COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

File copy

Washington, D.C.
June 23-25, 1994

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
WASHINGTON, D.C.
JUNE 23-25, 1994

1. Opening Remarks of the Chair

   A. Report on Recent Rules Amendments Approved by the Supreme Court

   B. Coordination of CJRA Tasks with the Court Administration and Case Management Committee

2. Approval of the Minutes

3. Report of the Administrative Office

   A. Legislative Activity Report

   B. Administrative Actions

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4. **ACTION** - Report to the Judicial Conference on Facsimile Filing Standards

5. Report of the Advisory Committee on Appellate Rules

   A. **ACTION** - Proposed Amendments to Rules 4, 8, 10, 47, and 49 for Approval and Submission to the Judicial Conference

   B. **ACTION** - Proposed Amendments to Rules 21, 25, 26, 27, 28, and 32 for Public Comment

   C. **ACTION** - Ninth Circuit Local Rule Regarding Capital Cases

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6. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** - Proposed Amendments to Rules 8018, 9029, and 9037 for Approval and Submission to the Judicial Conference

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

(Standing Committee)

Chair:

Honorable Alicemarie H. Stotler United States District Judge 751 West Santa Ana Boulevard Santa Ana, California 92701	Area Code 714 836-2055 FAX-714-836-2062 (Short FAX) 714-836-2460 (Long FAX)

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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 Chief Judge United States District Court 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 200 South Washington Street Alexandria, Virginia 22320	Area Code 703 557-7817 FAX-703-557-2830
Honorable William R. Wilson, Jr. United States District Judge 600 West Capitol Avenue, Room 153 Little Rock, Arkansas 72201	Area Code 501 324-6863 FAX-501-324-6869
Honorable James A. Parker United States District Judge P.O. Box 566 Albuquerque, New Mexico 87103	Area Code 505 766-1129 FAX-505-766-1283

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

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Secretary:

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Agenda: Standing: 6/94
Sect 4-2

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 29, 1994

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

William H. Rehnquist

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

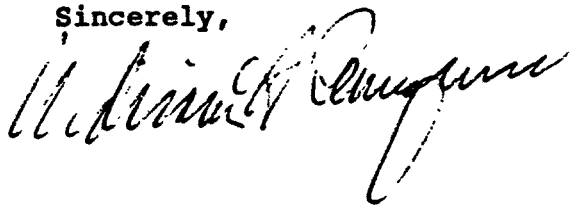
April 29, 1994

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court pursuant to Section 2075 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,



Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 29, 1994

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

William H. Rehnquist

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

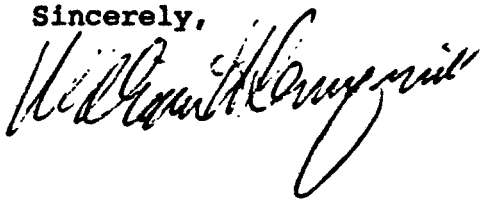
April 29, 1994

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress an amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code. The Court has withheld that portion of the proposed amendment to Rule of Evidence 412 transmitted to the Supreme Court by the Judicial Conference of the United States which would apply that Rule to civil cases. The reasons for the Court's action are set forth in the attached letter to Judge Gerry, Chairman of the Executive Committee of the Judicial Conference of the United States.

Accompanying this rule are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Note submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The Note was not revised to account for the Court's action, because the Note is the commentary of the advisory committee.

Sincerely,



Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 29, 1994

The Honorable John F. Gerry
Chair
Executive Committee
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Gerry:

I would like to express the Court's appreciation for the Judicial Conference's submission of the proposed amendments to the Federal Rules of Appellate Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence. I am writing to inform you that the court has approved and forwarded the proposed changes to the Congress, with one exception.

We have withheld approval of that portion of the proposed amendments to Rule of Evidence 412 which would apply that Rule to civil cases, and make evidence of the sexual behavior or predisposition of an alleged victim admissible only if "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." Proposed Rule of Evidence 412(b)(2).

Some members of the Court expressed the view that the amendment might exceed the scope of the Court's authority under the Rules Enabling Act, which forbids the enactment of rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). This Court recognized in *Meritor Saving Bank v. Vinson*, 477 U.S. 57, 69 (1986), that evidence of an alleged victim's "sexually provocative speech or dress" may be relevant in workplace harassment cases, and some Justices expressed concern that the proposed amendment might encroach on the rights of defendants.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Draft Minutes of the Meeting of January 12-14, 1994
Tucson, Arizona

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Tucson, Arizona on Wednesday, Thursday, and Friday, January 12 - 14, 1994. The following members were present:

Judge Alicemarie H. Stotler (chair)
Professor Thomas E. Baker
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Irving B. Nathan, Esquire (for Deputy Attorney General Philip Heymann)
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Judge George C. Pratt was unable to reach the meeting because of transportation problems caused by inclement weather. Alan C. Sundberg, Esquire, was unable to attend due to illness.

At the invitation of the chair, former members Judge Robert E. Keeton and Professor Charles Alan Wright participated in the meeting.

Supporting the committee were Professor 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 of the United States Courts.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules:
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules:
Judge Paul Mannes, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules:
Judge Patrick E. Higginbotham, Chair
Dean Edward H. Cooper, Reporter

unless a judge "otherwise directs." He added that several bankruptcy judges had voiced the opinion that the provisions of Fed.R.Civ.P. 26 made no sense in most contested matters.

Mr. Rabiej stated that the Rules Committee Support Office had received a request from the media to attend the scheduled public hearing on the proposed amendments to Fed.R.Crim.P. 53, dealing with cameras in the courtroom. Judge Stotler inquired as to what action should be taken if the media were to ask to videotape the hearings. Judge Jensen replied that his immediate reaction was that there would be no problem in allowing them to do so.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee approved the minutes of the June 17-19, 1993 meeting, with the addition of the language set forth in Mr. McCabe's January 7, 1994 letter to Judge Stotler, concerning Judge Keeton's resolution on facsimile filing.

Judge Keeton's resolution had been approved by the committee with one dissent. At the time he offered it during the course of the June 1993 meeting, Judge Keeton did not have before him: (1) the specific language of the Judicial Conference's existing guidelines on fax filing, and (2) a summary of the concerns of the advisory committee regarding the proposed new guidelines. It was agreed by the committee that detailed language regarding these two matters would be added to the resolution following the meeting.

In the interest of making the minutes of the June 1993 meeting as complete and self-contained as possible, the committee voted without objection to approve the following amendments to the draft minutes to incorporate the specific language added to the resolution after the meeting:

At the bottom of page 3 of the draft minutes, in lieu of "Here add a summary of the resolution," substitute the following:

> "Effective December 1, 1991, the Judicial Conference authorizes any court to adopt local rules to permit the clerk, at the discretion of the court, to accept for filing papers transmitted by facsimile transmission equipment; provided that such filing is permitted only:
>
> (1) in compelling circumstances, or
> (2) under a practice which was established by the court prior to May 1, 1991."

committee seek the views of bar associations. These views were endorsed by several other committee members.

Mr. Perry stated that lawyers generally are interested only in specific amendments to the rules, particularly amendments perceived as likely to affect their interests or those of their clients. They do not appreciate the balance and objectivity required of the rulemaking process. Accordingly, he suggested that the committee consider ways to reach out to lawyers -- to educate them and involve them in the rulemaking process.

A number of participants endorsed this view. Judge Stotler noted that the new AO pamphlet on the federal rules was very effective and should be distributed as widely as possible to the bar. Professor Hazard suggested that a copy of the pamphlet be included with each questionnaire so the recipient will have a basic knowledge of the rulemaking process when responding.

Judge Mannes stated that the advisory committees generally only hear from judges and lawyers who do not like a particular amendment. He recommended that the committees encourage comments from people who favor particular rule amendments.

Several members expressed regret that certain members of the bar had politicized the rules process for self interest. Judge Higginbotham pointed out, however, that the committee cannot escape politics. If a specific rule amendment hits a nerve center or touches economic interests, political actions are likely to override the rules process.

Judge Ellis stated that bar groups were now more interested in the rulemaking process. This was a direct result of the controversy surrounding the recent amendments to Fed.R.Civ.P. 26. The amendments represented a watershed event for the process.

Professor Baker reported that he had requested the members of the committee to list the concerns or issues they saw regarding the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure. He summarized the responses of the members as follows:

- How the rules committees relate to other Conference committees
- The role of the Supreme Court in the rulemaking process
- The timetables established for the rulemaking process
- The job description of the committee chair
- The future of the style subcommittee and the role of style
- The local rules project -- how to follow through and monitor it
- Integration of the various sets of federal rules
- Coordinating the work of the advisory committees and their liaisons
- Education of the bench, bar, and public
- Setting goals for rulemaking

added that he had prepared a section-by-section comparison between section 473 of the Civil Justice Reform Act and the recent amendments to the civil rules. Four of the six principles of case management set forth in the Act arguably had been satisfied by the civil rules amendments that took effect December 1, 1993. The only two principles in section 473 not addressed explicitly in the new rules were: (1) case tracking, and (2) an 18-month trial date.

INTERNAL COMMITTEE PROCEDURES

Judge Stotler said that it would be helpful to establish a regular format for committee meetings that would first address action items for Judicial Conference approval, followed by action items for publication and comment, followed by information items (i.e. amendments pending at the Supreme Court or in Congress and proposals published for public comment). She also stated that the docket system used by the Advisory Committee on Appellate Rules was very effective and should be considered for use by the other advisory committees.

Judge Ellis noted that many lawyers and academics had complained that the rules committees appeared to act in a piecemeal fashion and tended to make too many changes in the rules.

Professor Hazard recommended that amendments to the rules be processed only on a regularly scheduled basis, perhaps with amendments batched for approval every five years or so. He stated that emergency changes must be accommodated, but they are few in number. He argued that under this type of fixed schedule approach, the bar could regularly expect a package of rule amendments every five years, rather than piecemeal changes each year.

Judge Easterbrook stated that the cyclical approach had a serious problem because the terms of committee members and chairs were simply too short. Three-year terms for the chairs, in particular, were just not enough time to assure continuity in the rulemaking process and to see a package of amendments through from start to finish. Several of the members agreed strongly with this statement.

Mr. Spaniol sympathized with the desire for a regular cycle of rules changes, but he argued that the committee would just have to "play it by ear." He suggested that if a plan were developed calling for omnibus amendment packages every several years, the committees would soon have to depart from it out of necessity. Other members agreed with his observation.

Mr. Garner stated that when one focuses on style, substance is normally improved as a byproduct through the elimination of vagueness and ambiguities. He pointed out that the style subcommittee had simplified the civil rules from a 12th Grade reading level to a 9th Grade reading level, which would foster uniform interpretations.

Mr. Garner noted that he had been working on a set of guidelines for rule drafting that would cover structure, sentence order, word choices, and special conventions. The guidelines were designed for the use of the reporters to the advisory committees.

Mr. Spaniol stated that the committee must address how it will handle style in the future. He argued that style should be left basically to the reporters. If they draft the rules in good style at the outset the system will work efficiently.

Judge Stotler stated that the committee must address two important issues:

(1) the timing of the restyled rules packages, and
(2) whether style should be a separate process or integrated into the existing structure.

Judge Bertelsman cautioned that there was a general feeling in the legal profession that rules revisions had been too frequent. The opinion had been expressed most vocally by law professors. He stated that he was very much in favor of the style revisions, but was concerned that publishing a whole package of style changes at one time in the near future would be a mistake.

Judge Logan stated that the Advisory Committee on Appellate Rules preferred to have the appellate rules restyled as a package and would like to keep drawing on the talents of Bryan Garner.

Judge Wilson and several other committee members stated that the style project was vital and must be continued.

Mr. Perry suggested that all five sets of rules might be rewritten according to a prescribed schedule over the next several years. The committee might wait until all the revisions were completed and then issue all the rules together as a single package. The consensus of the committee, however, did not favor this approach.

Judge Easterbrook cautioned that it might be best to see how well the revisions in civil rules are received before tackling the other sets of rules. He expressed concern over hidden substantive changes made in the guise of style.

Judge Mannes stated that the Advisory Committee on Bankruptcy Rules had restyled all the official bankruptcy forms a few years ago with great success.

serious concerns over local barriers to government attorneys. Mr. Rabiej added that the Senate version of the pending omnibus crime bill had provisions for attorney conduct in violent crime cases.

In conclusion, Professor Coquillette summarized the plan of the local rules project as follows:

(1) To poll the district courts again.
(2) To begin work on reviewing the local criminal rules.
(3) To begin work on attorney admission and conduct.

Mr. Nathan, on behalf of the Department of Justice, urged action on attorney conduct rules. He noted that the practice of the federal courts to incorporate state attorney conduct rules had caused serious problems for the department. Government attorneys were forced to deal with more than 50 different sets of rules and were concerned that local attorney conduct rules affected procedure.

Chief Justice Veasey stated that the state courts were very much interested in preserving their authority in this area. The Conference of State Chief Justices had discussed the matter with the Department of Justice and would debate the matter at its next meeting. He recommended that the rules committee address attorney conduct, and he noted that it had constitutional and comity implications. The states clearly would not like to see a federal trump of attorney conduct matters, either by the Department of Justice or by local federal court rules.

Chief Justice Veasey emphasized that the states did not want a confrontation on the matter and wished to work with the Department of Justice and the rules committees. Moreover, the public was upset with attorney conduct in general. Accordingly, if the committee, the department, and the states failed to work together, a vacuum would be created for the politicians to fill.

Judge Bertelsman observed that the issue of attorney conduct may well be substantive in nature and beyond the power of the rules committees to address. Professor Wright pointed out that 28 U.S.C. § 1654 authorized each court to regulate attorney admission and practice,. Judge Bertelsman agreed but added that this subject was not part of the Rules Enabling Act process.

Professor Hazard stated that some aspects of attorney conduct were beyond the power of the committee because they did not constitute practice and procedure. Yet, other parts clearly lay within the committee's authority.

Judge Stotler declared that the integrity of the Rules Enabling Act was very important. She pointed out that the Automation and Technology Committee was also opposed to fax filing, largely on the grounds that fax represented old technology.

Judge Higginbotham stated that the Advisory Committee on Civil Rules did not have a major concern with the Rules Enabling Act. Rather, it was more concerned about fostering uniformity of practice among the district courts. Accordingly, the national guidelines would have to address procedural content.

Professor Resnick stated that the Advisory Committee on Bankruptcy Rules was opposed to fax filing in the bankruptcy courts in any form. He referred to the new federal bankruptcy rule that authorizes electronic noticing and stated that the advisory committee wants to leapfrog fax technology in favor of electronic filing.

Judge Keeton declared that the reporters' draft from the June 1993 meeting was a vast improvement over the original guidelines prepared by the Court Administration and Case Management Committee, but they were still far from acceptable to the standing committee. He pointed out that the Judicial Conference had rejected the proposed guidelines, largely on the basis that they would bypass the Rules Enabling Act process. He said that if the Judicial Conference itself violated the Act, it would surely undercut the judiciary's standing when it cautions the Congress against enacting rules by statute. Nevertheless, the Conference was expecting final action on fax guidelines by September 1994. Thus, the rules committees must produce some document.

Judge Keeton complimented the appellate advisory committee for excellent work in producing redrafted guidelines and a model local rule that separated technical matters from procedural directions. The latter surely should be set forth in rules, which are required to be published and made available to the bar.

Mr. Perry inquired as to whether the committee was dealing with fax filing on a routine basis or fax filing only in exceptional situations. Judge Logan responded that the appellate committee had prepared alternate drafts to cover both possibilities. Judge Stotler added that the charge to the committee was to address fax filing on a routine basis.

Mr. Perry moved that the committee recommend to the Judicial Conference that fax filing not be allowed on a routine basis. Judge Ellis seconded the motion, arguing that fax filing would be a disaster if allowed on a routine basis. He recommended that the committee oppose fax filing generally, but provide guidelines to take care of emergency and special situations only.

Judge Easterbrook suggested that one possible course of action for the committee would be to draft a model local rule, append it to the federal rules, publish it for public comment, but note in the comments that the committee was generally opposed to fax filing,

Judge Easterbrook pointed out that the proposed guidelines prepared by the appellate committee were not limited to district or appellate courts. Judge Logan added that they could be adapted for all levels of court.

Judge Easterbrook's motion failed by a vote of 5-6.

The committee's deliberations on fax filing were then continued to Friday to allow Judge Logan, Judge Easterbrook, Professor Mooney, Mr. Spaniol, and others to make overnight changes in the guidelines and model local rules prepared by the Advisory Committee on Appellate Rules.

On Friday Judge Logan distributed a clean copy of the revised guidelines and model rules to the members. He noted that the ad hoc drafting committee's overnight changes had included substituting the term "standards" for "guidelines," striking references to the bankruptcy rules and 28 U.S.C. § 2075, rewriting the technical standards contained in sections 1(b) and 2(a), and eliminating Part IV, dealing with court resources. Judge Logan stated that it would be appropriate for the style subcommittee to make additional changes in the product and that it would not have to be published for public comment.

Judge Logan stated that Mr. Spaniol had arrived at a possible solution to the fax guidelines that would give the chair of the standing committee a product to give to the Judicial Conference in September and would avoid the need to publish rules for comment.

Mr. Spaniol then presented the following draft resolution:

> Your Committee, after full consideration of the views of its members, and the chairs and reporters of the various Advisory Rules Committees, voted unanimously to recommend against facsimile filing "on a routine basis."
>
> It is the view of your Committee that facsimile filing in emergency or unusual situations is appropriate. The recent amendments to Rule 25 of the Federal Rules of Appellate Procedure and Rule 5(e) of the Federal Rules of Civil Procedure now authorize the courts of appeals and the district courts to adopt local rules permitting "papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards approved by the Judicial Conference of the United States." These new provisions provide ample authority for receiving documents by facsimile transmission.
>
> The Advisory Committee on the Federal Rules of Appellate Procedure reviewed the proposed guidelines referred to your Committee, made amendments to them, and submitted them to your Committee along with a proposed uniform local appellate court rule. This proposed rule could also be adapted for use by a district court.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of December 9, 1993. (Agenda Item XI)

Fed.R.Crim.P. 16

Judge Jensen reported that the advisory committee had approved a proposed amendment to Fed.R.Crim.P. 16 requiring the government, on request of the defendant, to disclose the names, addresses, and statements of witnesses at least seven days before trial. He noted that a similar proposed rule change had been approved by the Supreme Court in 1974, but had been rejected by the Congress as a result of vigorous opposition from the Department of Justice.

Judge Jensen stated that there was a natural tension between the need for a fair trial and the need to protect government witnesses. The draft rule approved by the advisory committee presented a good balance between these two principles. The rule provided a presumption of disclosure, but allowed exceptions freely in the unreviewable discretion of the United States attorney where there could be danger to witnesses or obstruction of justice.

He added that a series of changes had been made in the criminal rules over the years to require disclosure of information before trial, all with the theme of eliminating surprise, including Fed.R.Crim.P. 12.1 (notice of alibi), 12.2 (notice of insanity defense or expert testimony of defendant's mental condition), and 12.3 (notice of a defense based on police authority). He pointed out that the changes had been promoted by the Department of Justice to prevent surprise to the government at trial. He added that surprises occurring during a trial lead to interruptions in the process in order to obtain additional information.

Judge Jensen noted that in the state courts there was a clear movement towards greater disclosure. State systems generally provide for open disclosure, with exceptions made for security reasons. In most federal prosecutions, too, open file discovery prevailed. So, as a practical matter, disclosure of witnesses and other information already occurred in most cases.

He explained that the 1974 rule proposal had contained a provision for protective orders. The current rule, however, went much further to protect the government. It recognized the good faith of the prosecutor and made the prosecutor's determination unreviewable. This would avoid collateral litigation. It would also require reciprocal discovery, for the defendant must disclose witnesses when the government must.

Judge Wilson stated that he recognized that there was a danger to witnesses in some criminal cases. But in white collar crimes, the idea of going to trial without pretrial disclosure of the names of witnesses was ludicrous. He argued that the proposal of the Advisory Committee on Criminal Rules was very modest and promoted fundamental fairness. He aeerted that he was extremely skeptical that the Department of Justice would change its position at the next meeting.

Chief Justice Veasey stated that he came from an open disclosure state and had found the issue to be a "no-brainer." He saw the proposal as very reasonable, but expressed concern about inconsistency with the Jencks Act.

Several other members expressed their support for the proposed amendment on its merits, but were also concerned about the Jencks Act problem. Professor Wright pointed out that 28 U.S.C. § 2072(b) provided that the amended rule would supersede the Act in any event.

Judges Ellis and Easterbrook stated that they were troubled about the supersession clause in the Rules Enabling Act and suggested that it might be unconstitutional. Judge Easterbrook added that the advisory committee note was not completely candid. He suggested that the issue was whether the committee should openly confront the Jencks Act problem and rely on the supersession mechanism.

Judge Ellis moved to defer publication of the amendments to Fed.R.Crim.P. 16 until the next meeting of the committee, subject to the Department of Justice's planned study of current practices and problems.

The motion was approved without objection.

Internal Operating Procedures

Judge Jensen reported that the advisory committee had adopted two internal operating procedures:

(1) In discussing proposals for rules amendments, the burden would be placed on the reporter to provide a history of prior, similar proposals for consideration of the members. Issues may be raised anew, but the members should be made aware of past actions of the committee on similar suggestions.

(2) The appropriate place for people to make oral presentations to the advisory committee was at the scheduled public hearings, rather than at committee business meetings. Yet, if people are present at the meetings, they may be asked, in the committee's discretion, to participate in discussions.

Rule 68

Judge Higginbotham reported that the Court Administration and Case Management Committee had approved in principle a bill introduced by Senator Grassley that would expand substantially the offer of judgment procedure contained in Fed.R.Civ.P. 68. The advisory committee had studied the proposal at length at its last meeting and had decided that the proposal was a bad idea. The committee, however, agreed to obtain empirical data and study the matter in further depth.

Dean Cooper reported that the Federal Judicial Center was conducting a study of settlement behavior that might shed some light on the matter. The Center also planned to survey lawyers on how they thought revised proposals regarding offers of judgment might work in practice.

Judge Higginbotham stated that the advisory committee recommended that the Conference rescind its approval of the bill. This would put the Conference in a neutral position pending further study.

The committee approved the recommendation.

Other Rules Under Consideration

Judge Higginbotham reported that the advisory committee was also looking at Rule 23. with regard to its use in mass multi-district tort cases, and at Rule 53, with regard to possible expansion of the use of masters for pretrial management.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Professor Mooney presented the report of the advisory committee, as set forth in Judge Logan's memorandum of December 10, 1993. (Agenda Item X) She reported that the advisory committee had no requests for approval before the standing committee, other than the fax filing guidelines, discussed earlier.

Professor Mooney stated that the last two packages of appellate rule amendments had been based largely on the work of the local rules project and were designed to promote uniformity among the circuits. She provided a brief summary of some of the matters under active consideration by the advisory committee, including changes to F.R.A.P. 27, dealing with motions, and to F.R.A.P. 35, dealing with the grounds for in banc consideration.

Agenda Section 3A
Standing 6/94

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

May 20, 1994

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: Legislative Activity Affecting the Rules

Since the last meeting of the Standing Committee in Tucson on January 12-15, 1994, the rules committees have communicated in writing with Congress on legislation involving four principal areas. The following discussion briefly describes those actions. The relevant written correspondence is identified and attached.

I. The Violent Crime Control and Law Enforcement Act (H.R. 3355).

The Senate passed H.R. 3355, an amended comprehensive crime bill originally introduced in the House of Representatives. The Senate-passed crime bill contains ten separate sections that would amend rules directly or otherwise affect the rulemaking process. The bill affects Evidence Rule 412 (rape shield victim protection), Criminal Rule 32 (victim allocution), Evidence Rule 404 (admissibility of character evidence), and rules governing professional conduct of lawyers in criminal cases.

The House of Representatives has also passed a separate, comprehensive crime bill, but it is not similar to the Senate-passed bill. The bills will be reconciled in conference. Conferees from the Senate have just been designated to meet with the House conferees.

On March 30, 1994, a letter was sent from Judge Stotler to the chairs and ranking minority members of the Senate and House Judiciary committees and pertinent subcommittees recommending that no action on the provisions relating to the rules or the rulemaking process be taken in the crime bill. The letter is set out as Attachment A.

the request. Senator Heflin relied on the material and opposed Senator Brown's amendment on the floor of the Senate that same day. The amendment was tabled and ultimately rejected. A copy of a letter to Senator Dole concerning this issue and an excerpt from the Congressional Record containing Senator Heflin's remarks are set forth as Attachment D.

An oral update will be given at the meeting of any intervening developments in these legislative areas.

John K. Rabiej

Attachments

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

March 30, 1994

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The House of Representatives did not approve amendments to the Federal Rules of Evidence and the Federal Rules of Criminal Procedure proposed in several crime bills considered late last year. That action was greatly appreciated. I write now to request your assistance to prevent amendment of the federal rules outside the Rules Enabling Act process in your consideration of H. R. 4092 and the Senate-passed H.R. 3355, "Violent Crime Control and Law Enforcement Act."

The Senate-passed H.R. 3355 contains ten separate sections that would amend rules directly or otherwise affect the rulemaking process. They generally pertain to Evidence Rule 412, regarding the privacy concerns of a victim of sexual offense, (i.e. §§ 3251-54, 3706) and Criminal Rule 32, regarding a victim's opportunity to address the court during sentencing (i.e. §§ 901, 3264).

The other relevant sections, including §§ 831, 3711, and 3712, either involve the admission of evidence of the defendant's commission of a past sexual assault offense or otherwise generally affect the rulemaking process. The bill's pertinent sections are enclosed for your information. I am also enclosing two letters that discuss the committees' concerns with the amendments in H.R. 3355 as they had been included in previously considered bills.

A set of proposed amendments to Evidence Rule 412 and Criminal Rule 32 has been making its way through the demanding Rules Enabling Act (Act) process and will take effect, unless altered by the Supreme Court or Congress, on December 1, 1994. Consideration

committees considered similar proposals, but did not accept them. The committees were concerned about the proposals' fairness and the lack of supporting empirical data, particularly if evidence of the past sexual history of a victim was being excluded. Other reasons for the committees' action are set forth in the enclosed letters.

Sections 3711 and 3712 would require the Judicial Conference to report to Congress within 180 days on creating rules governing professional conduct of lawyers and to recommend changes to Evidence Rule 404. Both issues are controversial and complicated. The Conference committees are reviewing the proposals, but recommended changes to rules cannot be studied and acted on within these timeframes consistent with the Rules Enabling Act process.

Although amendments to Criminal Rule 32 were also approved by the Judicial Conference, no provision requiring victim allocution was included. Courts now consider this information as part of the presentence report and now may, and do, allow the victim(s) to address the court in appropriate cases. Moreover, requiring allocution in all cases could be counterproductive because under the federal sentencing guidelines the victim's testimony would have very little, if any, effect on the sentence. The Committee on Rules believes, however, that a separate amendment to title 18 to allow victim allocution for discrete criminal offenses would be a matter entirely within Congress' prerogative.

The Supreme Court is now reviewing the Conference-approved amendments to Evidence Rule 412 and Criminal Rule 32. If approved by the Court, the amendments will be transmitted to Congress no later than May 1, 1994. The amendments will take effect automatically on December 1, 1994, unless Congress affirmatively acts otherwise.

The amendments to Evidence Rule 412 and Criminal Rule 32 are in the final stages of the rulemaking process. Approval of legislation that would directly amend these rules, despite the nearly concluded rulemaking process, would effectively bypass the Rules Enabling Act process, render useless the hard work of our volunteer lawyers, judges, and professors, and frustrate the intent of the Act. Your assistance in maintaining the integrity of the Rules Enabling Act process is appreciated.

Sincerely yours,

Alicemarie H. Stotler

Alicemarie H. Stotler

Enclosures

Identical letters were sent to Senators Hatch, Heflin, and Grassley.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMM.

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHA
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR
EVIDENCE RULES

November 10, 1993

Honorable Charles E. Schumer
Chairman, Subcommittee on
Crime and Criminal Justice
United States House of Representatives
H2-362 Ford House Office Building
Washington, D.C. 20515

Dear Chairman Schumer:

In a letter dated October 20, 1993, a copy of which was sent to you, Judge Stanley Marcus and I provided an update on the actions of the Judicial Conference of the United States regarding the Federal Rules of Evidence and Criminal Procedure on the admissibility of evidence of a victim's past sexual behavior at trial and the establishment of a victim's right of allocution at sentencing. (A copy of the letter is enclosed for your convenience.)

I am writing now to inform you of the Judicial Conference's actions and concerns regarding several other proposals that would amend directly the Federal Rules of Evidence and Criminal Procedure or would otherwise affect the rule-making process. These proposals are contained in H.R. 688, the "Sexual Assault Prevention Act of 1993." If these proposals are raised during Congressional deliberations on the various pending crime bills, I am hopeful that this information will be helpful to you.

H.R. 688 would amend Evidence Rule 412 (excluding evidence of a victim's past sexual behavior in criminal and civil cases) and Criminal Rule 32 (establishing a right of victim allocution at sentencing), and would create a new Evidence Rule 416 (excluding evidence to show victim provocation). These provisions are similar to those contained in Subtitle A of Title IV of H.R. 1133, which were addressed in the enclosed October 20, 1993 letter. H.R. 688 also would add, however, new Evidence

(3) There is insufficient empirical data that evidence of past instances of sexual assaults or child molestation is so different from other evidence of misconduct involving, for example, prior drug use, violence, firearm use, or fraud, that it should be singled out as evidence that could be admitted to prove that the defendant acted in conformity with prior behavior on a particular occasion.

(4) Proposed Evidence Rules 413-415 would permit the use of evidence of the defendant's commission of another sexual offense in the prosecution's case-in-chief. Determining whether such evidence, standing alone, would be sufficient to sustain a conviction would raise serious issues.

PROPOSED AMENDMENT TO CRIMINAL RULE 24(b)

The proposed amendment to Rule 24(b) of the Federal Rules of Criminal Procedure in H.R. 688 would equalize the number of peremptory challenges between the government, which presently has six challenges, and the defendant, which has ten challenges. The Advisory Committee on Criminal Rules and the Standing Rules Committee have considered similar amendments to Rule 24(b) on several past occasions. On each occasion, no change was adopted after the issue had been thoroughly studied and debated.

Most recently, the Standing Rules Committee in 1991 agreed with the recommendation of the Advisory Committee on Criminal Rules and rejected proposed changes to Rule 24(b). The proposal to equalize the number of challenges had been published for public comment. It received widespread negative reaction from the public, bar, academia, and the bench.

Many reasons were submitted during the public comment period for rejecting the proposal to equalize the number of challenges. First, the greater number of peremptory challenges accorded to a defendant in Rule 24 reflects a historical right. Second, the defendant's "advantage" is necessary to offset the government's overwhelming resources available to it in examining the qualifications of prospective jurors. Third, the defendant has little control over the voir dire process that is exercised by the judge in most trials. Fourth, the proposal was perceived as another attempt to whittle away the rights of a defendant. Fifth, no convincing empirical data was provided to demonstrate that the amendment was necessary.

large and experienced group of practicing attorneys, jurists, and other professionals and laypersons. This scrutiny will be particularly helpful in reviewing codes regulating the conduct of attorneys and should not be bypassed by direct legislation.

Thank you for the opportunity to advise you of the actions of the Standing Rules Committee and the Judicial Conference on these important matters.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler

Enclosure

cc: Members of the Subcommittee on
Crime and Criminal Justice

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

October 18, 1993

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

We are writing to provide you with an update of recent actions taken by the Judicial Conference of the United States regarding the Federal Rules of Evidence and Criminal Procedure on the admissibility of evidence of a victim's past sexual behavior at trial and the establishment of a victim's right of allocution at sentencing.

The Judicial Conference approved the amendments to Evidence Rule 412 recommended by the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) at its session on September 20, 1993. The amendments will be transmitted to the Supreme Court for review, and if approved by the Court, will be transmitted to Congress by May 1, 1994. The Conference did not include a proposed provision on Criminal Rule 32 that would establish explicitly a victim's right to allocution at sentencing.

Enclosed for your information are the changes to Evidence Rule 412 approved by the Judicial Conference. The Conference has acted on these amendments on an expedited basis in light of the important public policy concerns and to facilitate timely congressional review.

The amendments underwent extensive scrutiny by the public, the bar, and the judiciary. Representatives from several organizations testified at a public hearing on the amendments, including: (1) the Women's Legal Defense Fund; (2) the NOW Legal Defense and Education Fund; (3) the American College of Trial Lawyers; and (4) the New York City Bar Association. We believe the final draft of the amendments, as approved by the Judicial Conference, is a significant improvement over earlier drafts and other proposals. The amendments reflect the deliberative and exacting process contemplated by the Rules Enabling Act.

There are other technical, but important differences between the Conference approved amendments to Evidence Rule 412 and those in the relevant provisions in S. 11. We would be pleased to discuss these with you or your staff at your convenience.

The Judicial Conference also considered, but did not include, a proposed provision in Criminal Rule 32 that would have required victim allocution at sentencing. The Rules Committees were convinced that the provision was unnecessary because: (1) the court considers this information as part of the presentence report; and (2) the court may allow victim allocution in a particular case under the existing rule.

The Rules Committees also believed that a mandatory provision might be counterproductive because under the federal sentencing guidelines the victim's testimony would have very little, if any, effect on the sentence. Victims would only become more frustrated with the justice system.

Most respectfully, we renew our suggestion that the proposed changes to Evidence Rule 412 and Criminal Rule 32 in S. 11 be withdrawn to permit the remaining important stages of the Rules Enabling Act process to go forward.

Needless to say, if we can be of any assistance to you or your staff in this matter, please do not hesitate to contact either of us.

Thank you again for considering our thoughts in this important matter.

Sincerely,

Alicemarie H. Stotler
Chair, Standing Committee
on Rules of Practice and
Procedure

Stanley Marcus
Chair, Ad Hoc Committee
on Gender-Based Violence

Enclosure

cc: Honorable Orrin G. Hatch
Honorable Howell Heflin
Honorable Charles E. Grassley

STATEMENT

of

PATRICK E. HIGGINBOTHAM

UNITED STATES JUDGE
for the
FIFTH CIRCUIT COURT OF APPEALS
and
CHAIRMAN, ADVISORY COMMITTEE
ON CIVIL RULES

before the

SUBCOMMITTEE ON COURTS
AND ADMINISTRATIVE PRACTICE

of the

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

Concerning Protective Orders
in Federal Litigation

April 20, 1994

procedures, such as sealing orders, that may close off public access to litigation materials.

The Judicial Conference of the United States strongly supports and promotes the integrity of the rulemaking process as prescribed by the Rules Enabling Act. (28 U.S.C. §§ 2071-2077.) The Act establishes a partnership between the courts and Congress designed to handle the daily business of the courts, which are matters of concern to all branches of government.

Under the Act's rulemaking procedures, any proposed change to the rules must be published and circulated to the bench and bar, and to the public generally, for comment and suggestions. Public hearings are scheduled on proposed changes to the rules. Rule changes become effective only after Congress has had an opportunity to review them following approval by the Judicial Conference and promulgation by the Supreme Court.

It is essential that before a proposal can become a national procedural rule it be considered most deliberately in this manner by thoughtful and experienced lawyers, law professors, judges, and interested organizations. The rulemaking process ensures that proposed rule changes are meticulously drafted and that those most affected by the rules are given ample opportunity to articulate their reactions, identify problems, and suggest improvements.

The use of protective orders as a procedural device is authorized under Rule 26(c) of the Federal Rules of Civil Procedure. At several meetings, the advisory committee discussed at length the provisions proposed in H.R. 2017 that would restrict

of a lawsuit may require access to material that includes trade secrets or other confidential commercial information, or involves matters of intense personal privacy. Protective orders may be essential to balance such litigation needs against the need for protection from disclosure. Without protective orders, moreover, more discovery disputes will arise as parties invoke other objections to discovery, including issues concerning equitable sharing of discovery expenses among multiple parties and the sale of discovery materials to the public.

