidelines or by way of departure, or which may bear on the selection of a fine or amount of restitution, or the proper conditions of probation) and which does not go to any particular "objection." Finally, Rule 32(c)(1) should require that a copy of the PSI, including the Addendum and any findings as to objections, be transmitted to the Bureau of Prisons in any case in which commitment to the custody of the Bureau is part of the sentence. As written, this appears to be optional.

9. Rule 32(c)(3)

The Advisory Committee Note suggests that the text of the revised Rule is intended to establish the order in which steps are to be taken. If so, then Rule 32(c)(3)(A) is out of place; it should be in (c)(1). If subsections (c)(3)(B)-(D) are intended to suggest the order in which allocutions should be made, we would suggest a change. The prosecutor should speak first, then the defendant personally, and finally defense counsel, with an opportunity for prosecutorial rebuttal of misstatements, in the court's discretion. Giving the defense the last word is more consistent with the order of argument after a trial, and with the respect for the defendant's humanity that is implicit in the common law right of allocution, the rule of lenity, and the statutory command that punishment be "no greater than necessary." 18 U.S.C. § 3553(b).

FEDERAL RULES OF EVIDENCE

Rule 412. Sex Offense Cases; Relevance of Victim's Past Sexual Behavior or Predisposition

1. "Predisposition"

The proposed amendments expand the evidence that is excluded under the rule to include evidence of "predisposition." Predisposition of what? The amendments do not make this clear. Is it predisposition of (for?) sexual behavior or predisposition of (for?) sexual misconduct? Not only is unclear what predisposition is supposed to refer to, but the term "predisposition" itself is not defined by the rule and is never mentioned in the Committee Note.

Unless the rule defines "predisposition" and provides a justification as to why this additional category is necessary, we believe it should not be included in the amended rule. This is especially true because "predisposition" is ordinarily considered to be a term of art that has special application in the defense of entrapment. To include it in a rule on exclusion of past sexual behavior would thus only increase the likelihood of confusion.

It may be that the Committee intended to use the word "propensity," which is a term of art commonly associated with sex crimes cases. See, e.g., 1 McCormick on Evidence § 190, at 803 (4th ed. J.W. Strong, et al., 1992). There is an entire body of law concerning what constitutes "propensity" evidence and discussing its admissibility. If the Committee intended to use the term "propensity," that should be made clear in both the rule and Committee Note and an opportunity to comment should be provided.

2. Notice period

The amended rule, as with its predecessor, requires that 15 days advance notice be given on the intent to introduce evidence of past sexual behavior (and "predisposition" evidence under the amended rule). The notice requirement was reasonable when it applied to cases in which the sexual misconduct was charged as a crime, because the defendant was then on notice of the possible need to introduce evidence of past sexual behavior. Since the amended rule is expanded to include cases in which sexual misconduct is not charged, the notice provision may be unfair. A solution would be to include a provision which says that notice must be given 15 days prior to trial of a party's inten-

tion to offer evidence of past sexual behavior of an alleged victim where the party seeking to include in its case evidence of sexual misconduct has given written notice of its intention to do so where the sexual misconduct is not charged as a crime.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 9. Release in a Criminal Case

1. Suggested clarification as to which subdivision applies before and after sentencing

The rule creates unnecessary confusion as to whether subdivision (a) or (b) applies after a finding of guilt (by plea or trial) and before sentencing. Subdivision (a) says it applies to "Release Before Judgment." "Judgment" in a criminal case is sentencing. See Fed.R.Crim.P. 32(d). If judgment is sentencing, then subdivision (a) would seem to apply any time before sentencing. Subdivision (b) says it applies to "Release After Judgment of Conviction." What is the meaning of the term "judgment of conviction"? If "judgment of conviction" is the entry of a finding of guilt, it would seem that subdivision (b) is meant to apply not only after sentencing, but before sentencing and after a finding of guilt. Either subdivision (a) should be changed to read "Release Before Judgment of Conviction" or subdivision (b) should be changed to read "Release After Judgment."

