COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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Washington, D.C.
July 5-7, 1995

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
WASHINGTON, D.C.
JULY 5-7, 1995

1. Opening Remarks of the Chair

   A. Report on actions taken by the Judicial Conference at its March 1995 session

      i. Approval of Bankruptcy Forms
      ii. Recommitment of proposed amendments to Civil Rule 26(c)
      iii. Transmission of report on Evidence Rules 413-415 to Congress
      iv. Approval of recommendations regarding pending legislation affecting rules committee membership and service provisions in admiralty cases
      v. Ninth Circuit local rules regarding capital cases

   B. Ongoing review of self-study plan

   C. Rules governing attorney conduct in federal courts

2. Approval of Minutes

3. Report of the Administrative Office

   A. Legislative activity report

   B. Administrative actions

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

   A. **ACTION** - Proposed amendments to Rules 21, 25, 26, and 27 for approval and transmission to the Judicial Conference

   B. **ACTION** - Proposed amendments to Rules 26.1, 28, 29, 32, 35, and 41 for public comment

   C. Minutes and informational items

6. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** - Proposed amendments to Rules 16 and 32 for approval and transmission to the Judicial Conference

   B. **ACTION** - Proposed amendments to Rule 24 for public comment

      i. Informational items on lawyer questioning of prospective jurors

   C. Minutes

7. Status Report on Uniform Numbering Systems Regarding the Appellate, Bankruptcy, Civil, and Criminal Rules

8. Report of the Advisory Committee on Civil Rules

   A. **ACTION** - Proposed amendments to Rule 5 for approval and transmission to the Judicial Conference

      i. Proposed amendments to Rule 43 previously approved by the Standing Committee for transmission to the Judicial Conference

   B. **ACTION** - Proposed amendments to Rules 9, 26, and 47 for public comment

      i. Proposed amendments to Rule 48 previously approved by Standing Committee for public comment

   C. Minutes

   D. Status report on committee's work regarding class actions

9. Report of the Advisory Committee on Evidence Rules

   A. **ACTION** - Proposed amendments to Rules 801, 803, 804, 806, and a new Rule 807 for public comment

      i. Proposed amendments to Rules 103 and 407 previously approved for public comment, including revised committee note to Rule 103

B. **ACTION** - Notifying public of the committee's review of twenty-four rules of evidence

i. Standing Committee previously approved committee's request to notify the public of its review of Rules 406, 605, and 606

C. Minutes

10. Report of the Advisory Committee on Bankruptcy Rules

A. **ACTION** - Proposed amendments to Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006 for approval and transmission to the Judicial Conference

B. **ACTION** - Proposed amendments to Rules 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035, and proposed new Rules 1020, 3017.1, 8020, and 9015 for public comment

C. Minutes

11. Next meetings

A. Winter meeting scheduled for January 10-12, 1996, and suggested summer meeting scheduled for June 19-22 or June 26-29, 1996

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Item IA-C

EXCERPT FROM REPORT

OF THE

JUDICIAL CONFERENCE

(MARCH 1995)

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OFFICIAL BANKRUPTCY FORMS

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to the Official Bankruptcy Forms made necessary by the enactment of the Bankruptcy Reform Act of 1994 (Public Law No. 103-394). The Judicial Conference approved the Committee's proposals to amend Official Bankruptcy Forms 1, 3, 6, 7, 8, 9A, 9C, 9D, 9E, 9E(Alt.), 9F, 9F(Alt.), 9G, 9H, 9I, 10, 16A, 16B, 16C, 17, and 18, and to adopt new Official Forms 16D and 19. The amendments take effect immediately.

FEDERAL RULES OF CIVIL PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Civil Rule 26 (General Provisions Governing Discovery; Duty of Disclosure). The proposed amendments grew out of a cooperative process in which the Advisory Committee on Civil Rules responded to concerns expressed by Congress in a number of legislative proposals. The amendments sought to meet the concern that protective orders may conceal information that could protect against ongoing risks to public health and safety, without imposing onerous procedural requirements that might weaken the benefits of protective orders in litigation over issues that do not involve any risk to public health or safety. The amendments were circulated to the bench and bar and discussed at a public hearing, and modifications were made to the original proposal in response to comments received. After voting to modify the proposed rule by striking the phrase "on stipulation of the parties," the Judicial Conference recommitted to the Committee on Rules of Practice and Procedure for further study the proposed amendments to Civil Rule 26(c).

The Rules Committee also recommended to the Conference that it propose to the Congress that the service provisions contained in the Suits in Admiralty Act, 46 U.S.C. § 742, which are different from the service provisions in Civil Rule 4, be deleted. The Committee noted that § 742 was enacted before the Civil Rules were adopted, and concluded that there is no apparent reason to have inconsistent time periods for service of process or to treat suits in admiralty differently from other civil actions. The Conference approved the Committee's recommendation.

FEDERAL RULES OF EVIDENCE

Under the "Violent Crime Control and Law Enforcement Act of 1994" (Public Law No. 93-322), new Rules 413-415 of the Federal Rules of Evidence, dealing with the admission of character evidence in certain sexual misconduct cases, were to take effect in February 1995 unless the Judicial Conference submitted alternative recommendations for amending the Evidence Rules as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault or child molestation. By mail ballot concluded February 8, 1995, the Judicial Conference approved a Rules Committee recommendation to urge that Congress reconsider its policy determinations underlying Evidence Rules 413-415. In the alternative, the Conference proposed amendments to Evidence Rules 404 and 405 in lieu of new Evidence Rules 413, 414, and 415. The Conference's report was transmitted to the Congress on February 9, 1995.

Materials for items

1 B and 1 C

will be distributed at a later date.

Item 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Draft Minutes of the Meeting of January 11-13, 1995
San Diego, California

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Diego, California on Wednesday, Thursday, and Friday, January 11-13, 1995. All the 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.
Judge Phyllis A. Kravitch
Judge James A. Parker
Alan W. Perry, Esquire
George C. Pratt, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Representing the Department of Justice on the committee were Deputy Attorney General Jamie S. Gorelick and Geoffrey M. Klineberg, Special Assistant to the Deputy Attorney General.

Supporting the committee were Professor Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office, and Mark D. Shapiro, senior attorney in the office.

Representing the advisory committees at the meeting were:

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

Professor David A. Schlueter, Reporter
Advisory Committee on the Rules of Evidence -
Judge Ralph K. Winter, Chair
Professor Margaret A. Berger, Reporter

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

INTRODUCTORY REMARKS

Judge Stotler reported that the Judicial Conference at its September 1994 meeting had rejected the proposal of the Court Administration and Case Management Committee to promulgate national guidelines governing cameras in courtrooms in civil cases. It then proceeded to disapprove the Standing Committee's proposed amendment to Fed. R. Crim. P. 53, which would have removed the rule's absolute ban on cameras in the courtroom in criminal cases.

The members discussed generally the policy that should be followed in providing information about pending committee business to the public and the media. Judge Stotler pointed out that the rules process is very open and provides numerous opportunities for the public to provide input to the committees. She added that recent correspondence between Administrative Office Director Mecham and Chief Judge Newman had left the door open on the issue of committee members having contacts with the media and the public. She stated that members were free to give their personal views, but should do so with discretion.

Judge Stotler also emphasized the importance of maintaining contacts with other committees of the Judicial Conference, especially the Court Administration and Case Management Committee. Judge Easterbrook added that Judge Ann Williams, chair of the Court Administration and Case Management Committee, had agreed to share with the Standing Committee preliminary results of the RAND Corporation's evaluation of the Civil Justice Reform Act (CJRA) pilot programs as soon as the results become available.

The members expressed concern that the timetables established by the CJRA were unrealistically short and did not allow sufficient time for the Judicial Conference and its committees to analyze the RAND data in a meaningful manner and to prepare meaningful recommendations for national rules changes. It was suggested that the committee communicate these concerns to members and staff of the judiciary committees of the Congress.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee unanimously approved the minutes of its June 23-24, 1994 meeting.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on recent legislative developments amending or affecting the federal rules.

First, the Congress had made a technical change, as requested by the Judicial Conference, in Fed. R. Crim. P. 46(i), correcting an erroneous statutory reference to the Bail Reform Act.

Second, the Congress had enacted Fed. R. Evid. 412 in the version approved by the Judicial Conference. In so doing, the Congress did not accept the changes made by the Supreme Court that would have limited the rule's application to criminal cases only. The Congressional conference committee explicitly adopted as part of the legislative history the committee note prepared by the Advisory Committee on the Rules of Evidence.

Third, the Congress had amended Fed. R. Crim. P. 32 to require victim allocution in cases involving a crime of violence or sexual abuse. The amendment was made effective on December 1, to coincide with the timing of all other changes in the rules under the Rules Enabling Act.

Fourth, the Congress had amended Fed. R. Bank. P. 7004 to require that service on insured depository institutions under the rule be made by certified mail.

Mr. Rabiej also reported that Senator Heflin had introduced a bill to require that each rules committee be comprised of a majority of practicing attorneys. He noted that the Chief Justice had been advised of the matter and had addressed it in his year-end report. The Chief Justice stated that the rulemaking system was working well, and that Congress should not seek to regulate further the composition of the rules committees.

CONTRACT WITH AMERICA

Mr. Rabiej reported that a bill had been introduced in the Senate, the counterpart of the House's Taking Back Our Streets bill, that included a provision

requiring that the number of Department of Justice representatives of each rules committee be equal to the number of members who represent defendants in criminal cases. It would affect the composition of the Standing Committee, the Advisory Committee on Criminal Rules, and the Advisory Committee on the Rules of Evidence.

Mr. Rabiej stated that the Judicial Conference had already taken a position on the House bill and had requested the Standing Committee to a consider taking a position on this particular bill. The committee agreed with the views of the Chief Justice that the rulemaking system had worked well and Congress should not seek to regulate the composition of the rules committees any more than it had. It was pointed out that many members of the rules committees have had prior prosecutorial experience and that committee votes are neither prosecution-oriented nor defense-oriented. Several members noted, too, that the Department of Justice had provided *ex officio* members to the Standing Committee and the advisory committees for many years. Accordingly, the committee voted to recommend that the Judicial Conference oppose legislation regulating the composition of the rules committees appointed to advise the Judicial Conference and the Supreme Court.

The consensus of the members was that there was no need to communicate further with the Congress on the legislation.

Judge Stotler reported that the responsibility over most of the Contract With America had been assigned to other committees of the Judicial Conference. Judge Higginbotham pointed out that many of the substantive areas assigned to other committees are laced with procedural issues. The Advisory Committee on Civil Rules was looking at the legislation, but only with regard to their impact on procedural issues.

Judge Winter pointed out that the Advisory Committee on the Rules of Evidence had reviewed Article VII of the Federal Rules of Evidence. It had concluded that since the Supreme Court's decision in the *Daubert* case was relatively new, it was premature to consider either amendments to Article VII or legislation to regulate scientific and technical evidence. He advised that pending legislation to revise Fed. R. Evid. 702 was flawed and that Congress should be persuaded to leave the rule alone. Professor Berger added that there were also difficulties with the proposed legislative redraft of Fed. R. Evid. 702(c), dealing with compensation of expert witnesses.

Judge Logan reported that the Advisory Committee on Appellate Rules had considered a proposed legislative amendment to Fed. R. App. P. 22, dealing with certificates of probable cause. The advisory committee had decided not to take a position on the merits of the proposal.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Eldridge described several research projects that the Federal Judicial Center had undertaken to assist the rules committees. He offered the services of the Center to evaluate the impact of rules changes and provide other help that the committees might want.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum of December 8, 1994. (Agenda Item 6) He noted that the committee was not presenting any items that would require action.

Judge Logan reported that the advisory committee had reviewed the Style Subcommittee's draft revisions of Rules 1-23 and planned to review Rules 24-48 as soon as its agenda permitted. He stated that the advisory committee intended eventually to present a restyled revision of all 48 rules to the Standing Committee as part of a single package.

Judge Logan stated that the advisory committee had approved substantive changes in Fed. R. App. P. 26, 29, 35, and 41, but would defer seeking approval of the changes until the July 1995 meeting of the Standing Committee.

Professor Mooney stated that the appellate advisory committee had voted—as had the other advisory committees—not to expand from 3 days to 5 days the additional time a party is given to act where service on the party has been made by mail.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Mannes and Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of December 14, 1994. (Agenda Item 8)

Judge Mannes stated that the advisory committee had approved several proposed amendments at its September 1994 meeting, but had decided to defer them for presentation to the Standing Committee at its July 1995 meeting. He also advised that the committee had held a special meeting in December to consider amendments to the Federal Rules of Bankruptcy Procedure made necessary by enactment of the Bankruptcy Reform Act of 1994.

Professor Resnick stated that the Act was very comprehensive and contained 60 operative sections. The advisory committee concluded that most of the rules changes to implement the Act did not require expedited action and could be promulgated under the normal Rules Enabling Act schedule. Accordingly, several proposed amendments would be brought before the Standing Committee for consideration at its July 1995 meeting.

The advisory committee determined, however, that certain matters required urgent attention through immediate: (1) amendment of the Official Forms, and (2) issuance of model interim rules.

The Official Forms, which are widely used by creditors and the general public, did not yet reflect important changes enacted by the 1994 law. Therefore, they were misleading to creditors in such matters as filing proofs of priority claims. Professor Resnick pointed out that the Official Forms are promulgated by the Judicial Conference directly and do not have to be submitted to the Supreme Court and the Congress. Accordingly, the necessary corrective changes could be implemented by the Judicial Conference at its March 1995 meeting.

The committee voted unanimously to approve the proposed amendments in the Official Forms and send them to the Judicial Conference for promulgation.

Under section 104 of the Bankruptcy Code, dollar amounts in the Code are adjusted every three years on the recommendation of the Judicial Conference. The advisory committee recommended that the Judicial Conference automatically change the Official Forms to reflect the periodic adjustments made in the statutory dollar amounts. The Standing Committee asked the advisory committee to return at the next meeting with a specific suggestion for effectuating the automatic adjustments in the Official Forms.

The advisory committee recommended three Suggested Interim Bankruptcy Rules for adoption as local court rules. (These rules would eventually be superseded by amendments to the national bankruptcy rules under the Rules Enabling Act process.) The three interim rules were considered necessary by the advisory committee to implement provisions of the Bankruptcy Reform Act of 1994 immediately. They dealt, respectively, with: (1) election of chapter 11 trustees, (2) special procedures for small business chapter 11 cases, and (3) jury trials.

Professor Resnick stated that the advisory committee had distributed model, interim rules directly to the courts in 1979 and 1987. This time, however, the committee was seeking approval of the Standing Committee to distribute the interim rules to the district and bankruptcy courts.

The committee voted unanimously to authorize the distribution of the Suggested Interim Bankruptcy Rules.

Professor Resnick pointed out that the advisory committee planned to engage in a dialogue with the new National Bankruptcy Review Commission, which had been given two years in which to report to the Congress with respect to further changes that may be appropriate in the bankruptcy laws. He also noted that the 1994 bankruptcy legislation had changed the effective date of amendments to the Federal Rules of Bankruptcy Procedure to December 1 of each year, making it consistent with the effective date for the other federal rules. It was the consensus of the committee that it would be appropriate for the advisory committee to deal directly with the National Bankruptcy Review Commission.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Higginbotham presented the report of the advisory committee, as set forth in his memorandum of December 13, 1994. (Agenda Item 9)

He stated that the advisory committee requested action by the Standing Committee on five items.

First, the committee recommended that the Judicial Conference ask the Congress to delete the service provisions from the Suits in Admiralty Act, 42 U.S.C. § 742. The Act requires that a libellant "forthwith" serve a libel on the United States attorney and the attorney general. "Forthwith" has been interpreted by some courts to require service within a period shorter than the 120-day period specified in Fed.R.Civ.P. 4(m), creating a trap for practitioners.

The committee approved the recommendation unanimously.

Second, the advisory committee recommended that amendments to Fed. R. Civ. P. 26(c), dealing with protective orders, be approved by the Judicial Conference at its March 1995 meeting. Judge Higginbotham pointed out that legislation introduced by Senator Kohl would cause difficulty because it focused too much on products liability litigation and would require a judge to conduct a hearing and make explicit findings before entering a protective order. He noted that he had met with the senator and his staff, had corresponded with them, and had carried on a dialogue in an attempt to

accommodate competing policy considerations. As a result, the advisory committee voted by mail ballot to make some changes in its original proposal to amend Rule 26(c).

Judge Higginbotham stated that the rule had been changed by the advisory committee after publication to make it clear that nonparties may intervene for the limited purpose of questioning a protective order, thereby reflecting current practice in the courts. The committee expanded the enumerated grounds for dissolving a protective order. It also provided explicitly in the rule for entry of a protective order on stipulation of the parties. In addition, the advisory committee note had been amended to explain more clearly the balancing required by the rule.

Judge Higginbotham stated that these changes would not require a republication of the amendments since they should follow closely the proposal that had been published.

The committee voted unanimously to send the amendments to Fed. R. Civ. P. 26(c) to the Judicial Conference for approval.

The committee further agreed to proceed on an expedited basis by seeking Judicial Conference approval of the amendments to Rule 26(c) at the March 1995 meeting.

Judge Higginbotham expressed his appreciation to Assistant Attorney General Frank Hunger for his assistance on Rule 26(c).

Third, the advisory committee recommended changes to Fed. R. Civ. P. 43(a): (1) to eliminate the requirement that testimony of witnesses at trial be taken "orally," and (2) to allow the court "for good cause shown in compelling circumstances" to permit presentation of testimony in open court by contemporaneous transmission from a different location.

The committee voted unanimously to approve the proposed amendments to Fed. R. Civ. P. 43(a), but to delay transmitting them to the Judicial Conference for approval until the Conference's fall 1995 meeting.

Fourth, the advisory committee recommended for publication amendments to Fed. R. Civ. P. 48 to return to the 12-person jury in civil cases. Judge Higginbotham traced the history of the judiciary's move to 6-person juries, following the Supreme Court decisions in *Duncan v. Louisiana* and *Williams v. Florida.* He argued that the literature demonstrates that 12-person juries are more stable in their decision-making than juries of 6 persons. Moreover, 12-person juries are more representative of the community.

Judge Higginbotham stated that the advisory committee had coordinated with

other committees of the Judicial Conference on this issue, including the Space and Facilities Committee and the Court Administration and Case Management Committee.

The committee voted without objection to publish the amendments to Fed. R. Civ. P. 48 for public comment.

Fifth, the advisory committee recommended for publication amendments to Fed. R. Civ. P. 47(a) to provide counsel with a right to participate in the examination of prospective jurors. Judge Higginbotham pointed out that the proposal would keep the judge in control of the voir dire process, but would give counsel an opportunity to supplement the court's questioning under limits set by the judge.

He stated that many judges are deeply concerned about the proposal, but that it is strongly supported by legal associations and had been approved by the advisory committee on a unanimous vote. He noted that trial lawyers offer two arguments in support of the change: (1) voir dire in civil cases conducted exclusively by judges is often inadequate, and (2) laywers know more about the details and nuances of their case than the judge. He also pointed out that recent research shows that more than 60 percent of district judges currently allow some form of voir dire by the lawyers. Finally, he mentioned that as a result of the *J.E.B.* and *Batson* cases, lawyers have a greater need for effective voir dire in order to articulate nondiscriminatory reasons for striking potential jurors.

Judge Jensen stated that the Advisory Committee on Criminal Rules had reached the same conclusions, but had not decided on the final language of a proposed amendment. He stated that his advisory committee would attempt to return to the Standing Committee in July 1995 with a common proposal to cover attorney participation in voir dire in both civil and criminal cases.

The committee voted without objection to table action on publishing Fed. R. Civ. P. 47 until the July 1995 meeting.

Judge Higginbotham reported, as an information matter, that the advisory committee was continuing to conduct research and to consult with the bar and academia on class actions. It had scheduled a special meeting in February at the University of Pennsylvania to hear the views of practitioners and academics expert in class actions. It also had planned to hold its regular meeting in New York in connection with a symposium on class actions conducted by the New York University Law School.

He also reported that he had appointed a subcommittee, chaired by Judge Scirica, to monitor legislative developments in the area of securities litigation and class actions.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of November 29, 1994. (Agenda Item 10)

He stated that the advisory committee had no matters requiring action, but would present some proposed amendments to the Standing Committee at the July 1995 meeting, including an amendment to Rule 24 (attorney participation in voir dire) and Rule 16 (pretrial discovery). He noted that in enacting Fed. R. Evid. 413-415, the Department of Justice and the Congress had both taken the position that it is necessary for purposes of a fair trial, when the prosecution intends to introduce propensity evidence, to have pretrial disclosure of witness statements, notwithstanding the Jencks Act.

REPORT OF THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Judge Winter presented the report of the advisory committee, as set forth in his memorandum of November 22, 1994. (Agenda Item 7)

He reported that the advisory committee had published for public comment its tentative decision not to amend 25 rules of evidence, but it had received only one comment. On the other hand, the committee had spent a great deal of its time in connection with evidentiary matters in which the Congress had taken an interest.

He stated that the advisory committee had made a tentative decision not to amend another three rules: Fed. R. Evid. 406, 605, and 606. He agreed to defer seeking authority to publish these rules until the July 1995 meeting of the Standing Committee, at which time the advisory committee would have other rules to present as part of a more comprehensive package.

Judge Winter requested authority to publish for public comment proposed amendments to Fed. R. Evid. 103(e) and 407.

Fed. R. Evid. 103(e)

The proposed new Rule 103(e) would make it clear that any pretrial objection to a proffer of evidence be renewed by counsel in a timely fashion at trial—unless the court expressly states on the record, or the context clearly demonstrates, that the court's ruling on the objection is final. Judge Winter pointed out that the case law among the circuits on the effect of a pretrial ruling is unclear, and the advisory committee had decided unanimously that a default rule would be very helpful to practitioners.

He added that some members of the advisory committee had thought that the default rule should be the converse, i.e., that a pretrial ruling by the court should normally be considered final and should not have to be renewed. A majority of the committee believed, however, that attorneys normally will raise issues again at trial in any event. Moreover, many rulings on admissibility are subject to change because of changed circumstances at the time of trial.

Mr. Perry moved: (1) to publish the advisory committee's proposed amendments to Fed. R. Evid. 103(e), incorporating several style improvements accepted by Judge Winter, and (2) to state explicitly in the accompanying note that the committee was also considering an alternative version of the default rule. By so doing, there would clearly be no need to republish the rule if the committee later accepted the alternate provision.

Other members suggested, however, that it would not be necessary to republish since a committee is always free to reach a different conclusion on a proposal, based on the comments it receives during the publication period. Judge Winter expressed concern that the alternative default rule might overrule the Supreme Court's decision in the *Lucas* case. Professor Schlueter suggested that a better approach would be to explain clearly in the advisory committee note that the committee had considered and rejected the converse approach, thereby directing public attention to the issue.

Mr. Perry's motion to include a description of the alternate default provision in the publication failed by a vote of 3-7.

Mr. Sundberg then moved to add a sentence to the note declaring that the committee had considered a default rule—providing that counsel would not have to renew an objection at trial—but had rejected it.

The motion was approved by a vote of 9-1.

The committee then voted unanimously to approve publication of Rule 103(e).

Fed. R. Evid. 407

Judge Winter stated that the advisory committee was proposing two amendments to Fed. R. Evid. 407 (subsequent remedial measures). The first would apply the rule expressly to product liability actions, thereby reflecting the position of a majority of the federal circuit courts (although state law is generally to the contrary). Second, the rule would be clarified to provide that it applies only to changes made after the occurrence that produced the damages giving rise to the action.

Judge Winter agreed to accept stylistic changes suggested by the members.

The committee voted 9-4 to publish Fed. R. Evid. 407 for public comment.

Fed. R. Evid. 413-415

Judge Winter stated that new Fed. R. Evid. 413-415 had been enacted as part of the 1994 omnibus crime legislation. The rules provide that in a civil or criminal action involving sexual assault or child molestation evidence of the defendant's commission of a prior sexual assault or child molestation "is admissible."

Judge Winter pointed out that the new rules have a very sparse legislative history, consisting principally of floor statements made by members after the bill had been passed. He reported that the rules would go into effect in 150 days after enactment—February 10, 1995—unless the Judicial Conference recommended otherwise. In that event, the rules would take effect in an additional 150 days.

He reported that the Administrative Office had distributed the new rules to thousands of people for comment and that the comments had been overwhelmingly negative. Opponents argued that: (1) the criminal justice system had a long tradition against allowing the introduction of propensity evidence, and (2) there was no empirical support for the change.

Judge Winter stated that there was virtually unanimous belief among the critics—which the advisory committee shared—that the rules as written were unclear as to whether the proffered evidence was subject to the balancing test of Rule 403 and to the other rules of evidence designed to protect against unreliable evidence (such as the hearsay provisions). Rule 403, for example, excludes evidence if its probative value is substantially outweighed by the danger of unfair prejudice or other specified factors. Accordingly, the new rules presented a constitutional problem, because the defendant's evidence would be subject to the balancing test, while that of the prosecution would not. Moreover, Rules 413-415 were inconsistent philosophically with Rule 412. The latter rule shields against earlier events, while the former makes them admissible.

Judge Winter reported that the Advisory Committee on the Rules of Evidence had passed a resolution with only a single dissenting vote by the representative of the Department of Justice that disagreed with Fed. R. Evid. 413-415 on policy grounds: (1) because the rules breached the traditional propensity bar, and (2) because of the high possibility that the prior acts evidence would be unduly prejudicial. The committee agreed, further, that the rules as drafted did not accomplish what their proponents wanted them to accomplish. Accordingly, the advisory committee had decided to assist the Congress by redrafting the rules to capture what appeared to be the intent of the proponents.

Judge Winter pointed out that in redrafting the rules, the advisory committee decided that the provisions belonged logically in Fed. R. Evid. 404 and 405, rather than as new Rules 413-415. He emphasized that the committee's draft would permit evidence

of an earlier act of sexual assault or child molestation to be introduced only "if otherwise admissible under these rules." It also included an explicit balancing test in the rule.

Judge Jensen stated that the Advisory Committee on Criminal Rules had examined Rules 413-415 and had agreed with the evidence committee that the rules were unsound as a matter of evidentiary policy and should not be enacted. He added that, as a matter of drafting, the Advisory Committee on the Rules of Evidence had made all the appropriate corrections in the rules. Professor Schlueter noted that the criminal advisory committee had considered the rules in 1991, when they were before the Congress, and had opposed them by a vote of 8-1. He added that the committee was also deeply concerned about the sidestepping of the Rules Enabling Act process.

Judge Higginbotham stated that the Advisory Committee on Civil Rules had also concluded that the rules were unwise, but had deferred to the evidence committee on matters of style. Professor Coquillette stated that he had read the public comments and that nearly all were negative, including those from child abuse organizations, which had stated that the rules would do more harm than good.

The consensus of the members following lengthy discussion, was stated by Professor Hazard and accepted by Judge Winter:

(1) The committee should express its opposition to the new rules because they are ill-founded and wrong as a matter of policy.
(2) If the Congress wishes to proceed with the rules, it should be encouraged to substitute the corrected and improved language drafted by the Advisory Committee on the Rules of Evidence.
(3) The committee should enumerate the deficiencies in the rules in its report to the Congress.
(4) No attempt should be made to supersede the rules through the Rules Enabling Act process.
(5) Members should communicate the committee's views personally to the House and Senate committees and staff.

Ms. Gorelick stated that the Department of Justice could not oppose adoption of the rules, nor could it support a delay in their effective date. The Department believed that the new rules must be read together with Fed. R. Evid. P. 403 and the hearsay rules. On the other hand, the Department would be pleased to participate in making improvements in the rules through the normal Rules Enabling Act process. Thus, the Department would vote against a motion to delay implementation of the rules for another 150 days, but would abstain on a motion for substitute language.

In light of the committee's deliberations, Judge Winter and Professor Berger drafted a revised report overnight and accepted style improvements in the rules,

presenting them to the committee on Friday morning.

After reviewing the revised draft of the report to the Congress, Ms. Gorelick suggested that it was too forceful in interpreting Rules 413-415 as requiring that evidence of past acts of sexual abuse or child molestation be admitted regardless of the limitations imposed by the other rules of evidence. She recommended that alternate language be used stating that the legislative history suggested that the rule might be interpreted as incorporating the hearsay rule and the Rule 403 balancing test. Judge Winter agreed to consider Ms. Gorelick's edits in preparing the final report.

Judge Stotler stated that there appeared to be a consensus on the committee that the report to the Congress should not include an absolute statement that evidence of prior acts of sexual abuse or child molestation is admissible regardless of the hearsay rules or Rule 403. She recommended that this view be incorporated in the final report. She suggested, though, that it would be impractical for the committee to draft the report as a committee of the whole.

Judge Stotler recommended that the committee endorse in principle the draft report to the Congress on Fed.R.Evid. 413-415, with the final language to be prepared by Judge Winter and distributed to the members as soon as possible.

The recommendation was approved unanimously.

NINTH CIRCUIT LOCAL RULE ON CAPITAL CASES

The Chief Justice had referred to the committee a request by the attorneys general of five states that the Judicial Conference exercise its power under 28 U.S.C. § 331 to invalidate Local Rule 22 of the United States Court of Appeals for the Ninth Circuit on the grounds that it was "inconsistent" with "federal law." The local rule prescribes procedures for processing capital cases in the Ninth Circuit.

The committee's discussion centered on a memorandum prepared by the reporter, Professor Coquillette. (Agenda Item 5) The members also had before them the brief of the state attorneys general and the response of the Ninth Circuit, submitted by Chief Judge Wallace.

Professor Coquillette posed two questions for the committee to consider:

(1) whether the Ninth Circuit rule is inconsistent with federal law under 28 U.S.C. § 331, and
(2) what action the Judicial Conference should take if the rule is in fact in conflict with federal law.

Professor Coquillette stated that the attorneys general had set forth nine legal arguments for holding the rule inconsistent with federal law. He found two areas where Local Rule 22 was most arguably inconsistent with federal law.

> The first is that the Ninth Circuit rule authorizes a single judge to invoke an in banc hearing. Under 28 U.S.C. § 46 and Fed.R. App. P. 35, however, a majority vote of the judges of the court in regular active service is required for in banc consideration. He pointed out that the Ninth Circuit had defended the legality of the rule on the grounds that Rule 22 itself had been adopted by a majority of the circuit judges in regular active service.
>
> The second is that Rule 22 provides for automatic issuance of a certificate of probable cause on the appellant's first petition. But the federal habeas corpus statute and case law require a determination on the merits for the issuance of a certificate of probable cause. The Ninth Circuit had defended the rule on the grounds that it had by majority vote delegated its power to act.

Professor Coquillette concluded that there is nothing in the pertinent statutes and rules that permits a court to delegate its judicial responsibility: (1) to act by majority vote on each suggestion for an in banc hearing, or (2) to consider each certificate of probable cause on the merits. He pointed out, however, that his memorandum contained a suggestion by Judge Easterbrook on how the Ninth Circuit might redraft the rule to deal with both problems.

Judge Easterbrook recommended that the committee express its considered view that Rule 22 was inconsistent in two respects with federal law and invite the Ninth Circuit to modify it. This procedure would give the court a formal opportunity to take action to correct the problems and avoid potential abrogation of the rule by the Judicial Conference.

Judge Ellis moved Judge Easterbrook's suggestion that the committee: (1) express its sense that there is an inconsistency in two respects between Ninth Circuit Rule 22 and the pertinent federal statutes and rules, and (2) invite the court to reconsider the rule and take whatever steps it deems appropriate.

The motion was approved unanimously.

Judge Stotler thanked Professor Coquillette for an excellent memorandum and expressed the committee's appreciation to Judge Easterbrook, Judge Logan, and the Advisory Committee on Appellate Rules for their work on the matter.

ATTORNEY DISCIPLINE RULES

The committee engaged in a general discussion of state Supreme Court rules and local United States district court rules that regulate attorney conduct. Professor Coquillette had prepared and distributed to the members a comprehensive chart surveying the content of each district court's local rule. Much of the committee's deliberations centered on a July 1994 regulation promulgated by the Department of Justice to govern the conduct of United States attorneys in making contacts with represented parties.

Deputy Attorney General Gorelick explained that federal criminal investigations and prosecutions had become more complex in recent years and that government lawyers had become more involved in investigations, particularly in undercover operations involving criminal conspiracies. Government attorneys, moreover, were faced with enormous variations in the rules of the 50 states and the federal district courts. She stated that in some cases government attorneys had experienced practical difficulties in complying with state ethical rules that prohibit attorney contacts with represented parties (as under Rule 4.2 of the A.B.A. model rules). The Department of Justice took the position that their attorneys do not have to comply with this specific ethical prohibition. Accordingly, it promulgated a national regulation to supersede state ethical obstacles in discrete circumstances. In some states, however, assistant United States attorneys have been threatened with the loss of their license if they follow the Department's rule.

Ms. Gorelick emphasized that the Department's rule was legally supportable and would be applied thoughtfully and narrowly. She stated that government attorneys should comply with state ethical rules generally, and she expressed the desire of the Department to reach agreement with the states on this sensitive and controversial issue.

Chief Judge Veasey framed the issue as one of authority and federalism. He asserted that the state chief justices have agreed unanimously that the regulation of the Department of Justice was without authority and posed a threat to federalism. He added that the state chief justices were willing to meet further with Department of Justice officials in an effort to resolve their differences.

REPORT OF THE LONG RANGE PLANNING SUBCOMMITTEE

Professor Baker presented an information report on behalf of the subcommittee. He noted that the subcommittee had distributed its draft report and welcomed any comments, especially from the advisory committees following their next meetings. He stated that the subcommittee would present a final report for action by the Standing Committee at the July 1995 meeting.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Pratt reported that the Style Subcommittee had sent its completed revision of the civil rules to the Advisory Committee on Civil Rules. The advisory committee had made considerable progress on the revisions, but was facing competing demands on its time.

He reported that the restyled appellate rules had been sent to the Advisory Committee on Appellate Rules. The advisory committee had completed its revisions of half the rules, and the Style Subcommittee was in the process of reviewing the revisions.

Judge Pratt stated that the subcommittee was about to begin work on the criminal rules.

He stated that the subcommittee had always operated on the assumption that once the rules had been restyled, the Standing Committee would authorize their publication for a considerable period of public comment. After the comment period, the rules would be reviewed again by the advisory committees and the Standing Committee under the normal rulemaking process.

Finally, Judge Pratt reported that Bryan Garner had completed work on a new style guide to rule drafting that had been approved by the subcommittee. He stated that it had been distributed to the advisory committees and would be published by the Administrative Office.

NEXT MEETINGS OF THE COMMITTEE

The next meeting of the committee had been scheduled for July 5-7 in Washington, D.C. The committee decided to hold the following meeting on January 10-12, 1996. The chair would determine the location.

Respectfully submitted,

Peter G. McCabe,
Secretary

Item 34

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

June 5, 1995

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: *Legislative Activity Report*

During the first session of the 104th Congress, several bills were considered that affect the rules of practice and procedure. Each of the bills has been monitored closely, and Judge Stotler and the chairs of the pertinent advisory committees have been apprised of developments.

The following discussion identifies the relevant bills and highlights the rules committees' responses.

CONTRACT WITH AMERICA

The House of Representatives passed the *Attorney Accountability Act* (H.R. 988) on March 7, 1995. It amends Civil Rule 11 and eliminates the "safe harbor" provision, removes the discretionary power of the court to impose sanctions on a finding of a Rule 11 violation, and requires compensation to the injured party as part of every sanction. Attorney fee-shifting based on offer-of-judgment is extended to both parties in diversity cases. The bill also amends Evidence Rule 702 to codify and expand the recent Supreme Court decision in *Daubert* dealing with the admission of expert opinion. Judge Ralph Winter urged the House and Senate judiciary leaders to withdraw the evidentiary provision as premature. (A copy of his letter is attached.)

Senator Hatch introduced the *Civil Justice Fairness Act* (S. 672), a comprehensive tort reform bill on April 14, 1995. It directly amends the offer-of-judgment provisions in Civil Rule 68. Amendments to Civil Rule 11 and Evidence Rule 702, similar to the House-passed versions in H.R. 988, are contained in the bill. Additional provisions include reform of health care liability and abusive prisoner litigation practices. Senate hearings on general tort reform concepts have

been held, but none specifically on S. 672. It is possible that the Senate will debate this tort reform bill on the floor as a committee of the whole sometime in the summer.

The *Common Sense Product Liability and Legal Reform Act* (H.R. 956) was passed by the House on March 10, 1995. It revises the substantive law affecting products liability cases in state and federal courts and imposes caps on punitive damages in all tort claim cases. No specific rule of practice and procedure was implicated.

The *Product Liability Fairness Act* (S. 565) was introduced in the Senate on March 15, 1995. It contains provisions similar to H.R. 956, but applies the cap on punitive damages only to product liability cases. During Senate debate on the bill, many amendments were added, including an amendment to Civil Rule 11 submitted by Senator Brown. His amendment would eliminate a court's discretion to impose a sanction on a finding of a violation of Rule 11 and require pleadings to be "well grounded in fact." The "safe-harbor" provision and the court's discretionary power to impose monetary sanctions would be retained. His amendment had been earlier introduced as a separate bill (S. 720) on April 24, 1995. In its debate on the *Product Liability* bill, the Senate later accepted a Senator Hatch amendment that would restore the court's discretionary power to impose a sanction on a finding of a violation of Rule 11. (The amendment is unlike the proposal Senator Hatch included in his comprehensive tort reform bill - S. 672.)

The *Product Liability* bill, as amended, failed to pass the Senate. A streamlined version - which excluded the Rule 11 amendment altogether - was ultimately approved on May 10, 1995. It is very similar to the original bill as introduced in the Senate. The differences between the House and Senate versions are substantial. No House-Senate conference has yet been scheduled.

The House passed the *Securities Litigation Reform Act* (H.R. 1058) on March 8, 1995. Most of the bill revises substantive law and makes extensive changes, which are intended to police abusive filing of class action securities cases. Several parts of the bill affect procedural provisions dealing with Civil Rule 9 and Rule 23. The Senate Banking, Housing, and Urban Affairs Committee has been actively considering the *Private Securities Litigation Reform Act* (S. 240). And on May 26, 1995, the Senate Banking Subcommittee reported favorably the bill after a mark-up session. It includes a provision applying modified Rule 11 sanctions to security cases. A subcommittee - chaired by Judge Anthony J. Scirica of the Civil Rules Committee - has been closely monitoring this legislative action.

STENOGRAPHIC RECORDING OF DEPOSITIONS

Judge Patrick Higginbotham wrote to the House judiciary leaders regarding H.R. 1445, which was introduced by Congressman Carlos Moorhead, chair, Subcommittee on Courts and Intellectual Property on April 6, 1995. (A copy is attached.) The bill would undo the 1993 amendments to Civil Rule 30(b) and require stenographic recording of all oral depositions unless otherwise ordered by the court or stipulated by the parties. Judge Higginbotham urged Congress to oppose the bill and retain the current provisions that provide the party with the discretion to record the deposition by sound, sound-and-visual, or stenographic means.

EVIDENCE RULES 413-415

The Judicial Conference Report on Evidence Rules 413-415 was transmitted to Congress on February 9, 1995. In accordance with the *Violent Crime Control and Law Enforcement Act of 1994*, the new rules now take effect on July 9, 1995 - unless Congress takes action otherwise. On April 6, 1995, Senator Kyl introduced the *Sexual Violence Prevention and Victim's Rights Act of 1995* (S. 694), which would make the new Rules 413-415 effective immediately.

Judge Winter has met with staff of key Congressional leaders urging them to accept the alternative amendments to Evidence Rules 404 and 405 in lieu of Rules 413-415 as approved by the Judicial Conference. Because of the approaching deadline, legislation under unanimous consent procedures (no objections by any member of Congress) appears to be the only procedural solution. Attempts continue to be made to secure full Congressional agreement.

SERVICE OF PROCESS PROVISIONS IN ADMIRALTY CASES

At its March 1995 session, the Judicial Conference approved the recommendation of the Standing Committee to request Congress to delete the special service provisions in 46 U.S.C. § 742 regarding admiralty cases. The time deadline for service in this section conflicts with the time deadline contained in Civil Rule 4. The appropriate committee of Congress is being advised of the Conference's action.

DEPARTMENT OF JUSTICE POLICY REGARDING ATTORNEY CONDUCT

Judge Gilbert S. Merritt, Chair, Judicial Conference Executive Committee, urged Senator Hatch not to go forward on § 502 of the *Violent Crime Control and Law Enforcement Improvement Act of 1995* (S. 3), which would authorize the Attorney General to adopt rules governing the "conduct of prosecutions" in federal

court that supersede any ethical rules or rules of the court of any State. In the same letter, Senator Hatch was advised that the Standing Committee has embarked on a comprehensive study of the problems and issues presented by court rules governing attorney conduct.

Senator Kyl's *Sexual Violence Prevention* bill (S. 694) would establish *Rules of Professional Conduct for Lawyers in Federal Practice*. Identical provisions had been included earlier in Congresswoman Molinari's *Sexual Assault Prevention Act of 1993* (H.R. 688). Additional information will be included in the agenda materials on this specific issue.

COMPOSITION OF RULES COMMITTEES

On February 8, 1995, Senator Howell Heflin introduced S. 370. The bill is identical to the one that he introduced late last Congress. It would require a majority of each of the Advisory Rules Committees and the Standing Rules Committee to be members of the practicing bar. A provision in Senator Kyl's *Sexual Violence Prevention* bill (S. 694) would require that the number of representatives from the Department of Justice on the Appellate, Criminal, Evidence, and Standing Rules Committees be equal to the number of non-judge committee members who represent defendants. The provision is identical to one contained in § 504 of the *Violent Crime Control and Law Enforcement Improvement Act of 1995* (S. 3).

The Judicial Conference adopted the recommendation of the Standing Committee to urge Congress not to regulate the composition of the rules committees. No hearings on the relevant bills regarding the composition of rules committees have been scheduled. It now appears probable that no comprehensive crime bill will be considered by Congress this session, other than the bill dealing with Terrorism.

TERRORISM PREVENTION ACT

On April 27, 1995, Senator Dole introduced the *Comprehensive Terrorism Prevention Act of 1995* (S. 735). One of its provisions amends Appellate Rule 22. Judge Logan wrote to the Senator advising him of concerns with some aspects of the amendment. (A copy is attached.) Judge Logan also recommended that any change of Rule 22 should take into account the stylistic changes now being considered by the committee.

John K. Rabiej

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

February 7, 1995

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
Room 2138, Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I write to request your assistance to prevent amendment of Rule 702 of the Federal Rules of Evidence (Testimony by Experts) outside the Rules Enabling Act process in your consideration of H.R. 10, the *Common Sense Legal Reform Act.*

The Chief Justice established and appointed members to the Judicial Conference Advisory Committee on Evidence Rules in early 1993. As part of a comprehensive review of all the evidence rules, the committee discussed at length the rules on expert testimony at separate public meetings on May 9-10, 1994, and October 17-18, 1994.

The committee unanimously concluded that amendment of Rule 702 would be counterproductive at this time in light of the recent decision of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993). It is yet too early to determine whether *Daubert* curbs abuses in the use of expert testimony. A valid assessment of its effects can only be made after courts acquire more experience with it. The committee will continue to study the operation and effect of the rule as construed under *Daubert* by the courts.

At its January 9-10, 1995 meeting, the committee discussed the proposed amendment of Evidence Rule 702 contained in H.R. 10. Section 102 of the bill would add a new subdivision (b) to Rule 702 purportedly codifying the *Daubert* decision. *Daubert* is now the law of the land. Restating the Court's opinion, even if drafted accurately, is unnecessary. But Rule 702(b) as proposed in H.R. 10 does not accurately codify *Daubert*. And if enacted would cause mischief.

Rule 702(b) distinguishes between "validity" and "reliability" of scientific evidence, a distinction expressly rejected in *Daubert*. Under the proposed

amendment, a judge must determine the "validity" of scientific evidence as a preliminary matter. This new requirement imposes an ill-defined burden on the courts. Indeed, it is difficult to see how scientific evidence can be "reliable" and yet not be "valid." The uncertainties created by the requirements could cause significant problems, particularly for prosecutors who often rely heavily on "scientific evidence" in establishing the guilt of defendants.

Rule 702(b) limits its scope to "scientific knowledge." It does not extend to "technical or other specialized knowledge," items explicitly contained in Rule 702. By implication, the proposed amendment would bar extension of *Daubert* to these other types of evidence - something *Daubert* leaves open.

The proposed Rule 702(b) would also reverse the present Evidence Rule 403 balancing test, which *Daubert* expressly applies to Rule 702 testimony. Rule 702(b) would require that the proffered opinion be "sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in Rule 403"; instead of the existing test which permits the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

The reverse balancing test used in Rule 702(b) raises serious problems, because it applies only to "scientific knowledge." The Rule 403 balancing test would continue to apply to opinion testimony that is "technical or other specialized knowledge." There is no apparent reason to apply different balancing tests to different types of opinions. The distinctions will generate unnecessary and wasteful litigation as resourceful lawyers attempt to discern differences in individual cases.

Section 102 would also add a new Evidence Rule 702(c), which excludes testimony from an expert who is entitled to receive "compensation contingent on the legal disposition of any claim with respect to which such testimony is offered." The need for the provision is unclear. Contingent fee expert testimony is prohibited in most districts under disciplinary rules regulating professional conduct.

Unlike disciplinary rules, the proposed Rule 702(c) would regulate and penalize contingent fee expert testimony by excluding the proffered evidence. Neither the provision's advantages nor adverse effects are fully understood. Moreover, the relationship between the new rule and the numerous statutory fee-shifting provisions is unclear. Expert testimony given in *pro bono* cases where payment of fees for experts is shifted to the losing party may be subject inadvertently to exclusion under Rule 702(c).

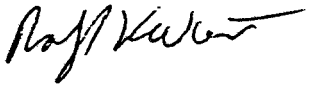
Although less likely, disputes may arise concerning large corporations' in-house experts whose livelihoods depend on their past records in testifying before

the courts or experts testifying in cases litigated on a contingency attorney-fee basis. The entire question of what "entitled to receive compensation" means in Rule 702(c) is a matter that needs careful attention and study.

Revision of evidence rules governing the admission of expert testimony in civil and criminal cases involves particularly complex issues that vary tremendously depending on the case. Under the Rules Enabling Act rulemaking process, every proposed amendment is subject to public comment and widespread examination by individuals who work daily with the rules and meticulous care in drafting by acknowledged experts in the area. Proposed amendment of Evidence Rule 702 is precisely the type of work best handled by the Act's rulemaking process.

The committee urges you to withdraw the proposed amendments to Evidence Rule 702 in section 102 from H.R. 10.

Sincerely yours,



Ralph K. Winter
Judge, United States Court
of Appeals

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RALPH K. WINTER, JR.
EVIDENCE RULES

April 28, 1995

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hyde:

I write to advise you of the concern of the Advisory Committee on Civil Rules of the Judicial Conference on the proposed amendments to Civil Rule 30(b) contained in H.R. 1445. The legislation would require stenographic recording of all oral depositions unless otherwise ordered by the court or stipulated by the parties. It would undo amendments to Rule 30(b) that took effect on December 1, 1993.

Present Rule 30(b) permits the party taking the deposition to record it by sound, sound-and-visual, or stenographic means. No court order or mutual consent is required. The rule, as amended, effectively removes impediments to parties who want to take advantage of newer, more efficient, and less-expensive recording technologies. It regulates only the recording of oral depositions, most of which never are used at trial. It does not regulate the manner in which courtroom proceedings are recorded.

The 1993 amendments to Rule 30 were adopted by the Supreme Court and transmitted to Congress only after the completion of a careful deliberative process, which included substantial public input. The 1993 amendments were originally considered in 1988 by the Advisory Committee on Civil Rules. A draft rule was published for public comment in September 1989, followed by public hearings in early 1990.

The draft proposal was modified in light of the comments, which disclosed potential problems with reliance at trial on tape-recorded testimony absent a written transcript. Another draft was published for public comment in August 1991, which generally required a written transcript of any deposition that was used in court. That proposal received hundreds of comments and was discussed at public hearings held in late 1991 and early 1992.

After further consideration, the present amendments to Rule 30 were approved in turn by the Advisory Committee, the Standing Rules Committee, and the Judicial Conference. On April 22, 1993, the Supreme Court adopted the rule without further revision and transmitted it to Congress. It took effect seven months later when Congress took no action.

Many of the criticisms voiced against the 1993 amendments to Rule 30 came from court reporters urging that video and audio tape recordings were unreliable and difficult to use at trial. The Advisory Committee was unanimous that these concerns were adequately dealt with in the revised draft.

Rule 30, as amended, contains safeguards to assure the integrity and utility of any tape or other non-stenographic recording, including the following:

(1) the officer presiding at the deposition must retain a copy of the recording unless otherwise ordered by the court or provided for by stipulation;

(2) the presiding officer must state certain identification information at the beginning of each unit of recording tape or other medium;

(3) any distortion of the appearance or demeanor of deponents or counsel by camera or recording techniques is expressly prohibited; and

(4) the court retains the authority to require a different recording method if the circumstances warrant.

The rule also permits any other party to designate an additional method (including stenographic means) to record the deposition at their expense. Finally, the rule requires the parties to furnish a written transcript if they intend to use a deposition recorded by non-stenographic means for other than impeachment purposes at trial or in a motion hearing.

The changes to Rule 30 were developed after full consideration of competing interests and policies regarding use of stenographic versus non-stenographic methods of recording depositions. The amendments allow the parties to decide which recording method will be used in a particular case and are designed to facilitate use of modern technology, while ensuring an accurate evidentiary record. The Advisory Committee is unaware of any problem with the operation of the rule as amended.

I urge you to consider opposing the undoing of the 1993 amendments to Civil Rule 30(b).

Sincerely yours,

Patrick E. Higginbotham
United States Court of Appeals

cc: Honorable John Conyers, Jr.
Honorable Carlos J. Moorhead
Honorable Patricia Schroeder

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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

May 31, 1995

The Honorable Bob Dole
United States Senate
Washington, D.C.

Re: S. 735--Comprehensive Terrorism Prevention Act of 1995

Dear Senator:

I am Chair of the Judicial Conference of the United States Advisory Committee on the Federal Rules of Appellate Procedure. In that capacity the Administrative Office of the U.S. Courts brought to my attention the provisions in S. 735, which you introduced and the Senate is currently considering, that amends Fed. R. App. P. 22, within the responsibility of my committee.

Pursuant to my telephone conversation with Marcie Adler of your office, I would not purport to comment on the policy decisions S. 735 makes. But I would like to point out two apparent errors or discrepancies in the draft of Rule 22 contained in S. 735 and to make, on behalf of my committee, one additional request.