The committee determined, nonetheless, that the concerns voiced about Rule 26(c) merited further study. The rule was also reconsidered to determine whether it should be amended in part to resist a request for an inappropriate protective order in the first instance and later to control and modify it once the order was issued.

After further consideration, 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.

On October 15, 1993, the advisory committee published for public comment the following amendments to Rule 26(c)(3):

> *(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*

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 that are also 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*, 1056 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 of protective orders 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

prescribed by the Rules Enabling Act. The sound working arrangement between Congress and the judiciary established by the Act should not be undercut by direct legislative action that bypasses the Judicial Conference and the bar as a whole. Your assistance in allowing the process to go forward will be of great value in maintaining the integrity of the Rules Enabling Act.

I appreciate your invitation to bring these important matters before you for your consideration. I would be pleased to respond to any questions.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

May 12, 1994

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

Senator Herb Kohl
Juvenile Justice Subcommittee
Room 305, Senate Hart Office Building
Washington, D.C. 20510

Attn: Jack Chorowsky

Dear Senator Kohl:

As I explained in my letter of April 27, 1994, I deferred until after the Advisory Committee meeting full response to your letter of April 25, 1994, regarding the proposed amendments to Civil Rule 26(c) on protective orders. I now respond and also answer the additional questions submitted after the hearing before your committee.

At its meeting in Washington, D.C. on April 28-29, 1994, the Advisory Committee discussed at length the public comments submitted on the proposed amendments to Rule 26(c), including the comments in your letter. Every public comment had been sent to each committee member prior to the meeting for careful consideration. At the meeting, the committee also heard the testimony of a witness in favor of the proposed amendments. A member of your staff, Jack Chorowsky, also attended the meeting and ably represented the concerns expressed in your letter.

The Advisory Committee decided to defer taking action on the proposed amendments to Rule 26(c) until its next meeting on October 20-22, 1994. The committee wanted to study further: (1) recommendations that a court consider additional factors in modifying or dissolving a protective order, (2) other suggestions for clarifying the rule or present practice, and (3) suggestions that more empirical data be sought on the use of protective orders.

The committee shares your concerns about the risks of sealing information, recognizing the considerable public interest both in privacy and disclosure. We must respond appropriately to any mischief worked by discovery protective orders. As we see it, the issue is one of adjustment, balance, and proportion. Relatedly, we

understanding of all the issues. I appreciate your spirit of shared concern, and I look forward to working with you and other members of Congress on this matter.

Sincerely,

Patrick E. Higginbotham

Enclosure: Answers to Supplemental Questions

cc: Honorable Joseph R. Biden
Honorable Howell Heflin
Honorable Orrin G. Hatch
Honorable Strom Thurmond
Honorable Charles E. Grassley
Honorable Janet Reno
Honorable L. Ralph Mecham
Honorable Frank Hunger
Honorable Alicemarie H. Stotler

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

May 12, 1994

CHAIRS OF ADVISORY COMMITTEES

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CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

Senator Herb Kohl
Juvenile Justice Subcommittee
Senate Hart Building, Room 305
Washington, D.C. 20510

Attn: Jack Chorowsky

Dear Senator Kohl:

You forwarded additional questions from the members of the Senate Subcommittee on Court and Administrative Practice, and I am pleased to respond. I have answered all questions in this single letter, because the questions and, by necessity, the answers overlap.

Senator Thurmond asked two questions. He first asked:

> Under the Rules Enabling Act process, would you say that the Advisory Committee adequately considers public policy in making judgments on possible changes in the federal rules?

The Advisory Committee attempts to consider fully the public interest in its recommended changes in the federal rules. Our committee has judges, practicing lawyers, and law professors in its membership. These members are selected by the Chief Justice with an eye to diverse representation from across the country. We conduct public hearings, inviting comment from the bar and general public regarding possible rule changes. Suggested changes constantly flow to the committee from the interested public. The committee gives wide notice of public changes in the rules. We typically mail in excess of 10,000 requests for comment about a proposed rule change. Proposed rules are also widely circulated by various legal publications. Finally, we consider all suggestions and testimony.

The collective trial experience of the committee is extensive, but we leave these conclusions as tentative, choosing not to now rest solely on our experience. At our request, the Federal Judicial Center has agreed to expand an earlier study of protective orders to gather more empirical data. Hopefully, this study will shed further light on these concerns. We have delayed sending forward the proposed rule to await these results.

Senator Grassley asked six questions. Question 1:

> What are the benefits of allowing judges to consider the need for protective orders on a case by case basis, rather than creating a universal right of access as proposed by this bill?

It is important that protective orders be considered on a case by case basis for the practical reason that, in the judgment of the committee, the overwhelming number of protective orders are entered routinely by agreement of the parties and shield nothing of public interest. Most civil discovery occurs away from the courthouse and is essentially a private matter conducted smoothly without judicial involvement. The protective order is the counter to the lax standards of relevance for discovery. Insisting that no protective order be entered without explicit findings by the court does not respond to the reality of the practice and would likely disrupt the discovery practices I described. In short, the proposed legislation in its present form sweeps too broadly.

Question 2:

> In your experience, what happens if there is an objection to a protective order? If the plaintiff objects, doesn't the defendant bear a heavy burden of proof?

In our experience, contested protective orders implicating the public interest are not entered without judicial examination. We doubt that a federal trial judge would lightly enter or decline to dissolve such an order. If there is objection to entry of a protective order, the party seeking protection bears the burden of

denial of a protective order may at times force a party to litigate, refusing settlement because of the need to vindicate its position against the shadows cast by release of discovery materials. On the other hand, it is thought that at times denial of a protective order forces a party to settle or even abandon the litigation by default or dismissal rather than reveal highly private information. Of course, settlements coerced by such pressures may not often be a desirable means of resolving a dispute.

Question 4:

> What impact, if any, does the new Federal Rule 26(a)(1), requiring mandatory disclosure of certain key information, have on a proposal such as this one?

Most of the information covered by the disclosure provisions of Rule 26(a)(1) is likely to be freely available without concern for protective orders. An important tension exists nonetheless between the disclosure-discovery structure adopted in 1993 and the proposed legislation. Rule 26(f) provides for a conference of the parties to plan disclosure and discovery; this conference is an integral--indeed the central--feature of the new structure. It is expected that the parties will work out for themselves disclosure and discovery plans that will reduce still further the need for court supervision and intervention. As with earlier practice, protective orders agreed upon by all parties will play a vital role. Any requirement that a court review the protective order and make specific findings would violate the effort to further reduce court involvement at this juncture.

Question 5:

> What will be the burden upon federal judges who will be called upon to determine at an early stage whether a dispute involves a health or safety concern for the purposes of evaluating the need for a protective order?

> interest" as alluding to the "public health and safety" standard contained in S. 1404 and discussed at the hearing. In light of your observation regarding the "great percentage" of cases, do you think the efficient operation of the federal courts would be significantly impaired by rules or legislation requiring judges to scrutinize more carefully requests for protective orders in cases implicating public health and safety?

The proposed bill would require a judicial determination that a protective order will not implicate "public health and safety" before the order becomes effective. Courts would have to make preliminary findings in every instance to determine whether further screening is necessary. The committee is concerned that insisting upon such findings in every protective order would draw heavily upon valuable judicial time. The time of the judge is a precious resource. We are not persuaded that the case for such a universal requirement has been made. Rather, we think that the opportunity to dissolve freely negotiated protective orders provides a more tailored response to the occasional abuse that understandably draws your concern.

Again, it is important to distinguish between the protection of materials produced by private litigants under the relaxed standards of relevance for discovery and of materials offered at trial or filed with the court in support of requested relief. The latter materials become part of the public domain. There is a strong argument that orders protecting information disclosed by court filings or in open court from further public dissemination should require affirmative judicial authorization.

Questions 2 and 3:

> You also observed during the course of your oral comments that if the "direction of the presumption" contained in S. 1404 would be changed, the bill would accomplish its desired ends without unduly burdening the courts. Could you elaborate on this observation?

Under proposed Rule 26(c), protective orders for discovery may be entered by agreement and can be dissolved upon application. The proposed rule redirects the presumption by dealing with orders that prove sufficiently troublesome that their dissolution is sought. It does more. Rule 26(c), by dealing only with discovery protective orders, reflects the dichotomy between protection of discovery materials and protection of other information. Information adduced in open court, or in papers filed with the court in support of relief, presents distinctive problems that should be dealt with separately.

You asked our views regarding limits on confidentiality orders imposed by judicially approved settlements. We have less concern over such limits. By definition, such settlements already have engaged the court and do not disrupt the discovery process. We note, however, that many, if not most, settlements do not require judicial approval. Rather, such settlements are effectuated by filing stipulated orders of dismissal that do not disclose settlement terms. We do not understand your proposal to insist on judicial approval of such private agreements. Rather, we understand your focus here to be on judicial orders regarding disclosure.

Finally, you ask our views regarding absolute prohibitions of voluntary disclosure by parties to public agencies. Protective orders do not prevent public agencies from requesting, or obtaining such information by lawful process. They prohibit voluntary disclosure by parties. Legislating such an exception to all protective orders would, in our judgment, substantially reduce the parties' willingness to rely upon their protection.

As explained, we see the sealing of court records in a different light from the protection of discovery materials. Insisting on judicial approval before sealing material adduced at trial, or filed with the court in support of relief, or sealed as part of a settlement that requires judicial approval for its effectiveness, coupled with some effort to guide judicial approval, may be appropriate. Finally, in our view, the open-ended standard of public health and safety ought to be refined if such a prohibition is to be adopted.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

April 12, 1994

Honorable Charles E. Grassley
Ranking Minority Member
Subcommittee on Courts
and Administrative Practice
Committee on the Judiciary
325 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

I write to advise you that the Judicial Conference of the United States, at its March 15, 1994 session, withdrew its position supporting in principle the offer-of-judgment proposal in S. 585, the "Civil Justice Reform Act." For the reasons that follow, the Conference also adopted the recommendation of its Rules Committee to take no action on the legislation at this time. The committee believed that the offer-of-judgment proposal contained in S. 585 is a matter that should be scrutinized in accordance with the Rules Enabling Act.

The Advisory Committee on Civil Rules has been actively considering proposed amendments to Rule 68 of the Federal Rules of Civil Procedure similar to the offer-of-judgment provision in S. 585. It has studied and debated extensively several drafts of proposed amendments to Rule 68. But the proposals are complex and controversial. They leave open many unanswered questions about the actual effect on settlement practices. As a result, the committee concluded that any endorsement of change to Rule 68 would be premature at this time. The committee also wishes to consider a survey by the Federal Judicial Center concerning proposed rule changes on settlement practices.

I am enclosing a paper prepared by Dean Edward H. Cooper, the reporter to the Advisory Committee on Civil Rules, which explains the issues in detail. The advisory committee will continue its study of proposed amendments to Rule 68 at its next meeting on April 28-30, 1994, in Washington, D.C. The meeting is open to the public, and we would welcome the attendance of members of your staff.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler

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

March 15, 1994

Honorable Robert J. Dole
Minority Leader, United States
Senate
Room S-230 Capitol Building
Washington, D.C. 20510

Dear Senator Dole:

I am requesting your assistance in opposing Senator Brown's amendment (No. 1496) to S.4, the "National Competitiveness Act of 1993." Senator Brown's amendment would change certain parts of the amendments to Rule 11 of the Federal Rules of Civil Procedure, which became effective on December 1, 1993. The Rule 11 amendments were submitted to Congress in May 1993 only after extensive scrutiny by the bench, bar, and public in accordance with the Rules Enabling Act.

Serious consideration of amendments to Rule 11 began about four years ago. The rule had been the subject of thousands of decisions and widespread criticism since it was substantially amended in 1983. In an unusual step, the Advisory Committee on Civil Rules issued a preliminary call for general comments on the operation and effect of the rule. It also requested the Federal Judicial Center to conduct two extensive surveys on Rule 11.

After reviewing the comments and studies, the committee concluded that the widespread criticisms of the 1983 version of the Rule, though frequently exaggerated or premised on faulty assumptions, were not without merit. There was support for the following propositions:

- Rule 11, in conjunction with other rules, has tended to impact plaintiffs more than defendants,
- it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery to determine if the party's belief about the facts can be supported with evidence,
- it has too rarely been enforced through nonmonetary sanctions, with cost-shifting being the normative practice,

which supported that subsidy, supported the GATT agreement.

I am also told that both McDonnell Douglas and Boeing oppose bringing a countervailing duty. I read from the Council on Competitiveness in June of last year. It states on page 36, and I am just taking this up by advice of counsel:

There has been industry and government consensus behind the pursuit of a negotiated solution to the trade-distorting effects of Airbus subsidies. There has, however, been little consensus behind the aggressive use of U.S. trade law to counter these subsidies. The gap between the tough talk on Airbus and the lack of trade action against it has at times been glaring.

In December 1985 and in February 1987, U.S. trade officials prepared section 301 cases against Airbus for Cabinet-level decision. Both times no decisive trade action was taken. The 1985 decision even followed a highly publicized Presidential speech, and section 301 was supported. An Airbus subsidy was singled out as a violation of trade agreements. Countervailing duty investigations were also considered several times from 1978 through 1992, and not one was initiated. A likely consequence of that inconsistency was the weakening of the credibility of the U.S. trade policy.

In lieu of trade action, negotiated solutions were sought with the objective of limiting the trade distortions associated with Airbus subsidies.

Three factors block U.S. industry-government consensus on trade action against Airbus. One, the desire of U.S. airlines for access to subsidize cheaper Airbus products; two, U.S. government's linking of trade policy goals to foreign policy priorities; three, concern of U.S. and aircraft parts producers over jeopardizing relations with their European airline customers.

In 1978, Eastern Airlines strongly opposed the Treasury Department self-initiated CBD case against Airbus. No action was taken. In 1985 the State Department blocked trade action on the grounds that it would damage U.S.-West European relations, particularly U.S.-French ties. And in 1987 McDonnell Douglas opposed Section 301 action out of fear that retaliation by Airbus governments would cost it important European airline customers.

Consequently, the action was dropped. Government officials were unwilling to take trade measures opposed by the U.S. industry, lacking full industry support and sometimes inter-government consensus. Trade policy was paralyzed.

I had a similar experience, Mr. President, with the automobile industry. I will never forget the excitement in the early part of the year when we had the three big auto companies coming here, the heads of General Motors, Ford, and Chrysler. They were going to appear for the first time before the committee. I heard a couple of days before the hearing that they intended to come and support a dumping case, initiating a joining of hands, initiating a dumping case. We know over 2 years ago—and I am just citing from memory with round figures—that the Japanese automobile industry lost about $3.2 billion on overseas sales, but back home in the domestic market they made it up with $11.1 billion in profits.

So there is an assault. Do not ask about losing any money, as has been pointed out by Airbus and not making any money. The strategy with Airbus is market share. The strategy with Japanese is market share.

We are not going to turn to that strategy here in the United States and put in a MITI and put in an Airbus and start subsidizing. But we have to do something to boost the commercialization of our technology, and that is what S. 4 is all about.

So there we are. We are back on S. 4 now. We have heard about the aerospace, and there is one point of agreement: the legitimacy of a philosophy that supports industry. That is the philosophy we have in this particular bill. We ought to assist with the research, definitely do that. That is the bare minimum, and we have been doing that over the years. We have done it in agriculture. That is the land grant colleges. The distinguished Senator knows agriculture better than any. And we at the land grant colleges conducted the research with Federal grants. We had the experimental stations to put new new ideas to the test. Then we had the extension centers to conduct outreach.

This is exactly what we have now for industry, and particularly small business industry on the industrial side, on the technology side, on the production side.

These programs are industry initiative and largely industry financed, with the National Academy of Engineering conducting peer review. We go about it in that very deliberate fashion and in a very modest way. I cannot find a business entity that opposes this. All of them have written in, all the coalitions: National Association of Manufacturers, the Competitive Technology Coalition, and all the others. So we have a good measure.

If we can move forward, I want to yield to see if we can get some amendments up and get some votes.

Mr. BROWN addressed the Chair.

The PRESIDING OFFICER. The Senator from Colorado is recognized.

Mr. BROWN. Mr. President, I have heard the chairman. I respond.

Mr. President, I rise to send an amendment to the desk, but I ask unanimous consent that the pending amendment be set aside.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 1496

(Purpose: To amend rule 11 of the Federal Rules of Civil Procedure)

Mr. BROWN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Colorado [Mr. BROWN] proposes an amendment numbered 1496.

Mr. BROWN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the end of the bill add the following new title:

TITLE —FEDERAL RULES OF CIVIL PROCEDURE

SEC. . RULE 11 FEDERAL RULES OF CIVIL PROCEDURE.

(a) IN GENERAL.—Rule 11 of the Federal Rules of Civil Procedure is amended—

(1) in subsection (b)(3) by striking out "or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery" and inserting "or are well grounded in fact"; and

(2) in subsection (c)—

(A) in the first sentence by striking out "may, subject to the conditions stated below," and inserting in lieu thereof "shall";

(B) in paragraph (2) by striking out the first and second sentences and inserting in lieu thereof "A sanction imposed for violation of this rule may consist of reasonable attorneys' fees and other expenses incurred as a result of the violation, directives of a nonmonetary nature, or an order to pay penalty into court or to a party."; and

(C) in paragraph (2)(A) by inserting before the period ", although such sanctions may be awarded against a party's attorneys".

(b) EFFECTIVE DATE.—The provisions of this section shall take effect 30 days after the date of the enactment of this Act.

Mr. BROWN. Mr. President, I know this bill has become somewhat controversial, that strong words have been exchanged. But I want to pay my respects to the distinguished work of the two Senators who are on the floor right now, the distinguished chairman who has brought this forward and the distinguished Senator from Missouri, who has worked so hard and long on this bill.

I know that both of them are genuinely and sincerely committed to improving the competitiveness of this country. I particularly appreciate the commitment of the chairman of the committee to work toward that end. While we may have some disagreements as to the funding level of this measure, I have no doubt that his purpose is sincere and that his commitment is to making this Nation much more competitive and to improving job opportunities for Americans.

Mr. President, in that regard, I want to offer an amendment to the Chamber that I hope will merit inclusion in the bill. It is one that I think deals with the fundamental question of competitiveness. Included in all of the factors that go to our competitiveness is the question of what has happened to our legal system and the potential for frivolous lawsuits.

In that regard, there has recently been a change in the rules of Federal Rules of Civil Procedure that I believe has a major impact on the potential competitiveness of this Nation. Those Rules of Civil Procedure were recently amended. I know many Members are familiar with the change. For those who are not, I might outline very briefly what has happened.

The Judicial Conference of the United States recommended to the Supreme Court that some changes to the Federal Rules of Civil Procedure be made. Their advisory committee has

gutted as the proposed revision suggests.

Mr. President, let me repeat Justice Scalia's comments, because I think it is very important. He refers to the feeling of the district judges that dealt with rule 11 before it was revised:

> The overwhelming approval of the rule by the Federal district judges who daily grapple with the problem of litigation abuse is enough to persuade me that it should not be gutted as the proposed revision suggests.

Mr. President, I have before me a variety of comments I would like to make, and I would like to go into the details of the amendment that I have offered to the Senate for consideration. But I see my colleague from Iowa here on the floor, and I know he wishes to make remarks with regard to this proposed amendment.

I would like at this time to yield to the distinguished Senator from Iowa for the purposes of debate only.

The PRESIDING OFFICER (Mr. FEINGOLD). The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I thank the Senator from Colorado for not only yielding, but I also thank him for his leadership in this area. He may have said this before I got to the floor, but this was of some concern to us last year as we reviewed within our Judiciary Committee the work of the courts and finally the Supreme Court in changing the rules of civil procedure.

So the Senator is not bringing up an issue that is new to the concern of our committee or the concern of this entire body. And he has spelled out very well the need for his amendment. But the amendment also expresses, over a long period of time, the concern that some of us have had on the Judiciary Committee, for the disregard that there is for rule 11.

So I rise in support of the Brown amendment, and I do that because we need to make sure that Federal courts are open to all who have legitimate claims. That is not the case now, because there is such a big amount of cases coming, some without merit, clogging our courts.

It seems to me that at the same time we are concerned that the Federal courts ought to be open to all legitimate claims, we also need to ensure that frivolous cases neither compete for attention with meritorious ones, nor that frivolous Federal litigation be used as a weapon.

As Federal civil litigation has grown, the number of frivolous cases has also grown.

Due to the general caseload increase, particularly in criminal cases, the time that passes before civil litigants can receive justice has lengthened tremendously. The rules of civil procedure had always had provisions against frivolous cases. But the original rule 11 was ineffective in preventing frivolous cases. So to take care of that problem, in 1983 sanctions were made mandatory.

The provision finally became effective in deterring the filing of cases that had not been fully investigated.

After 1983, rule 11 had teeth, and some lawyers who filed frivolous cases were bitten by those teeth. The provision was unfortunately weakened last year. No longer would sanctions be mandatory.

Worse, attorneys would no longer have to certify that the case appeared meritorious after reasonable investigation. Instead, Mr. President, an attorney, without penalty, could file a case without knowing that the case was meritorious. The attorney could file first and face no penalty if he or she reasonably believed evidence might be found to support the case afterward.

There would be no penalty under these circumstances, even if no evidence were ultimately found to support the frivolous claim. Moreover, no penalty could be imposed if the attorney agreed to dismiss the case. Even if a penalty were offered, it would be measured by its deterrent effect upon others, not upon the attorney who violated the rule by the award of attorney's fees.

So these provisions soon turned rule 11 into a hollow shell. If the rule is not soon changed, we will face an increase in frivolous cases in our Federal courts, further adding to their burden. This will cause our people and our economy to suffer wasted resources in time and money, without any benefit to anyone and with the denial of justice to a lot of people, because frivolous lawsuits in litigation benefit no one. It will not be deterred or punished under the current rule 11.

It certainly makes no sense to bring suit first and to determine that it is well grounded in fact later. Just think how long anyone would put up with this rule for criminal litigation—that a prosecutor could bring criminal charges first without any current belief that the law was broken and that the defendant violated it. That would be a regime that came right out of Alice in Wonderland, and of course there is no reason to implement such a system, then, in civil litigation, either.

The Brown amendment will restore effective sanctions to rule 11—that is all we are trying to do—as when rule 11 worked. No lawyer who practices in good faith nor any client of such a lawyer would have any reason to fear the changes that Senator BROWN is proposing. Moreover, the Brown amendment will not return rule 11 to its 1983 language in its entirety. Represented parties themselves will not be able to be sanctioned, and other changes that ensure the fairness of the rule will be maintained.

Cases that are not known to have a basis in fact or law at the time they are filed should not be brought. The Brown amendment will then fairly require that such cases not be brought.

I strongly support the amendment and I request that my colleagues support it, as well. It is something that will impact very positively upon our competitive position which the underlying bill is attempting to do. It will promote competitiveness from a point that is going to make a real impact because litigation, particularly litigation that is not legitimate, has economic consequences that are very negative.

So I urge the adoption of this amendment, and I yield the floor, Mr. President.

Mr. BROWN addressed the Chair.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. BROWN. Mr. President, I want to describe to the Chamber why it is this is offered on this amendment. We referred to that to some extent earlier.

It is my feeling, and I believe most Senators will agree, that the millions of dollars lost in frivolous litigation has an impact on the cost of goods and services in this country and has a significant impact on our potential competitiveness around the world. That is why I think it is important that this amendment be addressed along with S. 4.

But someone could, I think, fairly and reasonably raise the issue: Why offer it on this vehicle even though this is a competitiveness bill?

Well, the answer lies in part on how the changes were made last December to the Rules of Civil Procedure. The procedures for the adoption of these changes in the rules are basically this: A recommendation comes out of a committee, the Supreme Court forward it to us, and then it becomes effective unless Congress takes some action; that is, the changes in rules become effective automatically without any legislative action unless we act to overturn them.

The problem is this: We have had committee hearings in Judiciary, we have had discussions, but we have not had a bill referred out dealing with rule 11.

In other words, this Chamber has not had an opportunity to go on record on rule 11. I would not burden the Chamber with this amendment, even though I feel very strongly about it and I think it is important to competitiveness, if this Chamber had acted on rule 11 prior. I would not presume to move to a vote on these items if the Chamber had due consideration and had considered this and made their feelings clear.

But the reality is, the Rules of Civil Procedure are being changed without this body having a voice in that matter, without this body having a chance to vote on it. Thus, offering the amendment gives the body an opportunity to voice their concerns about it.

If the majority wants to encourage frivolous litigation or adopt these rules which encourage frivolous litigation, that, of course, will be up to each Senator and their own view of what is appropriate. But I would think it would be a tragedy to have this kind of change in the basic fundamental Rules of Civil Procedure take place in this country and not have the Senate of the United States ever review the item or vote on it.

this rule may consist of reasonable attorneys' fees and other expenses incurred as a result of the violation, directives of a nonmonetary nature, or an order to pay penalty into court or to a party."

What does it change? It focuses on the damage done to the innocent party. It drops any reference to paying only part of the damage, and it shifts the focus away from deterrence and back to compensation for damage. It raises the possibility of paying a penalty to a party and to the court. It also preserves the possibility of using nonmonetary penalties. Does anybody think if you are guilty of bringing a frivolous action you ought not to have to cover the attorneys' fees of the other side? I hope if people object to this amendment they will address that.

So the question on this portion of the amendment is pretty clear. Is rule 11 designed only for deterrence or do you allow the court to address the attorneys' fees and other costs imposed on the other party?

The fourth change that we thought was so egregious that we had to address it, involves a slight modification in the changes proposed by the Judicial Conference. They proposed adding this language, and I will read it because it is pretty brief.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

What is subdivision (b)(2)? Well, (b)(2) reads as follows:

[The party or attorney certifies that] the claims, defenses, and other legal contentions therein are warranted by existing or by a nonfrivolous argument for the extension, modification, or reversal of existing law or establishment of new law.

What does all this deal with? It deals with the case where the attorneys argue for an extension or modification or reversal of existing law. In other words, someone brings an action knowing the law has not been read that way in the past, arguing it should be read that way in the future.

The new rule 11 says that when you bring that action knowing the law does not support your position and you lose, sanctions cannot be brought against you.

We do not strike that section. Although, Mr. President, I think it would make sense to strike it. But we do modify it slightly. We leave in the part that does not allow sanctions against the complaining party, but we do permit sanctions against the party's attorney. Our fourth change simply says: "although such sanctions may be awarded against a party's attorney."

So we have retained the limitation on sanctions against the party whose attorney tries to reverse or extend the law, but, under our amendment, it would be possible to sanction the attorney.

What is the logic for that? A client does not know or understand the law as the lawyer does. It is the lawyer who makes the recommendation or decision to attempt to reverse or extend existing law. So if the attorney engages in frivolous arguments—and that is what we are talking about here, a frivolous argument that costs the other party money to defend—at least the attorney ought to bear responsibility for that. Otherwise, there is no disincentive against every lawyer in every lawsuit from filing a frivolous attempt to reverse existing law.

Mr. President, that is the body of the amendment. Those are four small, modest changes in the rules. It brings rule 11 partially back to what it was before the commission made its recommendation. It accepts those portions of the commission's recommendations that have some basis in logic.

This issue is fundamental. It is much more significant than simply some technical procedures under our Federal rules. The question that is before the Senate with this amendment is simply this: Do we sanction frivolous actions, or do we close our eyes and do away with the ability to sanction frivolous legal actions? Some may say, "Look, the new rule still has some restrictions in it." That would not be an unfair comment. But it is also quite clear that the heart and the soul and the guts of rule 11 have been torn out of it. It is also quite clear that rule 11's ability to deter frivolous actions has been abated.

Ultimately, the question we must answer on this amendment is whether it is in the Nation's interest to encourage attorneys and parties to bring frivolous actions, to misstate the law, to allege facts that they do not believe or do not know to be true or have not investigated. It seems to this Senator that it is only reasonable to ask somebody to investigate what they are going to allege in court. It seems to this Senator that parties should know some of the facts underlying what they charge in the pleadings. It seems reasonable to ask them to have some knowledge of it. It seems reasonable to ask that frivolous arguments not be made.

The question is whether or not we address the need for improved competitiveness in this Nation by making sure we do not gut the rules that protect us against frivolous lawsuits.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Who seeks recognition?

Mr. HOLLINGS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HEFLIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HEFLIN. Mr. President, that amendment has no place on this bill. It obviously deals with a matter pertaining to the operation of courts. I do not know why it is even being brought here.

But let me explain a little bit about the procedure which happens regarding the Federal Rules of Civil Procedure, which include rule 11.

There has been controversy as to how courts ought to take care of its rulemaking authority, but the prevailing point of view is that the judiciary has the inherent power to determine its own rules. Congress felt it had a role, so it adopted the Rules Enabling Act by which the Rules of Procedure would be changed by first having a committee appointed by the Judicial Conference of the United States to study any proposed changes.

After the committee made its report to the Judicial Conference, which is a body composed of judges from all levels of the judiciary, the Judicial Conference would study any proposals and then make recommendations to the Supreme Court of the United States. Then the Supreme Court of the United States would consider the issue and make recommendations to Congress. Under the Rules Enabling Act, Congress has 6 months to either adopt the recommendations, to modify them, or to delete them.

This particular rule 11 that came up was submitted to the Congress and the 6-month time period expired prior to Congress' taking any action, and so all of the proposed Rules of Civil Procedure, including rule 11, went into effect on December 1. We knew toward the end of the Congress last year that if any changes had to be made, they had to be made before December 1.

If a Senator is interested in making a change to a rule, he or she could introduce a bill, but no bill was introduced proposing to change rule 11.

During that 6-month period last year in the House or in the Senate, if there were reasons for change, a bill could have been introduced in the House or the Senate.

In all fairness to Senator BROWN, he said that he did not like rule 11, but he never took the steps to modify the proposed changes, and now he is now belatedly taking steps on this particular bill, which is unrelated and not germane to Senator HOLLINGS' technology bill.

My colleague from Colorado raises issues about frivolous lawsuits and let me say that this has been considered by many concerned groups of people. The Brown amendment is completely opposed by the civil rights community. The Brown amendment is opposed by the Department of Justice. Six members of the Supreme Court approve rule 11 that is now in effect. Senator BROWN quoted from Justice Scalia's dissent. There are always going to be dissents over at the Supreme Court, but if you have a 6 to 3 vote in the Supreme Court of the United States, that is a pretty good vote.

As I listened to the criticisms of the new rule 11 from Senator BROWN and Senator GRASSLEY, I do not agree with them. I have before me a memorandum

beyond some of the divisions of the last few days and try to focus on what this bill does.

We have had an extraordinary amount of debate in the U.S. Senate about jobs and the economy. During the NAFTA debate, there was a lot of discussion on the floor about the problems of the American workplace. There are, as you know, major problems in the American workplace. Raytheon Corp. in Massachusetts just announced that it will have to lay off some 4,400 more people over the course of the next couple of years—over 1,000 of them in Massachusetts itself.

Most of the companies in the country are downsizing in one way or the other. There are enormous numbers of jobs that are moving to low-skill, low-wage countries. There have been a series of articles in the newspapers recently commenting on the fact that—notwithstanding the improvements in the economy—there has not been an improvement in wages in America.

Americans are working longer, they are working harder, and they are taking home less. In the 1950's, most Americans could look forward to a major increase in income in the course of just a couple of years. Well, in the 1980's, it took the average American 10 years to achieve in income growth what it took only 2 years to achieve back then. In 1989 and 1990, American workers lost in each year what it had taken them those entire 10 years to get. That is the predicament of the American worker.

And it is that predicament that S. 4 seeks to address.

S. 4 has received support from a wide variety of technology businesses who recognize that America has a competitiveness problem, and who know there is nothing in this bill that smacks of industrial policy or the Government making decisions.

S. 4 is an effort to facilitate our ability to take products from the laboratory out into the workplace. It will help us avoid the situation we have faced in the past when Americans have developed technology—for the VCR, the fax machine—only to see it developed and manufactured by the Japanese, the Europeans, and others.

The fact is this bill will help create jobs.

Maybe this seems abstract to *some*. Let me cite a couple of examples of the tangible results the programs of the National Institute of Technology produce. In Massachusetts, Teradyne, Inc., is now marketing a new software package that was developed in conjunction with NIST. That package allows manufacturers of analog and analog/digital electronic components to actually test the components of these devices without compromising test accuracy.

This is a technique which would not have been developed, marketed, or produced without the NIST effort. And, without NIST, Americans would not be employed in this activity.

Studies by NIST researchers have pointed the way to significant processing improvements adopted by Ibis Technology, Inc., which is a company in Danvers, MA, the sole U.S. supplier of an experimental material. The NIST assistance can reduce by a hundredfold the number of defects in this material, making Ibis more competitive and allowing it to be a more secure employer of American workers.

I sincerely hope we can understand what is at stake here. We need to be able to commercialize ideas faster—better—and this bill permits industry to make choices about how to do that. It is an important bill for creating jobs and making this country more competitive.

I hope we can look a little harder at the ways in which S. 4 helps America to be competitive and helps us to create jobs and move away from a partisanship that seems to characterize so much of what happens in Washington.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Madam President, the distinguished Senator from Massachusetts is right on target. There is no question that our dilemma was foreseen by many over the past 10 years, specifically the U.S. Council on Competitiveness, headed up by John Young of Hewlett-Packard, George Fisher, then with Motorola and now Kodak, and other business leaders, certainly a nonpartisan group, which issued a document entitled "Gaining New Ground, Technology Priorities for America's Future" back in 1992, 2 years ago, and it says:

> The U.S. position in many critical technologies is slipping and, in some cases, has been lost altogether. Future trends are not encouraging.

I ask unanimous consent to print the entire document in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

GAINING NEW GROUND: TECHNOLOGY PRIORITIES FOR AMERICA'S FUTURE

EXECUTIVE SUMMARY

Throughout America's history, technology has been a major driver of economic growth. It has carried the nation to victory in two world wars, created millions of jobs, spawned entire new industries and opened the prospect of a brighter future. In many respects, technology has been America's ultimate comparative advantage. Because of our great technological strength, U.S. manufacturing and service industries stood head and shoulders above other nations in world markets.

That comforting view is under assault. As a result of intense international competition, America's technology edge has eroded in one industry after another. The U.S.-owned consumer electronics and factory automation industries have been practically eliminated by foreign competition; the U.S. share of the world machine tool market has slipped from about 50 percent to 10 percent; and the U.S. merchant semiconductor industry has shifted from dominance to a distant second in world markets. Even such American success stories as chemicals, computers and aerospace have foreign competitors close on their heels.

Blame for the problems has been laid at many doorsteps: sluggish domestic productivity growth, closed foreign markets, the deteriorating U.S. education and training system, poor management and misguided government policies in areas ranging from capital formation to product liability laws. Some fear the United States is too preoccupied with national prestige technology projects to worry about investing in the generic enabling technologies that are critical to the competitiveness of many industries. Others charge that the United States is increasingly turning over the difficult job of commercialization and manufacturing technology to foreign companies. Unfortunately, in turning over technology to its competitors, America is turning over the keys to economic growth and prosperity.

The American people and its leaders have too readily assumed that preeminence in science automatically confers technological leadership and commercial success as well. It does not. America assumed that government support for science would be adequate to provide for technology. It is not. In too many sectors, America took technology for granted. Today, the nation is paying the price for that complacency.

This report examines the U.S. position in critical technologies and the actions the nation must take to strengthen it.

KEY FINDINGS

1. There is a broad domestic and international consensus about the critical generic technologies driving economic growth and competitiveness

The U.S. Office of Science and Technology Policy, the U.S. Department of Commerce, the U.S. Department of Defense, Japan's Ministry of International Trade and Industry, the European Community and many individual industry groups have all compiled similar lists of critical technologies. This project examined critical technologies from the point of view of a cross section of U.S. industry and confirmed the overlap of critical technologies that appears in these other studies. Given the broad consensus about critical technologies, it is time to move beyond making lists and begin implementing programs that will strengthen U.S. technological leadership.