It is possible to read the Committee Note to suggest that subdivision (b) is meant to apply after a finding of guilt has been made and that subdivision (a) is meant to apply before a finding of guilt and at no time thereafter. If that is the intended division, then the change suggested above to subdivision (a) should be made.

Another possible dividing point between the two subdivisions which would be consistent with the Committee Note and more logical in terms of procedure and jurisdiction would be to make the distinction before and after a notice of appeal has been filed in the principal case. Subdivision (a) could apply any time before a notice of appeal is filed and subdivision (b) could apply any time after a notice of appeal has been filed. This dividing point would also recognize the practical significance of whether there is already in existence a court of appeals case (and file) for the defendant.

2. Clarification that motion must always first be made in the district court

The Committee Note states that even after a notice of appeal of the judgment of conviction and/or sentence has been filed, the defendant must first apply to the district court for release and may not apply directly to the court of appeals. If this is going to be required by the rule, then the text of the rule should state that an application for release or for modification of conditions of release, must always be made in the first instance in the district court.

3. Suggested change to subdivision (c)

Subdivision (c) of the rule provides that the release decision "must be made in accordance with applicable provisions of Title 18 U.S.C. §§ 3142 and 3143." We would suggest that specific statutory references not be used and that the subdivision say that the decision "must be made in accordance with applicable statutory provisions."

Reference to specific statutes increases the likelihood that the subdivision will be incomplete or will become outdated if Congress makes any change in the bail statutes. For example, 18 U.S.C. § 3145 also applies to certain aspects of the release decision, yet it is not mentioned by subdivision (c). Moreover, the benefit to be gained by reference to the specific statutory provisions (alerting the reader to what they are), can be accomplished by making reference to them in the Committee Note.

4. Opportunity to present new information on appeal

We recommend that either the text of subdivision (b) or the Committee Note be amended to make it clear that a party requesting bail from the court of appeals may supplement the record of the district court bail proceedings with appropriate evidentiary material. Certain information may be obtained or events may occur after bail is sought in the district court and before the motion is heard by the court of appeals that would be appropriate for the court of appeals to receive. Rather than requiring the party to start over again in the district court, or not to allow the court of appeals to learn of the information, the party should be able to submit additional evidentiary material to the court of appeals that was not submitted to the district court. This accords with current practice, although not explicitly provided for in the Rule. See, e.g., Truong Dinh Hung v. United States, 439 U.S. 1326, 1329 (1978) (Brennan, Circuit Justice, in chambers).

Rule 28. Briefs

Requiring a summary of argument

Some very good appellate lawyers include a summary of argument in their briefs. Some do not. Some use a summary of argument occasionally, but not always. A brief which raises a single issue, for example, may not benefit from a summary of argument. Unless a particular item is necessary in all appellate briefs, it should not be made mandatory by Rule 28. In our experience, a summary of the argument does not meet that criterion. We would recommend that the decision whether to include a summary of argument be left to the judgment of the lawyer.

Making a summary of argument obligatory is also troubling given local rules which shorten the permissible length of appellate briefs. The Ninth Circuit, for example, will soon limit briefs to 35 pages. Given the steadily increasing amount of information that already is required to be included in a brief, both by the Federal and local rules, eacg additional requirement, such as that of a summary of argument, leaves less room for the argument itself or the facts that must be presented in support of the argument.

Rule 32. Form of a Brief, an Appendix, and Other Papers

1. Single spaced footnotes

Subdivision (a) would require footnotes that contain more than citations be double spaced. Footnotes in all written materials (including general literature and judicial opinions) are single spaced. What need has been shown for imposing a different rule in federal court of appeals briefs? Perhaps it is true that some lawyers use lengthy textual footnotes in an effort to get more information into the 50 pages permitted for a brief. Those efforts are ultimately self-defeating to the lawyer's cause, however, which should be sufficient restraint against misuse of footnotes. There is no reason why all appellate lawyers should be presumed to be incapable of using footnotes properly and in a manner which makes them effective, even when single spaced.