1. One error or inconsistency is that in the bill's proposed amendments to 28 U.S.C. § 2253 (see p. 96) it provides that in either a habeas case (arising out of a state court conviction) or a § 2255 motion proceeding (arising out of a federal conviction) there is no right of appeal unless a circuit justice or judge issues a certificate of appealability. Yet in the proposed amendment to Fed. R. App. P. 22(b) the bill provides for either a district or circuit judge to issue the certificate of appealability (see p. 98). I note that the Taking Back our Streets bill introduced in the House, in its § 103, would amend that same Rule 22 to eliminate the district court process of issuing a certificate of probable cause (which your bill replaces with a more appropriately named certificate of appealability). S. 735 should either eliminate the district court from the Rule 22(b) amendments or reinstate the district court in the § 2253 amendments.

2. The second error or inconsistency is that although the amendment to § 2253 adds "a proceeding under section 2255" to those requiring a certificate of appealability (see p. 96) and the title to the amended Rule 22 includes with habeas corpus "and Section 2255 proceedings" (see p. 98), the text of the amended Rule 22(b) does not mention § 2255 proceedings, and by its words

would apply only to habeas cases. Either Rule 22(b) should be amended to include the reference to § 2255, or § 2253 should be amended to exclude § 2255 proceedings.

3. Finally, on behalf of the Advisory Committee, I make the following drafting request. We are currently in the process of revising all of the appellate rules, not to make changes of substance, but to rewrite them in simpler, more understandable English. We are aided by an expert on language as applied to the law--Bryan Garner--hired by the Judicial Conference's Standing Committee on Practice and Procedure, and by a style subcommittee of the Standing Committee. We have already made proposed changes to Rule 22, although they have not been presented for comment to the bench and bar nor to the Judicial Conference. If you enact a revised Rule 22 we would request that you follow our stylistic changes. I include below how we would request that it read if you make the substantive changes S. 735 proposes and make the corrections or alterations I mention above in paragraphs one and two to eliminate the district court from the certificate of appealability process and include § 2255 proceedings in the rule. Thus, the revision would read as follows (substituting for lines eighteen through twenty-five on page ninety-seven and one through twenty-five on page ninety-eight in § 703):

> (a) Application for Writ. -- An application for a writ of habeas corpus shall be made to the appropriate district court. If made to a circuit judge, the application shall be transferred to the appropriate district court. If a district court denies an application, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the writ.
>
> (b) Necessity of Certificate of Appealability. -- If the detention complained of in a habeas corpus proceeding arises from process issued by a state court or a motion proceeding pursuant to 28 U.S.C. § 2255, the applicant or movant cannot take an appeal unless a circuit judge issues a certificate of appealability. A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals. A certificate of appealability is not required when a state or its representative appeals.

If other changes are contemplated we would be happy to provide style suggestions. Thank you for considering our views.

Sincerely yours,

James K. Logan
Chair

JKL:sa

Item 3B

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

June 5, 1995

MEMORANDUM TO STANDING COMMITTEE

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

ADMINISTRATIVE ACTIONS

The following report briefly outlines some of the major initiatives undertaken by the office to improve its support service 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 record center...."

All rules-related documents from 1935 through 1990 have been entered on microfiche and indexed. The documents for 1991 will be catalogued and boxed for shipment to a government record center this summer. Congressional Information Services (CIS) - the publisher of the microfiche collection - will enter the documents on microfiche and incorporate them into existing indexes. The microfiche collection continues to prove useful to us and the public in researching prior committee positions.

The office is continuing its efforts to develop better methods and procedures in monitoring and retrieving rules-related records and materials. The private-sector consultant, who was hired to assess our needs and recommend an automated tracking and retrieval system, issued a final report recommending hardware (e.g. upgraded PC's, scanners, etc.) and software (off-the-shelf) and estimating costs. In accordance with the report's recommendations we are purchasing equipment and should begin

testing the system later this year.

When implemented the system should provide a searchable database with comprehensive indexing and cross referencing capabilities that will allow easy retrieval of information. We are exploring the feasibility of providing access to the document database to committee chairs and reporters, and possibly to other committee members and the general public at some point in the future. Full implementation of the project is scheduled for January 1997.

In the meantime we have improved our ability to acknowledge and follow-up each public comment or suggested rule change. Our new manual system of tracking comments continues to work well. The office received, acknowledged, and forwarded 261 comments and many suggestions to the appropriate committees over the last six months. The consecutive numbering of comments enabled the members of the committee to determine instantly whether they had received all comments (See attached). We are sending a follow-up letter to each individual and organization that submitted a comment, which explains the action taken by the pertinent advisory committee on the proposed rule change.

B. Distribution of Proposed Rule Changes

We are continuing our efforts to improve the distribution of proposed rule amendments for public comment. The reformatted title page of the publication containing proposed amendments to the rules highlighted the comment-seeking purpose of the publication and indicated which rules are being amended. The pamphlet summarizing the proposed amendments has proven very helpful.

In August 1994 Judge Stotler sent a letter to the president of each state bar requesting that it designate a point of contact to the rules committee to solicit and coordinate that state bar's comments on the proposed amendments. A follow-up letter was sent in November to those who failed to respond to the original request. The Standing Committee's outreach to the organized bar has resulted in 42 state bars designating a point of contact (See attached). We received comments on the proposed rules amendments published in September 1994 from 12 points of contacts, several of whom commented on more than one set of rules.

We have added the names of approximately 200 law school deans and 51 state Supreme Court Justices to the mailing list. We have also invested substantial time in updating and correcting the mailing list. An additional 200 attorneys and 100 professors will be added to a temporary list every six months until the list contains 2,500 names. If an individual does not comment on rules amendments published for comment for three years, the name will be removed from the list and replaced.

We are exploring the possibility of making the *Request for Comment* available on the Internet. This will allow wide distribution of the *Request for Comment*. Internet access would supplement, rather than replace, our current system of targeted mailing.

We will continue to monitor the level of response to the *Request for Comment* and take steps as necessary to improve our circulation of rules-related materials. The *Request for Comment* published on September 1, 1994, elicited 261 comments compared with 51 comments submitted on the rules amendments published in 1993.

C. Tracking Rule Amendments

We have updated the time chart indicating the status of all rules changes. It will be distributed at the meeting.

D. Miscellaneous

In March 1995 we delivered to William Suter, Clerk of the Supreme Court, a diskette containing a clean version of proposed rule amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, which were approved by the Judicial Conference at its September 1994 session. We also prepared the transmittal letters and orders necessary to forward the rules to Congress.

In May 1995 we provided the courts with the House Documents containing the amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, approved by the Supreme Court and transmitted by the Chief Justice to Congress on April 27, 1995. We provided copies to approximately 50 legal publishers.

The office has forwarded the minutes of the Spring 1994 committees' meetings to several legal publishers. The minutes from those meetings should be available on-line by the end of this month. The minutes of the Fall 1994 committees' meetings will be forwarded to the publishers in July.

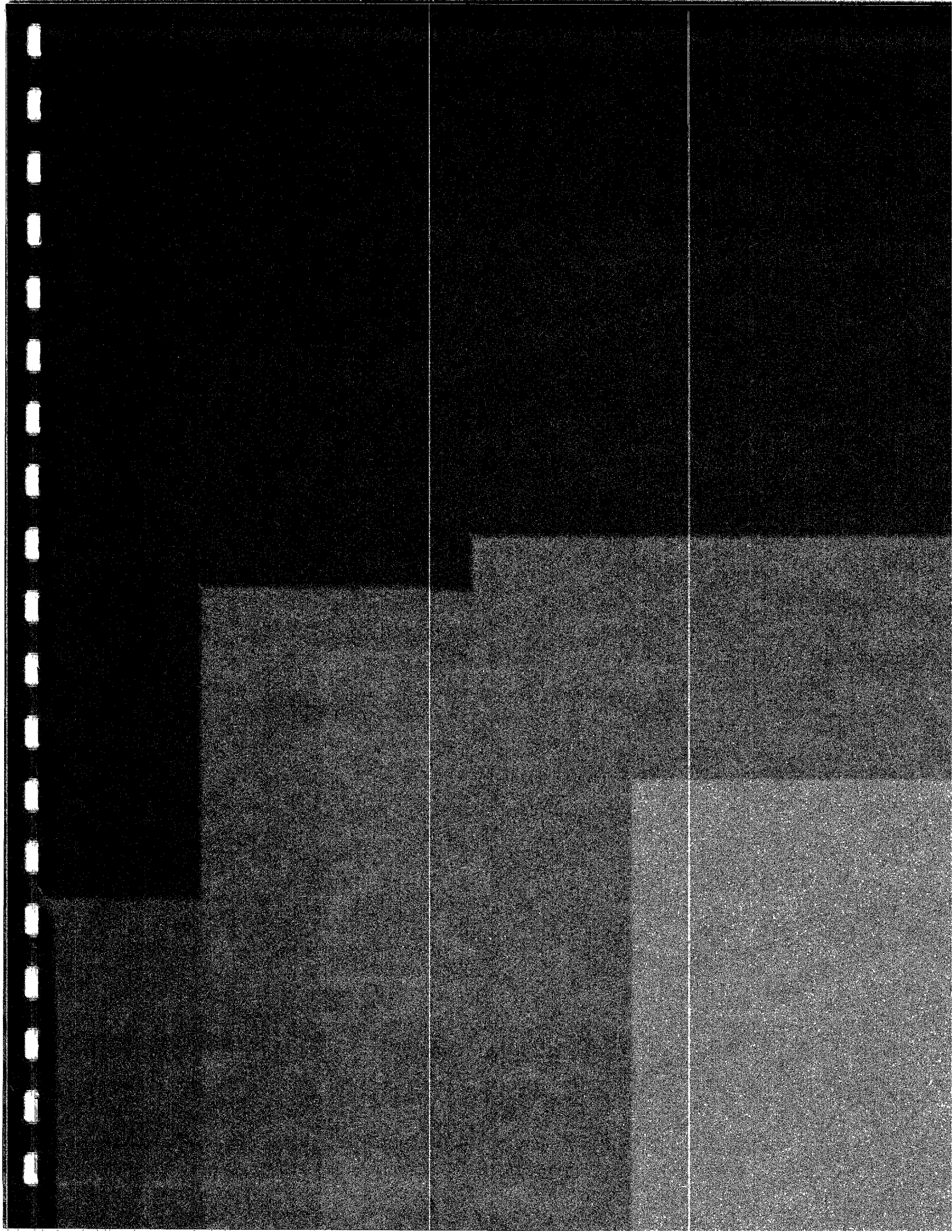
John K. Rabiej

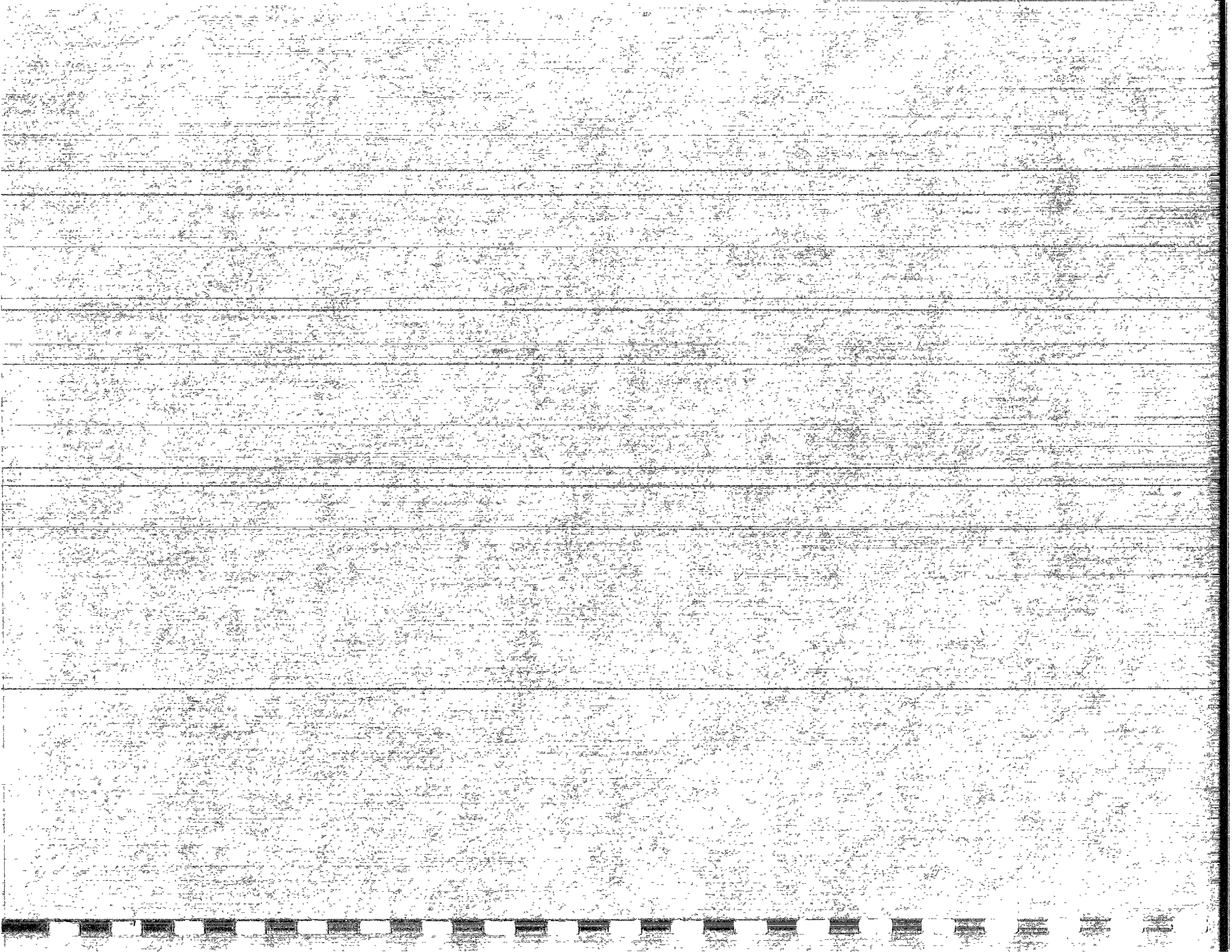
Attachments

STATE BAR ASSOCIATIONS' POINT OF CONTACTS

STATE	NAMES
ALABAMA	FRANK BAINBRIDGE
ALASKA	MONICA JENICK
ARIZONA	ANTHONY R. LUCIA
ARKANSAS	J. THOMAS RAY
CALIFORNIA	LEE ANN HUNTINGTON
COLORADO	FRANCES KONCILIJA
CONNECTICUT	FRANCIS J. BRADY
DELAWARE	GREGORY P. WILLIAMS
DISTRICT OF COLUMBIA	THOMAS EARL PATTON
FLORIDA	ANTHONY S. BATTAGLIA
HAWAII	MARGERY BRONSTER
IDAHO	DIANE MINNICH
ILLINOIS	DENNIS RENDLEMAN
INDIANA	THOMAS A. PYRZ
IOWA	DONALD THOMPSON
KANSAS	BRIAN G. GRACE
KENTUCKY	NORMAN E. HARNED
LOUISIANA	PATRICK A. TALLEY
MAINE	MARTHA C. GAYTHWAITE
MARYLAND	ROGER W. TITUS
MICHIGAN	JON R. MUTH
MINNESOTA	ERIC J. MAGNUSON
MISSOURI	ROBERT T. ADAMS
MONTANA	LAWRENCE F. DALY
NEBRASKA	TERRENCE D. O'HARE
NEW JERSEY	RAYMOND A. NOBLE
NEW MEXICO	CARL J. BUTKUS
NEW YORK	MARK H. ALCOTT
NORTH CAROLINA	JAMES M. TALLEY
NORTH DAKOTA	SANDI TABOR
OHIO	EUGENE P. WHETZEL
OREGON	HONORABLE ROBERT E. JONES
PENNSYLVANIA	H. ROBERT FIEBACH
RHODE ISLAND	BENJAMIN WHITE, III
SOUTH CAROLINA	WILLIAM HOWELL MORRISON

STATE	NAMES
TEXAS	RONALD F. EDERER
VERMONT	JOHN J. KENNELLY
VIRGINIA	MARY YANCEY SPENCER
WASHINGTON	TIM WEAVER
WEST VIRGINIA	THOMAS R. TINDER
WISCONSIN	GARY E. SHERMAN
WYOMING	RICHARD E. DAY





Appellate Rules Comments

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
AP-01	Bruce Comly French, Esq.	10/6	21	10/31	
AP-02	Jg. Cornelia G. Kennedy	10/14	25(c) & 27	"	
AP-03	Jg. Paul J. Kelly, Jr.	10/17	25(c)	"	
AP-04	Amer. Jewish Congress (Marc Stern & D. Simmons)	10/17	32	"	
AP-05	Lawrence A.G. Johnson, Esq.	10/17	32	"	
AP-06	P. Michael Jung, Esq.	10/17	27, 28, 32	"	
AP-07 (Also BK, CV, CR, & EV comments)	Arkansas Bar Assn (Robt. L. Jones III)	10/12	All	10/13	
AP-08	Jg. Dorothy W. Nelson	10/24	32	10/31	
AP-09	Robt. H. Rotstein, Esq.	10/24	32	10/31	
AP-10	Jg. Stephen S. Trott	10/31	32	11/1	
AP-11	Kathleen L. Millian, Esq.	11/3	32	11/15	
AP-12	Stephen A. Kroft, Esq.	11/4	32	11/15	
AP-13	Judge Procter Hug, Jr.	11/16	32	11/28	
AP-14	Jg. Ruggero J. Aldisert	11/16	32	11/28	
AP-15	Jg. Pasco M. Bowman	11/18	32	11/28	
AP-16	Jg. Floyd R. Gibson	11/18	32	11/28	
AP-17	Jg. Charles E. Wiggins	11/18	32	11/28	
AP-18	Jg. H. Robert Mayer	11/18	32	11/28	

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
AP-19	Jg. John T. Noonan, Jr.	11/23	32	11/28	
AP-20	Jg. J.L. Edmondson	11/28	32	12/5	
AP-21	Jg. Wilfred Feinberg	11/28	32	12/5	
AP-22	Cynthia M. Hora, Asst. Atty. Gen., State of Alaska	11/29	27	12/5	
AP-23	Prof. Eugene Volokh	12/1	32	12/5	
AP-24	Jg. Michael Boudin	12/5	28, 32	12/12	
AP-25	Jg. William C. Canby, Jr.	12/6	32	12/12	
AP-26	Jg. Bobby R. Baldock	12/6	32	12/12	
AP-27	Kevin M. Kelly	12/6	32	12/12	
AP-28	Jg. Stanley F. Birch, Jr.	12/6	32	12/12	
AP-29	John S. Moore, Esq.	12/6	25,26,27,28 (& CV 5)	12/12	
AP-30	Michael H. Hoffheimer, Assoc. Prof.	12/6	21 (& CV 5(e)	12/12	
			& EV 101-615)		
AP-31	Jg. Charles E. Wiggins	12/28	32	1/3/95	
AP-32	Jg. Thomas G. Nelson	12/8	32	1/3	
AP-33	Jg. James R. Browning	12/20	32	1/3	
AP-34	Sandra S. Ikuta, Esq. (for O'Melveny & Myers)	12/20	32	1/3	
AP-35	Brett M. Kavanaugh, Esq.	12/20	32	1/3	
AP-36	Jg. Jerome Farris	12/20	32	1/3	
AP-37	Jg. Richard F. Suhrheinrich	12/20	32	1/3	
AP-38	Stewart A. Baker, Esq.	12/21	32	1/3	

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
AP-39	Lawrence J. Siskind, Esq.	1/4/95	32	1/17	
AP-40	K. John Shaffer, Esq.	1/4/95	32	1/17	
AP-41	Diane M. Stahle, Esq. (McGiverin sent to Logan.)	1/4	32	1/17	
AP-42	Prof. Julie Rose O'Sullivan	1/5	32	1/17	
AP-43	Hon. Shirley M. Hufstedler	1/6	32	1/24	
AP-44	Prof. Michael S. Knoll	1/18	32	1/24	
AP-45	Judge Stephen Reinhardt	1/19	32	1/24	
AP-46	Peter W. Davis, Chair, 9th Circuit Advisory Committee on Rules of Practice	1/24	32	1/24	
AP-47	Judge Frank H. Easterbrook	1/24	32	1/25	
AP-48 (Also, BK,CV, CR, & EV	John W. Witt, on behalf of ABA Sec. of Urban, State & Local Govt. Law	1/10	General	1/30	
AP-49	Jg. Walter K. Stapleton	2/1	32	2/2	
AP-50 (Also AP-C)	Michael E. Rosman, Center for Individual Rights	2/1	25,26	2/2	
AP-51	Kelly M. Klaus, Esq.	2/13	32	2/27	
AP-52	Ch. Jg. J. Clifford Wallace -- 9th Circuit Ct. of Appeals' Executive Committee endorses comments submitted by 9th Circuit Advisory Committee on Rules of Practice & Procedure	2/13	32	2/28	

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
AP-53	Michael J. Mueller & Thomas Earl Patton (Bar Assn. of D.C.)	2/10	25,28,32	2/28	
AP-54	Jg. J. Daniel Mahoney	2/16	32	2/27	
AP-55	Aaron H. Caplan, Esq. (Perkins Coie)	2/13	32	2/27	
AP-56	Jg. J. Michael Luttig	2/16	32	2/27	
AP-57	Jg. Pierre N. Leval.	2/22	32	2/27	
AP-58	Jg. David A. Nelson	2/22	32	2/27	
AP-59	Richard Bisio, Esq. (Honigman Miller) for the State Bar of Michigan	2/24	32	2/27	
AP-60	Jg. Brian Barnett Duff	2/27	21	2/27	
AP-61	Gordon P. MacDougall, Esq.	2/27	25,26,27, 28,32	2/27	
AP-62	Pamela E. Dunn, Esq., Chair, Appellate Courts Committee, Los Angeles County Bar Assn.	2/27	21,25,26, 27,32	2/27	
AP-63 (Also BK, CV, & CR)	New Jersey State Bar Assn. (Raymond Noble)	2/28	21,25,26, 27,28,32	3/2	
AP-64 (Also CV & CR)	Mohave Community College	2/21	25, 32	3/9	
AP-65	Jesse A. Moorman, Esq.	2/27	32	3/7	
AP-66	L.A. Chapter Fed Bar Assn. (James H. Craig)	2/28	32	3/7	

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
Ap-67	Ninth Circuit Senior Advisory Board (Mark Mendenhall)	2/28	21,25,26, 27,28,32	3/7	
AP-68 (Also BK)	Postmaster General (by Mary Elcano, Gen. Counsel)	2/28	21,25,26 27	3/9	
AP-69	Holland & Hart Appellate Practice Group Joseph Halpern, etc.)	2/28	25, 32	3/7	
AP-70	Public Citizen Litigation Group (Paul Alan Levy)	2/28	25,26,27, 28,32	3/7	
AP-71	ABA Section of Litigation (David C. Weiner)	2/28	21,25,26, 27,28,32	3/7	
AP-72 (Also CV)	State Bar of Arizona (Bruce Hamilton)	2/28	21,25,26, 27,28,32	3/9	
AP-73	CEI (Competitive Enterprise Institute) (by Sam Kazman)	2/28	32	3/7	
AP-74	Jg. Hubert L. Will	3/1	21	3/7	
AP-75	Jg. Frank H. Easterbrook	3/2	32	3/8	
AP-76 (Also CV)	Chicago Council of Lawyers Fed. Courts Committee (Paul Mollica)	2/27	28, 32	3/9	
AP-77 (Also CR)	Witherspoon, Kelley, Davenport & Toole (by Leslie Weatherhead)	3/1	27, 32	3/9	
AP-78 (Also CR & EV)	District of Columbia Bar Section on Courts, Lawyers and the Administration of Justice (Anthony C. Epstein)	3/2	21,27,32	3/13	

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
AP-79 (Also CR comment & EV suggestion)	National Assn. of Criminal Defense Lawyers (Gerald Goldstein, William Genego & Peter Goldberger)	3/1	21,25,26, 27,32	3/9	
AP-80 Also BK & CV)	Assn. of the Bar of the City of New York Committee on Federal Courts (by Patricia M. Hynes)	2/28	25(a)(2)(1)	3/9	
AP-81 (Also AP suggestion)	Cathy A. Catterson, on behalf of the Clerks of the U.S. Courts of Appeals	3/6	32	3/9	
AP-82	James A. Shapiro	3/7	27	3/7	
AP-83	State Bar of California Committee on Appellate Courts (by Jean Perloff)	3/9	21,25,26, 27,28,32	3/13	
AP-84	State Bar of California Federal Courts Committee (Lee Ann Huntington, Chair)	3/9	21,25,26. 27,28,32	3/13	

Appellate Rules Suggestions

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
AP-A	Charles D. Cole, Jr., Esq.	10/3	32(a)	10/31	
AP-B	Alan B. Morrison, Public Citizen Litigation Gp	10/14	38	1/4/95	
AP-C (Also AP-50)	Michael E. Rosman, Center for Individual Rights	2/1/95	25,26	2/2/95	
AP-D (Also AP-81)	Cathy A. Catterson, on behalf of Clerks of U.S. Courts of Appeals	3/6	To create a form certification as an appendix to the rules	3/9	
AP-E (Also CV-J)	Brian Wolfman for Public Citizen Litigation Group	4/18	Appeal in certain class actions	5/3	
AP-F	William Lynn Johnson, Sr. (Prisoner)	4/11	3, 24	5/8	
"	Kenneth Earl Bonds (Prisoner)	4/11	3, 24	5/8	
AP-G	Jg. Stephen F. Williams	5/3	Rule 4	No need to acknowledge.	

Bankruptcy Rules Comments

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
BK-01 (Also AP, CV, CR, & EV comments)	Arkansas Bar Assn (Robert L. Jones III)	10/12	All	10/13	
BK-02 Also, suggestion	Glenn Gregory, Ch. Bank. Clerk, Utah	12/8	2002	12/21	
BK-03	Jg. Judith Klaswick Fitzgerald	12/28	Uniform numbering system for local bk. rules	1/24	
BK-04 (Also, AP,CV, CR,EV)	John W. Witt, on behalf of ABA Sec. on Urban, State & Local Govt. Law	1/10	General	1/30	
BK-05	Jg. Donal D. Sullivan	1/30	Uniform numbering system for local bk. rules	1/30	
BK-06	Susan J. Lewis (Matthew Bender)	2/1	2002(h)	2/3	
BK-07	Samuel L. Kay, Clerk	1/31	Uniform numbering system for local bk. rules	2/3	

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
BK-08	Marvin E. Jacob, Esq.	2/1	Election of Chapter 11 Trustees. (Too late for comment on Interim Rules.) To be sent out in Fall for publicatio n.	2/28	2/28
BK-09	Judge Tamara O. Mitchell	2/7	Uniform numberin g system for Local Bank. Rules.	2/15	
BK-10	Jg. Charles R. Wolle	2/17	Suggested interim bankrupt cy rules. To be sent out in Fall for publicatio n.	2/28	
BK-11	Lee Ann Huntington, State Bar of California	2/27	All	2/28	

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
BK-12	Sam G. Bratton II, Chair, Advisory Committee on Local BK Rules for Northern District of Oklahoma	2/27	Uniform Numbering System for Local BK Rules.	2/28	
BK-13	Jg. Steven A. Felsenthal	2/27	"	2/28	
BK-14	Francis F. Szczebak	2/27	4004	2/28	
BK-15	Richard M. Kremen for Maryland Bar Assn Com. on Creditors' Rights, Bankruptcy and Insolvency	2/28	2002, 3002	3/2	
BK-16	Becket & Watkins (by James T. Watkins)	2/28	2002	3/2	
BK-17 (Also AP,CV, & CR)	New Jersey State Bar Assn. (Raymond Noble)	2/28	Proposed changes are ministerial & don't require comment.	3/2	
BK-18 (Also AP)	Postmaster General (by Mary Elcano, Gen.Counsel)	2/28	2002,7004	3/9	
BK-19 (Also AP & CV)	Assn. of Bar of the City of New York Committee on Federal Courts (by Patricia M. Hynes)	2/28	5005(a)(2)	3/9	
BK-20	Jg. Barbara J. Sellers	3/7	Uniform numbering system for local bankruptcy rules	3/7	

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
BK-21	LEXIS-NEXIS (Monica Yunag)	3/13	Uniform numberin g system for local bankrupt cy rules	3/13	
BK-22	West Publishing Company (Michael R. Kimitch)	3/13	Uniform numbarin g system for local bankrupt cy rules	3/13	
BK-23	Thomas J. Yerbich, for Local BK Rules Committee of BK Sec., Alaska Bar Assn.	3/14	Uniform numberin g system for local bankrupt cy rules	3/15	
BK-24	Ch. Jg. John D. Schwartz	3/15	"	3/16	
BK-25	Patrick H. Tyler, Esq.	3/16	"	3/17	
BK-26	Lawrence T. Bick, Clerk	3/21	"	3/22	
BK-27	Barry K. Lander, Clerk	3/21	"	3/22	
BK-28	Lisa Sommers Gretchko, Esq., for the Eastern District of Michigan Bank. Ct.	4/18	"	5/3	
BK-29	Jg. John J. Thomas	4/25	"	5/3	
BK-30	Douglas J. Lustig	4/11	3002(c)(6)	5/3	

Bankruptcy Rules Suggestions

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
BK-A	Jg. Chas. E. Matheson	9/12	2004(c)	9/20	
BK-B	Harvey R. Miller, Esq.	9/29	2014	10/13	
BK-C	Jg. Steven W. Rhodes	10/11	Adopting local rules for nat'l.	11/30	
BK-D	Jg. Judith Klaswick Fitzgerald for Bank. Judges Advisory Comm.--W. Dist. PA	12/6	3010, 3015, 9014	12/21	
BK-E Also comm-ent	Glenn M. Gregory, Ch. Deputy Clerk, Utah	12/5	2002	12/21	
BK-X	Hon. Janet Reno	9/9/94	2002 & 6007	9/20	
BK-XX	Michael L. Temin, Esq.	9/29/94	9014	10/13	
BK-F	Martin Stone, Esq.	2/1/95	2002	2/15/ 95	
BK-G	Ike Shulman, Pres., National Assn. of Consumer Bankruptcy Attorneys	2/27	2016(b), and more.	4/5	
BK-H	Paul H. Arkinson, Esq.	2/27/95 Originally submitted 2/18/93	1001	3/14	
BK-I	Jon M. Wage, Esq. (Addressed to & held up at House Judiciary Committee. Forwarded to us by Peter Levinson.)	5/1	3002	5/8	

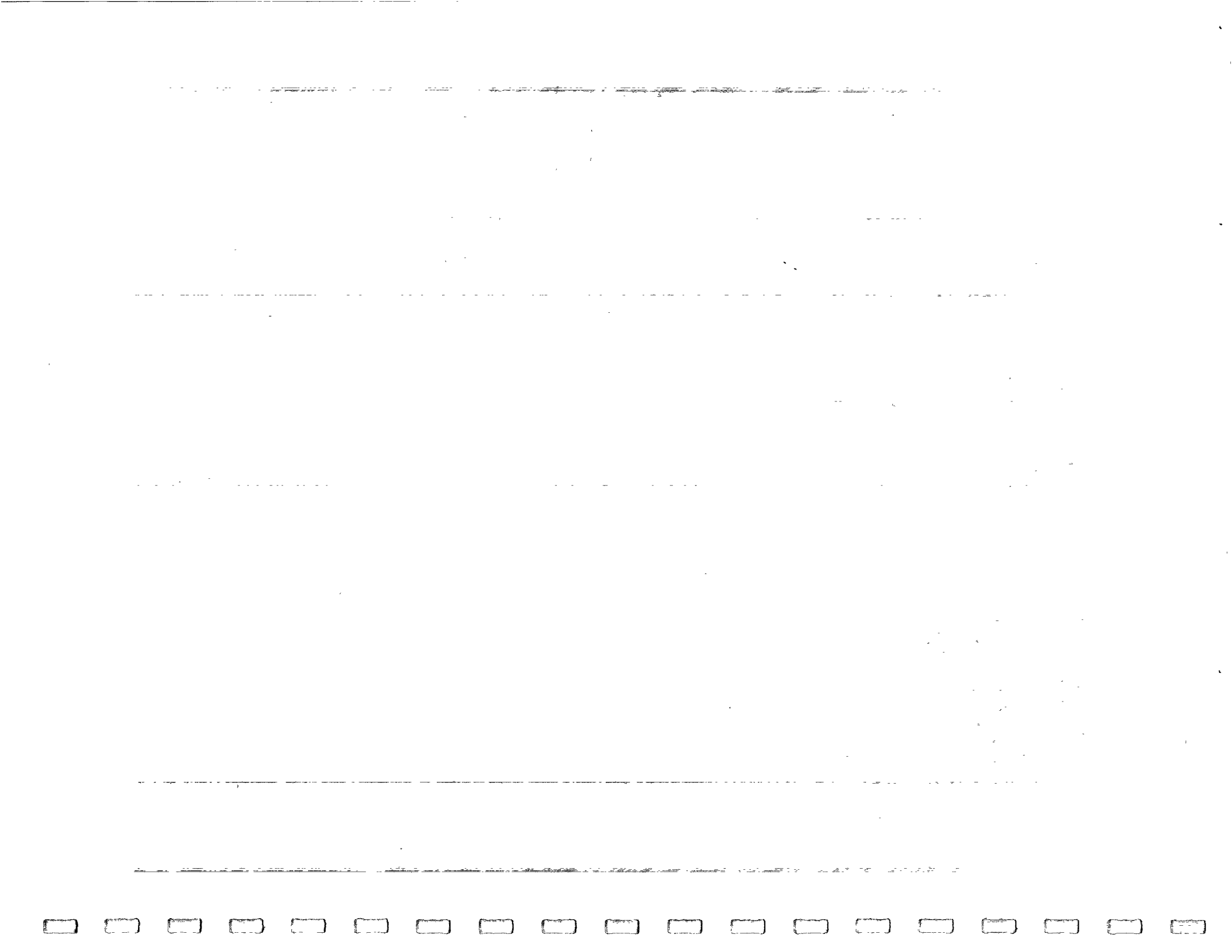
DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
BK-J	Donald Ross Patterson, Esq. (Addressed to & held up at House Judiciary Committee. Forwarded to us by Peter Levinson.)	5/1	3002	5/8	
BK-K	Jg. Richard L. Bohanon	5/8	To provide procedures to rule on an application for writ of assistance.	5/18	

Civil Rules Comments
1994

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
CV-01 (Also AP, BK, CR, & EV comments)	Arkansas Bar Assn. (Robert L. Jones III)	10/12	5(e)	10/13	
CV-02	Senator William S. Cohen	11/4	26(c)	11/16	
CV-03	John S. Moore, Esq.	12/6	5 (& AP)	12/12	
CV-04	Michael H. Hoffheimer, Assoc. Prof.	12/6	5(e) (& AP & EV)	12/12	
CV-05	Daniel J. O'Callaghan, Esq.	12/12	16(e) & 39(c)	1/24/95	
CV-06	Roy A. Klein, Esq. (re-buttal to Callaghan)	12/28	"	1/24	
CV-07	Michael A. Pope, Pres., Lawyers for Civil Justice	1/6/95	47	1/25	
CV-08 (Also, AP,BK, CR,EV)	John W. Witt, on behalf of ABA Sec. of Urban, State & Local Govt. Law	1/10	General	1/30	
CV-09 (Also AP,BK, & CR)	New Jersey State Bar Assn. (Raymond Noble)	2/28	5(e)	3/2	
CV-10 (Also AP & CR)	Mohave Community College	2/21	5(e)	3/9	

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
CV-11 (Also CV-21 and CV-G)	Michael E. Kunz, Clerk, E-Pa.	2/27	5(e)	3/9	
CV-12	Edward J. Klecker, Clerk, North Dakota	3/2	5(e)	3/9	
CV-13 (Also AP)	State Bar of Arizona (Bruce Hamilton)	2/28	5(e)	3/9	
CV-14 (Also AP)	Chicago Council of Lawyers Federal Courts Committee (Paul Mollica)	2/27	5(e)	3/9	
CV-15 (Also AP & BK)	Assn. of the Bar of the City of New York Committee on Federal courts (by Patricia M. Hynes)	2/28	5(e)	3/9	
CV-16 (Also CV-H)	Christopher R. Costa, Esq.	2/27	5	3/9	
CV-17	Jeddi Corporation (Ch. Jg. B. Paul Cotter, Jr.)	2/28	5	3/9	
CV-18	Lloyd R. Ziff, Esq. (Harkins Cunningham)	2/28	5(e)	3/9	
CV-19	Francis P. Newell, Esq. (Montgomery McCracken) (Immediate past chair Fed. Courts Committee, Philadelpha Bar Assn.)	2/28	5(e)	3/9	
CV-20	Ch. Jg. Edward N. Cahn	2/27	5(e)	3/9	
CV-21 (Also see CV 11 & CV G	Michael E. Kunz, Clerk	2/27	5(e)	3/9	

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
CV-22	Robert M. Landis for the Civil Justice Reform Act Advisory Group for the Eastern District of Pennsylvania	3/8	5(e)	3/9	
CV-23	Robert L. Baechtold, Esq.	3/9	5(e)	3/9	
CV-24	Michael D. Webb, Clerk	3/10	5(e)	3/13	
CV-25	Philadelphia Bar Assn. Federal Courts Committee (Ann B. Laupheimer)	3/10	5(e)	3/13	
CV-26	Kevin R. Casey on behalf of himself and the Litigation Practice and Procedure Committee of the Philadelphia Intellectual Property Law Assn.	3/15	5(e)	3/15	
CV-27	Jg. Edward R. Becker	3/16	5(e)	3/17	
CV-28	Stanley H. Cohen	4/5	5(e)	4/6	
CV-29	Jg. Richard M. Bilby	4/7	5(e)	4/13	
CV-30	Harold Berger, Esq.	4/7	5(e)	4/13	
CV-31	Richard H. Weare, Dist. Ct. Exec./Clerk	4/7	5(e)	4/13	
CV-32	Eugene Chovanes, Esq.	4/12	5(e)	4/13	
CV-33	Mari M. Gursky Shaw, Esq.	4/17	5(e)	4/19	
CV-34	Nancy M. Mayer-Whittington, Clerk	4/18	5(e)	5/3	



Civil Rules Suggestions

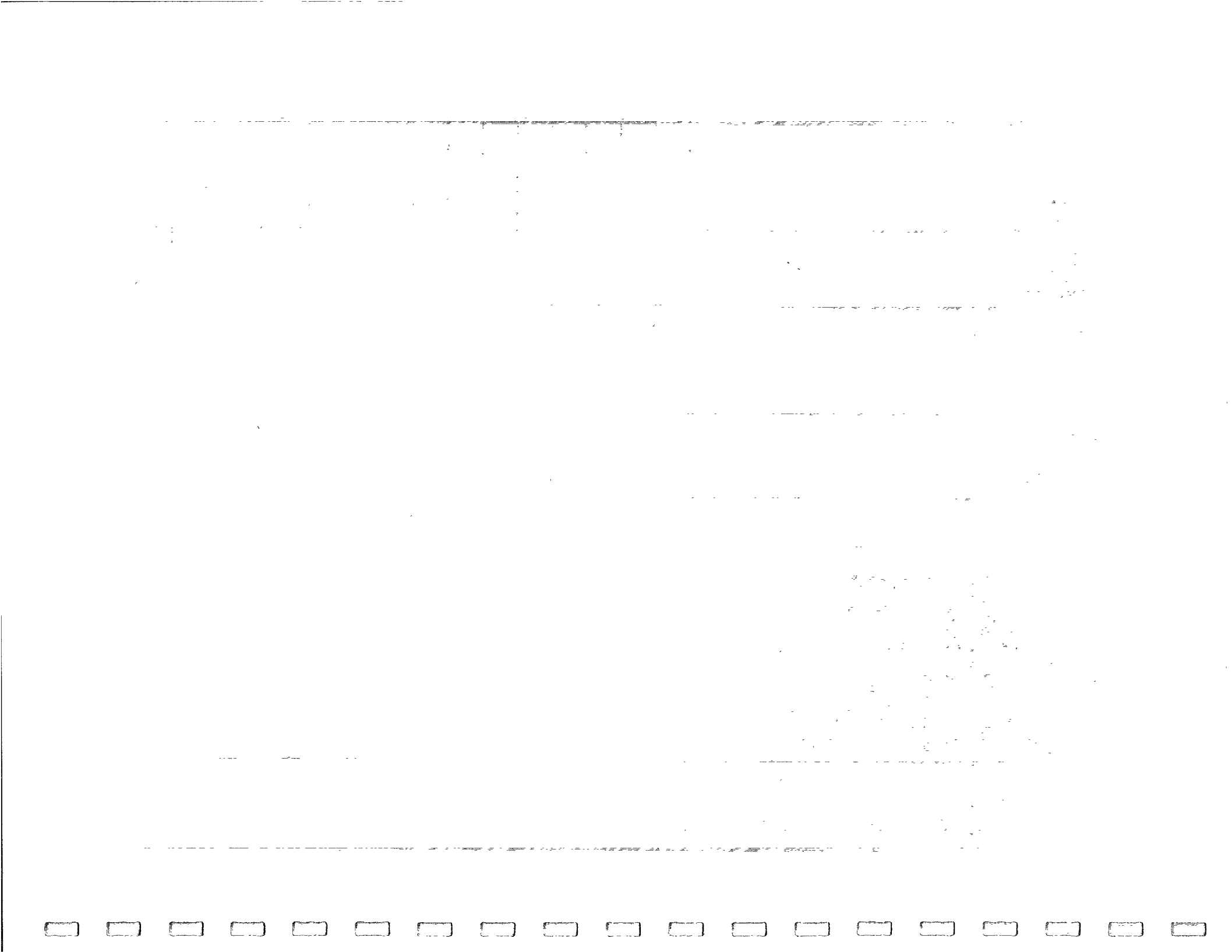
DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
CV-A	National Institute of Municipal Law Officers, Inc. (Donna Clemons-Sacks)	10/21	9 (Heightened Pleading)	11/1	
CV-B	Jg. John S. Martin, Jr.	10/20	15	10/24 by Higginbotham	
CV-C	Jg. Judith K. Guthrie	10/31	15(a)	11/1	
CV-D	Jg. Judith N. Keep	11/28	56(c)	12/21	
CV-E	Thomas F. Harkins, Jr., Esq.	11/30	26	12/21	
CV-F	EMPTY				
CV-G (Also CV-11, and CV-21)	Michael E. Kunz, Clerk	2/27	5(b) & 77(d)	3/9	
CV-H (Also CV-16)	Christopher R. Costa, Esq.	2/27	5(a) and/or (b)	3/9	
CV-I	Philip A. Berns, U.S. Justice Dept., Civil Div.	2/8	Admiralty Rules B & C	No need to acknowledge.	
CV-J (Also AP-E)	Brian Wolfman for Public Citizen Litigation Group	4/18	Civil Rule 23	5/3	
CV-K (Also EV-C)	Councilor John McDonough (Forwarded by Sen. Wm. Cohen)	4/18	Loser pays	5/3	

Criminal Rules Comments
1994

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
CR-01	Jg. Graham C. Mullen	9/22	16	9/23	
CR-02 (Also AP, BK, CV, and EV comments)	Arkansas Bar Assn. (Robert L. Jones III)	10/12	16	10/13	
CR-03	Jg. Prentice H. Marshall	10/4	16	11/1	
CR-04	Jg. James E. Seibert	11/15	16	11/15	
CR-05 *Also reqst testify	David A. Schwartz, Esq.	11/16	16	11/29	
CR-06	Edward F. Marek, Esq.	11/23	16	11/29	
CR-07	Wm. H. Jeffress, Jr., Esq.	12/8	16	12/12	
*Reqst Testify	Plato Cacheris: Peter Vaira for Amer. Clg. Trial Lawyers	11/29	General	12/6	
*Reqst Testify	Lee T. Lawless -- Fed. Pub. Defenders			12/21	
CR-08 *Also request testify	Norman Sepenuk, Esq.	12/19	16	1/4/95	
CR-09	Michael H. Leonard, Esq.	1/26/95	16	1/30	

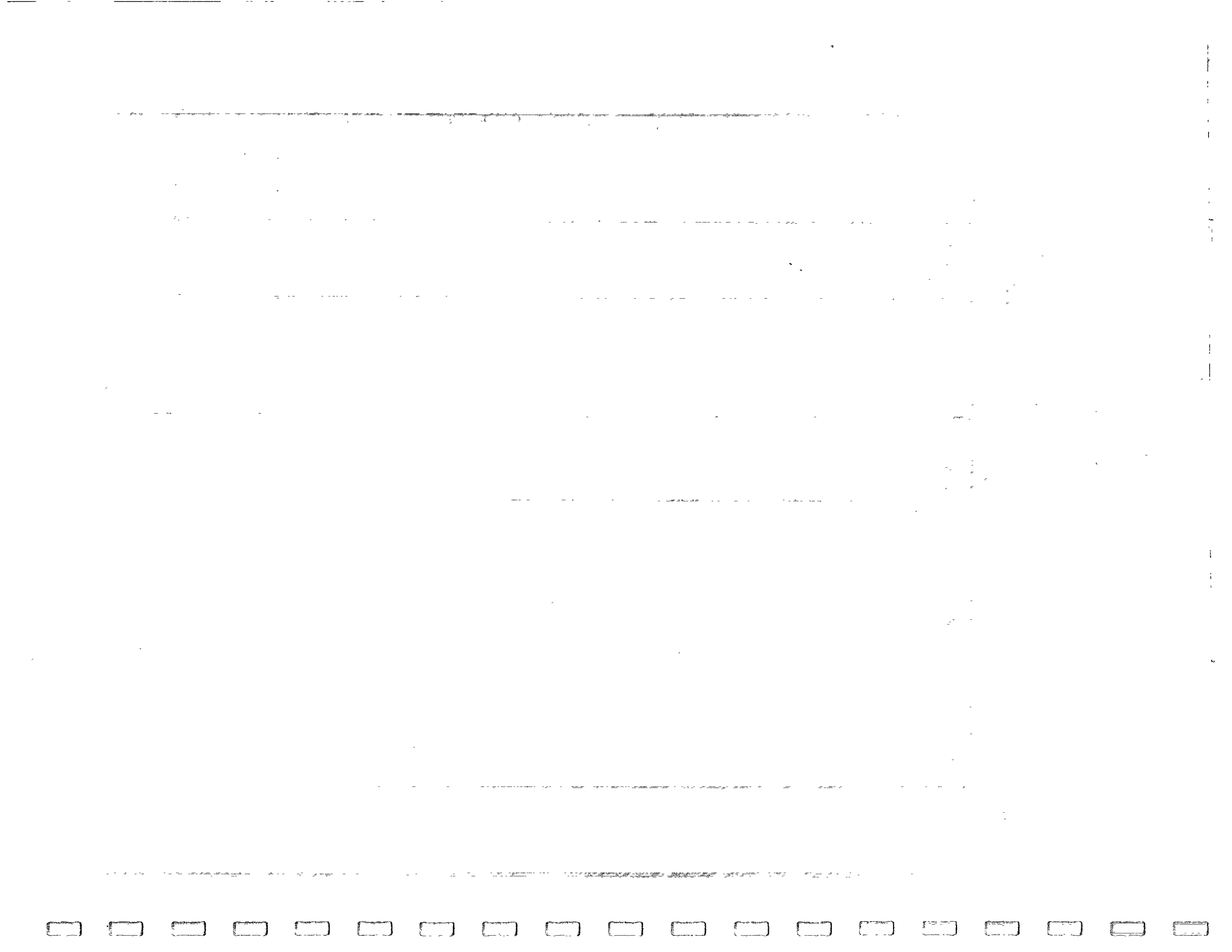
DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
CR-10 (Also AP,BK, CV,& EV)	John W. Witt, on behalf of ABA Sec. of Urban, State & Local Govt. Law	1/10	General	1/30	
CR-11	Akron Bar Assn (E. Jane Bell, Pres.)	2/6	16	2/7	
CR-12 (Also AP,BK, & CV)	New Jersey State Bar Assn. (Raymond Noble)	2/28	16, 32	3/2	
CR-13	Irvin B. Nathan	2/21	16	Jensen responded 2/17	
CR-14 (Also AP & CV)	Mohave Community College	2/21	16, 32	3/9	
CR-15	Jg. Paul M. Rosenberg	2/27	16	3/7	
CR-16	Federal Public and Community Defenders	2/27	16	3/7	
CR-17	State Bar of California Committee on Federal Courts (Lee Ann Huntington)	2/28	16, 32	3/7	
CR-18	Federal Bar Assn. Criminal Law Committee, Philadelphia Chapter	2/28	16	3/7	
CR-19	ABA	2/28	16	3/7	
CR-20	Maryland Bar Assn. Section of Criminal Law & Practice	3/1	16	3/7	

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
CR-21 (Also AP)	Witherspoon, Kelley, Davenport & Toole (by Leslie Weatherhead)	3/1	16	3/9	
CR-22 Also AP & EV)	District of Columbia Bar Section on courts, Lawyers and the Administration of Justice (Anthony Epstein)	3/2	16	3/13	
CR-23 (Also AP comments & EV suggestion)	National Assn. of Criminal Defense Lawyers (Goldstein, Genego, & Goldberger)	3/1	16, 32	3/9	