2. The U.S. position in many critical technologies is slipping and, in some cases, has been lost altogether. Future trends are not encouraging

America pioneered such technologies as numerically controlled machine tools, robotics, optoelectronics and integrated circuits only to lose leadership in them to foreign competitors. Moreover, in many critical technologies, ranging from leading-edge scientific equipment to precision bearings, trends are running against U.S. industry. (See lists on pages 7 to 11.) The erosion of the U.S. position in critical technologies has helped to highlight an important lesson about industrial competition in the late 20th century: a lead in science is not sufficient to sustain technological leadership. Scientific excellence also must be supplemented by a strong position in critical technologies and by the ability to convert these technologies into manufactured products, processes and services that can compete successfully in the marketplace. Otherwise, America's jobs, standard of living and national security will be in jeopardy and, because technology is increasingly driving new scientific advances, so will America's future lead in science.

3. Foreign governments are systematically pursuing leadership in critical technologies.

Governments in other major industrialized countries have used R&D incentives, public-private technology consortia, infrastructure

Agenda Section 3B
Standing 6/94

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

May 24, 1994

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: Report of the Administrative Actions Taken by the Rules Committee Support Office

ADMINISTRATIVE ACTIONS

The Rules Committee Support Office was established by the Director in July 1992. The work of the office was previously performed by the Deputy Director and attorneys from the agency assigned on a when needed basis. The following report briefly outlines some of the major initiatives undertaken by the office to improve its support function to the rules committees.

A. Record Keeping

Under the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* all rules-related records must "be maintained at the Administrative Office of the United States Courts for a minimum of two years and ... thereafter the records may be transferred to a Government Records Center ...." Until 1992, all documents relating to the Federal Rules of Practice and Procedure were archived with minimum indexing. Historical research of rules-related issues was extremely cumbersome.

Beginning in late 1992, all rules-related records from 1935 through 1989 have been entered on microfiche. Under a cooperative arrangement these records are indexed and microfilmed by Congressional Information Service (CIS), a private company located in Bethesda, Maryland. The index and microfilm are marketed, and a copy is available in the library at the Administrative Office.

B. Distribution of Proposed Rule Changes

We recently reviewed the office's procedures concerning the publication and distribution of proposed amendments published for comment. We have found the current procedures to be adequate, mainly because the proposed amendments are published and widely disseminated by some of the major legal publishing firms, e.g. West Publishing. But we have noted areas for improvement.

The most recent distribution of proposed amendments for comment was mailed to all federal judges, the chief justice of the highest court of each state, members of the American College of Trial Lawyers, many law school deans and professors, and other interested parties who have requested over time to be on our mailing list. Additionally, notice of the publication was published in the Federal Register.

Our first area of improvement has been the identification of major legal organizations for public comment distribution. Relying on the Directory of the American Bar Association, we have located a list of over sixty relevant ABA sections and affiliated law associations. We have also contacted the American Association of Law Schools to inquire about purchasing mailing labels for all law school deans. Additionally, we have obtained a mailing list of all State Bar Associations. All organizations not otherwise included in our mailing list are being added to our permanent list.

We plan to add the names of approximately 200 individual lawyers and 100 law professors to the mailing list every six months. The names will be chosen at random from Martindale-Hubbell, the Directory of Law Teachers, and the National Association of Criminal Defense Lawyers. Additional names will be selected every six months until we achieve a total list containing about 2,500 names. These names will remain on a temporary list. If any individual chosen in this manner does not comment on any proposed amendments to the rules for three years their names will be stricken from the list. Those commenting on a proposed amendment will be transferred to a permanent list along with all legal organizations and associatioons.The temporary list of names will be replenished apace maintaining 2,500 names at all times.

We are studying reformatting the title page of the publications containing proposed amendments to the rules. Some subtle changes were made to it last year. Other changes intended to clarify and highlight the request of the committees for public comment are actively being considered.

C. Tracking Rule Amendments

At the January 1994, a draft time chart was prepared and distributed to the members to keep trackof which rules are under consideration for amendment, and

Agenda Section 4
Standing 6/94

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

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CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

May 24, 1994

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: FACSIMILE FILING STANDARDS

At its September 1993 session, the Judicial Conference took the following action:

> The Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September 1994 Conference, the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted.

The Standing Committee reported to the Judicial Conference in March 1994 in an informational item that it unanimously concluded that facsimile filing should not be permitted on a routine basis. The committee agreed, however, that facsimile filing should be permitted on a non-routine basis to reflect actual practices in the courts. It revised the latest draft of the filing standards to facilitate such an approach.

The conclusions of the committee and the revised filing standards were transmitted to the Committees on Automation and Technology and Court Administration and Case Management. On March 22, 1994, the chair of the Court Administration Committee responded and raised several concerns with the revised, limited standards. (See attached letter from the Secretary to chairs of both committees, Judge Williams' response, and also an earlier survey of courts on facsimile filing.) The Automation Committee is meeting on June 16-17, while the Court Administration Committee is meeting on June 20-21.

The agendas of both committee meetings include consideration of the facsimile filing standards issue. A report on the actions taken by the committees will be given at the meeting.

John K Rabiej

John K. Rabiej

Attachments

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

JUDICIAL CONFERENCE of the UNITED STATES

Honorable Ann C. Williams
Chair

March 22, 1994

Honorable Alicemarie H. Stotler
United States District Court
Post Office Box 12339
Santa Ana, California 92712

Dear Judge Stotler:

Thank you for forwarding the draft of "Standards for Facsimile Transmission." I appreciate the opportunity to comment on the changes proposed by the Standing Committee on Rules of Practice and Procedure.

In consideration of the comments and proposals of the Standing Committee on Rules of Practice and Procedure, the Committee on Court Administration and Case Management will revisit whether or not to continue to support the routine filing of papers by facsimile transmission as a local option, at our next Committee meeting in June. I anticipate that, given the concerns of your Committee as well as the Committee on Automation and Technology, this Committee may well withdraw its recommendation regarding routine filing by facsimile transmission.

At the same time, I must express some concern related to the proposed guidelines. The purpose of the proposed guidelines for filing by facsimile, as presented by the Committee on Court Administration and Case Management, was to provide guidance to those courts which elected to enact local rules to allow for the acceptance of filings by facsimile transmission on a routine basis. Thus, the guidelines were designed specifically to apply to a more expansive policy on the acceptance of papers than presently is authorized under Judicial Conference policy.[1] Indeed, if these restrictive guidelines were to apply to current policy, they would greatly increase any burdens on the clerks of court. It is important to maintain maximum flexibility for emergency situations, especially for the appellate courts and for last minute filings in death penalty cases. Although the guidelines clearly would serve a purpose if routine facsimile transmission were allowed, our Committee does not want these restrictions to hamper the clerks' ability to accept emergency filings.

---

[1] Currently, the Judicial Conference allows the acceptance of papers transmitted by facsimile transmission in narrow circumstances: (a) in compelling circumstances or (b) under a practice which was established prior to May 1, 1991.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

February 9, 1994

Honorable Ann C. Williams
Chair, Committee on Court Administration
and Case Management
United States Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

Honorable Rya W. Zobel
Chair, Committee on
Automation and Technology
John W. McCormack Post Office and
Courthouse, Room 1802
90 Devonshire Street
Boston, Massachusetts 02109

Dear Judges Williams and Zobel:

On behalf of the Committee on Rules of Practice and Procedure, I am sending to you the enclosed draft of "Standards for Facsimile Transmission." The standards were reviewed and revised by the five advisory rules committees and were discussed at length and approved by the Standing Committee at its January meeting. I am also sending to you a two-page excerpt of an informational item in the Committee's report to the Judicial Conference explaining its views on fax filing.

Please call me at (202) 273-1800 if you have any questions on these materials.

Sincerely,

Peter G. McCabe
Secretary

Enclosures

III. Technical Requirements:

For purposes of these standards, in order for courts to receive by facsimile the following technical requirements must be met.[1]

(1) Facsimile Machine Standards:

(a) A facsimile machine must be able to send or receive a facsimile transmission using the international standards 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.

(b) The receiving unit must produce a permanent image on plain paper. Thermal and chemical images are not allowed.

(2) Additional Facsimile Standards for Senders:

(a) Each sender must satisfy or exceed the following equipment standards:

(i) CCITT Compatibility - Group 3[2]

(ii) Model Speed - 9600-2400 bps (bits per second) with automatic stepdown; and

(iii) Image Resolution - standard 203 x 98.

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

[2] 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.

V. **Fax Filing.** The procedures and requirements imposed upon facsimile filings should be in rules readily available to parties and their attorneys. Because current fax transmissions are relatively slow and produce less than desirable images, transmissions directly to the clerk should be permitted only in emergencies or by permission of the court. Also, because electronic transmission is evolving and fax appears to be an interim technology to be replaced eventually by more sophisticated systems, difficult-to-change national rules seem undesirable. Nevertheless, uniformity is desirable since fax filing is most likely from remote locations and across jurisdictional boundaries. For these reasons uniform local rules in the following form are suggested as appropriate for both district and circuit courts:

MODEL LOCAL RULES

Loc. R.( ).1 **Facsimile Filing.** The court will accept for filing a single copy of a paper transmitted directly to the clerk by facsimile (fax) if authorized by the court in a particular case or by the clerk in an emergency or other appropriate circumstance. The fax transmission must comply with the Judicial Conference Standards For Facsimile Transmission, which (are attached or can be obtained from the clerk's office on request).

Loc. R.( ).2 **When Filing is Complete.** Mere fax transmission does not constitute filing. The paper actually must be received by the clerk. Filing is accomplished as of the time the sending machine completes transmission if the fax is directly to the clerk and is printed out in the clerk's office from the same transmission.

Loc. R.( ).3 **Signature.** The image of an original signature on a fax paper is an original signature for filing purposes.

Loc. R.( ).4 **Cover Sheet.** A paper faxed directly to the clerk must have a fax cover sheet (in addition to any other cover required by the rules) showing the following:

a. the name of the case and the case number, if known;
b. the title of the document or documents being faxed;
c. the sender's name, address, telephone number and fax number;
d. the number of pages, including the cover sheet, being faxed;
e. the date and time faxed; and
f. whether acknowledgment of receipt is requested.

This cover sheet does not count against page limitations otherwise applicable to the document.

Agenda F-19
Rules
March 1994

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Your Committee on Rules of Practice and Procedure met in Tucson, Arizona, on January 12-14, 1994. All members of the Committee attended the meeting, except Judge George C. Pratt and Alan C. Sundberg, Esquire. The immediate past chair, Judge Robert E. Keeton, and former member, Professor Charles Alan Wright, also attended. Representing the advisory committees were: Judge James K. Logan, Chair, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge Paul Mannes, Chair, and Professor Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge Patrick E. Higginbotham, Chair, and Dean Edward H. Cooper, Reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, Chair, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; and Dean Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

Committee on Bankruptcy Rules has continued to oppose unanimously the application of the facsimile guidelines to bankruptcy proceedings for a variety of reasons, particularly the practical consequences on bankruptcy clerks' offices and its outmoded technology. The Advisory Committees on Criminal and Evidence Rules expressed no objections to the facsimile guidelines.

Your Committee considered at length views of the various committees on and the several versions of the guidelines, and it concluded unanimously that facsimile filing should not be permitted on a routine basis. Among the principal problems with routine facsimile filing are the following: (1) the procedures would impose great burdens on clerks' offices; (2) the technical equipment requirements would not be honored by those members of the bar who have obsolete equipment, and it would be difficult to police compliance effectively; and (3) the guidelines may create a trap for members of the bar who rely on last minute filings but are frustrated because others are using the same transmission line.

Your Committee, however, agreed that facsimile filing should be permitted on a non-routine and locally approved basis to reflect actual practices in the courts. Accordingly, it revised the latest draft of the facsimile filing guidelines to facilitate such an approach, and it will furnish the Committees on Automation and Technology and Court Administration and Case Management with copies for their consideration. A report on the results of the coordinated effort will be given to the Conference at its September 1994 session.

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

February 16, 1994

MEMORANDUM TO JUDGE ALICEMARIE H. STOTLER

SUBJECT: Survey of Courts Regarding Facsimile Transmissions

For your information, I am sending to you the results of a February 1993 survey of courts regarding the earlier draft of the "facsimile filing guidelines." The majority of courts strongly objected to the guidelines. Most of the other courts did not endorse the routine use of fax, but believed that courts should have the authority to use it in their discretion.

The survey supports the committee's recommendation opposing the routine use of facsimile transmissions for filing and may be helpful in your future contacts with the Committees on Court Administration and Case Management and Automation and Technology.

John K. Rabiej

John K. Rabiej

Attachment

cc: Honorable James K. Logan
Honorable Patrick E. Higginbotham
Professor Carol Ann Mooney
Dean Edward H. Cooper

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

KATHRYN C. HOGAN
CHIEF, AUTOMATION PLANNING &
POLICY FORMULATION OFFICE

April 22, 1993

MEMORANDUM TO THE SUBCOMMITTEE ON FILING BY FACSIMILE

SUBJECT: Filing by Facsimile Transmission Survey Results

As requested by Judge Britt in his memorandum of March 30, 1993, I have correlated and analyzed the responses to the survey of all clerks on proposed guidelines for filing by facsimile.

A. INTERPRETIVE SUMMARY OF RESPONSES

1. Response to Survey

The proposed guidelines for filing by facsimile were sent with a memorandum dated February 1, 1993, to all clerks of the appellate, district, and bankruptcy courts. The memorandum requested comments and observations from the clerks so that the Committee on Automation and Technology could determine their reaction to the guidelines.

As shown in Table I, responses to the survey came from 48 courts. In addition to these courts, two groups comprised of clerks responded: the District Court Clerks' Advisory Committee and the National Conference of Bankruptcy Clerks.

TABLE I: NUMBER OF COURTS RESPONDING TO SURVEY.

COURT	TOTAL COURTS	NUMBER RESPONSES	PERCENT RESPONDING
Appellate	13	5	38%
District	94	25	27%
Bankruptcy	90	18	20%
TOTAL	197	48	24%

Many of these replies consolidated the views of more than one individual, however, and a few judges or staff from the clerk's office also wrote letters. Two clerks responded more than once, and at least one clerk wrote a response for more than one court. For the purposes of this analysis each court was treated as one unit regardless of the number of individual replies, as there was no significant divergence of opinion within court units.

B. COMMENTS ON PROPOSED GUIDELINES

Many of the respondents believe that while filing by facsimile will be inevitable in the future, the Judiciary is not yet ready to accept such filings on a large scale. At least four courts readily support the guidelines. Regardless of whether new guidelines are adopted, many courts stated their preference that facsimile transmission remain the exception and not the rule. Two courts inquired whether they would be "grandfathered" should new guidelines be adopted. Several other recurring themes appeared:

Resource requirements (personnel and equipment) were cited as the most frequent concern and negative aspect of accepting filings by facsimile:

- An overwhelming majority of all the courts responding (including those generally in favor) expressed deep concern about the staff required to accept filings by facsimile on a routine basis, especially with the limited staffing allocations provided this year and anticipated in the coming years. Most noted it would be an administrative burden to accept and process filings and collect fees.

- An equal majority of courts said they could not pay for additional facsimile equipment and supplies given lower budgets. Two courts specifically said accepting facsimile filings would take facsimile equipment from its original administrative purpose.

Many respondents posed questions and problems associated with the proposed fees and their collection:

- Eight courts expressed apprehension over accepting fees after documents are filed or stated that any document which requires a fee should not be accepted by fax.

- At least five courts noted fees would not adequately compensate for personnel and other resources required to process facsimile filings or proposed fees be used to reimburse the courts for the resources used in accepting filings by facsimile.

- Staffing and administrative concerns with respect to fee collection were cited by more than a dozen courts.

Court components, although sharing many similar concerns, reacted differently to portions of the proposed guidelines:

Subcommittee Members:

Honorable W. Earl Britt
Honorable Lee M. Jackwig
Honorable John P. Moore

cc: Honorable Rya W. Zobel (w/o attachments)
Roy L. Carter
Kathryn C. Hogan
Robert Lowney
Karen K. Siegel (w/o attachments)

INTERPRETIVE SUMMARY
APPELLATE COURTS

RESPONDENT	PREVAILING TONE	INTERPRETATION			
		Generally Favors	Generally Opposes	Prefers Current Policy	No Opinion/ Unable to Determine
Fourth Circuit	With respect to the operation of appellate courts, these guidelines will unnecessarily complicate that which is simple. Concerned about the feasibility of applying the guidelines to courts such as his and urges the clerks be given notice and the opportunity to address the issue.			•	
Fifth Circuit	The court accepts filings by facsimile in emergency situations or under other compelling circumstances. Questions whether fees for filing by fax would be levied in certain situations.				•
Seventh Circuit	Accepts fax filings in limited circumstances and only with previous authorization. Unanimously oppose any broadening of the policy for that court. As long as the matter is left to the individual court, however, such broadening would not be detrimental.			•	
Eighth Circuit	Allows all filings in death cases to be made by fax. Does not anticipate any difficulty in implementing the proposed guidelines.	•			
Eleventh Circuit	In the absence of significant proven benefits accruing to an appellate court from the adoption of a broad fax filing policy, it is likely most courts of appeals will limit fax filing to emergency matters or other compelling circumstances. Since they do much of their work as panels or en banc, the burden of facsimile filings would be magnified in appellate courts because of the number of copies required for all cases.				•

APPENDIX A

RESPONDENT	PREVAILING TONE	INTERPRETATION			
		Generally Favors	Generally Opposes	Prefers Current Policy	No Opinion/ Unable to Determine
Minnesota	Filing by fax is a ten-dollar solution to a ten-cent problem. The Judiciary must consider fax filing in terms of cost to benefit. It is an example of style over substance.		•		
Missouri	The proposed guidelines were quite thorough, although that court is concerned about the increased legal costs resulting from higher filing fees (FAX fees versus post office rates) and costs to the clerk's office.				•
New Hampshire	With the current climate of staffing and budget cuts, this court could not take on any extra administrative burdens at this time, especially something of this magnitude.		•		
New York Eastern	Reluctant to suggest increasing fax availability beyond the significant number of submissions already received as courtesy or convenience copies. Authorizing fax filings, however tightly controlled by a local rule, still imposes an enormous burden upon judicial staffing resources with no gain to the judiciary.			•	
New York Northern	The best course is to wait until electronic filing technology is perfected and implemented in the federal courts. The unanimous feeling of the clerks in the second circuit is that existing guidelines should not be amended.			•	
North Carolina Middle	Hope that the expansion of authority to receive documents for filing by fax would be delayed nationwide until there is a more equitable distribution of resources than exists today. There is little to indicate that it will be less costly or less time-consuming or reduce delays.		•		
North Dakota	Put this court on record as being opposed to the proposed guidelines. They appear to ease the workload of the bar while correspondingly increasing the workload of the clerk's office.		•		

RESPONDENT	PREVAILING TONE	INTERPRETATION			
		Generally Favors	Generally Opposes	Prefers Current Policy	No Opinion/ Unable to Determine
Rhode Island	The time has come for the use of fax machines on a routine basis in the federal courts, but these services should be accompanied with adequate resources to cover the costs of such services. Absent direct funding, legislation should be enacted to enable the judiciary and individual district courts to recover costs expended for providing facsimile services without resorting to funding these services out of already lean budgets.	•			
South Carolina	Courts should be allowed to determine at the local level whether or not to accept papers for filing by facsimile.	•			
Tennessee Middle	While the guidelines are thorough and well developed, major concerns (staffing, resources) mitigate against broadening the guidelines. Current policy is sufficient to cover the situations under which facsimile filings are appropriate. To promulgate the proposed guidelines now in this budgetary climate, however, would open the proverbial floodgates to pressure from the bar and,m in some instances, from judges.			•	
Texas Northern	Overall guidelines are adequate. Clerk has strongly discouraged judges in that court from adopting a policy to accept on routine basis because of personnel issues involved. Hopes the adoption of these guidelines will not send a signal to the courts that the AO or the Conference is encouraging courts to permit acceptance of faxed documents on a routine basis; accepting only in emergency works well in that court.			•	
Texas Western	Guidelines well written and comprehensive. Individual districts would need to address certain questions prior to implementing a system.	•			
Virginia Eastern	Acceptance of facsimile transmissions will always be governed by policies adopted by the judges as set forth in local rules. If adopted, the proposed guidelines would give much needed guidance in this area.	•			

INTERPRETIVE SUMMARY
BANKRUPTCY COURTS

RESPONDENT	PREVAILING TONE	INTERPRETATION			
		Generally Favors	Generally Opposes	Prefers Current Policy	No Opinion/ Unable to Determine
National Conference of Bankruptcy Clerks	Facsimile filing should be considered the exception and not the rule.		•		
Alaska	Overall found that having a fax process has enhanced the ability of the litigants to litigate efficiently and effectively.	•			
California Northern	Implementation of the proposal this year or next would create acute problems; Fax machines should be used only sparingly (such as transmitting orders to be signed by the judge) or in emergency situations; urge that section IX of the proposed rules be changed so that court will not be precluded from continuing to accept petitions by fax.				•
Florida Southern	Filing by fax should remain optional to the courts as the procedure places additional and unnecessary burdens on a clerk's office. Filing fees should not be considered an important venue enhancement and require all courts adopt this practice.			•	
Florida Middle	The Bankruptcy Judges of the Middle District of Florida are uniformly opposed to the practice of filing by facsimile and urge not to make mandatory to permit filing by facsimile any documents in connection with a case filed under Title 11.		•		
Georgia Middle	Opposed to any transmission of a document to the clerk's office that by its nature is not without control of the court. Not opposed to a policy guideline change to eliminate the need for emergency filings.		•		
Maine	Wonders if the grandfather clause will be continued.				•

RESPONDENT	PREVAILING TONE	INTERPRETATION			
		Generally Favors	Generally Opposes	Prefers Current Policy	No Opinion/ Unable to Determine
Utah	The proposed guidelines as drafted will place such additional burdens on the clerk's office and the court in ensuring compliance and in collecting fees that they may actually act as an impediment to the courts adopting local rules.		•		
Vermont	Filing by fax is important to rural courts such as Vermont.	•			
Washington Eastern	Offers comments on guidelines.				•
West Virginia Northern	A staunch critic of permitting the use of facsimile equipment for filing formal court documents. Guidelines strike an intelligent balance between pitfalls and advantages. Would specifically endorse language in any official rule which includes the prerequisite of "compelling circumstances".		•		

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE Agenda Section 5A
OF THE Standing 6/94
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

TO: Honorable Alicemarie Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

FROM: Honorable James K. Logan, Chair
Advisory Committee on Appellate Rules

DATE: May 27, 1994

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

I. Action Items

A. Proposed amendments to Federal Rules of Appellate Procedure 4(a)(4), 8, 10, 47, and 49, approved by the Advisory Committee on Appellate Rules at its April 25 and 26 meeting. The Advisory Committee requests that the Standing Committee approve these amended rules and forward them to the Judicial Conference.

The proposed amendments were published in November 1993. A public hearing was scheduled for March 14, 1994 in Denver, Colorado, but was rescheduled for April 25. None of the testimony dealt with any of the rules that the Advisory Committee requests be sent to the Judicial Conference. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments.

- Part A(1) of this Report summarizes the proposed amendments.
- Part A(2) includes the text of the amended rules.
- Part A(3) is the GAP Report, indicating the changes that have occurred since publication.
- Part A(4) summarizes the comments.

III. Minutes

Part III of the report is draft minutes of the Advisory Committee Meeting held April 25 and 26 in Denver, Colorado. The minutes have not yet been approved by the Advisory Committee.

cc with enclosures: Members of the Advisory Committee on Appellate Rules

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 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 further require that all general directions regarding practice before the court be in local rules rather than internal operating procedures or standing orders. The amendments also state that a nonwillful violation of a local rule imposing a requirement of form may not be sanctioned in any way that will cause the party to lose rights. The amendments further allow a court to regulate practice in a particular case in a variety of ways so long as any such orders are consistent with federal law.

5. 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.

~~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

Fed. R. Civ. P. 50, 52, and 59 were previously inconsistent with respect to whether certain postjudgment motions had to be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) spoke of making or serving such motions rather than filing them. Civil Rules 50, 52, and 59, are being revised to require filing before the end of the 10-day period. As a consequence, this rule is being amended to provide that "filing" must occur within the 10 day period in order to affect the finality of the judgment and extend the period for filing a notice of appeal.

The Civil Rules require the filing of postjudgment motions "no later than 10 days after entry of judgment" -- rather than "within" 10 days -- to include postjudgment motions that are filed before actual entry of the judgment by the clerk. This rule is amended, therefore, to use the same terminology.

The rule is further amended 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 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

Rule 47. Rules ~~by~~ of a Courts of Appeals

(a) *Local Rules.*

(1) 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 for comment, ~~from time to time~~ make and amend rules governing its practice. A generally applicable direction to a party or a lawyer regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. 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 and 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.~~

Subdivision (b). This rule provides flexibility to the court in regulating practice in a particular case 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. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they 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 been furnished in a particular case with 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.~~

GAP REPORT
CHANGES MADE AFTER PUBLICATION

1. There were no comments on the proposed amendment of Rule 4(a)(4), and no changes have been made.

2. There were no comments on the proposed amendment of Rule 8, and no changes have been made.

3. There was one comment on the proposed amendment of Rule 10, but it resulted in no change in the proposed amendment.

   The purpose of the amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made that suspends a filed notice of appeal under Rule 4(a)(4). The commentator suggested that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript because the appeal is suspended or dismissed pending disposition of the postjudgment motion. The Advisory Committee did not add such a requirement, believing that the party bearing the cost of production of the transcript will inform the court reporter.

4. There were three comments on the proposed amendment of Rule 47 and the Advisory Committee recommends several changes in Rule 47. The changes on pages 11 and 12 are indicated by the shading.

   a. At its February meeting, the Advisory Committee on Bankruptcy Rules recommended a change in that part of the rule dealing with sanctions for violation of a local rule imposing a requirement of form. The published rule said that no sanction that would cause a party to lose rights should be imposed for a "negligent" failure to comply with such a local rule. The Bankruptcy Committee recommended that "negligent" be changed to "nonwillful." The Advisory Committee on Appellate Rules recommends an identical change found at line 23 of the amended rule.

   b. Two of the commentators expressed concern about that in some circuits "internal operating procedures" (I.O.P.'s) are used like local rules and directly affect a party's dealings with the court.

published rule states that a court may not sanction failure to comply with a non-rule requirement "unless the alleged violator has been furnished in the particular case with actual notice of the requirement." That limitation applies to regulation by standing order or some other similar means.

If, as recommended by the Advisory Committee, a sentence is added to rule (a) requiring that all general directions regarding practice must be in rules, there is no need for the sanctions limitation in (b). The only type of non-rule regulation permitted would be by order in a particular case, in which instance there is actual notice. So, the Advisory Committee recommends deletion of the sanctions limitation and amendment of the first sentence, lines 24 through 26, to make it clear that it is referring to orders in individual cases.

d. The Committee Notes have been altered to conform to the changes recommended above. The altered portion of the comments are shaded for easy identification.
In addition to the conforming changes, the Advisory Committee voted to add a new sentence to the Notes. The sentence states, "It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit." It may be found at lines 3 through 5 of the Committee Note.

5. The only comment on Rule 49 was that the delegation of authority to the Judicial Conference to make technical amendments might be better made by amending the Rules Enabling Act. The Advisory Committee has made no changes in the proposed Rule 49.

LIST OF COMMENTATORS
SUMMARY OF THEIR INDIVIDUAL COMMENTS

1. Rule 4(a)(4)
none

2. Rule 8
none

3. Rule 10
There was one commentator

Honorable J. Clifford Wallace
Chief Judge, United States Court of Appeals
United States Courthouse
San Diego, California 92101-8918

Chief Judge Wallace suggests that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript if the appeal is suspended or dismissed pending disposition of the postjudgment motion.

4. Rule 47
There were three commentators

   a. Philip A. Lacovara, Esquire
   Mayer, Brown & Platt
   2000 Pennsylvania Avenue, N.W.
   Washington, D.C. 20006-1882

   Mr. Lacovara has three comments:
   i. He notes that paragraph (a)(1) requires that circuit "rules" and "local rules" must conform to federal law. The third sentence of the paragraph requires the clerk of a court of appeals to send the Administrative Office a copy not only of each "local rule" but also of each "internal operating procedure." Mr. Lacovara suggests that the rule should require that internal operating procedures, as well as local rules, be consistent with federal law.
   ii. Because in some circuits "internal operating procedures" directly affect the parties' dealings with the court, paragraph (a)(2) and

5. Rule 49
There was one commentator

Alan B. Morrison, Esquire
Public Citizen Litigation Group
Suite 799
2000 P Street, N.W.
Washington, D.C. 20046

Public Citizen does not oppose giving the Judicial Conference the power to make technical amendments to the rules without the need to go through the Supreme Court and Congress. Public Citizen questions, however, whether such delegation to the Judicial Conference is authorized by the Rules Enabling Act. To avoid a controversy, Public Citizen suggests that the Supreme Court ask Congress to amend the Rules Enabling Act to authorize this limited type of amendment. Public Citizen further urges that Congress require the Judicial Conference to provide notice and opportunity for comment before making even technical changes. That requirement would help assure that the technical changes are appropriate and clear and that changes that are not technical are not inappropriately made under the delegation.

Agenda Section 5B
Standing 6/94

SUMMARY OF PROPOSED RULE AMENDMENTS TO BE PUBLISHED FOR COMMENT

1. 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 judge is permitted to appear to oppose issuance of the writ only if the court of appeals orders the judge to do so. The proposed amendments also permit a court of appeals to invite an amicus curiae to respond to the petition.

2. The proposed amendments to Rule 25 provide that in order to file a brief or appendix using the mailbox rule, the brief or appendix must be mailed by first-class mail or delivered to an "equally reliable commercial carrier." The amendments also require a certificate stating that the document was mailed or delivered to the carrier on or before the last day for filing. Subdivision (c) is also amended to permit service on other parties by an "equally reliable commercial carrier." Amended subdivision (c) further provides that whenever feasible, service on other parties shall be by a manner at least as expeditious as the manner of filing.

3. The proposed amendment to Rule 26 makes the three day extension for responding to a document served by mail also applicable when the document is served by an "equally reliable commercial carrier."

4. Rule 27, governing motions, is entirely rewritten. The amendments require that any legal argument necessary to support the motion must be contained in the motion; no separate brief is permitted. The amendments also make it clear that a reply to a response may be filed. A motion or a response to a motion must not exceed 20 pages and a reply to a response may not exceed 10 pages. The form requirements are moved from Rule 32(b) to subdivision (d) of this rule. Subdivision (e) makes it clear that a motion will be decided without oral argument unless the court orders otherwise.

5. Rule 28 is amended to delete the page limitations for a brief. The length limitations have been moved to Rule 32. Rule 32 deals generally with the form and format for a brief.

6. Rule 32 is amended in several significant ways. The rule permits a brief to be produced using either a monospaced typeface or a proportionately spaced typeface, although the rule expresses a preference for the latter.

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.*~~ *Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.*

(1) ~~Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing~~ A party petitioning for a writ of mandamus or prohibition directed to a court 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~~ proceeding in the trial court. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2) ~~The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and~~

The petition must:

(A) be titled In re [name of petitioner];

(B) state

~~and all parties by letter, but the petition shall not thereby be taken as admitted.~~

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.

(2) The court of appeals may order the trial court judge to respond or may invite an amicus curiae to do so.

(3) The clerk must serve the order to respond on all persons directed to respond.

(4) Two or more respondents may answer jointly.

(5) If briefs or oral argument are required, ~~T~~the clerk ~~shall~~ must advise the parties, and when appropriate, the trial court judge or amicus curiae. ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.~~

(6) The proceeding ~~shall~~ must be given preference over ordinary civil cases.

(c) *Other Extraordinary Writs.* Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule ~~shall~~ must be made by petition filed with the clerk of the court of appeals with proof service on the parties named as respondents. Proceedings on such applications ~~shall~~ must conform, so far as is

entry of the challenged order but also by the arguments made on behalf of the party opposing the relief. The latter does not create an attorney-client relationship between the party's attorney and the judge whose action is challenged, nor does it give rise to any right to compensation from the judge.

If the court of appeals desires to hear from the trial court judge, however, the court may order the judge to respond. In some instances, especially those involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue. Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an *amicus curiae* to provide a response to the petition. In those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response, participation of an *amicus* may avoid the need for the trial judge to participate.

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.

(D) *Electronic filing.* 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.

(3) *Filing a Motion with a Judge.* 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 on the motion 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.~~

Subdivision (c). The amendment permits service by "equally reliable commercial carrier." The amendment also expresses a desire that when feasible, service on a party be accomplished by a manner at least as expeditious as the manner of filing. When a brief or motion is filed with the court by overnight courier, the copies should be served on the other parties in as expeditious a manner -- meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight.

~~**Rule 27. Motions**~~

~~(a) *Content of motions; response.* Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or other relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.~~

~~(b) *Determination of motions for procedural orders.* Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may by application to the court request consideration, vacation or modification of such action.~~

~~(c) *Power of a single judge to entertain motions.* In addition to the authority~~

(B) *Accompanying documents.* If a motion is supported by affidavits or other papers, they must be served and filed with the motion.

(i) Only affidavits and papers necessary for the determination of the motion may be attached.

(ii) An affidavit may contain only factual information and not legal argument.

(iii) A motion seeking substantive relief must include a copy of the lower court opinion or agency decision as a separately identified exhibit.

(C) *Documents not required.*

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) *Response.* Any party may file a response to a motion. The provisions of (2) apply to a response. The response must be filed within 7 days after service of the motion unless the court shortens or extends the time, but

(A) a motion for a procedural order is governed by

court of appeals may act on any request for relief that under these rules may properly be sought by motion, but a single judge must not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

(d) *Form of Papers, Page Limits, and Number of Copies.*

(1) *In Writing.* A motion must be in writing unless the court permits otherwise.

(2) *Format.*

(A) A motion, response, or reply may be produced by any duplicating or copying process that produces a clear black image on white paper. The paper must be opaque, unglazed paper, 8-1/2 by 11 inches. Carbon copies must not be used without the court's permission except by pro se persons proceeding in forma pauperis.

(B) The text must not exceed 6-1/2 by 9-1/2 inches and must be double spaced. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced.

indicating that an application for an order or other relief is made by filing a motion unless another form is required by some other provision in the rules.

Paragraph (2) outlines the content of a motion. It begins with the general requirement from the old rule that a motion must state with particularity the grounds supporting it and the relief requested. It adds a requirement that all legal arguments should be presented in the body of the motion; a separate brief or memorandum supporting or responding to a motion must not be filed. The Supreme Court uses this single document approach. Sup. Ct. R. 21.1. In furtherance of the requirement that all legal argument must be contained in the body of the motion, paragraph (2) also states that an affidavit that is attached to a motion should contain only factual information and not legal argument.

Paragraph (2) further states that whenever a motion requests substantive relief, a copy of the lower court opinion or agency decision must be attached.

Although it is common to present a district court with a proposed order along with the motion requesting relief, that is not the practice in the courts of appeals. A proposed order is not required and is not expected or desired. Nor is a notice of motion required.

Paragraph (3) continues the provisions of the old rule concerning the filing of a response to a motion. Although not directly addressed in the rule, a party filing a response in opposition to a motion may also request affirmative relief. It is the Committee's judgment that it is permissible to combine the response and the new motion in the same document. Indeed, because there may be substantial overlap of arguments in the response and in the request for affirmative relief, a combined document may be preferable. If a request for relief is combined with a response, the caption of the document should alert the court to the request for relief. The time for a response to such a new request and for reply to that response are governed by the general rules regulating responses and replies.

Paragraph (4) is new. It permits the filing of a reply to a response. Two circuits currently have rules authorizing a reply. If there is urgency to decide the motion, the moving party may waive the right to reply or may file the reply very quickly.

Subdivision (b). This subdivision remains substantively unchanged except to clarify that one may file a motion for reconsideration, etc., of a disposition by either the court or the clerk. A new sentence is added indicating that if a motion is granted in whole or in part before the filing of timely opposition to the motion,

Subdivision (e). This new provision makes it clear that there is no right to oral argument on a motion. Seven circuits have local rules stating that oral argument of motions will not be held unless the court orders it.

~~(j)~~ (i) *Citation of supplemental authorities.*-- When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Committee Note

Subdivision (g). The amendment deletes former subdivision (g) that limited a principal brief to 50 pages and a reply brief to 25 pages. The length limitations have been moved to Rule 32. Rule 32 deals generally with the format for a brief or appendix.