2. Location of the number of the case

Subdivision (a)(1) adds a new provision which states that "the number of the case must be centered at the top of the front

cover." While we question the need for the federal rules to dictate the location of the number of the case, if it is the intention of the provision to require the number to be at the very top of the cover page, the text of subdivision (a)(1) should be clarified. The order of discussion should correspond to the item's location on the cover page, from top to bottom. The subdivision would then read: "(1) the number of the case, which must be centered and placed at the top of the page, above all other information; the name of the court; ...."

3. Form of a petition for rehearing

Subdivision (b) provides that a petition for rehearing or suggestion for rehearing in banc shall be in the form required for a brief under subdivision (a). Since some circuits allow rehearing petitions to be done in the form of a motion, the subdivision should be modified to provide that a rehearing petition or suggestion for rehearing in banc may be in the form of a brief or a motion. Alternatively, subdivision (b) should be modified to provide that the petition shall be in the form prescribed by subdivision (a) unless a local rule provides otherwise.

Rule 38. Damages and Costs for Frivolous Appeals

The amendment would make it explicit that notice must be provided before damages or costs can be imposed. We believe the notice requirement is important and strongly endorse the Committee's proposed amendment.

Rule 41. Issuance of Mandate, Stay of Mandate

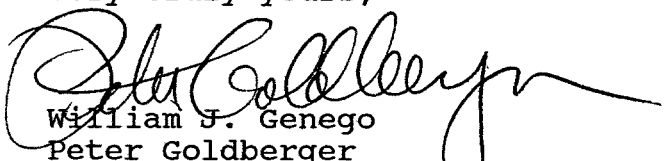
Presumptive period of stay pending certiorari

Subdivision (b) provides that the stay of the issuance of the mandate shall be for 30 days unless the period is extended for "cause shown" or unless a petition for a writ of certiorari is filed within the 30 day period and the party files a notice from the clerk of the Supreme Court reflecting the filing of the petition. The 30 day period was written into the rule at a time when the period for filing a petition for a writ of certiorari in a federal criminal case was 30 days. As of January, 1990, the Supreme Court's rules were amended to provide that a party has 90 days to file a petition for a writ of certiorari. The period of time in subdivision (b) should be modified to 90 days so that it corresponds to the Supreme Court rule. Even if the

period is not changed to 90 days, it should be extended to at least 60 days to provide a party with the benefit of a stay a reasonable amount of time within which to prepare and file a petition for a writ of certiorari.

NACDL appreciates the opportunity to offer our comments on the Standing Committee's proposals. We look forward to working with you further on these important matters.

Very truly yours,



William J. Genego
Peter Goldberger
Co-Chairs, National Association
of Criminal Defense Laywers
Committee on Rules of Procedure

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

April 15, 1993

Mr. William J. Genego
Mr. Peter Goldberger
National Association
of Criminal Defense Lawyers
1110 Vermont Ave. NW, Suite 1150
Washington, DC 20005

Re: Proposed Amendments to the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence

Dear Mr. Ganego and Mr. Goldberger:

Thank you for your letter of April 14, 1993, transmitting the comments of the National Association of Criminal Defense Lawyers on the proposed changes to Criminal Rules 16, 29, and 32, Evidence Rule 412, and Appellate Rules 9, 28, 32, 38, and 41. A copy of your letter will be sent to the members of the Judicial Conference Advisory Committees on Criminal Rules, Evidence Rules and Appellate Rules for their consideration.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Robert E. Keeton

Honorable William Terrell Hodges
William R. Wilson, Esquire
Advisory Committee members
Professor David A. Schlueter

Honorable Kenneth F. Ripple
Honorable Dolores K. Sloviter
Advisory Committee members
Professor Carol Ann Mooney

Honorable Ralph K. Winter, Jr.
Honorable Wayne D. Brazil
Advisory Committee members
Dean Margaret A. Berger
Professor Stephen A. Saltzburg