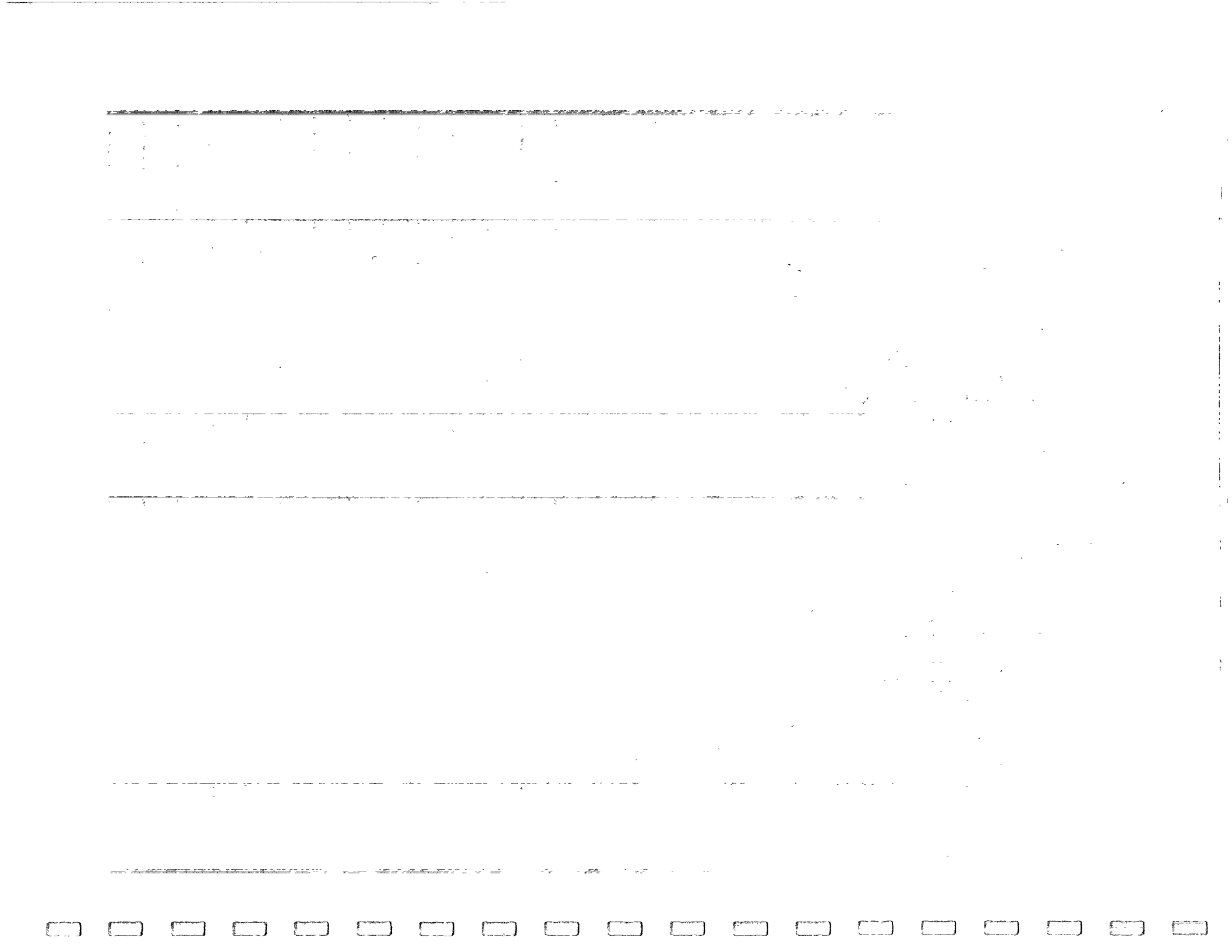
Criminal Rules Suggestions

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
CR-A	Jg. Prentice H. Marshall	9/30	16	11/1	
CR-B	Jg. David G. Lowe	1/10/95	58(d)(1)	1/17/95	
CR-C	Robert L. Potter, Esq.	2/6	Defendent's Testimonial Rights	4/5	
CR-D	Michael R. Levine, Asst. Fed. Defender	3/3	26.2	4/5	



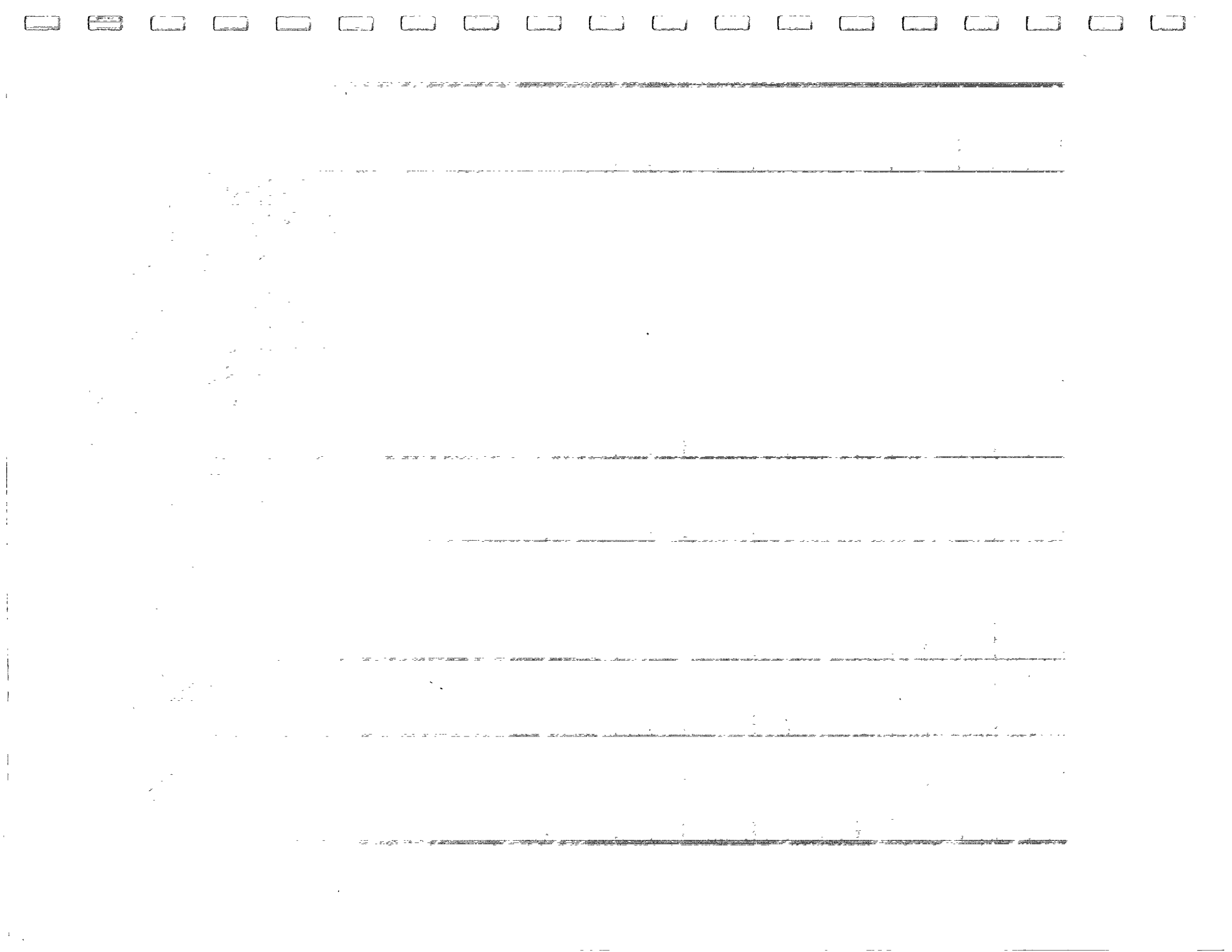
Evidence Rules Comments (Excluding 413-415)

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
EV-27	Jg. Robert B. Propst	9/27	611	9/28	
EV-32	Jg. Prentice H. Marshall	10/4	101-615	10/11	
EV-66	Robert L. Jones III, Pres., Arkansas Bar Assn.	10/12	Proposed amend to AP, BK, CV, CR, & EV Rules.	10/13	
EV-86	Michael H. Hoffheimer, Assoc. Prof.	12/6	101-615	12/12	
EV-87	John W. Witt, on behalf of ABA Sec. of Urban, State & Local Govt. Law	1/10/95	General. Also, AP, BK, CV, & CR.	1/30/ 95	
EV-88	DC Bar Section on Courts, Lawyers and the Administration of Justice (Anthony Epstein)	3/2	409, 601, & 613	3/13	



Evidence Rules Suggestions

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
EV-A	National Assn. of Criminal Defense Lawyers (Goldstein, Genego & Goldberger)	3/1	416	3/9	
EV-B	Edward F. Marek, Esq.	3/31	1101(d)(3)	4/6	
EV-C (Also CV-K	Councilor John F. McDonough (Forwarded by Sen. Wm. Cohen)	4/18	To protect the confidentiality of police internal affairs investigation reports	5/3	



Standing Suggestions

DOC #	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE(S)	DATE RESP	FOLLOW UP
ST-A	Dennis A. Rendleman on behalf of the Illinois State Bar Assn.	2/27/95	Proposed a uniform rule for discipline of attorneys admitted to practice before the federal courts.	2/28	

Item 4

Federal Judicial Center
Research Division

(202) 273-4072

memorandum

DATE: May 25, 1995

TO: Hon. Alicemarie H. Stotler, Chair
Standing Rules Committee

FROM: James B. Eaglin, Assistant Director JBE

SUBJECT: Update of FJC research projects undertaken for the various Rules Committees

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The attached brief update of current FJC projects undertaken for the various rules committees is provided at the request of John Rabiej of the Rules Office. We will be happy to provide additional information on any of the projects listed. Please continue to view us a resource to all of the rules committees.

Update of FJC Projects Undertaken for Rules Committees

Application of Fed. R. Civ. P. 26(a), (d), and (f) in the District Courts. In March, 1995, the Center distributed a report summarizing on a district-by-district basis the courts' responses to the 1993 amendments to Fed. R. Civ. P. 26. The detailed table that makes up the heart of the report shows which districts have elected to follow specific sections of the federal rule and which have opted out. It also shows whether the courts have requirements for disclosure other than those provided by the federal rule. The report was developed to aid the work of the Committee on Rules of Practice and Procedure, the Advisory Committee on Civil Rules, and the Committee on Court Administration and Case Management.

Application of Fed. R. Civ. P. 26(a) and (f) in Bankruptcy Cases. To assist the Advisory Committee on Bankruptcy Rules, the Center recently reviewed whether individual bankruptcy courts had opted out of the new disclosure and meeting requirements of Fed. R. Civ. P. 26. A summary of the Center's work was presented to the Advisory Committee at its September meeting. A report of this work was distributed to the chief bankruptcy judges and clerks of the bankruptcy courts early this winter and is available from the Center on request. The Center prepared a similar report on the district courts' responses to Rule 26.

Class Actions. The Advisory Committee on Civil Rules has asked the Center to conduct a study of class action litigation, focusing on the incidence of class action activity, the extent of litigation over issues of certification and categorization of classes, the relationship of settlements and awards to attorneys' fees, and other issues related to the advantages and disadvantages of proposed changes to Fed. R. Civ. P. 23. The Center gave the advisory committee an initial report in October, which presented national statistics regarding the number and types of class actions. That report was retracted in January after discovering problems with the national statistics on class actions. A report on class action activity in four districts (E.D. Pa., N.D. Calif., S.D. Fl., and N.D. Ill.) will be given to the advisory committee in the late summer or fall of 1995. A preliminary report was provided to participants in the April, 1995, New York University Conference on Class Actions and, after consultation with members of the advisory committee, certain data from that report on class action securities litigation were provided to staff in the Justice Department, Congress, and the SEC.

Rule 11. The Advisory Committee on Civil Rules has asked the Center to prepare a proposal for a study of the effects of the 1993 amendments to F. R. Civ. P. 11. The purpose of the study is to determine the extent of the asserted problem with abusive civil litigation and the role of the 1983 and 1993 versions of Rule 11 in helping to control abuse. The Center is preparing a proposal to survey lawyers and judges in a sample of recently terminated civil cases to determine their experiences under the two versions of Rule 11 and their views of the effects each version has had. Questionnaires are scheduled for mailing during the spring of this year.

Survey of the Bench and Bar Regarding the Federal Rules of Bankruptcy Procedure. The Advisory Committee on Bankruptcy Rules is undertaking a comprehensive study to identify necessary modifications, if any, to the Federal Rules of Bankruptcy Procedure and related forms. At its September meeting, that Committee asked the Center to survey the bench and bar to ascertain their views about the scope, format, and organization of the rules. The questionnaire developed by the Center includes six questions concerning the scope, format, and organization of the Federal Rules of Bankruptcy Procedure and related forms, and an additional question about local bankruptcy rules. The questionnaire is exploratory and open-ended so the Committee can be made aware of the range of views about the rules. A preliminary report of the survey results was presented to the Bankruptcy Rules Committee at its March meeting; a final report will be completed this summer.

Protective Orders and Sealed Court Records. In response to Congressional interest, the Center undertook a study of district court practices that restrict access to court records in civil cases. The study was expanded in May 1994 in response to a request from the Advisory Committee on Civil Rules for assistance in assessing the need for rule revisions. Practices of concern include (1) protective orders that restrict disclosure of discovered information; (2) sealed settlement agreements that restrict discussion of the nature of the case, the materials discovered, and the amount and terms of the settlement; and (3) orders that seal court documents or cases in their entirety. To date the study has concentrated on the use of protective orders in three district courts (D. DC., E.D. Pa., and E.D. Mich.). An interim report was submitted to the advisory committee in October, and a more comprehensive report will be completed in early summer.

Civil Rule 49 (Special Verdicts and Interrogatories). While not specifically requested by one of the rules committee, the Center is examining how district courts use special verdicts and general verdicts with interrogatories, the two alternatives to the general verdict provided by Civil Rule 49, with the goal of developing guidelines for their use. We expect to have a report in late summer.

Item 5A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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: June 5, 1995

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 21, 25, 26, and 27, approved by the Advisory Committee on Appellate Rules at its April 17 and 18 meeting. The Advisory Committee requests that the Standing Committee approved these amended rules and forward them to the Judicial Conference.

The proposed amendments were published in September 1994. A public hearing was scheduled for January 23, 1995, in Denver, Colorado. Because there were no requests to appear, the hearing was canceled. 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 been made since publication.
- Part A(4) summarizes the comments.

B. Proposed amendments to Federal Rules of Appellate Procedure 26.1, 28, 29, 32, 35, and 41, approved by the Advisory Committee on Appellate Rules at its April 17 and 18 meeting. The Advisory Committee requests the Standing Committee's approval of these proposed amendments for publication.

The Advisory Committee actually requests republication of Rules 28 and 32. Those rules were also published last September along with the rules discussed in part A of this report. After considering the written comments, the Committee recommends what it believes are significant changes in these published rules and requests republication to provide an additional period for public comment.

The Advisory Committee requests initial publication of proposed amendments to Rules 26.1, 29, 35, and 41.

- Part B(1) of this report summarizes the proposed amendments.
- Part B(2) includes the text of the proposed amendments.
- Part B(3) is the Gap Report for Rules 28 and 32.
- Part B(4) summarizes the public comments on Rules 28 and 32.

II. Information Items

Part II of this report includes the Advisory Committee's Table of Agenda Items which indicates the status of proposed amendments under consideration by the Committee.

III. Minutes

Part III of the report is draft minutes of the Advisory Committee Meeting held April 17 and 18 in Pasadena, California. The minutes have not yet been approved by the Advisory Committee.

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

SUMMARY OF PROPOSED RULE AMENDMENTS TO BE FORWARDED TO THE JUDICIAL CONFERENCE

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 trial court clerk is, however, served with a copy of both the petition and the order disposing of the petition. The judge is permitted to appear to oppose issuance of the writ only if the court of appeals invites or 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 dispatched to the clerk by a commercial carrier for delivery within three calendar days. The amendments also require that a party using the mailbox rule must certify in the proof of service that the brief or appendix was mailed or delivered to the commercial carrier on or before the last day for filing. Subdivision (c) is also amended to permit service on other parties by commercial carrier. Amended subdivision (c) further provides that when reasonable, service on other parties should be by a manner at least as expeditious as the manner used to file the paper with the court.

3. The proposed amendment to Rule 26 makes the three-day extension for responding to a document served by mail also applicable whenever the party being served does not receive the document on the date of service recited in the proof of service.

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 time for responding to a motion is expanded from 7 days to 10 days. The amendments also make it clear that a reply to a response may be filed; a reply must be filed within 5 days after service of the response. A motion or a response to a motion must not exceed 20 pages and a reply to a response must 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.

PROPOSED RULE AMENDMENTS TO BE FORWARDED TO THE JUDICIAL CONFERENCE[1]

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 shall file a petition ~~therefor~~ with the circuit 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. The party shall also file a copy

[1] The shaded text indicates changes made by the Advisory Committee after publication.

with the clerk of 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~~

(A) The petition must be titled "In re [name of petitioner]."

(B) The petition must state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issues presented by the petition; and

(iv) the reasons why the writ should issue;

(C) The petition must include copies of any order or opinion or parts of the record ~~which~~ that may be essential to ~~an~~ understand~~ing of~~ the matters set forth in the petition.

(3) ~~Upon receipt of~~ When the clerk receives the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) *Denial; Order Directing Answer; Briefs; Precedence.* ~~If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named~~

~~respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~

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

(3) Two or more respondents may answer jointly.

(4) The court of appeals may invite or order the trial court judge to respond or may invite an amicus curiae to do so. The trial court judge may not respond unless invited or ordered to do so by the court of appeals.

(5) If briefing or oral argument is required, ~~T~~ the clerk shall 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.

(7) The circuit clerk shall send a copy of the final disposition to the clerk of the trial court.

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

(d) *Form of Papers; Number of Copies.*-- All papers may be typewritten. An original and three copies must be filed unless the court requires the filing

of a different number by local rule or by order in a particular case.

Committee Note

In most instances, a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, *e.g., Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (7th Cir. 1971). In order to change the tone of the rule and of mandamus proceedings generally, the rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to the writs as being "directed to a judge or judges."

Subdivision (a). Subdivision (a) applies to writs of mandamus or prohibition directed to a court, but it is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. The amendments to subdivision (a) speak, however, about mandamus or prohibition "directed to a court." This language is inserted to distinguish subdivision (a) from subdivision (c). Subdivision (c) governs all other extraordinary writs, including a writ of mandamus or prohibition directed to an administrative agency rather than to a court and a writ of habeas corpus.

The amendments require the petitioner to file a copy of the petition with the clerk of the trial court. This will alert the trial court to the filing of the petition. This is necessary because the trial court judge is not treated as a respondent and, as a result, is not served. A companion amendment is made in subdivision (b). It requires the circuit clerk to send a copy of the disposition of the petition to the trial court clerk.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge may not respond unless the court invites or orders the judge to respond.

The court of appeals ordinarily will be adequately informed not only by the opinions or statements made by the trial court judge contemporaneously with the 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 invite or 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.

Subdivision (c). The changes are stylistic only. No substantive changes are intended.

Rule 25. Filing, Proof of Filing, and Service, and Proof of Service

(a) *Filing.*

(1) *Filing with the Clerk.* A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) *Filing: Method and Timeliness.*

(A) *In general.* Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, ; ~~except that~~

(B) *A brief or appendix.* ~~briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used~~ A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to the clerk for delivery within 3 calendar days by a third-party commercial carrier.

(C) *Inmate filing.* ~~Papers~~ A paper filed by an inmate confined in an institution ~~are~~ is timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of ~~papers~~ a paper by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that

first-class postage has been prepaid.

(D) *Electronic filing.* A court of appeals may, by local rule, permit papers to be filed or signed by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States. A paper filed by electronic means in accordance with this rule constitutes a written paper for the purpose of applying these rules.

(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 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.~~

(4) *Clerk's Refusal of Documents.* The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

* * * * *

(c) *Manner of Service.* Service may be personal, ~~or~~ by mail, or by third party commercial carrier for delivery within 3 calendar days. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a ~~clerk or other~~

responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(d) *Proof of Service; Filing.* A paper Papers presented for filing must contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

* * *

Committee Note

Subdivision (a). The amendment deletes the language requiring a party to use "the most expeditious form of delivery by mail, except special delivery" in order to file a brief using the

mailbox rule. That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The amendment makes it clear that it is sufficient to use First-Class Mail. Other equally or more expeditious classes of mail service, such as Express Mail, also may be used. In addition, the amendment permits the use of commercial carriers. The use of private, overnight courier services has become commonplace in law practice. Expedited services offered by commercial carriers often provide faster delivery than First-Class Mail; therefore, there should be no objection to the use of commercial carriers as long as they are reliable. In order to make use of the mailbox rule when using a commercial carrier, the amendment requires that the filer employ a carrier who undertakes to deliver the document in no more than three calendar days. The three-calendar-day period coordinates with the three-day extension provided by Rule 26(c).

Subdivision (c). The amendment permits service by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of the paper. The amendment also expresses a desire that when reasonable, service on a party be accomplished by a manner as expeditious as the manner used to file the paper with the court. When a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner -- meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard is included so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. If use of an equally expeditious manner of service is not reasonable, use of the next most expeditious manner may be. For example, if the paper is filed by hand delivery to the clerk's office but the other parties reside in distant cities, service on them need not be personal but in most instances should be by overnight courier. Even that may not be required, however, if the number of parties that must be served would make the use of

overnight service too costly. A factor that bears upon the reasonableness of serving parties expeditiously is the immediacy of the relief requested.

Subdivision (d). The amendment adds a requirement that when a brief or appendix is filed by mail or commercial carrier, the certificate of service state the date and manner by which the document was mailed or dispatched to the clerk. Including that information in the certificate of service avoids the necessity for a separate certificate concerning the date and manner of filing.

Rule 26. Computation and Extension of Time

* * * * *

(c) *Additional Time after Service by Mail or Commercial Carrier.* Whenever a party is required or permitted to ~~do an~~ act within a prescribed period after service of a paper upon that party, ~~and the paper is served by mail,~~ 3 calendar days ~~shall be~~ are added to the prescribed period unless the paper is delivered on or before the date of service stated in the proof or acknowledgement of service.

Committee Note

The amendment is a companion to the proposed amendments to Rule 25 that permit service on a party by commercial carrier. The amendments to subdivision (c) of this rule make the three-day extension applicable not only when service is accomplished by mail, but whenever delivery to the party being served occurs later than the date of service stated in the proof or acknowledgement of service. When service is by mail or commercial carrier, the proof of service recites the date of mailing or delivery to the commercial carrier. If the party being served receives the paper on a later date, the three-day extension applies. If the party being served receives the paper on the same date as the date of service recited in the proof of service, the three-day extension is not available.

The amendment also states that the three-day extension is three calendar days. Rule 26(a) states that when a period prescribed or allowed by the rules is less than seven days,

intermediate Saturdays, Sundays, and legal holidays do not count. Whether the three-day extension in Rule 26(c) is such a period, meaning that three-days could actually be five or even six days, is unclear. The D.C. Circuit, recently held that the parallel three-day extension provided in the Civil Rules is not such a period and that weekends and legal holidays do count. *CNPQ v. Inter-Trade, 50 F.3d 56 (D.C.Cir. 1995).* The Committee believes that is the right result and that the issue should be resolved. Providing that the extension is three calendar days means that if a period would otherwise end on Thursday but the three-day extension applies, the paper must be filed on Monday. Friday, Saturday, and Sunday are the extension days. Because the last day of the period as extended is Sunday, the paper must be filed the next day, Monday.

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 expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule 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; Number of Copies.* All papers relating to a motion may be typewritten. An original and three copies must be filed unless the court requires~~

~~the filing of a different number by local rule or by order in a particular case.~~

(a) *In General.*

(1) *Application for Relief.* An application for an order or other relief is made by motion unless these rules prescribe another form.

(2) *Content of a Motion.*

(A) *Grounds and relief sought.* A motion must state with particularity the grounds for the motion and the relief sought. The motion must contain the legal argument necessary to support it.

(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 determining the motion may be

attached.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's 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.*

(A) Any party may file a response to a motion. Rule 27(a)(2) applies to a

response. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time, with the following exceptions:

(i) a motion for a procedural order is governed by Rule 27(b); and

(ii) a motion authorized by Rules 8, 9, 18, or 41 may be acted upon after reasonable notice.

(B) A response may include a motion for affirmative relief. The time for response to the new motion, and for reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must, under Rule 27(d)(2)(D), alert the court to the request for relief.

(4) *Reply to Response.* The moving party may

file a reply to a response. A reply must be filed no later than 5 days after service of the response, unless the court shortens or extends the time. A reply must not reargue propositions presented in the motion or present matters that do not reply to the response.

(b) *Disposition of a Motion for a Procedural Order.* A motion for a procedural order -- including any motion under Rule 26(b) -- may be acted upon at any time without awaiting a response. A court may, by rule or by order in a particular case, authorize the clerk to dispose of motions for specified types of procedural orders. A party adversely affected by the court's, or the clerk's, disposition may file a motion requesting reconsideration, vacation, or modification of such action. Timely opposition to a motion that is filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion

requesting that relief must be filed.

(c) *Power of a Single Judge to Entertain a Motion.* A single judge of a court of appeals may act on any motion, but may 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 only the court may act on any motion or class of motions. The court may review the action of a single judge.

(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.

(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.

(C) The pages must be stapled or bound at the upper-left-hand corner.

(D) A cover is not required but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed.

(3) *Page limits.* A motion or a response to a motion must not exceed twenty pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the

court permits or directs otherwise. A reply to a response must not exceed ten pages.

(4) *Number of Copies.* An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

(c) *Oral Argument.* A motion will be decided without oral argument unless the court orders otherwise.

Committee Note

The rule has been entirely rewritten.

Subdivision (a). Paragraph (1) retains the language from the old rule 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 trial court's opinion or agency's 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 except that the time for responding has been expanded to 10 days rather than 7 days. Because the time periods in the rule apply to a substantive motion as well as a procedural motion, the longer time period may help reduce the number of motions for extension of time, or at least provide a more realistic time frame within which to make and dispose of such a motion. 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 must 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. As a general matter, a reply must not "reargue propositions presented in the motion or present matters that do not reply to the response." Sometimes, matters relevant to the motion arise after the motion is filed; treatment of such matters

in the reply is appropriate even though strictly speaking it may not reply to the response.

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, the filing of the opposition is not treated as a request for reconsideration, etc. A party wishing to have the court reconsider, vacate, or modify the disposition must file a new motion that addresses the order granting the motion.

Although the rule does not require a court to do so, it would be helpful if, whenever a motion is disposed of before receipt of any response from the opposing party, the ruling indicates that it was issued without awaiting a response. Such a statement will aid the opposing party in deciding whether to request reconsideration. The opposing party may have mailed a response about the time of the ruling and be uncertain whether the court has considered it.

Subdivision (c). The changes in the subdivision are stylistic only. No substantive changes are intended.

Subdivision (d). This subdivision has been substantially revised. Paragraph (1) states that a motion must be in writing unless the court permits otherwise. The writing requirement has been implicit in the rule; the Committee decided to make it explicit. There are, however, instances in which a court may permit oral motions. Perhaps the most common such instance would be a motion made during oral argument in the presence of opposing counsel; for example, a request for permission to submit a supplemental brief on an issue raised by the court for the first time at oral argument. Rather than limit oral motions to those made during oral argument or, conversely, assume the propriety of making even extremely complex motions orally during argument, the Committee decided that it is better to leave the determination of the propriety of an oral motion to the court's discretion. The provision also would not disturb the

practice in those circuits that permit certain procedural motions, such as a motion for extension of time for filing a brief, to be made by telephone and ruled upon by the clerk.

The format requirements have been moved from Rule 32(b) to this rule. No cover is required, but a caption is needed as well as a descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed.

Paragraph (3) establishes page limits; twenty pages for a motion or a response, and ten pages for a reply. Three circuits have established page limits by local rule. The rule does not establish special page limits for those instances in which a party combines a response to a motion with a new request for affirmative relief. Because a combined document most often will be used when there is substantial overlap in the argument in opposition to the motion and in the argument for the affirmative relief, twenty pages may be sufficient in most instances. If it is not, the party may request additional pages. If ten pages is insufficient for the original movant to both reply to the response, and respond to the new request for affirmative relief, two separate documents may be used or a request for additional pages may be made.

Paragraph (4) is unchanged.

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.

GAP REPORT
CHANGES MADE AFTER PUBLICATION

1. RULE 21

Several changes have been made in Rule 21.

a. A sentence has been added at lines 15 and 16. The new language requires the party petitioning for mandamus to file a copy of the petition with the clerk of the trial court. The Advisory Committee wanted the trial court judge to have notice of the petition. To be consistent with the fact that the judge is not treated as a respondent, the copy is sent to the trial court clerk rather than directly to the judge.

b. At line 70, language was added authorizing a court of appeals to "invite" the judge's participation as well to order it.

c. A sentence has been added at lines 72-75. The new language states that the trial judge may not respond unless requested to do so by the court of appeals. In the published rule the judge's inability to participate without court of appeals authorization was implicit but not stated directly except in the Committee Note.

d. Paragraph (b)(7) is new. It requires the circuit clerk to send a copy of the order disposing of the petition to the clerk of the trial court. This change is a companion to the change requiring the petitioner to file a copy of the petition with the trial court. Filing the petition in the trial court will result in its docketing. Receipt of the order disposing of the petition will notify the trial court that the mandamus proceeding has been completed.

e. Several stylistic changes were adopted.

   i. At lines 9 and 43, "must" was changed to "shall".

   ii. At lines 10 and 11, and line 91, "clerk of the court of appeals" was changed to "circuit clerk".

   iii. Lines 26 and 27 were combined as subparagraph (A) and the words "The petition must were" were inserted at line 28 before the word "state". At line 37, the words "The petition must" were inserted before the word "include".

   iv. The numbered paragraphs of subdivision (b) were rearranged. Paragraph (4) of the new draft (beginning at line 70) had been paragraph (2) of the published draft.

   v. At line 76, the word "briefs" was changed to "briefing" and the

word "are" was changed to "is".

vi. At lines 87 and 88, the plural subject was changed to singular and the words "one of" were added.

vii. At line 90, the word "shall" was changed to "must" because the sentence is passive.

viii. At line 90, the sentence was changed so that application is not made by "petition filed" with the clerk, but by "filing a petition" with the clerk.

ix. At line 92, the words "parties named as" were deleted.

2. Rule 25

Several changes have been made in Rule 25.

a. The caption of the rule has been amended to read: "Filing, Proof of Filing, Service, and Proof of Service. This change was made to alert the reader to the fact that when the mailbox rule is used for filing a brief or appendix, a certificate reciting the date and manner of filing is required by an amendment to subdivision (d).

b. New language is added at lines 21 through 23. The language makes the mailbox rule applicable not only to First-Class Mail but also to any other class of mail that "is at least as expeditious." This makes the mailbox rule applicable if Express Mail or Priority Mail are used but does not make their use mandatory.

c. New language is added at lines 25 through 27. The published rule made the mailbox rule applicable when a party used a "reliable commercial carrier" to deliver a brief or appendix to the court. Several commentators objected to the adjective "reliable". The new language makes the mailbox rule applicable when a brief or appendix is dispatched to the clerk "for delivery within 3 calendar days by a third-party commercial carrier." The change eliminates the possibility of satellite litigation about reliability as well as the possibility of using a reliable but purposely slow carrier. Parallel language changes were made at lines 75 and 76 dealing with service by commercial carrier. The 3-calendar-day period coordinates with the amendments to Rule 26 regarding the 3-day extension of time for responding after service.

d. The sentence at lines 76 through 81 has been amended. Several commentators objected to the provision requiring that "when feasible" service should be accomplished in as expeditious a manner as the manner used to file the paper with the court. The provision now calls for comparable service "when reasonable considering such factors as the immediacy of the relief sought, distance, and cost." The

Committee believes that this language provides better guidance.

e. Subdivision (2)(B) of the published rule required a party using the mailbox rule to provide a certificate that it was mailed or delivered to a reliable commercial carrier on or before the last day for filing. That provision has been rewritten and moved to subdivision (d). The certification requirement was moved to subdivision (d) so that it could be combined with the proof of service.

f. Stylistic changes were made:
   i. At line 19, the word "was" was replaced by "is:".
   ii. At lines 20 and 21, initial caps were used for "First-Class Mail".
   iii. At line 58, the word "must" was changed to "shall".
   iv. At line 82, the words "clerk or other" were omitted.
   v. At line 86, the word "Papers" was made singular.
   vi. At line 90, the word "names" was made singular.

3. **RULE 26**

Several changes have been made in Rule 26.

a. The published amendment gave a party who must respond within a specified time after service of a document 3 additional days to respond when service is by "reliable commercial carrier" as well as when service is by mail. Because the distinction between personal service and other kinds of service is not always clear, the words "and the paper is served by mail" were deleted from lines 4 and 5, and new language has been added at lines 6 through 8. These changes make the 3-day extension available whenever a document is not delivered to the party being served on the same day that it is "served." The 3-day extension was created because service by mail is complete on the date of mailing. Since the party being served by mail does not receive the paper on that date, an extension is provided. Making the extension available whenever the party does not receive the document on the date it is served achieves the original objective and avoids the confusion arising from the need to know the type of service.

b. At line 5, the word "calendar" was added before the word "days." That change makes it clear that weekends and holidays are counted because the 3-day extension period is not covered by the provision in Rule 26(a) that weekends and holidays do not count when a period is less than 7 days.

c. Stylistic changes were also made:
   i. At line 2, the word "Whenever" was changed to "When".

ii. At line 3, the words "do an" were omitted.

4. Rule 27

a. At line 84, the time for filing a response to a motion was changed from 7 to 10 days. At line 105, the time for filing a reply was changed from 3 to 5 days. The rule covers a broad spectrum of motions from simple procedural motions, such as a motion for an extension of time, to dispositive motions, such as a motion for summary affirmance or reversal. The Committee believes that the 7 day period for a response is too short for substantive motions. But because of the difficulty of distinguishing between substantive/nonsubstantive or dispositive/ nondispositive motions, the Committee decided it is better to have a single set of time limitations. The Committee lengthened the time periods, however, to help reduce the number of motions for extension of time and to provide a more realistic time within which to make and dispose of such a motion.

b. Lines 95 through 102 are new. These lines expressly authorize inclusion of a request for affirmative relief in a response to a motion. The provision states that the time for response to the new request and for a reply to that response are governed by the general rule.

c. The rule permits a court to act upon a motion for a procedural order without awaiting a response from the opposing party. The published rule stated that if timely opposition to a motion is filed after the motion is granted, the opposition does not constitute a request to reconsider, vacate, or modify the disposition. Lines 123 through 125 have been amended to state directly that a party must file a new motion to request such relief. Although that was implicit in the published draft, the redraft makes it explicit.

d. Because the use of carbon paper has become extremely rare, the proposed language dealing with carbon copies was omitted.

e. Stylistic changes were made.

i. Line 47 was changed to active voice so that it reads "unless these rules prescribe another form".

ii. At line 60, the words "the determination of" were replaced by the word "determining".

iii. At line 63, the word "may" was changed to "must" in order to remove an ambiguity.

iv. At lines 68 and 69, the words "the lower court opinion or agency decision" were changed to "the trial court's opinion or

agency's decision".

v. Lines 81 through 102 were restructured in light of the new language added at lines 95 through 102 (See b. above). Subparagraph (A) begins at line 81 and continues through line 94. The new language constitutes subparagraph (B). At lines 86 and 87 the word "but" was replaced with the words "with the following exceptions:".

vi. The caption of subdivision (b), line 111, was changed from "Determination of a Motion for a Procedural Order" to "Disposition of a Motion for a Procedural Order".

vii. At line 128, the words "request for relief that under these rules may properly be sought by motion" were deleted and replaced by the word "motion". Also at line 128, the words "a single judge must" were deleted and replaced by the word "may".

viii. Lines 131 through 133 were changed to the active voice. At line 131 the words "only the court may act on" were inserted after the word "that", and at line 132 the words "must be acted upon by the court" were deleted. At lines 132 and 133, the words "court may review the" were inserted after the word "The" and before the word "action". At line 133, the words "may be reviewed by the court" were stricken.

SUMMARY
COMMENTS RECEIVED ON PROPOSED AMENDMENTS

1. RULE 21 - Mandamus

Of the 14 commentators on the published rule, 7 support the rule without qualification. Three other commentators support the proposed amendments but suggest revisions. Four commentators oppose the revisions.

a. Opposition

Three of the four commentators who oppose the rule amendments do so because they believe that the trial judge should have the right to participate in a mandamus proceeding. The fourth person states that he sees no need for the change.

i. The trial judge's right to respond

Specifically, Judge Duff states that removing the trial judge may allow the parties to ignore the institutional interests of the district court, to misrepresent the facts to the appellate court, and to impugn the reputation of the trial judge. Judge Will emphasizes that the judge may be the principal or only party with an interest in opposing the mandamus. If the judge is not a party to the proceeding, Judge Will asks whether the judge will have standing to petition for certiorari in the event that mandamus is granted. Neither Judge Will nor Judge Duff object to deleting the trial judge's name from the title of the case, but they are concerned with precluding the judge from receiving notice of the filing of a petition, from responding to the petition, and from having standing to seek review of the issuance of the writ.

The arguments presented by Judges Duff and Will in opposition to the amendments are the same as those that led to the publication in October 1993 of the preceding draft. The earlier published draft required service on the judge and permitted the judge to participate whenever the judge thought it appropriate. At its April 1994 meeting, following publication of that draft and based upon the comments received at that time, the Advisory Committee -- by divided vote -- decided to publish the current draft that permits a trial judge to respond to a petition for mandamus only when ordered to do so by the court of appeals.

ii. Other issues

Professor Hoffheimer opposes even deleting the judge as a respondent. Professor Hoffheimer believes that the need to serve the judge may discourage the commencement of the proceedings, and they should be rare.

Professor Hoffheimer also states that the judge has an interest in receiving notice of the petition and that there may be a jurisdictional problem in enforcing specific relief directed against a trial judge who has not been served. Professor Hoffheimer further notes that the proposed amendments may be incompatible with the statutory grant of jurisdiction under 28 U.S.C. § 1651(b) to issue alternative writs. He asks whether an alternative writ can be granted if the party has not been joined. He believes that the changes are so radical that they would be better made by Congress.

b. Support

Seven commentators support the amendments without qualification. Three others support them but make suggestions for improvement.

The suggestions for improvement are as follows:

i. The New Jersey State Bar Association notes that the rule authorizes a court of appeals to "order" the trial judge to respond. The association recommends that the rule also authorize a court to "invite" the trial judge to participate. Such an amendment would permit a court of appeals to give the trial judge the option to participate while not requiring the judge to become involved. The association also suggests that a copy of the petition should be mailed to the trial judge so that the judge has notice of the filing.

ii. The American Bar Association (ABA) Section of Litigation supports the amendments but suggests that the rule be amended in the following ways:
- The Committee Note states that a trial judge may not respond to a petition for mandamus unless the court orders the judge to respond. The sections recommends that if such a prohibition is intended, it should be clearly stated in the text of the rule.
- A reply to a response should be permitted.
- Subdivision (b)(2) should explain:
  - the procedure for identification and invitation of an amicus

curiae;
- how and when the petitioner will be notified of the amicus' participation; and
- how the involvement of an amicus will affect the timing of the decision.

- Subdivision (b) should be amended to prohibit adoption of a local rule that requires a party to file other than 3 copies of a petition.

iii. The United States Postal Service also supports the amendment but expresses a concern similar to the ABA Litigation Section's third suggestion. The postal service states that the rule should provide guidance concerning the circumstances in which a court may appropriately invite an amicus to participate. The postal service suggests that a court should involve an amicus only 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." The postal service also suggests that the rule should address the qualifications of those who may be asked to serve as an amicus.

2. RULE 25 - Filing and Service

Of the 16 commentators on the published rule, four support the published amendments without qualification and seven generally support the amendments but suggest further revision. Only one commentator expresses general opposition to the amendments while four express opposition to the requirement that service on other parties be by a manner at least as expeditious as the manner of filing with the court.

a. Opposition

i. General

One commentator opposes extending the "mailbox rule" (applicable to the filing of a brief or appendix) to the use of a "reliable commercial carrier." The commentator believes that this and other changes to Rule 25 inappropriately place the emphasis upon the receipt of a brief by the clerk rather than upon what the commentator believes is the more critical time, the receipt of a brief by opposing counsel.

ii. Service

The published amendments to subdivision (c) permitted service by "reliable commercial carrier" in addition to the current methods – personal service or mailing. The proposed amendments also stated that "[w]hen feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." Four commentators oppose requiring service in as expeditious a manner as the manner of filing with the court.[2]

- One of those commentators states that the rule treats all methods of service as equivalent and there is no justification for placing a limitation on the use of any method.
- Another states that the change is unnecessary because the time for serving and filing a responding brief or motion paper runs from the time of service and is, therefore, subject to the Rule 26(c) extension whenever service is other than personal.
- A third believes that the rule is unclear; he asks if service may be accomplished by First-Class Mail on an opposing party who lives out of state when a paper is personally delivered to the clerk's office for filing. He suggests deleting the sentence.
- A fourth commentator states that there is not a sufficient problem to warrant the costs of the proposal but that if such a change is made it should be confined to instances in which the party seeks immediate action.

b. Support

Four commentators support the proposed amendments without qualification. Seven commentators are supportive of the amendments but suggest additional revisions.

i. Type of mail service

The current rule provides that a brief is treated as filed on the day of mailing "if the most expeditious form of delivery by mail, except special delivery, is used." That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The Committee wanted to make it clear that use of First-Class Mail is sufficient. The published amendment provided that a brief is timely filed if, on or before the day for filing, it is mailed by First-Class Mail. Three commentators point out that a literal reading of the rule would make the "mailbox

[2] As will be discussed below, four commentators state their specific support for the requirement.

rule" inapplicable if the party mailed its brief to the court by Express Mail. Since Express Mail and two-day mail service are generally more expeditious than First-Class Mail, the rule should not preclude their use. The United States Postal Service recommends either adding the term Express Mail to the proposed rule or replacing "First-Class Mail" with "United States Mail." Another commentator suggests making the mailbox rule applicable to First-Class Mail and "other classes of mail that are at least equally expeditious."

ii. Reliable commercial carriers

The published amendment made the mailbox rule applicable when a brief or appendix is delivered to a "reliable commercial carrier." While most of the commentators support the change, four noted that disputes about the reliability of a carrier are likely to arise. The United States Postal Service notes that the provision does not violate the Private Express Statutes but because of the satellite litigation it believes likely to arise concerning "reliability," the Postal Service suggests deleting the provision in its entirety. The other three commentators suggest either deleting the adjective "reliable" or defining it. For example, a "reliable" carrier might be one that guarantees delivery as quickly as First-Class Mail.

iii. Service

The published amendments to subdivision (c) required that "when feasible," service on a party be accomplished "by a manner at least as expeditious as the manner of filing." Four commentators expressed their support for that specific change. Although they support that amendment of subdivision (c), two of those four commentators, as well as two others, suggest refinement of that provision.

- One commentator states that the language of the rule is unclear and that it would be better to state that service must be accomplished "in the same manner" as filing with the court. The same commentator suggests deleting the word "feasible" because it can be misunderstood and misinterpreted.
- One commentator suggests that the standard should be more precise and suggests that the rule require as expeditious service not simply "when feasible" but "when feasible and reasonable, considering such things as distance and extraordinary cost . . .."
- Another commentator opposes requiring personal service when a brief or motion is filed with a clerk of court by hand delivery. The commentator points out that hand delivery on a party or attorney residing in a different state, city, or region may be both difficult and costly to arrange. The commentator suggests amending the language to make it applicable "[w]hen filing with the court is made by mail or commercial carrier, service on a party

must be by a manner at least as expeditious . . .."

- A fourth commentator does not oppose requiring personal service when a paper is filed by hand delivering it to the court but suggests amending the committee note to state that when a "brief or motion is filed with the court by hand or by overnight courier, the copies . . ."

iv. Miscellaneous

One commentator suggests that the rule should permit the consolidation of the certification of mailing with the certificate of service.

Another commentator suggests that the mailbox rule should be extended to a paper filed in connection with a motion or a petition for rehearing.

Another commentator notes that subdivision (b) requires service "on counsel" if a party is represented by counsel. The commentator suggests that if a party is represented by two or more different firms, that one of them should be designated as the "service attorney" and an opposing party need only serve the "service attorney."

The Association of the Bar of the City of New York is concerned about the proposed language in 25(a)(2)(D) authorizing local rules governing electronic filing. (The language is virtually identical to that in proposed amendments to Civil Rule 5(e), and Bankruptcy Rule 5005(a)(2).) The association is concerned that the proposed amendment does not impose any controls on the rules local courts may develop and that there is no provision for monitoring those local rules to determine which of them are most effective. The committee recommends that the rule be amended to require that any local rule must provide for such things as public access to files, accuracy of electronically stored documents, and security and integrity of the files.

3. Rule 26 - Computation and Extension of Time

The published amendment of this rule gave a party who must respond within a specified time after service of a document three additional days to respond when service is by a "reliable commercial carrier," just as a party has a 3-day extension when service is by "mail." Of the twelve commentators on the proposed amendment to Rule 26, five support the amendments without qualification and three support the amendments but suggest further refinement of them. Three commentators oppose the amendments and one suggests that the three day extension provided for a

response when service is by mail is insufficient.

a. Opposition

The United States Postal Service suggests that the Committee should delete the provision making the three-day extension applicable when a document is served by a "reliable commercial carrier." In fact, the Postal Service opposes not only the applicability of the extension but service by commercial carriers. See the preceding discussion about Rule 25. The Postal Service believes that the provision will spawn satellite litigation dealing with the "reliability" of a carrier and the relevance of a party's assumption about a carrier's reliability and that the change is not necessary. Another commentator concurs; he opposes the reference to a "reliable commercial carrier" as ambiguous and unnecessary.

A third commentator opposes the amendment stating that the proposal highlights the fact that there is no clear dividing line between personal service and other kinds of service. He uses the following example. If a lawyer uses a messenger to serve a brief or motion on a party and the messenger either signs a certification under Rule 25(d) or obtains an "acknowledgment of service," service is personal. If a lawyer gives a brief to a private courier service instructing that it be delivered the next day and, having done so, the agent signs a statement certifying that [s]he left the document at the opposing attorney's office with a "clerk or other responsible person," is not that also personal service? The commentator suggests that the real difference between "personal" service, and service by "mail" or by "commercial carrier" rests upon who signs the proof of service. In all instances someone personally delivers the paper. If it is true that the hallmark of personal service is that the proof of service is signed by the person who personally delivered the document to the opposing party or his/her counsel, the commentator asks how a recipient of the document will know whether the 3 day extension is available.

The third commentator notes that adding 3 days will discourage the use of overnight service. He suggests adding one 1 day and requiring use of one-day service, or measuring the time for responding from the date of receipt if some reliable indication of such receipt can be obtained. He asks whether dropping a package in a private carrier's pick-up box counts as "delivery to the carrier" or whether the package must be taken to the carrier's office. He also suggests clarifying the interrelationship of subdivisions (a) and (c).

b. Support

Five commentators support the proposed amendments without qualification and three others expressly support the amendments but suggest additional refinements. Many of the commentators note that even though it is not authorized by the existing rules, service by commercial carriers is common.

The commentators who support the change but offer suggestions for further revision suggest the following:

i. The adjective "reliable" should be dropped from the reference to commercial carriers as it can be misunderstood and misinterpreted.
ii. That it is unnecessary to add 3 days rather than 1 or 2 if service is made by overnight or second-day carrier.
iii. The rule should define "reliable commercial carrier."

c. Miscellaneous

One commentator suggests that the 3-day extension is not enough time to add to the deadline for responding to a paper that is served by mail. The commentator states that mail from the west coast to Washington often takes five days.

4. RULE 27 - Motions

Of the 18 commentators on the amended rule, five express unqualified support, another five support the amendments but offer suggestions for further improvement. Three commentators do not indicate either general support or opposition, but provide suggestions for further amendment. Only one commentator opposes the suggested revisions as a whole; three others express opposition to one or more provisions in the amended rule.

a. Opposition

Only one commentator states that Rule 27 should stay "as is." He believes that motion practice in the courts of appeals should not be encouraged. He also specifically opposes the requirement that a copy of the trial court decision accompany the motion because it may be lengthy and part of the joint appendix. He also states that the use of a typewriter, now permitted in Rule 27(d), is not carried forward to the proposed rule.

Other commentators expressed opposition to specific portions of the amended rule.

i. Time period for responsive pleadings

The State Bar of Arizona believes that the time periods for responding to a motion (7 days) and for replying to a response (3 days) are too short. The association suggests that those time periods be raised to 10 days for a response to a motion and 5 days for a reply to a response. The association notes that the deadlines apply to substantive motions and that a motion for extension of time is not adequate because a decision on a motion for extension may not be rendered until after the time limits in the rule have passed.

Another commentator who expresses general support for the proposed amendments "strongly urges" that the 7-day period for filing a response to a motion be expanded to 21 days when the motion is a dispositive motion for summary affirmance or reversal. The commentator states that 7 days is sufficient for non-dispositive motions.

ii. Procedural rulings made without waiting for response

Subdivision (b) of Rule 27 currently provides that a motion for a procedural order may be acted on without awaiting a response. A party who is adversely affected by such action may request reconsideration, vacation, or modification of the action. Those provisions are retained in the published version of the rule.

Three commentators, Public Citizen, the Assistant Attorney General of Alaska, and Leslie R. Weatherhead, Esq., object to portions of subdivision (b). Subdivision (b) states that if a motion for a procedural order is decided before the time for filing a response has expired, the timely filing of an opposing response is not considered a request for reconsideration. The assistant attorney general states that the timely filing of opposition should require de novo reconsideration of the motion and the opposing party should not be required to file a motion for reconsideration.

Public Citizen poses a more fundamental objection, that the rule should not permit a court to rule on a motion before the opposing party responds. Public Citizen states that once a ruling is made, the burden effectively shifts to the opposing party to show why it should not have issued even though, ordinarily, the burden would be on the party seeking the motion. Public Citizen suggests that an ex parte ruling should be permitted only if the party filing the motion has sought the consent of the other party. In those instances in which the other party refuses to consent, the

rule should require the movant to serve the opposing party by telecopier or overnight delivery and a ruling should be permitted only after a set amount of time (less than the ordinary 7 days), sufficient to allow the adversary to deliver a quick response.

Another commentator joins Public Citizen stating that in all non-exigent circumstances, a court should not render a decision without giving both sides an opportunity to be heard. She too states that if, by not waiting, a court makes an erroneous ruling, the wronged party has the burden of changing the status quo.

iii. Local rules re: number of copies

Public Citizen also opposes the provision in (d)(4) permitting local rules on the number of copies of a motion that must be filed. The American Bar Association Section of Litigation also recommends deletion of that provision.

b. Support and miscellaneous suggestions

Five commentators provide unqualified support; five others support the amendment but suggest some adjustments. The general sentiment of those supporting the amendments are that they make the rule clearer and more in keeping with modern practice.

Those who support the amendments, or make no general statement either supporting or opposing the amendments offered the following suggestions:

i. Including a request for affirmative relief in a response

The American Bar Association Section of Litigation approves the amendments but recommends that paragraph (a)(3) be amended. Paragraph (a)(3) governs a response to a motion. The section recommends that the rule:

- state that a party filing a response in opposition to a motion may request affirmative relief in the response;
- require that the title of the document alert the court to the request for relief; and
- provide that the time for a response to such a new request and for a reply to that response be governed by the general rules regulating responses and replies.

ii. Request for reconsideration following ex parte ruling

The American Bar Association Section of Litigation and Public Citizen both

recommend that subdivision (b) state directly that a party must file a new motion to have the court reconsider, vacate, or modify the disposition of a procedural ruling entered prior to the filing of timely opposition.