Former subdivisions (h) through (j) have been redesignated as subdivisions (g) through (i). New subdivision (g) has been amended to require the appellee's brief to comply with (a)(1) through (7) with regard to a cross-appeal. The addition of a separate paragraph requiring a summary of argument increased the relevant paragraphs of subdivision (a) from (6) to (7).

(2) *Typeface.* Either a proportionately spaced typeface or a monospaced typeface may be used in a brief, but a proportionately spaced typeface is preferred.

(A) "A proportionately spaced typeface" is one in which the individual characters have individual advance widths. The design must be of a serifed, roman, text style. Examples are the Roman family of typefaces, Garamond, and Palatino.

(B) "A monospaced typeface" is a typeface in which all characters have the same advance width and there are no more than 11 characters to an inch. Examples are Pica type, and a 12 point Courier font.

(3) *Paper Size, Margins, and Line Spacing.* A brief must be on either 8-1/2 by 11 inch paper or 6-1/8 by 9-1/4 inch paper.

(A) A brief on 8-1/2 by 11 inch paper must be double spaced, but quotations more than two lines long may be indented and single-spaced, and headings and footnotes may be single-spaced. In addition,

(i) if a proportionately spaced typeface is used, the side margins must be 1-1/4 inch, and the top and bottom margins must be 1 inch; and

may rely upon the word count of the word processing system used to prepare the brief. No certificate is required if the brief is

(A) in at least a 12 point proportionately spaced typeface and does not exceed

(i) 30 pages for a principal brief; or

(ii) 15 pages for a reply brief; or

(B) in a monospaced typeface and does not exceed

(i) 40 pages for a principal brief; or

(ii) 20 pages for a reply brief.

(7) *Appendix.* An appendix must be in the same form as a brief, but when an appendix is bound in volumes having pages 8-1/2 by 11 inches, it may include a legible photocopy of any document found in the record or of a published court or agency decision.

~~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.~~

(8) *Cover.* ~~If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to~~

party ~~on whose behalf~~ for whom the document is filed.

(9) *Binding.* 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 for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8 1/2 by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible.~~

~~A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.~~

(1) *Motion.* The form for a motion is governed by Rule 27(d).

(2) *Other Papers.* Other papers, including a petition for rehearing and a suggestion for rehearing in banc, and any response to such petition or suggestion, must be produced in a manner prescribed by subdivision (a), but paragraph (a)(6)

wide letter such as a capital "m" and a narrow letter such as a lower case "i" are given the same space. In contrast "a proportionately spaced typeface" gives a different amount of horizontal space to characters depending upon the need of the character. A capital "m" would be given more horizontal space than a lower case "i."

Additional requirements are imposed. "A proportionately spaced typeface," as further defined by the rule, must be "serifed." Serifs are the small strokes at the top or bottom of a character. Serifs give a horizontal emphasis to a line of text and make continuous text easier to read. The typeface must be a roman style, again because roman style typefaces are easier to read. The Roman family of typefaces, Garamond, and Palatino are all serifed, roman style typefaces. Lastly, the typeface must be a text typeface rather than a display or script typeface.

"A monospaced typeface" within the meaning of this rule must have not only the same advance width for each character, but there must not be more than 11 characters per inch. The latter requirement is to ensure that the typeface is of sufficient size for easy legibility. A typewriter with Pica type produces a monospaced typeface with no more than 11 characters per inch, as does a computer with Courier font in 12 point.

The rule continues to authorize pamphlet size briefs on 6-1/8 by 9-1/4 inch paper; the size used by commercial printers. Although commercially printed briefs are not common, they are favored by judges; and technology is progressing to the point where production of such briefs "in house," that is using equipment in a lawyer's own office, may soon be possible. Such briefs must be single spaced and use proportionately spaced typeface.

A brief produced on 8-1/2 by 11 inch paper generally must be double spaced. For 8-1/2 by 11 inch briefs, the margins differ depending upon whether a monospaced or proportionately spaced typeface is used. The side margins must be wider and the tops and bottom margins must be smaller when a proportionately spaced typeface is used than when a monospaced typeface is used. Again the differences are aimed at increasing ease of legibility.

The amendments include a length limitation based on the number of words per brief rather than the number of pages. This gives every party the same opportunity to present an argument without regard to the typeface used and eliminates any incentive to use footnotes or typographical "tricks" to squeeze more material onto a page. The rule imposes not only an overall word limit, but also

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 but the length limitations of paragraph (a)(6) are not applicable, the sheets may be attached at the left margin, and a cover is not required if a caption is used that provides all the information needed by the court to properly identify the document and the parties for whom it is filed.

Former subdivision (b) stated that other papers "may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8-1/2 by 11 inches in size." That alternative is not eliminated because (a)(2)(B) permits the preparation of documents with standard pica type. The only change is that the rule now specifies margins for these typewritten documents.

b. In addition, the proposed amendments require that if the timeliness of a brief or appendix is dependent upon the mailbox rule, the document must be accompanied by a certification that it was mailed or delivered to the commercial carrier on or before the day for filing.

c. The authorization for service by facsimile, a proposed amendment to subdivision (c), has been deleted. That change is in accord with the decision of the Standing Committee at its January 1994 meeting.

d. Authorization to make service on a party by "equally reliable commercial carrier" has been added to subdivision (c).

e. A requirement that, when feasible, service on a party be accomplished in a manner at least as expeditious as the manner of filing, has been added to subdivision (c).

3. Rule 32

Several significant changes have been made in Rule 32 since publication.

a. The major change recommended concerns "typeface" issues. The testimony presented to the Committee made it clear that specifying a minimum point size for a proportionately spaced typeface would not guarantee that the typeface would be of uniform size or easily legible. Therefore, the rule now relies upon the combination of required margins, a limitation of the overall number of words in a brief, and a limitation on the average number of words per page, to arrive by "default" at a typeface of sufficient size to be easily legible. A proportionately spaced typeface also must have serifs, be roman style, and text style (as distinguished from script or display style). The rule continues to authorize monospaced typefaces such as Pica type and Courier. As in the published rule, a monospaced typeface must have no more than 11 characters per inch.

b. All references to standard typographic printing have been deleted. The experts who testified stated that term has no continuing vitality.

c. The overall length of a brief is no longer expressed in pages but is determined by a maximum number of words.

d. Compliance with the words per brief and average number of words per page limitations must be certified unless the brief falls within one of the safe harbors specified.

e. The typeface requirements, etc. are not applicable to an appendix. The rule recognizes that an appendix is most often produced by photocopying existing documents.

f. The rule no longer requires covers for any document other than a brief or appendix.

filed by first-class mail.

Three of the commentators suggest that the mailbox rule, making a brief or appendix timely filed if deposited in the United States Mail on or before the last day for filing, should apply when a party delivers a brief or appendix to a private overnight courier service.

Two of the commentators oppose the provision that when the timeliness of a brief or appendix depends upon the mailbox rule, the mailing must be postmarked on or before the last day for filing. A third commentator does not oppose the postmark requirement but recommends amending it so that it does not preclude the use of an office postage meter.

3. **Rule 32.** Eight written comments were received, and oral testimony was presented by three persons concerning the proposed amendments to Fed. R. App. P. 32. Rule 32 governs the form of briefs or appendices.

Four commentators oppose the detailed printing provisions in the published amendments and all of the alternatives presented in the footnote published with the proposed amendments.
- One of them suggests that the rule simply require that the brief be prepared using no less than 12 point type.
- Another suggests that it would be sufficient to require 11 pitch or 11 point type, and opposes any word count because of uncertainty regarding the counting of citations and the time and energy that would be expended counting words.
- A third suggests that it would be sufficient to specify format requirements such as margins, type size, and line spacing.
- The fourth believes that the problem does not justify imposing the burden of detailed printing provisions, but of the alternatives presented in the rule or outlined in the footnote, the commentator prefers the 300 word per page limit.

Two of these commentators suggest that if a word limit per page is imposed, a safe harbor provision should be included.

One commentator favors a limit on the total number of characters per brief. That commentator opposes a limitation on the number of characters per inch or the number of words per page if the circuits are permitted to reduce the maximum page limits under Rule 28(g). Another commentator states that local rules reducing the number of pages allowed in a brief below the number authorized in FRAP should be forbidden. That same

LIST OF COMMENTATORS
SUMMARY OF THEIR INDIVIDUAL COMMENTS

Rule 21

There were seven commentators

1. District of Columbia Bar
Section on Courts, Lawyers, and the Administration of Justice
Anthony C. Epstein, Esquire
Jenner & Block
601 Thirteenth Street, N.W.
Washington, D.C. 20005

The Section supports the amendments treating a mandamus proceeding as an adversary proceeding between the parties but opposes giving the district judge the option to participate in the proceeding. The Section states that the judge's participation is inconsistent with the basic thrust of the proposed amendment. The Section suggests that if the opposing party does not adequately defend the challenged decision, the court of appeals should appoint an amicus curiae. Alternatively, if the district judge has not adequately explained the challenged ruling, the court of appeals may remand for further explanation.

The Section suggests that the rules should be amended to require a court of appeals to issue a published opinion or explanatory memorandum for each dispositive ruling and to permit every such ruling to be cited as precedent. In short, it recommends abolition of unpublished decisions.

2. Honorable Leonard I. Garth
United States Circuit Judge
Room 429, Post Office Building
and Courthouse
Newark, New Jersey 07101

Judge Garth is concerned about the use of the term "extrinsic" in the third sentence of the second paragraph of the Committee Note. He suggests that the meaning is unclear and that the commentary should be refined. He is concerned that it might imply extrajudicial conduct. (By that I

judge should not be able to offer a defense of a ruling that was not placed on the record contemporaneously with the ruling.

d. In those instances in which a court of appeals needs to hear from the judge, the rule gives the court authority to order the judge to respond.

e. The language stating that a judge need not respond unless the judge "chooses to do so" is "insensitively cavalier" and implies a haughtiness and condescension that Mr. Lacovara believes was unintended. The provision also provides no guidance for the judge in determining whether to "choose" to assert an interest in the ruling being challenged.

If the provision is retained Mr. Lacovara suggests that it be rephrased. He suggests dropping the phrase "if the judge chooses to do so." Alternatively, he suggests substituting language that indicates the instances in which a response from the trial judge would be appropriate, such as "if no respondent has opposed the petition" or "if the petition constitutes a personal attack on the judge."

4. Frank J. McGarr, Esquire
Pope, Cahill & Devine, LTD.
311 South Wacker Drive
Suite 4200
Chicago, Illinois 60606-6693

Mr. McGarr's comments were submitted by the Judiciary Committee of the American College of Trial Lawyers.

Mr. McGarr notes that there will be circumstances in which a judge will want to respond to a petition for mandamus and that the published rule permits the judge to do so. Mr. McGarr asks who will represent the judge. Mr. McGarr states that the judge should not personally respond and should not be required to pay counsel or to impose on a lawyer to represent the judge pro bono. Mr. McGarr suggests that the U.S. attorney might represent the judge.

5. National Association of Criminal Defense Lawyers
1627 K. Street, N.W.
Washington, D.C. 20006

Approves the proposed amendments.

Rule 25

There were six commentators

1. Richard Bisio, Esquire
Honigman Miller Schwartz and Cohn
2290 First National Building
Detroit, Michigan 48226-3583

Mr. Bisio notes that under the proposed rule the timeliness of a brief deposited in the mail is determined by the postmark; he believes that may cause difficulty. He notes that a party who delivers an item to the post office does not control when the post office affixes the postmark. A party may deliver an item to the post office one day, but the postmark may not be affixed until the following day. He suggests that the words "bears a postmark" be replaced by "includes a certificate of mailing."

2. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1882

Mr. Lacovara says that limiting the mailbox rule to the use of first-class mail "overlooks an alternative that is widely used for virtually all other forms of important written communication and that offers at least equal likelihood of timely receipt: use of overnight courier services." He suggests that if the rules permit timely filing by use of an overnight courier service, the rules should require that copies of the brief be served in the same manner. He notes that the amendment of Fed. R. Civ. P. 4(d)(2)(B), effective December 1, 1993, provides that the notice to an adversary of the filing of a lawsuit which requests waiver of formal service of process may be "dispatched through first-class mail or other reliable means."

3. Gordon MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Opposes the requirement in the published rule that if the timeliness of a brief or appendix depends upon the mailbox rule, it must be postmarked no later than the last day for filing. He notes that many offices have postage meters as to which the date is set by the office. He further notes

Rule 32

Eight written comments were received, and oral testimony was presented by three persons.

The written comments were as follows:

1. Lawrence A. G. Johnson, Esquire
2535 East 21st Street
Tulsa, Oklahoma 74114

Mr. Johnson opposes all variations of the printing provisions suggested in the amendment or the footnote thereto, including number of characters per inch or line, number of characters per brief, or number of words per page. He suggests that the rule simply state that a brief may be prepared using no less than 12 point type. He states that such a requirement would leave sufficient flexibility to prepare attractive, legible briefs.

Mr. Johnson also suggests that the rule should permit the scanning of photographs or important documents into the body of the brief, making cumbersome turning to the appendix unnecessary. He also suggests that the Rule should permit printing on both sides of paper in order to conserve weight and bulk in a brief.

2. Arnold D. Kolikoff, Esquire
10 Plaza Street, 9J
Brooklyn, New York 11238

Mr. Kolikoff opposes the provision that a brief "contain on average no more than 300 words per page, including footnotes and quotations." Mr. Kolikoff believes that formatting requirements with regard to margin, type size, line-spacing, etc. is sufficient to prevent an attorney from circumventing the length limitation. Mr. Kolikoff states that "on average" is ambiguous and may require an attorney to do a word count of a brief and that counsel should not be put to the burden of performing such a tedious task. Mr. Kolikoff also opposes use of any of the alternatives set forth in the footnote to the published rule; he believes that the Committee's objective can be satisfied with format restrictions.

5. Alan B. Morrison, Esquire
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Public Citizen supports the changes with the exception of the printing provisions. Public Citizen's basic position is that the general burdens imposed are not justified by the problem. Assuming the worst case possible, Public Citizen does not believe that anyone could add more than 10 pages to a brief, and that assumes that lawyers do not get the message that efforts to evade the spirit of the rule are frowned upon and may exact a cost. Public Citizen suggests that the Committee not include any of the anti-cheating provisions and instead simply authorize the courts of appeals to require the re-filing of briefs that flagrantly disregard the intent of the rule.

If the detailed requirements are imposed, Public Citizen suggests a safe harbor: if a brief has 10% fewer pages than the limit, no certification should be required; the assumption being that if a brief is not within 5 pages of the 50 page limit, the lawyer is not truly worried about the brief being too long.

Of all the printing options offered by the Committee, Public Citizen prefers the 300 word per page approach. Assuming that a no-footnote page would have about 250 words, approximately 1/6 of each page could be footnotes. Because it is unlikely that the ratio of footnotes to text would be that high and, as a result, most pages would not be close to 300 words per page, the various ways that word processing packages count words would not be of grave consequence.

In addition to the printing provisions, Public Citizen offers a number of other suggestions:

a. Local rules reducing the number of pages allowed in a brief below the number authorized in FRAP should be forbidden.

b. The rule should clarify
- whether briefs should be single or double-sided,
- what color supplemental briefs should be,
- whether the summary of the argument counts toward the page limits,
- whether the cover stock on a petition for rehearing should be the

8. Honorable J. Clifford Wallace
Chief Judge, United States Court of Appeals
San Diego, California 92101-8918

Chief Judge Wallace suggests that the rule should be easy to enforce by deputy clerks. Therefore, the Ninth Circuit suggests something along the lines of
- a specified number of character per inch
- 28 lines per page
- margins as currently stated
- a declaration by counsel that the brief conforms to FRAP and Circuit Rules

On April 25, 1994, three persons appeared before the Committee to testify about the proposed amendments to Rule 32. The three persons were:

Mr. William Davis
Monotype Typography Inc.
53 West Jackson Boulevard
Chicago, Illinois 60604

Paul F. Stack, Esquire
Stack, Filipi & Kakacek
140 South Dearborn Street
Chicago, Illinois 60603-5298

Ms. Sarah C. Leary
Microsoft Corporation
One Microsoft Way
Redmond, Washington 98052-6399

They made a joint presentation. After explaining a number of typography terms, they presented exhibits showing that point size is not a uniform standard and that a rule specifying only that a brief must be prepared in at least 11 point type does not guarantee either a legible typeface or even a typeface large enough to be easily legible.

They presented a draft rule for the Committee's consideration. A copy of their draft rule is attached to the minutes of the meeting. The draft contained definitions of a "monospaced typeface" and a "proportionately spaced typeface" that are similar to those in the revised draft for which the Advisory Committee

Agenda section 5C
Standing 6/94

NINTH CIRCUIT RULE 22

Five Attorneys General from capital states in the ninth circuit wrote to Chief Justice Rehnquist claiming that the new ninth circuit procedures for death penalty cases, 9th Cir. R. 22, conflict with federal law. The Attorneys General requested that the Judicial Conference use its statutory authority to modify or abrogate circuit rules that are inconsistent with federal.

Chief Justice Rehnquist referred the matter to the Standing Committee on Rules. The Chair of the Standing Committee requested that the Advisory Committee on Appellate Rules review the ninth circuit procedures and formulate a recommendation for consideration by the Standing Committee.

The Advisory Committee discussed the matter extensively at its April 1994 meeting. For a summary of that discussion, please see pages 86 through 97 of this report, which are the relevant pages of the draft minutes of that meeting. (The minutes are included in part III of this report.)

The Advisory Committee decided the following:

1. Local rules that do not violate federal law should not be voided by the Judicial Conference. However, the Judicial Conference should remain mindful of the fact that it can recommend adoption of a national rule that would have the effect of voiding or preempting a local rule that it finds troublesome.

2. The Advisory Committee was asked to present the Standing Committee with the Advisory Committee's best judgment about the consistency of the local rules with federal law. The Advisory Committee decided that in those instances in which it has questions about the consistency of the rules, it is the Advisory Committee's responsibility to report its views to the Standing Committee.

3. The Advisory Committee took a vote on each of the issues raised by the Attorneys General which in the opinion of the Advisory Committee raised serious consistency questions.

    a. Ninth Circuit Rule 22-4(e)(4) permits a limited in banc review followed by a full in banc review if a full in banc review is requested by an active judge. A motion to recommend abrogating the dual in banc procedure was defeated by a vote of 3 to 4 with 2 abstentions.

d. The ninth circuit death penalty procedures apply to related civil proceedings. 9th Cir. R. 22-1. The Attorneys General challenge the provisions in the ninth circuit rule authorizing a stay of execution in non-habeas civil cases. The Supreme Court, in connection with the McFarland case, is currently considering the authority of a federal judge to grant a stay of execution when a habeas petition is not pending before that judge. Because the question is currently before the Supreme Court, the Advisory Committee voted unanimously to make no recommendation concerning the validity of the procedures as applied to non-habeas cases.

The Advisory Committee discussed two other issues but took no votes because the challenged provisions did not appear to be inconsistent with federal law. First, the ninth circuit rule authorizes a single judge to grant a temporary stay. No vote was taken on that issue because a single circuit judge may grant a temporary stay in almost any kind of case. Second, the Attorneys General claim that the ninth circuit rule countenances inappropriate ex parte communication with a single judge of the circuit. The Advisory Committee concluded that the rule attempts to reduce ex parte communication.

Two members of the Advisory Committee requested that this report make it clear that the recommendations to the Standing Committee are based upon the information available. In their opinion the materials presented to the Advisory Committee by both the Attorneys General and the ninth circuit were not adequate to reach the merits of the issues. Their votes not to invalidate a challenged portion of the ninth circuit rule were based upon the fact that the provisions had not been shown to be invalid.

The two members who consistently abstained were the member from the ninth circuit and the representative from the Department of Justice. The Chair only voted to break ties.

Agenda Section 5D
Standing 6/94

Advisory Committee on Appellate Rules
Part II - Status of Other Proposals

II. The status of proposed amendments under consideration by the Advisory Committee on Appellate Rules is summarized on the attached table of agenda items.

Advisory Committee on the Federal Appellate Rules
Table of Agenda Items -- Revised May 1994

FRAP Item	Proposal	Source	Current Status
86-19	Amendment of Rule 38 to afford appellant opportunity to respond to proposed award of damages or costs.	Standing Committee & Chicago Council of Lawyers	Drafts considered by Committee, Chair to contact Circuits re current practices and possible possible committee action 10/89 Further research requested 10/90 Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
86-23	Accommodation by rule the difficulty prisoners have in receiving notice of a magistrate's report in time to file their objection.	Hon. Dolores Sloviter (CA-3)	Under study by reporter Held over for further discussion 10/92 Draft to be sent to Chief Judges, Committee of Staff Attorneys, and Committee of Defenders 4/93 No further action deemed appropriate 4/94
86-24	Rule to permit sanctioning of attorneys for bringing frivolous appeals.	Chief Justice Vincent McKusick (ME)	See notes under item 86-19 and 92-8 Subcommittee appointed to monitor; no need for action at this time 4/93 C.J. Breyer's suggestion submitted to subcommittee 9/93, see item 93-9

FRAP Item	Proposal	Source	Current Status
91-4	Typeface, re: rule 32.	Mr. Greacen (CA-5)	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 11/92 Approved by Standing Committee for publication to bench and bar 12/92 Advisory Committee approved new drafts for submission to Standing Committee for re-publication 5/93 Standing Committee approved new draft for re-publication 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94
91-5	Use of special masters in courts of appeals.	Hon. Kenneth Ripple Hon. Gilbert Merritt Hon. Delores Sloviter	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to the Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-8	Amendment of Rule 25 so that whenever service is accomplished by mailing, the proof of service shall include the addresses to which the papers were mailed.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94

FRAP Item	Proposal	Source	Current Status
91-13	Amendment of Rule 41 to provide a uniform standard for granting a stay of a mandate.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-14	Amendment of Rule 21 so that a petition for mandamus does not bear the name of the district judge and the judge is represented pro forma by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Standing Committee referred the proposal back to to Advisory Committee for further consideration 12/92 New draft approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91

FRAP Item	Proposal	Source	Current Status
91-27	Number of copies.	Local Rules Project	Reporter asked to draft language 12/91 Mr. Kopp, Mr. Strubbe, & Mr. Spaniol asked to study chart question 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-28	Updating Rule 27	Advisory Committee	Mr. Kopp asked to prepare memo 12/91 Held over 10/92 Subcommittee appointed 4/93 Approved in substance; subcommittee to prepare new draft 9/93 Approved for submission to Standing Committee 4/94
92-1	Amendment of Rule 47 to require that local rules follow uniform numbering system and delete repetitious language.	Standing Committee	Draft requested 1/92 Approved for submission to Standing Committee 4/92 Standing Committee referred to Committee of Reporters 6/92 New draft approved 10/92 Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92 Approved by Advisory Committee for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94

FRAP Item	Proposal	Source	Current Status
92-9	Amendment of Rule 10(b)(1) to conform to 4(a)(4).	Advisory Committee on Bankruptcy Rules	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94
92-10	Reconsideration of some of the language of amended Rule 4(a)(4).	Standing Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94
92-11	Consideration of local rules that do not exempt government attorneys from being required to join court bar or from paying admission fees.	Attorney General Barr and Standing Committee	On hold pending views of Solicitor General 4/93
93-1	Conflict between Civil Rule 9(h) & 28 U.S.C. § 1292(a)(3) re: interlocutory appeal of admiralty cases with non-admiralty claims.	Hon. Edward Becker (CA-3)	Awaiting initial Committee discussion Referred to Advisory Committee on Civil Rules 4/94
93-2	Amend Rule 8(c) re: cross-reference to Crim. R. 38.	Department of Justice	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94

MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES APRIL 25 & 26, 1994

Having been preceded by testimony regarding the proposed amendments to Rule 32, the meeting was called to order by Judge Logan at 10:40 a.m. in the Hyatt Regency Hotel in Denver, Colorado. In addition to Judge Logan, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Judge Cynthia Hall, Judge Grady Jolly, Chief Justice Arthur McGiverin, Mr. Michael Meehan, Mr. Luther Munford, and Judge Stephen Williams. Mr. Robert Kopp attended on behalf of Solicitor General Days. Judge Kenneth Ripple, the former chair of the Committee, and Judge Alicemarie Stotler, Chair of the Standing Committee, were present. Mr. Robert Hoecker, the Clerk of the Tenth Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Bryan Garner, the consultant to the Style Subcommittee of the Standing Committee, was present. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, Mr. Paul Zingg - Mr. McCabe's assistant, and Mr. Joseph Spaniol were present along with Ms. Judith McKenna of the Federal Judicial Center.

Rule 32

The witnesses who had just completed their testimony, Mr. Paul Stack who is General Counsel of Monotype Typography, Inc., Mr. William Davis who also is from Monotype Typography, and Ms. Sarah Leary of Microsoft Corporation, were present. So that the Committee would be able to take advantage of the speakers expertise, Judge Logan began the meeting with discussion of Rule 32. Judge Logan stated that his goal for the morning was to have the Committee make substantive decisions about the direction of Rule 32 rather than to approve precise language. Judge Logan indicated that following the initial discussion, he would appoint a drafting subcommittee to prepare a new draft for the Committee's consideration the following morning.

The Reporter summarized two additional comments on Rule 32 that had been received since the preparation of the materials for the meeting.

The speakers, during their earlier testimony, had presented an alternative draft for the Committee's consideration. Judge Logan called for a vote on whether the Committee preferred to work with the published draft or with the new draft. The Committee preferred the new draft by a vote of six to one. A copy of the draft is attached to these minutes.

The Committee conceptually approved paragraphs (a)(3) and (a)(4) of the definitions.

Subdivision (b) of the draft dealt with the form of a brief and an appendix. The Committee conceptually approved paragraphs (b)(1), (b)(2), (b)(4), (b)(9) and (b)(10).

Paragraph (b)(3) established different margins for briefs using proportionately spaced typefaces and for those using monospaced typefaces. The draft suggested wider side margins (resulting in shorter lines of text) for proportionately spaced typeface. A proportionately spaced typeface fits more material in the same amount of space than a monospaced typeface of the same size. If the same line length is used for both typefaces, there is not only more text in the lines produced with a proportionately spaced typeface but the comprehensibility of the proportionately spaced document also declines. Therefore, the Committee approved different margins dependent upon the typeface used. Paragraph (b)(3) also authorized the use of pamphlet sized briefs. Technology is developing to the point that law firms soon will be able to produce the pamphlet sized briefs in-house. The consensus was that the pamphlet sized briefs are preferred and the rule should continue to permit them.

Paragraph (b)(7) of the draft provided that "[a]ll case citations in a brief must be underlined. A brief typeset in a proportionately spaced typeface accompanied by a true italic typeface may use the italic in lieu of underlining." A member of the Committee noted that the current rule is silent about the treatment of citations and there may be no need to include such a provision. Other members of the Committee expressed preference for the use of italic rather than underlining and stated that if the rule deals with the issue, it should state a preference for italics. The Committee did not reach a consensus about the appropriateness of a provision such as (b)(7).

The Committee agreed that all references to the "appendix" should be removed from paragraphs (b)(1) through (5). An appendix is typically produced by photocopying existing documents. Paragraph (b)(8) provided that if photocopies of documents are included in the appendix "such pages may be informally renumbered if necessary." The Committee agreed that the pages must be renumbered in order of their appearance in the appendix. It was further suggested that it would be helpful if an appendix had a table of contents.

Subdivision (c) of the draft dealt with the length of a brief. It suggested that a principal brief should not exceed 14,000 words and that a reply brief should

Judge Logan then informed the Committee that he would take up the remaining proposed amendments that had been published for comment.

Rule 4(a)(4)

There were no comments on the proposed amendments to Rule 4(a)(4). The Committee unanimously approved submission to the Standing Committee of the rule as published.

Rule 8

There were no comments on the proposed amendment to Rule 8. The Committee unanimously approved submission to the Standing Committee of the rule as published.

Rule 10

The proposed amendment to Rule 10 suspends the 10-day period for ordering a transcript if a timely postjudgment motion is made that suspends a notice of appeal under Rule 4(a)(4). One comment was received. It suggested that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript because of a pending postjudgment motion. The Committee agreed that the party paying for preparation of the transcript would have a strong incentive to notify the court reporter that preparation should be halted until disposition of the motion and, therefore, that an additional rule change was unnecessary.

The Committee unanimously approved submission to the Standing Committee of the rule as published.

Rule 21

The proposed amendments to Rule 21 provide that the trial judge is not named in a petition for mandamus and is not treated as a respondent. The published rule, however, permits the judge to appear to oppose issuance of the writ if the judge chooses to do so, or if the court of appeals orders the judge to do so.

Three of the commentators on the rule opposed the provision giving the judge the option to file a response if the judge wishes to do so. The primary reason for the opposition was that the judge's participation puts the judge in an

amicus curiae to do so.

The member questioned the wisdom of making it obligatory for the trial court judge to respond when there is no respondent. The provision was rewritten as follows:

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed timed.
(2) The court of appeals may order the trial court judge to respond or may invite an amicus curiae to do so.

Another member questioned the role of the amicus curiae; should the amicus assume the traditional "neutral" role or should the amicus be in communication with the trial court judge and essentially represent the judge's position? The consensus was that the rule need not specify the role, that it either would evolve or the amicus could ask the court of appeals for instructions concerning its proper role.

The Committee next discussed the necessity of subdivision (c). It was decided that subdivision (c) governs applications for extraordinary writs when there is no on-going trial court proceeding. For example, it covers an application to an individual circuit judge for an original writ of habeas corpus or a petition for mandamus directed to an administrative agency. The procedures under 21(a) exist when there is an on-going trial court proceeding. The last sentence of subdivision (c) ("Proceedings on such applications shall conform, so far as is practicable, to the procedure prescribed in subdivision (a) and (b) of this rule.") makes allowance for the fact that there will be differences, for example, between the procedures for an original petition for habeas corpus filed with circuit judge and those for a petition for mandamus or prohibition directed to a court because in the former there is no on-going trial court proceeding. For example, subdivision (a) requires service on all other parties to the trial court proceeding; that requirement would be inapplicable in the context of an original writ of habeas corpus.

Given that subdivision (c) governs applications for extraordinary writs when there is no trial court involvement, it was unanimously decided to leave subdivision (c) in its present form. To make the distinction between (a) and (c) clear, however, it was decided that lines 1, 4, and 5 of draft two should be amended to make it clear that subdivision (a) applies only to a petition for mandamus or prohibition directed to a court.

Subdivision (c) was amended to permit service by equally reliable commercial carrier and to state that service by commercial carrier is complete upon delivery to the carrier.

The Committee decided, however, to delete lines 49 through 52 providing that when a brief or appendix is filed by delivery to a private carrier, copies must be served on the other parties in the same manner. It was pointed out that there would be instances in which a brief is filed with the court by delivery to a private carrier but the opposing party's counsel resides across the street and service could be accomplished more quickly by personal delivery. It was further noted that the desire for expeditious service is at least as strong in motions practice as it is with regard to briefing.

To eliminate the problem of lawyers filing documents with the court but manipulating service so that the opposing party does not have notice of the filing until much later, an additional sentence was added to subdivision (c). It states, "When feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." One member pointed out that although the gamesmanship that is the motivation for the change is real, the change might impose economic hardship because it could be expensive to serve a large number of parties by private carrier. It was felt, however, that the "when feasible" language would be broad enough to encompass such difficulties unless there is evidence of manipulation of the service. The "when feasible" language expresses a policy that service should be performed in a manner "at least as expeditious" as the manner of filing, but the rule does not require it. The amendment was passed by a vote of 7 in favor and 1 opposed.

Rule 26(c) provides 3 additional days for filing a response to a document served by mail. The Committee unanimously decided to make the extension applicable whenever service is by mail or "commercial carrier." Both the caption and the text of 26(c) must be so amended.

The Committee concluded that because of the changes making the mailbox rule applicable to a brief entrusted to a commercial carrier, and permitting service by commercial carrier, both Rules 25 and 26 should be republished.

Rule 47

The proposed 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

local rule may not bar any practice that these rules explicitly or implicitly permit." For example, if the national rules permit a brief that contains 14,000 words, any local rule that limits a brief to less than 14,000 words is inconsistent with the national rules. The motion passed with no opposition, but one abstention.

Subdivision (b) was amended, by a vote of 7 to 1, to make it applicable only to a "particular case." If subdivision (a) is amended to require that all generally applicable directions regarding practice or procedure be contained in local rules, the only sort of regulation that could be authorized by (b) is the issuance of an order in a particular case.

The Committee was of the opinion that it would not be necessary to republish the rule because the changes approved by the Committee simply memorialize the statutory distinction between local rules and I.O.P.'s and that the local rules project had discussed the problem as well.

Rule 49

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.

The only commentator expressed no opposition to the amendment but suggested that the change might be better made by amending the Rules Enabling Act.

The Committee unanimously approved submission to the Standing Committee of the rule as published.

The Committee adjourned for the day at 5:10 p.m.

The Committee reconvened at 8:30 a.m. on April 26.

Ninth Circuit Rule 22

Five Attorneys General from capital states in the ninth circuit wrote to Chief Justice Rehnquist claiming that the new ninth circuit procedures for death penalty cases conflict with federal law. The Attorneys General requested that the Judicial Conference use its statutory authority to modify or abrogate circuit rules that are inconsistent with federal law.

seems to contemplate making a decision to invalidate a rule in a non-adjudicatory setting.

One member asked whether the Attorneys General are challenging the ninth circuit rules in court. No one was aware of any such challenge. Although the local rules became effective on February 14, 1994, the rules were operative on an interim basis for some time before the official effective date. One member commented that the apparent reason for adoption of the ninth circuit rules was to bring order to the eleventh hour litigation that seems to be inevitable in death penalty cases. Raising the legitimacy of the rules during that time would only add to the existing frenzy and chaos; it makes sense, therefore, to examine the rule in a calmer context.

Judge Logan next asked the Committee to consider how it would handle a rule that is arguably inconsistent. One member pointed out that the language of § 331 is not mandatory; it says that the Judicial Conference "may modify or abrogate" inconsistent rules. Another member commented that there should be some discretion not to intervene when the inconsistency is doubtful. Another member noted that § 331 authorizes modification or abrogation of a rule "found inconsistent." He further commented that the language seems to require a degree of firm and settled opinion, arguably requiring a bit more certainty than an individual judge would need to vote on an issue in a case.

Another member commented that the ninth circuit rules have been attacked in 2-1/2 pages. The level of detail and scrutiny that the challengers have brought to bear is minuscule in comparison with what would be presented in litigation.

Another member stated that in his opinion, all the Committee really could address at this time is the question being pursued, the "standard of review" question; that there is insufficient information to make a decision on the merits of the ninth circuit rules.

Another member indicated that two major bodies, the courts and the Judicial Conference, have the duty to determine the consistency of local rules with federal law. Courts have that job when a rule is challenged during litigation. Section 331, however, also gives the Judicial Conference authority to modify or abrogate a rule based on its facial inconsistency with federal law. When a rule may or may not be consistent depending upon its particular application during the course of litigation, the issue should be decided by a court as part of the litigation. But as to an issue such as permitting a second en banc hearing, a committee is as

1. Are two level in banc hearings appropriate?

As to the first issue, Ninth Circuit Rule 22-4(e)(4) permits a limited in banc review followed by a full in banc review if full in banc review is requested by an active judge. The Attorneys General state that when Congress authorized limited in banc review, authority was not given for two levels of in banc review.

Chief Judge Wallace responded that the two level in banc review is not limited to capital cases and is within the broad authority of 27 U.S.C. § 46(c) to establish procedures for in banc hearings. To date, the ninth circuit is the only circuit that has accepted Congress's invitation to "perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." 92 Stat 1633. Chief Judge Wallace asserts that the language of the statute is broad enough to authorize both limited and full court in banc review of a single case.

A member of the Committee argued that dual in banc hearings are not authorized by the language of the statute. The language of the statute is singular; a court "may perform its en banc function by such number of members of its en banc courts as may be prescribed by rules of the court. . ."

Another member asked whether the circuits permit the filing of a petition for rehearing of a case heard in banc or whether it would be lawful to have a rule permitting a petition for rehearing in banc after an in banc hearing. The member thought that permitting such a petition would be analogous to the dual in banc review authorized by the ninth circuit.

Another member asked whether the statutory language permitting a court to perform its in banc function with a limited in banc court should be read to imply a negation of the existing power to convene a full in banc court. That member stated that the burden should be on those persons claiming the negation of the preexisting power. He further stated that to the extent the Committee is looking for clear conflict with federal law, there is no such conflict arising from the dual in banc provisions.

Another member noted that the double in banc review procedure did not originate in the death penalty setting and has existed since the ninth circuit began using limited in banc courts. The full in banc court should be able to delegate its authority to a limited in banc court, but if the full court is displeased with the action taken by the limited court, the full court should be able to convene to rehear the case. Another member noted that the existence of such a back-up

Hall, from the ninth circuit, and Mr. Kopp, representing the Department of Justice, abstained on this vote and all subsequent votes on the validity of the ninth circuit rules.

2. Should a single judge be able to cause a case to be heard in banc?

Judge Logan asked the Committee to consider the challenge to the provision in the ninth circuit rules permitting a single judge to convene an in banc court. The charge is that such a provision is inconsistent with the requirement that a majority of the active judges must approve an in banc hearing. Chief Judge Wallace responded by saying that "[t]he statute does not specify, however, that the ordering of an en banc hearing always must be by majority vote taken separately in each individual case." Because a majority of the circuit judges have voted to approve the local rule which says a single judge may call for an in banc hearing in a death penalty case, Judge Wallace contends that the rule is not inconsistent with the statute. In addition, he points out that the rule actually may save time because a stay of execution often would be necessary to permit a vote on whether the case should be heard in banc.

One member expressed his agreement with Chief Judge Wallace's argument. The member believes that having a majority of the members of the circuit leave their standing votes that a certain class of cases should be heard in banc is an arguable way to comply with the statute. He noted one important qualification, however, to his approval of the process. The validity of the provision depends, in his opinion, upon the support of a persistent current active majority of the members of the court. The local rule is likely to remain on the books for many years and should be periodically reaffirmed as the composition of the court changes. The 1994 majority should not be used to support an in banc hearing in the year 2000. One member noted that a majority of the court can repeal a local rule at any time and asked whether the failure to repeal a rule should be seen as providing continuing support for the existing rule. The original speaker responded negatively; he believes that the rule requires continuing active support.

One member noted that the D.C. Circuit had taken a similar step when it had ordered that all Watergate cases be initially heard in banc. Another member expressed strong disapproval of the ninth circuit rules. In his opinion, the ninth circuit rules, like the D.C. Circuit's earlier action, give special treatment to politically sensitive cases. In his opinion, sound jurisprudence requires that all cases be governed by the same procedural rules.

allow a single circuit judge to grant a temporary stay in almost any kind of case.

4. Is it appropriate to automatically grant a certificate of probable cause and a stay of execution on appeal from a first habeas petition.

Ninth Circuit Rule 22-3(c) provides:

> On a first petition, if a certificate of probable cause and a stay of execution have not been entered by the district court or if the district court has issued a stay of execution that will not continue in effect pending the issuance of this court's mandate, upon application of the petitioner a certificate of probable cause will be issued and a stay of execution will be granted by the death penalty panel pending the issuance of its mandate. (emphasis added)

One member said that he did not consider this a problem because the Supreme Court has said that in a first petition case a court of appeals should almost always grant a stay but should be reluctant to do so on subsequent petitions.

Another member stated that the automatic issuance of a certificate of probable cause seems inconsistent with federal law as enunciated by the Supreme Court in Barefoot v. Estelle.

Another member questioned why the automatic issuance was thought necessary since it was his impression that there are members of the ninth circuit who are always willing to issue the certificate of probable cause and the rule removes the discretion that is supposed to exist.

One judge responded that if a certificate will inevitably be granted on a first petition, why shouldn't the rules make it automatic.

Another member stated that although a single judge can grant a certificate of probable cause, if all the issues raised by the petition are frivolous, the certificate should be denied at every level.

A motion was made to recommend to the Judicial Conference that automatic issuance of a certificate of probable cause on a first petition is inconsistent with federal law as enunciated by the Supreme Court in Barefoot and with Fed. R. App. P. 22(b).

of execution when there is not a pending habeas petition is currently before the Supreme Court. The Committee agreed unanimously.

6. Does the rule countenance inappropriate ex parte communication with a single judge of the circuit?

One member stated that in the Harris case the ACLU went to a judge who was not a member of the panel and ostensibly presented new evidence to the judge causing the judge to issue a stay. The new rules are aimed at reducing such "ex parte" communication.

The new rules require the parties to file a motion for a stay with the clerk of the court who is directed to refer the motion to the panel. If a motion is presented directly to a judge not on the panel, the rules require the judge to refer the motion to the clerk for determination by the panel. Ninth Cir. R. 22-4(d)(5). A single judge may grant a temporary stay only if execution is imminent and the panel has not determined whether to grant a stay pending final disposition of the appeal, and that judge must immediately notify the clerk and the panel of the action. By majority vote the panel may vacate the stay. Id.

No motions having been offered as to items 3 and 6, Judge Logan undertook to summarize the Committee's discussion for purposes of reporting to the Standing Committee.
The Committee had decided the following:

1. Local rules that do not violate federal law should not be voided by the Judicial Conference. However, the Judicial Conference should remain mindful of the fact that it can recommend adoption of a national rule that would have the effect of voiding or preempting a local rule that it finds troublesome.
2. The Advisory Committee was asked to present the Standing Committee with the Advisory Committee's best judgment about the consistency of the local rules with federal law. The Advisory Committee decided that in those instances in which it has questions about the consistency of the rules, it is the Advisory Committee's responsibility to report its views to the Standing Committee.
3. The Advisory Committee took a vote on each of the issues raised by the Attorneys General which in the opinion of the Advisory Committee raised serious consistency questions.
   a. A motion to recommend abrogation of the dual in banc procedure was defeated by a vote of 3 to 4 with 2 abstentions.

fall meeting. Mr. Garner said that the chief function of the review by the Advisory Committee is to make certain that the changes recommended by the style subcommittee do not substantively change the rule. Judge Logan said that he probably would divide the redrafted rules and assign them to subcommittees of the Advisory Committee hoping that the subcommittees could work with Mr. Garner prior to the meeting to iron out any obvious difficulties. In that way it might be possible with a three day meeting to review the entire set of restylized rules in the fall.

Rule 32

On the basis of the discussion the preceding day, a new draft of the first part of the Rule 32 had been prepared for the Committee's discussion. The new draft read as follows:

(a) Form of a Brief, an Appendix, and Other Papers

(1) A brief may be produced by typing, printing, or by any duplicating or copying process that produces a clear black image on white paper with a resolution of 300 dots per inch or more. The paper must be opaque, unglazed paper, both sides of the paper may be used if the resulting document is clear and legible. Carbon copies of a brief or appendix must not be used without the court's permission, except by pro se persons proceeding in forma pauperis.

(2) Either proportionately spaced typeface or monospaced typeface may be used in a brief but proportionately spaced typeface is preferred.

(A) "A proportionately spaced typeface" is one in which the individual characters have individual advance widths. The design must be of a serifed, text, in roman style. For example, Dutch Roman, Times Roman, and Times New Roman are all proportionately spaced typefaces.

(B) "A monospaced typeface" is a typeface in which all characters have the same advance width and there are no more than 11 characters to an inch. For example, both a typewriter with Pica type, and Courier font in 12 point are both monospaced typefaces.

(3) A brief must be on either 8-1/2 by 11 inch paper or 6-1/8 by 9-1/4 inch paper.

(A) A brief on 8-1/2 by 11 inch paper

record may be included. The pages of the appendix must be separated by tabs, one for each document, or consecutively numbered.

In paragraph (a)(1), the draft provided that brief may be produced using both sides of the paper as long as the brief is clear and legible. This was responsive to one of the comments on the published rule. Two members of the Committee noted their circuits had affirmatively rejected a suggestion that briefs be double sided. A motion was made that the rule be left silent on the issue of single or double-sided briefs, leaving determination of the issue to local rule. The motion was defeated by a vote of 3 to 5 so the double-sided provision remains in the draft.

Paragraph (a)(2) defined proportionately spaced and monospaced typefaces. The second and third sentences of (a)(2)(A) were amended to read as follows: "The design must be of a serifed, roman, text style. Examples are the Roman family of typefaces, Garamond, and Palatino." The second sentence of (a)(2)(B) was amended to read as follows: "Examples are Pica type and Courier font in 12 point."

In paragraph (a)(4) the words "bold typeface" were replaced by "boldface," and "[c]ase citations" was changed to "[c]ase names."

In paragraph (a)(5) the word limitation for a principal brief was reduced from 14,000 to 12,500, and for a reply brief, from 7,000 to 6,250. The 12,500 word limit corresponds to the new D.C. circuit rule. Also the charts presented during the testimony the preceding day indicated that courier font in 12 point produces approximately 250 words per page, so that a 50 page brief in courier font in 12 point would have approximately 12,500 words.

The page limits in the safe-harbor provisions in (a)(5) were lowered to 30 pages for a principal brief and 15 pages for a reply brief using a proportionately spaced typeface and to 40 pages for a principal brief and 20 pages for a reply brief using a monospaced type face. With regard to a brief prepared with a typewriter rather than a computer, it was recognized that such a person should be able to file a 50 page brief. But it was further recognized that unless such a brief was larded with footnotes, the certification could honestly be made without counting every word. If a typed brief is heavily footnoted, several members of the Committee felt that it would be appropriate to require the preparer to count all the words in order to make the certification.

be consistent with the changes made in Rule 32. The general consensus was that there was no need for the same level of detail as in Rule 32. Several members favored retaining the 20 page limit in (d)(3) but eliminating any word limit per page, etc.

Sanctions

Chief Judge Breyer placed the proposed amendments to Rule 38 on the discussion calendar for the Judicial Conference last fall. He was concerned that requiring notice and opportunity to respond before a court can assess costs and sanctions for filing a frivolous appeal would stifle the ability of the courts to sanction minor delicts of counsel. Chief Judge Breyer asked the Advisory Committee to consider a procedure that would permit a court to appropriately note such an infraction.

The subcommittee chaired by Judge Boggs reported that it had considered Chief Judge Breyer's concerns. The subcommittee stated that there have been historically and remain, without hindrance from the revised Rule 38, a number of methods to deal with matters not warranting invocation of Rule 38. These include:

1. admonition from the bench;
2. letters to counsel subsequent to decision, transmitted either by the clerk, the presiding judge, or the entire panel;
3. criticism in an opinion; and
4. referral to the bar association.

The subcommittee believes that such methods can adequately address minor delicts that do not warrant the significant sanctions envisioned by Rule 38 or that are not cost effective to address through that rule.

The subcommittee could not think of any matters that would fall outside of Rule 38 that could not be adequately addressed by the alternative methods enumerated above.

A member of the Committee noted that some of the alternatives mentioned can be more serious than any sanction under Rule 38. Criticism of a lawyer in a judicial opinion, for example, can ruin a lawyer's career; and yet the lawyer is not entitled to due process.

Judge Logan said that he would relay the response to Judge Breyer.

from the Supreme Court Rule, the member noted that it will be a difficult burden for an amicus to shoulder at the time of the first appeal especially because the Committee also decided that an amicus must file its brief at the same time as the party it supports. At the time of Supreme Court review, the parties have already prepared briefs for consideration by the court of appeals and, therefore, an amicus knows the line of argument the party will use. An amicus does not have the same sort of information at the time of review by a court of appeals.

In view of the hour, it was decided that discussion of the new draft should be postponed until the next meeting.

Items 91-25 and 92-4, In Banc Proceedings

Item 92-4 involves a suggestion from the Solicitor General that intercircuit conflict should be made an explicit ground for granting an in banc hearing. At its September 1993 meeting, the Committee preliminarily approved such a change but did not decide whether intercircuit conflict should constitute a separate category of cases as to which in banc review is appropriate, or whether to treat intercircuit conflict as grounds for determining that a proceeding involves a question of "exceptional importance."

The representative from the Federal Judicial Center indicated that four circuits have local rules or I.O.P's stating that intercircuit conflict is grounds for granting an in banc hearing. The Federal Judicial Center volunteered to study the kind and number of petitions in those circuits and report to the Committee at its next meeting.

Judge Logan postponed discussion of the two in banc items until the next meeting.

Item 93-1

Judge Becker wrote to Judge Ripple, in his capacity as Chair of the Committee, about the apparent conflict between Fed. R. Civ. P. 9(h) and 28 U.S.C. § 1293(a)(3) with respect to interlocutory appeal of admiralty cases that include non-admiralty claims. Section 1293(a)(3) authorizes interlocutory appeal from a decree in an admiralty case, as distinguished from an admiralty claim. As such, § 1293 apparently permits interlocutory appeal of a non-admiralty claim that is part of a larger admiralty case. Fed. R. Civ. P. 9(h), however, can be read to limit the broad grant in § 1293(a)(3) of interlocutory appeal in admiralty cases to one that allows only interlocutory appeal of admiralty claims.

Proposed Amendments to Rule 32 submitted to the Judicial Conference Advisory Committee by Paul F. Stack and William Davis April 25, 1994 Denver, Colorado

Rule 32. Form of a Brief, an Appendix, and Other Papers

(a) *Definitions.*

(1) A "monospaced typeface" is a typeface in which (i) all characters, including spaces, have the same advance width, (ii) there are no more than 11 characters to an inch, and (iii) the weight of the typeface design is regular or its equivalent.

(2) A "proportionately spaced typeface" is a typeface in which (i) individual characters have individual advance widths, (ii) the x-height (the height of the lower case "x") is equal to or greater than 2 millimeters, (iii) the em-width (the width of the upper case "M") is equal to or greater than 3.7 millimeters, (iv) the design is of a serifed, text, roman style, and (v) the weight of the typeface design is regular or its equivalent.

(3) A "typeset" document is one in which a clear black image is placed on paper by means of a typesetting device including, but not limited to, an output device with a resolution of 300 dots per inch or greater utilizing digital data or a typewriter.

(4) Except as otherwise expressly provided, all printing and typesetting terms used in this rule shall have the same meaning as used in the printing and typesetting industry.

(b) Form of a Brief and an Appendix.

(1) A brief or appendix must be typeset in either a monospaced or a proportionately spaced typeface on opaque, unglazed, white paper. Copies of the brief or appendix may be produced using any duplicating or copying process that produces a clear black image on white paper. Carbon copies of a brief or appendix may not be used without the court's permission, except by pro se persons proceeding in forma pauperis.

(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;

(v) the title of the document identifying the party or parties for whom the document is filed; and

(vi) the name, office address, and telephone number of counsel representing the party for whom the document is filed.

(10) 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.

(c) Length of a Brief.

(1) Except by permission of the court, a principal brief shall not exceed 14,000 words and a reply brief shall not exceed 7,000 words.[1] The word count shall not include the corporate disclosure statement, table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. A court may establish by local rule a list of words and symbols commonly used in legal citation which shall not be counted as words for the purpose of this rule.

(2) A brief typeset in a monospaced typeface in compliance with this rule which is 50 pages or less shall be conclusively presumed to be within the 14,000 word limit of subdivision (c)(1) of this rule and a reply brief typeset in a monospaced typeface in compliance with this Rule which is 25 pages or less shall be conclusively presumed to be within the 7,000 word limit of subdivision (c)(1) of this rule. In order for the conclusive presumption to attach, the party submitting such brief shall not have used footnotes in a manner that would increase the content of the brief. Nothing in this rule shall prevent the submission of an opening or responsive brief typeset in a monospaced typeface in excess of 50 pages or a reply brief in excess of 25 pages so long as the actual word limitations of subdivision (c)(1) are not exceeded.

(3) A brief shall have affixed to it at its end a declaration by an attorney of record for the party submitting such brief that the brief is in compliance with this rule and any applicable local rule. In the case of a brief

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[1]This proposed rule contemplates the elimination of Rule 28(g) of the Federal Rules of Appellate Procedure.

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

Agenda Section 6A
Standing 6/94

TO: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

SUBJECT: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 16, 1994

The report of the Advisory Committee on Bankruptcy Rules includes the following items:

I. Action Items

A. Proposed amendments to Rules 8018, 9029, and 9037, which conform to the uniform provisions dealing with local rules, standing orders, and technical amendments, are presented to the Standing Committee for its consideration. A preliminary draft of these proposed amendments was published for comment in October 1993. These proposed amendments are discussed in my separate memorandum to you dated May 12, 1994, which is enclosed immediately following this memorandum. A draft of the proposed amendments and a summary of the comments received from the bench and bar are attached to my May 12th memorandum.

B. The Advisory Committee requests permission to publish for comment by the bench and bar a preliminary draft of proposed amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006. These proposed amendments are summarized in, and attached to, my enclosed letter dated May 14, 1994.

II. Information Items

A. The Supreme Court has forwarded to Congress amendments to Bankruptcy Rules 8002(b) and 8006 governing appeals from

conform to a uniform numbering system, the Subcommittee on Local Rules has been working together with Patricia S. Channon, Senior Attorney in the Bankruptcy Judges Division of the Administrative Office, to devise such a numbering system. The subcommittee met on February, 23, 1994, and approved for presentation to the Advisory Committee a proposed numbering system that is tied to the numbers of the relevant national Bankruptcy Rules. That numbering system has been approved preliminarily by the Advisory Committee, but further work needs to be done. It is anticipated that a numbering system will be considered by the Advisory Committee at its next meeting in September 1994.

F. The Advisory Committee has been monitoring Congressional efforts to amend the Bankruptcy Rules. During the past few years, bills have been introduced that would amend Bankruptcy Rule 7004 dealing with service of process on federal depository institutions or on other business entities. On two occasions, letters have been written by the Chairman of the Standing Committee in opposition to these bills. In addition, Francis F. Szczebak, Chief of the Bankruptcy Judges Division of the Administrative Office, testified in opposition to such a provision contained in a comprehensive bankruptcy reform bill (S.540). On April 21, 1994, the Senate passed S.540 (with revisions from the prior text of S.540 on which Mr. Szczebak testified). Section 112 of S.540 would require that service on federal depository institutions be by certified mail addressed to an officer unless (a) the institution has filed an appearance (in which case the attorney shall be served by first class mail), (b) the court orders -- on application served on the institution by certified mail -- that service may be by first class mail sent to an officer designated by the institution, or (c) the institution has waived its right to service by certified mail. A copy of section 112 of S.540 is enclosed for your information. It is not certain as to whether a similar provision will be included in proposed legislation in the House or whether S.540 will become enacted.

At its meeting in February 1994, the Advisory Committee approved a preliminary draft of Rule 7004 that continues the current practice of allowing service by first class mail, rather than requiring service by certified mail, with respect to all entities. The proposed amendments to Rule 7004 recommended by the Advisory Committee are included in the package of proposed amendments for which the Advisory Committee has requested permission to publish for comment.

Attachments:

1. Memorandum from Judge Mannes to Judge Stotler dated May 12, 1994 with attachments relating to proposed amendments to Rules 8018, 9029, and 9037.

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

TO: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendments to Bankruptcy Rules 8018, 9029, and 9037

DATE: May 12, 1994

On behalf of the Advisory Committee on Bankruptcy Rules, it is my honor to transmit proposed amendments to Bankruptcy Rules 8018, 9029, and 9037 for consideration by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

These proposed amendments are unusual in their origin. Whereas original recommendations for proposed amendments usually derive from the advisory committee and are presented to the Standing Committee for its approval, the original suggestions for proposed amendments governing local rules, procedure when there is no controlling law, and technical amendments originated from the Standing Committee with a view toward uniformity among the four bodies of federal procedural rules -- Appellate, Bankruptcy, Civil, and Criminal. As a result of the coordinated efforts of the reporter to the standing committee and the reporters to the advisory committees, the language of the proposed amendments on these subjects is substantially the same in all four bodies of federal rules.

The Advisory Committee on Bankruptcy Rules favors the proposed amendments to Rules 8018 and 9029 relating to local rules and procedure when there is no controlling law, and recommends that they be adopted with one change discussed below. At the Standing Committee meeting in June 1993, however, the Advisory Committee on Bankruptcy Rules expressed its opposition

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

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.

(1) Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may, ~~by action of~~ acting by 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 -- Acts of Congress and the rules of

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

panel or district judge may regulate practice in any manner consistent with federal law, 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 law, federal rules, Official Forms, or the local rules of the circuit council or district court unless the alleged violator has been furnished in the particular case with 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.

and amend rules of practice and procedure which are ~~not inconsistent~~ consistent with -- but not duplicative of -- Acts of Congress and 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.

(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 nonwillful failure to comply with the requirement. ~~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.~~

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.

Paragraph (2) of subdivision (a) 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 paragraph (2) is narrowly drawn -- covering only violations that are not willful 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 stubbornly 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

noncompliance with such an internal directive, unless the alleged violator has been furnished in a particular case with 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.

SUMMARY OF COMMENTS ON THE PROPOSED AMENDMENTS TO BANKRUPTCY RULES 8018, 9029, AND 9037

The Advisory Committee on Bankruptcy Rules received seven comments from the bench and bar in response to the publication of the preliminary draft of proposed amendments to Bankruptcy Rules 8018, 9029, and 9037. Listed below are the names and addresses of the commentators and a summary of each comment.

(1) Edith Broida, Esq.
P.O. Box 5941
Washington, D.C. 20016
(March 30, 1994)

Ms. Broida disagrees with Rule 9029(b) in that it permits a judge to regulate practice before him or her. "All judges need to be instructed in judicial management and have the rules set for them." She also criticizes a particular local rule in the Southern District of Florida that permits a bankruptcy judge to hear a motion to dismiss an appeal from an order of the bankruptcy court based on the appellant's failure to comply with procedures for designating the issues. Ms. Broida also comments on several other issues that are not related to Bankruptcy Rules 8018, 9029, or 9037.

(2) Honorable Samuel L. Bufford
United States Bankruptcy Court
Central District of California
Roybal Building
255 East Temple Street, Suite 1580
Los Angeles, CA 90012
(December 2, 1993)

Judge Bufford agrees with the comments contained in the letter of Judge Lisa Hill Fenning (see below), except that he believes that "local" local rules (standing orders) should be actively discouraged. Judge Bufford discusses the experience in the Central District of California where procedures of some 20 bankruptcy judges have been coordinated, resulting in publicized local rules rather than judge-specific standing orders.

Judge Bufford also comments that the numbering of local rules to correspond to the national Bankruptcy Rules "would introduce a needless difficulty for lawyers in finding the appropriate local rule." In the Central District, local rules have been numbered to correspond to the local district court rules. "A renumbering of the bankruptcy rules to correspond to the Federal Rules of Bankruptcy Procedure will make it more difficult for a non-specialist to find the appropriate local rule." He then recommends two ways to ameliorate this difficulty. First, the Bankruptcy Rules should be re-numbered to correspond to the Federal Rules of Civil Procedure and, second, district courts should be required to number their local rules to correspond to the Fed.R.Civ.P. Then "the entire federal practice

Kentucky, which is tied to the national Bankruptcy Rules, be used.

(5) Honorable Lisa Hill Fenning
United States Bankruptcy court
Central District of California
Roybal Building
255 East Temple Street, Suite 1682
Los Angeles, CA 90012
(November 24, 1993)

Judge Fenning supports the goal of developing a uniform numbering system for local rules, and says that her court is awaiting guidance from the Advisory Committee as to how to renumber their rules. However, Judge Fenning urges the Advisory Committee to first consider whether the present numbering system for the national Bankruptcy Rules is "logical and consistent." She believes that the national rules have evolved in a sequence that perhaps no longer reflects a useful structure or order. Once any necessary renumbering of the national rules is completed, then local rules could be numbered to correlate with the national rules.

Judge Fenning also comments that proposed Rule 9029(b) appears to sanction the practice of "local" local rules (standing orders), which she opposes. She believes that judges should strive to reach consensus for uniform procedures to be included in local rules, rather than having numerous judge-specific orders. She supports the principle that a litigant should not be punished for noncompliance with a standing order if there is no notice of the requirement. Judge Fenning also comments that standing orders could interfere with the functioning of the clerk's office by imposing additional demands upon the clerk's staff to enforce special requirements of particular judges. She recommends that Rule 9029(b) be amended further to provide that "any regulations adopted by an individual judge must not interfere with the functioning of the clerk's office."

(6) Honorable Henry L. Hess, Jr.
Unites States Bankruptcy Court
District of Oregon
1001 S.W. Fifth Avenue, #900
Portland, Oregon 97204
(January 5, 1994)

Judge Hess proposes that the Bankruptcy Rules expressly require that "local rules must conform to the numbering system of the Bankruptcy Rules." The local rules in the District of Oregon already conform to the national Bankruptcy Rules. "What better way to provide uniformity than to require local rules to use the same numbering system as the national rules?"

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

Agenda Section 6B
Standing 6/94

TO: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006

DATE: May 14, 1994

On behalf of the Advisory Committee on Bankruptcy Rules, it is my honor to submit proposals to amend the Federal Rules of Bankruptcy Procedure.

I request that the preliminary draft of these proposed amendments be circulated to the bench and bar and that views and comments be solicited. I further request that the Advisory Committee be permitted to conduct a public hearing to afford an opportunity for the oral presentation of views.

The proposed amendments are as follows:

(1) Rule 1006(a) is amended to include within the scope of the rule any fees prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1930(b) that is payable to the clerk upon commencement of a case. This fee will be payable in installments in the same manner that the filing fee prescribed by 28 U.S.C. § 1930(a) is payable in installments pursuant to Rule 1006(b).

(2) Rule 1007(c) is amended to provide that schedules and statements filed prior to conversion of a case to another chapter are treated as filed in the converted case, regardless of the chapter the case was in prior to conversion. The rule now provides that schedules and statements filed prior to conversion

(8) Rule 4004(c) is amended to delay the debtor's discharge in a chapter 7 case if there is a pending motion to extend the time for filing a complaint objecting to discharge or if the filing fee has not been paid in full.

(9) Rule 5005(a) is amended to authorize local rules that permit documents to be filed, signed. or verified by electronic means, provided that such means are consistent with technical standards, if any, established by the Judicial Conference. The rule also provides that a document filed by electronic means constitutes a "written paper" for the purpose of applying the rules and constitutes a public record open to examination. The purpose of these amendments is to facilitate the filing, signing, or verification of documents by computer-to-computer transmission without the need to reduce them to paper form in the clerk's office.

(10) Rule 7004 is amended to conform to the 1993 amendments to Rule 4 of the Federal Rules of Civil Procedure. First, cross-references to subdivisions of F.R.Civ.P. 4 are changed to conform to the new structure of the Civil Rule. Second, substantive changes to Rule 4 F.R.Civ.P. that became effective in 1993 are implemented in Rule 7004 to the extent that they are consistent with the continuing availability under Rule 7004 of service by first class mail as an alternative to the methods of personal service provided under Rule 4 F.R.Civ.P.

(11) Rule 8008 is amended to permit district courts and, where bankruptcy appellate panels have been authorized, circuit councils to adopt local rules to allow filing, signing, or verification of documents by electronic means in the same manner and with the same limitations that are applicable to bankruptcy courts under Rule 5005(a), as amended.

(12) Rule 9006 is amended to conform to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8).

Drafts of the proposed amendments, and Advisory Committee Notes explaining them, are attached.

Rule 1006. Filing Fee

(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the ~~prescribed~~ filing fee except as provided in subdivision (b) of this rule. For the purpose of this rule, "filing fee" means the filing fee prescribed by 28 U.S.C. § 1930(a)(1)-(a)(5) and any other fee prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

(b) PAYMENT OF FILING FEE IN INSTALLMENTS.

(1) Application for Permission to Pay Filing Fee in Installments. A voluntary petition by an individual shall be accepted for filing if accompanied by the debtor's signed application stating that the debtor is unable to pay the filing fee except in installments. The application shall state the proposed terms of the installment payments and that the applicant has neither paid any money nor transferred any property to an attorney for services in connection with the case.

(2) Action on Application. Prior to the meeting of creditors, the court may order the filing fee paid to the clerk or grant leave to pay in installments and fix the number, amount and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the

Rule 1007. Lists, Schedules and Statements; Time Limits

* * *

(c) TIME LIMITS. The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days after entry of the order for relief. Schedules and statements ~~previously~~ filed prior to the conversion of a case to another chapter ~~in a pending chapter 7 case~~ shall be deemed filed in ~~a superseding~~ the converted case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

* * * *

~~(7) EXTENSION OF TIME TO FILE CLAIMS AGAINST SURPLUS. Any extension of time for the filing of claims against a surplus granted pursuant to Rule 3002(c)(6), shall apply to holders of claims who failed to file their claims within the time prescribed, or fixed by the court pursuant to paragraph (6) of this rule, and notice shall be given as provided in Rule 2002.~~

COMMITTEE NOTE

Subdivision (7) is abrogated to conform to the abrogation of Rule 3002(c)(6) and the addition of Rule 3002(d). If a proof of claim is tardily filed after a case is converted to a chapter 7 case, the claim may be allowed to the extent that the creditor, as the holder of an unsecured claim proof of which is tardily filed, is entitled to receive a distribution under section 726 of the Code.

hearings on all applications for compensation or reimbursement of expenses totalling in excess of $500; ~~(8)~~ (7) the time fixed for filing proofs of claims pursuant to Rule 3003(c); and ~~(9)~~ (8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan.

* * * *

(c) CONTENT OF NOTICE.

* * * *

(2) Notice of Hearing on Compensation. The notice of a hearing on an application for compensation or reimbursement of expenses required by subdivision ~~(a)(7)~~ (a)(6) of this rule shall identify the applicant and the amounts requested.

* * * *

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of

* * * *

(8) a summary of the trustee's final report ~~and account~~ in a chapter 7 case if the net proceeds realized exceed $1,500.

* * * *

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, ~~the court may,~~ after 90 days following the

receive copies of all notices required by subdivisions (a)(1), ~~(a)(6)~~ (a)(5), (b), (f)(2), and (f)(7), and such other notices as the court may direct.

* * * *

(k) NOTICES TO UNITED STATES TRUSTEE. Unless the case is a chapter 9 municipality case or unless the United States trustee otherwise requests, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), ~~(a)(5)~~ (a)(4), ~~(a)(9)~~ (a)(8), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), and (f)(8) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses. Notices to the United States trustee shall be transmitted within the time prescribed in subdivision (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. Nothing in these rules shall require the clerk or any other person to transmit to the United States trustee any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq.

* * * *

COMMITTEE NOTE

Paragraph (a)(4) is abrogated to conform to the abrogation of Rule 3002(c)(6). The remaining paragraphs of subdivision (a) are renumbered, and references to these paragraphs contained in other subdivisions of this

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case

* * * *

(b) CHAPTER 12 TRUSTEE AND DEBTOR IN POSSESSION. In a chapter 12 family farmer's debt adjustment case, the debtor in possession shall perform the duties prescribed in clauses ~~(1)-(4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this paragraph.

(c) CHAPTER 13 TRUSTEE AND DEBTOR.

(1) Business Cases. In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses ~~(1)-(4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court.

* * * *

COMMITTEE NOTE

Under subdivision (a)(1), the trustee in a chapter 7 case and, if the court directs, the trustee or debtor in possession in a chapter 11 case is required to file and transmit to the United States trustee a complete inventory of the debtor's

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. An unsecured creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005.

* * * *

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

* * * *

~~(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time herein above prescribed.~~

(d) TARDILY FILED CLAIM IN CHAPTER 7 CASE. Notwithstanding subdivision (a) of this rule, if a creditor files a proof of claim in a chapter 7 case after the expiration of the time for filing the proof of claim prescribed in subdivision (c) of this rule, the creditor, as

Rule 3016. Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

~~(a) TIME FOR FILING PLAN. A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied or the court otherwise directs.~~

~~(b)~~ (a) IDENTIFICATION OF PLAN. Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.

~~(c)~~ (b) DISCLOSURE STATEMENT. In a chapter 9 or 11 case, a disclosure statement pursuant to § 1125 or evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by the court.

COMMITTEE NOTE

Section 1121(c) gives a party in interest the right to file a chapter 11 plan after expiration of the period when only the debtor may file a plan. Under § 1121(d), the exclusive period in which only the debtor may file a plan may be extended, but only if a party in interest so requests and the court, after notice and a hearing, finds cause for an extension. Subdivision (a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a plan without satisfying the requirements of § 1121(d). The abrogation of subdivision (a) does not affect the court's discretion with respect to the scheduling of hearings on the approval of disclosure statements when more than one plan has been filed.

to delay entry of the discharge order if the debtor has not paid in full the filing fee and the administrative fee required to be paid upon the commencement of the case. If the debtor is authorized to pay the fees in installments in accordance with Rule 1006, the discharge order will not be entered until the final installment has been paid.

COMMITTEE NOTE

The rule is amended to permit, but not require, courts to adopt local rules that allow filing, signing, or verifying of documents by electronic means. However, such local rules must be consistent with technical standards, if any, promulgated by the Judicial Conference of the United States.

An important benefit to be derived by permitting filing by electronic means is that the extensive volume of paper received and maintained as records in the clerk's office will be reduced substantially. With the receipt of electronic data transmissions by computer, the clerk may maintain records electronically without the need to reproduce them in tangible paper form.

Judicial Conference standards governing the technological aspects of electronic filing will result in uniformity among judicial districts to accommodate an increasingly national bar. By delegating to the Judicial Conference the establishment and future amendment of national standards for electronic filing, the Supreme Court and Congress will be relieved of the burden of reviewing and promulgating detailed rules dealing with complex technological standards. Another reason for leaving to the Judicial Conference the formulation of technological standards for electronic filing is that advances in computer technology occur often, and changes in the technological standards may have to be implemented more frequently than would be feasible by rule amendment under the Rules Enabling Act process.

It is anticipated that standards established by the Judicial Conference will govern technical specifications for electronic data transmission, such as requirements relating to the formatting of data, speed of transmission, means to transmit copies of supporting documentation, and security of communication procedures. In addition, before procedures for electronic filing are implemented, standards must be established to assure the proper maintenance and integrity of the record and to provide appropriate access and retrieval mechanisms. These matters will be governed by local rules until system-wide standards are adopted by the Judicial Conference.

Rule 9009 requires that the Official Forms shall be observed and used "with alterations as may be appropriate." Compliance with local rules and any Judicial Conference standards with respect to the

Rule 7004. Process; Service of Summons, Complaint

(a) SUMMONS; SERVICE; PROOF OF SERVICE. Rule ~~4(a), (b), (c)(2)(C)(i), (d), (e) and (g)-(j)~~ 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service pursuant to Rule ~~4(d)~~ 4(e)-(j) F.R.Civ.P. may be made by any person not less than 18 years of age who is not a party and the summons may be delivered by the clerk to any such person.

(b) SERVICE BY FIRST CLASS MAIL. In addition to the methods of service authorized by Rule ~~4(e)(2)(C)(i) and (d)~~ 4(e) -(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state. The summons and complaint in such case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person

Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service under this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in

and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending.

(c) SERVICE BY PUBLICATION. If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule ~~4(d) or (i)~~ 4(e)-(j) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail postage prepaid, to the party's last known address and by at least one publication in such manner and form as the court may direct.

(d) NATIONWIDE SERVICE OF PROCESS. The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

~~(e) SERVICE ON DEBTOR AND OTHERS IN FOREIGN COUNTRY. The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) F.R.Civ.P. in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any~~

~~subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules shall be the subdivisions of Rule 4 F.R.Civ.P. in effect on January 1, 1990, notwithstanding any amendment to Rule 4 F.R.Civ.P. subsequent thereto.~~

COMMITTEE NOTE

The purpose of these amendments is to conform the rule to the 1993 revisions of Rule 4 F.R.Civ.P. Rule 7004, as amended, continues to provide for service by first class mail as an alternative to the methods of personal service provided under Rule 4 F.R.Civ.P.