The Los Angeles County Bar Association Appellate Courts Committee suggests that the rule should require the court to state whether the initial order was granted without considering any opposition. If the court indicates whether it has considered the opposition papers, the party who filed the opposition will know whether its papers were considered and can then decide whether to request reconsideration.

iii. Dispositive motions

One commentator suggests that the rule should address the two main kinds of motions for substantive relief: 1) a motion for summary affirmance or denial, which he says should be granted only "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists;" and 2) an appellee's motion to dismiss the appeal for lack of appellate jurisdiction.

iv. Content of a reply

Proposed paragraph 27(a)(4) states that a reply "must not reargue propositions presented in the motion or present matters that do not reply to the response." One commentator finds that language too restrictive. He argues that a reply should be able to address matters that arise after the motion is filed.

v. Page limits

The amended rule establishes page limits for a motion, response, and reply. None of the commentators object to the limits. The following suggestions, however, were made:

- that tables and cover pages should be excluded from the page count; (one commentator)
- that the length of motions is not a problem but that if limits are to be included and if Rule 32 adopts a word limit rather than a page limit, Rule 27 should also use a word limit; (one commentator) and
- that the font size, type style, and words per page specifications in Rule 32 should be included in Rule 27, or at least cross-referenced (two commentators).

LIST OF COMMENTATORS
SUMMARY OF THEIR INDIVIDUAL COMMENTS

1. RULE 21

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.

1. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section supports the proposed amendment which conforms the rule to actual mandamus practice in many circuits. The section, however, makes several suggestions and observations.

a. Neither subdivision (b)(2) nor the Committee Note explains the procedure for the identification and invitation of an amicus curiae, nor how or when the petitioner will be notified of the amicus' participation, nor how the involvement of an amicus will affect the timing of the decision. The section recommends amendment of subdivision (b) to make the procedures clear.

b. The Committee Note states that the trial judge may not respond unless the court orders the judge to respond, but the text of the rule does not contain any such express prohibition. The section recommends that if such a prohibition is intended, it should be clearly stated in the text of the rule.

c. The section recommends that a reply to a response should be allowed in the same manner as in proposed rule 27(a)(4).

d. The section also recommends that subdivision (b) be amended to delete the ability of a circuit to change the 3 copies requirement by local rule.

2. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

3. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the proposed change.

4. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee endorses the amendments.

5. District of Columbia Bar
Section on Courts, Lawyers and the Administration of Justice
Anthony C. Epstein, Co-chair
Jenner & Block
601 Thirteenth Street, N.W., Suite 1200
Washington, D. C. 20005

The section supports the amendments. The section agrees that a trial judge should not be given the option to participate and that if an appellate court believes that the prevailing party below cannot adequately defend the challenged decision, the court should appoint an amicus.

6. Honorable Brian Barnett Duff
United States District Judge
219 South Dearborn Street
Chicago, Illinois 60604

Judge Duff opposes the change that would deprive a trial court judge of the right to participate in a mandamus proceeding to which the court is a party. He cited two instances illustrating that removing the trial judge may allow the

parties to ignore the institutional interests of the district court, to misrepresent to the appellate court facts leading to the mandamus proceeding, and to impugn the reputation of the trial judge.

7. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service is concerned about the lack of guidance concerning the circumstances under which a court should invite participation by an amicus and about the qualifications or limitation upon who should serve as an amicus. The postal service suggests that a invitation to an amicus should be limited to "those instances in which respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response."

8. Bruce Comly French, Esquire
165 Tolowa Trail
Lima, Ohio 45805-4124

Mr. French believes that the trial judge should be named in the petition. He sees no need for the change.

9. Associate Professor Michael H. Hoffheimer
Law Center
The University of Mississippi
University, Mississippi 38677

Professor Hoffheimer disagrees with removing the trial judge from mandamus and prohibition proceedings for the following reasons:

1. Such proceedings are disfavored. Treating the trial judge as a respondent who must be served, etc., may indirectly, and appropriately, discourage the commencement of such proceedings.
2. Because relief in such proceedings is normally predicated upon a showing that the trial court has refused to do some ministerial act, a trial judge has an interest in receiving notice of such allegation.
3. There may be a jurisdictional problem in enforcing specific relief directed against a trial judge who has not been served.
4. The proposed amendment may be incompatible with the statutory

grant of jurisdiction, under 28 U.S.C. § 1651(b), to issue alternative writs. He asks whether an alternative writ can be granted if the party has not been joined.

Professor Hoffheimer suggests that the amendments so radically alter practices followed since the Judiciary Act of 1789 that they may exceed the scope of rulemaking authority and that it would be better for the proposed change to be enacted by Congress.

10. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee of the Los Angeles County Bar Association unanimously approves the proposed amendments.

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

The association supports the amendments.

12. New Jersey State Bar Association
One Constitution Square
New Brunswick, New Jersey 08901-1500

The association approves the amendment that eliminates the naming of the district judge as a respondent but recommends that the rule be modified to permit a court of appeals to "invite" the trial court judge to respond as well as to order the judge to respond. In other words, the court of appeals should be permitted to give the district judge the option to provide additional information while not requiring the judge to become involved. The association also suggests that a copy of the petition should be mailed to the trial court judge so that the judge has notice of the filing. (Draft language is provided.)

13. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board had no stated objections or concerns.

14. Honorable Hubert L. Will
Senior Judge
United States District Court
219 South Dearborn Street
Chicago, Illinois 60604

Judge Will is concerned about the proposed change that would preclude a district judge from participating as a party in a mandamus proceeding brought against him or her and that the judge will not even be served with a copy of the petition. Judge Will recounts his experience in two mandamus cases that were ultimately decided by the Supreme Court, Will v. United States, 389 U.S. 90 (1967) and Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978). In the latter case he was the principal or only party with an interest in opposing the mandamus. He states that in some instances "judicial prerogatives and process may have more interest in the mandamus proceedings than the non-petitioning nominal parties." Judge Will questions whether the judge would have standing under the proposed rule to petition for certiorari, as he did in the Calvert Insurance case because the judge would not be a party.

Judge Will does not object to deleting the judge's name from the title of the case, but he does object to precluding the judge from receiving notice of the filing of a petition, from responding to the petition, and from having standing to appeal the issuance of the writ.

2. RULE 25

The proposed amendments 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 a "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 a "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.

1. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section supports the recognition that most lawyers use commercial carriers.

The section supports and encourages the adoption of local rules to permit filing by electronic means.

The section supports the requirement that, when feasible, service be by a manner at least as expeditious as the manner of filing with the court.

2. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

3. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the proposed change.

4. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee endorses the amendments including the requirement that service be by a manner at least as expeditious as the manner of filing. The committee suggests, however, that subdivision (c) set a more precise standard and state that "when feasible and reasonable, considering such things as distance and extraordinary cost, service on a party must be by a manner at least as expeditious ...."

5. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service notes that inasmuch as 39 C.F.R. § 310.1(a)(7)(iii) excludes "papers filed in lawsuits . . . and orders of courts" from the definition of "letter," the private carriage proposed by the amendments would not violate the Private Express Statutes. The service states however, that a literal reading of the rule would give litigants only two choices: First-Class Mail or a "reliable commercial carrier," making Express Mail an unsafe option. The service suggests either adding the term Express Mail to the proposed rule or replacing "First-Class Mail" with "United States Mail." The service states that the second option would eliminate confusion as to whether Priority Mail service could be used. Priority Mail service literally is First-Class Mail but public perception is that it is a distinct service and may lead some litigants to erroneously conclude that the rule does not permit use of Priority Mail.

The postal service, however, suggests deleting the change relating to the use of a "reliable commercial carrier." The service believes that collateral litigation will arise concerning whether a particular carrier should be considered "reliable" and also about the relevance of a filer's assumption that a particular carrier is "reliable."

The service also notes that the proposed rule uses the term "first-class mail" but that correct usage calls for initial caps: i.e. "First-Class Mail."

6. Joseph W. Halpern, Elizabeth A. Phelan, & Heather R. Hanneman, Esquires
Holland & Hart
555 Seventeenth Street, Suite 2900
Denver, Colorado 80202-3979

Mr. Halpern, Ms. Phelan, and Ms. Hanneman agree that when a party files a brief or motion with a court by overnight courier that service on an opposing party should be by a method that is at least as expeditious as overnight delivery. They oppose requiring service by hand delivery when a brief or motion is filed with a clerk of court by hand delivery. Hand delivery on parties or attorneys residing in different states, cities, or regions may be both difficult and costly to arrange. They suggest that the second sentence of 25(c) should state: "When filing with the court is made by mail or commercial carrier, service on a party must be by a manner at least as expeditious as the manner of filing with the court whenever feasible."

7. Honorable Paul J. Kelly, Jr.
United States Circuit Judge
P.O. Box 10113
Santa Fe, New Mexico 87504-6113

Judge Kelly is troubled by the provision that "when feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." He believes that the language creates ambiguity. He asks whether personal delivery of papers to the clerk's office for filing may be followed by first-class mail to the opposing party who lives out of state? If a document is hand delivered to the clerk's office for filing, is personal delivery to lawyers within the same city required? He states that there should not be litigation over what was "feasible." He suggests deleting the sentence.

8. Honorable Cornelia G. Kennedy
United States Circuit Judge
U.S. Courthouse
Detroit, Michigan 48226

Judge Kennedy questions the need to have service effected in at least as expeditious a manner as that used to file with the court. Having once decided that all the methods of service should be allowed because they are equivalent, she sees no justification for placing this limitation on the use of one method or the other.

9. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee unanimously approves the proposed amendment but recommends deleting the adjectives "reliable" and "feasible" because they can be misunderstood or misinterpreted. The committee also suggests that the language requiring that service "be by a manner at least as expeditious as the manner of filing with the court" is unclear. It would be more clear to say that service must be in the same manner as filing with the court. At a minimum, the committee suggests that the committee note should provide some illustration of how the rule should be applied.

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

Mr. MacDougall sees no need to permit delivery by "reliable commercial carrier." He also opposes the revision because it places "emphasis on receipt of briefs by the Clerk, when it is receipt of briefs by opposing counsel which is more critical." Mr. MacDougall also opposes the style revisions because he believes they make "filing" paramount to "service"; he believes that under the current rule the primary emphasis is on "service" and that "filing" has a lesser role. He states that there is not a good reason for separate subsections on electronic filing or inmate filing.

11. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore approves of the proposed amendments without further comment.

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

The association supports the amendments. The association points out, however, that in addition to first class mail, the rule should authorize priority

mail and express mail. Although first class mail is "sufficient," the rule seems to preclude "other classes of mail that are at least equally expeditious." The section suggests that the Advisory Committee consider adding the last quoted language to the rule.

The association states that the certification requirement is better than the last proposal's reliance upon the postmark. The association suggests that the rule should permit consolidation of the certification of mailing with the certificate of service under 25(d).

The association supports the requirement that service be made, when feasible, in a manner at least as expeditious as that used for filing. The association says that such a requirement is a "welcome response to petty gamesmanship." The association recommends amending the committee note to state that when a "brief or motion is filed with the court by hand or by overnight courier, the copies .... [etc.]"

The association supports the progress toward electronic filing.

13. Association of the Bar of the City of New York
Committee on Federal Courts
Patricia M. Hynes, Chair
Milberg Weiss Bershad Hynes & Lerach
One Pennsylvania Plaza
New York, New York 10119-0165

The committee comments on the proposed 25(a)(2)(D), specifically on the provision allowing local rules governing electronic filing without prior approval by the Judicial Conference and without any requirement that the Conference first develop standards to govern the rules. Given the minimal experience that state and federal courts have had with electronic filing and the developing state of technology, the committee agrees that a period of experimentation and at least some temporary diversity is justified. The committee is concerned, however, that the proposed amendment does not impose any controls on the rules local courts may develop. The committee makes several recommendations many of which are based upon the assumption that electronic filing will be used to reduce the courts' burden of document storage and will result, therefore, in electronic filing of documents that will not be subsequently embodied in an officially filed hard copy. The committee recommends that the rule require that any local rule must provide
a) reasonable access to court files by both parties and non-party members

of the public;

b) assurance of the identity of filers and accuracy of the electronically stored document;

c) compatibility with generally available systems for electronic transmission and retrieval of data; and

d) maintenance of the security and integrity of the files.

The committee urges that some form of monitoring of the local experiments be undertaken with the goal of deriving meaningful and objective data as to the experience of the various courts using different systems and procedures.

14. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board suggests that defining the term "reliable commercial carrier" could help avoid ambiguity and disputes between counsel, particularly with regard to "reliability."

15. Public Citizen Litigation Group
2000 P. Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that the mailbox rule in 25(a)(2)(B) should extend to a paper filed in connection with motion or a petition for rehearing.

With regard to 24(a)(2)(B)(ii), Public Citizen suggests that the rule should allow use of any mail service that guarantees delivery as quickly as first-class mail. That would permit use of Express Mail or two-day mail and limit use of commercial carriers to those that deliver at least that fast. Public Citizen states that use of the term "reliable" is likely to produce more disputes than it will resolve and should be deleted.

With regard to 25(c) (the service provision) Public Citizen states that there is not a sufficient problem to warrant the costs of the proposal. If filing is accomplished by over-night mail, service must be by overnight mail regardless

of whether the party being served is likely to, or even has a right to, file a response. Public Citizen states that expeditious service should be required only with respect to matters on which the party filing a paper seeks immediate action or for post-argument submissions (such as letters citing supplemental authority under Rule 28(j), when the court may rule at any time. Public Citizen states that a cautionary note in the Committee Note may be sufficient but that if a rule change is made it should be confined to cases in which an immediate decision has been sought.

16. Michael E. Rosman, Esquire
Associate General Counsel
Center for Individual Rights
1300 Nineteenth Street, N.W.
Suite 260
Washington, D.C. 20036

Mr. Rosman supports the extension of the "mailbox rule" (under which a brief is deemed filed on the day of mailing) to delivery to a reliable commercial carrier. He also "heartily support[s]" the proposal to permit service by a reliable commercial carrier noting that the limitation in current Rule 25(c) which only permits service by mail or personal service is routinely ignored by both practitioners and the courts.

Mr. Rosman objects to the statement that "[w]hen feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." He does not see any legitimate reason for the rule because the time for serving and filing a responding brief or motion paper runs from the time of service and is, therefore, subject to the Rule 26(c) extension when service is other than personal.

Mr. Rosman suggests that the committee incorporate the following additional amendments:

a. Subdivision (b) requires service "on counsel" if a party is represented by counsel. If a party is represented by two or more different firms, Mr. Rosman suggests that one of them must be designated as the "service attorney" and the opposing attorney need only serve papers on the "service attorney."
b. He suggests that electronic service should be permitted; i.e. service by facsimile, modem transfer of files, or other electronic means.

3. **RULE 26**

The proposed amendment makes the three-day extension for responding to a document served by mail also applicable when the document is served by a commercial carrier.

1. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section supports the proposed amendment as a practical recognition of the widespread use of commercial carriers.

2. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

3. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the proposed change.

4. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee endorses the amendments.

5. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service suggests deleting the change relating to the use of a "reliable commercial carrier." The service believes that collateral litigation will arise concerning whether a particular carrier should be considered "reliable" and also about the relevance of a filer's assumption that a particular carrier is "reliable."

6. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee unanimously approves the proposed amendment but recommends deleting the adjective "reliable" because it can be misunderstood or misinterpreted.

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

Mr. MacDougall opposes the reference to "reliable commercial carrier" as ambiguous and unnecessary.

8. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore approves of the proposed amendments without further comment.

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

The association does not oppose the rule but does not see why 3 days should be added, rather than 1 (or 2) if delivery is made by overnight (or second-day) carrier.

10. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board supports the amendment but reiterates its suggestion that the rule should define "reliable commercial carrier."

11. Public Citizen Litigation Group
2000 P. Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that the 3-day extension may not be enough time to add to the deadline for responding to a paper that is served by mail -- mail from the West Coast to Washington, D.C., often takes five days. With motion, a party may have only 7 days or 3 days to file an opposition or a reply, and the three day extension can be insufficient.

12. Michael E. Rosman, Esquire
Associate General Counsel
Center for Individual Rights
1300 Nineteenth Street, N.W.
Suite 260
Washington, D.C. 20036

Mr. Rosman opposes the amendment that would add three days to the time for responding to a brief or motion if it is served by a reliable commercial carrier. Mr. Rosman notes that permitting service by "reliable commercial carrier" makes it clear that there is no clear dividing line between personal service and other kinds of service. Service is "personal" if a lawyer sends a messenger down the block to serve a brief or motion and the messenger obtains an "acknowledgment of service" or signs a certification pursuant to Rule 25(d). Isn't service personal if a brief is given to a Federal Express agent who is instructed to deliver the brief the next day and the Federal Express agent signs a statement certifying that [s]he left the documents at an

attorney's office with a "clerk or other responsible person" (Rule 25(c)? isn't that also personal service? Commercial carriers, in their competitive effort to obtain business, might be willing to sign such forms.

Mr. Rosman suggests that the difference between "personal" service or service "by mail" or "by commercial carrier" rests upon who signs the certificate of service. In all instances someone personally delivers the paper.

The amendment gives a party three additional days to respond to a document served by commercial carrier. Mr. Rosman asks how the attorney receiving the paper will know whether the clerk who gave the brief to the Federal Express or UPS agent has signed the statement certifying service, or whether the Fed Ex or UPS deliverer is going to sign it. Mr. Rosman additionally asks whether the recipient's signing for the package may be used as an acknowledgment of service?

He further notes that adding 3 days will discourage the use of overnight service because it will provide an opponent with 2 more days to respond than if service had been personal.

He suggests either:

a. adding only one (1) day to the time permitted and requiring use of one-day service; or
b. measuring the time for responding from the date of receipt when some reliable indication of such receipt can be obtained, as it frequently can with commercial carriers.

He notes that there is an ambiguity in the proposed rule. The amendment states that "[s]ervice by mail or by commercial carrier is complete upon mailing or delivery to the carrier." Does dropping a package in a Federal Express pick-up box count as "delivery to the carrier" or must the package be taken to the carrier's office?

Mr. Rosman also suggests that the rule should clarify the interrelationship of subdivisions (a) and (c).

4. RULE 27

Rule 27 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.

1. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section approves the amendments subject to criticisms of subdivisions (a)(3) and (b).

The section recommends amendment of (a)(3) to state expressly that (1) a party filing a response in opposition to a motion may also request affirmative relief in the response document; (2) the title of the document should alert the court to the request for relief; and (3) the time for a response to such a new request and for reply to that response is governed by the general rules regulating responses and replies.

The section also recommends amendment of subdivision (b) to state directly that a party must file a new motion to have the court reconsider, vacate, or modify the disposition of a procedural ruling prior to the filing of timely opposition.

The section also recommends that (d)(4) be amended to delete the ability of a circuit to change the 3 copies requirement by local rule.

2. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona opposes the time deadlines for responding to a motion (7 days) and for replying to a response (3 days). The deadlines apply even to substantive motions such as a motion to dismiss for lack of subject

matter jurisdiction. The association does not believe that a motion for extension of time adequately meets the objection because a party may not receive a decision of a motion for extension before the time limits in the rule have passed. The association suggests the timetable in the Arizona appellate rules that requires a response within 10 days after service of a motion and a reply within 5 days after service of the response.

The association also questions to language in subdivision (c). Subdivision (c) says that a "separate brief . . . must not be filed" whereas a "notice of motion" and a "proposed order" are "not required." Why is mandatory language used for supporting brief while permissive language is used for notices of motion and proposed orders?

3. District of Columbia Bar
Section on Courts, Lawyers and the Administration of Justice
Anthony C. Epstein, Co-chair
Jenner & Block
601 Thirteenth Street, N.W., Suite 1200
Washington, D. C. 20005

The section generally supports the proposed amendments but "strongly urge[s]" one additional change. The proposed revision leaves unchanged the current requirement that opposition to a motion is due seven days after service of the motion. The section states that the 7-day period is adequate for non-dispositive motions but not for dispositive motions for summary affirmance or reversal. The section states that "[m]any circuits now resolve a substantial percentage of appeals on motions for summary affirmance or reversal." They suggest that the time to respond to dispositive motions should be 21 days. The time to respond to other motions (for example a motion for a stay) would continue to be 7 days.

4. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the proposed change as long as tables and cover pages are excluded from the page count.

5. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee endorses the amendments.

6. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service notes that format requirements have been moved to this rule from Rule 32 and that the proposed amendments establish a 20 page limit for motions and responses but that the font size and words per page limits in proposed Rule 32 are neither incorporated by reference or explicitly states in this rule. The service suggests that Rule 27 include font size, type style, and number of word specifications consistent with Rule 32.

7. Honorable Cynthia M. Hora
Assistant Attorney General
Office of Special Prosecutions and Appeals
310 K. Street, Suite 308
Anchorage, Alaska 99501-2064

Ms. Hora objects to that portion of subdivision (b) which states if a motion for a procedural order is decided before the time for filing a response has expired, the timely filing of an opposing response is not considered a request for reconsideration. She suggests that the filing of timely opposition should require de novo reconsideration of the motion. If her suggestion were adopted, the opposing party would not need to file a motion for reconsideration.

8. P. Michael Jung, Esquire
Strasburger & Price, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 73202

Mr. Jung points out that events occur during the pendency of an appellate motion that are material to the disposition of the motion. 27(a)(4) states that

a reply "must not reargue propositions presented in the motion or present matters that do not reply to the response." Mr. June states that 27(a)(4) should permit a reply to reference matters that arise after the motion is filed. He gives an example: If a movant seeks to stay an appeal due to a bankruptcy filing, the respondent may oppose the motion on the ground that it anticipates the stay will be lifted; the movant should be able to reply that the bankruptcy court has denied the motion to lift the stay.

9. Honorable Cornelia G. Kennedy
United States Circuit Judge
U.S. Courthouse
Detroit, Michigan 48226

Judge Kennedy asks whether Rule 27 should have a cross-reference to the words-per-page requirement of Rule 32(a)(6). She believes that with only the page limitation and the word processor's ability to reduce spacing, one may need a magnifying glass to read the words.

10. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee unanimously approves the proposed amendments but suggests that the rule should require the court to state whether the initial order was granted without considering any opposition filed. The suggestion is made in light of the last sentence of subdivision (b) which states that "timely opposition to a motion that is filed after the motion is granted in whole or in part does not constitute a request for reconsideration, vacation, or modification of the disposition." If the court indicates that the motion was made without consideration of the opposition, the party who filed the opposition will know that its papers were not considered and can then decide whether to request reconsideration.

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

Mr. MacDougall states that Rule 27 should stay "as is." He states that motion practice in the courts of appeals should not be encouraged. He opposes the requirement that a copy of the lower court decision be included because it

may be lengthy and part of a joint appendix. He also notes that the use of a typewriter, now permitted in Rule 27(d), is not carried over to the proposed rule.

12. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore approves of the proposed amendments without further comment.

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

The association states that the proposed "uniform, modern approach is highly commendable."

14. New Jersey State Bar Association
One Constitution Square
New Brunswick, New Jersey 08901-1500

The association states that the amended rule is a helpful clarification and simplification of the current rule and is basically consistent with motion procedures already employed in the third circuit.

15. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board supports the amendments because they make the rule clearer and easier to follow.

16. Public Citizen Litigation Group
2000 P. Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that the rule need not require that a motion be accompanied by a copy of the decision if the decision has already been received by the court of appeals whether with the record itself or with earlier motions. Public Citizen also suggests that there is no need to require service of a copy of the decision below on each party because the parties presumably already have a copy of the decision.

Public Citizen opposes the portion of the rule allowing a procedural ruling without waiting for a response (a provision that exists in the current rule). Public Citizen believes that issuing a ruling subject to reversal on reconsideration may effectively place the burden on the party seeking to have the decision reversed, even if ordinarily the burden of obtaining the ruling would be on the movant. Public Citizen suggests that an ex parte ruling should be permitted only if the party filing the motion has sought the consent of the other party and, if consent is refused, the motion is served by telecopier or overnight delivery. A ruling should be made in such instances (subject to reconsideration) only after a set amount of time (less than the full 7 days) sufficient to allow the adversary to deliver a quick response.

The last paragraph of subdivision (b) appears to require a separate motion to reconsider. If that is correct, Public Citizens suggests that the rule state so expressly. Public Citizen, however, opposes such a requirement especially when a ruling and a response cross in the mail.

Public Citizen does not believe that the length of motions is a problem but states that if the length limits for a brief is to be expressed in number of words, Public Citizen sees no reason for stating the limit for a motion in number of pages.

Public Citizen opposes the provision in (d) (4) encouraging adoption of local rules on the number of copies of motions to be filed.

17. James A. Shapiro, Esquire
1660 North LaSalle, #2401
Chicago, Illinois 60614

Mr. Shapiro suggests that Rule 27 should directly address the two main kinds

of motions for substantive relief: 1) a motion for summary affirmance or reversal; and 2) an appellee's motion to dismiss the appeal. The rule should clearly authorize substantive appellate motions. Summary disposition should be appropriate "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Williams v. Chrans*, 1994 WL 709027 (7th Cir. Dec. 22, 1994). A motion to dismiss an appeal is appropriate only when the court of appeals does not have appellate jurisdiction. Mr. Shapiro provides draft language.

18. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
422 West Riverside, Suite 1100
Spokane, Washington 99201-0390

Ms. Weatherhead supports the change that requires all matters relating to a motion to be contained in a single document.

Ms. Weatherhead, however, opposes that portion of the rule (also found in the current rule) that authorizes rulings to be made routinely based on only one party's showing. She states that the rule in all non-exigent cases should be that a court does not decide until both adversaries have been heard. If, by not waiting to hear both sides, a court makes an erroneous ruling, the wronged party has the burden to change the status quo via a rehearing.

SUMMARY OF PROPOSED RULE AMENDMENTS TO BE PUBLISHED FOR COMMENT

1. Rule 26.1 - Corporate Disclosure Statement

The rule has been divided into three subdivisions to make it more comprehensible.

The proposed amendments delete the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The amended rule requires disclosure of a parent corporation and any stockholders that are publicly held companies owning 10% or more of the party's stock.

2. Rule 28 - Briefs

The proposed amendments to Rule 28 are necessary to conform it to proposed amendments to Rule 32.

a. Rule 32 is being amended to require that a brief include a certificate of compliance with format, typeface, and length requirements established by that rule. Rule 28(a) and (b) are amended to include that certificate in the list of items that must be included in a brief.

b. Rule 28(g) is amended to delete the page limitations for a brief. The length limitations have been moved to Rule 32.

c. Rule 28(h) is amended so that the cross-reference to 28(a) includes paragraph (7), requiring a summary of argument, and paragraph (8) requiring a certificate of compliance with Rule 32.

3. Rule 29 - Brief of an Amicus Curiae

Rule 29 is entirely rewritten and several significant changes are made.

a. The amended rule requires that the brief be filed with the motion requesting permission to file the brief. In addition to identifying the

movant's interest and stating the general reasons why an amicus brief is desirable, the motion must state the relevance of the matters asserted to the disposition of the case.

b. The amendments make it clear that an amicus brief need not include all of the items required in a party's brief.

c. The amended rule limits an amicus brief to one-half the length of a party's principal brief.

d. An amicus is not permitted to file a reply brief.

4. Rule 32 - Form of a Brief or Appendix

Rule 32 is amended in several significant ways.

a. The amended rule permits a brief to be produced using either a monospaced typeface or a proportionately spaced typeface. Monospaced and proportionately spaced typefaces are defined in the rule.

b. The provisions for pamphlet-sized briefs have been deleted.

c. All references to use of carbon copies have been deleted.

d. The rule establishes new length limitations for briefs which are defined separately for proportionately spaced briefs and monospaced briefs. A proportionately spaced brief is limited to a total of 14,000 words and a reply brief must not exceed 7,000 words. In addition, the average number of words per page must not exceed 280 words. The latter limitation is included to ensure that the typeface used is sufficiently large to be easily legible. The length of a monospaced brief may be measured by the same word limits, both overall and per page, applicable to a proportionately spaced brief, or by the total number of pages. If a page count is used rather than a word count, a monospaced principal brief must not exceed 40 pages, and a reply brief must not exceed 20 pages.

e. The rule requires a certificate of compliance with the form, format, typeface, and length provisions of Rule 32(a)(1) through (4).

5. Rule 35 - En Banc Proceedings

a. Rule 35 is amended to treat a request for a rehearing en banc like a petition for panel rehearing. As amended, a request for a rehearing en banc also will suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The amendments delete the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. In keeping with the intent to treat a request for a panel rehearing and a request for a rehearing en banc similarly, the term "petition for rehearing en banc" is substituted for the term "suggestion for rehearing en banc."

b. The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the criteria for en banc consideration. Intercircuit conflict is cited as a reason for determining that a proceeding involves a question of "exceptional importance" -- one of the traditional criteria for granting an en banc hearing.

c. A petition for en banc review is limited to 15 pages, even when combined with a petition for panel rehearing.

6. Rule 41 - Mandate

a. As a companion to the proposed amendments to Rule 35, Rule 41(a)(2) is amended so that a petition for rehearing en banc delays the issuance of the mandate.

b. Proposed Rule 41(a)(2) also provides that a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delays the issuance of the mandate until the court disposes of the motion.

c. The amended rule makes it clear that the mandate is effective when it is issued.

d. The presumptive period for a stay of mandate is changed from 30 to 90 days.

PROPOSED RULE AMENDMENTS
SUBMITTED FOR PUBLICATION

Rule 26.1. Corporate Disclosure Statement

(a) *Who Shall File.* ~~Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's~~ Any nongovernmental corporate party to a proceeding in a court of appeals shall file a statement identifying any parent corporation and listing stockholders that are publicly held companies owning 10% or more of the party's stock.

(b) *Time for Filing.* A party shall file the statement with the principal brief or upon filing a motion,

response, petition, or answer in the court of appeals, whichever ~~first~~ occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.

(c) *Number of Copies.* ~~Whenever~~ If the statement is filed before ~~a party's~~ the principal brief, the party shall file an original and three copies, ~~of the statement must be filed~~ unless the court requires the filing of a different number by local rule or by order in a particular case. ~~The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.~~

Committee Note

The rule has been divided into three subdivisions to make it more comprehensible.

Subdivision (a). The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modelled on the seventh circuit's disclosure requirement.

Subdivision (b). The language requiring inclusion of the disclosure statement in a party's principal brief is moved to this subdivision because it deals with the time for filing the statement. No substantive change is intended.

Subdivision (c). The amendments are stylistic and no substantive changes are intended.

Rule 28. Briefs.

(a) *Appellant's Brief.* The appellant's brief ~~of the appellant~~ must contain, under appropriate headings and in the order here indicated:

* * * * *

(8) The certificate of compliance required by Rule 32(a)(5).

(b) *Appellee's Brief.* The appellee's brief ~~of the appellee~~ must conform to the requirements of ~~paragraphs~~ Rule 28(a)(1)-(6) and (8), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement ~~of the appellant~~:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the standard of review.

* * * * *

(g) [reserved]

~~*Length of briefs.* Except by permission of the court, or as specified by local rule of the court~~

~~of appeals, principal briefs must not exceed 50 pages, and reply briefs must not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.~~

(h) *Briefs in a Case Involving a Cross-Appeal*. If a cross-appeal is filed, the party who ~~first~~ files a notice of appeal first, or ~~in the event that~~ if the notices are filed on the same day, the plaintiff in the proceeding below ~~shall be~~ is deemed the appellant for the purposes of this rule and Rules 30, ~~and~~ 31, and 34, unless the parties agree otherwise ~~agree~~ or the court orders otherwise ~~orders~~. The appellee's brief ~~of the appellee~~ ~~shall~~ must conform to the requirements of ~~subdivision~~ Rule 28(a)(1)- ~~(6)~~ (8) ~~of this rule~~ with respect to the appellee's cross-appeal as well as respond to the appellant's brief ~~of the appellant~~ except that a

statement of the case need not be made unless the appellee is dissatisfied with the appellant's statement ~~of the appellant~~.

Committee Note

Subdivision (a). The amendment conforms this rule with an amendment being made to Rule 32. Rule 32 is amended to require that a brief include a certificate of compliance with format, typeface, and length requirements established by that rule. Rule 28(a) is amended to include that certificate in the list of items that must be included in a brief.

Subdivision (b). This is also a conforming amendment accompanying the amendment requiring a certificate of compliance with Rule 32. An appellee's brief must include such a certificate, so the cross-reference to subdivision (a) now includes paragraph (8).

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.

Subdivision (h). The amendment requires an appellee's brief to comply with (a)(1) through (8) with regard to a cross-appeal. The addition of separate paragraphs requiring a summary of argument and a certificate of compliance with Rule 32 increased the relevant paragraphs of subdivision (a) from (6) to (8). The rest of the changes are stylistic; no substantive changes are intended.

Rule 29. Brief of an Amicus Curiae

~~A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.~~

(a) *When Permitted.* The United States or its

officer or agency, or a State, Territory or Commonwealth may file an amicus-curiae brief without consent of the parties or leave of court. Any other amicus curiae may file a brief only if:

(1) it is accompanied by written consent of all parties;

(2) the court grants leave on motion; or

(3) the court so requests.

(b) *Motion for Leave to File.* The motion must be accompanied by the proposed brief, and must state:

(1) the movant's interest;

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) *Contents and Form.* An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32(a), the cover must identify the party or parties supported or indicate whether the brief supports affirmance

or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. With respect to Rule 28, an amicus brief must include the following:

(1) a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited;

(2) a concise statement of the identity of the amicus and its interest in the case;

(3) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(4) the certificate of compliance required by Rule 32(a)(5), modified to take into account the length limitation in Rule 29(d).

(d) *Length.* An amicus brief may be no more than

one-half the length of a principal brief as specified in Rule 32.

(e) *Time for Filing.* An amicus curiae shall file its brief, accompanied by a motion for filing when necessary, within the time allowed to the party being supported. If an amicus does not support either party, the amicus shall file its brief within the time allowed to the appellant or petitioner. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) *Reply Brief.* An amicus curiae is not entitled to file a reply brief.

(g) *Oral Argument.* An amicus curiae's motion to participate in oral argument will be granted only for extraordinary reasons.

Committee Note

Rule 29 is entirely rewritten

Subdivision (a). The only changes in this material are stylistic.

Subdivision (b). The provision in the former rule,

granting permission to conditionally file the brief with the motion, is changed to one requiring that the brief accompany the motion. Sup. Ct. R. 37.4 requires that the proposed brief be presented with the motion.

The former rule only required the motion to identify the applicant's interest and to generally state the reasons why an amicus brief is desirable. The amended rule additionally requires that the motion state the relevance of the matters asserted to the disposition of the case. As Sup. Ct. R. 37.1 states:

> "An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored."

Because the relevance of the matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing.

Subdivision (c). The provisions in this subdivision are entirely new. Previously there was confusion as to whether an amicus brief must include all of the items listed in Rule 28. Out of caution practitioners in some circuits included all those items. Ordinarily that is unnecessary.

The requirement that the cover identify the party supported or indicate whether the amicus supports affirmance or reversal is an administrative aid.

Subdivision (d). This new provision imposes a shorter page limit for an amicus brief than for a party's brief. This is appropriate for two reasons. First, an amicus may omit certain items that must be included in a party's brief. Second, an amicus brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter

not adequately addressed by a party.

Subdivision (e). The time limit for filing is unchanged; an amicus brief must be filed within the time allowed the party the amicus supports. Ordinarily this means that the amicus brief must be filed within the time allowed for filing the party's principal brief. That, however, is not always the case. For example, if an amicus is filing a brief in support of a party's petition for rehearing, the amicus brief is due within the time for filing that petition. Occasionally, an amicus supports neither party; in such instances, the amendment provides that the amicus brief must be filed within the time allowed the appellant or petitioner.

The former rule's statement that a court may, for cause shown, grant leave for later filing is unnecessary. Rule 26(b) grants general authority to enlarge the time prescribed in these rules for good cause shown. This new rule, however, states that when a court grants permission for later filing, the court must specify the period within which an opposing party may answer the arguments of the amicus.

Subdivision (f). This subdivision prohibits the filing of a reply brief by an amicus curiae. Sup. Ct. R. 37 and local rules of the D.C., Ninth, and Federal Circuits state that an amicus may not file a reply brief. The role of an amicus should not require the use of a reply brief.

Subdivision (g). This provision is taken unchanged from the existing rule.

Rule 32. Form of a Briefs, ~~the~~ an Appendix, and Other Papers

(a) *Form of a Briefs and ~~the~~ an Appendix.*

(1) *In General.* ~~Briefs and appendices~~ A brief may be produced by ~~standard typographic printing or by any duplicating or copying process which produces~~ any process that results in a clear black image on white paper, including by typing, printing or photocopying. The paper must be opaque and unglazed, and only one side may be used. ~~Carbon copies of briefs and appendices may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis. All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in~~

~~volumes having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches. Those produced by any other process shall be bound in volumes having pages 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

(2) *Typeface.* Either a proportionately spaced typeface of 14 points or more, or a monospaced typeface of no more than 10-1/2 characters per inch may be used in a brief. A proportionately spaced typeface has characters with different advance widths. The design must be in roman, non-script type. A monospaced typeface has characters with the same advance width.

(3) *Paper Size, Line Spacing, and Margins.* A brief must be on 8-1/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. The side margins must be at least 1 inch, and the top and bottom margins must be at least 1-1/4 inch.

(4) *Length.*

(A) Proportionately spaced briefs. A principal brief must not exceed 14,000 words and a reply brief must not exceed 7,000 words. No brief may have an average of more than 280 words per page, including headings, footnotes, and quotations.

(B) Monospaced or typewritten briefs. A brief prepared in a monospaced typeface must either:

(i) comply with the word counts, both total and average per page, for a proportionately spaced brief; or

(ii) not exceed 40 pages for a principal brief and 20 pages for a reply brief.

(C) Exclusions. Word and page counts do not include any of the following: corporate disclosure statement, table of contents, table of citations, certificate of service, certificate of compliance with Rule 32, or any addendum containing statutes, rules, regulations, etc.

(5) *Certificate of Compliance.* The attorney, or party proceeding pro se, shall include a certificate of compliance with Rule 32(a)(1)-(4). The person preparing the

certificate may rely on the word count of the word-processing system used to prepare the brief. The certificate must state the brief's line spacing and either:

(i) that the brief is proportionately spaced, together with the typeface, point size, and word count; or

(ii) that the brief uses a monospaced typeface, together with the number of characters per inch, and word count or number of counted pages.

(6) *Appendix.* An appendix must be in the same form as a brief but may include a legible photocopy of any document in the record.

~~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.~~

(~~7~~) *Cover.* ~~If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available,~~ Except for filings of pro se parties, the cover of the appellant's brief ~~of the appellant should~~ must be blue; ~~that of the appellee~~ the appellee's, red; ~~that of~~ an intervenor's or amicus curiae's, green; ~~that of~~ and any reply brief, gray. The cover of ~~the appendix, if separately printed, should~~ a separately printed appendix must be white. The front ~~covers of the briefs and of appendices, if separately printed, shall~~ cover of a brief and of a separately printed appendix must contain:

(A) the number of the case centered at the top;

(~~1~~) (B) the name of the court ~~and the number of the case~~;

~~(2)~~ (C) the title of the case (see Rule 12(a));

~~(3)~~ (D) the nature of the proceeding in the court (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

~~(4)~~ (E) the title of the document, identifying the party or parties for whom the document is filed ~~(e.g., Brief for Appellant, Appendix)~~; and

~~(5)~~ (F) the ~~names~~ name, ~~and~~ office addresses, and telephone number of counsel representing the party ~~on whose behalf~~ for whom the document is filed.

(8) *Binding.* A brief or appendix must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably 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 of a motion is governed by Rule 27(d).

(2) *Other Papers.* Any other paper, including a petition for rehearing and a petition for rehearing en banc, and any response to such a petition, must be produced in a

manner prescribed by Rule 32(a), with the following exceptions:

(A) Rule 32(a)(4) does not apply;

(B) a cover is not necessary if the paper has a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the paper and identifying the party or parties for whom it is filed.

Committee Note

Subdivision (a). A number of stylistic and substantive changes have been made in subdivision (a). The rule permits printing on only one side of the paper. Although some argue that paper could be saved by allowing double-sided printing, others argue that in order to preserve legibility a heavier weight paper would be needed, resulting in little, if any, paper saving. In addition, the blank sides of a brief are commonly used by judges and their clerks for making notes about the case.

Because photocopying is inexpensive and widely available and because use of carbon paper is now very rare, all references to the use of carbon copies have been deleted.

The rule requires that a brief be produced by a process "that produces a clear black image on white paper."

It is strongly preferred that the method used to produce the brief have a print resolution of 300 dots per inch or more. This will ensure the legibility of the brief. A brief produced by a typewriter, laser printer, or daisy wheel printer has a print resolution of 300 dots per inch (dpi) or more. But a brief produced by a dot-matrix printer, fax machine, or portable printer that uses heat or dye transfer methods do not. Some ink jet printers are 300 dpi or more, but some are 216 dpi and would not be sufficient.

New paragraphs have been added governing the printing of a brief or appendix. The old rule simply stated that a brief or appendix produced by the standard typographic process must be printed in at least 11 point type or, if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computer. The availability of computer fonts in a variety of sizes and styles has given rise to local rules limiting type styles. The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to ensure that the documents are easily legible.

The rule provides two options. The text can be prepared using a proportionately spaced typeface of 14 points or more or a monospaced typeface of no more than 10-1/2 characters per inch.

A monospaced typeface is defined as one in which all characters have "the same advance width." That means that each character is given the same horizontal space on the line. A wide letter such as a capital "m" and a narrow letter such as a lower case "i" are given the same space. The rule requires use of a monospaced typeface that produces no more than 10-1/2 characters per inch. A standard typewriter with pica type produces a monospaced typeface with 10 characters per inch (cpi). That is the ideal monospaced typeface. The rule permits up to 10-1/2 cpi because some computer software programs contain monospaced fonts that purport to produce 10 cpi but that in fact produce slightly

more than 10 cpi. In order to avoid the need to reprint a brief produced in good faith reliance upon such a program, the rule permits a bit of leeway. A monospaced typeface with no more than 10 cpi is preferred.

A proportionately spaced typeface gives a different amount of horizontal space to characters depending upon the width of the character. A capital "m" would be given more horizontal space than a lower case "i." Books and newspapers are ordinarily printed in proportionately spaced typefaces. The rule requires a minimum size of 14 points so that the type is easily legible. A proportional typeface must be roman, that is non-italic. That does not mean, however, that italics cannot be used for case names or for occasional emphasis. In addition, the typeface may not be a script typeface.

Because pamphlet sized briefs are rarely used in the courts of appeal, the rule makes no provision for them. The rule requires that all briefs be prepared on 8-1/2 by 11 inch paper. A brief generally must be double-spaced.

Length limitations are defined separately for proportionately spaced briefs and monospaced briefs. The length limitation for a proportionately spaced brief is 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 limits the average number of words per page. The reason for the limit on the average number of words per page as well as the limit on the total number of words is to ensure legibility. The limitation on the average number of words per page is an important element in guaranteeing that any proportionately spaced typeface used is of sufficient size to be easily legible. Although the rule specifies a minimum point size of 14, the various 14 point fonts can produce wide variations in the amount of material per page.

The length of a monospaced brief may be measured by the same word limits, both overall and per page, applicable to a proportionately spaced brief, or by the total number of pages. The Committee believes that the overall word limit of 14,000 words is the equivalent of a 50 page brief written with reasonable use of footnotes and single-spaced quotations. If the person preparing the brief does not want to certify the number of words in the brief, he or she may use the safe-harbor provision allowing 40 pages for a principal brief and 20 pages for a reply brief. The safe-harbor provision limits a monospaced principal brief to 40 pages rather 50 to prevent the use of the safe-harbor provision to produce a 50 page heavily footnoted brief or one containing extensive single-spaced quotations. No safe-harbor is provided for proportionately spaced briefs because they are ordinarily prepared on a computer and an exact word count is readily available.

Until adoption of these amendments, Rule 28(g) governed the length of briefs. Rule 28(g) began with the words "[e]xcept by permission of the court," signalling that a party could file a motion to exceed the limits established in the rule. The absence of similar language in Rule 32 does not mean that the Committee intends to prohibit motions to deviate from the requirements of the rule. The Committee did not believe that any such language was needed to authorize such a motion.

The rule requires a certification of compliance with the requirements of Rule 32(a)(1) through (4). The rule permits the person preparing the certification to rely upon the word count of the word processing system used to prepare the brief.

The rule recognizes that an appendix is virtually always produced by photocopying existing documents. The rule, however, requires that the photocopies be legible. Photocopies of the original documents are most legible; photocopying of copies, and especially of faxes should be avoided. If a decision that is included in the appendix has been published, a copy of the published decision should be

provided.

The rule requires a brief or appendix to be bound in any manner that is secure, does not obscure the text, and that permits the document to lie reasonably flat when open. Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is significantly more convenient. The Federal Circuit already has such a requirement, and the Fifth Circuit rules state a preference for it. While a spiral binding would comply with this requirement, it is not intended to be the exclusive method of binding. Stapling the brief at the upper left-hand corner also satisfies this requirement as long as it is sufficiently secure.

The rule requires that the number of the case be centered at the top of the front cover of a brief or appendix. This will aid in identification of the document and again the idea was drawn from a local rule. The rule also requires that the title of the document identify the party or parties on whose behalf the document is filed. When there are multiple appellants or appellees, this information is necessary to the court. If, however, the document is filed on behalf of all appellants or all appellees, it may so indicate. Further, it may be possible to identify the class of parties on whose behalf the document is filed. Otherwise, it may be necessary to name each party. The rule also requires that attorneys' telephone numbers appear on the front cover of a brief or appendix.

Having amended the national rule to provide additional detail, the Committee foresees little need for local variation and suggests that the existing local rules be repealed. It is the Committee's further suggestion that before a circuit adopts a local rule governing the form or style of papers, the circuit will carefully weigh the value of the proposed local rule against the difficulties and inefficiencies local variations create for national practitioners.

Subdivision (b). The old rule required a petition for rehearing to be produced in the same manner as a brief or

appendix. The new rule also requires that a petition for rehearing en banc and a response to either a petition for panel rehearing or a petition for rehearing en banc be prepared in the same manner. But the length limitations of paragraph (a)(4) do not apply 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 language has been deleted but that method of preparing documents is not eliminated because (a)(2) permits use of standard pica type. The only change is that the rule now specifies margins for these typewritten documents.

Rule 35. ~~Determination of Causes by the Court In Banc~~ En Banc Proceedings

(a) *When Hearing or Rehearing ~~in~~ En Banc ~~Will~~ May Be Ordered.* -- A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals ~~in~~ en banc. ~~Such a~~ An en banc hearing or rehearing is not favored and ordinarily will not be ordered ~~except when~~ unless:

(1) consideration by the full court is necessary to secure or maintain uniformity of its decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) *~~Suggestion of a party~~ Petition for Hearing or Rehearing ~~in~~ En Banc.* - A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing ~~in~~ en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; a proceeding may present a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue (citation

to the conflicting case or cases being required).

(2) Except by the court's permission, a petition for en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32(a)(4)(C).

(3) Except by the court's permission, if a petition for panel rehearing and a petition for rehearing en banc are both filed-- whether or not they are combined in a single document--the combined documents must not exceed 15 pages, excluding material not counted under Rule 32(a)(4)(C).

~~No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or~~

~~reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.~~

(c) *Time for ~~Suggestion of a party~~ Petition for Hearing or Rehearing ~~in~~ En Banc.* ~~; Suggestion Does Not Stay Mandate. If a party desires to suggest that~~ A petition that an appeal be heard initially ~~in~~ en banc~~, the suggestion~~ must be ~~made~~ filed by the date ~~on which~~ when the appellee's brief is ~~filed~~ due. A ~~suggestion~~ petition for a rehearing ~~in~~ en banc must be ~~made~~ filed within the time prescribed by Rule 40 for filing a petition for rehearing. ~~, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.~~

(d) *Number of Copies.* -- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

(e) *Response.*-- No response may be filed to a petition for en banc consideration unless the court orders a response.

(f) *Voting on a Petition.* -- The clerk must forward any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard. But a vote need not be taken to determine whether the cause will be heard or reheard en banc unless one of those judges requests a vote.

Committee Note

One of the purposes of the amendments is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.

Subdivision (a). The title of this subdivision is changed from "When a hearing or rehearing in banc will be ordered" to "When a Hearing or Rehearing En Banc May Be Ordered." The change emphasizes the discretion a court has with regard to granting en banc review.

Subdivision (b). The term "petition" for rehearing en banc is substituted for the term "suggestion" for rehearing en banc. The terminology change is not a necessary part of the changes that extend the time for filing a petition for a writ of certiorari when a party requests a rehearing en banc. The terminology change reflects, however, the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing en banc.

The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the criteria for en banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support en banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards.

Intercircuit conflict is cited as a reason for determining that a proceeding involves a question of "exceptional importance." Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the Supreme Court's inability to increase the number of cases it considers on the merits, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an en banc proceeding will not necessarily prevent intercircuit conflicts, an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts.

Four circuits have rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing en banc. D.C. Cir. R. 35(c); 7th Cir. R. 40(c); 9th Cir. R. 35-1; and 4th Cir. I.O.P. 40.5. An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.

The amendment states that a proceeding may present a question of exceptional importance "if it involves an issue as to which the panel decision conflicts with the authoritative decision of every other federal court of appeals that has addressed the issue." That language contemplates two situations in which a rehearing en banc may be appropriate. The first is when a panel decision creates a conflict. A panel decision creates a conflict when it conflicts with the decisions of all other circuits that have considered the issue. If a panel decision simply joins one side of an already existing conflict, a rehearing en banc may not be as important because it cannot avoid the conflict. The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict. The amendment states that the conflict must be with an "authoritative" decision of another circuit. "Authoritative" is used rather than "published" because in some circuits unpublished opinions may be treated as authoritative.

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of subdivision (a) of this Rule.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in five circuits; D.C. Cir. R. 35(b), 5th Cir. R.

35.5, 10th Cir. R. 35.5, 11th Cir. R. 35-8, and Fed. Cir. R. 35(d). Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using a word count similar to that in Rule 32 because there has not been a serious enough problem to justify importing the word count and typeface requirements applicable to briefs into other contexts.

Paragraph (3), although similar to (2), is separate because it deals with those instances in which a party files both a petition for rehearing en banc under this rule and a petition for panel rehearing under Rule 40.