Rule 4(d)(2) F.R.Civ.P. provides a procedure by which the plaintiff may request by first class mail that the defendant waive service of the summons. This procedure is not applicable in adversary proceedings because it is not necessary in view of the availability of service by mail under Rule 7004(b). However, if a written waiver of service of a summons is made in an adversary proceeding, Rule 4(d)(1) F.R.Civ.P. applies so that the defendant does not thereby waive any objection to the venue or the jurisdiction of the court over the person of the defendant.

Subdivisions (b)(4) and (b)(5) are amended to conform to the 1993 amendments to Rule 4(i)(3) F.R.Civ.P., which protect the plaintiff from the hazard of losing a substantive right because of failure to comply with the requirements of multiple service when the United States or an officer, agency, or corporation of the United States is a defendant. These subdivisions also are amended to require that the summons and complaint be addressed to the civil process clerk at the office of the United States attorney.

Subdivision (e), which has governed service in a foreign country, is abrogated and Rule 4(f) and (h)(2) F.R.Civ.P., as substantially revised in 1993, are made applicable in adversary proceedings.

The new subdivision (f) is consistent with the 1993 amendments to F.R.Civ.P. 4(k)(2). It clarifies that service or filing a waiver of service in accordance with this rule or the applicable subdivisions of

Rule 8008. Filing and Service

(a) FILING. Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be filed by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs shall be deemed filed on the day of mailing. An original and one copy of all papers shall be filed when an appeal is to the district court; an original and three copies shall be filed when an appeal is to a bankruptcy appellate panel. The district court or bankruptcy appellate panel may require that additional copies be furnished. Rule 5005(a)(2) applies to papers filed with the clerk of the district court or the clerk of the bankruptcy appellate panel if filing by electronic means is authorized by local rule promulgated pursuant to Rule 8018.

* * * *

COMMITTEE NOTE

This rule is amended to permit, but not require, district courts and, where bankruptcy appellate panels have been authorized, circuit councils to adopt local rules that allow filing of documents by electronic means, subject to the limitations contained in Rule 5005(a)(2). See the committee note to the 199__ amendments to Rule 5005.

Agenda Section 6C
Standing 6/94

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of February 24-25, 1994

Sea Island, Georgia

AGENDA

Introductory Items

Approval of minutes of September 1993 meeting.

Report of January 1994 meeting of Standing Committee.

Rules

1. Published amendments to Rules 8018, 9029, and 9037 re: local rules, standing orders, and technical amendments. [Materials: Reporter's memorandum dated 12/27/93.]

2. Proposed amendment to Rule 9014 to make certain 1993 amendments to Fed.R.Civ.P. 26 inapplicable in contested matters. [Materials: Reporter's memorandum dated 01/03/94.]

3. Proposed amendments to Rule 3002 to conform the rule to §726 of the Code. Related proposed amendments to Rules 1019, 2002, and 9006. [Materials: Reporter's memorandum dated 01/06/94.]

4. Proposed amendments to Rules 1007(c) and 1019 concerning converted cases. [Materials: Reporter's memorandum dated 01/05/94.]

5. Proposed amendments to Rule 7004 to conform to 1993 amendments to Fed.R.Civ.P. 4. [Materials: Reporter's memorandum dated 01/09/94 and House Document 103-74 (amendments to Federal Rules of Civil Procedure).]

6. Proposed amendments to Rule 1006 to include administrative fee and to authorize chapter 13 trustee to collect filing fee installments on behalf of the clerk. Proposed adaptation of Official Form 3. [Materials: Reporter's memorandum dated 01/08/94; copy of proposed form.]

7. Proposed amendment to Rule 8002 re: filing of notice of appeal by an inmate. [Materials: Reporter's memorandum dated 01/07/94.]

8. Proposed amendments to Rules 3017, 3018, and 3021 re: record date for voting and distribution purposes. [Materials: Reporter's memorandum dated 01/04/94.]

DRAFT

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of February 24 -25, 1994
Sea Island, Georgia

Minutes

The Advisory Committee on Bankruptcy Rules met at The Cloister in Sea Island, Georgia. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman
Circuit Judge Alice M. Batchelder
District Judge Adrian G. Duplantier
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge James J. Barta
Bankruptcy Judge James W. Meyers
Professor Charles J. Tabb
Henry J. Sommer, Esquire
Kenneth N. Klee, Esquire
Gerald K. Smith, Esquire
Leonard M. Rosen, Esquire
Neal Batson, Esquire
Professor Alan N. Resnick, Reporter

The following former members also attended the meeting:

District Judge Joseph L. McGlynn, Jr.
Ralph R. Mabey, Esquire
Herbert P. Minkel, Esquire

The following additional persons also attended all or part of the meeting:

District Judge Thomas S. Ellis, III, member, Committee on Rules of Practice and Procedure, and liaison with this Committee
Bankruptcy Judge Lee M. Jackwig, member, Committee on Automation and Technology
Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure
Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, and Assistant Director, Administrative Office of the U.S. Courts
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office of the U. S. Courts
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court, Eastern District of California
Gordon Bermant, Director, Planning and Technology Division, Federal Judicial Center

bankruptcy bill currently pending, would do. Amendments to Rule 8002 and 8006 are pending at the Supreme Court and will take effect August 1, 1994, absent congressional action to the contrary. No bankruptcy rules amendments were before the January 1994 Standing Committee meeting, and there was sentiment by Standing Committee members, he said, that advisory committees should exercise restraint in proposing amendments.

With respect to the style revisions to the rules, Professor Resnick reported that Bryan Garner had submitted the proposed draft of the civil rules and the Advisory Committee on Civil Rules is in the process of line-by-line review. The intent is to make only style changes, not substantive ones, he said.

Professor Resnick said that the Judicial Conference has guidelines on access to materials. He said that committee members should be careful about circulating memoranda that do not represent committee positions. Mr. Sommer observed in response that rules committee meetings are open to the public (28 U.S.C. § 2073(c).) and that committee records also are public.

PUBLISHED DRAFT RULES

Published (Preliminary Draft) Amendments to Rules 8018, 9029, and Proposed New Rule 9037. Professor Resnick reviewed the history of these proposals for "common rules" concerning local rules and technical amendments. He described the initiating of the amendments by the Standing Committee, the negotiating of the language with the other advisory committees, and the publication of similar amendments for the appellate, civil, and criminal rules. The last time the proposals were considered by the Advisory Committee was in February 1993, and several changes were introduced after that, which the committee had not had a chance to consider prior to publication of the preliminary draft. Most of these were stylistic or involved minor changes to the committee notes. There were two changes that were substantive, however.

The first was an insert to the amendments to Rules 8018(a)(2) and 9029(a)(2) that would prohibit a court from enforcing any local rule imposing a requirement of form in a way that would cause a party to lose rights if the failure to conform to the requirement was a "negligent failure." Mr. Rosen asked how other "non willful" failures would be treated under the rule and suggested that the appropriate standard ought to be "non willful," rather than negligence. Professor Coquillette said this was a good suggestion and might be adopted if the other advisory committees concur. Judge Robreno said he thought it "revolutionary" to have rules that do not have to be followed, but wondered whether his comment might be too late to have any effect. The Reporter said it was not too late. Judge Meyers

In the event the committee thought it appropriate to make the mandatory disclosure and meeting requirements inapplicable to contested matters nationally, the Reporter had drafted an amendment to Rule 9014 for this purpose. After discussion, **a motion to defer action and study the operation of discovery deadlines in contested matters overall carried by a 6-0 vote.**

Rule 7004 and the 1993 Amendments to Fed.R.Civ.P. 4. The 1991 amendments to the bankruptcy rules "froze" the Fed.R.Civ.P. 4 (to which reference is made in Rule 7004 and parts of which are incorporated into the bankruptcy rules by Rule 7004) to the version of the rule that was in effect on January 1, 1990. This action was taken because amendments to Rule 4 were pending, but their final form was still uncertain. Rule 4 now has been amended, and it is time to amend Rule 7004 to conform to the new Rule 4. The Reporter had prepared a draft for this purpose. In addition, the Reporter had drafted a new subdivision (f) to cover service and personal jurisdiction over a party who is a non-resident of the United States having contacts with the United States sufficient to justify application of United States law but insufficient contact with any single state to support jurisdiction under a state long-arm statute. The new subdivision tracks a similar new provision in Rule 4. **A motion to adopt the Reporter's draft carried by a vote of 6-2.** The amendments to Rule 4 included creating a new Rule 4.1 to cover "other" process, not a summons or subpoena. These provisions formerly were in a subdivision of Rule 4 that was not incorporated by Rule 7004. The Reporter said he had consulted with Professor Lawrence P. King, a former member and former Reporter to the committee, about the history of not incorporating the subdivision. Professor King had said the subdivision was left out intentionally so that it would not apply to the servicee of motions. Rule 4.1 also contains territorial limits on service that are inconsistent with the nationwide service provisions of Rule 7004. **There was no opposition to the Reporter's recommendation that Rule 4.1 not be incorporated into the bankruptcy rules.**

PROPOSED AMENDMENTS

Rule 1006. Professor Resnick stated that the Judicial Conference in 1992 had prescribed a $30 administrative fee for chapter 7 and chapter 13 cases, payable at filing. As originally prescribed, this fee was not payable in installments as is the filing fee for such cases. In late 1993, however, the Judicial Conference had amended the schedule of fees prescribed under 28 U.S.C. § 1930(b) to permit payment of the $30 fee in installments. Professor Resnick had proposed two drafts to incorporate the administrative fee into the rule on installment payments. **A motion to adopt the shorter draft, amending Rule 1006(a), carried on an 8-3 vote.** The Reporter stated that there also had been a proposal by the president of the National Association of Consumer Bankruptcy

claims. The Reporter reviewed his memorandum dated January 9, 1994, which detailed various suggestions for amendments, two from deputy clerks of court, several related to deleting references to Rule 3002(c)(6) which the Committee separately had voted to abrogate, and several further amendments suggested by Professor Resnick. **The Committee approved amendments to Rule 2002(h) that would assure the mailing of notices to the debtor, the trustee, and all creditors during any 90-day claims filing period arising from notification by the trustee that newly discovered assets may be available for distribution. The Committee rejected a proposal to amend subdivision (h) to extend the period during which all creditors receive notices until the time has expired for the filing of a claim on behalf of a creditor by the debtor or the trustee. The Committee referred the proposed amendments to Rule 2002(h) and the Committee Note to the style subcommittee with the following instructions: 1) make sure line 12 does not exclude the debtor, the trustee, and the U.S. trustee from receiving notices, 2) make sure that creditors who filed claims late are not excluded from receiving notices, and 3) reorganize the Committee Note to state simply that the rule is being amended "as follows" and list the changes. A motion to approve the proposed amendments as described above, subject to further work by the style subcommittee, carried unanimously.**

Rule 3002. The Reporter briefly reviewed the history of various proposals to amend this rule that have been considered by the Committee and noted that the case law concerning the status of a late-filed proof of claim remains very unsettled. The Committee declines to take a position on the issue. Nevertheless, the language of Rule 3002(a), especially when read together with Rule 3009, leads to the conclusion that an unsecured creditor who misses the deadline for filing claims may not have an "allowed claim" and may not receive any distribution in a chapter 7 case. This conclusion, however, conflicts with the provisions of § 726 of the Code that indicate that a late-filed claim can be an "allowed" claim, at least in some instances, and expressly direct payment of "tardily filed" claims under certain circumstances. To clear up any conflict between the Code and the rules on this issue, the Reporter had drafted amendments that would add a new subdivision (d) to the rule and delete existing subdivision (c)(6) as unnecessary if (d) were added. The proposed subdivision (d) would state that a late claim may be allowed to the extent the creditor would be authorized to receive a distribution by § 726. Mr. Rosen offered alternative language to accomplish the same result. **A motion to approve the amendments as redrafted to incorporate Mr. Rosen's suggestions carried, with none opposed. A motion to approve conforming changes to the proposed Committee Note also carried, with none opposed.**

Rules 3017, 3018, and 3021 and Proposed Amendments Regarding the Record Date for Voting and Distribution. Rule 3017(d) requires that certain documents in a chapter 11 case be mailed to

hand, if the individuals do not all have to be physically present at every proceeding, much time and energy can be saved and other efficiencies realized in the utilization of judicial time. For example, a judge could handle a case from another district without having to travel.

Judge Barta, chairman of the subcommittee, reported that the subcommittee had met twice and had drafted two amendments that would authorize courts to accept electronic filings. These are discussed below. Judge Barta stated that the report requested by the Committee on the future of technology and the rules was not yet complete due to the raising at the first subcommittee meeting of several issues that require further inquiry. The philosophy anchoring the report would be that the Advisory Committee should take a leading role in adopting rules to implement changing technology, he said. One result of the Committee's having stepped forward is Rule 9036, which now permits delivery of information from the court by means other than paper; the next step, he said, is to authorize the court to receive documents other than on paper. Judge Barta said he expects the report to be finished in time for the Standing Committee to consider it in connection with any request to publish the proposed electronic filing amendments.

Rule 5005. The subcommittee on technology proposed adding a new subdivision (a)(2) that would authorize a court by local rule to "permit documents to be filed, signed or verified by electronic means" consistent with any technical standards established by the Judicial Conference. **A motion to adopt the proposed amendment carried, with none opposed. On further motions, the Committee approved the deletion of lines 12 - 15 (no intent to permit filing by facsimile transmission) and lines 68 - 71 (no intent to affect any statute requiring a "writing" or "signature") of the proposed Committee Note.**

Rule 8008(a). The subcommittee's proposed amendment to the rule would authorize a district court or bankruptcy appellate panel by local rule to accept electronic filings. **A motion to adopt the amendment carried, with none opposed.**

Subcommittee on Alternative Dispute Resolution

Professor Tabb, chairman of the subcommittee, requested guidance on the need for proposed amendments concerning alternative dispute resolution. The consensus was that, although some districts operate local, voluntary programs, there is not a need for national rules at this time. A need could arise if Congress were to mandate an ADR program for the bankruptcy courts. Accordingly, the subcommittee's work remains investigatory at this time.

Oregon, as the site for a meeting in August 1995, and on Arizona for a meeting in February or March of 1996.

Respectfully submitted,

Patricia S. Channon

Agenda section 7A
Standing 6/94

To: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure

From: Honorable Ralph K. Winter, Chair
Advisory Committee on the Federal Rules of Evidence

Date: May 18, 1994

I hereby transmit by separate attachment proposed amendments to Rules 412 and 1102 of the Federal Rules of Evidence. Both have been published and subject to public comment. The proposed amendment to Rule 412 has been considered by the Supreme Court, which has withheld approval of it. The Advisory Committee respectfully recommends that it be resubmitted to the Judicial Conference.

I am also transmitting tentative decisions by the Advisory Committee not to amend certain of the Rules of Evidence. The work of the Committee has proceeded apace since its reconstitution. However, we have had very little input from the bench, bar and public. This is unfortunate because the Committee is undertaking a comprehensive review of all of the Rules. In these circumstances, a decision not to amend a particular rule may be as important as a decision to amend, and there is the danger that some arguments for amendments have not been presented to or considered by the Advisory Committee. The Committee believes that a tentative decision on its part not to amend certain rules during this comprehensive review should be subject to the same procedures for public comment as its tentative decisions to propose amendments. The Advisory Committee

Attachment to Memorandum of
Transmittal dated May 17, 1994

PROPOSED AMENDMENTS

Rule 412

The Supreme Court has withheld approval of the proposed amendments to Rule 412(b)(2). In a letter to the Chair of the Executive Committee of the Judicial Conference of the United States, the Chief Justice stated a concern on the part of some members of the Court that the proposed rule might violate the Rules Enabling Act, which forbids the enactment of rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The Chief Justice's letter suggested that the proposed rule might encroach on the rights of defendants in sexual harassment cases because it may be inconsistent with Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). Finally, the Chief Justice's letter suggested that the Conference or Standing Committee might revisit the proposed rule in light of the concerns expressed in his letter.

The Advisory Committee on the Federal Rules of Evidence was asked by the Chair of the Standing Committee to state its views on the Supreme Court's withholding of approval of proposed Rule 412(b)(2) and concerns expressed in the Chief Justice's letter. Respectfully, the Advisory Committee recommends that proposed Rule 412(b)(2) be resubmitted to the Judicial Conference. The Advisory Committee sees no inconsistency with

Attachment to Memorandum of
Transmittal dated May 17, 1994

(b) Exceptions.

* * *

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

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*New matter is underlined.

Committee Note

The Committee believes that proposed Rule 412(b)(2) is within the rulemaking power delegated to the Supreme Court by the Rules Enabling Act. Although commentators questioned the applicability of rulemaking authority established in the original 1934 Act to rules of evidence (see Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U.Pa.L. Rev. 1015 (1982); John Hart Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693 (1974)), Congress' delegation of power to promulgate Federal Rules of Evidence is now explicit. In 1988, the Act was amended to add: "The Supreme Court shall have the power to prescribe . . . rules of evidence . . ." (Pub. L. No. 100-702, § 401(a), 102 Stat. 4648 (1988), codified at 28 U.S.C. § 2072(a) (emphasis added). Cf. 28 U.S.C. § 2074(b) requiring Congressional approval for any rule "creating, abolishing or modifying an evidentiary privilege").

In 1988, Congress also reenacted the requirement in the second sentence of the original Rules Enabling Act of 1934 that a

authority. Cf. 1990 amendments to Rule 609(a)(1) (in criminal cases amendment removed protection of special balancing test previously accorded defense witnesses as well as the defendant, and extended protection of a Rule 403 balancing test to prosecution witnesses; in civil cases amendment rejected holding of Supreme Court in Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989), and extended Rule 403 balancing to witnesses against whom all felony convictions had previously been admissible).

Rule 1102. Amendments

(a) Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

(b) 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

Subdivision (b) 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.

TENTATIVE DECISIONS NOT TO AMEND

The Advisory Committee on the Federal Rules of Evidence has reached tentative decisions not to amend certain of the

Attachment to Memorandum of
Transmittal dated May 17, 1994

A list of Rules that the Advisory Committee has tentatively decided not to amend follows. The list is partial and will be added to as the Committee continues its work. The absence of a Rule from the list does not mean, therefore, that amendments to that Rule will be proposed.

The Advisory Committee has tentatively decided not to amend the following rules:

Fed. R. Evid. 101.	Scope
Fed. R. Evid. 102.	Purpose and Construction
Fed. R. Evid. 105.	Limited Admissibility
Fed. R. Evid. 106.	Remainder of or Related Writings on Recorded Statements
Fed. R. Evid. 201.	Judicial Notice of Adjudicative Facts
Fed. R. Evid. 301.	Presumptions in General Civil Actions and Proceedings
Fed. R. Evid. 302.	Applicability of State Law in Civil Actions and Proceedings
Fed. R. Evid. 401.	Definition of "Relevant Evidence"
Fed. R. Evid. 402.	Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible
Fed. R. Evid. 403.	Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
Fed. R. Evid. 404.	Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes
Fed. R. Evid. 409.	Payment of Medical and Similar Expenses
Fed. R. Evid. 601.	General Rule of Competency

Report to Standing Rules Committee
Advisory Committee on Civil Rules

May 25, 1994

Introduction

The draft minutes of the April 1994 meeting of the Civil Rules Advisory Committee are attached. The draft was prepared by the Committee Reporter, Edward H. Cooper, and reviewed by me. These minutes supply a detailed account of the matters summarized in this Report.

Action Items

Proposed Amendments Submitted for Approval To Transmit to the Judicial Conference

Summary of Amendments

The Committee recommends transmission to the Judicial Conference of proposed amendments to Civil Rules 50, 52, 59, and 83. The proposals were published for comment on October 15, 1993. Each of these amendments parallels amendments being proposed by other advisory committees. The Committee does not recommend transmission to the Judicial Conference of proposed amendments to Rules 26(c), 43(a), and 84 that were published at the same time. Rule 84 is discussed in this section; Rules 26(c) and 43(a) are discussed in the next section.

The amendments to Rules 50, 52, and 59 establish a uniform period for the post-trial motions authorized by those rules. A post-trial motion under any of these rules must be filed no later than ten days after entry of the judgment. Until now, these rules have variously required that within the ten-day period the motion be served and filed, or be "made," or be served. Stylistic changes also have been made to conform to the new style conventions.

The discussion of Rules 50, 52, and 59 is set out at pages 8 to 9 of the draft minutes.

The amendments to Rule 83 deal with local rules and with orders regulating matters not covered by national or local rules. In keeping with the language of 28 U.S.C. § 2071, the requirement of conformity with national statutes and rules would be expressed by requiring that they "be consistent," in place of the present "be not inconsistent." Local rules would be required to conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule imposing a requirement of form could not be enforced in a manner that would cause a party to lose

Summary of Comments

Rules 50, 52, and 59. There were few comments on the Rule 50, 52, and 59 proposals. One lengthy comment was premised on the erroneous belief that Rule 6(a) now permits a motion under any of these rules to be "filed" by mailing within ten days, without regard to the time of actual delivery to the court. (The requirement of delivery to the court to establish filing is illustrated by Cavaliere v. Allstate Ins. Co., 11th Cir.1993, 996 F.2d 1111.) Another comment addressed the failure to clarify the question whether Rule 50(b) requires renewal of a motion for judgment as a matter of law "where the court simply fails to rule on the motion made at the close of the evidence rather than denies it." This part of Rule 50(b) was extensively amended in 1991, and the Committee decided not to revisit the issue for the present.

Rule 83. The Federal Magistrate Judges Association opposed the Rule 83 proposal. They urged that there is no compelling reason to establish national uniformity in local rule numbers, that the Rule 83(a)(2) restriction on enforcing local rules is vague, and that the Rule 83(b) requirement of actual notice would forbid enforcement of widely accepted norms that are not codified in any form of order. Another comment was that while all of the proposed changes are desirable, still greater efforts should be made to control the variable, confusing, and often unwise requirements adopted by local rules and standing orders. Perhaps the authority of the Judicial Councils of the Circuits under 28 U.S.C. §§ 332(d)(4) and 2071 should be clarified, or perhaps some other system of effective review should be established.

Information Items

Status of Proposed Amendments Under Consideration

Rules 26(c)(3) and 43(a)

Proposals to amend Rules 26(c) and 43(a) were published for comment on October 15, 1993. In light of the comments received and further consideration by the Committee, it was decided to hold each proposal for further study.

The proposed Rule 26(c)(3) expressly recognizes authority to modify a discovery protective order and requires consideration, among other matters, of the extent of reliance on the order, the public and private interests affected by the order, and the burden that the order imposes on persons seeking information relevant to other litigation. It was intended to formalize and perhaps make more uniform the Committee's sense of general present practices. Public comments covered a wide spectrum. Apart from support for the proposal, some comments feared that it would allow protection to be defeated too easily. Other comments suggested that the

the advantages of live testimony in favor of mere convenience for witnesses. A suggestion that the rule might be amended to limit transmitted testimony to exceptional or compelling circumstances was discussed but not brought to a vote. A motion to recommend that minor changes be made in the Committee Note and that the amendment be transmitted to the Judicial Conference failed by even vote. The proposal remains on the Advisory Committee Agenda.

Discussion of proposed Rule 43(a) is set out at page 8 of the draft minutes.

Continuing and New Projects

Rule 23

Reconsideration of the long-standing Rule 23 draft began with discussion by a panel composed of John P. Frank, Esq., of the Arizona bar; Professor Francis E. McGovern, of the University of Alabama School of Law; and Herbert M. Wachtell, Esq., of the New York Bar. The panel discussion covered topics beginning with the process that led to adoption of current Rule 23 in 1966 and ranging through the most contemporaneous experience with mass-tort litigation.

The topics opened by the panel discussion were generalized in the ensuing Committee discussion. It was recognized that much informal reaction rejects the current Rule 23 draft as not necessary. In large part it would simply confirm present practices. In trying to regularize and articulate present practices, however, the draft is likely to create new uncertainties that will cause trouble for years.

The informal reactions to the draft suggest the lack of hard information about the actual operation of Rule 23. Each year brings several hundred to more than a thousand new class action filings. The backlog of unresolved class actions is gradually growing. It may be that despite the growing backlog, most of these actions are resolved by well-settled routines that make light of the theoretical questions suggested by more difficult cases that are reported and draw attention. It also may be that many of these actions present intransigent difficulties that lie far beyond the reach of the relatively modest changes proposed by the draft. Some class actions may be instruments of important social justice, while others epitomize the worst fears that predatory lawyers win large fees by alternatively settling unfounded class claims and selling out meritorious class claims. Very little is known in a systematic way about such issues as the frequency of races among competing counsel to be the first to file class claims; the proportion of attempted classes that are certified; the time of the initial certification determination, particularly in relation to proposed settlements; the extent of litigation over certification issues and

incorporate them by reference in separate rules for pretrial and post-trial masters.

At least one aspect of this project will require coordination with the Evidence Rules Advisory Committee. Although it is difficult to form any clear picture, it seems likely that there is some ongoing practice of appointing a single person to serve functions that combine the traditional role of master as temporary judge with the role of expert trial witness. The overlapping functions may become particularly sensitive if the parties perceive that a witness has private access to the judge. Although it may well be that the question should be handled primarily through the Civil Rules, the best approach can be found only after drawing from the wisdom of the Evidence Rules Committee on current practices and the need to regulate whatever practices have emerged.

Discussion of pretrial masters is set out at pages 26 to 28 of the draft minutes.

Rule 68

John Shapard reported the initial results of the Federal Judicial Center study of offer-of-judgment provisions. Complete results will be available for the October Committee meeting. Substantial results also should be available for Professor Rowe's ongoing simulation study.

Initial study results did not resolve the many doubts that have attended study of Rule 68. Doubts remain at several levels. At one level, it is not clear whether any plausible changes in Rule 68 will have much effect on the time of settlement or the number of cases that settle. At the next level, the direct effects of increased incentives may do more harm than any good. One level further down, earlier or more frequent settlements also may be undesirable. In waiting for the complete study results, the Committee also intends to consider several alternative possibilities. One is to abrogate Rule 68. Others are to attempt to make it more effective by providing stronger incentives — in addition to the capped benefit-of-the-judgment attorney fee shifting of the current draft, other possibilities include restrictions on contingent fees, shifting of expert witness fees, or partial attorney fee shifting.

Discussion of Rule 68 is set out at pages 22 to 26 of the draft minutes.

Style Project

The Committee met to discuss the Civil Rules style revisions on February 21, 22, and 23. The minutes of the meeting are attached.

PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE*

Rule 50. Judgment as a Matter of Law in ~~Actions Tried by~~ Jury Trials; Alternative Motion for New Trial; Conditional Rulings

* * * * *

(b) ~~Renewal of~~ Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. ~~Whenever~~ If, for any reason, the court does not grant a motion for ~~a~~ judgment as a matter of law made at the close of all the evidence ~~is denied or for any reason is not granted~~, the court is ~~deemed~~ considered to have submitted the action to the jury subject to ~~a later determination of~~ the court's later deciding the legal questions raised by the motion. ~~Such a motion may be renewed by service and~~ The movant may renew its request for judgment as a matter of law by filing a

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

matter of law ~~or may order a new trial~~.

(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 serve~~ must be 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 change, other than stylistic, intended by this revision is to prescribe a uniform explicit time for filing of post-judgment motions under this rule — 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, or merely

Rule 52. Findings by the Court; Judgment on Partial Findings

* * * * *

(b) **Amendment.** ~~Upon~~ On a party's motion ~~of a party made~~ 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.

* * * * *

Rule 59. New Trials; Amendment of Judgments

* * * * *

(b) **Time for Motion.** Any motion for a new trial ~~shall~~ must be ~~served~~ 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 ~~u~~pon affidavits, they ~~shall~~ must be ~~served~~ filed with the motion. The opposing party has 10 days after ~~such~~ service ~~within which~~ to ~~serve~~ 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 10 days after entry of judgment the court, on ~~of~~ its own, ~~initiative~~ may

inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during the prescribed period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used — rather than "within" — to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 5 the motions when filed are to contain a certificate of service on other parties. It also should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, but that Bankruptcy Rule 9006(a) excludes intermediate Saturdays, Sundays, and legal holidays only in computing periods less than 8 days.

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 district judges ~~thereof~~, may ~~from time to time~~, after giving appropriate public notice and an opportunity ~~to~~ for comment, make

form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedure When There is no Controlling Law. ~~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 law, 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 law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

oppose motions for summary judgment.

SUBDIVISION (b). 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 28 U.S.C. §§ 2072 and 2075, and with the district 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. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they 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 been furnished actual notice of the requirement in a particular case.

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. 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

Agenda Item 8B
Standing 6/94

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

APRIL 28 AND 29, 1994

The Advisory Committee on Civil Rules met on April 28 and 29, 1994, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Paul V. Niemeyer; Professor Thomas D. Rowe, Jr.; Judge Anthony J. Scirica; Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Edward H. Cooper was present as Reporter. Judge Alicemarie H. Stotler attended as Chair of the Committee on Rules of Practice and Procedure, as did Chief Judge William O. Bertelsman as Liaison Member from that Committee and Professor Daniel R. Coquillette as Reporter of that Committee. Chief Judge Paul Mannes, Chair of the Advisory Committee on Bankruptcy Rules, and Judge Jane A. Restani, a member of that Committee also attended. Parts of the meeting were attended by Judge William W Schwarzer, Joe S. Cecil, John Shapard, Elizabeth Wiggins, and Thomas E. Willging of the Federal Judicial Center. Peter G. McCabe, John K. Rabiej, Mark Shapiro, Judith Krivit, and Joseph F. Spaniol Jr., were present from the Administrative Office. Observers included Kenneth J. Sherk, Esq., and Alfred W. Cortese, Jr., Esq.

HEARING

The meeting began with a hearing on the proposals to amend Civil Rules 26, 43, 50, 52, 59, 83, and 84 that were published for comment on October 15, 1993.

Alfred W. Cortese, Jr., Esq. testified on the Rule 26(c)(3) proposal, supporting the amendment as a restatement of current good practice. He provided a history of the public perception that protective orders may defeat public access to information important to protect public health and welfare, and of the efforts that have been made over the past five years to enact state legislation in this area. Some states have adopted statutes or court rules that increase public access; many have failed to act on similar proposals. Washington passed a broad statute and then cut it back. Experience with the Texas rule has shown that it is very difficult to administer. The standards also are difficult to apply; in determining whether there is a public hazard, the judge may seem to be prejudging the merits of the case. He urged that much of the drive for increased access is based not on a need to inform the public of important issues — full information is presently available to protect against any significant hazards — but on the desire for publicity. The examples often given of thwarted public

regulatory agencies cannot demand production of information they do not know about; they are not adequately staffed to follow all litigation all around the country. There is a need to scrutinize carefully the extent of the possible problems with protective orders. There is a view that they are desirable because they facilitate discovery. More often than not, however, "good cause" is not shown — the parties stipulate, or the judge simply orders protection. Even if the primary purpose of litigation is to resolve private disputes, it is wrong to conclude that courts have no role in protecting the public interest. There is only anecdotal information about harms to the public interests, much of it arising from automobile crash litigation including such matters as the risks of rear-set lapbelts, sidesaddle gas tanks, and crash-testing. Perhaps courts should not be required to inquire into every stipulated protective order, but at least the parties should be required to stipulate that there is no public interest involved. The bill now pending in fact would require the court to make findings in each case. And courts will be able to administer a "public health or safety" standard.

Stephen Yagman, Esq., testified on Rule 83. He would oppose any action that might weaken the requirement that orders by individual judges be consistent with the Federal Rules and local rules. His own experience litigating 42 U.S.C.A. § 1983 actions in a small firm shows that there are far too many standing orders, as set out in his written statement. It is very difficult to achieve effective review of standing orders by an appellate court. The rule should be further amended to provide effective means of enforcement. It is not clear what authority the Judicial Council of a Circuit has to review standing orders under 28 U.S.C. §§ 332 and 2071. Perhaps a committee of judges should be established in each district to review the standing orders of that district on an ongoing basis. He also urged that Rule 30 should be amended to allow the attorney taking a deposition to administer the oath or affirmation, saving the cost of having a court reporter attend. Finally, he urged that Rule 45 should be amended so that attendance of a party at trial could be compelled by notice, without need to resort to a subpoena.

MEETING

The meeting began after the hearing concluded. Judge Higginbotham welcomed Judge Stotler and noted that the press of other duties has led Chief Justice Holmes to resign as a member of the Committee.

The draft minutes of the October, 1993, and February, 1994 meetings were approved with corrections.

Comments on Proposed Rules

discovery materials. To the extent that proposed legislation mingles discovery materials with other materials, it should be clarified. The general topic of access to court records was addressed again, briefly, in connection with the sketch of a possible Rule 77.1 noted below.

The purpose of the proposal as published was described by several members of the committee as confirmation of present law in the sense of the general and better practice. This purpose seemed well reflected in many of the public comments. Some questioned the need to adopt a rule that simply confirms current practice. Others thought it sensible to confirm current practice as a means of stabilizing practice and making it more uniform. Still others challenged the proposal as not going far enough. The range of commments itself was taken as evidence of the great importance of the topic and the need to think carefully about it.

One topic not addressed by the proposal is the standard for issuing an initial protective order. Some of the comments addressed this omission, suggesting that the standard should be amended to require consideration of public health and safety. Some members of the committee expressed the view that the present rule has worked effectively and that the standard for issuing an initial protective order should not be changed.

The question of reliance on a protective order was addressed in the public comments, some believing reliance an important consideration and some urging that reliance is irrelevant to modification or dissolution.

Some concern was expressed that it is inappropriate for a party to secure sweeping discovery under a protective order that limits use of the discovery materials and then switch fields by arguing that public health or safety require dissemination of the materials. A request for access by a nonparty might be different, at least if it were clear that the nonparty request had not been stimulated by a party. A response to this distinction was ventured that a nonparty who has a legitimate litigating need for information should file suit and undertake its own discovery. A different response was that these questions are genuinely complex. There is a strong pressure on counsel to do whatever best facilitates disposition of the immediate case. Protective orders and related confidentiality agreements can expedite discovery and also can ease the way to settlement. Once the fruits of discovery have been uncovered, however, there may come a new realization that the dispute involves issues that could affect other litigation or the general public.

The philosophy of discovery in relation to private civil litigation also came under consideration. Deep divergences of

of the power to modify or dissolve. It was moved that the proposal be amended by deleting the first sentence and incorporating portions of it in the second sentence. As revised, the first sentence would read: "In ruling on a motion to dissolve or modify a protective order, the court must consider * * *." Deletion of the reference to a motion might have some impact on the freedom with which courts act on their own intiative, but it was not intended that the published proposal cut off the power to act without motion. After discussion, it was decided by vote of 6 to 4 that the language should not be changed.

The discussion of the need for a motion also addressed the question of "standing" to seek modification or dissolution. It was supposed that the draft language does not change present practice, that a nonparty would be allowed to seek access in the same circumstances as now support a nonparty request. The question was recognized as a difficult one that deserves further consideration.

The public comments suggested many possible changes in Rule 26(c). One that was picked out for discussion was incorporation of an explicit reference to changes in circumstances between initial issuance of a protective order and the time of a motion to dissolve or modify. No conclusion was reached as to this suggestion.

Another question raised by the public comments is whether it is feasible to administer a test that looks to public health and safety. During the early phases of discovery, when protective orders are most likely to be important, it may be difficult to get behind plausible assertions of a threat to public health or safety. Efforts to determine the question may take on aspects of a preliminary trial. If protection is denied, prospects of settlement may be diminished because publicity drives the defendant to seek vindication by judgment. Again, no conclusion was reached as to this concern.

Discussion then turned to the proper course to take on the present proposal. It was noted that protective discovery orders have been caught up in the more general debate about access to court records, often without distinguishing the differences between discovery information and materials that have been submitted for consideration and action by a court. Congress and many state legislatures have undertaken active consideration of these topics, and it is important to develop some means of integrating the work of the Advisory Committee with the work of Congress. The single most important question, moreover, remains a matter of competing anecdotes. There still is no systematic empirical evidence to show whether legitimate and significant needs for public access to discovery information are often defeated by protective orders. Protective orders do much good. But if they also cause much harm, some means must be found to preserve most of the good and avoid

Discussion of the proposed amendments to Rules 50, 52, and 59 focused in part on the history of the proposal. Each rule now sets 10 days as the period for these post-trial motions, but the period is allowed variously to "serve" the motion, to "file and serve" the motion, or to "make" the motion. The Bankruptcy Rules Committee suggested that the rules be changed so that each allows 10 days from entry of judgment to file the motion. This suggestion drew from the desire to further integrate bankruptcy practice with practice under the Civil Rules. A parallel change has been proposed for Appellate Rule 4. Filing was chosen as the requirement because ordinarily it is an objective phenomenon that can be easily verified at the clerk's office. Some concern was expressed with the difficulty of accomplishing timely filing by lawyers located in remote areas.