To improve the clarity of the rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (e) and (f).

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. The deletion of that sentence does not affirmatively accomplish the goal of extending the period for filing a petition for writ of certiorari; it simply sets the stage for such an amendment. In order to affirmatively accomplish that objective, Sup. Ct. R. 13.3 must be amended.

Second, the language permitting a party to include a request for rehearing en banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from

former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b).

Because of the discretionary nature of the en banc procedure, the filing of a suggestion for rehearing en banc has not required a vote; a vote is taken only when requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered the decision sought to be reheard. It is not the Committee's intent to change the discretionary nature of the procedure or to require a vote on a petition for rehearing en banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) *The Mandate: Date of Issuance, Effective Date.*

(1) Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(2) ~~The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue.~~ The court's mandate must issue 7 days after the time for filing a petition for rehearing expires, unless an order shortens or extends the time, or a party

files a petition for rehearing, a petition for rehearing en banc, or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari. Unless the court orders otherwise, the ~~The~~ timely filing of a petition for rehearing, a petition for rehearing en banc, or the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari, ~~will~~ stays the mandate until ~~disposition~~ the court disposes of the petition or motion, ~~unless otherwise ordered by the court.~~ If the ~~petition is denied~~ court denies the petition for rehearing or rehearing en banc, or the motion for stay of mandate, the ~~mandate must~~ court must issue the mandate 7 days after entry of the order denying the last such petition or motion, ~~unless the time is shortened or enlarged by order~~ but an

order may shorten or extend the time.

(3) The mandate is effective when issued.

(b) *Stay of Mandate Pending Petition for Certiorari.* ~~A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion~~ A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that ~~a petition for certiorari~~ the certiorari petition would present a substantial question and that there is good cause for a stay. The stay ~~must not~~ cannot exceed ~~30~~ 90 days, unless the period is extended for good cause ~~shown~~, and it cannot, in either case, exceed the time that the party who obtained the stay has to file a petition for a writ of certiorari in the Supreme Court. ~~or unless during the period of the stay, a notice from~~ But if the clerk of the

Supreme Court ~~is filed showing~~ files a notice during the stay indicating that the party who ~~has~~ obtained the stay ~~has~~ filed a petition for the writ, ~~in which case~~ the stay ~~will~~ continues until ~~final disposition by~~ the Supreme Court's final disposition. The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security before ~~the~~ granting or ~~continuance of~~ continuing a stay of ~~the~~ mandate.

Committee Note

Subdivision (a). The amendment to paragraph (2) provides that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc delays the issuance of the mandate is a companion to the amendment of Rule 35 that deletes the language stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. The Committee's objective is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of

appeals' judgment and extend the period for filing a petition for writ of certiorari. The change made in this rule advances the Committee's objective of tolling the time for filing a petition for writ of certiorari only indirectly. Amendment of Sup. Ct. R. 13.3 is also necessary. Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

The amendment to paragraph (2) also provides that the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delays the issuance of the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate issue immediately.

Paragraph (3) has been added to subdivision (a). Paragraph (3) provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed. This amendment is intended to make it clear that the mandate is effective upon issuance and that its effectiveness is not delayed until receipt of the mandate by the trial court or agency, or until the trial court or agency acts upon it. This amendment is consistent with the current understanding. See, *e.g.*, 4th Cir. I.O.P. 41.1; 10th Cir. I.O.P. VIII.B.1. Unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact.

Subdivision (b). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days and in any event to no longer than the period the party who obtained the stay has to file a petition for a writ of certiorari to the Supreme Court. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

The amendment does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days.

GAP REPORT
CHANGES MADE IN RULES 28 AND 32 AFTER PUBLICATION

Rule 28 and 32 were previously published. The Advisory Committee is not requesting that these rules be forwarded to the Judicial Conference. A Gap Report may not be technically required. This segment of the report, however, will summarize the changes made since publication. The summary should facilitate the discussion of the changes.

Because the proposed amendments to Rules 26.1, 29, 35, and 41 have not been previously published, they are not treated in this portion of the report or the succeeding portions.

1. RULE 28 - Briefs

The post-publication changes in Rule 28 are not, by themselves, significant. Republication is requested, however, because these changes are companions to those in Rule 32. The Advisory Committee believes that the changes in Rule 32 are significant and requests republication of that rule.

The following changes have been made in Rule 28:

a. Subdivisions (a) and (b) are amended to provide that a party's brief must include the certificate of compliance required by amended Rule 32(a)(5).

b. Former subdivision (g) is noted as "reserved" and the remaining subdivisions retain their current labels.

c. The cross-reference in subdivision (h) to subdivision (a) now includes new paragraph (8), dealing with the certificate of compliance required by Rule 32.

d. Numerous stylistic changes were made.

2. RULE 32 - Form of a Brief or Appendix

Numerous changes have been made in Rule 32.

a. At line 10, double-sided printing is prohibited. Thirty-one commentators opposed double-sided printing of a brief or appendix.

b. The language previously located at line 7, requiring a print resolution of 300 dots per inch (dpi) has been deleted from the text of the rule, but the Committee Note expresses a strong preference for a printing method that produces 300 dpi or more. Six commentators objected to the requirement as being too technical.

c. At lines 11 through 15, the provisions dealing with carbon copies have been deleted. The use of carbon paper has become so rare that the Committee did not believe that the rule should address the use of carbon copies.

d. At line 35, the preference for proportional type has been omitted. Nine commentators opposed the use of proportional type and another 15 commentators would delete the preference for proportional type. At line 32, the rule is amended to require that proportional type be at least 14 point type. Twenty-seven commentators said that if proportional type is permitted it should be larger than 12 point.

e. Lines 33 and 34 provide that the monospaced type permitted under the rule cannot have more than 10-1/2 characters per inch. The published rule said no more than 11 characters per inch.

f. Line 42 requires that a brief must be on 8-1/2 by 11 inch paper. That precludes a pamphlet brief. Given the infrequent use of pamphlet briefs in the courts of appeals, the rule was simplified by dropping all treatment of them. The Committee believes that this change is significant.

g. The margins specified in lines 47 through 49 apply to all briefs whether proportionately spaced or monospaced. Five commentators opposed having different margins depending upon the style of type.

h. At lines 50 through 78, length limitations are defined separately for

proportionately spaced briefs and monospaced briefs.

i. The length of a proportionately spaced brief is based upon the number of words per brief, not the number of pages. A proportionately spaced principal brief must not exceed 14,000 words, and a reply brief must not exceed 7,000 words. (The previously published rule set the limit at 12,500 and 6,250 words.) In addition, the brief must not have an average of more than 280 words per page. The safe-harbor provision was deleted for proportionately spaced briefs.

ii. The length of a monospaced brief may be measured by the same word limits, both overall and per page, applicable to a proportionately spaced brief, or by the total number of pages. If a page count is used rather than a word count, the counted pages may not exceed 40 for a principal brief and 20 for a reply brief.

i. At lines 79 through 95, a more detailed certificate of compliance is required than that required by the published rule. The certificate is also required to be included in all briefs, even those using the page count method for determining the length of a monospaced brief. The Advisory Committee believes that these changes are significant.

j. At line 144, a brief or appendix is required to lie "reasonably" flat, rather than simply "flat."

k. The prohibitions against use of sans-serif type and boldface were deleted. The language requiring case names to be underlined unless a distinct italic typeface is used was also omitted.

l. Numerous style revisions were made.

SUMMARY
OF COMMENTS RECEIVED ON PROPOSED AMENDMENTS TO RULES 28 AND 32

1. Rule 28

Only two comments were specifically aimed at Rule 28. Because of the interrelationship of the changes in Rule 28 and 32, most commentators combined their discussion of the two rules. Because the "substance" of the change is contained in Rule 32, all issues except those specifically addressing Rule 28 are treated with Rule 32.

One commentator suggests that subdivision (g) should be shown as "reserved" in order to preserve the current labels for the remaining subdivisions.

Public Citizen suggests amendment of subdivision (h) to make it clear that when there is more than one appellant or appellee, a court of appeals cannot require the filing of a joint brief. At its September 1993 meeting the Advisory Committee rejected a proposal that each side file a single brief in a consolidated or multi-party appeal, but the Committee had not considered the wisdom of prohibiting a court from requiring a joint brief. No change was made.

2. Rule 32

The Committee received a total of sixty-nine comments on the proposed amendments to Rule 32. Most of them deal with discreet provisions without expressing either general support for or opposition to the amendments as a whole. Six of the comments, however, expressed support for the amendments and the general approach taken by them and 11 comments stated general opposition. The commentators who oppose the rule amendments typically criticize the complexity of the proposed rule and its technical nature.

The vast majority of comments were directed at specific provisions. The most commonly addressed issues are outlined below.

a. Proportional type

Nine commentators expressed opposition to the use of proportional type. Another 15 commentators would delete the preference for proportional type. Most of these commentators state that proportional type is too difficult to read.

Twenty-seven commentators say that if proportional type is permitted, it should be required to be larger than 12 point. Most of the commentators say that it should be at least 14 or 15 point.

One commentator specifically supports the preference for proportional typeface because use of a proportional typeface makes it possible to fit more material on a single page and there will be a resulting environmental savings.

b. Monospaced type

The commentators who oppose use of proportional type, as well as those who would delete the preference for proportional type, prefer monospaced type. 19 commentators say that the monospaced type permitted under the rule should have no more than 10 characters per inch, the equivalent of pica type on a standard typewriter.

c. Double-sided printing

Thirty-one commentators oppose double-sided printing. A major concern is legibility even though the rule permits double-sided printing only when the brief is legible. Several commentators point out, however, that even if a brief is legible when submitted by the party, once the user of the brief highlights portions and takes notes on the brief there may be bleed through that destroys legibility. Another concern is that the back-side is currently used by many judges and law clerks for notetaking. Several of the opponents point out that any environmental saving that might result from use of fewer sheets of paper is likely to be offset by the use of heavier weight paper needed to meet the legibility requirement.

One commentator supports double-sided printing specifically because of the environmental savings.

d. Length limitations

Twelve commentators specifically oppose use of word limitations (both total words per brief and average number of words per page); one other opposes

applying word limits to *pro se* litigants proceeding *in forma pauperis*. Another five commentators implicitly reject the word limitations by saying that the rule should use page limits. Various reasons are given for the opposition. Some oppose word counts because not all lawyers have computers or office machinery that will perform the counting function. Others oppose the counts because of the time and effort that will be used to comply with a rule that they think is unnecessarily technical. Still others worry about the fact that different word-processing systems count words differently.

Eight commentators support the use of word limits as the most straightforward way to address the "cheating" that is currently a problem. Three of these commentators, however, recommend that the rule define a "word" in an effort to minimize the variation in word counting as performed by various computer programs. One commentator favors a character count rather than a word count because it eliminates the variations resulting from the different counting methods used by software programs.

Seven commentators object to what they believe is a shortening of brief length. They state that the word limitations in the published rule shorten briefs. The Ninth Circuit Advisory Committee on Rules and the Los Angeles County Bar Association Appellate Courts Committee, both recommend that the total number of words be raised to 14,000 for a principal brief and 7,000 for a reply brief, but that the average number of words per page remain at no more than 280. Judge Easterbrook recommends that the total number of words be increased to 14,500 per brief and that the average number of words per page be no more than 320. The National Association of Criminal Defense Lawyers recommends increasing both the word limits and the safe harbors by 10%.

Several commentators also state that the safe harbors are too restrictive.

Three commentators object to the requirement that a brief include a certification that it does not exceed either the total word count or the limit on average number of words per page. They find the requirement demeaning.

e. Use of decisions retrieved electronically

Seven commentators object to that portion of the Committee Note stating that decisions retrieved electronically from Lexis or Westlaw may not be included in an appendix. The commentators note that if citation to an opinion that is either unpublished or not yet published is permitted, inclusion of the opinion as retrieved from Lexis or Westlaw may be the only pragmatic way to provide the

court with a copy of the opinion. Because of the delay in publication of advance sheets and the slow response time to requests for copies of slip opinions, the electronically retrieved opinion may be all that the party can obtain. The restriction could deprive the litigants and the court of the opportunity to use the most current precedent. Moreover, the ability to "download" opinions and print them on high quality laser printers can eliminate legibility problems.

f. Miscellaneous "technical" matters.

Five commentators oppose requiring different margins depending upon whether a brief is prepared with monospaced or proportional type.

Four oppose the requirement that a brief lie flat when open. One approves the requirement but requests further guidance as to the type of binding that is acceptable. One commentator suggests that the rule should require spiral binding for all 8-1/2 by 11 inch briefs.

Six commentators recommend deleting the requirement that the print have a resolution of 300 dots per inch or more. The commentators believe that the requirement is too technical and that requiring "legibility" is sufficient.

LIST OF COMMENTATORS
SUMMARY OF THEIR INDIVIDUAL COMMENTS

1. Rule 28

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.

Because of the interrelationship of the changes to Rules 28 and 32 most commentators combined their discussion of the two rules. Because the "substance" of the changes is found in Rule 32, this list includes only those comments aimed specifically at Rule 28. The rest of the comments are summarized under Rule 32.

1. P. Michael Jung, Esquire
Strasburger & Price, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 73202

Mr. Jung suggests that 28(g) should be shown as "[reserved]" rather than relettering Fed. R. App. P. 28(h)-(j).

2. Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that subdivision (h) should be amended to make it clear that when there is more than one appellant or appellee they cannot be required to file joint briefs. This can result in parties who opposed each other below, and whose rights are still at odds although they are on the same side of the appellate caption, being forced to join in one brief.

2. Rule 32

The published amendments changed Rule 32 in several significant ways. The published rule would permit a brief to be produced using either a monospaced typeface or a proportionately spaced typeface, although the rule expressed a preference for the latter. Monospaced and proportionately spaced typefaces were defined in the rule. Margins were specified for different paper sizes and different typefaces.

The proposed rule established new length limitations for briefs. A principal brief would be limited to a total of 12,500 words and a reply brief could not exceed 6,250 words. In addition, the average number of words per page could not exceed 280 words. The latter limitation was included to ensure that the typeface used would be sufficiently large to be easily legible.

1. Honorable Ruggero J. Aldisert
United States Circuit Judge
6144 Calle Real
Santa Barbara, California 93117-2053

Given the caseload crises in the United States Courts of Appeals, Judge Aldisert states that any rule amendment should be designed to assist the judges. He believes that certain portions of the proposed amendments do not pass that test. He states that the rule should prohibit the use of proportionately spaced typeface because it is too difficult to read, but that if proportional type is used, the point size should be greater than 12. He objects to brief length being measured by number of words because it will be more difficult for court personnel to monitor. His strongest objection is to authorizing double-sided printing of briefs. Judge Aldisert uses the reverse side of the pages for his notes.

Specifically Judge Aldisert suggests that a monospaced typeface be not more than 10 characters per inch. He also suggests that brief lengths be expressed in number of pages and that a principal brief should be no more than 35 pages.

2. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section disagrees with and proposed changes to (a)(1)-(6), (a)(7), and (b)(2).

With regard to (a)(1)-(6) the section disagrees with the substance and mechanics used to curtail the ability of lawyers to circumvent the current page limits.

a. The section opposes (a)(6) stating that it effectively shorten the maximum length of a brief from 50 to 44 pages. The sections emphasizes that a party appearing before a court of appeals has a right to present all of his or her non-frivolous arguments to the court.

b. The section believes that the paragraphs (a)(1)-(6) are unduly confusing, hard to follow, and will be even more difficult to administer. The section cites the differing margin requirements depending upon the typeface used as illustrative. The section further notes that many word processors do not have word counting capabilities and that many pro se litigants and small firms still use typewriters. The section recommends a simpler solution such as keeping the current margin and page length requirements and requiring that all briefs not commercially printed be produced in 11-point, 10 character per inch Courier. As an alternative, it suggests the Fifth Circuit Rules 28.1 and 32.1, which allows proportional fonts but is relatively easy to follow and administer.

With regard to (a)(7), the section opposes the restrictive language in the Committee note regarding legibility of documents to be included in an appendix. The section believes that simply requiring "legibility" is sufficient and that the additional requirements of the note should not be added to the rule and that the language of the note should be stricken. The section points out that in many cases, the "original" document in the record is a copy. Sometimes the record document is a copy of a fax. Similarly, Westlaw and Lexis opinions can be retrieved on printers that produce a 300 dot per inch resolution in double column format.

With regard to (b)(2), the section notes that neither the text nor the note indicate whether the length limitations apply to "other papers." The section

recommends that, at a minimum, the rule should refer to Rule 40(b), which prescribes a 15-page limit for a petition for rehearing.

3. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

4. Stewart A. Baker, Esquire
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

Notes that it is difficult to read long lines of proportionally spaced type. He suggests that if the words per page limit is a subtle way of requiring the use of larger margins, the rule should be more direct.

5. Honorable Bobby R. Baldock
United States Circuit Judge
Post Office Box 2388
Roswell, New Mexico 88202

Judge Baldock prefers 14 point proportional type to either 12 point proportional type (which he characterizes as the least desirable) or monospaced type with at least 10 characters per inch. Judge Baldock also objects to double-sided printing.

6. Honorable Stanley F. Birch, JR.
United States Circuit Judge
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Judge Birch joins in the remarks of Judge Edmondson (see summary below).

7. Honorable Michael Boudin
United States Circuit Judge
J.W. McCormack Post Office and
Courthouse
Boston, Massachusetts 02109

Judge Boudin questions the replacement of the 50/25-page length limitations for principal and reply briefs by the new provisions governing typeface, words per page, and total number of words. He believes the new provisions are unduly complicated and will be especially burdensome for solo and small firm practitioners. He recognizes that there probably should be different page limits for printed and typewritten briefs but would otherwise simply include in the rule an admonishment that "any devices that appear unreasonably designed to crowd more than an ordinary number of words into the page limits may subject the brief to rejection, or requirement of refiling in proper form, or (in egregious cases) other sanctions. He also suggests that it is unnecessary to require an appendix to lie flat when open.

8. Honorable Pasco M. Bowman
United States Circuit Judge
819 U.S. Courthouse
Kansas City, Missouri 64106

Judge Bowman prefers monospaced type and suggests deleting the preference for either monospaced type or proportional type. He also suggests that the rule require 14 or 15 point proportional type rather than 12. He notes that the use of 12 point proportional type can result in considerably more words per page than the 280 word maximum in the proposed rule. With regard to monospaced type he questions why a maximum of 11 characters per inch is specified when the most common monospaced typefaces have only 10 characters per inch. He questions whether double-sided printing is a good idea.

9. Honorable James R. Browning
United States Circuit Judge
121 Spear Street
Post Office Box 193939
San Francisco, California 94119-3939

Judge Browning prefers single-sided briefs. He prefers monospaced

typeface; if the rule permits proportionately spaced typeface, he believes that it should be larger than 12 point. With regard to monospaced typeface, he suggests that 10 characters per inch should be the minimum.

10. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee opposes using a word count to limit the length of a brief and reducing the length of a brief from 50 pages to 44.6 (12,500 words per brief divided by 280 words per page). The committee says that many law firms do not have the capability of counting words using their word processing equipment and the safe harbors cause too significant loss in length. The committee also opposes the prohibition on using Lexis and Westlaw printouts in an appendix. The committee further notes that two-sided briefs are difficult to read and that common brief bindings generally do not lie flat.

11. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee states that the word limits are "a very bad idea." They believe that the cost exacted by the change is too great. Time will be wasted simply on compliance with a format requirement. Many attorney's offices do not have equipment that will count words and even automated counting will be unduly time consuming. The committee prefers the current page limits but would find a total word limit, without per-page limits, more palatable. The safe-harbor alternatives are not palatable.

The committee opposes the prohibition on use of Lexis and Westlaw printouts in an appendix. If necessary, the rule simply should require that the printouts be legible.

12. Honorable William C. Canby, Jr.
United States Circuit Judge
6445 United States Courthouse
230 N. First Avenue
Phoenix, Arizona 85025

Judge Canby states that double-spaced pica type is far easier to read than proportionately spaced type in 12, 14, or even 15 point type. Judge Canby urges the committee to require monospaced type with 10 characters per inch. If, however, the rule continues to allow proportionately spaced type, it should be 14 point type. He would not, however, say "at least 14 points" because footnotes are difficult to read at 14 points and even more difficult at 15 points. Judge Canby also urges reconsideration of the two-sided brief.

13. Aaron H. Caplan, Esquire
on behalf of the Law Firm Waste Reduction Network
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099

Mr. Caplan writes on behalf of the Law Firm Waste Reduction Network, an affiliation of attorneys and staff from among Seattle's larger law firms. The group writes in support of those portions of the proposed rule permitting the use of both sides of the page and encouraging the use of proportionately spaced typefaces. The group also proposes that the committee consider encouraging the use of recycled content paper for submissions to the courts of appeals.

The group calls double-sided printing both environmentally beneficial and cost-effective. They note that legibility is not an objection because the rule already takes legibility into account. Note taking, they say, is not a problem because commercially printed briefs are double-sided and there should not be a different standard when briefs are produced in-house.

With regard to recycled content paper, the group says that the states of Florida, New York and Colorado permit papers submitted to their courts on recycled-content paper and that Michigan and Washington have similar proposals under consideration. The group also notes that Executive Order 12873 requires the use of recycled paper by the administration. The group states that recycled-content paper is comparable to most types of

nonrecycled paper in terms of quality, function, availability, and price and requires no changes in office machinery. They argue that mandating recycled-content paper for important appellate documents would have a ripple effect making the use of such paper acceptable generally in the practice of law, a profession that uses a great deal of paper products.

14. Chicago Council of Lawyers
Federal Courts Committee
One Quincy Court Building, Suite 800
220 South State Street
Chicago, Illinois 60604

The Federal Courts Committee of the Chicago Council of Lawyers supports the goal of setting a national standard for typeface and other requirements, "to clear the tangle of contradictory local rules."

The committee, however, opposes replacing the current page limits with the proposed word count. The committee believes that overlong briefs are usually the product of either poor writing style or the courts' insistence that all issues be fully briefed, on pain of waiver.

The committee also opposes the requirement that only "printed court or agency decision[s]" be included in an appendix. The committee points out that very often district court opinions are not printed at all. Even as to those that are "printed" there is a lag time of two to three weeks before incoming slip opinions are available in the federal court library and that West advance sheets run a full month to two months behind decision dates. The restriction would deprive the reviewing court of the benefit of the most recent, on-point authority.

15. Clerks of the United States Courts of Appeals for
D.C. Circuit and the First through Eleventh Circuits

The primary concern of the clerks is that the rule be one that can realistically be enforced by deputy clerks and easily understood and abided by litigants. Specifically, the clerks state:

a. Legibility is crucial, but they question the need to require a "resolution of 300 dots per inch." How would a deputy clerk clearly identify a possible violation?
b. They suggest deletion of the preference for proportional type.

c. They are concerned about the requirement that a typeface design be serifed, Roman, text style. Given the large variety of type styles, they are concerned about enforceability and about fairness to those who have invested in alternatives.

d. They prefer a single margin requirement rather than varying the margins depending upon whether monospaced or proportional type is used.

e. Paragraphs (a)(4) and (5), dealing with boldface and underlining or italicizing case names, unnecessarily limit formatting discretion and provide more detail than is necessary in a national rule.

f. They support the use of word counts for defining the length of a brief provided the certification by the litigant can be relied upon for purposes of filing. They suggest that it might be helpful to create a form certification as an appendix to the rules.

16. Competitive Enterprise Institute
1001 Connecticut Avenue, N.W., Suite 1250
Washington, D.C. 20036

The institute opposes double-sided printing and, anticipating that the Advisory Committee will receive suggestions that it mandate the use of recycled paper, mandating the use of recycled paper. The institute does not believe that such measures will have any significant environmental benefits. Among other factors the institute provides statistics about the pollutants generated in recycling paper.

17. Peter W. Davis, Esquire, Chair
Ninth Circuit Advisory Committee on
Rules of Practice
Crosby, Hearey, Roach & May
1999 Harrison Street
Oakland, California 94612

The Ninth Circuit committee generally favors the approach taken in the proposed revisions and supports the basic concepts: that there be distinct provisions for proportionately spaced type in contrast to monospaced type, and that the length of proportionately spaced briefs be calculated by a "word-count" method.

The committee favors the word-count method because it removes the incentive to cram words on a page or otherwise "cheat" on a page limit.

The one objection to word counting that troubled the committee is that various word processing systems count differently so that the total will vary depending on the system used. They believe that the difference can be more than 200 words for a 35 page brief (or the equivalent of a three-quarters of a page). Even so, the committee believes that the benefits of the rule outweigh its drawbacks and that it should be adopted.

The committee made a number of suggestions for "fine-tuning" the rule.

a. In paragraph (a)(1) the committee believes that the 300 dots per inch requirement is too technical and that requiring "a clear black image" is sufficient.

b. The committee also suggests that only single-sided printing be permitted.

c. In paragraph (a)(2) the committee questions whether there is a uniform preference for proportional typefaces.

d. In subsections (a)(2)(A) and (B), the committee recommends that the rule require proportional fonts to be 14 points rather than 12. The committee also believes that defining proportional and monospaced type in terms of "advance widths" may not be understood by many practitioners and suggests more reader-friendly definitions. The committee suggests that proportionately spaced type could be defined as that having "characters of different widths" and that monospaced type could be defined as that having "characters of the same width." The committee also suggests deleting the reference in the rule to particular type style examples. The committee does not believe that it is necessary to require serifed styles to ensure readability. Finally, the committee believes that monospaced type should be 10 characters per inch rather than 11.

e. In subsection (a)(3)(A), the committee would use a single margin requirement for all briefs.

f. In subsection (a)(3)(B), the committee would eliminate the option of using 6-1/8 by 9-1/4 inch paper.

g. The committee believes that paragraphs (a)(4) and (5) impinge unnecessarily on formatting discretion.

h. With regard to paragraph (a)(6), the committee recommends that the permissible number of words be increased from 12,500 (6,250 for a reply brief) to 14,000 (7,000). A brief containing 14,000 words

would be 50 pages in length if the average number of words per page is 280. The committee would eliminate the "safe harbor" exception from the certificate of compliance because it is overly complicated and burdensome to enforce. The committee believes that a word count is the better approach for all proportionately spaced briefs.

With regard to monospaced briefs, the committee believes that litigants may use excessive single-spaced footnotes to circumvent the limitation on length. The committee recommends, therefore, that any monospaced principal brief exceeding 40 pages (or reply brief exceeding 20 pages) should be subject to the average words per page and maximum words per brief rule as well as the certificate of compliance requirement.

i. In paragraph (a)(7), the committee suggests that the volumes of an appendix be limited to 300 pages each.

j. The committee suggests that paragraph (a)(8) prohibit plastic covers on briefs.

k. In paragraph (a)(9), the committee suggests that requiring a brief to "lie flat" may be too restrictive and suggests that it might be better to require that it "stay open" or "lie reasonably flat when open."

18. The Bar Association of the District of Columbia
Litigation Committee and its Subcommittee on Court Rules
1819 H. Street, N.W., 12th Floor
Washington, D.C. 20006

Although the Litigation Committee agrees that there should be a uniform national standard for appellate briefs, one that will preempt local rules on the subject, the committee believes that the existing provisions in Rules 28 and 32 dealing with the length and form of a brief are sufficient to accomplish the Advisory Committee's goals of ensuring that all litigants have an equal opportunity to present their material and that the documents are easily legible. The Litigation Committee opposes the proposed revisions for several reasons. The committee objects in general to the complexity of the proposed revisions. The committee objects to the complexity not only because of the burdens ordinarily accompanying any complex rule, but also because, in this case, the complexity "suggests that lawyers have an improper attitude and simply cannot be trusted." The Litigation Committee urges the courts of appeals "simply to respect the integrity of the bar to comply with present requirements." If the Standing Committee, however, believes that a word count is necessary to curtail

"cheating," the Litigation Committee suggests that a word count alone is a sufficient limitation.

Specifically, the Litigation Committee notes that some long-time practitioners on the committee did not understand the requirement that a font be "serifed, roman, text style" and that even the distinction between "monospaced" and "proportionately" spaced typeface eluded some members of the committee. The committee questions the propriety of including examples of acceptable typefaces in the rule, calling them "a virtual advertisement for a product sold by those who drafted and testified in favor of the rule." The committee questions the need to vary the margin sizes depending upon whether a typeface is monospaced or proportionately spaced.

The committee states that the complexity of the rule will make court evaluation of compliance difficult. The committee notes the need for the litigants to certify the total and average word counts. The committee states that the rule's reliance upon the party's representation as to compliance demonstrates the superfluousness of the rule. The committee objects to reliance upon the word count derived from the word processing system used to prepare the brief because different systems count differently.

The committee believes that the 300 dots per inch minimum is unnecessary (in light of the requirement that text be a "clear black image") and that court determination of compliance will be difficult. If the judgment is that it is important to keep the 300 dpi standard, the Litigation Committee believes that it should be moved from the text of the rule to the note so that the rule will not become outdated by technological changes.

The Litigation Committee also objects to the requirement that a brief lie flat when open.

Finally, the committee objects to the requirement that only "printed court or agency decisions" may be included in an appendix. The committee states that if an unpublished decision may be cited, a party should be permitted to use the decisions in the form normally obtained from Lexis, Westlaw, or the courthouse database through the Internet. The committee argues that "[s]ometimes, an electronically retrieved version of a decision is far more legible than an nth-generation photocopy that is the only 'original' available to a party."

19. District of Columbia Bar
Section on Courts, Lawyers and the Administration of Justice
Anthony C. Epstein, Co-chair
Jenner & Block
601 Thirteenth Street, N.W., Suite 1200
Washington, D. C. 20005

The section agrees that the length of a brief and other papers should be primarily governed by limits on the number of words and by general rules concerning the layout of pages. The section states that the proposed amendments are, however, too detailed and will be confusing to those not versed in typographic issues. Specifically, the section states:

a. The requirement of "a clear black image on white paper" is sufficient; there is no need for the "300 dots per inch" standard.

b. The rule should not require a certification of compliance. The rule could provide that by filing a brief, an attorney certifies that the brief complies with the rule. The certification requirement is "implicitly demeaning to the integrity and professionalism of lawyers." The rules do not otherwise require certification of compliance even when a violation may not be obvious from the face of a document.

20. Honorable Frank H. Easterbrook
United States Circuit Judge
219 South Dearborn Street
Chicago, Illinois 60604

Judge Easterbrook states that the proposed amendments are a substantial step forward but he suggests a number of additional amendments.

a. He suggests that the copies of faxes and Lexis printouts should not be includible in an appendix. He believes that the appropriate step would be to permit inclusion of a document in an appendix only if the original has 300 dots per inch or better.

b. To aid a judge with vision difficulties, the rule should require lawyers to retain electronic copies of any brief composed on a computer so that the courts by local rule, or order in particular cases, may call for the briefs and other papers in electronic form. This would permit a judge to enlarge the text on a computer screen, print it in a larger size on a local printer, or even have it read aloud by a computer equipped to do so. He does not suggest that the rule require routine filing of disks.

c. He continues to believe that the rule should adopt character rather than word limits.

d. He is concerned that the conversion from pages to words has substantially curtailed the maximum length of a brief from the old 50-page rule. The proposed rule establishes a maximum of 12,500 words per brief and an average of 280 words per page. Using five briefs submitted to the Supreme Court (printed, of course) he found that the number of words in a 50 page printed brief would ordinarily be at least 14,000 and may be almost as high as 16,900. He also found that a 50 page typewritten brief produced in 12 point Courier also has significantly more than 12,500 words. Using one inch margins all around his document had 13,875 words (counted by Microsoft Word) and using the smallest margins allowed by the current rule 14,543 words. Setting the same brief in an easily read proportional typeface and using the margins in the proposed rule, his document had 16,333 words in 50 pages. The average words per page in the printed briefs varied from a low of 283 to a high of 338. The typewritten brief in 12 point Courier had 277.5 words per page with the one inch margins and 290.1 words per page with the smaller margins. The brief with proportional typeface had 326.7 words per page.

   As previously stated, Judge Easterbrook prefers a character count to a word count. His examples show that there is less variation in character count from one word-processing package to another than there is using a word count.

In a later comment, Judge Easterbrook responds to the comments of the Ninth Circuit Advisory Committee on Rules. He agrees with many aspects of the comment and differs with others. Specifically he responds as follows:

a. He rejects the suggestion that the rule define how to count a word as not feasible. He prefers a character count because it eliminates the disparity in word count approaches across software packages, but if a character count is rejected he believes we simply must live with the variation from package to package as to word count.

b. The 300 dot per inch may be too technical, but rather than delete it he would offer more explanation in the committee note.

c. Double-sided printing is fine but he agrees that the rule should require 20 pound paper (or heavier) to prevent bleed through.

d. The preference for proportional type should be retained. "The current prejudice against it by some judges may be traced to its use

as a cheating device. From here on, only legibility counts."

e. The minimum point size may stay at 12. "Once typographical tricks have been eliminated as a means to squeeze more words into a brief, lawyers will begin to appreciate how type can be used for persuasion. A brief set in Adobe Garamond ought to be 13-point; a brief set in Berthold Baskerville ought to be 12-point; if we try to give a table of these things we'll end up in a swamp."

f. The term "advance widths" can be abandoned in favor of the proposed definitions of "characters of different widths" and "characters of the same width" for proportional and monospaced type.

g. Examples of typefaces do not belong in the text of the rule but would be helpful in the committee note.

h. It is essential to limit proportionally spaced fonts to those with serifs. A sans serif font is tiring to read in longer passages.

i. The reason the rule requires a monospaced font to have no more than 11 characters per inch (cpi) rather than 10 cpi is that some of the monospaced fonts built into printers yield about 10-1/4 or 10-1/2 cpi when printed at 12 point but when printed at 13 point, they look too large. Perhaps the rule could say that 10 cpi is strongly preferred and that no more than 10-1/2 cpi are allowed.

j. The reason for wider side margins for proportionally spaced type is that it is less readable in lines that reach 6-1/2 inches.

k. It would not be a big loss to abandon the pamphlet brief.

l. Boldface generally should be prohibited and case names should be in italic unless that is impossible.

m. The word limits should be increased to 14,500 per principal brief and no more than 320 word per page. The safe-harbors are designed for simplicity and should be retained. Judge Easterbrook agrees that the rule might limit the safe harbor for monospaced briefs to 40 pages to ward off the excessive use of footnotes.

n. Appendix volumes exceeding 300 pages are not troublesome.

o. Plastic covers are not problematic but Judge Easterbrook dislikes plastic backs, but is not convinced that either should be the subject of rulemaking.

p. Requiring a brief to "stay open" or "lie reasonably flat when open" would do the trick without compelling everyone to use spiral binders.

21. Honorable J.L. Edmondson
United States Circuit Judge
Room 416, 56 Forsyth Street
Atlanta, Georgia 30303

Judge Edmondson strongly objects to typeface as small as 12 point. If proportionately-spaced typeface is allowed, he believes that 15 point type should be required. If monospaced typeface is used, he believes that at least ten characters per inch should be the standard but he prefers even fewer than 10 characters per inch. Judge Edmondson also objects to double-sided briefs. He further objects to single spacing footnotes that contain more than simple citations to authority.

22. Honorable Jerome Farris
United States Circuit Judge
United States Courthouse
1010 5th Avenue
Seattle, Washington 98104

Judge Farris objects to printing text on both sides of the page. He also objects to use of proportionately spaced type. He further objects to the word counts; they will be difficult for a person using a typewriter. He suggests that the 11 characters per inch be changed to 10 characters per inch which is standard for typewriters.

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

Judge Feinberg opposes double-sided briefs. He suggests that the rule should specify that a monospaced typeface may have no more than 10 characters per inch. He further suggests that proportional typeface should be prohibited rather than preferred but if it is permitted it should be at least 14 point type.

24. Honorable Floyd R. Gibson
United States Circuit Judge
837 United States Courthouse
811 Grand Avenue
Kansas City, Missouri 64106-1991

Judge Gibson objects to the use of 12 point proportional type; he finds monospaced, pica (10 characters per inch) much easier to read. He also questions permitting double-sided printing unless it can be done without the imprint on one side of the page interfering with the characters on the other side of the page.

25. Joseph A. Halpern, Elizabeth A. Phelan, & Heather R. Hanneman, Esquires
Holland & Hart
555 Seventeenth Street, Suite 2900
Denver, Colorado 80202-3979

Mr. Halpern, et al, oppose the substitution of a word limitation for a page limitation even though they recognize the desirability of minimizing creative evasions of page limitations and the need for uniformity and legibility of briefs. They point out that gamesmanship will continue with a word limitation. They note that different word processing systems, and even different versions of the same system, count "words" differently. They performed a word-count on the same 50 page brief and found that Word Perfect 5.1 counted 12,436 words, MicroSoft Word 6.0 counted 12,850, and WordPerfect Windows 6.1 counted 13,011 words. Given the difference in word counting functions, Mr. Halpern concludes that a certificate concerning word count will be meaningless. Other gamesmanship opportunities exist; lawyers may eliminate parallel citations, shorten case names in citations, or use typographical characters that do not count as words, such as "7" instead of "seven." Finally they note that a word limitation is onerous for parties that do not have access to word processing systems.

Mr. Halpern, Ms. Phelan, and Ms. Hanneman recommend that Rule 32 limit the length of a brief by (1) using a page limitation; (2) specifying a minimum point size; and (3) specifying acceptable typefaces for briefs.

26. Honorable Shirley M. Hufstedler
Hufstedler & Kaus
Thirty-Ninth Floor
355 South Grand Avenue
Los Angeles, California 90071-3101

Judge Hufstedler objects to the revisions for a variety of reasons including that they will require conscientious lawyers to spend unjustifiable amounts of time trying to comply. She does not believe that the benefits to the judges are significant enough to justify the increased cost to litigants.

Judge Hufstedler also object to shortening the length of appellate briefs; she believes that shortening the length will actually increase the work for courts of appeals because there will be more motions to file oversized brief and difficult factual situations and hard questions of law will not be effectively explained if the length in inappropriately shortened. She does not believe that shorter briefs are more efficient or conducive to quality decision making.

Judge Hufstedler also challenges the apparent assumption that every lawyer who files a brief in a federal appellate court is computer literate and has available to him or her the kind of equipment that permits ready compliance with the revised rule.

27. Honorable Procter Hug, Jr.
United States Circuit Judge
50 W. Liberty Street, Suite 800
Reno, Nevada 89501

Judge Hug objects to permitting the use of 12 point proportional type to prepare a brief. He believes that it is too difficult to read. He thinks that the use of monospaced pica, 10 character per inch, should be encouraged, if not mandated. If proportional type is permitted it should not be smaller than 15 point type.

28. Sandra S. Ikuta, Esquire
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071-2899

Ms. Ikuta believes that 12 point type is too small to be easily read. She

also believes that proportional type is less readable than monospaced type, especially in footnotes.
She recommends monospaced typeface of 10 characters per inch on single-sided pages. The preferred typeface should be 15 point type.

29. Lawrence A. G. Johnson
Johnson & Swenson
2535 East 21st Street
Tulsa, Oklahoma 74114

Mr. Johnson suggests that Rule 32 should permit a brief writer to petition a court for permission to scan pertinent photographs and documentary evidence into the body of brief and that such items should be exempt from the page limits.

30. P. Michael Jung, Esquire
Strasburger & Price, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 73202

Mr. Jung suggests that 32(a)(7) should permit inclusion in an appendix of any court or agency decision, whether printed or not. Unprinted decisions, available only in electronic or manuscript form, may well be those whose inclusion is most helpful to the court.

31. Brett M. Kavanaugh, Esquire
2727 29th Street, N.W. #134
Washington, D.C. 20008

Mr. Kavanaugh believes that the rule should require, or at least encourage, monospaced typeface. At a minimum, he states, the rule should not state a preference for proportionately spaced typeface.

Mr. Kavanaugh further suggests that if proportionately spaced typeface is to be allowed, the rule should require a 14 or 15 point type.

Mr. Kavanaugh suggests that the rule should prohibit double-sided briefs except for "printed" briefs.

With regard to the requirement that a brief be bound so that it lies flat when open, Mr. Kavanaugh suggests that the rule require spiral binding for

all 8-1/2 by 11-inch briefs.

32. Mr. Kevin M. Kelly
1800 Avenue of the Stars
Suite 500
Los Angeles, California 90067

Mr. Kelly objects to double-sided printing of briefs. He also objects to the use of 12 point proportional type. He finds 12 point type difficult to read especially if certain small fonts (such as CG Times) are used. He recommends use of 14 or 15 point proportional typeface but would favor stating a preference for monospaced type.

33. Kelly M. Klaus, Esquire
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304-1050

As a general matter Mr. Klaus questions the need to amend Rule 32. She believes that the existing rule has the virtues of brevity and flexibility and that the proposed rule is unduly complex and will result in an increase in motions to strike portions of brief that allegedly fail to comply with the rule. Specifically, with regard to double-sided briefs, Ms. Klaus notes that even though the rule required that counsel's finished product be legible, that highlighting and notetaking on the brief by judges and law clerks will likely bleed through the paper causing legibility problems. Ms. Klaus also objects to the preference for proportionately spaced typeface. She suggests that monospaced type be preferred or even required and that the rule specify a maximum of 10 characters per inch rather than 11.

34. Associate Professor Michael S. Knoll
The Law Center
University of Southern California
University Park
Los Angeles, California 90089-0071

Professor Knoll suggests that the rule should omit the preference for proportional type and encourage the use of monospaced type because it is easier to read. He also believes that lawyers could abuse the 12 point proportional font option and attempt to press more words into their documents using the safe harbor provisions in (a)(6)(A). If proportional

type is permitted, he believes the rule should require 14 or 15 point type. He also objects to double-sided briefs.

35. Stephen A. Kroft, Esquire
McDermott, Will & Emery
2049 Century Park East
Los Angeles, California 90067-3208

Mr. Kroft does not believe that the proposed amendments will materially improve the legibility of appellate briefs but that the amendments may create unnecessary difficulties. He favors monospaced type, specifically courier pica (10 characters per inch) because he finds it easier to read. He states that 12 point proportional type is not only more difficult to read, but it results in many more than 280 words per page. He would prefer 40 page briefs in courier pica type rather than 35 page briefs in 12 point proportional type. If proportional type is to be encouraged, he suggests that it be no smaller than 15 point type. He does not favor double-sided printing.

36. Honorable Pierre N. Leval
United States Circuit Judge
United States Courthouse
Foley Square
New York, New York 10007

Judge Leval notes that word counts may be impractical for pro se litigants proceeding in forma pauperis. He believes that pro se litigants proceeding in forma pauperis should be exempted from the word count and be subject, instead, to page limits.

37. Los Angeles Chapter of the Federal Bar Association
Section on Appellate Practice

The section endorses the work and comments of the Ninth Circuit Advisory Committee on Rules of Practice. The section also urges that the rule provide guidance as to the criteria by which "words" will be defined for purposes of applying the word count limitation. The section suggests that citations (including parallel citations and citations to the record) be counted as a single word.

38. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee of the Los Angeles County Bar Association agrees that the word count approach will greatly further the purposes of the rule. The committee states that use of a word count will level the playing field and eliminate the "cheating" now possible by playing font and spacing games. The committee is concerned, however, about the number of words and the ways a word is counted. The committee recommends that the count be raised to 14,000 and 7,000 (from 12,500 and 6,250). The committee also recommends that the rule define a "word" so that practitioners will know how to count a "word." The committee also suggests that all requirements pertaining to one format category of brief should be contained under a single heading rather than requiring the reader to jump from subsection to subsection to find all applicable requirements.

The committee offers the following suggestions:

a. Double-sided reproduction should be encouraged but heavier weight paper should be required to avoid bleed-through.
b. The rule might have an appendix that provides samples of approved typefaces, samples of approved type sizes, and a chart summarizing all of the various requirements.
c. The rule might specify a standardized format for brief covers, including a list of all required information and the order in which it is to be displayed. The methods, manner and style of page numbering should be specified. It might be helpful to prescribe a standardized set of titles for various briefs.
d. The margins should be the same regardless of style of typeface.
e. Pamphlet-sized briefs can be eliminated.
f. Additional format and style parameters might be set forth as "preferred."
g. A single rule should be used to define the format of all papers rather than having separate rules for briefs, motions, etc.
h. Type size and line spacing of footnotes should be the same as the text.

39. Honorable J. Michael Luttig
United States Circuit Judge
United States Court of Appeals for
the Fourth Circuit

Judge Luttig opposes the use of proportional typeface in briefs; he also opposes double-sided briefs. If the rule allows proportional type, he recommends that it require either 14 or 15 point type. He also states that for monospaced type, the standard should be 10 characters per inch.

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

Mr. MacDougall states that Rule 32 should stay "as is." He states that the proposal eliminates the use of a typewriter. He suggests that a resolution of 300 dots is not needed in a national rule. He states that a national rule in inappropriate on the matter of two-sided briefs. He opposes the preference for proportionately spaced typeface. He would not change the margins. He states that the elimination of the 50 page rule would work a hardship on those required to count words or else be confined to 40 pages. He opposes the requirements that the case number be positioned at the top of the cover and that counsel's telephone numbers appear on the cover. He also opposes the "lie flat" requirement for binding briefs and appendices.

41. Honorable J. Daniel Mahoney
United States Circuit Judge
55 Red Bush Lane
Milford, Connecticut 06460

Judge Mahoney finds monospaced type easier to read than proportionately spaced typeface. He suggested that proportional typeface should be 14 or 15 point and that monospaced type should be no more than 10 characters per inch. Judge Mahoney opposes double-sided printing of briefs.

42. Honorable H. Robert Mayer
United States Circuit Judge
United States Court of Appeals for
the Federal Circuit
Washington, D.C. 20439

Judge Mayer opposes double-sided printing. He also objects to the preference for proportionately spaced typefaces and would change the definition of monospaced typeface to specify no more than 10 characters per inch. Judge Mayer also suggests that proportionately spaced typeface should be at least 14 point.

43. State Bar of Michigan
United States Courts Committee
Richard Bisio
Honigman Miller Schwartz and Cohn
2290 First National Building
Detroit, Michigan 48226-3583

The United States Courts Committee of the State Bar of Michigan opposes the detailed regulation of brief format in the proposed amendments. The committee proposes that the first paragraph of present Rule 32(a) be retained with a modification specifying a minimum type size and that the current page limits of Rule 28(g) be retained (a redraft is provided). The committee believes that the increased time and expense of compliance with and enforcement of the detailed provisions in the proposed amendments will outweigh the marginal increase in readability or any other advantages. The committee also suggests that paragraph 32(a)(7) of the proposed rule be modified to permit use in an appendix of copies of electronically retrieved opinions when they are not readily available from other sources.

44. Kathleen L. Millian, Esquire
Terris, Pravlik & Wagner
1121 12th Street, N.W.
Washington, D.C. 20005-4632

Ms. Millian requests that the Committee consider allowing submissions on non-white recycled paper. Rule 32(a) states that all briefs must be submitted on white paper. Ms. Millian notes that recycled paper with a high content of post-consumer waste is usually gray-tone or off-white and requests that the rule be amended to allow non-white recycled paper. She

states that the fact that the paper is not white does not affect its durability or readability.

45. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore disapproves of the changes in Rule 28 and 32. He states that it "[w]ill take a specialist to spend time to make certain that compliance has been achieved."

46. Jesse A. Moorman, Esquire
Wood & Moorman
808 North Spring Street, Suite 614
Los Angeles, California 90012

Mr. Moorman says that the definition of "proportionately spaced typeface" is not clear and that using the term "advance width" may not even follow the conventions of the typesetting community. He also comments that the omission of "Times Roman" or "Times New Roman" from the examples may be confusing because they are widely available in Windows.

Mr. Moorman likes the idea of a brief "lying flat" but wants more guidance as to what is acceptable.

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

The association makes a number of comments.

a. It appreciates the simple yet flexible manner in which the rule would accommodate both proportional and monospaced typefaces, by adjusting margin width. It also appreciates the receding on the question of single-spaced footnotes and headings.
b. The association supports the abolition of Rule 28(g) and in particular its local option provision but notes that the committee note should make it clear that local options would be invalid under the revised rule.
c. The association supports the change to a word count but opposes

the reduction in brief length that results from the 12,500 word limitation (at 280 words per page, 45 pages) and the 40 page safe harbor length. The association opposes the reduction. The association "emphatically" urges the committee to add 10% to each of the proposed word counts and safe harbor page counts.

d. The association finds the certification of compliance "demeaning overkill."

e. The association supports the provision permitting a petition for rehearing or suggestion for rehearing in banc to be produced with simple binding and without a cover.

48. Honorable David A. Nelson
United States Circuit Judge
Potter Stewart U.S. Courthouse
100 E. 5th Street
Cincinnati, Ohio 45202-3988

Judge Nelson opposes double-sided briefs and suggests that if the issue is addressed at all that the rule state that the use of both sides is not encouraged. He thinks that 12 point proportionately spaced typeface is too small for the safe harbor. He also opposes the word-count provisions because not all lawyers have equipment capable of performing automatic word counts.

49. Honorable Dorothy W. Nelson
United States Circuit Judge
125 South Grand Avenue, Suite 303
Pasadena, California 91105

Judge Nelson objects to the use of proportionately spaced typeface and suggests that its use be prohibited. If it is permitted, she suggests that at least 14, and preferable 15, point type be required. She notes that 12 point type typically produces between 400 and 450 words per page, far more than the 280 words per page permitted under the rule. Judge Nelson also objects to double-sided briefs.

50. Honorable Thomas G. Nelson
United States Circuit Judge
Post Office Box 1339
304 North Eighth Street
Boise, Idaho 83701-1339

Judge Nelson suggests that Rule 32 should require monospaced typeface and since 10 characters per inch is most commonly used, the rules should use 10 rather than 11. If monospaced typeface is not required, Judge Nelson suggests that the rule should express a preference for monospaced typeface.

Judge Nelson does not believe that the word limit will protect the readability of a brief. He suggests discarding the word limit and tightening the safe harbor provisions and using them as the standards for brief preparation. He suggests limiting the allowable line per page on an 8-1/2 by 11-inch page, having no footnotes, to 28 lines. Footnotes should be double-spaced and in the same typeface as the body of the brief. He believes that, if footnotes cannot be used as a length extender, their use will decline. If double-spaced footnotes are unacceptable, he suggests that footnotes be limited to an average of three lines per page, or 105 lines in a 35-page brief. If proportionately spaced typeface is permitted, the minimum size should be 15 point.

In additional, Judge Nelson suggests that the Committee limit a principal brief to no more than 35 pages regardless of the typeface used and a reply brief to 15 pages.

He objects to double-sided printing.