It was urged on behalf of the Bankruptcy Rules Committee that the Note to Rule 59 should be revised by adding the information that Bankruptcy Rule 9006(a) treats "intervening Saturdays, Sundays, and legal holidays" differently than Civil Rule 6(a). This request was adopted.

A motion to send Rules 50, 52, and 59 to the Standing Committee for approval, with the addition to the Rule 59 note, was adopted.

Rule 83

The Bankruptcy Rules Committee recommended that the proposed Rule 83(a)(2) reference to "negligent" failure to comply with a local rule requirement of form be changed to "nonwillful." The change reflects the prospect that read literally, the proposal would not reach an unavoidable failure to comply. The Committee accepted this recommendation without dissent.

The discussion of proposed Rule 83(b) focused on the question whether it might be possible to do something more effective to restrict or eliminate standing orders. Several Committee members thought it would be desirable to reduce drastically the use of standing orders. It was noted, however, that past efforts to reduce even the use of local rules have proved difficult; efforts to reduce the use of individual judge standing orders seem all the more likely to prove difficult.

A motion to send Rule 83 to the Standing Committee for approval was adopted.

Rule 84

Discussion began with the proposal to add a new Rule 84(b). It was suggested that the proposal is ultra vires. The Rules

support in principle of such legislation.

Proposed amendments of Rule 11 in the National Competitiveness Act seem to have been defeated, at least for the time being.

S. 1976 contains a substantial number of class action provisions that would apply to implied causes of action under the Securities Exchange Act of 1934. The provisions will deserve consideration in the course of the Committee's ongoing study of Rule 23.

Ongoing Rule Proposals

Rule 23

The discussion of Rule 23 began with a panel of three class-action experts: John P. Frank, Esq., of the Arizona bar; Professor Francis E. McGovern, of the University of Alabama School of Law; and Herbert M. Wachtell, Esq., of the New York bar.

Herbert Wachtell spoke first. He sketched his own background in class action litigation. His longest experience has been in securities law litigation, commonly defending. More recently, he has been involved in an attempt to use Rule 23 to accomplish an omnibus settlement of a massive asbestos litigation, appearing for a defendant who desired certification of a plaintiff class. He also has been co-chair of the Lawyers Committee for Civil Rights Under Law, and exposed to class actions from the civil rights perspective.

In the securities area, there are abuses and strike suits. There are unseemly races to the courthouse without investigation in an effort to be first in line as class counsel. But despite these problems, and properly administered, Rule 23 can work reasonably well without changes. Abuses are addressed effectively by means both procedural and substantive.

Three procedural devices have been particularly effective in securities class actions. First is rigorous enforcement of Rule 9(b) as to allegations of fraud – the Second and Seventh Circuits are on the front lines of this development. The Second Circuit requires allegation of specific facts giving rise to a strong inference of fraud. The Seventh Circuit effectively requires pleadings of who, what, when, where, and why. A second procedural device has been to expand the scope of materials that can be considered on a Rule 12(b)(6) motion to include materials referred to on the face of the complaint and public-filed documents. If, for example, the plaintiff alleges that X,Y, and Z were not disclosed, the court will consider SEC filings in which X, Y, and Z were disclosed. Third, there is a developing trend to stay

described, even for purposes of settlement.

As to the proposed amendments, Mr. Wachtell agreed with most of the written comments submitted by the Association of the Bar of the City of New York. Radical overhaul of Rule 23 is not desirable. The bench and bar have learned to live with Rule 23 as it is now. The proposed requirement that a class representative be willing to represent the class will do away with defendant classes. Defendant classes are essential to settle mass torts. In corporate litigation, defendant classes can serve the function of a "bill of peace" to make sure there are no more claims out there. It might be desirable, however, to find some way to compensate the unwilling defendant class representative for the additional costs of defending on behalf of a class.

Opt-in classes should not be restored. This device was abandoned for a reason.

A provision for interlocutory appeal in the sole discretion of the court of appeals is a desirable supplement to interlocutory appeal by certification of the district court and permission of the appellate court under 28 U.S.C. § 1292(b). The decision on class certification is, at times, effectively the final decision in the action. Denial leaves the representatives unable to litigate the claim, while grant forces the defendant to settle.

The suggestion that a modest amendment should be made to signal the availability of class actions in mass tort cases should be resisted. Class action treatment is desirable only for settlement, not for litigation.

It would be good to create a discretionary power to deny opt-outs in (b)(3) classes, particularly for settlement. There should be a presumption against opting out of (b)(1) and (b)(2) classes, and in favor of opting out in (b)(3) classes.

The basic notice scheme should be preserved, but the district court should be given discretion to reduce the extent of notice required in (b)(3) class actions.

Professor McGovern spoke next. He noted that over the course of many years of experience with class actions, often acting as special master, he has experimented with many different ideas. With accumulating experience, he has become more conservative about the answers to class action questions. Mass torts was his topic for this day.

One observation heard from many experienced class-action observers is that it does not make much difference what Rule 23 says. Judges and lawyers are result-oriented and will achieve the

represent.

Class action notices have the effect of bringing lots of claims to court. Without a class action, perhaps 10% to 20% of legitimate claims will be filed. Notice brought in lots of claims in the Dalkon Shield litigation. Once $4,000,000 worth of notices are sent out in the breast implant litigation, much the same is likely to happen. But if there are a lot of opt-outs, the defendants will have a real problem. They are taking big risks from fear of the alternatives.

Salvation may lie not in Rule 23 but in something else.

Are class actions good or bad for tort claims? Even ATLA is deeply divided on this. There is a major argument that plaintiffs' lawyers are using Rule 23 to line their own pockets and sell out victims by sweetheart settlements. The other side is that firms who make much money representing the sickest of the sick are simply looking to protect their own positions.

John Frank finished the panel presentation. He began with a history of present Rule 23, noting that it is a product of the rebirth of the civil rules process in 1960. It also was a product of the civil rights movement of the 1960s. Subdivision (b)(2) was imperative; without it, the committee might not have touched Rule 23 at all. The changes were undertaken at the apogee of the Great Society. The litigation explosion had not yet come. The mass tort was wholly outside the rulesmakers' ken.

In this setting, (b)(1) was made broader than before. (b)(2) was broadened to ensure effective civil rights enforcement. And (b)(3) was broadened in the most radical act of rulemaking since the Rule 2 "one form of action" merger of law and equity.

Whether to have (b)(3) at all was a real concern. A significant fear was that big tort defendants might rig a "patsy" plaintiff class, beguiling courts into selling res judicata at a bargain price. Big business, at the time, had little stock of public trust. And there was intense sensitivity to individual rights. James W. Moore gave a circus fire as an example in which a class action would go against the grain of individual control of individual litigation. Judge Wyzanski developed the opt-out mechanism in a stroke of genius. The opt-out preserved individual autonomy, at least in the setting of small and manageable cases that the committee contemplated. It was assumed that opting out would represent the conscious choice of a person with a meaningful alternative in an individual action. Professor Kaplan, as reporter, raised the possiblity of classes involving many plaintiffs; Judge Wyzanski was firm on the principle that notice should reach all class members, and also believed that the

There has been frequent departure from the requirement that a class certification decision be made as soon as practicable. Often a settlement is arranged and the request for certification and approval of the settlement is presented as a package. This gives class members an opportunity to "peek" before deciding whether to opt out. In turn this leads to efforts to recruit class members to rival but parallel actions, with promises that a different class action will produce results better than the first proposed settlement.

These presentations were followed by a period of discussion.

The first question went to the practical consequences of collapsing subdivisions (b)(1), (2), and (3) into mere factors to be considered in determining whether a class action is superior. The consequences tie, in part, to the decision to expand discretion in determining whether to permit opting out, an issue that itself has stirred recent litigation. Mr. Wachtel said he would leave the present structure alone. Combination of the present categories would just cause uncertainty. But he would give the court the right to deny opt-out rights when that is constitutionally permissible. Professor McGovern expressed similar concerns. The collapse would create more opportunity to decide whether a mandatory class is a good idea, a matter that will generate real concern and real resistance. Mr. Wachtel observed further that the problem with Rule 23 as a mass tort device is the huge oppression of the defendant even if there is an opt out. In litigation, as contrasted to settlement, Rule 23 maximizes the importance of disparate issues in mass tort claims. Increased use for settlement, however, is desirable and should include the power to deny opt-outs. The Shutts decision does not speak to the constitutionality of mandatory classes for federal courts, at least as to plaintiffs in the United States.

A related observation was that some of the concerns might be a function of aggregation more than class action certification, that large numbers of marginal cases can have a real nuisance potential. Mr. Wachtel responded that yes, there is a force that makes the merits irrelevant. Professor McGovern noted that he acted as special master in one litigation with 4,000 consolidated cases in which the plaintiffs refused class treatment. The cases settled — and were promptly followed by 26,000 more related cases. Mr. Wachtel added that at some point defendants are prepared to put an end to all claims, meritorious and nonmeritorious, by settlement. Notice and opportunity to be heard is enough without allowing opt-outs. There is a real problem of developing a mechanism to get rid of these mass cases. The rule should not be more restrictive than due process limits.

The next question went to the means of drafting a class action

Turning again to mass tort cases, Mr. Wachtel repeated his view that class treatment is appropriate for settlement. Professor McGovern added that a common-issue trial is an appropriate use for Rule 23, but there is not enough commonality for other issues. He also noted that if a liability class had been certified in the breast implant litigation, it would have made settlement harder. Mr. Wachtel responded that it is important to consider the sequence of cases. Litigating mass claims often is an evolutionary process, with more evidence available after there have been several trials. The ordinary sequence is that plaintiffs win some cases and lose others before things shake out. It would be undesirable to stake everything on a single and first trial.

The final observation was that at least in the Eastern District of Pennsylvania, much has been accomplished without class certification by voluntary reliance on the first litigation of issues as settling common matters.

Following the panel discussion, the committee turned to formal consideration of the pending Rule 23 draft. It began with recognition that all alternatives remain open. The draft has been polished to a form that could be sent forward to the Standing Committee with a recommendation for publication for comment. This Committee is not committed to any amendment of Rule 23, on the other hand, and could conclude that the time is not yet ripe. And the alternative of further study, reconsidering matters once put aside and perhaps considering new approaches, remains open.

Several forces were seen at work in the present pressures surrounding Rule 23. Class actions respond to powerful forces, some of them indirect. Reduction of the barriers to lawyer advertising has facilitated case solicitation. Substantive law is in flux in some areas, particularly products liability. Courts have been willing to accommodate the phenomenon of aggregation that is not a "dispute" in any traditional sense, but a commodification of torts. The claimants are treated not as distinct cases but as fungible units; the process does not change the nature of individual claims, but there is a drastic change in the relationship between counsel and "clients" who are, as individuals, often completely unknown to counsel. The old "equitable" class actions have long been with us, on the other hand, representing principles far older than (b)(3) classes. They provide a reservoir of traditional power that we must not give up. It is a powerful history.

It is not enough simply to decide to "study" the problem. We need a more active approach, a program that focuses on aggregation more generally than Rule 23 categories alone. Scholarship and empirical research can be brought to bear.

judge swept into massive consolidated litigation would not be able to do anything else.

In the same vein, it was suggested that the problem is in the mass tort area. Single-event disasters are well-suited to class treatment. A recent illustration of events that are not well-suited to class treatment is provided by an attempted class action on behalf of all cigarette smokers who have become addicted.

The aggregation problem, it was noted, often begins with the filing of many individual actions, not class actions. Aggregation of those actions leads to the same problems.

The question of rules designed for settlement arose again. In the present system there is a fear of trial. The fear of trial causes lawyers, not judges, to arrange the settlement. The clients want to achieve certainty and repose, to get out from under. If there is no settlement, some of the cases will go to trial. The transaction costs, however, are enormous.

These reflections led to discussion of the question whether the Civil Rules can establish adequate answers to the problems of aggregating large numbers of related claims. There is little organized information on what is happening. The ALI Complex Litigation project approaches statutory means of consolidation. The procedural devices to be employed after consolidation are not explored. The answers may lie with Congress, or perhaps in devices that require cooperative development involving both Congress and the Enabling Act process. One possibility may be creation of a claims-administration structure that litigants can agree to opt into.

The concluding portions of this discussion turned to the need for further information. It was agreed that more must be known about probable effects before proposing rule changes. An effort should be made to develop a study that will reveal more of what Rule 23 does in its present operations. 28 U.S.C. § 331 requires the Judicial Conference to carry on a continuous study of the operation and effect of the general rules of practice and procedure. Rule 23 is a suitable subject of such study. A subcommittee will be formed to undertake development of a research program, working initially with the Federal Judicial Center.

Rule 64

The Committee has earlier reviewed an American Bar Association proposal that Rule 64 be amended, in conjunction with new federal legislation, to provide federal standards for prejudgment security and to establish nationwide effects for security orders. Phillip Wittmann reported that he had met with a representive of the ABA

failure of communication-negotiation, or it may have been divergence between the settlement views of counsel and clients.

The answers for the civil rights cases were comparable to other cases on many questions. But there was polarization on some questions. Defendants want Rule 68 strengthened, and plaintiffs would be happy to abolish it. These answers reflect the fact that defendants and plaintiffs both understand the way Rule 68 works today in litigation under attorney fee-shifting statutes.

The information about expenses incurred in responding to pretrial requests is one important result of the survey.

Mr. Shapard responded to a question by stating that if he were writing the rule, he would try to give it teeth for both sides, without upsetting the fee-shifting statutes. He would be encouraged by the survey responses to proceed on a moderate basis to allow offers by both plaintiffs and defendants, with greater consequences such as shifting 50% of post-offer attorney fees. Although it would be more effective to avoid any cap on fee-shifting, it is a political necessity to adopt a cap that protects a plaintiff against any actual out-of-pocket liability for an adversary's attorney fees.

Another question asked about the element of gamesmanship that might be introduced by increasing Rule 68 consequences, leading to strategic moves designed to control or exploit this new element of risk rather than to produce settlement. Mr. Shapard recognized the risk, but observed that we can create a new set of game rules. Although there are cases that the parties do not wish to compromise, most cases settle because of the economics of the situation. A changed game will only lead to getting better offers on the table.

Mr. Shapard also suggested that this survey will provide about 90% of what might be learned by empirical research. There is a growing body of theoretical research as well. Some states have rules that might be considered in the effort to gain additional empirical evidence of the effects of enhanced consequences.

It was asked what might be done to generate positive incentives for plaintiffs in fee-shifting cases, since they get fees if they win without regard to Rule 68. Mr. Shapard replied that this was uncertain, although expert witness fees might be used as a consequence if they are not reached by the fee-shifting statute. Another possibility would be to allow an increment above the statutory fee.

It was observed that some lawyers would like to abolish Rule 68. Mr. Shapard suggested that this would be of little consequence

Experience with the California practice was again recalled. California includes "costs" in the offer-of-judgment sanctions, and costs commonly include expert witness fees. The rule seems to exert a real influence on settlement. It also is helpful in effecting settlement pending appeal because the cost award is a useful bargaining item. One conclusion was that the Committee should find out more about the actual operation of the California practice as a more modest means of encouraging acceptance of offers.

Mr. Sherk was asked to describe experience with Arizona Rule 68. Starting with a rule like Federal Rule 68, the Arizona rule was first amended to make it bilateral. Then, noting that an award of costs does not provide a meaningful benefit to a plaintiff who has prevailed to the extent of doing better than its offer of judgment, stiffer sanctions were adopted. The rule has become more complicated, and is difficult to administer.

Professor Rowe described his ongoing research of the effects of different attorney fee sanctions by means of a computer simulation exercise sent to practicing attorneys. One of the hypotheses is that significant sanctions will smoke out more realistic offers, which will ease the path to settlement. Another concern to be tested is the effect of "low-ball" offers on risk-averse and poorly financed parties. One preliminary result of the research is that in a significant minority of cases there also can be a "high-ball" effect in which significant sanctions encourage defense attorneys to accept high plaintiff demands. The explanation may be that a defending lawyer hates to have to tell the client that the client must pay the plaintiff's attorney fees. Another effect is that substantial sanctions give poor plaintiffs the means to bring claims that are strong on the merits for relatively small amounts.

The observation that present Rule 68 can operate to distort relations between attorneys and clients in statutory fee-shifting cases led to the question whether a system that allows for offers by plaintiffs as well as by defendants might lead to arrangements in which clients insist that lawyers bear the cost of Rule 68 sanctions.

Note was made of a quite different sanction possibility. Founded on the premise that many contingent-fee cases do not involve any significant risk that the plaintiff will take nothing, this suggestion would limit plaintiffs' attorneys to hourly rates for post-offer work that leads to recovery of less than a Rule 68 offer.

The conclusions reached after this discussion were, first, that the current draft proposal should not now be presented to the

tests well may be different from those used for trial appointments. Masters add cost, may cause delay, and often are not experienced in the judicial role. Second, specific provisions are needed to regularize and discipline the process. It helps to address such matters as the occasions and standards for appointment, scope of permissible duties, the need for clear directions, the scope of review, and related matters.

The standard allowing appointment of a pretrial master if the master's duties cannot be adequately performed by an available magistrate judge will be expanded to refer to district judges as well as magistrate judges. The drafting may spell out the reference, or may combine both offices into a reference to judicial officer. It was not decided whether the standard should include judges and magistrate judges from other districts — "if the master's duties cannot be adequately performed by an available district judge or magistrate judge of the district."

It was suggested that the requirement that a master advance the action be modified to require substantial improvement: "a master will advance substantially the just, speedy, * * *."

The need to use special masters for pretrial purposes was reviewed. Some pretrial purposes not listed in the draft rule approach trial, and probably should be governed by Rule 53 — a preliminary injunction hearing was given as an illustration of a matter that would justify reliance on a master only in exceptional circumstances. In some courts, at least, there is a real need to rely on pretrial masters to handle the caseload. And there may be cases in which the special knowledge of a master may prove invaluable; an example was given of the frequent use of a single person as special master in a series of cases involving leaking underground storage tanks. In some cases the parties may readily consent to appointment of a master to facilitate litigation. One member noted a pending case in which the parties had requested appointment of two discovery masters to rule on deposition disputes. The rule, however, is not designed to invite unthinking reliance on pretrial masters. Nor will consent of all parties always be sufficient to justify appointment of a master.

Application of the Code of Conduct for United States Judges to masters was explored briefly. It was decided that no attempt would be made to adopt parallel — or divergent — conduct provisions in any rule that may be proposed.

The question of ex parte communications between master and the parties was raised. There was strong support for the view that the draft should address the topic. It was urged that ex parte communications with the parties should be allowed only in cases in which the master is limited to settlement matters, but this

that control the access decision; and the specificity of the sealing order as to matters sealed, duration, and modification or dissolution.

The discussion focused primarily on the distinction between discovery protective orders and all other sealing orders. Discovery protective orders reflect the broad scope that has permitted discovery to range well beyond matters admissible in evidence, and have been an important counterbalance guarding against unnecessary invasions of privacy that could not be invaded for other purposes and that need not be surrendered as part of the process of judicial decision. The question was raised whether the general topic of public access should be addressed by a formal rule of procedure. In addition to First Amendment constraints, some issues may involve substantive concerns; the confidentiality of private or public settlement agreements is one example.

It was concluded that the time had not come for further study of the general public access topic.

Public Rules Suggestions

Rule 4

Joseph W. Skupniewitz, Clerk for the Western District of Wisconsin, suggested two revisions in Civil Rule 4. New Rule 4(c)(1) makes the plaintiff responsible for service "within the time allowed under subdivision (m)." As compared to former practice, this has encouraged some plaintiffs to take advantage of the full 120-day period, producing delays in the early stages of case processing. Rule 4(c)(2) carries forward the provision for service by the marshal in forma pauperis actions; new Rule 4(d), however, transforms the former "service by mail" provisions into a procedure for requesting waiver of service. It is not clear whether a marshal may request waiver of service, nor whether it would be wise for a marshal to undertake to evaluate the consequences of requesting waiver. The Committee concluded that it is premature to reconsider the details of Rule 4 so soon after the December 1, 1993 effective date of the new rule.

Michael Marks Cohen, Esq. wrote that the provisions of new Rule 4(i)(1) and (3) conflict with the provision for serving the United States Attorney and the Attorney General in the Suits in Admiralty Act, 46 U.S.C.A. § 742. The statute may cause confusion for the unwary. The Committee concluded that there is no need for official action recommending amendment to Congress. It is sufficient to ask the Administrative Office to bring this question to the attention of Congress.

Prefiling Conference And Disclosure

Discussion of Rule 32 began with the suggestion that the first paragraph of the present rule should be restored. Many members of the committee found significant difficulties with the redrafted Rule 32, however, and it was concluded that it would be unwise to undertake detailed review of the rule without the assistance of Bryan Garner, the consultant to the Subcommittee.

Respectfully submitted,

Edward H. Cooper, Reporter

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

February 21, 22, 23, 1994

The Advisory Committee on Civil Rules met on February 21, 22, and 23, 1994, at The Cloisters, Sea Island, Georgia. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Chief Justice Richard W. Holmes; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Paul V. Niemeyer; Professor Thomas D. Rowe; Judge Anthony J. Scirica; Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Judge William O. Bertelsman attended as liaison member from the Standing Committee, and Judges Robert E. Keeton and George C. Pratt attended as members of the Standing Committee Subcommittee on Style. Professor Daniel R. Coquillette, Reporter of the Standing Committee, was present, as were Standing Committee consultants Joseph F. Spaniol, Jr., Esq., and Bryan A. Garner, Esq., and Peter McCabe, Esq., and John K. Rabiej, Esq., of the Administrative Office. Professor Edward H. Cooper was present as reporter.

The sole agenda item was work on the current draft of a restyled set of Civil Rules, prepared by Judge Sam C. Pointer from the Style Subcommittee draft.

Before turning to the style project, the schedule for the April meeting of the Committee was discussed. One of the major items on the April agenda will be Rule 23; background materials will be sent out soon. Three experienced lawyers have been invited to attend the afternoon session on April 28 to discuss the history of Rule 23 beginning with the 1966 amendments and to discuss its present effects. John P. Frank, Esq., Professor Francis E. McGovern, and Herbert M. Wachtel, Esq. will form a panel. It was observed that settlements of truly massive tort actions now are creating private ADR mechanisms – "the market" is pushing to develop mechanisms that up to now have eluded legislative solution.

Note was made of the October recommendation with respect to offer-of-judgment legislation, which was approved by the Standing Committee in January. The recommendation that the Judicial Conference suspend its endorsement of such legislation pending completion of Enabling Act consideration may be on the Conference discussion calendar in March.

Early experience with the voluntary disclosure provisions of new Rule 26(a)(1) was discussed. Judge Brazil has prepared a tentative list of variations among districts that have suspended

familiarity of fictive waiver concepts warrants retention of the term. The "deemed waived" language was restored.

A few word conventions were adopted. "Parts" or "partly" should be used for "portions" or "partially." "Limits" should be used for "limitations." Phrases including "pendency" ordinarily should be simplified.

A number of substantive questions were noted, often with suggestions of study for amendment outside the style project.

Rule 26(a)(3): The present rule requires that disclosures be "made," and that "[w]ithin 14 days thereafter," objections be made. The style draft, Rule 26(a)(3)(B)(i), required objections "[w]ithin 14 days after receiving the disclosure." The change was thought to entail a change of meaning, since the present rule does not define the time when a disclosure is "made." We may wish to consider amending the rule to set the time from receipt, since that would provide a clear answer for cases in which the disclosures are served by mail.

Rule 26(b)(4)(C): The present rule requires that an expert witness be paid a reasonable fee for time spend in responding to discovery. The style draft required compensation for expenses as well. This change was thought desirable — indeed mere correction of a probable oversight — but beyond the scope of the style project.

Rule 26(c)(1): This draft has been published for public comment up to April 15, 1994. It was agreed that the word "also" should be elaborated before the Committee recommends the rule to the Standing Committee: " — and, on matters relating to a deposition, ~~also~~ either that court or the court for the district where the deposition will be taken * * *."

Rule 26(e): By a 7:6 vote, the restyled version was adopted, as amended. Those who preferred to continue the present language without change agreed that the new structure is better, but feared that any variation in the still-controversial disclosure provisions might prove controversial.

The final sentence of present Rule 26(e)(1) now requires disclosure of any additions or other changes to information provided by an expert witness. The style version added the requirement that the additions or changes be "material." The requirement of materiality was thought desirable — indeed a limit that should be implicit in the present rule — but a matter that should be accomplished by amendment outside the style process.

Rule 26(g)(2): Subparagraph (A) does not contain the language

more than ten depositions being taken under this rule or Rule 31 * * *." The meaning of this provision was debated. Some thought that depositions of expert witnesses authorized by Rule 26(b)(4) do not count for this purpose, reasoning that these are Rule 26(b)(4) depositions rather than Rule 30 depositions. Others thought that Rule 26(b)(4) does not of itself supply authority for taking depositions, but simply regulates the practice for Rule 30 or 31 depositions when a party wishes to depose an expert. This view was supported by observing that Rule 26(b)(4) does not address any of the many deposition practice questions regulated by Rules 30 and 31, and Rule 37 nowhere provides for enforcing Rule 26(b)(4) depositions. If this doubt proves troubling in practice, it may be desirable to provide a clear answer by amending the rule.

Rule 30(f)(1): This Rule provides for sending a copy of the deposition to the attorney who arranged for the transcript or recording. It does not provide for sending the copy to a party who proceeded without an attorney. This omission should be cured by amendment.

Rule 30(f)(1)(B): This rule provides "that if the person producing the materials desires to retain them the person may * * * (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition." The style version, Rule 30(f)(1)(A)(ii) translates this: " * * * with originals being returned to the producing party and the copies then being used as if originals annexed to the deposition." The style version highlights a possible ambiguity in the present rule. Many members of the Committee believe that "materials" must be read in the same sense in both places in the same sentence — it is the originals, not any copies made by other parties, that may be used as if annexed to the deposition. This has been the practice of several. Others believe that it is desirable to allow the copies to be used as if annexed, and that the style draft reflects the correct meaning of the current rule.

The history of Rule 30(f)(1) is reflected in the 1970 and 1980 Committee Notes. It is not particularly helpful. The current version was adopted in 1980. The 1970 version, set out in 8 Federal Practice & Procedure: Civil § 2114, was criticized as ambiguous. The 1970 version read:

> except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person

Agenda Item 9A
Standing 6/94

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

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal Procedure

DATE: May 17, 1994

I. INTRODUCTION.

At its meeting April 18 & 19, 1994, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals and 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 April meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

A. In General.

Pursuant to action by the Standing Committee at its Summer 1993 meeting, proposed amendments in the following rules were published for public comment: Rule 5. Initial Appearance Before the Magistrate Judge; Rule 10. Arraignment; Rule 43. Presence of the Defendant; Rule 53. Regulation of Conduct in the Court Room; Rule 57. Rules by District Courts; and finally Rule 59. Effective Date; Technical Amendments. A hearing on these amendments was held on April 18, 1994 in Washington, D.C. in conjunction with the Committee's meeting. In addition to the three witnesses who testified at that hearing (which was televised by C-Span), the Committee also carefully considered written comments on the proposed amendments.

The attached GAP Report provides more detailed discussion of the changes

E. Rule 43. Presence of the Defendant; In Absentia Sentencing.

The proposed amendment to Rule 43 was intended to (1) provide for teleconferencing for pretrial sessions where the accused is not in the courtroom, and (2) provide for in absentia sentencing. Based upon its discussion regarding the proposed amendment to Rule 10, *supra*, the Committee voted to delete that provision from Rule 43. The Committee also modified the proposed language in Rule 43(b) to make it clear that in absentia sentencing could take place after jeopardy had attached, including entry of a guilty plea or a nolo contendere plea. The Committee voted by a margin of 9 to 1, with one abstention, to forward the proposed amendment, as modified, to the Standing Committee.

Recommendation: The Committee recommends that Rule 43, as modified, be approved and forwarded to the Judicial Conference, without further publication and comment.

F. Rule 53. Regulation of Conduct in the Court Room

The proposed amendment to Rule 53 would permit broadcasting from, and cameras in, federal criminal trials under guidelines or standards promulgated by the Judicial Conference. The Advisory Committee considered the testimony of one witness, Mr. Steve Brill of Court TV, and several written comments, which were for the most part supportive of the amendment. During the Committee's discussion of the amendment, it was suggested that broadcasting and cameras should only be permitted if both the prosecution and defense agreed to such coverage. The Committee was generally opposed to that suggestion because it would in effect frustrate the purpose of the amendment and any possible pilot programs. It was also suggested that the amendment to Rule 53 should be written in a more neutral tone. That suggestion was also rejected because as published, the rule reflects the view the general rule of no broadcasting or cameras unless appropriate guidelines are established by the Judicial Conference. The Committee ultimately decided, by vote of 9 to 1, to forward the proposed amendment to Rule 53 as it was published for comment.

The Committee agreed that in light of other Committees' interest regarding cameras in the court room, careful coordination with those committees would be required. The Committee also believed strongly that given the special problems associated with criminal trials, that it should be actively involved in the process of formulating appropriate guidelines. To that end, a subcommittee was appointed to draft suggested guidelines and to report to the Committee at its Fall 1994 meeting.

Recommendation: The Advisory Committee recommends that the amendment to Rule 53 be approved and forwarded to the Judicial Conference, with the recommendation that the Advisory Committee on Criminal Rules should be actively involved in drafting any appropriate guidelines.

The proposed amendment, and Committee Note are attached to this report.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 16 regarding government requested discovery of defense expert testimony be approved for publication and comment by the bench and bar.

C. Rule 16(a)(1)(F), (b)(1)(D). Disclosure of Witness Names and Statements

At its Fall 1993 meeting, the Advisory Committee approved (by a vote of 9 to 1) a proposed amendment to Rule 16 which would require the government, upon request by the defendant, to disclose the names, addresses, and statements of its witnesses at least seven days before trial. As discussed in the Committee Note accompanying the proposed amendment, in 1974 Congress rejected a similar amendment proposed by the Supreme Court after a vigorous protest from the Department of Justice. In the intervening years, similar amendments have been proposed, debated, and rejected by the Advisory Committee. Thus, no amendment addressing the production of witness names has been published for public comment in almost two decades.

At its January 1994 meeting, the Standing Committee considered the Advisory Committee's proposed amendment to Rule 16. Mr. Irvin Nathan from the Department of Justice reiterated the Department's general opposition to the amendment but asked the Standing Committee to defer action on the proposal so that the Department could attempt to reach a compromise on the amendment. Following extensive discussion, the Standing Committee referred the amendment back to the Advisory Committee for additional discussion with the Department of Justice. During the discussion, the view was expressed that referring the matter back to the Advisory Committee would not delay publication and comment. A number of possible changes to the amendment and the Committee Note were also suggested for consideration by the Advisory Committee, including the issue of whether the amendment would be inconsistent with the Jencks Act.

Speaking on behalf of the Department of Justice at the Advisory Committee's April 1994 meeting, Ms. Jo Ann Harris, Assistant Attorney General, Criminal Division, urged the Committee to further defer action on the amendment. As noted in the Committee's minutes, Ms. Harris indicated that the Department was prepared to conduct a thorough study of pretrial discovery of witnesses in an attempt to gather "hard data" on the issue and possibly promulgate internal guidelines for disclosure. She also expressed the view that the proposed amendment did not sufficiently recognize the privacy interests of government witnesses.

The Advisory Committee ultimately voted by a margin of 9 to 1 to approve the amendment, with some minor changes, and recommend to the Standing Committee that the amendment be published for public comment without any further delay.

In summary, the proposed amendment to Rule 16 creates a presumption that the defense is entitled to discovery of the government's witnesses and their statements. The rule recognizes, however, that the government may refuse to disclose that information, in whole, or in part, by filing a nonreviewable, *ex parte*, statement with

As discussed in its Note accompanying the amendment, the Advisory Committee is sensitive to following the Rules Enabling Act process and recognizes that ultimately, Congress can accept or reject the amendment.

The Committee continues to believe that the amendment is necessary and appropriate and that it strikes the appropriate balance between assuring witness safety and the need for defense pretrial discovery. The Committee also continues to believe that the amendment will result in more efficient operation of criminal trials.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 16 concerning pretrial disclosure of witness names and statements be published for public comment by the bench and bar.

D. Rule 32(d). Sentence and Judgment; Forfeiture Proceedings Before Sentencing

The Committee has proposed that Rule 32, which is currently before Congress, be further amended to provide for forfeiture proceedings before sentencing. The current language of proposed Rule 32(d) simply provides that the sentence may include an order of forfeiture. The proposed amendment would explicitly permit the trial court, in its discretion, to conduct forfeiture proceedings *before* sentencing. As noted in the accompanying Committee Note, the amendment is intended to protect the interests of the government and third parties.

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 32 be published for public comment by the bench and bar.

Attachments

Gap Report (Rules 5, 40, 43, 53, 57, and 59)
Minutes from April 1994 Meeting
Proposed Amendments (Rules 16 and 32)

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: GAP Report: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Rules 5, 10, 40, 43, 53, 57, and 59.

DATE: May 17, 1994

At its July 1993 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 5, 10, 43, 53, 57 and 59.

All six rules were published in the Fall 1993 with a deadline of April 15, 1994 for any comments. At its meeting on April 18 and 19, 1994 in Washington, D.C., three 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 three 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 5. Initial Appearance Before the Magistrate Judge: Exception for UFAP Defendants.**

The Committee made no changes to the proposed amendment to Rule 5. Although there were very few comments on the proposed amendment to Rule 5, one commentator suggested a conforming amendment to Rule 40. The Committee agreed with that proposal and as discussed *infra*, has proposed a minor amendment to Rule 40 to reflect the change to Rule 5.

2. **Rule 10. Arraignment**

After considering the testimony of several witnesses and several written comments, the Committee has decided to defer any further consideration of the proposed amendment to

7. Rule 59. Effective Date; Technical Amendments.

No changes were made to the proposed amendment to Rule 59, which also mirrors similar amendments in the other rules.

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

the words "without unnecessary delay" mean a period of time of 48 hours.

Charles B. Kuenlen, Esq.
Instructor, Department of the Treasury
Glynco, Georgia
December 17, 1993.

Without commenting directing on the merits of the proposed rule change, Mr. Kuenlen observes that the amendment is in apparent conflict with Rule 40 which also requires appearance before a federal magistrate.

Myrna Raeder
Professor of Law
Southwestern University
Los Angeles, CA,
April 12, 1994.

Writing on behalf of the American Bar Association, Professor Raeder expresses opposition to the amendment. She notes that the amendment is in conflict with the "Pretrial Release" chapter of the *ABA Standards for Criminal Justice* (2d ed. 1986, Supp.) which states that unless an accused is released by lawful means or on citation, the accused is to be taken before a judicial officer promptly after an arrest. Any convenience to law enforcement officers would be greatly outweighed by the important right to appear promptly before a judicial officer.

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 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 $5,000 or imprisoned not more than five years, or both.
>
> Violations of this section 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

Rule 40. Commitment to Another District

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

* * * * *

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 10

I. SUMMARY OF COMMENTS/TESTIMONY: Rule 10

The Committee received five written comments and heard testimony from two witnesses on the proposed amendment to Rule 10. Support for the amendment was split; the Committee ultimately decided to defer any further action on the amendment until 1995 pending completion of pilot programs on video teleconferencing for arraignments.