51. New Jersey State Bar Association
One Constitution Square
New Brunswick, New Jersey 08901-1500

The association opposes the word-count approach because it may be more difficult for practitioners to follow and particularly difficult for pro se litigants and others without sophisticated word processing programs. In light of typeface and margin requirements, the association believes that page limits can be used.

52. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board opposes the proposed amendments for several reasons. The board does not believe that the amendment will help the courts or save them time. The board suggests that the proposed amendments violate the following general principles about rulemaking: appellate rules should provide general guidance and direction to assist the lawyers and the courts and should not be rigid or tied to a particular state of technology; rules should not prohibit accommodation to local needs and conditions, nor should national rules attempt to micromanage regional court operations. Specifically, the board states that specifying computer printer resolution, limiting the length of a brief to a specified number of words, and specifying typeface and spacing are too rigid for a national rule. The board believes that the rule makes an arbitrary 40% reduction in the maximum brief length (from 50 to 30 pages) and questions whether the committee had adequate information upon which to base the change. If 30 pages is inadequate to provide the judges with sufficient information, the board believes that the limitation may delay the decisionmaking process.

53. Honorable John T. Noonan, Jr.
United States Circuit Judge
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939

Judge Noonan objects to double-sided printing of briefs.

54. Associate Professor Julie Rose O'Sullivan
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001-2075

She believes that the rule should prohibit the use of proportional type but that if it is permitted, the rule should require 14 or 15 point type. She also objects to double-sided briefs.

55. Mr. Patrick D. Otto
Mohave Community College
1971 Jagerson Avenue
Kingman, Arizona 86401

Mr. Otto agrees with the proposed amendments.

56. Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen has a number of comments on the proposed amendments.

a. As to 32(a)(2)(A), the terms "roman style" or "text" style should be explained either in the rule or the note.

b. As to 32(a)(4), the rule should not forbid use of bold type for emphasis.

c. As to 32(a)(6), Public Citizen in not averse to the use of a word limit rather than a page limit if the committee is determined to "fix" this "problem" although they state that lawyers will find ways to stretch a word limit. Public Citizen "object[s] strenuously," however, to the "substantial cut in the permissible length of briefs." With 280 words per page, the maximum size of a principal brief would be 44-1/2 pages. Examining several briefs containing fewer than 90% of the applicable page limits (on the assumption that none of such briefs would have been manipulated to comply with length limitations), Public Citizen found that no brief averaged as few as 250 words per page. The average ranged from a low of 254 words per page to a high of 278 words per page. Public Citizen also contended that their briefs tend to use fewer footnotes and fewer blocked quotations than seems to be the norm. Others of their briefs had an average number of word per page as high as 305 or 311.

In light of recent amendments to FRAP requiring a statement of subject matter and appellate jurisdiction and a statement of standard of review, and in light of the growth in the complexity of federal law and the quantity of federal precedent. Public Citizen states that "it seems unfair to the litigants to require their counsel to write shorter briefs." Public Citizen suggests that the number of words per brief and the average number of words per page should be more realistic and should not effectively reduce the existing length limitation. Public Citizen supports the concept of a safe harbor but says the 30 page limit is too low. Public citizen suggests that 37 pages should suffice for a principal brief and 18 pages for a reply.

57. Honorable Stephen Reinhardt
United States Circuit Judge
312 North Spring Street
Los Angeles, California 90012

He objects to double-sided printing and the proposal concerning typeface. He urges the committee to make the rule comprehensible to those without a great deal of technical expertise and to avoid excessive detail and a hypertechnical rule.

58. Robert H. Rotstein, Esquire
McDermott, Will & Emery
2049 Century Park East
Los Angeles, California 90067-3208

Mr. Rotstein believes that the use of proportionately spaced typeface is "detrimental to effective appellate advocacy and decision making because the briefs are too difficult to read, especially in 12 point type. He urges the committee to require "ten pitch pica monospaced typeface" in appellate briefs. In the alternative he suggests proportionately spaced typeface in at least 14 point type. Mr. Rotstein also opposes double-sided printing.

59. K. John Shaffer, Esquire
Stutman, Treister & Glatt
3699 Wilshire Boulevard
Suite 900
Los Angeles, California 90010-2739

His principal objection is to the complexity of the proposed rule. He

suggests that the rule should simply require monospaced type with 10 characters per inch. He also objects to permitting double-sided briefs.

60. Lawrence J. Siskind, Esquire
Cooper, White & Cooper
201 California Street
Seventeenth Floor
San Francisco, California 94111

Mr. Siskind objects to double-sided briefs. He also dislikes the preference for proportionately spaced typeface because he believes it is harder to read. He would prefer that the rule state a preference for monospaced typeface but would be satisfied if the rule omitted a preference for either. He believes that the minimum acceptable size for proportional type should be 14 point.

61. Diane M. Stahle, Esquire
Davis, Hockenberg, Wine, Brown, Koehn & Shors, P.C.
The Financial Center
666 Walnut Street, Suite 2500
Des Moines, Iowa 50309-3993

Ms. Stahle favors limiting brief by number of words rather than the number of pages but states that it is unclear whether headings are included in the word count. If headings are to be counted, she suggests changing the language in paragraph (a)(6) -- lines 104-107 -- to read: "and in either case there must be on average no more than 280 words per page including headings, footnotes and quotations."

62. Honorable Walter K. Stapleton
United States Circuit Judge
Federal Building, 844 King Street
Wilmington, Delaware 19801

Judge Stapleton opposes the provision permitting text on both sides of each page. He believes that any environmental savings would be offset by the use of heavier paper made necessary to render the brief legible.

63. Marc D. Stern & Denise Simmonds
American Jewish Congress
Stephen Wise Congress House
15 East 84th Street
New York, New York 10028-0458

Mr. Stern and Ms. Simmonds approve of the proposed revision believing "that it accurately reflects the current technology widely used in the preparation of appellate briefs. They suggest that the rule should be a "mandatory and inflexible national requirement" and that local departures should be forbidden.

64. Honorable Richard R. Suhrheinrich
United States Circuit Judge
United States Post Office and
Federal Building
315 West Allegan, Room 241
Lansing, Michigan 48933

Judge Suhrheinrich objects to printing briefs on both sides of the page and use of proportionately spaced type at less than 14 point. He also believes that the rule makes life difficult for a person using a typewriter. Word counts are difficult for a typewriter user. He suggests, at a minimum, that the rule allow monospaced type of 10 characters per inch, rather than 11, because 10 is standard on typewriters.

65. Honorable Stephen S. Trott
United States Circuit Judge
Room 666
United States Court Building
Boise, Idaho 83724

Judge Trott urges to the committee to be concerned about ease of reading and suggests that proportionately spaced typeface be 14 or 15 point type. Judge Trott also believes that most of the proposed rule is too technical to be readily understood.

66. Professor Eugene Volokh
School of Law
University of California, Los Angeles
405 Hilgard Avenue
Los Angeles, California 90024-1476

Professor Volokh objects to double-sided printing of briefs. The bleed-through from two-sided printing will make briefs much harder to read but the even greater problem will be the bleed-through from highlighting and notes made by the reader of the briefs. Because heavier paper will be used to avoid the foregoing problems, there will be little, if any, environmental savings.

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

Chief Judge Wallace states that the Ninth Circuit Court of Appeals' Executive Committee endorses, in principle, the comments submitted by the Ninth Circuit Advisory Committee on Rules of Practice and Procedure.

68. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
422 West Riverside, Suite 1100
Spokane, Washington 99201-0390

Ms. Weatherhead opposes use of a word count to limit the length of a brief. She suggests that a better solution would be to sanction those lawyers who chisel on brief length limits by fudging the margins, typefaces, etc.

Ms. Weatherhead suggests that the rule should direct parties to attempt to produce a joint appendix "subject to the right of any party to supplement the joint appendix with whatever materials were overlooked or become necessary as the case develops in the briefing."

69. Honorable Charles E. Wiggins
United States Circuit Judge
50 West Liberty Street, Suite 950
Reno, Nevada 89501

Judge Wiggins has diabetes related vision problems. He requests that: the total pages be limited; margins be reasonable; the number of lines of text per page be limited; that all type (including that used for footnotes) be of a size and type style that is reasonable (he needs 14 or 15 point type to be able to read). He also encourages the committee to print, in the rule, an example of the required size and style of type. He further encourages requiring counsel to submit at least one "floppy disc" so that any judge who needs to do so may project the brief on a computer screen in a much larger version than the authorized type size.

DRAFT

MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES APRIL 17 & 18, 1995

Judge James K. Logan called the meeting to order at 8:30 a.m. in the Ritz-Carlton Hotel in Pasadena, California. In addition to Judge Logan, the Committee Chair, the following Committee members were present: Chief Justice Pascal Calogero, Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp attended the meeting on behalf of Solicitor General Days. Judge Alicemarie Stotler, the Chair of the Standing Rules Committee attended. Mr. Robert Hoecker, the Circuit Executive for the Tenth Circuit and that circuit's former clerk, and Ms. Cathy A. Catterson, the Clerk of the Ninth Circuit, attended on behalf of the clerks. Professor Carol Mooney, the Reporter for the Advisory Committee was present. Mr. Peter McCabe, the Secretary, and Mr. John Rabiej, the Chief of the Rules Committee Support Office were present along with Ms. Judith McKenna of the Federal Judicial Center, and Mr. Joseph Spaniol, consultant.

Judge Logan began by introducing the new member, Chief Justice Pascal Calogero of the Louisiana Supreme Court. Judge Logan welcomed Chief Justice Calogero to the Committee and introduced the other members of the Committee.

The minutes of the October 1994 meeting were approved as submitted.

Mr. Munford pointed out that the minutes state that the subcommittee on sanctions should prepare a report for the fall 1995 meeting. Because Mr. Munford is the sole remaining member on that subcommittee, he requested that Judge Logan appoint additional members, especially a judicial member, to the subcommittee. Judge Logan asked Professor Mooney to work with Mr. Munford but promised to appoint at least one additional member.

Mr. Rabiej reported that the Supreme Court was still considering the rule amendments approved by the Judicial Conference last September. Mr. Rabiej stated that the Supreme Court decided to change "must" back to "shall" in all the rules under consideration so that the language of the rules would be uniform. Whether a consistent use of "must" would be acceptable to the Court remains uncertain. Having changed "must" back to "shall," the Supreme Court planned to send the rule amendments to Congress by May 1.

I. RULES PUBLISHED SEPTEMBER 1, 1994

Judge Logan asked the Committee to turn its attention to the rules that had been published for comment on September 1, 1994. The comment period closed on February 28, 1995. Judge Logan stated that the Advisory Committee's

task was to consider all the comments and decide whether to amend the published rules.

Rule 21 - Mandamus

The published amendments provide that the trial judge is not named in a petition for mandamus 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 a petition. The only issue that had been controversial among the Committee members was whether a trial judge should have the right to respond to a petition for mandamus. Some members of the Advisory Committee, as well as some members of the Standing Committee, believe that a judge should have the right to respond.

The reporter summarized the post-publication changes that she suggested in her redraft. First, the draft was amended to state directly that a trial judge may not respond unless requested to do so by the court of appeals. In the published rule the judge's inability to participate without court of appeals authorization was implicit but not stated directly except in the Committee Note. Second, the redraft authorizes a court of appeals to "invite" the judge's participation as well as order it. The only other changes suggested were stylistic.

A motion to adopt the redraft was made and seconded. The motion passed by a vote of 7 to 2.

In a recent circuit court proceeding one of the parties asked the trial judge to write to the court of appeals concerning the proceeding. An opposing party pointed out that the judge's letter was not a pleading to which the party could respond. The redraft permits a court of appeals to "invite" the trial judge to respond to a petition for mandamus. When extending such an invitation, a court of appeals may also authorize the opposing party to respond.

One member expressed agreement with the decision to delete the trial judge as a party, but wanted the judge to have notice of the proceeding. Another member responded that the philosophy of the published rule is that the trial judge is no longer the respondent. The focus is shifted to the real parties in interest.

Judge Logan agreed that the rule should ensure that notice of a mandamus petition is given to the trial judge. He suggested that language might be added at line 84 of the redraft. Lines 71-72 permit a court to deny a petition without an answer, but lines 72-74 state that in all other instances the respondent must be ordered to answer. Lines 82-84 require the clerk to serve a notice to respond on all persons directed to answer. Judge Logan suggested that a trial court does not

need notice of a petition if the court of appeals denies it without ordering any response. Therefore, he suggested that line 84 could require service on the trial judge only when there is an order to respond. Since the majority of mandamus petitions are disposed of without requiring a response, some members of the Committee supported this suggestion on the assumption that the trial judge need not be concerned about such petitions.

Other members of the Committee disagreed. They said that if a judge is to be given notice, it would be simpler and more efficient if the notice is given at the inception of the proceeding and in all cases. Therefore, it was agreed to amend line 15 so that notification is given to the judge when the petition is filed. In order to be consistent with the fact that the judge is not treated as a respondent, the Committee decided to require that a copy of the petition be sent to the clerk of the trial court rather than directly to the judge.

A motion was made and seconded to amend line 15 to include a new sentence as follows: "The party shall also file a copy with the clerk of the trial court." The motion passed with 8 members voting in favor of it, none in opposition, and 1 abstention.

Judge Stotler asked whether the language at lines 78-81 of the redraft would permit a trial judge who had received notice of the proceeding to request permission to participate. A trial judge may have information that should be brought to the court's attention and the judge may want to seek permission to do so. The Committee consensus was that the language would permit a trial judge to request authorization to respond to a petition.

The newly approved amendment requires a petitioner to file a copy of a petition for mandamus with the trial court. Filing a copy of the petition with the trial court clerk will result in the docketing of the petition. The Committee considered whether it should require the court of appeals to send a copy of its order disposing of the petition to the trial court. Some members of the Committee believe that it is unnecessary to do anything other than notify the trial judge of the commencement of the proceeding. If the court of appeals orders the trial court to do something, the trial court will receive notice of that order. In other instances, notice is unnecessary. The majority of the Committee, however, believe it better to ensure that the trial court has notice of both the beginning and ending of a mandamus proceeding. A motion was made and seconded to add a new paragraph (7) after line 97. The new paragraph would say: "The circuit clerk shall send a copy of the final disposition to the clerk of the trial court." The motion passed by a vote of 7 to 2.

The numbered paragraphs of subdivision (b) were also rearranged. A motion was made and seconded to move paragraph (2) of the draft below

paragraphs (3) and (4). The motion passed with 6 voting in favor of it, no one opposing it, and 3 abstentions.

Rules 25 and 26 - Filing and Service

The published 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 a "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 amended to permit service on other parties by a "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.

The published amendment to Rule 26 gives a party who must respond within a specified time after service of a document 3 additional days to respond when service is by "reliable commercial carrier," just as a party has a 3-day extension when service is by "mail."

Some of the commentators suggested that the rules need not permit the use of commercial carriers. As a preliminary matter Judge Logan asked whether there was any sentiment on the Committee to prescind from the possible use of commercial carriers. Only one member spoke in favor of omitting use of commercial carriers.

A member of the Committee noted that one of the commentators suggested that there should be a specific preemption of local rules. Because that suggestion is not specific to Rule 25, the member asked that it be discussed at a later time.

One of the commentators on Rule 26 stated that the proposed amendment highlights the fact that there is no clear dividing line between personal service and other kinds of service. If a messenger service can be used to make personal service on a party residing in the same city as the person making service, it is not clear that using a private courier service to make service on a party residing in another city is not personal, especially if the carrier leaves the document with a "clerk or other responsible person." Yet the proposed Rule 26(c) gives a 3-day extension when service is by reliable commercial carrier, but not when it is personal. To the extent that it is unclear whether service is personal or by commercial carrier, it is unclear whether the 3-day extension is applicable or not.

One possible solution would be to require use of next-day service and to provide only a one-day extension when commercial carriers are used. Then in the ordinary course of events there would be no confusion. Personal service is

complete upon delivery, but service by commercial carrier is complete upon delivery to the carrier. If the carrier makes delivery the next day, it would be pragmatically irrelevant to the recipient whether service was personal or by commercial carrier; the time for response would (as a practical matter) be counted from the day of receipt. One problem with that approach is that the United States Postal Service also provides next-day service and service in that manner should be treated like next-day service provided by a commercial carrier. Another problem is that there are places in the ninth circuit where next-day service is not available.

A motion was made and seconded to adopt yet another approach -- to eliminate subdivision (c) and any extension of time. Eliminating the extension following service by mail might provide an incentive to use more expeditious forms of service. If a paper is served by mail and takes several days to arrive and the response time is computed from the date of service, it is likely that a motion to extend the response time will be made and granted. To avoid such a delay, the serving party has an incentive to personally serve the paper or to use expedited commercial or postal delivery. The motion failed by a vote of 3 in favor and 6 in opposition.

Another possible solution was considered -- to provide the 3-day extension whenever a document is not delivered to the party being served on the same day that it is "served." The 3-day extension was created because service by mail is complete on the date of mailing. Since the party being served by mail does not receive the paper on that date, an extension is provided. Making the extension available whenever the party does not receive the document on the date it is served achieves the original objective and avoids the confusion arising from the need to know the type of service.

A motion was made and seconded to adopt that approach. The motion was to amend Rule 26(c) to state that when a party must act within a "prescribed period after service of a paper upon that party, unless the paper is delivered on or before the date of service stated in the proof or acknowledgement of service" three days are added to the prescribed period. Since the party being served will receive a copy of the proof of service which states the date and manner of service and the party will know when he or she receives the document, the party should have no difficulty knowing whether he or she has the benefit of the 3-day extension.

The discussion made it clear that the rule should not tie the extension to whether or not the paper is delivered on or before the day it is "filed." A paper may be "served" before it is filed, as when a paper is mailed to the court for filing and hand-delivered to opposing counsel on the day of mailing. The party being served would not know the filing date and would need to contact the court

to ascertain that date.

The motion passed by a vote of 8 to 1.

Lines 8 through 10 of the redraft addressed another problem raised by the comments. The problem is whether the 3-day extension provided by subdivision (c) is itself a period of less than 7 days for purposes of subdivision (a). In other words, if the time for responding after service is 30 days and service is by mail, does the party served by mail have 33 days in which to respond, or 30 days plus 3 days; and as to the latter 3 days, do weekends and holidays count? Assume that an appellant serves its principal brief by mail on a Wednesday. If the appellee's brief is due 33 days later, it is due on Monday. If, however, the appellee's brief is due 30 days later, plus a separate 3-day period because of the mailing and if the separate 3 day period is governed by 26(a), the appellee's brief is due Wednesday (30 days ends on Friday, then the additional 3-day period is computed excluding weekend days). On the basis of a recent D.C. Circuit case construing the parallel civil rule, Fed. R. Civ. P. 6, the Committee decided that the 3-day extension should mean 3 calendar days so that weekends and holidays are counted. A motion was made and seconded to adopt the substance of the suggestion but to do so by omitting the sentence at lines 8-10 of the redraft and inserting the word "calendar" before the word "days" on line 5. The motion passed by a vote of 6 to 3. The consensus was that the Committee Note should be amended to explain that the insertion of "calendar days" is intended to clarify the relationship of the 3-day extension with subdivision (a).

Having completed its discussion of Rule 26, the Committee returned to Rule 25.

The published rule made the mailbox rule applicable when a brief or appendix is mailed on or before the last day for filing by First-Class Mail. In order to permit the use of Express Mail or Priority Mail, language was added that makes the mailbox rule applicable not only to First-Class Mail but also to any other "class of mail that is at least as expeditious." The Committee did not want to require use of Express or Priority Mail but did not want to preclude their use.

Several commentators opposed the provision requiring that when feasible service should be accomplished in as expeditious a manner as the manner used to file the paper with the court. An equal number of commentators expressed support for the change. The purpose of the change was to preclude a party from using an overnight courier to file with the court but serving opposing parties by some significantly slower method, sometimes in an obvious effort to shorten the response time available to the party being served. This is a special problem when the time to respond runs from the date of filing rather than the date of service. The redraft eliminated the "when feasible" language and stated that "when

reasonable considering such factors as distance and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court."

One member stated that the standard, even in the redraft, is too vague. He favored the approach suggested by one of the commentators that the requirement of comparable service should apply only when a document is hand-delivered to a court for filing. Another member asked how the provision would be enforced and suggested deleting the language from the rule and moving it to the Committee Note. Another member indicated that he envisioned the provision being invoked only when a party who had been the victim of "slow service" sought an extension or there was an argument about the timeliness of a responsive document.

Another member favored the new language but suggested adding to it. He suggested that one of the factors that should bear upon the reasonableness of using comparable service is the immediacy of the relief requested. The method of service is not nearly so critical with a brief, where the response time is relatively long, as it is with a motion.

A motion was made and seconded to amend line 96 as follows: "considering such factors as immediacy of the relief sought, distance, and cost . . ." The motion passed by a vote of 8 to 1.

Four commentators said that using the term "reliable commercial carrier" was undesirable because disputes about "reliability" are likely to arise. In response to those commentators, and to coordinate with the amendments to Rule 26 regarding the 3-day extension of time, a motion was made to amend the language at lines 35 and 36 on page 46. The motion would make the mailbox rule applicable if a brief or appendix is dispatched to the clerk on or before the last day for filing "for delivery within 3 calendar days by a third-party commercial carrier." The motion was seconded and unanimously approved. The reporter was instructed to make any coordinating changes necessary, e.g. at lines 96 and 97.

On page 50, the second sentence of the shaded material in the Committee Note accompanying subdivision (c) was deleted upon motion and unanimous approval.

The Committee adjourned for lunch at 12:15 and reconvened at 1:30 p.m. Upon reconvening, the Committee was joined by Bryan Garner, Esq., the consultant to the Style Subcommittee of the Standing Committee, and by a visitor, Miriam Krinsky of the United States Attorney's Office in Los Angeles.

Judge Logan asked Mr. Garner to review the changes to Rules 21, 25, and

26, that were approved by the Committee during the morning session, and began the afternoon session with discussion of Rule 27.

Rule 27 - Motions

Judge Logan asked the Reporter to explain the changes made in the redraft. She noted that at page 95 lines 67 through 79 are new. These lines, like the Department of Justice's original draft, expressly authorize inclusion of a request for affirmative relief in a response to a motion. The provision states that the time for response to the new request and for a reply to that response are governed by the general rule.

The reporter further noted that at page 96 lines 107-109 are new. The rule permits a court to act upon a motion for a procedural order without awaiting a response from the opposing party. The published rule stated that if timely opposition to a motion is filed after the motion is granted, the opposition does not constitute a request to reconsider, vacate, or modify the disposition. The new language states that a motion requesting such relief must be filed. Although that was implicit in the published draft, the redraft makes it explicit.

Two changes were made in the Committee Note in response to comments. Paragraph (a) of Subdivision (a) permits a reply to a response and states that a reply generally must not "reargue propositions presented in the motion or present matters that do not reply to the response." The first addition to the Committee Note recognizes that matters relevant to a motion sometime arise after the motion is filed. The Note states that treatment of such matters in the reply is appropriate even though strictly speaking it is not in reply to the response.

As previously noted, subdivision (b) permits a court to dispose of a procedural motion without awaiting a response from the opposing party. If the party opposing the motion files the response shortly before the court issues its order, the party may be uncertain whether the court considered the response before issuing the order. It would be helpful to the party deciding whether to request reconsideration to know whether the court considered its response. The second addition to the Committee Note states that if a court has received and considered the response before issuing its order, it is desirable for the court to indicate that it has done so.

In keeping with the procedure followed in the morning, the changes in the redraft were treated as having the status of a motion made and seconded. The changes were approved by a vote of 7 in favor and none in opposition.

Two commentators said that the time periods for responding to a motion (7 days) and for replying to a response (3 days) are too short. One of those

commentators suggested providing longer response periods for "dispositive" motions and retaining the shorter time periods for "non-dispositive" motions. A member of the Committee agreed that the time periods are too short for substantive motions but because of the difficulty of distinguishing between substantive/non-substantive or dispositive/non-dispositive motions, he rejected the idea of different time periods depending upon the nature of the motion. He suggested lengthening the time for the initial response to 10 days (page 94, line 53) and for the reply to 5 days (page 95, line 83).

Although some members of the Committee favored different time periods for substantive motions, the Committee decided that it would be better to have a single set of time limitations; having different time limits depending upon the nature of the motion would create difficulties for the clerk's office. It was further noted that as to procedural orders, subdivision (b) permits the court to act prior to receipt of a response. A motion was made and seconded to change the time for an initial response from 7 to 10 days. The motion passed by a vote of 5 to 3.

A motion was then made and seconded to change the time for filing a reply from 3 to 5 days. That motion was approved by a vote of 8 to 1.

The following style changes were also approved:

1. On page 95, lines 68 and 71, the word "request" was changed to "motion."
2. On page 96, line 90, the words "determination" was changed to "disposition."
3. On page 97, lines 112-114, the words "request for relief that under these rules may properly be sought by motion" were deleted and replaced by the word "motion", and at lines 114-115, the words "a single judge must" were deleted and replaced by the word "may".
4. On page 97, lines 118 through 122 were amended to change from the passive to the active voice. At line 118, the words "only the court may act on" were inserted after the word "that", and at line 119, the words "must be acted upon by the court" were deleted. At line 120, the words "court may review the" were inserted after the word "The" and before the word "action". At lines 121-122, the words "may be reviewed by the court" were stricken.

The Committee did not believe that republication would be necessary because the post-publication changes, including the changes in time periods, were not significant. The consensus was that all the suggested changes are logical outgrowths of the published rule.

Style Changes to Rules 21 and 26

Mr. Garner, having had the opportunity to review the changes approved during the morning session, suggested the following stylistic changes, all of which were approved.

1. Rule 21
   a. At page 20, line 11, and page 24, line 88, the word "must" was changed to "shall" in light of the Supreme Court's recent decision regarding the rules before it. In contrast at page 24, line 95, and page 25, line 111, the "must" was retained because "shall" should be used only when the subject of the sentence is the actor who has a duty.
   b. At page 21, lines 27 through 29 were combined as subparagraph (A) and the words "The petition must" were inserted at line 30 before the word "state." At page 22, line 21, the words "The petition must" were inserted before the word "include."
   c. At page 24, line 87, the word "briefs" was changed to "briefing" and the word "are" was changed to "is".

2. Rule 26
   a. At page 65 line 2, the word "Whenever" was changed to "When"; at line 3, the words "do an" were omitted.
   b. At page 65 the words "3 calendar days are added to the prescribed period" were deleted from lines 5 and 6 and inserted in line 4 after the word "party."

Rule 28 - Briefs

Rule 28 as published was amended to delete the page limitations for a brief and to make the correct cross-reference in subdivision (h) to paragraphs in subdivision (a). The length limitations are being moved to Rule 32. The only change made in the redraft as a result of the comments on the published amendments was to note that subdivision (g) is reserved and to leave the current labels on the remaining Rule 28 subdivisions. Those changes were approved by the Committee unanimously.

Mr. Garner, however, suggested a number of style revisions in subdivision (h) all of which were approved. As amended, subdivision (h) reads as follows:

> (h) *Briefs in a Cases Involving a Cross-Appeals.* If a cross-appeal is filed, the party who ~~first~~ files a notice of appeal first, or if ~~in the event that~~ the notices are filed on the same day, the plaintiff in the proceeding below is ~~shall be~~ deemed the appellant for the purposes of this rule and Rules 30,

~~and~~ 31, and 34, unless the parties agree otherwise ~~agree~~ or the court ~~otherwise~~ orders otherwise. The appellee's brief must ~~of the appellee shall~~ conform to the requirements of Rule 28 ~~subdivisions~~ (a)(1)-(7) ~~(6) of this rule~~ with respect to the appellee's cross-appeal as well as respond to the appellant's brief, ~~of the appellant~~ except that a statement of the case need not be made unless the appellee is dissatisfied with the appellant's statement ~~of the appellant~~.

Rule 32 - Form of Briefs and Other Papers

Judge Logan began the discussion of Rule 32 with the topics that drew the most comment. He asked the Committee to initially make substantive decisions on the issues rather than deal with specific language.

1. Double-sided printing

Thirty-one commentators opposed double-sided printing of a brief or appendix. Judge Logan suggested that any reference to printing on both sides be eliminated. A motion was made and seconded to eliminate the reference. The motion passed unanimously. A motion was then made to go one step further and prohibit printing on both sides, at least for 8-1/2 by 11" briefs. That motion passed by a vote of 7 to 1.

2. Proportional type

Nine commentators expressed opposition to the use of proportional type; another 15 commentators would delete the preference for proportional type. A motion was made and seconded to eliminate the preference for proportional type. The motion passed unanimously. A motion was then made and seconded to include a preference for monospaced type. The motion failed by a vote of 1 in favor and 8 in opposition.

Twenty-seven commentators said that if proportional type is permitted it should be required to be larger than 12 point. Most of the commentators said that it should be at least 14 or 15 point. A motion was made and seconded that the minimum size should be 14 point. Some members of the Committee believed that the published rule may have been too subtle in using word limitations to both eliminate the incentive to squeeze as much material as possible on a page and to free practitioners to use the most attractive and most legible type. Yet other members of the Committee believed the word limitation approach is sufficient and should be retained. They believed that the change to a pure word limit would eliminate the incentive for game playing and the sole remaining incentive would be to make a brief legible. Reference was made to the font samples included in Judge Easterbrook's letter to the Committee. Some members of the

Committee believed that a 14 point minimum would be too large in some fonts. The motion to require a minimum of 14 points passed by a vote of 6 to 2.

3. Monospaced type

Nineteen commentators said that the monospaced type permitted under the rule should have no more than 10 characters per inch, the equivalent of pica type on a standard typewriter. The reason that the published rule states that the monospaced type used cannot have more than 11 characters per inch (cpi) is that some of the monospaced typefaces produced by computers that are labeled 10 cpi actually produce slightly more than 10 cpi. A motion was made and seconded to change to 10 cpi. The motion failed by a vote of 3 to 6. A motion was then made and seconded to specify no more than 10-1/2 cpi. The motion was approved.

4. Length

Regarding the length limitation, twelve commentators opposed use of word limitations (both total words per brief and average number of words per page); one other opposed applying word limits to *pro se* litigants proceeding *in forma pauperis*. Another five commentators implicitly rejected the word limitations by saying that the rule should use page limits. A motion was made to use word counts. The motion passed unanimously.

One commentator suggested that the word counts should be replaced by a character count because a character count eliminates the variations resulting from the different word counting methods used by software programs. Although various word processing programs count words differently, a difference of 200 or 300 words per brief is insignificant compared to the variation possible under the current rule. No motion was made to use a character count.

Having decided to retain word limits, Judge Logan asked whether the limits should be increased. Seven commentators objected to the 12,500 word limit in the published rule on the ground that it reduces the length below the traditional 50 page limit. The commentators suggested increasing the total number of words to 14,000 or 14,500. A motion was made and seconded to raise the limit to 14,000 words.

Some members of the Committee believed that even if 12,500 words is shorter than the traditional 50 page brief in pica type, that 12,500 words is sufficient. A local rule in the D.C. Circuit limits a principal brief to 12,500 words and that length seems sufficient. Other members of the Committee were concerned that some cases warrant a longer brief and that it is more of a problem to cut short helpful discussion than to have some briefs longer than need be. A

longer, more complete brief can be of significant assistance to the court.

The Committee examined some of the sample brief pages prepared by Microsoft using proportional typefaces and complying with the 280 word per page limit in the published rule. The pages were attractive and easily legible. If each page has no more than 280 words, a 50 page brief would have 14,000 words. Although some members continued to support 12,500 as sufficient, it was argued that it would be better to provide more leeway because of the variation in word counting methods.

The motion to increase the word limit to 14,000 passed by a vote of 7 to 1.

The next issue considered was retention of the 280 words per page limit. Retention was unanimously approved.

5. Certification of compliance & safe harbors

Three commentators objected to the requirement that a brief must include a certification that it does not exceed either the total word count or the limit on the average number of words per page. The commentators stated that the requirement is demeaning. The Committee approved retention of the requirement. The person preparing a brief has easy access to the information through use of the computer equipment used to prepare the brief; the clerk's office does not.

A certification of compliance is not required if the brief falls in the safe harbor. The next issue considered was whether to retain the safe-harbor provisions. If the safe-harbor provisions are generous enough, a person preparing a brief using a typewriter will use the safe harbor and will not be forced to manually count words in order to make certification.

Ms. Catterson, the Clerk of the Ninth Circuit, stated that her office had flow-charted the operation of the published rule to indicate all the various requirements and the things that would need to be checked by a deputy clerk. On the basis of that exercise, she recommended that all briefs contain a certification of compliance with the rule and indicate the method of compliance being used.

The Committee first decided, by a vote of 7 to 1 with 1 abstention, to delete the safe-harbor provisions for proportional type and retain a safe harbor only for monospaced type.

The discussion then turned to the length of a monospaced brief permitted under the safe-harbor provision. The published rule set the maximum length under the safe harbor for a principal brief at 40 pages. A member of the

Committee argued that it should be 50 pages. He argued that the primary method of "cheating" under the current length limitation is the use of proportional type; if the safe harbor applies only to monospaced briefs (with a typeface producing no more than 10-1/2 cpi), he asked why the length should be any less than 50 pages. Another member responded that in addition to the use of small proportional type, single-spaced footnotes and quotations are also used to pack more material into a brief. Most members of the Committee agreed that the safe harbor should be shorter than 50 pages. A motion was made to retain a 40 page limit for the safe harbor. The motion passed by a vote of 6 to 3.

6. Inclusion in an appendix of electronically retrieved opinions

Seven commentators objected to that portion of the Committee Note stating that decisions retrieved electronically from Lexis or Westlaw may not be included in an appendix. If an opinion is unpublished or not yet published but citation to it is permitted, inclusion of the opinion as retrieved from Lexis or Westlaw may be the only pragmatic way to provide the court with a copy of the opinion. Paragraph (a)(7) of the published rule said that an appendix may include a legible photocopy of any document found in the record or of a printed court or agency decision. The language limiting inclusion to "printed" decisions was the source of the objections.

One member asked why a Rule 30 appendix would ever include copies of decisions in other cases. It was pointed out that although the classical appendix contains only documents pertaining to the case being appealed, in some circuits it is common practice for a lawyer who believes that he or she has found some new authority relevant to the case to prepare an appendix to the brief containing that authority. A motion was made to delete the words "or of a printed court or agency decision" from paragraph (a)(7). The motion passed by a vote of 8 to 1. A further problem was, however, noted. Even as to the decision being appealed, it is far more convenient to have the published decision, if any, rather than the typewritten decision. A motion was made to amend the Committee Note to state that if any opinion that is included in the appendix has been published, a copy of the published decision should be provided.

7. Margins

Five commentators opposed having different margins depending upon whether a brief is prepared with monospaced or proportional type. The draft rule prescribed different margins because proportional type is easier to read if the line length does not exceed 6 inches. Given the change to requiring a minimum of 14 point proportional type, a motion was made to have side margins of not less than 1 inch regardless of the type style used. The motion passed by a vote of 6 to 3.

8. Requiring a brief to lie flat when open

Four commentators opposed requiring a brief to lie flat when open. A motion was made to eliminate that requirement. The motion failed by a vote of 2 in favor, 6 opposed and 1 abstention. A motion was made to require a brief to lie "reasonably" flat when open. The motion passed.

9. Pamphlet briefs

Given the infrequent use in the courts of appeals of pamphlet briefs, a motion was made to simplify the rule by eliminating pamphlet briefs. The ninth circuit eliminated pamphlet briefs because the circuit's rules committee believed that a party submitting a pamphlet brief has an advantage. Some members of the Advisory Committee concluded, on the same basis, that pamphlet briefs should be encouraged; while other members of the Committee concluded that pamphlet briefs should be prohibited because they can be used only by parties with sufficient economic resources to pay for the printing. A motion to eliminate pamphlet briefs passed by a vote of 7 to 2.

10. 300 dots per inch

Six commentators recommended deleting the requirement that briefs be printed with a resolution of 300 dots per inch or more. The commentators stated that the requirement is too technical and that requiring "legibility" is sufficient. A motion to eliminate the 300 dots per inch requirement passed unanimously. But the Committee favored inserting a statement in the Committee Note that would encourage the use of print with a resolution of 300 dots per inch or more.

11. Serifs, bold type, underlining, and italics

Several commentators objected to requiring type with serifs. A motion was made to eliminate that requirement. The motion passed by a vote of 5 in favor, 2 in opposition, and one abstention.

Other commentators objected to the prohibitions on use of bold type, underlining, and italics. The objection was that the rule should not be concerned with such technical matters and should leave such matters to the discretion of the person preparing the brief. Mr. Garner pointed out that the misuse of bold type, etc. is very distracting and should be controlled. A motion was made to eliminate (a)(4) and (5). The motion passed by a vote of 6 to 3.

12. Preemption of local rules

The question of whether Rule 32 should include a provision preempting all

local rules dealing with brief length, printing and format was postponed until later discussion. Rule 47 says that a local rule cannot be inconsistent with the national rules. But a question remains with regard to local variations that are not squarely inconsistent with the national rule. For example, on the basis of the preceding discussion, Rule 32 will permit both monospaced and proportional typefaces but will not express a preference for either one. A local rule that expressed a preference for monospaced type would not be inconsistent with the national rule. Should the national rule, in the interest of nation-wide uniformity, prohibit any such local rule? That question was postponed for later discussion because it has broad-ranging impact.

Given the breadth of the changes approved by the Committee, the sense of the Committee was that Rule 32 should be republished for comment.

The chair thanked the Committee for its work on the rule and promised that he and the reporter would prepare a new draft that evening for the Committee's consideration the next morning.

The Committee adjourned for the evening at 5:15 p.m.

The Committee reconvened at 8:30 a.m. on April 18.

The chair and reporter had prepared the following redraft of Rule 32 for the Committee's consideration.

Rule 32. Form of a Briefs, ~~the~~ an Appendix, and Other Papers

(a) *Form of a Briefs and ~~the~~ an Appendix.*

(1) *In General.* ~~Briefs and appendices~~ A brief may be produced by ~~standard typographic printing or by any duplicating or copying process which produces~~ any process that results in a clear black image on white paper, including typing, printing, or photocopying. The paper must be opaque and unglazed, and only one side may be used. Carbon copies ~~of briefs and appendices may not be submitted without~~ may be used only with the court's permission ~~of the court, except in behalf of parties allowed to proceed~~ or by pro se persons

proceeding in forma pauperis. ~~All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6 1/8 by 9 1/4 inches and type matter 4 1/6 by 7 1/6 inches. Those produced by any other process shall be bound in volumes having pages 8 1/2 by 11 inches and type matter not exceeding 6 1/2 by 9 1/2 inches with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

(2) *Typeface.* Either a proportionately spaced typeface of 14 points or more, or a monospaced typeface of no more than 10-1/2 characters per inch may be used in a brief. A proportionately spaced typeface is one that has characters with different widths. The design must be in roman, non-script type. A monospaced typeface is a typeface in which all characters are the same width.

(3) *Paper Size, Line Spacing, and Margins.* A brief must be on 8-1/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. The side margins must be at least 1 inch, and the top and bottom margins must be at least 1-1/4 inch.

(4) *Length.*

(A) Proportionately spaced briefs. A principal brief must not exceed 14,000 words, and a reply brief must not exceed 7,000 words. No brief may have an average of more than 280 words per page, including headings, footnotes, and quotations.

(B) Monospaced or typewritten briefs. A brief prepared in a monospaced typeface must either:

(i) comply with the word counts, both total and average per page, for a proportionately spaced brief; or

(ii) not exceed 40 pages for a principal brief and 20 pages for a reply brief.

(C) Exclusions. Word and page counts do not include any of the following: corporate disclosure statement, table of contents, table of citations, certificate of service, or any addendum containing statutes, rules, regulations, etc.

(D) A party may move for permission to exceed the brief lengths established by this rule.

(5) *Certificate of Compliance.* The brief must be accompanied by a certificate of compliance with (A) or (B) above. A party preparing this certificate may rely on the word count of the word-processing system used to prepare the brief.

(6) *Appendix.* An appendix must be in the same form as a brief, but may include a legible photocopy of any document found in the record.

~~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.~~

(7) *Cover.* ~~If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available,~~ Except for filings of pro se parties, the cover of the appellant's brief ~~of the appellant should~~ must be blue; ~~that of the appellee~~ the appellee's, red; ~~that of~~ an intervenor's or amicus curiae's, green; ~~that of~~ and any reply brief, gray. The cover of ~~the appendix, if separately printed, should~~ a separately printed appendix must be white. The front ~~covers of the briefs and of appendices, if separately printed, shall~~ cover of a brief and of a separately printed appendix must contain:

(A) the number of the case centered at the top;

~~(1)~~ (B) the name of the court ~~and the number of the case~~;

~~(2)~~ (C) the title of the case (see Rule 12(a));

~~(3)~~ (D) the nature of the proceeding in the court (*e.g.*, Appeal, Petition for Review) and the name of the court, agency, or board below;

~~(4)~~ (E) the title of the document, identifying the party or parties for whom the document is filed ~~(e.g., Brief for (Appellant, Appendix)~~; and

~~(5)~~ (F) the ~~names~~ name, ~~and~~ office addresses , and telephone number of counsel representing the party ~~on whose behalf~~ for whom the document is filed.

(8) *Binding.* A brief or appendix must be stapled or bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably 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) does not apply, and

(A) consecutive sheets may be attached at the left margin; and

(B) a cover is not necessary if the paper has a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the paper and identifying the party or parties for whom it is filed.

The Committee made several additional changes.

Because use of carbon paper is so rare, a motion was made to eliminate any reference to carbon copies. Because the rule prohibits the use of carbon copies unless the court grants permission to use them, some members of the Committee favored retention of the rule provision. The motion to eliminate the sentence at lines 7 through 10 of the redraft passed by a vote of 6 to 3.

With regard to the definitions of proportionately spaced typeface and monospaced typeface, it was noted that it is incorrect to omit the notion of advance width. Even in Courier the characters are different widths; an "i" is narrower than a "w". The real difference between monospaced and proportionately spaced typefaces is that a monospaced type advances the same width across the page for each letter regardless of the width of the character. The sentences at lines 22 through 25 were rewritten as follows:

> "A proportionately spaced typeface has characters with different advance widths. . . . A monospaced typeface has characters with the same advance width."

The Committee asked that the Committee Note be amended to explain the notion of "advance width" and to make it clear that use of pica type on a standard typewriter is a monospaced typeface having 10 characters per inch. Although the Committee had voted to require that type be "roman" (meaning non-italic), the Committee also requested that the Note should make it clear that italics may be used for case names or occasional emphasis. Typographers agree that use of italics is preferable to underlining, which distracts the reader.

The Committee approved by divided vote (5 to 4) deletion of (a)(4)(D); it provides that a party may move for permission to exceed the length limits

established in Rule 32. Several members of the Committee believed that inclusion of such language looks like an invitation to file such a motion and it is unnecessary. Although a motion may be filed without any such authorizing language, the dissenting members believed that retention of the language clarifies how one should seek permission to exceed the standard length. Although the Committee voted to delete the language, the consensus was that the Committee Note should say that removal of the corollary language ("Except by permission of the court") from the current rule does not mean that the Committee intends to prohibit motions to deviate from the requirements of the rule.

With regard to the certificate of compliance required by (a)(5), it was pointed out that the draft does not require the certificate to indicate the manner of compliance. In contrast, Rule 25 requires a certificate of service to indicate the date and manner of service, the names of persons served, the addresses, etc. Rule 32 also should require specification of those items that the attorney knows but the clerk's office does not necessarily know and cannot ascertain by a cursory examination of the brief. Following discussion, the provision was renumbered as (a)(5) and was amended to read as follows:

> (5) Certificate of Compliance. The attorney, or party proceeding pro se, shall include a certificate of compliance with Rule 32(a)(1)-(4) which states the brief's line spacing, and states either:
> (i) that the brief is proportionately spaced, together with the typeface, point size, and word count; or
> (ii) that the brief uses a monospaced typeface, together with the number of characters per inch, and word count or number of counted pages.
> The person preparing this certificate may rely on the word count of the word-processing system used to prepare the brief.

The possibility of developing a standard form that could be included in the appendix to the rules was discussed. Use of the forms is not mandatory, but they are helpful to practitioners. The rule, however, should require inclusion of all information that the Committee wants in every certificate.

The Committee discussed the sufficiency of simply stating that a brief contains less than 14,000 words rather than specifying the exact word count. Some members said that a person who prepares a 15 page brief should not spend any time counting words. Whereas other members said that it is so simple to get a word count from the computer that requiring inclusion of a word count is not an imposition. In addition, even a 7 page proportionately spaced brief must comply with the average number of words per page requirement and requiring the exact word count can make it clear that the number of words per page is excessive. The specific requirement also helps to focus the lawyer's attention. Because the

Committee contemplated that the rule will be republished, it decided (by a vote of 5 to 4) to publish the more stringent requirement because it is easier to back away from a stringent requirement than to insert one. Furthermore, inclusion of specific information in the brief, such as typeface, point size, word count, etc. will allow the courts to study and refine the requirements.

The Committee defeated (by a vote of 2 to 6) a motion to move to the Committee Note the statement that the person preparing the certificate may rely on the word count of the word-processing.

The Committee discussed whether Rule 28 should be amended to reflect the fact that every brief must include a certificate of compliance. The language just approved by the Committee requires that a brief "include" a certificate of compliance. One member suggested that it might not be necessary to amend Rule 28 if the rule simply required that a brief be "accompanied" by a certificate of compliance or if the rule said that the certificate must be "attached" rather than "included." One member pointed out that although a certificate of service is required, Rule 28 does not list that as an essential part of a brief. Another member argued that it would be more helpful to a lawyer if Rule 28 listed everything that must be included. If that approach were taken, it might be necessary to also include mention in Rule 28 of the certificate of service. There is, however, a significant difference between a certificate of service and a certificate of compliance. Proof of service frequently is completed after the brief is completed and the proof of service may be filed after the brief; whereas, all the facts necessary for completion of the certificate of compliance are known at the time the brief is filed. It was concluded, therefore, that it would be inappropriate for Rule 28 to require that each brief "include" a certificate of service.

A motion was made to amend Rule 28 to require that each brief include a certificate of compliance. The motion passed by a vote of 5 to 3.

With regard to the binding provision in (a)(9), the words "stapled or" were deleted. Deletion of those words does not prohibit stapling. In fact, the new language would permit stapling a brief at the upper left-hand corner. The change makes it clear that however a brief is bound the binding must "be secure," "not obscure the text" and done in a manner that "permits the document to lie reasonably flat when open."

Subdivision (b) deals with the form of other papers. A number of stylistic changes in that subdivision were approved. The Committee also decided to delete (b)(2)(A) of the redraft. That subparagraph said that "consecutive sheets may be attached at the left margin." Because the rule amendments delete the requirement that a brief or appendix be bound along the left margin, that subparagraph is no longer necessary.

The Committee concluded the discussion of Rule 32 by returning to the question of the need to republish the rule. The Advisory Committee voted, 7 to 2, to recommend that Rule 32 be republished. The Committee concluded that the elimination of the pamphlet brief and the increased level of specificity being required in the certificate of compliance are substantial changes.

A suggestion was received that Rule 32 should specify the brief colors in a cross-appeal. The Committee decided to take no further action on that suggestion.

Style Changes to Rules 25 and 27

In response to Judge Logan's earlier request, Mr. Garner suggested additional style revisions to the rules considered the preceding morning prior to his arrival.

1. Rule 25

On page 46 Mr. Garner proposed eliminating the separate paragraphs (i) and (ii). The Committee voted, however, to retain the paragraphs and the indentations.

The published rule requires a party using the mailbox rule to file a certificate that the brief was mailed or dispatched to the clerk by commercial carrier on or before the last day for filing. The language on page 46, however, states that the brief is timely "if accompanied by a certification that" it was so mailed. Taking that language literally, a brief would be timely even if mailed after the deadline as long as it is accompanied by certificate (however false) that it was timely mailed. To avoid that problem, lines 24 and 25 were amended by dropping the words "accompanied by a certification that." It was proposed that the certification requirement be moved to a later section of the rule.

Consideration of the language on page 46 highlighted the fact that as to a brief or appendix, three separate "certificates" may be required. Rule 25(d) requires all papers to have proof of service in the form of either a certificate of service or an acknowledgement of service. Proposed Rule 32 requires a brief to "include" a certificate of compliance with Rule 32. Under proposed Rule 25(a)(2)(B), if a party makes use of the mailbox rule, there must be a certificate stating that the brief was mailed or dispatched by commercial carrier on or before the last day for filing.

In order to make it clear that Rule 25 has been amended to require a certificate of filing, a motion was made to amend the caption to the rule so that it includes mention of "proof of filing." The motion passed by a vote of 7 to 1.

Another motion was made to amend 25(d) so that its heading reads "Proof of Service; Filing" and its text includes the following language:

> When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

That language combines the two certificates required by Rule 25. The motion passed unanimously.

2. Rule 27

Mr. Garner suggested that on page 92, lines 4-6 should be changed to active voice so that it would read: "unless these rules prescribe another form." The change was accepted.

On page 93, lines 26 through 29 were amended to remove an ambiguity. As amended the sentence states: "An affidavit must contain only factual information, not legal argument."

On page 98, lines 136 through 141, dealing with carbon copies, were deleted. The change was in keeping with the decision previously made to delete the language in Rule 32 dealing with carbon copies.

II. RULES FOR INITIAL PUBLICATION

At its meeting last October, the Advisory Committee approved several rule amendments but decided to delay a request for publication for two reasons. First, there already were a number of rules in the pipeline including the substantial package of rules published in September. The Committee did not want two sets of rules out for publication at the same time. Second, delay in publication would permit the Style Subcommittee to review the rules and make suggestions for improvement prior to publication.

Mr. Garner had reviewed the rules and was present to discuss his suggestions with the Committee.

Rule 26.1 - Corporate Disclosure

The proposed amendments to Rule 26.1 simplify the disclosures that must be made by a corporate party. The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The committee does not believe that it is necessary to make such disclosures. Instead, the amended rule requires disclosure only of a parent corporation and of any stockholders that are publicly held companies owning 10% or more of the party's stock.

Mr. Garner suggested a number of language changes. The Advisory Committee adopted his suggestions and made several changes of its own, including subdividing the rule into three subdivisions. As amended, the rule would read as follows:

Rule 26.1 Corporate Disclosure Statement

(a) *Who Shall File.* Any nongovernmental corporate party to a proceeding in a court of appeals shall file a statement identifying any parent corporation and listing stockholders that are publicly held companies owning 10% or more of the party's stock.

(b) *Time for Filing.* A party shall file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if

the statement has already been filed, the party's principal brief must include the statement before the table of contents.