II. LIST OF COMMENTATORS/WITNESSES: Rule 10

1. Hon. Gustave Diamond, Chair, Judicial Conference's Committee on Defender Services, Pittsburg, PA, 4-6-94.

2. Kathleen M. Hawk, Dir., Federal Bureau of Prisons, Washington, D.C., 4-15-94.

3. William J. Genego & Peter Goldberger, NADCL, Washington, D.C., 4-14-94.

4. Eduardo Gonzales, Dir., US Marshals Service, Arlington, VA., 4-15-94.

5. Ms. Elizabeth Manton & Mr. Alan Dubois, Raleigh, NC, Testimony, 4-18-94

6. Myrna Raeder, Prof., Los Angeles, CA, 4-12-94.

III. COMMENTS: Rule 10

Hon. Gustave Diamond
Chair, Judicial Conference's Committee on Defender Services
Pittsburg, PA
April 6, 1994

Judge Diamond urged the Committee to defer action on the proposed amendment. He expressed concern about the

Mr. Gonzales expressed strong support for the amendment, noting that the amendment would increase efficiency, save financial resources of the Marshals and the courts, and increase security for both the "court family" and the public.

Ms. Elizabeth Manton, Esq.
Mr. Alan Dubois, Esq.
Federal Public Defenders
Raleigh, NC
April 18, 1994

Ms. Manton and Mr. Dubois presented live testiomony to the Committee on April 18, 1994. Based upon their experiences in several cases, they were very opposed to the amendment. They cited a number of practical problems that the amendment would raise and reiterated the very important right of the defendant to personally appear in court.

Myrna Raeder
Professor of Law
Southwestern University
Los Angeles, CA,
April 12, 1994.

Writing on behalf of the American Bar Association, Professor Raeder expressed support for the amendment but raiseed a number of practical and financial considerations which she believed should be studied by the Committee. She also suggested that the Judicial Conference should consider running a pilot program in two large urban districts and also consider any existing state arraignment projects.

ED North Carolina
December 10, 1994

Judge Britt expressed support for the proposed amendment to Rule 43 which would permit video teleconferencing for pretrial sessions. He indicated that he had been part of the Judicial Conference's pilot project and that in his experience, the proceedings had been conducted in a fair and just manner. He expressed concern, however, that the amendment might be construed as providing the defendant with a right to be present during a competency hearing. He urged the Committee to either expressly provide that in competency hearings the defendant's consent is not required or that the amendment was not intended to cover that issue.

Hon. Gustave Diamond
Chair, Judicial Conference's Committee on Defender Services
Pittsburg, PA
April 6, 1994

Judge Diamond urged the Committee to defer action on the proposed amendment to Rule 43 vis a vis video teleconferencing. He expressed concern about the potential impact of the amendment on costs for video teleconferencing; and noted that the process would result in a shift of funding from the Bureau of Prisons and Marshals Service to the judiciary's Defender Services appropriation. He added that he was concerned about possible issues of effective representation and noted that deferral would be appropriate pending the results of several pilot programs which could assess video teleconferencing.

Hon. Martin Feldman
District Judge
ED Louisiana
November 16, 1993

Judge Feldman questioned whether the Committee intended through the amendment to Rule 43(c)(4)(video teleconferencing for pretrial sessions) that the defendant has a right to be present at pretrial conferences.

safety, for the amendments to Rule 43 concerning video teleconferencing, Ms. Hawk reiterated the Bureau of Prisons' support for the change. She noted that the need for the amendment has made clear in caselaw which holds that the Rules of Criminal Procedure do not permit video teleconferencing.

Ms. Elizabeth Manton, Esq.
Mr. Alan Dubois, Esq.
Federal Public Defenders
Raleigh, NC
April 18, 1994

Ms. Manton and Mr. Dubois presented live testiomony to the Committee on April 18, 1994. Based upon their experiences in several cases, they were very opposed to the amendment to Rule 43 which would have provided for video teleconferencing for pretrial sessions. They cited a number of practical problems that the amendment would raise and reiterated the very important right of the defendant to personally appear in court.

Myrna Raeder
Professor of Law
Southwestern University
Los Angeles, CA,
April 12, 1994.

Writing on behalf of the American Bar Association, Professor Raeder expressed general support for the amendment to Rule 43 dealing with video teleconferencing of pretrial sessions. She raised a number of practical and financial considerations, however, which she believed should be studied by the Committee. She also suggested that the Judicial Conference should consider running a pilot program in two large urban districts and also consider any existing state arraignment projects.

is such as to justify exclusion from the courtroom.

(c) PRESENCE NOT REQUIRED. A defendant need not be present ~~in the following situations~~:

(1) ~~A corporation may appear by counsel for all purposes.~~ when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;

(2) ~~In prosecutions for offenses~~ when the offense is 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~~ when the proceeding involves only a conference or ~~argument~~ hearing upon a question of law~~.~~;

(4) ~~At~~ when the proceeding involves a correction ~~reduction~~ of sentence under Rule 35.

COMMITTEE NOTE

The revisions to Rule 43 focus on two areas. First, the amendments make clear that a defendant who, initially present at trial or who has entered a plea of guilty or nolo contendre, but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia. Second, the rule is amended to extend to organizational defendants. In addition, some stylistic changes have been made.

Subdivision (a). The changes to subdivision (a) are stylistic in nature and the Committee intends no substantive

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 53

I. SUMMARY OF COMMENTS/TESTIMONY: Rule 53

The Committee received five written comments and heard testimony from two witnesses on the proposed amendments to Rule 53. With two exceptions, the commentators and witnesses supported the amendment.

II. LIST OF COMMENTATORS/WITNESSES: Rule 53

1. Hon. Donald C. Ashmanskas, Portland OR, 12-8-93.
2. Steven Brill, Court TV, Washington, D.C. 4-18-94.
3. Prof. Edward Cooper, Ann Arbor, Mich., 1-16-94.
4. Timothy B. Dyk, Esq., Washington, D.C., 4-15-94.
5. William J. Genego & Peter Goldberger, NADCL, Washington, D.C., 4-14-94.
6. Rory K. Little, Esq., ND CA, 4-15-94
7. Myrna Raeder, Prof., Los Angeles, CA, 4-12-94.

III. COMMENTS: Rule 53

Hon. Donald C. Ashmanskas
United States Magistrate Judge
Portland OR
December 8, 1993

Judge Ashmanskas indicated that he is strongly opposed to the proposed amendment to Rule 53. He stated that his opposition is based upon 18 years of experience during which he had observed a number of horrible experiences re cameras in the court room. He noted that with the exception of coverage for naturalization, ceremonial, investiture proceedings or for educational purposes, cameras should be

April 14, 1994.

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, support the amendment and applaud attempts to give the public greater access to federal criminal proceedings. The dangers once associated with broadcasting trials are not well founded and there are substantial public benefits in doing so.

Rory K. Little, Esq.,
United States Attorney
ND, California
April 15, 1994

Mr. Little, citing years of experience in both appellate and trial courts, stated strong opposition to the proposed amendment to Rule 53. He indicated that although few may be willing to admit it, lawyers do act differently in front of cameras in a courtroom and that permitting broadcasting of trials will be distorted and lengthened with such posturing and preening. Secondly, broadcasting trials will lead to additional costs in both time and expense as the parties and the courts debate whether a particular trial should be broadcasted. He also urged the Committee not to "punt" on this issue by simply deferring to the Judicial Conference; in his view, the Committee should stop any attempts to experiment with broadcasting of trials.

Myrna Raeder
Professor of Law
Southwestern University
Los Angeles, CA,
April 12, 1994.

Writing on behalf of the American Bar Association, Professor Raeder expressed general support for the amendment to Rule 53

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 available to the public at large. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)(vital role of print and electronic media as surrogates for the public supports opening of courts to audio and camera coverage).

Rule 57. Rules by District Courts

(a) IN GENERAL.

(1) Each district court ~~by action of~~ acting by a majority of ~~the~~ its district ~~the~~ judges ~~thereof~~ may ~~from time to time~~, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice ~~not inconsistent these rules~~. A local rule must be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(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) PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. The proscription of 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 stubbornly 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 that the defendant waive a jury trial within a specified time.

Subdivision (b). 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 28 U.S.C. § 2072, 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. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of the 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 disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished in a particular case with 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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 59

I. SUMMARY OF COMMENTS/TESTIMONY: Rule 59

The Committee received no written comments on the proposed amendments to Rule 59.

II. LIST OF COMMENTATORS/WITNESSES: Rule 59

None

III. COMMENTS: Rule 59

None

Agenda Item 9B
Standing 6/94

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(E) EXPERT WITNESSES. At the defendant's request, the government ~~shall~~ must disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government, at the defendant's

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1. New matter is underlined and matter to be omitted is lined through.

(2) any statements, as defined in Rule 26.2(f), made by those witnesses.

If the attorney for the government believes in good faith that pretrial disclosure of this information will threaten the safety of any person or will lead to an obstruction of justice, disclosure of that information is not required if the attorney for the government submits to the court, ex parte and under seal, an unreviewable written statement containing the names of the witnesses and stating why the government believes that the specified information cannot safely be disclosed.

* * * * *

(2) *Information Not Subject to*

Disclosure.

* * * * *

(C) EXPERT WITNESSES. The defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial ~~If~~ if (i) the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) the defendant has provided notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. ~~the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to~~

an ex parte statement under subdivision (a)(1)(F).

* * * * *

COMMITTEE NOTE

The amendments to Rule 16 cover two issues. The first addresses the ability of the government to request the defense to disclose information concerning its expert witnesses on the issue of the defendant's mental condition. The second provides for pretrial disclosure of witness names and addresses.

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government may call during the trial. The amendment is a reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (a)(1)(F). No subject has engendered more controversy in the Rules Enabling Act process over many years than pretrial discovery of the witnesses the government intends to call at trial. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent

which the government might be unfairly surprised or disadvantaged without it. In several amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding disclosure of witnesses -- the rules now provide for defense disclosure of certain information. See, e.g., Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 10(4)(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and statements). Similarly, pretrial disclosure of witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses is much greater than that in the federal system. *See generally* Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 Cath. U. L. Rev. 641, 657-674 (1989)(citing state practices).

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a

approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses and information when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or will lead to an obstruction of justice.

The provision that the government provide the names and statements no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital cases; currently, the government is required in such cases to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would be greater in capital cases.

The amendment provides that the government's ex parte submission of reasons for not disclosing the requested information will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. While it is true that under the rule the government could refuse to disclose a witness' name and statement even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the

discovery to the defense. The amendment to Rule 16 is consistent with that approach; it permits the government to block pretrial disclosure where there is a danger to a person's safety or their is a risk of obstruction of justice.

The amendment is clearly consistent with other amendments to other Federal Rules of Criminal Procedure, approved by Congress, which extend defense discovery of statements at some pretrial proceedings. *See, e.g.*, 26.2(g) and pretrial discovery of expert witness testimony.

In proposing the amendment to Rule 16 the Committee was fully cognizant of the respective roles of the Judicial, Legislative, and Executive branches in amending the rules of procedure and believed it appropriate to offer this important change in conformity with the Rules Enabling Act. 28 U.S.C. §§ 2072 and 2075. The Committee views the amendment as a purely procedural change. Under the Rules Enabling Act, the proposed change to Rule 16 will provide Congress with an opportunity to review the extent and application of the Jencks Act and if it agrees with the amendment, permit the it to supercede any conflicting statutory provision, under 28 U.S.C. § 2072(b). *See* Carrington, *"Substance" and "Procedure" In the Rules Enabling Act*, 1989 Duke L.J. 281, 323 (1989)("In authorizing supercession and assuming responsibility for a view of promulgated rules, Congress demands that it be asked whether a proposed rule conflicts with a procedural arrangement previously made by Congress and, if so, whether the arrangement is one on which the Congress will insist.").

the government withholds any information requested under that provision, the court in its discretion may limit the government's right to disclosure under this subdivision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

enter the order of forfeiture at any time before sentencing, but not sooner than eight days after the return of the verdict or the disposition of a motion for a new trial, a motion for judgment of acquittal, or a motion to arrest the judgment. The order of forfeiture must authorize the Attorney General to seize the property subject to forfeiture, to conduct such discovery as the court may deem proper to facilitate the identification, location, or disposition of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At the time of sentencing, the order of forfeiture must be made a part of the sentence and included in the judgment.

Entry of an order of forfeiture before sentencing rests within the discretion of the court, which may take into account anticipated delays in sentencing, the nature or the property, and the interests of the defendant, the government, and third persons.

The amendment permits the court to enter its order of forfeiture at any time before sentencing, but not sooner than eight days after the entry of the court's verdict or its disposition of a motion for new trial under Rule 33, a motion for judgment of acquittal under Rule 29, or a motion for arrest of the judgment under Rule 34. Nothing in the rule, however, prevents the court and the parties from considering the issue of forfeiture in the interim. Before entering the order of forfeiture the court must provide notice to the defendant and a reasonable opportunity to be heard on the question of timing and form of any order of forfeiture.

The rule specifies that the order, which must ultimately be made a part of the sentence and included in the judgment, must contain authorization for the Attorney General to seize the property in question and to conduct appropriate discovery and to begin any necessary ancillary proceedings to protect the interest of third parties who have an interest in the property.

Agenda Item 9C
Standing 6/94

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 18 & 19, 1994
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. April 18 and 19, 1994. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 18. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair
Hon. W. Eugene Davis
Hon. Sam A. Crow
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. B. Waugh Crigler
Prof. Stephen A. Saltzburg
Mr. Tom Karas, Esq.
Ms. Rikki J. Klieman, Esq.
Mr. Henry A. Martin, Esq.
Ms. Jo Ann Harris, Assistant Attorney General &
Mr. Roger Pauley, Jr., designate of Ms. Jo Ann Harris
Professor David A. Schlueter, Reporter

Also present at the meeting were Judge Alicemarie H. Stotler and Judge William R. Wilson, Jr., chair and member respectively of the Standing Committee on Rules of Practice and Procedure; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe, Mr. John Rabiej, Mr. Paul Zingg, and Mr. David Adair of the Administrative Office of the United States Courts and Mr. James Eaglin from the Federal Judicial Center.

I. HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The attendees were welcomed by the chair, Judge Jensen, who introduced the three new members to the Committee,

2. Rule 29(b), Delayed Ruling on Judgment of Acquittal;
3. Rule 32, Sentence and Judgment; and
4. Rule 40(d), Conditional Release of Probationer

C. Rules Approved by the Standing Committee for Public Comment

The Committee was also informed that comments had been received on amendments which had been approved for public comment by the Standing Committee at its June 1993 meeting.

1. Rule 5(a), Initial Appearance Before the Magistrate; Exception for UFAP Defendants

The Reporter summarized the few comments received on the proposed amendment to Rule 5, which would create an exception for the prompt appearance requirement in those cases where the defendant is charged only with the offense of unlawful flight to avoid prosecution. One commentator raised the question of whether there should be a cross-reference to the proposed amendment in Rule 40 as well and another commentator writing on behalf of the American Bar Association indicated that the proposed amendment was in conflict with Section 10-4.1 of the ABA Standards for Criminal Justice. The proposed amendment was endorsed by the National Association of Criminal Defense Lawyers. Following brief discussion of the comments, Professor Saltzburg moved that the amendment be forwarded without change to the Standing Committee. Mr. Pauley seconded the motion, which carried by a vote of 9 to 2.

Mr. Pauley moved that Rule 40 be amended to reflect a cross-reference to the change in Rule 5 and Professor Saltzburg seconded the motion. The motion carried by a vote of 9 to 0 with two abstentions.

2. Rule 10, Arraignment; Video Teleconferencing.

The Reporter and Chair informed the Committee that several written comments had been received on the proposed amendment to Rule 10 which would permit arraignments by video teleconferencing, with the consent of the defendant. The American Bar Association and National Association of Criminal Defense Lawyers were opposed to the proposal, as were two witnesses who had appeared before the Committee. The Committee was also informed that Judge Diamond of the Committee on Defender Services had requested deferral of action on the proposed amendment pending completion of a pilot program on use of video teleconferencing technology in

4. Rule 53, Regulation of Conduct in the Court Room; Permitting Cameras and Broadcasting[1]

In addressing the proposed amendment to Rule 53 which would permit broadcasting from, and cameras in, federal criminal trials, Professor Saltzburg observed that although the proposed amendment seemed an easy rule to implement, he was concerned about simply deferring to the Judicial Conference to promulgate guidelines for implementing the rule. Instead, the Committee should consider drafting a rule which included such standards.

Judge Stotler informed the Committee that the Judicial Conference's Committee on Court Administration and Case Management was very interested in the proposed amendment and its potential implications for federal criminal trials. She emphasized that the amendment would definitely require coordination between a number of entities and committees. She noted that the Judicial Conference had voted to extend the pilot program for civil trials until December 31, 1994.

The Reporter indicated that as proposed, the amendment would clearly authorize the Judicial Conference to determine whether to conduct a pilot program for criminal trials or to implement guidelines or standards. If that language were removed, the Standing Committee might question the potential role of the Judicial Conference and put the language back in.

Judge Jensen observed that unless Rule 53 is amended in some way, there is no authority to conduct any pilot programs like those conducted by the Judicial Conference for federal civil trials. In response, Judge Crigler raised the possibility of amending Rule 53 simply to provide for pilot programs in criminal trials. But Judge Wilson questioned whether there was any need to proceed with any pilot programs.

Mr. Rabiej indicated that the Standing Committee could transmit the Committee's desire to be actively involved in drafting any guidelines, or suggesting any pilot programs. Judge Jensen added that the Committee's report to the Standing Committee could emphasize the difference in civil and criminal trials. He also noted that the report could include a statement that the Committee would remain available to assist in establishing a pilot program and any pertinent guidelines.

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1. The Committee's discussion of the amendment to Rule 53 took place on the first day of the meeting, April 18 and on the second day, April 19. It is presented in its entirety here to provide continuity.

5. Rule 57, Rules by District Courts

The Reporter informed the Committee that the proposed amendments to Rule 57 were being coordinated by the Standing Committee which hoped to maintain consistency in all of the rules addressing this particular topic. He noted that the Bankruptcy Advisory Committee had suggested using the term "nonwillful" instead on "negligent failure" in Rule 57(a)(2). Professor Saltzburg moved that Rule 57 be approved as published. Mr. Pauley seconded the motion. Following brief discussion of the issue, the Committee agreed with Judge Stotler's suggestion that the reference in the Advisory Committee's note to waiving a jury trial be deleted. The motion to approve the amendment and forward it to the Standing Committee carried by a unanimous vote.

6. Rule 59, Effective Date; Technical Amendments

Following a brief description concerning the proposed amendment to Rule 59 which would permit the Judicial Conference to make minor, technical changes to the Rules, Mr. Karas moved that the amendment be approved and forwarded to the Standing Committee. Judge Crigler seconded the motion, which carried by a unanimous vote.

D. Rules Under Consideration by Advisory Committee

1. Rule 6; Amendment to Permit Disclosure of Grand Jury Materials to State Judicial and Discipline Agencies.

The Reporter informed the Committee that Mr. Barry Miller of Chicago had suggested to the Committee that Rule 6(e) be amended to permit disclosure of grand jury testimony to state judicial and attorney discipline regulatory agencies. He also briefly reviewed the Committee's prior positions on grand jury secrecy and its rejection of earlier proposals to expand the disclosure of grand jury proceedings. Judge Jensen noted that the proposal apparently arose from situations where federal grand juries had heard testimony or information which implicate rules of professional responsibility and possible discipline by state agencies.

Mr. Pauley noted that the Seventh Circuit had addressed the question and had concluded that disclosure might be permitted under Rule 6(e)(3)(C)(i) where a state judicial body is seeking disclosure. Judge Jensen and Judge Crigler noted that if there is question about possible violation of state criminal laws, disclosure might be possible under

any dispositive caselaw on the subject and suggesting that a minor amendment to Rule 16 might be appropriate. She noted that she had informally spoken with a number of defense counsel who were not in favor of the amendment because it might encourage laziness on the part of young or inexperienced defense counsel who would not conduct meaningful discovery on behalf of their clients.

Judges Davis and Marovich agreed with that assessment and in particular, the fact that Rule 16 sets out only the minimum standards and that judges have the authority to order such discovery in a particular case. Mr. Pauley, while arguing against a rule change, nevertheless disagreed with that conclusion. He noted that if read literally, the 1974 Committee Note would eliminate the necessity of any additional discovery amendments in Rule 16, including a proposed amendment to require the government to disclose the names of its witnesses before trial. Judge Jensen observed that a trial court's order to the government to produce what amounts to its work product in a major case would be unwarranted.

Ms. Klieman indicated that what the defense really wants is an indication from the government as to what information it will be introducing at trial. Professor Saltzburg agreed, noting that under Rule 16, as written, there are clear differences between various documents and materials and that the problem often arises where defense counsel do not clearly articulate just what they want from the government.

Following additional brief discussion on whether any special action should be taken with regard to accepting formally the subcommittee's report, Judge Jensen indicated that no action would be necessary on the report itself and that if there was interest in amending Rule 16, a motion to do so would be in order. There was no such motion.

b. Prado Report Re Allocation of Costs of Discovery

The Reporter indicated that portions of the Report of the Judicial Conference of the United States on the Federal Defender Program, i.e., the Prado Report had been referred to the Committee for its consideration. The Report recommended consideration of amendments to the rules which would address the issue of assessing or allocating discovery costs between the defense and government. Judge Crigler questioned whether any amendment was appropriate. Mr. Martin gave examples of how the government currently provides defense access to photocopying machines for purposes of discovery. Following additional brief

codifying what they generally do -- provide open disclosure to the defense. Ms. Harris added that the Department was willing to work toward a uniform policy of discovery and asked for time to conduct a thorough survey of current practices. In response to a comments from Judge Jensen and Judge Smith that the comment period would not interfere with the Department's proposed survey, Ms Harris noted that the results of the survey might affect even the initial draft sent out for public comment.

Professor Saltzburg noted that the issue before the Committee was not new and that there is a real policy question at issue. He added that the draft amendment provided more than adequate protection for government witnesses who were in danger. Mr. Wilson noted that open file discovery was often inversely proportional to the strength of the government's case.

Judge Marovich indicated that a system of informal discovery practices often depended on the trial judge. He also cited his experience in state courts, which often involve questions of witness safety and yet discovery is provided.

The Reporter commented on the history of the present amendment and that the Department of Justice had assured the Committee several years earlier that it would consider internal policy changes to provide broader pretrial discovery and that the Department had worked actively to stem any formal amendments. He also indicated that the Department had assured the Standing Committee that it would work in good faith to reach an accommodation on this particular amendment and that it had not indicated that it would seek further delay in the amendment process.

Ms. Harris indicated that the Department was simply recommending that the Committee have the benefit of a formal survey of United States Attorneys before moving forward with the amendment. She also noted that the present draft did not give sufficient attention to the privacy interests of the witnesses.

Concerning specific comments on the proposed amendment, Ms. Harris and Mr. Pauley noted that there were problems with the Jencks Act, which they believed was clearly at odds with the amendment. Mr. Pauley also stated that there might be potential separation of powers issues.

Professor Saltzburg agreed with the view that the amendment is inconsistent with Jencks but that that argument is merely a screen for not addressing the merits of the amendment. He also indicated that in his view there is no

the interests of the defense in discovering the witness' identity. Many witnesses are aware that most cases will not go to trial, but will have been needlessly identified. Judge Davis indicated that he could support an amendment to the rule to cover a separate class of witnesses who fear intimidation and that the trial court could review the government's reasons for not disclosing those witnesses. The Reporter indicated that the Committee Note recognizes that other provisions of Rule 16 might be invoked by the prosecution to protect its witnesses and those provisions might be relied upon to protect witnesses not otherwise covered by the proposed amendment. There was no motion to further amend the Rule or the Committee Note regarding the possibility of additional criteria for withholding disclosure.

Ms. Harris stated that the Department of Justice was concerned about the seven day period envisioned by the rule. She would favor a shorter time frame. Mr. Pauley indicated that the seven-day provision was inconsistent with the three-day disclosure provision in capital cases. Mr. Wilson urged the Committee to retain the seven-day provision and Judge Jensen noted that in actual practice, 10 days is a typical time frame. Mr. Pauley responded that the proposal did not take into account long trials. Professor Saltzburg stated that it would be important to keep the seven day provision because the defense needs to know early in the trial who the government intends to call. There was no formal motion to change the time period envisioned in the proposal.

Turning to the question of whether the rule envisioned an all or nothing approach to reciprocal discovery, Judge Davis moved to amend the proposal to reflect the fact that the court has the discretion to limit the government's reciprocal discovery rights if the government has filed an ex parte affidavit indicating its refusal to disclose information. Judge Dowd seconded the motion. Following additional brief discussion on the motion, the Committee voted 5 to 3 to amend the proposal.

On the main motion, the Committee voted 9 to 1 to send the amendment to the Standing Committee for public comment.

d. Defense Disclosure to Government of Summary of Expert Testimony on Defendant's Mental Condition

Mr. Pauley indicated that the Department of Justice had proposed an amendment to Rule 16, which would require the defense to disclose, upon a triggering request from the government, information about its expert witnesses who would

Judge Jensen queried whether the trial court has any authority to impose forfeiture notwithstanding the sentence. Mr. Pauley indicated that while a court may freeze assets, there is no authority to actually proceed with forfeiture and protect third party interests. Professor Saltzburg expressed concern that the amendment would actually prevent destruction of the property and stated that in his view, the All Writs Act provided authority to the trial court. Other members raised questions about the practical aspects of entering a forfeiture order and then incorporating that order as part of the judgment in the case. Mr. Pauley indicated that the Department's proposal paralleled part of a larger legislative package on forfeiture and that the amendment could be made a part of that legislative package instead of proceeding through the rules enabling act.

The Reporter expressed concern about the timing of the proposed amendment to Rule 32 in light of the fact that Congress would be considering the massive amendments to that rule, at the same time the proposed amendment would be out for public comment. Several members indicated in response that if the Standing Committee views that as a legitimate issue, it could delay publication of the proposal pending any final action by Congress on Rule 32.

The Committee voted 6 to 4 to amend Rule 32 as recommended by the Department of Justice in its letter to the Committee.

5. Rule 46; Typographical Error

The Reporter informed the Committee that a typographical error had been discovered in Rule 46(i), an amendment which went into effect on December 1, 1993. That new provision addresses the issue of disclosing statements by witnesses who testify at pretrial detention proceedings. The rule, however, cites 18 U.S.C. § 3144 instead of § 3142, which governs pretrial detention hearings. Apparently, several magistrate judges are reading the rule literally although it is clear in the Advisory Committee Note and in other amendments to the rules that the Committee intended the rule to apply at detention hearings. Mr. Pauley indicated that the United States Attorneys have been instructed to not argue for literal application of the provision. The Reporter indicated that Judge Jensen had requested the Administrative Office to initiate any necessary legislative action to correct the provision.

IV. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

After brief discussion the Committee decided to hold its next meeting in Santa Fe, New Mexico on October 6 & 7, 1994. Alternate dates are October 13 & 14, 1994.

The meeting adjourned at 10:30 a.m. on April 19, 1994.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Agenda Item 10
Standing 6/94

Interim Report

Self-study of Judicial Rulemaking

to

Committee on Rules of Practice and Procedure

from

Professor Thomas E. Baker
Chair, Subcommittee on Long Range Planning

June 1994

You will recall that at the June 1993 meeting the Standing Committee authorized our Subcommittee on Long Range Planning to undertake a thorough evaluation of the federal judicial rulemaking procedures that will include: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.

The Self-study was suspended, in effect, in anticipation of the January 1994 Executive Session and related discussion. At that meeting, it was reported that the Subcommittee had enlisted the assistance of three distinguished and expert law professors: Linda S. Mullenix, University of Texas; John B. Oakley, University of California, Davis; and Carl Tobias, University of Montana.

The time since the January 1994 meeting has been spent doing research into the extensive literature on federal judicial rulemaking and digesting the Public Comments. Appendix A to this Interim Report is an Annotated Bibliography of the most relevant secondary legal literature. Appendix B is a Summary Of the Comments Received (if you want a complete copy of the actual comments, please call Professor Baker).

The Final Report of the Self-study will be filed in time for consideration at the January 1995 meeting of the Standing Committee. It will contain a section, not yet drafted, providing some history and describing the current rulemaking procedures. In the remainder of this Interim Report, the Subcommittee offers a very rough-preliminary draft of two sections of the Report: "Evaluative Norms in Judicial Rulemaking" and a "Preliminary List of Criticisms and Issues." This is still very much a work in progress. It has not been approved by the Subcommittee on Long

the three specified norms of justice, speed, and economy in civil litigation are rooted in common sense, they seem to beg the most important questions.

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

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

On the other hand, justice also has something to do with concerns of equality and aggregate social efficiency. If we were to allocate all of our resources to attaining the Nth degree of accuracy and equity in our determinations of legal liability in a particular case, there would be no resources left to adjudicate any other cases, let alone to accomplish all of the other functions of government beyond deciding civil disputes. Moreover, if equity were given a standing veto over pre-existing legal rules as applied to the actual facts of any given case, we would subvert to the point of disappearance the system of reliance on protected expectations that permits a society to function amid a welter of conflicting interests without every such conflict becoming a contest in court.

The fact that Rule 1 speaks of a just determination in every case, not just the one before a judge at any given moment, is more a reminder of the inevitable tension between concerns of fairness and efficiency than a criterion for resolving it. It should therefore be no surprise that the history of federal civil procedure under the Federal Rules has featured a continuous but infrequently elaborated struggle between the primacy of fairness (arguing for subordination of procedural rules in favor of reaching "the merits" of the parties' dispute under the substantive law, and conditioning the finality of determination on liberal opportunities for amendment of pleadings, reconsideration by the trial court, and appellate review) and the primacy of efficiency (arguing for rigorous enforcement of

seriously is public comment encouraged and facilitated, and is this a pro forma gesture or is there evidence that adverse public comment makes a difference in the progression of a proposal into a rule change? As applied to the rules that the process produces, the norm of fairness requires evaluation of whether changes in the rules promote or retard the likelihood that individual cases will come to the right result, whether by adjudication or pro tanto by settlement, in relation to the efficiency gains or losses that result from such changes. Is the rulemaking system biased in favor of ratcheting up efficiency at the expense of fairness, or vice versa?

3. Simplicity

This norm, statutorily specified in 28 U.S.C. § 331, serves the interests of both efficiency and fairness. Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and hence unfair application.

4. Consensus

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

5. Uniformity

This norm is fundamental to the rulemaking process set in place by the 1934 Rules Enabling Act. The Act was intended to promote a system of federal civil procedure that was not only trans-substantive but, with minor local variations, uniform in application in all federal district courts.

Geographical uniformity is more important than trans-substantive application of the Federal Rules. Deviations from trans-substantive uniformity can, where necessary and appropriate, be expressly specified within the rules. Current examples are the special rules for class actions brought

v. potential for inflexibility that could attend too lengthy service.

c. **Sufficient resources:** time, money, information, interest to participate actively, "keep up" with developments in modern civil litigation, and develop effective proposals for procedural change - Justice White's Separate Statement Accompanying April 1993 Transmittal raises issues as to Supreme Court.

d. **Interactions:** Rule revision entities' interaction, coordination and restraint and doing so most effectively - TB memos of 9/93, 12/93, JO 9/93 Letter, at 2.

i. Possibility of Advisory Committee chairs as voting members of Standing Committee - Robert Keeton 10/93 memo.

e. **Which entities which responsibilities**

i. General - TB memos of 9/93, 12/93, JO 9/93 Letter, at 2.

ii. Initial Generation/Drafting of Proposals: Advisory Committee (AC) now, possibility of change

iii. Other entities than AC dissatisfaction with drafts of entities below them in hierarchy: who should do redrafting, that entity or AC

f. Too solicitous of needs of judiciary/insufficiently solicitous of needs of federal court lawyers, litigants and others proposals affect - CT, Reconsidering Rule 11, 46 U. MIAMI L. REV. 855, 897 (1992); Frank; LM, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. REV. 795 (1991).

g. Relations with Congress, Executive Branch, Outside groups - 1/94 Executive Session Memo.

2. **Specific Entities**

a. Advisory Committee - see 1.f.; perhaps reflected in action on 1993 amendments of Rules 11, 26.

b. Standing Committee - same; see 1.e.iii.

3. Rule revisors insufficiently sensitive to authority issues - Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 BROOK L. REV. No. 3 (1994).

4. Use of Rule Revision - Too often or too infrequently - TB 9/93 Memo v. Harold Lewis, The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rule Revision, 85 MICH. L. REV. 1507 (1987).

5. Length of Process - Too slow and thorough or too fast and superficial - TB 9/93 memo.

6. Process too incremental, responsive to specific problems, *e.g.*, of inconsistent interpretation rather than taking longer term view or, *e.g.*, best procedures for 21st century - Lewis article; Judith Resnik 1991 testimony before AC.

7. Committee Meeting Management

   a. Drafting by Committee during meetings - CT Miami article.

   b. Who does redrafting - Wilson 9/93 Letter.

   c. Uniform recording method, testimony - 1/94 Executive Session Memo.

   d. Other helpful procedural changes?

C. Federal Rules Amendments Themselves

1. Amendments applicable nationally across 94 districts - Robert Keeton, The Function of Local Rules and the Tension with Uniformity, 50 U. PITT. L. REV. 853 (1989).

2. Much above under entities or process could fit here.

D. Miscellaneous Unresolved Questions

1. Local rule revision under 1988 Act and 1990 CJRA - LM, two Minnesota articles; CT, Civil Justice Reform and the Balkanization of Federal Civil Procedure, 24 ARIZ. ST. L. J. 1393 (1992).

2. Rand analysis, CJRA experimentation and integration of local procedures with Federal Rules - See generally A. Leo Levin, Local Rules as Experiments: A Study in the Division of Power, 139 U. PA. L. REV. 1567 (1991); Laurens Walker, Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments, 51 LAW &

APPENDIX A

FEDERAL JUDICIAL RULEMAKING: AN ANNOTATED BIBLIOGRAPHY

Prepared under the supervision

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April 1994

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APPENDIX B

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

by

Thomas E. Baker
Chair, Subcommittee on Long Range Planning
May 2, 1994

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

SELF-STUDY

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

The self-study will consider:

What are the appropriate goals of federal judicial rulemaking?

How well do the existing rulemaking procedures accomplish those goals?

What are the criticisms of the way rules are made?

How might rulemaking procedures be improved?

What follows are summaries of the comments and suggestions

all the local options; advocates the restoration of the balance of lawyer-members on the Advisory Committees; urges that reconstituted committees, each with a majority of lawyer-members, should reconsider the rules from beginning to end with the fundamental goal in mind to restore simplicity and to end the present insiders' game that federal procedure has become.

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

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

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

(9) Thomas Earl Patton, Schnader, Harrison, Segal & Lewis,

canvassing of the available literature, including relevant empirical data each time a proposal is considered; the committees should communicate with the research community and fund particular studies for possible rules changes; there is a need for systematically and longitudinally gathering and recording civil justice indicators (akin to criminal justice indicators) and data about caseloads and existing court procedures; the memberships of the committees should be more representative of the bar and other groups; questions whether the Supreme Court should continue to play a role in rulemaking.

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

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

(16) Robert D. Evans, Director, Governmental Affairs Office, American Bar Association, Mar. 23, 1994: statement from the ABA; urges that appointments to the rules committees reflect the demographic diversity of the legal community and that membership also more substantially represent the practicing bar, especially trial lawyers and criminal defense lawyers, and the academy; the membership of the Evidence Rules Advisory Committee needs this sort of attention; records should be kept and made public giving some accounting of the diversity of memberships and appointments; if the Supreme Court does not and cannot participate actively in rulemaking, the rules enabling legislation should be amended to eliminate the Court's formal role that adds approximately six months to the already lengthy process; deadlines for public comments — illustrated by the deadline for responses in the present self-study — do not afford ample time for meaningful participation by institutions like the ABA; calendaring meetings twice a year results in a two or three year cycle for rules changes; a priority should be given to

recommends a national meeting of researchers, academics, lawyers, and judges to consider the kind of information that is available and to contemplate what other information might be gathered; concludes some permanent structure, perhaps similar to the lawyers advisory committees under the CJRA, is needed to provide systemic information from those "outside" the judiciary.

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

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

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

Agenda Items 11-12
Standing 6/94

ORAL PRESENTATIONS