(c) *Number of Copies.* If the statement is filed before the principal brief, the party shall file an original and three copies, unless the court requires the filing of a different number by local rule or by order in a particular case.

Some local rules require much broader disclosure than Rule 26.1 requires. The Committee Notes make it clear that such local rules are not preempted by the national rule. The Advisory Committee had previously attempted to formulate a rule requiring broader disclosure but was unable to develop a consensus among the circuits for such a rule.

Judge Stotler recommended that the Committee submit the proposed amendments to the Judicial Conduct Committee for its review.

Rule 29 - Amicus Curiae Briefs

Mr. Garner suggested a number of language changes in Rule 29; they were approved by the Committee. The rule as amended reads as follows:

Rule 29. Brief of an Amicus Curiae

(a) *When Permitted.* The United States or its officer or agency, or a State, Territory or Commonwealth may file an amicus-curiae brief without consent of the parties or leave of court. Any other amicus curiae may file a brief only if:

(1) it is accompanied by written consent of all parties;

(2) the court grants leave on motion; or

(3) the court so requests.

(b) *Motion for Leave to File.* The motion must be accompanied by the proposed brief, and must state:

(1) the movant's interest;

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) *Contents and Form.* An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32(a), the cover must identify the party or parties supported or indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. With respect to Rule 28, an amicus brief must include the following:

(1) a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited:

(2) a concise statement of the identity of the amicus and its interest in the case; and

(3) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review.

(d) *Length.* An amicus brief may be no more than one-half the length of a principal brief as specified in Rule 32.

(e) *Time for Filing.* An amicus curiae shall file its brief, accompanied by a motion for filing when necessary, within the time allowed to the party being supported. If an amicus does not support either party, the amicus shall file its brief within the time allowed to the appellant or petitioner. A

court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) *Reply Brief.* An amicus curiae is not entitled to file a reply brief.

(g) *Oral Argument.* An amicus curiae's motion to participate in oral argument will be granted only for extraordinary reasons.

The Committee discussed the possibility of dividing (b)(2) into two paragraphs making it (b)(2) and (b)(3). By vote of 7 to 1, the Committee decided to leave it one paragraph. The majority of the Committee believed that the two ideas are interdependent and that it would be unwise to separate them.

With regard to oral argument, it was pointed out that if the party being supported cedes a portion of its time to an amicus, the court of appeals is likely to approve the participation of the amicus. It is only when an amicus seeks its own time that it is unusual for a court to grant the time. The Committee consensus, however, was that the language of subdivision (g) should remain as drafted.

Rule 35 - En Banc Proceedings

Rule 35 is amended to treat a request for a rehearing en banc like a petition for panel rehearing. As amended, a request for a rehearing en banc also will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The amendments delete the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. In order to affirmatively extend the period for filing a petition for writ of certiorari, however, Sup. Ct. R. 13.3 must be amended. In keeping with the intent to treat a request for a panel rehearing and a request for a rehearing en banc similarly, the term "petition" for rehearing en banc is substituted for the term "suggestion" for rehearing en banc.

The amendments add intercircuit conflict as a reason for determining that a proceeding involves a question of "exceptional importance" -- one of the traditional criteria for granting an en banc hearing.

The amendments also establish a 15 page limit on such petitions.

The first issue the Committee discussed was the use of "en" banc or "in" banc. Judge Logan recounted his extensive discussion with Judge Newman concerning the issue. The Committee voted 7 to 1 to use "en" banc.

Mr. Spaniol was troubled by the repetition in (b)(1)(A) and (B) of language in (a)(1) and (2). Several members of the Committee responded that the arrangement of that particular material in the rule was the result of much negotiating. The Solicitor General requested the addition of intercircuit conflict as a reason for granting an en banc hearing. The Advisory Committee was unwilling to expand the criteria for en banc consideration beyond two existing criteria set forth in subdivision (a): 1) the need to secure or maintain uniformity, and 2) a case involving a question of exceptional importance. The Committee was willing, however, to state that the existence of an intercircuit conflict may lead to the conclusion that the proceeding involves a question of exceptional importance. The Committee concluded that the repetition may be necessary to preserve the carefully negotiated compromise.

Mr. Garner objected to the inclusion in (b)(1)(B) of two sentences when (b)(1)(A) and (B) are intended to be alternative portions of a single sentence. The Committee experienced difficulty in attempting to redraft (B) and asked Mr. Garner to work with the reporter to try to improve the structure of the subparagraphs.

Mr. Garner suggested additional language changes in Rule 35; the Committee approved those changes.

Rule 41 - Mandate

Mr. Garner suggested minor language changes, all of which were approved by the Committee.

In (a)(2) he would move the words "unless the court orders otherwise," to the beginning of the second sentence.

In (b) he suggested changing the words "A party may, by motion, request a stay of mandate . . ." to "A party may move to stay the mandate . . .." In that same subdivision, he would change language in the third sentence from "unless the period is extended for cause shown" to "unless the period is extended for good cause".

The meeting adjourned at 4:15 p.m. The Committee will reconvene in Washington, D.C. on October 19, 20, and 21. The fall meeting will be devoted solely to style revisions.

Respectfully submitted,

Carol Ann Mooney
Reporter

Advisory Committee on the Federal Appellate Rules
Table of Agenda Items -- Revised June 1995

FRAP Item	Proposal	Source	Current Status
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 sub-committee 9/93, see item 93-9 Response provided to C.J. Breyer 5/94; no further action deemed appropriate at this time 4/94 Subcommittee to report - 10/95
89-5	Amendment of FRAP 35(c).	Mr. Robert St. Vrain (CA-8)	Under study by reporter Discussion with Supreme Court Clerk to precede any further action 10/90 Additional drafts requested 12/91 Approved for submission to Standing Committee 4/92 Standing Committee requested that Advisory Committee reconsider 6/92 Draft approved for submission to Standing Committee 4/93. Check all other FRAP for cross-references to "suggestions" for rehearing in banc Approved by Standing Committee for publication to bench and bar 6/93 Publication delayed pending completion of Items 91-25 and 92-4, 9/93
90-1	Amend FRAP 35(b) and (c) to change "suggestion" for an in banc to a "petition" for an in banc.	Hon. Jon Newman (CA-2) Mr. St. Vrain (CA-8)	Under study See notes under item 89-5
91-3	Final decision by rule/expanding inter-locutory appeal by rule.	Federal Courts Study Committee Judicial Improvement Act of 1990, P.L. No. 101-650; and Federal Courts Administration Act of 1992, P.L. No. 102-572	Discussion on-going 4/91 Consideration of interlocutory review of rulings on class certification. Referral from Civil Rules Committee 6/93

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 Approved by Standing Committee for republication 6/94 Published 9/94 New draft approved by Advisory Committee 4/95
91-9	Amendment of Rule 32(a) to require counsel to include their telephone numbers on the covers of briefs and appendices.	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 6/93 but not forwarded to the Judicial Conference, republished along with other changes to Rule 32 under item 91-4 Published 11/93 Republished 9/94 New draft approved by Advisory Committee 4/95

FRAP Item	Proposal	Source	Current Status
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 Approved by Standing Committee for republication 6/94 Published 9/94 Approved for resubmission to Standing Committee 4/95
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91
91-24	Page limits for and contents of amicus briefs.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95

FRAP Item	Proposal	Source	Current Status
91-25	Amendment of Rule 35 to specify contents of suggestions for rehearing in banc.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95
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 Approved by Standing Committee for publication 6/94 Published 9/94 Approved for resubmission to Standing Committee 4/95

FRAP Item	Proposal	Source	Current Status
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 Approved by Standing Committee for submission to Judicial Conference 6/94 Approved by Judicial Conference 9/94 Supreme Court forwarded to Congress 4/95
92-4	Amendment of Rule 35 to include intercircuit conflict as ground for seeking in banc.	Solicitor General Starr	Subcommittee consisting of Judges Logan and Williams and Mr. Kopp to consult with Reporter Report from FJC pending 1/93 On hold pending views of Solicitor General 4/93 Approved in substance; subcommittee to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95

FRAP Item	Proposal	Source	Current Status
92-5	Amendment of Rule 25 re "most expeditious form . . . except special delivery".	Advisory Committee	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 Approved by Standing Committee for republication 6/94 Published 9/94 Revised draft approved for resubmission to Standing Committee 4/95
92-8	Amendment of Rule 38 re: 1) defining "frivolous"; 2) whether responsibility falls on the client or the attorney; 3) requiring a court to state reasons.	Alan B. Morrison, Esq.	Subcommittee appointed to monitor; no need for action at this time 4/93 Subcommittee reported; new chair to be approved 10/94 Subcommittee to report, 10/95
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 Approved by Standing Committee for submission to Judicial Conference 6/94 Approved by Judicial Conference 9/94 Supreme Court forwarded to Congress 4/95

FRAP Item	Proposal	Source	Current Status
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 Approved by Standing Committee for submission to Judicial Conference 6/94 Approved by Judicial Conference 9/94 Supreme Court forwarded to Congress 4/95
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
93-2	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 Approved by Standing Committee for submission to Judicial Conference 6/94 Approved by Judicial Conference 9/94 Supreme Court forwarded to Congress 4/95
93-3	Amend Rule 41 re: 7-day period for issuance of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95
93-4	Amend Rule 41 re: length of time for stay of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95

FRAP Item	Proposal	Source	Current Status
93-5	Amend Rule 26.1 to delete use of term "affiliate."	Mr. Joseph Spaniol	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95
93-6	Amend Rule 41 re: effective date of mandate.	Solicitor General Days	Draft approved 10/94 to be submitted to Style Subcommittee] Revised draft approved for submission to Standing Committee 4/95

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

Item 6A

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 of Advisory Committee on Rules of Criminal Procedure**

DATE: **May 23, 1995**

I. INTRODUCTION.

At its meeting on April 10, 1995, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting, a GAP Report, and a proposed amendment to Rule 24(a) are attached.

II. ACTION ITEMS

A. Action on Rules Published for Public Comment: Rules 16 and 32

At its June 1994 meeting the Standing Committee approved for publication for public comment amendments to Rule 16 and 32. The deadline for those comments was February 28, 1995 and at its April 1995 meeting the Advisory Committee considered the comments, made several minor changes to the rules and now presents them to the Standing Committee. The amended Rules and Committee Notes are included in the attached GAP Report.

1. Action on Proposed Amendments to Rules 16(a)(1)(E) & (b)(1)(D). Disclosure of Expert Witnesses.

Minor stylistic changes were made to the proposed amendments to Rules 16(a)(1)(E) and (b)(1)D) which address the issue of disclosure of the names and statements of expert witnesses who may be called to testify about the defendant's mental condition.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 16(a)(1)(E) and (b)(1)(C) and forward them to the Judicial Conference for approval.

2. Action on Proposed Amendments to Rule 16(a)(1)(F) and (b)(1)(D). Pretrial Disclosure of Witness Names and Statements.

As noted in the attached GAP Report, the Committee made several minor changes to the proposed amendment and the accompanying Committee Note. The Committee considered again the view that the amendments are inconsistent with the Jencks Act; it continues to believe that forwarding the proposed changes to Congress is appropriate under the Rules Enabling Act.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 16(a)(1)(F) and (b)(1)D) and forward them to the Judicial Conference for approval.

3. Action on Proposed Amendments to Rule 32(d). Forfeiture Proceedings Before Sentencing

The Advisory Committee made a number of changes to Rule 32(d) after publication. Those changes which are discussed more fully in the attached GAP Report, do not in the Committee's view require additional publication and comment.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 32(d) and forward them to the Judicial Conference for approval.

B. Action on Proposed Rule 24(a). Voir Dire.

At its meeting in April 1995, the Advisory Committee considered amendments to Rule 24(a) which would provide for supplemental questioning of jurors by counsel. During its discussion, the Committee considered formal and informal surveys of judges on the issue as well as a draft circulated by the Civil Rules Committee which would amend

Civil Rule 47. The Criminal Rules Committee determined that the proposed amendment should go forward for public comment. The proposed amendment to Criminal Rule 24(a) and its accompanying Note are attached.

The Advisory Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 24(a).

III. INFORMATION ITEMS

1. Proposed Amendments Considered by the Advisory Committee

At its April 1995 meeting the Advisory Committee considered proposed amendments to Rule 11 (questioning the defendant re prior discussions with the prosecutor), Rule 26 (proposal to require trial court to determine if defendant had been apprised of right to testify), Rule 35(c)(proposal to consider further definition of term "imposition of sentence" in rule), and Rule 58 (proposal to specify in rule whether forfeiture of collateral amounts to a conviction).

As noted in the attached minutes, the Committee decided to take no action on the proposed amendments to Rules 11, 26 and 58. With regard to Rule 35(c), the Committee decided to defer any amendments pending re-stylization of the Criminal Rules.

2. ABA Liaison with Committee

The Committee briefly discussed the issue of formal liaisons from various bar associations and was apprised that because no such procedure exists, it would be better to simply establish points of contact with such organizations.

Attachments

GAP Report on Rules 16 and 32
Proposed Amendment to Rule 24(a)
Minutes of Committee Meeting

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 16 and 32.**

DATE: **May 23, 1995**

At its June 1994 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 32.

Both rules were published in September 1994, with a deadline of February 28, 1995 for any comments. At a hearing on January 27, 1995 representatives of the Committee heard the testimony of several witnesses regarding the amendments to Rule 16. At its meeting in Washington, D.C. on April 10, 1995, the Advisory Committee considered the writtent submissions of members of the public as well as the testimony of the witnesses.

Summaries of the any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

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

1. Rule 16(a)(1)(E) & (b)(1)(C). Disclosure of Expert Witnesses.

The Committee made only minor stylistic changes to the proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C). Very few comments were received on these particular provisions in Rule 16.

2. Rule 16(a)(1)(F) & (b)(1)(D). Pretrial Disclosure of Witness Names and Statements

After considering the numerous written submissions and oral testimony on the proposed amendments to Rule 16(a)(1)(F) and (b)(1)(D). the Committee made several minor amendments to the Rule and the accompanying Note. The Committee changed the Rule to limit the disclosure requirements to *felony*, non-capitol cases. It also clarified language in Rule 16(a)(1)(F) concerning the content of the nonreviewable statement by the attorney for the government. As rewritten, the rule explicitly recognizes that the government may decline to disclose either the name or the statement, or both, of a particular witness. Finally, the Committee made stylistic changes consistent with Mr. Garner's suggestions at the June 1994 Standing Committee meeting.

The changes to the Committee Note accompanying Rule 16 sharpen the Committee's position that the proposed amendment is consistent with other amendments to the Rules of Criminal Procedure, already approved by Congress, which technically violate the Jencks Act. Those amendments provide for some limited *pretrial* disclosure of a government witness' statement before the witness testifies on direct examination at trial, as provided in the Jencks Act.

3. Rule 32(d). Forfeiture Proceedings.

Five commentators, including the Department of Justice, which had proposed the amendment, supported the proposed amendment to Rule 32(d) which permits the trial court to enter a forfeiture order prior to sentencing. The Department of Justice's comments suggested changes which might have been considered significant enough to require republication for public comment. Ultimately, the Committee changed the rule in the following respects: (1) the amendment now provides that the procedures in Rule 32(d) may be applied where the defendant has entered a plea of guilty subjecting property to forfeiture; (2) the Committee eliminated any reference to specific timing requirements; and (3) the Committee added the last sentence which recognizes the authority of the court to include conditions in its final order which preserve the value of the property pending any appeals.

Given the relatively minor nature of these changes and the low number of public comments on the published version, the Committee believes that republication of this amendment is unnecessary.

Attachments:

Rule 16 and Committee Note; Summary of Comments and Testimony
Rule 32 and Committee Note; Summary of Comments

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 that 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 must, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, and 705 as evidence at trial on the issue of the defendant's mental condition. ~~This~~ The summary provided under this subdivision must describe the witnesses' opinions,

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[1]. New matter is underlined and matter to be omitted is lined through.

the bases and the reasons therefor, and the witnesses' qualifications.

(F) NAMES AND STATEMENTS OF WITNESSES. At the defendant's request in a non-capital felony case, the government must, no later than seven days before trial, disclose to the defendant the names of the witnesses that the government intends to call during its case-in-chief as well as any statements, as defined in Rule 26.2(f), made by those witnesses. But disclosure of that information is not required under the following conditions: (1) 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, and (2) if the attorney for the government submits to the court, ex parte and under seal, an unreviewable written statement indicating why the government believes in good faith that either the name or statement of a witness, or both, cannot be disclosed.

(2) *Information Not Subject to Disclosure*. Except as provided in paragraphs (A), (B), (D), ~~and~~ (E), and (F) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agents ~~in connection with the investigation or prosecution of~~ investigating or prosecuting the case. ~~Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.~~

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure*.

* * * * *

(C) EXPERT WITNESSES. Under the following circumstances, the defendant must, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under

Rules 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given 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 use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial.~~ This summary must describe the witnesses' opinions ~~of the witnesses~~ , the bases and reasons therefor, and the witnesses' qualifications.

(D) NAMES AND STATEMENTS OF WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(F) of this rule, and the government complies, the defendant must, at the government's request, disclose to the government before trial the names and statements of witnesses -- as defined in Rule 26.2(f) -- that the defense intends to call

during its case-in-chief. The court may limit the government's right to obtain disclosure from the defendant if the government has filed 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 require, upon request, the defense to provide pretrial disclosure of information concerning its expert witnesses on the issue of the defendant's mental condition. The amendment also requires the government to provide reciprocal pretrial disclosure of information about its expert witnesses when the defense has complied. The second amendment 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 intends to call during the trial as well as reciprocal pretrial disclosure by the government upon defense disclosure. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (a)(1)(F). No subject has generated 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 years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal enterprises, and other crimes committed by criminal organizations.

Notwithstanding the absence of an amendment to Rule 16, the federal courts have continued to confront the issue of whether the rule, read in conjunction with the Jencks Act, permits a court to order the government to disclose its witnesses before they have testified at trial. *See United States v. Price*, 448 F.Supp. 503 (D. Colo. 1978)(circuit by circuit summary of whether government is required to disclose names of its witnesses to the defendant).

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well-being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the burden faced by defendants in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in 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 pretrial 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 prosecution witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses are 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). Moreover, the vast majority of cases involving charges of violence against persons are tried in state courts.

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 defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases, and that trials in those cases will be fairer and more efficient.

The Advisory Committee regards the addition of Rule 16(a)(1)(F) as a reasonable, measured, step forward. In this regard it is noteworthy that the amendment rests on the

following three assumptions. First, the government will act in good faith, and there will be cases in which the information available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons in every case of an *ex parte* submission under seal would result in an unacceptable drain on judicial resources.

The Committee considered several approaches to discovery of witness names and statements. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names of witnesses and their statements unless the attorney for the government submits, *ex parte* and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why some or all of this information cannot be disclosed. The amendment adopts an 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 non-capital felony cases. Currently, in capital cases the government is required 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. Although 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 part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of significant judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

The most critical aspect of the amendment is the requirement that the government disclose the statements of its witnesses before trial, unless it files a statement indicating why it cannot do so. The amendment creates a conflict with the Jencks Act, 18 U.S.C. § 3500 which only requires the government to disclose its witnesses' *statements* at trial, *after* they have testified. *Palermo v. United States*, 360 U.S. 343 (1959). But the amendment is

consistent with the spirit of the Act to the extent that it reflects the importance of defense discovery in criminal cases. In *Campbell v. United States*, 365 U.S. 85, 92 (1961) the Court stated that to the extent the Act requires disclosure of any statements by government witnesses after they have testified, the statute "reaffirms" the Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957) that a defendant is entitled to relevant and competent statements for the purposes of impeachment. In promulgating the Jencks Act, Congress recognized the potential dangers of witness tampering and safety and obstruction of justice and attempted to strike a balance between those concerns and the value of discovery to the defense. Considering the ability of the prosecution to block disclosure, the amendment to Rule 16 is harmonious with that approach. It permits the government to block pretrial disclosure where there is a danger to a person's safety or there is a risk of obstruction of justice.

The amendment is also clearly consistent with other amendments to other Federal Rules of Criminal Procedure, previously approved by Congress. Those amendments, which provide for defense discovery of statements in some pretrial proceedings, are technically inconsistent with the Jencks Act in that they require disclosure before the witness testifies at *trial. See, e.g.*, 26.2(g)(3)(disclosure of witness statements at detention hearing); Rule 12(i)(disclosure of witness statements at suppression hearings); Rule 46(i)(disclosure of witness statements at detention hearings) and Rule 16(a)(1)(E)(pretrial disclosure of expert witness testimony). The amendment is also consistent with other rules which require the government to provide pretrial disclosure of the names of its witnesses and addresses. *See, e.g.*, Rule 12.1(b)(disclosure of names and addresses of government witnesses re rebuttal of alibi defense); Rule 12.3(a)(2)(pretrial disclosure of names and addresses of government witnesses re defense based upon public authority).

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 it to supersede 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 supersession and assuming responsibility for a review 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.").

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders from the court under subdivision (d) of this rule.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the

government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names and statements, is triggered by compliance with a defense request made under subdivision (a)(1)(F). If 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.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 16

I. SUMMARY OF COMMENTS: Rule 16

The Committee received 23 written submissions and heard testimony from three witnesses; two of those witnesses also supplied written comments. While several were statements filed by organizations, most of those commenting were in private practice. No current federal prosecutor filed a statement. Several were members of the judiciary.

With one exception (who declined to make any comments) all those submitting comments were in favor of the general expansion of federal criminal discovery in Rule 16. Most favored the amendments as published with one or two suggested changes. Beyond that, there were various levels of support for the key features in the amendment: One specifically favored the 7-day provision; four were opposed to it as being too short. With regard to the provision for an ex parte statement by the prosecution, 8 were opposed to it and two explicitly stated that the procedure was appropriate. Three specifically stated that the concern about danger to witnesses was overstated. One commentator stated that the Jencks Act should not be a problem. Several encouraged the Committee to extend production to FBI 302's. Three were in favor of requiring production of addresses of the witnesses. Several mentioned the issue of reciprocal discovery; one was opposed to it altogether and several indicated that the defense should have the opportunity to also refuse to disclose its witnesses under a procedure similar to that available for the prosecution.

II. LIST OF COMMENTATORS: Rule 16

CR-01	Graham C. Mullen, Federal District Judge, Charlotte, N.C., 9-19-94.
CR-02	Robert L. Jones, III, Arkansas Bar Assoc., Fort Smith, Ark., 10-7-94.
CR-03	Prentice H. Marshall, Federal District Judge, Chicago, IL., 9-30-94.
CR-04	James E. Seibert, United States Magistrate Judge, Wheeling, W.V.,11-4-94.
CR-05	David A. Schwartz, Esq., San Francisco, CA, 11-8-94.

CR-06	Edward F. Marek, Esq., Cleveland, OH, 11-16-94.
CR-07	William H. Jeffress, Jr., Esq., Wash. D.C., 12-6-94.
CR-08	Norman Sepenuk, Esq., Portland, OR, 12-16-94.
CR-09	Michael Leonard, Alexandria, VA, 1-18-95.
CR-10	John Witt, City of San Diego, CA., 1-6-95
CR-11	Akron Bar Assoc. (Jane Bell), Akron, OH., 1-27-95
CR-12	New Jersey Bar Assoc.(Raymond Noble), 2-24-95
CR-13	Irvin B. Nathan, Esq., Wash. D.C., 2-7-94.
CR-14	Patrick D. Otto, Mohave Community College, Kingman, AZ, 2-15-95.
CR-15	Paul M. Rosenberg, United States Magistrate Judge, Baltimore, MD, 2-17-95.
CR-16	Federal Public and Community Defenders, Chicago, IL, 2-21-95.
CR-17	Lee Ann Huntington, State Bar of CA, San Francisco, CA, 2-24-95.
CR-18	Federal Bar Association, Philadelphia Chapter, Philadelphia, PA, 2-27-95.
CR-19	ABA Section of Criminal Justice, Wash., D.C., 2-27-95.
CR-20	Maryland State Bar Association, Roger W. Titus, Rockville, MD, 2-21-95.
CR-21	Leslie R. Weatherhead, Esq., Spokane, WA, 2-28-95.
CR-22	Section on Courts, Lawyers and Administration of Justice of D.C. Bar, Anthony C. Epstein, Wash., D.C., 2-28-95.
CR-23	National Association of Criminal Defense Lawyers, Wash., D.C., 2-28-95.

III. LIST OF WITNESSES (Hearing in Los Angeles, Jan. 27, 1995) -- Rule 16

1. Norman Sepenuk, Esq., Attorney at Law

2. David A. Schwartz, Esq., Attorney at Law

3. Maria E. Stratton, Esq., Federal Public Defender

IV. COMMENTS: Rule 16

Hon. Graham C. Mullen (CR-01)
Federal District Judge, Western District of North Carolina
Charlotte, N.C.
Sept. 19, 1994

Judge Mullen believes the proposed new Rule 16 is long overdue. His only concern is that the requirement of seven days before trial for disclosure of witnesses may be too close to trial date to benefit anyone. Additionally, Judge Mullen feels that although objections will arise concerning witness safety, the committee has correctly concluded that such is confined to the minority of cases and has provided an appropriate mechanism to afford confidentiality.

Robert L. Jones, III (CR-02)
President, Arkansas Bar Association
Fort Smith, Ark.
Oct. 7, 1994

Mr. Jones, commenting on behalf of the Arkansas Bar Association, agrees with the proposed changes to Rule 16 of the Federal Rules of Criminal Procedure.

Hon. Prentice H. Marshall (CR-03)
Federal District Judge, Northern District of Illinois
Chicago, IL.
Sept. 30, 1994

Judge Marshall urges the Committee to adopt the language of Rule 26(a)(2) of the Rules of Civil Procedure in the proposed amendment to Criminal Rule 16 relating to anticipated expert testimony. Additionally, in addressing the amendments regarding witness disclosure, he agrees with the Committee that risk to witnesses is greatly exaggerated by prosecutors, citing one minor incident in his 41 years of criminal trial experience. He concludes that knowledge of witnesses and their pretrial statements expedites cross-examination.

Hon. James E. Seibert (CR-04)
United States Magistrate Judge, Northern District of West Virginia
Wheeling, W.V..
Nov. 4, 1994

Judge Seibert strongly supports the proposed amendments and believes there exists an adequate safety valve in those limited cases where a witness list would not be appropriate. He notes that for the past four years he has required witness lists seven days prior to trial and that such has come to be accepted by the practicing U.S. Attorneys and defense bar (an initial scheduling order containing the requirements for witness lists is enclosed). He comments that a witness list allows the defense some reasonable assistance in trial preparation and that until a defendant has knowledge of the witnesses against him, it is difficult to properly decide whether to plead or go to trial.

David A. Schwartz (CR-05)
Private Practice
San Francisco, CA
Nov. 8, 1994

Mr. Schwartz supports the proposed amendment dealing with witness statements and names and suggests several changes. First, in support of the proposed amendments, he suggests that more liberal pretrial disclosure of witness information will advance the search for truth and cause of justice. Along these lines, he adds that the present practice of revealing witness information under the *Jencks* standards is unconscionable. Second, in support of the Rule 16 proposal, Mr. Schwartz explains that such alterations to the Rule will aid in negotiating plea agreements. Third, in support of the proposed amendments, Mr.

Schwartz suggests that such will cause the entire system to run more efficiently and force prosecutors to confront weaknesses in their case. Fourth, in support, he explains that forcing the government to reveal more information is consistent with due process and fundamental fairness. Finally, in support of the amendments, Mr. Schwartz comments that the arguments made by the Department of Justice regarding witness safety are inflated. He suggest several changes to the proposed amendments. First, he suggests that the seven day rule may be of little use to the defendant and that such should be expanded to thirty or sixty days prior to trial. Second, he suggests that prosecutors should not be given unreviewable carte blanche to deny discovery by claiming witness intimidation. He favors judicial intervention, through hearing, to determine the validity of the claim of witness intimidation. In the alternative, absent *pro se* representation, he suggests that undisclosed information be made available to defense counsel as an officer of the court under the stipulation that the defendant will not be privy to this information absent further court order.

Edward F. Marek (CR-06)
Private Practice
Cleveland, OH
Nov. 16, 1994

Mr. Marek (a former member of the Advisory Committee) supports the proposed amendments to Rule 16. He argues that such amendments should not be defeated because they may conflict with the Jencks Act. Mr. Marek explains that one can point to a number of amendments enacted through the rules enactment process which conflict with the Jencks Act but which Congress has seen fit to approve. For example, Rules 412 and 413 of the Federal Rules of Evidence as contained in the Violent Crime Control and Law Enforcement Act of 1994 represent Congress' belief that in sexual assault and child molestation cases government witness disclosure prior to trial is necessary. Mr. Marek suggests that these new evidence rules clearly show that Congress believes that the Jencks Act should not stand as a barrier to more enlightened discovery in Federal Courts. Mr. Marek points out that proposed amendments to Rule 16 are modest compared to Federal Rules of Evidence 412 and 413. Finally, he adds that the proposed Advisory Committee Note is important in that it provides that the prosecutor's *ex parte* statement must contain facts concerning witness safety or evidence which relate to the individual case. This language, Mr. Marek suggests, properly represents the Committee's intention that any argument, for example, that danger to safety of witnesses exists in all drug cases, would not be sufficient showing to block production of statements.

William H. Jeffress, Jr. (CR-07)
Private Practice
Washington, D.C.
Dec. 6, 1994

Although Mr. Jeffress is Chair of the ABA's Criminal Justice Standards Committee, the views stated in his comments are personal. Mr. Jeffress supports the proposed amendments to Rule 16. Mr. Jeffress does believe three aspects of the amendments could be and should be improved. First, he believes that the Committee's proposed amendment to Rule 16 does not require the prosecution to disclose witnesses it may call in rebuttal at trial, yet requires the defense to disclose all witnesses even if solely to be used to impeach. To Mr. Jeffress this seems an inappropriate balance of obligations. Second, Mr. Jeffress believes the Committee's accommodation of the witness safety concern goes so far that it undermines the utility and fairness of the Rule. Third, he argues that any rule giving the government the absolute right to refuse disclosure, without incurring significant adverse consequences for so refusing, is unsound. He suggests that the prosecutor's ability to refuse pretrial disclosure of names and statements of witnesses should depend on judicial approval, based upon *ex parte* submission, in accordance with Rule 16(d)(1). Mr. Jeffress disagrees with the Committee Note suggesting a hearing on this matter requires vast judicial resources. For the Committee's information he encloses a copy of the Third Edition Discovery Standards approved by the ABA of which he makes reference to in his comments.

Norman Sepenuk (CR-08)
Private Practice
Portland, OR
Dec. 16, 1994

Mr. Sepenuk favors the proposed amendments to Rule 16. He comments that complete disclosure of the government's case prior to trial is the best tool to facilitation of case disposition and to loosening up the criminal trial dockets. Mr. Sepenuk explains that such facilitation will be in the form of plea dispositions due to knowledge of the government case and the reaching of stipulations in advance of trial. He believes that the proposed Rule 16(a)(1)(F) should be amended to provide for pretrial disclosure of names and statements no later than ten days after arraignment. He also suggests amendment to Rule 26.2(f) to expand the definition of a "statement" required to be disclosed in advance of trial. Additionally, he believes that FBI memoranda of interview and similar interview statements should be explicitly made available under the Rules, and federal agents' reports should be subject to discovery to the extent they present a factual recitation of events, much like that of expert reports, which under the rules need not be produced.

Michael Leonard (CR-09)
Military Counsel
Alexandria, VA
Jan. 18, 1995

Mr. Leonard offers the views of someone who has been associated with the military criminal justice system for seven years and provides an overview of the discovery procedures in the military. In his experience, disclosure of the prosecution's witnesses takes place well in advance of trial, including any copies of witnesses' statements. The rules, he notes, are intended to reduce gamesmanship. Those interests, he asserts, are the same in federal practice. If the Committee is looking for a middle ground, he states, a review of the discovery rules followed by "other" federal prosecutors on a daily basis in military criminal practice my assist the Committee.

John Witt (CR-10)
City of San Diego
San Diego, CA
Jan 6, 1995

Mr. Witt thanks the Committee for an opportunity to provide input on the proposed amendments and notes that his counsel have informed him that nothing the amendments will have enough impact to justify any comments.

Ms Jane Bell (CR-11)
Akron Bar Assoc.
Akron, Ohio
Jan. 27, 1995

The Akron Bar Assoc. supports the proposed amendments to Rule 16. But it objects to the fact that the government may file an "unreviewable" statement for not providing the information. The Bar Assoc. suggests that provision be made for ex parte review of the government's reasons. No hearing would be necessary on that statement. The Assoc. also recommends substitute language for accomplishing that proposal. It also supports the provisions for discovery concerning experts.

The New Jersey Bar Assoc. (CR-12)
Raymond Noble
New Brunswick, NJ
Feb. 24, 1995

While the New Jersey Bar Assoc. supports the amendments to Rule 16, it recommends that the word "unreviewable" be removed from the amendment.

Mr. Irvin B. Nathan (CR-13)
Private Practice
Washington, D.C.
Feb. 7, 1995

Mr. Nathan (former Associate Deputy Attorney General who appeared before the Standing Committee on this issue at its January 1994 meeting) supports the proposed amendments to Rule 16 and requests incorporation of his article published in the New York Times endorsing the Committee's proposal. He points to state rules of discovery such as in California as examples of the growing sentiment of legislative bodies that fairness, efficiency and elimination of trial by ambush are better served by broader criminal discovery concerning witnesses. Mr. Nathan urges that the Justice Department withdraw its opposition to the proposed amendments.

Mr. Patrick D. Otto (CR-14)
Mohave Community College
Kingman, AZ
Feb. 15, 1995

Mr. Otto agrees with the proposed amendments to Rule 16 concerning witness names and statements. Mr. Otto further concurs on letting the trial court rule on the amount of defense discovery and the proposals regarding witness safety and risk of obstruction of justice.

Judge Paul M. Rosenberg (CR-15)
United States Magistrate Judge
Baltimore, MD
Feb. 17, 1995

Judge Rosenberg suggests that the proposed amendments concerning witness names and statements be modified to exclude misdemeanor and petty offenses. He explains that the requirement of supplying witness information seven days in advance of trial would be unduly burdensome in these cases especially in light of the fact that many U.S. Magistrate Judges handle large misdemeanor and petty offense dockets.

Federal Public and Community Defenders (CR-16)
Carol A. Brook and Lee T. Lawless
Chicago, IL
Feb. 21, 1995

The comments submitted are an expanded version of those provided the Committee prior to testifying in Los Angeles. The comments fall into two main categories. First, support is given to the proposed Rule 16 amendments as much needed and an improvement in the administration of justice. Second, comments are submitted on specific parts of the proposed amendments that the Federal Defenders feel will lead to unfair results not intended by the Committee. It is believed that disclosure of witness names and statements will enhance the ability to seek the truth, will provide information necessary to the decision of pleading guilty or going to trial, will contribute to the exercise of confrontation and compulsory process rights, and will save time and money. It is suggested that witness intimidation and perjury are exceptions to the rule and that ex parte, unreviewable proceedings are contrary to the adversary system of justice. Additionally, concern is expressed regarding the lack of reciprocity in the proposed amendment to Rule 16(b)(1)(D) which states that the court may limit the government's right to obtain disclosure if it has filed an ex parte statement. Also, concern is expressed over the requirement of defense witness disclosure prior to trial as such witnesses are not always known beforehand. Finally, it is suggested that witness addresses be disclosed.

Ms. Lee Ann Huntington (CR-17)
Chair, Committee on Federal Courts, State Bar of California
San Francisco, CA
Feb. 24, 1995

The Committee on Federal Courts of the State Bar of California supports the proposed amendments to Rule 16 in their aim to make reciprocal prosecution and defense discovery obligations. The Committee on Federal Courts suggests one further amendment to Rule 16. It is proposed that defendants be afforded the reciprocal right to refuse disclosure of witnesses who fear testifying and their statements (i.e., because of community harassment or pressure from victims' families) and that they be allowed to file a similar nonreviewable, ex parte statement under seal.

Criminal Law Committee, Federal Bar Association (CR-18)
James M. Becker, James A. Backstrom and Anna M. Durbin
Philadelphia Chapter
Philadelphia, PA
Feb. 27, 1995

The Committee supports reform of Rule 16, but suggests modification to what it deems to be two unwise elements of the proposed Rule change. First, the Committee suggests that the unreviewable nature of the government's decision to withhold disclosure should be made reviewable. Second, the Committee believes there should be no reciprocal duty on the defense to disclose any witness or statements before trial because the prosecution and the defense are not in like positions vis-a-vis the burden of proof or resources for investigation. The Committee feels there is no reason to obligate defendants beyond the present Rules.

ABA Criminal Justice Section (CR-19)
Arthur L. Burnett, Sr.
Washington, D.C.
Feb. 27, 1995

Judge Burnett, writing on behalf of the American Bar Association, expresses the Association's strong support for the proposed amendments to Rule 16. Although, in the Association's view, the proposed amendments to Rule 16 do not go as far as the ABA approved Third Edition Criminal Discovery Standards, the Association believes the changes are a step forward in more open discovery. The Association, in addressing disclosure of defense impeachment witnesses and statements, does suggest that the Committee

commentary recognize that reciprocal obligations of disclosure must be consistent with the constitutional rights of the defendant and the differing burdens on each side in criminal cases. The Association feels that the proposed changes would not substantially conflict with the Jencks Act and that where conflict may arise, Congressional approval would act as a partial amendment of the Act.

Criminal Law and Practice Section (CR-20)
Maryland State Bar Association
Mr. Roger Titus
Rockville, MD
Feb. 21, 1995

The Maryland State Bar Association endorses the adoption of the proposed amendments to Rule 16. The Association does express concern over the government's veto power of defense requests for pre-trial witnesses and statement disclosure through use of an unreviewable, ex parte statement under seal of the court. Additionally, the Association believes that the language of Rule 16(b)(1)(D) should not be discretionary. Where the government has avoided discovery by resort to the ex parte statement, it should thereby lose its right of reciprocal discovery.

Leslie R. Weatherhead (CR-21)
Witherspoon, Kelley, Davenport and Toole
Spokane, WA
Feb. 28, 1995

Ms. Weatherhead applauds the proposed amendments to Rule 16 as a small step in the right direction. Ms. Weatherhead strongly opposes the provision allowing for government refusal to disclose certain witnesses and statements through an unreviewable, ex parte statement.

Section on Courts, Lawyers and the Administration of Justice (CR-22)
District of Columbia Bar
Anthony C. Epstein, Cochair
Washington, D.C.
Feb. 28, 1995

The Section agrees with the basic premise of the proposed amendments to Rule 16. In general, these amendments make trials fairer and more efficient and facilitate appropriate

resolutions before trial. Specifically, the Section agrees with the Committee's decision to recommend the unreviewable, ex parte statement method of government non-disclosure. The Section believes it is appropriate to try this approach and to determine how it works in practice. Additionally, the Section seeks clarification on the Committee's "good faith" requirement for refusal to disclose and suggests that the defense be required to provide reciprocal discovery no more than three days prior to trial.

National Association of Criminal Defense Lawyers (CR-23)
Gerald H. Goldstein, William J. Genego & Peter Goldberger
Washington, D.C.
Feb. 28, 1995

Citing its long standing support of extensive broadening of the scope of criminal discovery, the NACDL supports what it terms the Committee's modest step in this direction. The NACDL suggests several changes to expand the Committee's movement towards more liberal discover. First, the NACDL believes that addresses of witnesses should be included in the disclosure. Second, the NACDL suggests that the seven day requirement does not afford enough time and that the three day rule for capital defendants is inadequate. Third, the NACDL believes that the definition of statement in Rule 26.1(f) must be amended to include such reports as DEA 6's and FBI 302's. Such amendment would also require modification to Rule 16(a)(2). Fourth, The NACDL expresses concern over the unreviewable, ex parte statement veto power of the government. Fifth, the NACDL suggests that no reciprocal disclosure requirement should be placed in the defendant and that if any duty is to exist that the time limit should be no earlier than when the government informs the defense that it is calling its final witness. In any event, the NACDL feels that the wording of Rule 16(b)(1)(D) should be amended to alleviate the discretionary language and should impose no duty on defense disclosure where the government withholds.

V. TESTIMONY

Three witnesses testified at a public hearing on the proposed amendments to Rule 16 at the Federal Courthouse in Los Angeles, California on January 27, 1995. Present were Hon. D. Lowell Jensen, Chair, Mr. Henry Martin, member, Professor Dave Schlueter, Reporter, and Mr. John Rabiej, Administrative Office.

Norman Sepenuk, Esq.
Attorney at Law
Portland, Oregon

Mr Sepenuk (who also submitted written comments which are summarized supra) indicated that as a former federal prosecutor he believed in an open file system, which in his view, expedited plea bargains and stipulations and provided for cleaner and crisper trials.. He stated that the 7-day provision is too short and proposes that the Committee change the amendment to provide for disclosure 10 days before trial. He pointed out that the prosecutors should be pushing for full and early disclosure to encourage plea bargaining. In return the defense should be required to turn over its names well before trial. He added that the definition of statement should include a specific reference to "302's" and require production of the witness's address. He would also require the government to show good faith for its belief that disclosure would harm an individual. Mr. Sepenuk also stated that he did not believe that it would be necessary to differentiate between types of cases vis a vis threats to witnesses; he believes that the prosecution and defense should be able to work it out. He noted that he had personal experience with delays resulting from failure of the government to make timely disclosure of a witness.

Mr. David A. Schwartz, Esq.
Attorney at Law
San Francisco, California

Mr. Schwartz (who had submitted written comments summarized, supra) testified that in his opinion the amendment does not coddle defendants. Nor does it have any effect on victims' rights. In his experience he often received witness statements the day before they testified. He is also aware of office policy to turn witness statements over on the Friday before the trial begins. In his experience, the public is aghast that federal criminal defendants do not receive more discovery. While he recognizes that there is a problem with witness intimidation and harassment, he has heard from friends who are prosecutors that they do not want to turn over too much information which may give the defense something to work with in the case. He does not believe that the Jencks act is reasonable and is unsure whether seven days is sufficient time. He noted that in his experience with white collar crime cases that the defendants often knew who the witnesses were but did not know what they would say. Mr. Schwartz also testified that he had some witnesses tell him that government investigators had discouraged them from talking to the defense. He stated that he was opposed to the provision for ex parte reasons being filed by the prosecutor; he stated that in California, defense counsel are precluded from disclosing the names and addresses of the government witnesses to the defendant. He proposes some sort of evidentiary hearing to determine the propriety of disclosure -- or at least to have the opportunity to refute the

government's reasons for nondisclosure. In his experience, he did know of cases which had been postponed because of delays in disclosing witnesses to the defense. It was also his experience in various state courts that the defense was provided an open file and that that often induced plea bargaining at an early stage. He does not object to reciprocal discovery although he does believe that there may be self-incrimination problems. And while he could live with an amendment which deleted reference to witness statements, he would want as much as he could get in discovery.

Ms. Maria Elena Stratton, Esq.
Federal Public Defender
Los Angeles, California

Ms. Statton testified that she works in a district with the second largest US Attorney's Office -- 170 assistants in the criminal division -- and that there is no uniform discovery policy. She noted that there are three areas of problems: First, the rogue agents and rogue prosecutors who operate in bad faith. Because these seem to be rare the amendment should not be geared to those situations. Second, there are inexperienced investigators and prosecutors who make uninformed decisions. Third, there are situations where the cases are weak and the prosecutors do not want to turn over information helpful to the defense. In her view, a real problem with the amendment is the lack of review of the prosecutor's ex parte statements. She noted that similar problems arise with regard to disclosing informants and that that procedure should work. She also suggested that the defense should also be permitted to decline to produce its witness' names. Just as there are dangers that the defendant may harass the government witness, she has experience the reverse situation; agents were harassing defense witnesses. Ms Stratton noted that there may be a problem with a note on page 124 of the booklet which indicates that the amendment does not address discovery of memoranda and other documents. She also expresses concern about the seven day requirement; she would move up the time to 14 or 21 days. She testified that she has had experience with continuances being granted because of last minute discovery. Ms. Stratton also stated that she has heard US attorneys candidly admit that the amendment is a good amendment; in that regard she indicated that she did not believe that the folks in Washington were really aware of what was happening in the field. With regard to the Jencks Act issue, she noted that in the Los Angeles federal courthouse there were no judges who enforces that Act. At arraignments, the judges indicate to the prosecutors indirectly that they would like to see the information disclosed. She also expressed some concern about the fact that the judge who sees the ex parte statement by the prosecutor may also sentence the defendant -- and the defense may not know what was in that statement which might otherwise affect the sentence.

Rule 32. Sentence and Judgment

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture.* ~~When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.~~ If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture must authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final order of forfeiture must be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

COMMITTEE NOTE

Subdivision (d)(2). A provision for including a verdict of criminal forfeiture as a part of the sentence was added in 1972 to Rule 32. Since then, the rule has been interpreted to mean that any forfeiture order is a part of the judgment of conviction and cannot be entered before sentencing. *See, e.g., United States v. Alexander*, 772 F. Supp. 440 (D. Minn. 1990).

Delaying forfeiture proceedings, however, can pose real problems, especially in light of the implementation of the Sentencing Reform Act in 1987 and the resulting delays between verdict and sentencing in complex cases. First, the government's statutory right to discover the location of property subject to forfeiture is triggered by entry of an order of forfeiture. *See* 18 U.S.C. § 1963(k) and 21 U.S.C. § 853(m). If that order is delayed until sentencing, valuable time may be lost in locating assets which may have become unavailable or unusable. Second, third persons with an interest in the property subject to forfeiture must also wait to petition the court to begin ancillary proceedings until the forfeiture order has been entered. *See* 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(m). And third, because the government cannot actually seize the property until an order of forfeiture is entered, it may be necessary for the court to enter restraining orders to maintain the status quo.

The amendment to Rule 32 is intended to address these concerns by specifically recognizing the authority of the court to enter a preliminary forfeiture order before sentencing. 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 of 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. Before entering the order of forfeiture, however, 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 third parties who have an interest in the property.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 32(d)

I. SUMMARY OF COMMENTS: Rule 32(d)

The Committee received 4 written submissions on the proposed amendment to Rule 32(d). The commentators were in accord in their view that the amendment is necessary and clarifies the procedures for entering forfeiture orders before sentencing.

II. LIST OF COMMENTATORS: Rule 32(d)

CR-12 New Jersey Bar Assoc.(Raymond Noble), 2-24-95

CR-14 Patrick D. Otto, Mohave Community College, Kingman, AZ, 2-15-95.

CR-17 Lee Ann Huntington, State Bar of CA, San Francisco, CA, 2-24-95.

CR-23 National Association of Criminal Defense Lawyers, Wash., D.C., 2-28-95

Mr. Roger Pauley, Department of Justice, Wash. D.C., 3-3-95

III. COMMENTS: Rule 32(d)

Mr. Raymond Noble (CR-12)
New Jersey Bar Assoc.
New Brunswick, N.J.
Feb. 24, 1995

Mr. Noble, on behalf of the New Jersey Bar Association. briefly notes that the proposed amendment is a sensible response to procedural problems which have arisen.

Item 95-1

Mr. Patrick D. Otto (CR-14)
Mohave Community College
Kingman, AZ
Feb. 2-1995

Mr. Patrick Otto of Mohave Community College registers agreement with the Committee's proposed amendment; trial courts should have jurisdiction for the third party protection weighted more for "them" than for the government.

Lee Ann Huntington (CR-17)
State Bar of California
San Francisco, CA
Feb.24, 1995

Writing on behalf of the Committee on Federal Courts, State Bar of California, Ms. Huntington endorses the proposal, noting that the amendment recognizes the penal aspects of forfeiture and that it codifies double jeopardy concerns.

Mr. G. Goldstein, Mr. W. Genego & Mr. P. Goldberger
National Association of Criminal Defense Lawyers
Wash., D.C.,
Feb. 28, 1995

The National Assoc. of Criminal Defense Lawyers (Mr. Goldstein, Mr. Genego & Mr. Goldberger) welcomes and endorse the amendment to the extent that it clarifies procedure for turning a verdict of forfeiture into an order. The commentators also are glad to see that the rule encourages judges to hold separate hearings on criminal forfeitures. But two aspects of the amendment trouble them. First, they are concerned that the early entry of an order may interfere with the trial court's duty under the Eighth Amendment to determine that the forfeiture is proportional.. And second, they have not noticed the government's ability to conduct investigations into the defendant's potential forfeitable property. They believe that the amendment should include language to show that an order of forfeiture may be modified at any time until formal entry of the judgment. Also, the rule or the note should indicate that the court has the power under Rule 38(e) to stay enforcement of the order.

Mr. Roger Pauley
Department of Justice
Washington, D.C.
March 3, 1995

Finally, Mr.Roger Pauley has indicated that the Justice Department has modified its proposed changes to Rule 32(d) and wishes to have that change considered as a comment. The submitted revision would make three changes to the rule. The first is the elimination of the 8-day time limit in the published version.. The Department believes that there may well be cases where courts will have made up their minds that they will not grant new trials, etc. and they should be permitted to begin the proceedings as soon as possible after the verdict. Second, the new draft eliminates the absolute requirement for notice and a hearing as to the timing and form of the order of forfeiture. While a court would clearly have the discretion to hold a hearing, the very narrowness of the contemplated hearing that is contemplated indicates that a hearing is not necessary in every case and will normally serve no purpose. Third, the newer version seens to place greater emphasis on the fact that the court should enter the order. The Department, Mr. Pauley notes, believes that the newer version is simplified.

Rule 24. Trial Jurors.

(a) VOIR DIRE EXAMINATION. The court will conduct the preliminary voir dire examination of the trial jurors . Upon timely request, the court must permit the defendant or the defendant's attorney and the attorney for the government to conduct a supplemental examination of prospective jurors, subject to the following:

(1). The court may place reasonable limits on the time, manner, and subject matter of such supplemental examination; and

(2) The court may terminate supplemental examination if it finds that such examination may impair the jury's impartiality

The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

* * * * *

COMMITTEE NOTE

The amendment is intended to insure that the parties are given an opportunity to participate in the critical stage of jury selection. While a recent survey from the Federal Judicial Center indicates that a majority of district courts permit participation by counsel, Shapard & Johnson, *Survey Concerning Voir Dire* (Federal Judicial Center 1994), the Committee recognizes that in many cases the right to participation is completely precluded under the present rule. Those opposing greater participation by counsel assert that providing an opportunity for such participation will extend the time for selecting a jury and that counsel may use the examination for improper means, e.g., attempting to influence or educate the jury regarding their client's view of the case.

Those supporting greater counsel participation assert that it is important for the parties to participate personally in the process because jurors may be intimidated by the trial court and that their answers to the judge may be less than candid. See generally D. Suggs & B. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56

Indiana L. Jour. 245, 256-257 (1981)(authors note that unintentional, nonverbal, communication from judge during voir dire may affect jurors' response); S. Jones, *Judge-Versus Attorney-Conducted Voir Dire,* 11 Law and Human Behavior 131, 143 (1987))(study showed the jurors attempted to report not what they truly felt but "what they believed the judge wanted to hear"). Second, in order to insure a fair opportunity to obtain information relevant to the exercise of peremptory challenges and challenges for cause, it is important that at a minimum counsel be given the opportunity to conduct supplemental examination.

Although the concerns expressed by the opponents are not without merit, the Committee believed that on balance, the need for counsel participation outweighed the risk of potential abuse. The amendment recognizes that, particularly in criminal cases, there are good reasons for permitting supplemental inquiries by counsel, without regard to whether counsel or the courts can do a better job of picking an impartial jury. The amendment avoids that debate and at the same time recognizes that the defendant or defendant's counsel should have the right, even if limited, to question the potential jurors.

While the amendment recognizes the long-standing tradition in federal courts that the primary responsibility for conducting voir dire rests with the trial judge, it creates a presumptive right of counsel to participate in supplemental examinations. The right to supplemental questioning, however, is not absolute and may be conditioned on one of serveral factors.

First, the rule requires counsel to make a timely request to conduct supplemental questioning. This is designed to encourage the parties to give some forethought to the process, especially in those courts where extensive use is made of questionaires which may require time and effort to tailor the questionaire to a particular case. The rule leaves to the court to decide under the facts of the case whether the request is timely; the question will be one of reasonableness.

Second, the court may place reasonable limits on the time, manner, and subject matter of the examination. This condition probably reflects current practice in some courts. That is, at the present time, judges already permit counsel to pose supplemental questions, subject to such reasonable limitations in cases where attorney-conducted voir dire is permitted.

The final condition reflects the Committee's view that the court should retain the authority in particular cases to cut off absolutely any supplemental questioning. The amendment assumes that the supplemental examination has begun and that at some point, the defendant or trial counsel has engaged in conduct which demonstrates a purpose to use the voir dire process for some reason other than determining the ability of a potential juror to serve impartialy.. The amendment also assumes that the court should have an articulable reason for absolutely barring supplemental questioning by the parties.

Research Division
202-273-4070

memorandum

DATE: 9/26/94
TO: Advisory Committee on Civil Rules
FROM: John Shapard, Molly Johnson
SUBJECT: Survey Concerning Voir Dire

At the request of the Chairman of your Committee, the Center initiated a survey of active district judges concerning certain of their practices in conducting voir dire, as well as their opinions about counsel participation in voir dire and their impressions of the effect on voir dire of the line of cases beginning with *Batson v Kentucky*, 476 U.S. 79. A copy of the questionnaire is attached as exhibit A. This memorandum explains the results of the survey, and provides in a few instances comparisons to the results of a similar survey conducted by the Judicial Center in 1977.[1]

The survey was mailed to a randomly selected sample of 150 active district judges, with the sampling designed to achieve proportional representation of districts, chief judges, and time since appointment to the district bench. 124 Judges (83%) completed and returned the questionnaire. Because the information provided here is based on a sample, the results must be understood as estimates. The fact, for example, that 59% of respondents indicated that they ordinarily allowed counsel to ask questions during civil voir dire does not necessarily mean that 59% of all district judges allow some counsel questioning. There is a margin of error of roughly plus or minus 8% (hence somewhere between 51% and 67% of all district judges allow counsel questioning).[2]

Extent of Counsels' Participation in Voir Dire

One focus of the survey was the extent to which judges permit counsel to address prospective jurors directly—as opposed to the court asking all questions—in the course of voir dire. Asked about their "standard" practice, 59% indicated that they allowed at least some direct attorney participation in voir dire of civil trial juries, and 54% so indicated with regard to criminal juries. In the Center's 1977 study, less than 30% of district judges reported allowing any questioning by counsel during voir dire in "typical" civil or criminal cases. There was no marked difference in responses to a second question asking about practices in "exceptional" cases, the percentages being 67% (civil) and 51% (criminal). The extent of permitted counsel participation was indicated by three different responses, distinguished by unavoidably subjective terms. One response indicated that the judge allows counsel to "conduct most or all of voir dire," another

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[1] See Bermant, The Conduct of Voir Dire Examination: Practices and Opinions of Federal District Judges, Federal Judicial Center, 1977.

[2] To be a bit more specific, the plus-or-minus 8% figure is the size of the 95% confidence interval, which means that with random sampling from the population of active district judges, there is at most a 5% chance that the percentage given for the sample (here 59%) would occur if in fact the percentage for the entire population of active district judges was more than 8% different (i.e., below 43% or greater than 59%).

indicated that the judge conducts a preliminary examination and then gives " counsel a fairly extended opportunity to ask additional questions", and the third indicated that after the judge's examination, counsel were given "a very limited opportunity to ask additional questions." The percentages of these answers selected by the respondents are shown in Table 1.

TABLE 1

RESPONSE	"Standard Practice" Civil	"Standard Practice" Criminal	"Exceptional Cases" Civil	"Exceptional Cases" Criminal
a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).	9%	7%	8%	6%
b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.	18%	18%	27%	26%
c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.	33%	29%	29%	28%
d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.	41%	46%	34%	38%
e. Other	2%	1%	2%	3%

Another question asked the judge to estimate the average time taken in questioning jurors during voir dire, broken down between time spent by counsel and by the court, and by civil and criminal cases. The average total time—court and counsel—reported was 1:12 for civil cases and 1:39 for criminal cases. The range of the responses is shown in Table 2, together with figures for a similar question asked in the Center's 1977 study.

TABLE 2

Total Average Time Spent Questioning Prospective Jurors	**Percent of Respondents** Current Study Civil	Current Study Criminal	1977 Study Civil	1977 Study Criminal
less than 30 minutes	4%	2%	33%	16%
30 min - 1 hour	25%	10%	49%	49%
1 - 2 hours	56%	55%	14%	28%
2 or more hours	15%	34%	1%	7%

Among judges who reported any time expended by counsel, the average was 31 minutes in civil cases and 40 in criminal cases. Perhaps most intriguing, however, is the absence of much relationship between total voir dire time and the judge's indication of his or her standard practice regarding attorney participation in voir dire (which is summarized above in Table 1). Table 3 shows the reported times broken down by standard voir dire practice.

TABLE 3

Standard Voir Dire Practice	Average Voir Dire Time					
	Civil			Criminal		
	Ct	Cnsl	**Tot**	Ct	Cnsl	**Tot**
a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).	0:13	0:55	**1:09**	0:20	1:08	**1:28**
b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.	0:43	0:32	**1:15**	0:57	0:42	**1:39**
c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.	0:54	0:20	**1:15**	1:19	0:25	**1:44**
d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.	1:05	0:00	**1:05**	1:32	0:00	**1:32**

Effects of *Batson*

The survey also asked questions pertaining to the influence of *Batson* and its progeny (hereafter, simply "*Batson*"). When asked what percentage of their jury trials in the last year had involved a *Batson-type* objection,[3] 36% answered "none." The average percentage reported was 7%, with a median of 2%. (15% reported that such objections occurred in more than 10% of their trials).

It can be argued that *Batson* creates a need for increased attorney participation in voir dire (or at least for more probing voir dire) to afford counsel more information on which to base their exercise of peremptories. *Batson* prohibits exercise of peremptories based simply on stereotypes of certain kinds. Hence counsel may need more information to determine, for instance, if a particular prospective juror harbors the bias that counsel suspects is common among persons of that class (e.g., that race, gender). To help illuminate this issue, we asked judges how often they though the explanation for a peremptory that is offered in response to a Batson objection was an explanation based on information that would be adduced from a routine voir dire (as opposed to information obtained only from a somewhat probing voir dire). The average answer was 84%, with a median of 90% (fully 47% of responses were 95% or greater). Hence a large majority of judges think it rare that explanations for peremptories are based on information other than that "routinely elicited in voir dire or otherwise routinely available to counsel."[4]

When asked whether *Batson* "led you to alter your practice with regard to voir dire," fewer than 20% of the judges gave any affirmative response. Of those, most noted changes regarding the method of exercising peremptories. Only about 5% indicated that they had changed their

[3] See the attached survey for the definition of "*Batson-type* objection."

[4] Of course, if the only information available to counsel is that which is "routinely elicited," then the explanation can hardly be based on anything else. It that were the basis for the answers to this questions, however, one might expect to see a correlation between the answer to this question and the extent of counsel participation in voir dire reflected in questions 1 and 3. There was no significant correlation, and the only one even suggested by the data suggests that numerically larger answers to this question are most common among judges who allow counsel to conduct all or most of the voir dire.

practices regarding voir dire questioning, all but one indicating that voir dire questioning is more probing than in the past, at least in "exceptional" cases.[5]

Asked whether *Batson* had led to changes in regard to challenges for cause, 18% indicated that counsel "have increased their efforts to excuse jurors for cause," and 16% said that they "have become more willing to excuse jurors for cause." 74% of the respondents indicated that neither change had occurred.

Others Views Regarding Questioning by Counsel in Voir Dire

Question 8 asked the judges to indicate statements with which they agreed pertaining to questioning by counsel in voir dire. The statements and the percentage indicating agreement are shown in Table 4.

TABLE 4

Questioning of prospective jurors by counsel:

a. Takes too much time.	50%
b. Is less time-consuming than voir dire conducted entirely by the judge.	4%
c. Results in counsel using voir dire for inappropriate purposes (e.g. to argue their case, or simply to "befriend" jurors).	67%
d. Is an appropriate opportunity for counsel to introduce themselves to jurors.	31%
e. Is necessary to permit counsel and the parties to feel satisfied with the jury selection process, but is not otherwise worthwhile.	14%
f. Is necessary to permit counsel and the parties adequately to inform themselves of bases for challenges, whether peremptory or for cause.	32%
g. Is more effective because counsel know better what questions to ask.	17%
h. Is inappropriate; it should be the judge who solicits information about the jurors' ability to properly discharge their duties as jurors.	33%
i. Other	23%

Judges who indicated agreement with statement a in Table 4 (counsel questioning takes too much time) were asked to indicate how much more time counsel questioning would take than voir dire conducted entirely by the judge. The median response was 1.5 hours for civil cases and 2 hours for criminal cases. Compared to the total voir dire time reported by the respondents in question 2 (see tables 2 and 3 and associated text, above), these responses reflect a view that counsel questioning of jurors will more than double the time required for voir dire. This is at odds with the information presented in Table 3, above, which indicates very little difference in voir dire time regardless of whether the judges allows much, little, or no counsel questioning of jurors. The disharmony between these two aspects of the responses may also be due to either or both of two other phenomena:

1. Those judges who allow counsel questioning may manage to do so without it taking excessive time, and many of those who prohibit counsel participation may do so in part because they believe it will take too much time—a belief sometimes but not always based on personal experience.
2. At least some judges apparently interpreted the inquiry as pertaining to "unlimited" attorney voir dire (e.g. as they experienced voir dire as a state court judge), and indicated that

[5] The percentages mentioned in this paragraph pertain only to those respondents who were appointed to the bench before the *Batson* decision (86% of all respondents).

attorney participation in voir dire takes vastly more time, even though the judge routinely allows at least some questioning by counsel (the "takes too much time" response was chosen by 28% of the judges who report that they routinely allow some counsel questioning in both civil and criminal cases).

The responses to question 8 (see Table 4) can be used to gauge general attitude about counsel questioning in voir dire. Responses a, c, and h may be taken as negative views of attorney participation in voir dire, and the others (except i - other) as positive. Of those who selected any of these answers, 19% expressed only positive views, 68% expressed only negative views, and 13% expressed both positive and negative views.

Finally, we asked those judges who do allow counsel questioning to indicate how they ensure that counsel "do not use voir dire for inappropriate purposes or simply take too much time." The responses are summarized in Table 5.

TABLE 5

Response	Percent:
a. Not applicable. I do not permit counsel to ask questions of jurors during voir dire.	41%
	Percent of those answering other than a
b. I rarely find it necessary to do anything, although I may occasionally admonish an attorney to take less time or to avoid speeches or improper questions.	44%
c. I make clear to counsel at the outset that I do not tolerate inappropriate or time-consuming questioning. (By what means:)	79%
c1. oral reminder at the bench	41%
c2. standard part of pretrial order	8%
c3. other (mostly during pretrial conference)	41%
d. I generally limit the time allowed for voir dire.	50%
Average minutes per side allowed in routine case, Civil: 22, Criminal: 25	
e. Other (most referred simply to close monitoring of counsels' questions)	10%

A number of the respondents offered explanations of their approaches to conducting voir dire that are not amenable to tabulation but that may be useful in considering either questioning by counsel during voir dire or how voir dire practices might be modified in light of *Batson*. These are listed below.

Approaches to controlling attorney questioning of prospective jurors.

1. Some judges who indicated that they permit counsel to conduct all or most of the voir dire pointed out that the oral questioning was limited to follow-up questions. The initial "voir dire" is handled by a questionnaire tailored to the specific case that jurors are asked to complete before reporting to the courtroom. An example of such a questionnaire is attached as exhibit B.
2. While many judges impose time limits on counsel questioning, others constrain the questioning by limiting the scope of questioning, sometimes by an in-chambers conference where counsel explain the questions they want to ask and the judge in turn specifies what questions will be permitted.

3. Some judges will simply take over the questioning (and thus end counsel's questioning) if counsel does not comply with the judge's rules concerning proper inquiry. Other judges employ the approach of suggesting that counsel "rephrase" a question that the court finds problematic.
4. One respondent noted following the Scheherezade rule: "if they keep me interested, they can keep asking questions."
5. Another mentioned a list of restrictions, including: (a) A question may not be directed to an individual juror if it can be addressed to the panel as a whole; (b) Prohibit using voir dire to instruct jurors; and (c) A question may not seek a juror's commitment to support a given position based on hypothetical facts.

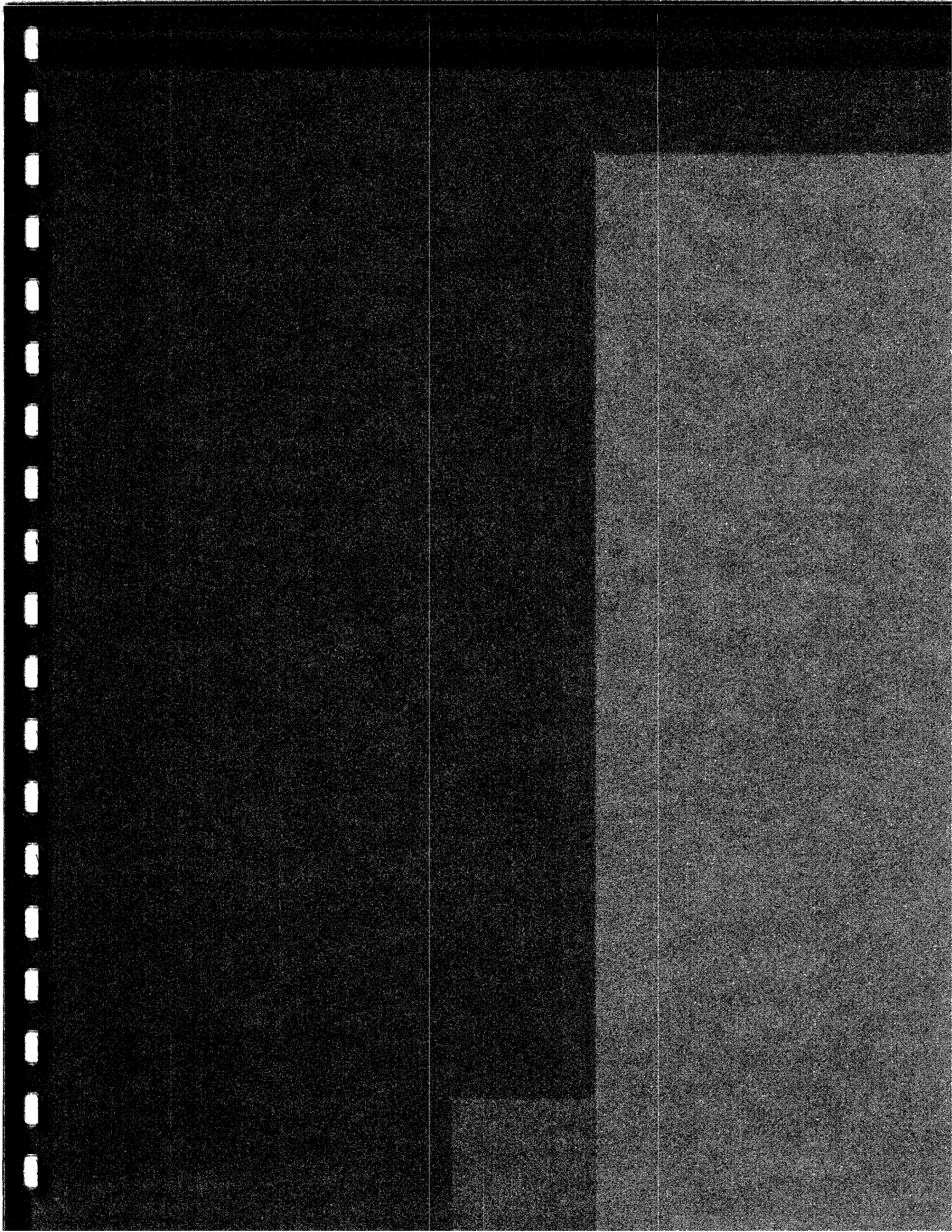
Responses to *Batson*:

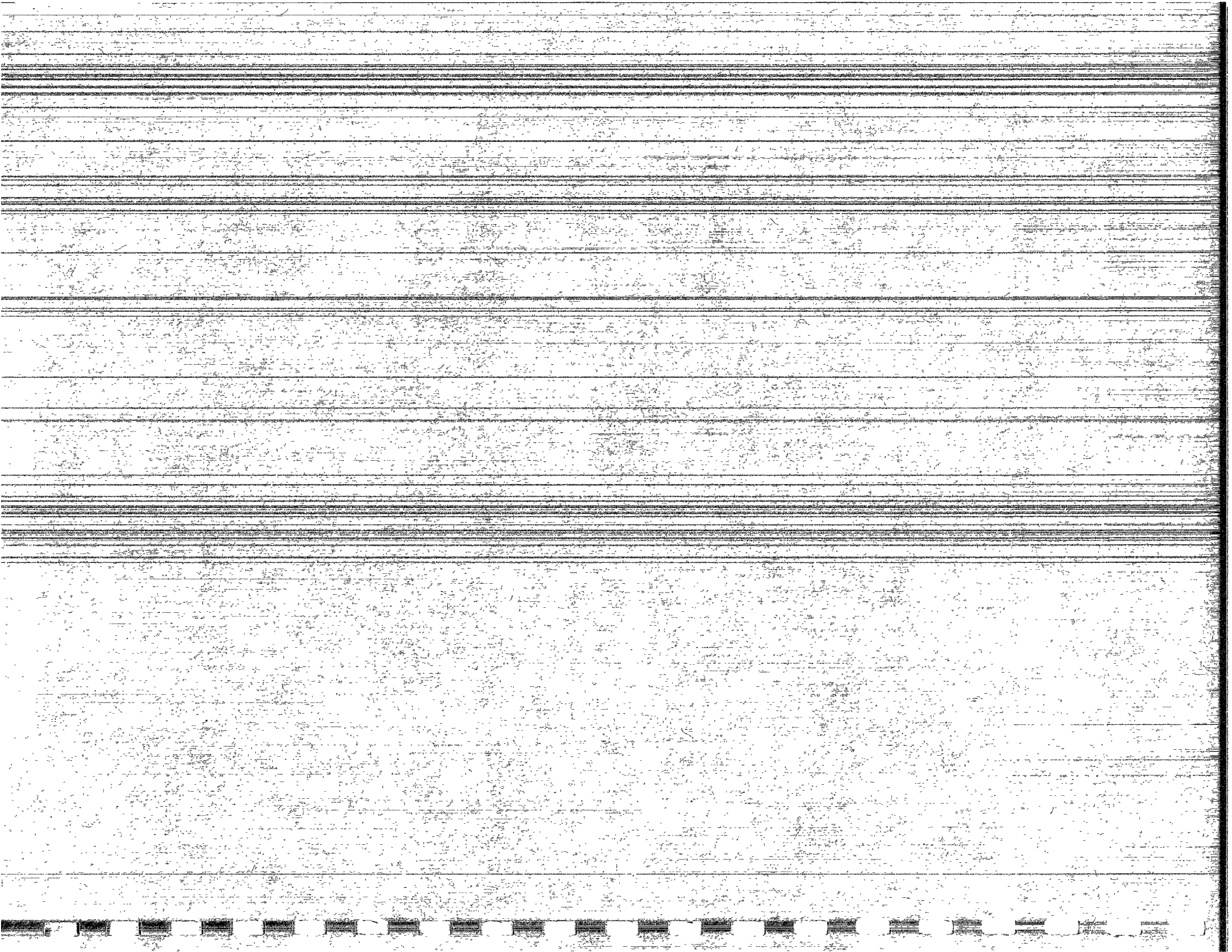
1. Some judges require that peremptories be exercised first after an initial panel (e.g. 12 jurors) have passed challenges for cause, with challenged jurors then being replaced by random draw from the pool of prospective jurors, peremptories exercised only with respect to the replacements, and so on. This approach prevents counsel from knowing who might replace a challenged juror, and so makes it more difficult to pursue a strategy prohibited by *Batson* (or any other strategy).
2. Other judges, for the same purposes, allow all peremptories to be exercised after all challenges for cause, but with the parties making their choices "blind" to the choices made by opposing parties (in contrast to alternating "strikes" from a list of the names of panel members).[6]

Observations about questioning of prospective jurors by counsel.

1. A number of respondents indicated that judges <u>should</u> conduct voir dire, because—as every trial lawyer knows—the lawyer's objective is to obtain a biased jury. Only the judge is in a position to foster selection of unbiased jurors.
2. A number suggested that judges simply do a better job of voir dire questioning, for one or more of several reasons: (a) counsel aren't very good at it, (b) some questions are better asked by the judge (to shield counsel from adverse responses to the asking of such questions), and (c) jurors will be more candid in responding to the judge than to counsel.

[6] A more extreme approach to the same end (not mentioned by any of the respondents but practiced in some state courts) is a procedure where jurors are individually questioned and passed for both peremptory and cause challenges one at a time—juror #1 is seated before juror #2 is questioned (or perhaps even identified). This approach imposes maximum limits on counsel's ability to employ peremptories in a strategic manner.





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February 28, 1995

MEMORANDUM TO JUDGES D. LOWELL JENSEN AND PATRICK E. HIGGINBOTHAM

SUBJECT: Research Materials on *Voir Dire*

I requested Robert Deyling, our Judicial Fellow, to research *voir dire* practices in the state courts. He identified three state court systems that may be helpful in the committees' study of this issue. The materials referred to two law journal articles on *voir dire* practices, which are also included. The articles purport to demonstrate that more honest, accurate information is elicited from prospective jurors by attorney, instead of judge, questioning.

STATE COURT PRACTICES

The Arizona *voir dire* practice in civil cases was changed in 1991 and is very similar to the practice suggested under the proposed rules amendments. A committee of the Arizona Supreme Court now recommends extending the right of attorneys to question prospective jurors in criminal cases. "The principal reason for the committee's position is that lawyer participation in *voir dire* is more likely to result in a fair and impartial jury than is *voir dire* conducted by the judge alone." The accompanying materials include letters of support and opposition to the 1991 change in Arizona's civil rules.

New York *voir dire* is undergoing review. A pilot program is underway in four judicial departments studying various *voir dire* practices. The study will conclude on May 19, 1995. New York *voir dire* in civil cases is now done entirely by attorneys outside the presence of a judge. Among other procedures, the pilot program will study the effects of some or full judge supervision. During the sixteen-week pilot program, however, only one week was singled out to review *voir dire* where the judge is present throughout the proceeding. The remaining weeks focus on *voir dire* in which judges merely monitor the proceedings periodically or are present initially and available throughout for questions.

The *voir dire* procedures in California are provided for comparison purposes.

LAW JOURNAL ARTICLES

The two articles include the results of some empirical testing of prospective jurors' responses to questions from attorneys versus judges. The authors conclude that the "higher authority status" of judges unduly influences jurors' responses.

The role differences between an attorney and a judge are highlighted in the *Indiana Law Journal* article. The authors note that a juror is more likely to open up and disclose meaningful information to an attorney rather than a judge for several cited reasons. In addition, the authors note that unintentional, nonverbal communication from a judge during *voir dire* may prejudice a juror's response. Even the physical distances and barriers between a judge and jury versus an attorney and a jury may influence the jurors' responses.

The *Law and Human Behavior* article is more technical. It discusses the results of an experiment conducted of over 100 participants regarding judge versus attorney questioning. The results appear to be consistent with the conclusions drawn in the *Indiana Journal* article.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Professor David A. Schlueter
Professor Edward H. Cooper

Juror Self-Disclosure in the Voir Dire: A Social Science Analysis†

DAVID SUGGS*
BRUCE D. SALES**

The term "voir dire" has been translated as "to speak the truth"[1] or "to see them talk."[2] It refers to the preliminary examination of a potential witness or juror when his competence is in issue. It has also taken on the colloquial meaning of referring to the entire stage of trial in which jurors are empaneled. To convey this latter meaning, many people use the term "jury selection" rather than voir dire, which incorrectly implies that the jury is actively selected. In fact, the jury is not "selected," but is composed of persons who were not rejected through a process of exclusion.[3] During voir dire, questions are put to prospective jurors by the attorneys or judge or both; after this time, the attorneys may exercise challenges to remove particular jurors from the panel. Those remaining after the exercise of these challenges comprise the jury.

There are two types of challenges which may be made to remove prospective jurors—challenges for cause and peremptory challenges. A challenge for cause is successful whenever it is shown that the juror does not satisfy statutory requirements for jury service[4] or that the

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[1] BLACK'S LAW DICTIONARY 1746 (4th ed. 1968).

[2] Zeisel & Diamond, *The Effect of Peremptory Challenges on the Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 491 n.1 (1978) (noting that this is an incorrect translation).

[3] "The right to challenge is the right to reject, not the right to select." 1 F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 74 (encyc. ed. 1959).

[4] A person does not become eligible for jury duty until he has reached the minimum age prescribed by statute. *See, e.g.*, ALA. CODE § 12-16-60(a)(1) (Supp. 1980) (19 years); CONN. GEN. STAT. ANN. § 51-217 (Supp. 1980) (18 years). Nonresidents are usually excluded from jury duty, *see, e.g.*, IND CODE § 33-4-5-7 (1976), and some states exempt various government officials, *see, e.g.*, CONN. GEN. STAT. ANN. § 51-219 (Supp. 1980), and attorneys, *see, e.g., id.*, from serving as jurors. In addition, grounds for challenges for cause commonly provided for by statute include: conviction of a felony, *see, e.g.*, ALA. CODE § 12-16-150(5) (1975); indictment for a similar offense within a fixed time, *see, e.g., id.* § 12-16-150(3); having scruples against capital punishment, *see, e.g.*, IND. CODE § 35-1-30-4(3) (Supp. 1980); relation by blood or affinity to a party in interest, *see, e.g., id.* § 35-1-30-4(4), or to any attorney in the case, *see, e.g.*, ALA. CODE § 12-16-150(4), (11) (1975); previous jury service within a year, *see, e.g.*,

juror is so biased or prejudiced that he cannot render a fair and impartial verdict based on the law and evidence as presented at trial.[6] Attorneys may make an unlimited number of challenges for cause during voir dire. When a challenge is made, it is up to the judge to determine its validity. In addition, the judge may remove a juror for cause *sua sponte*.

For several reasons, the use of challenges for cause is inadequate to remove those jurors who may have significant biases or prejudices. First, assuming that the juror is willing to admit to being biased or prejudiced, the judge may decide that the juror is not so biased or prejudiced as to be incompetent to serve on the jury as a matter of law. Second, if the juror admits that he has formed an opinion about the case, it is standard procedure to ask if he can set aside that opinion and decide the case on the basis of the evidence to be presented.[6] Since all of us like to think we can be fair, it is the rare juror indeed who will admit to being unable to set aside an already formed opinion. Nevertheless, challenges for cause are rarely sustained when the juror maintains that he can be impartial. Third, the problem of using challenges for cause to eliminate jurors is further complicated by the fact that "[j]urors often, either consciously or unconsciously, lie on *voir dire*."[7]

Since challenges for cause are so infrequently sustained, the exercise of peremptory challenges remains the chief means for securing an impartial jury. Unlike challenges for cause, the number of peremptory challenges allowed is limited by statute.[8] No explanation need be given for the use of a peremptory challenge, and attorneys may use their allotted challenges for whatever tactical reasons they desire.[9] Theoretically, after the attorneys have exercised their peremptory challenges, those jurors who were most biased will have been eliminated, and the resulting jury will be relatively impartial.

In order to exercise their peremptory challenges intelligently, at-

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IND CODE § 35-1-30-4(15) (Supp. 1980); and solicitation of service as a juror, *see, e.g., id.* § 35-1-30-4(10).

[5] *See, e.g.*, CONN. GEN. STAT. ANN. § 51-240 (Supp. 1980).

[6] *See, e.g.*, IND CODE § 35-1-3-4(2) (Supp. 1980).

[7] Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 528 (1965).

[8] *See, e.g.*, IND. CODE § 34-1-20-7 (1976); *id.* §§ 35-1-30-2 to -3. Peremptory challenges are regarded as a privilege granted by legislative authority and a litigant may exercise them as a matter of right only to the extent authorized by the legislature. *See* Kunk v. Howell, 40 Tenn. App. 163, 189, 289 S.W.2d 847, 877 (1956).

[9] Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1715, 1718 (1977). A few recent cases, however, have held that some uses of peremptory challenges may be impermissible. *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (systematic use of peremptory challenges by prosecutor to eliminate blacks from jury denied defendant the right to jury representing a fair cross-section of the community).

torneys must gain information through voir dire regarding jurors' attitudes toward the opposing litigants, counsel for both sides and the legal and factual issues which are relevant to the case. Yet attorneys do not receive adequate information through voir dire upon which to base their peremptory challenges. One study concludes that "[v]*oir dire* was grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.'"[10] Another study summarizes:

> [O]n the whole, the voir dire, as conducted in these trials did not provide sufficient information for attorneys to identify prejudiced jurors. The average performance score of the prosecution was near the zero point . . . , indicating an inability to distinguish potential bias; defense counsel performed only slightly better . . . . Perhaps most significant is the inconsistent performance of attorneys. Occasionally, one side performed well in a case in which the other side performed poorly, thereby frustrating the law's expectation that the adversary allocation of challenges will benefit both sides equally."[11]

Given that the typical voir dire does not produce sufficient information to identify prejudiced jurors, the question becomes why this is so. This article will answer this question by first asserting that voir dire may be ideally characterized as a self-disclosure interview because it purports to obtain background and attitudinal information which might affect a juror's decision in the case. The balance of this article will then demonstrate that the procedures used during voir dire and the psychological atmosphere in which it takes place are virtually guaranteed to inhibit rather than facilitate such self-disclosure. To support this thesis, a number of variables will be examined: first, whether the voir dire is conducted by the attorneys or by the judge; second, whether the potential jurors are questioned as a group, as individuals within a group or individually; third, the interaction distance between the prospective jurors and the interviewer; and fourth, the environmental characteristics of the room in which the questioning takes place. For each of these variables, the current legal practice and its rationale will be examined. Research from social science literature tending to indicate that the current legal practice discourages self-disclosure during voir dire will then be presented. The research presented is not specifically addressed to the issue of juror self-disclosure. Rather, it is basic social science research which has been undertaken to explore the determinants of self-disclosure in clinical and experimental settings. Although application of the conclusions of this research to the setting of the courtroom involves extrapolation, the extent of the research and the consistency of its

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[10] Broeder, *supra* note 7, at 505.

[11] Zeisel & Diamond, *supra* note 2, at 528-29.

results are great enough to raise serious questions as to the validity of current voir dire practices. Finally, a number of recommendations will be made for modifying the current practices to enhance self-disclosure by jurors and, thus, facilitate the intelligent exercise of peremptory challenges by attorneys.

THE PURPOSES OF VOIR DIRE

There are three judicially sanctioned purposes for voir dire. The first two are related to causal challenges while the third is related to the exercise of peremptories. First, voir dire may always be used for the purpose of determining whether the juror satisfies statutory requirements for serving on a jury.[12] Second, jurors may also be questioned to determine if they can impartially participate in the deliberation on the issues of the case based solely on the law and evidence as presented at trial.[13] This second purpose is mandated by the sixth amendment guarantee of the right to trial by an impartial jury.[14] Nevertheless, the extent of questioning allowed for this purpose is restricted to determining if the juror is biased or prejudiced as a matter of law.[15] Often, when the judge conducts questioning of this type, it will simply take the form: "'Can you be fair?' Once the juror has answered 'Yes,' everything else is considered irrelevant and the judge passes on to the next juror, even though Adolph Hitler himself would have answered that question in the affirmative."[16]

The third, and final, judicially sanctioned purpose of voir dire is to provide the attorney with a procedure by which he may obtain information to exercise the peremptory challenges intelligently.[17] The scope of

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[12] 2 A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 328 (1967).

[13] Hare, *Voir Dire and Jury Selection*, 29 ALA. LAW. 160, 173 (1968).

[14] *See* Witherspoon v. Illinois, 391 U.S. 510, 518, 521 (1968).

[15] A prejudiced juror is one who has actually decided how he will rule in the case before the trial. A biased juror, on the other hand, has an inclination to favor one side over the other. If the juror admits that he has already decided on what the outcome of the case should be, the juror may be excluded as a matter of law. In order to be successful in challenging a prospective juror for cause on the ground of bias, however, it is necessary to show that the bias is of such a magnitude as to lead to the natural inference that the juror will not act impartially. *See generally* Flowers v. Flowers, 397 S.W.2d 121 (Tex. Civ. App. 1965).

[16] Garry, *Attacking Racism in Court Before Trial*, in MINIMIZING RACISM IN JURY TRIALS xv, xxii (A. Ginger 1969).

[17] *See* Evans v. Mason, 82 Ariz. 40, 46, 308 P.2d 245, 249 (1957); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 2.4 (1968). *See also* MacGuiman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290 (1972); Van Dyke, *Voir Dire: How Should It Be Conducted to Ensure that Our Juries Are Representative and Impartial?*, 3 HASTINGS CONST. L.Q. 65 (1976); Comment, *Court Control over the Voir Dire Examination of Prospective Jurors*, 15 DE PAUL L. REV. 107 (1965).

Some jurisdictions, however, do not sanction this purpose, and allow only questions

questioning for this purpose is much broader than that associated with challenges for cause. For example, under this rubric questioning is often allowed to probe the juror's occupation, marital status, number of children, past jury service, residence, exposure to news coverage of the case, attitudes toward the death penalty, degree of belief in the concept that the defendant is innocent until proven guilty and attitudes toward racial minorities.[18]

The broader scope of permissible questioning for this purpose results from the importance of peremptory challenges, and the courts have frequently recognized this importance. In *Swain v. Alabama*,[19] for example, the United States Supreme Court stated: "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury."[20] This use of voir dire to gain information for peremptory challenges is based on the recognition by the law that

> the rules of evidence can only partly limit the extent to which a juror's bias affects his deliberation. The tests which the law furnishes to the jury for weighing evidence are crude and imperfect and provide few internal checks on jury prejudice. There is a critical area in every case, where a juror must rely on his own experience to reach a decision. If bias permeates a juror's thinking, it may distort the importance of evidence consistent with it. . . . Bias may, therefore, be a fact of singular importance in the case.[21]

The notion that verdicts are frequently affected by the jurors' values and biases is supported by a report that "in about two-thirds of all cases the jurors are likely to differ over the significance of the evidence presented to them in the trial. In only about one-third of the trials is the jury unanimous on the first ballot; in two-thirds of the cases the jurors differ in their vote."[22]

In addition to the above three approved purposes, voir dire is often used for reasons which are not judicially sanctioned. Some attorneys

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which might uncover legal grounds for challenges for cause. 2 A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 12, § 334. In these jurisdictions, "any enlightenment given by the answers which serves to inform counsel's judgment on the intelligent exercise of peremptory challenges is at best a by-product, and often one suspiciously regarded." *Id.* *See also* Van Dyke, *supra*, at 89-90.

[18] For general discussions of the proper scope of voir dire, see 2 A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 12, §§ 334, 336; 1 F. BUSCH, *supra* note 3, § 84; Bodin, *Selecting a Jury*, in CIVIL LITIGATION AND TRIAL TECHNIQUES 211, 225-62 (H. Bodin ed. 1976).

[19] 380 U.S. 202 (1965).

[20] *Id.* at 219.

[21] *See* MacGutman, *supra* note 17, at 303-04. The concept of bias used here is the same as that referred to in the challenge for cause, *see* note 15 *supra*, with the exception that the attorney does not have to prove that the juror will not act impartially before exercising a peremptory challenge.

[22] Zeisel & Diamond, *The Jury in the Mitchell-Stans Conspiracy Trial*, [1976] AM. B. FOUNDATION RESEARCH J. 151, 173 (footnote omitted).

abuse the voir dire by using it as a means to ingratiate themselves with the jurors and to indoctrinate the jurors to their version of the case before the presentation of evidence.[22] Attempts at ingratiation may take a variety of forms. The "grandstand play" occurs when the attorney declines the opportunity to question the prospective jurors, announcing his faith in the jury system and in that particular panel.[24] This method is not often employed, however, and jurors tend to regard an attorney who uses this method as careless in his treatment of the case.[25] More commonly employed methods of ingratiation include such obvious strategies as exaggerated courtesy extended to members of the panel, concerned but polite questioning as to the health of the older members, joking with the panel and making it known that the jurors and the attorney have mutual acquaintences or associations. Attorneys also use voir dire to attempt to indoctrinate the prospective jurors. For example, one author recommends that attorneys use voir dire to teach jurors important facts, to expose damaging facts in the case in order to reduce their impact, to instruct jurors as to the law involved and to force jurors to face their own prejudices.[26]

A minimum level of rapport between the person conducting voir dire and the jurors is necessary for a productive dialogue. However, at the point at which the establishment of effective rapport becomes an attempt at ingratiation, it becomes unacceptable and should be guarded against. Likewise, while the jurors must be given some minimum level of introduction to the facts of the case during voir dire since the questioning cannot take place in a vacuum, this introduction should not be allowed to become indoctrination in the pejorative sense. The concern of the judiciary over these two unacceptable purposes of voir dire seems to be somewhat justified. A study of a number of cases in a midwestern federal district court concludes that attorneys use about eighty percent of voir dire time indoctrinating the jury panel.[27] The study adds, however, that such indoctrination attempts by the attorneys often do not appear to succeed.[28]

ATTORNEY-CONDUCTED AS OPPOSED TO JUDGE-CONDUCTED VOIR DIRE

Traditionally, the questioning of jurors during voir dire was left to at-

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[22] *See* Blunk & Sales, *Persuasion During the Voir Dire*, in PSYCHOLOGY IN THE LEGAL PROCESS 39 (B. Sales ed. 1977); Field, *Voir Dire Examinations—A Neglected Art*, 33 U. Mo. KAN. CITY L. REV. 171 (1965).

[24] *See* M. BELLI, MODERN TRIALS § 121, at 803 (1954).

[25] *Id.* at 804.

[26] *See* A. GINGER, JURY SELECTION IN CRIMINAL TRIALS §§ 7.18-.21 (1975).

[27] Broeder, *supra* note 7, at 522.

[28] *Id.* at 522-23.

torneys.[29] In recent years, however, there has been a move away from attorney-conducted and toward judge-conducted voir dire. At present, only nineteen states allow attorneys to exercise primary control over the conduct of voir dire in both civil and criminal cases.[30] In fifteen states, the judge has unfettered control, although attorneys may submit questions for the judge to ask.[31] The judge, in his discretion, may or may not ask the questions or, alternatively, may allow the attorneys to directly question jurors after he has questioned them. The remaining jurisdictions divide the responsibility for conducting voir dire between the judge and the attorneys. Usually this means that the judge will begin by asking standard questions and then the attorneys will be allowed to ask their own questions concerning particular matters important to the case at hand.

In the federal system, judges may allow attorneys to conduct voir dire, but are not obligated to do so.[32] In the event the judge elects to conduct the voir dire himself, he is required to allow the attorneys to supplement the examination or to submit further questions to be asked by the judge. Nevertheless, the scope of supplemental questioning lies in the discretion of the judge. In fact, by 1977, "approximately three-fourths of federal judges conduct voir dire examinations without oral participation by counsel."[33] It would seem that the trend toward increasing judicial control over the conduct of voir dire is continuing; a 1970 report revealed that at that time only fifty-six per cent of the federal district judges reported that they conducted the voir dire without oral participation by counsel.[34]

One of the justifications given for this recent shift is that it prevents attorneys from abusing the voir dire process. Those who support judge-conducted voir dire argue:

> [It] saves time, promotes respect for the court, brings the judge into greater prominence at the very outset, reveals that an impartial court can obtain an impartial jury better than partisan counsel, that extended individual questioning by counsel may embarrass or even

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[29] *See* McGuirk & Tober, *Attorney-Conducted Voir Dire: Securing an Impartial Jury*, 15 N.H. B.J. 1, 4 (1973).

[30] *See* Van Dyke, *supra* note 17, at 95-97.

[31] *See id.*

[32] *See* FED. R. CIV. PROC. 47(a); FED. R. CRIM. PROC. 24(a).

[33] G. BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION 6 (Federal Judicial Center Pub. 1977).

[34] *See* COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON VOIR DIRE PROCEDURES (1970). There are regional differences in the degree of counsel participation allowed. G. BERMANT, *supra* note 33, at 5-20. Federal district courts sitting in states which allow attorney participation in the state courts are more likely to allow a greater degree of attorney involvement in the federal voir dire. *Id.* at 10-13.

> insult the juror, or that he may become brainwashed and committed by counsel before any evidence has been heard.[28]

There is no question but that abuse by attorneys of voir dire through ingratiation and indoctrination attempts will be completely eliminated by judge-conducted voir dire. In addition, the assertion that judge-conducted voir dire saves time is supported by data. In a direct comparison of voir dires conducted by attorneys and judges, one study finds that judge-conducted voir dire results in a significant savings of time.[29] Yet, there is no objective data to support the assertion that a judge is more likely than partisan counsel to obtain an impartial jury. It is also doubtful that any attorney would intentionally embarass or insult a prospective juror, since such conduct would alienate not only that particular juror, but also the remaining jurors who witness the event.

Those who support the attorney-conducted voir dire argue that inquiry into the biases of jurors requires the interviewer to have a thorough knowledge of the legal issues involved in the case and of the evidence to be presented by both sides. Because the trial judge does not, and should not, have such knowledge at the time of voir dire, it has been argued that he is not as competent as the attorneys to question the jurors.[30] In addition, some commentators argue that judges do not ask pressing or probing questions about the jurors' attitudes and that, "[e]ither because of institutional pressures to keep their calendars moving or because of their lack of sympathy to one or both of the litigants, many judges question prospective jurors without much interest or enthusiasm, hoping that a panel can be quickly assembled and that the trial can begin."[31] Studies which report that judge-conducted voir dire saves time have been criticized because, if the studies are examined as a whole, no conclusive proof exists one way or the other. Even though some studies do show a statistically significant savings of time through the use of judge-conducted voir dire, the time differences are not dramatic when compared to the overall length of the trial.[32]

Finally, supporters of attorney-conducted voir dire argue that it is unnecessary to eliminate attorney participation simply because attorneys

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[28] Braswell, *Voir Dire—Use and Abuse*, 7 WAKE FOREST L. REV. 49, 54 (1970); *see* Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916 (1971); Note, *Judge Conducted* Voir Dire *as a Time-Saving Trial Technique*, 2 RUT.-CAM. L.J. 161 (1970).

[29] *See* Levit, Nelson, Ball & Chernick, *supra* note 35, at 946-49.

[30] *See* MacGuitman, *supra* note 17, at 327-28; Padawer-Singer, Singer & Singer, *Voir Dire by Two Lawyers: An Essential Safeguard*, 57 JUDICATURE 386, 391 (1974); Comment, *The Jury Voir Dire: Useless Delay or Valuable Technique*, 11 S.D. L. REV. 306, 317-18 (1966).

[31] Van Dyke, *supra* note 17, at 76.

[32] *See id.* at 88-89 (noting that what little court time was saved by judge-conducted voir dire was made up for by additional pretrial conferences).

have been known to abuse it. A number of commentators point out that the conduct of the voir dire has always been subject to the judicial discretion of the courts.[40] Thus, the judge has the power to curtail any attorney abuse of the voir dire.

Social Science Research Relevant to a Determination of Who Should Conduct Voir Dire

There is a considerable body of basic research investigating how status differentials and reinforcement techniques affect self-disclosure in interview situations. There is also a considerable body of research which illustrates how attitudes may be communicated to others through nonverbal communication. This research indicates that attorneys are probably better suited to conduct the voir dire.

Status Differentials Between the Judge and Attorneys

The judge obviously has the highest status of anyone in the courtroom. He is physically separated from and elevated above everyone else, and is addressed by jurors and attorneys alike as "your honor." One psychological study seems to indicate that the judge would be the more appropriate interviewer to elicit juror self-disclosure.[41] It finds that both males and females disclose more to a high-status male interviewer than to one of low status.[42] On the other hand, the status level of female interviewers does not appear to affect the amount of self-disclosure from either male or female subjects. Since there are currently more male judges and attorneys than there are female judges and attorneys, the judge, having a higher status than the attorney would appear to be the more appropriate interviewer in most cases.

Other studies, however, indicate that there is a curvilinear relationship between the status of the interviewer and interviewee and the amount of self-disclosure: too great a status differential between the interactants may lead to an interviewing bias effect.[43] One study on bias in information interviews states:

> [B]ias is likely to occur in the interview when there is social distance between interviewer and respondent. Status distance and threatening questions may create a situation in which the respondent feels pressure to answer in the direction he believes will conform to the opinions or expectations of the interviewer. . . .

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[40] *See, e.g.*, Comment, *supra* note 17, at 110; Comment, *supra* note 37, at 318.

[41] *See* Brooks, *Interactive Effects of Sex and Status on Self-Disclosure*, 21 J. COUNSELING PSYCH. 469, 473 (1974).

[42] *Id.*

[43] *See, e.g.*, Williams, *Interviewer Role Performance: A Further Note on Bias in the Information Interview*, 32 PUB. OPINION Q. 287 (1968).

> It would seem likely that the role performance of the interviewer could either enhance or mitigate the biasing effects of status characteristics and potentially threatening questions.[44]

Furthermore, another study finds that liking for a person will vary as a function of perceived similarity.[45] A large status differential between the interactants will most likely reduce perceived similarity and, in turn, the degree of self-disclosure. Finally, it has been found that such interviewer biasing effects are greatest when the respondent perceives the social distance between himself and the interviewer to be either very large or very small.[46] When social distance is very large, the respondent may hedge opinions out of fear of retaliation from a more powerful interviewer. On the other hand, when the social distance is very small, he may hedge opinions so as not to alienate an equal.

While the lawyer is in a higher status position in the courtroom as compared to the prospective jurors, he is at an intermediate social distance from the jurors as compared to the judge. It is probable that attorneys will be seen by the jurors as more similar to themselves than is the judge. Given these circumstances, it appears that attorneys would be better suited than the judge to interview prospective jurors and elicit self-disclosure.

Role Differentials Between the Judge and Attorneys

The judge has an extremely difficult role to fulfill, both intellectually and emotionally. He must be the arbiter of fine points of law, coordinate the activities of all parties to facilitate a just result and remain above interparty rivalries, all of which require that he remain aloof and emotionally detached. In fact, the judge's physical placement in the courtroom and the use of somber black robes probably evolved to foster such detachment. The attorneys, on the other hand, are free to modulate openness and familiarity with prospective jurors without compromising role requirements. Indeed, the flamboyant and expansive lawyer is a part of American folklore. Thus, attorneys are capable of interacting with prospective jurors either in a warm and friendly manner, or in an aggressive manner, depending on what the situation requires.

Common sense dictates that people prefer to talk to and will reveal more of themselves to warm and friendly people, than they will to those who are aloof and emotionally detached. This view is supported by a

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[44] *Id.* at 287-88 (footnotes omitted).

[45] *See* Knecht, Lippman & Swap, *Similarity, Attraction, and Self-Disclosure*, 8 PROCEEDINGS OF THE 81ST ANNUAL CONVENTION OF THE APA 205 (1973).

[46] Dohrenwend, Colombotos & Dohrenwend, *Social Distance and Interview Effects*, 32 PUB OPINION Q. 410 (1968).

number of psychological studies.[47] Since an attorney can manipulate his behavior to appear warm and friendly to prospective jurors, whereas the judge runs the risk of compromising his role performance if he acts in that way, it would seem that attorneys are better suited for the role of the interviewer.

Furthermore, because of the greater flexibility in behavior allowed to the attorney in his role as the interviewer, he is in a better position to positively reinforce the prospective jurors' self-disclosure. For example, it has been shown that nonverbal stimuli, such as head-nodding and mm-hmming which indicate interest in what the interviewee is saying stimulate longer speech.[48] Increased eye contact, less physical distance, relaxed posture and a direct orientation of the interviewer's body toward the interviewee all serve to reinforce the interviewee and, thus, elicit more verbalization and presumably more self-disclosure from him.[49] A word of caution is in order, however, in regard to eye contact. Another study indicates that a direct linear relationship between eye contact and intimacy appears to hold only for women subjects: males view continuous eye contact, especially from other males, as threatening.[50] Other research reveals that increased body motion on the part of male therapeutic counselors generates more self-disclosure from subjects, while low levels of body motion on the part of female counselors enhances subject self-disclosure.[51]

The judge would not be at a disadvantage, as compared to the attorneys, in rendering the nonverbal types of positive reinforcement to prospective jurors. But his role requirements and physical placement within the courtroom preclude him from administering some of the other types of reinforcement. For example, the judge's placement behind the bench may prevent him from directly facing the jurors and the fact that he wears a robe may obscure expressive body motions and relaxed body posture. Attorneys, on the other hand, can get out from behind the table, approach the jury[52] and engage in all of the nonverbal

[47] *See, e.g.*, Pope & Siegman, *Interviewer Warmth and Verbal Communication in the Initial Interview*, 2 PROCEEDINGS OF THE 75TH ANNUAL CONVENTION OF THE APA 245 (1967); Simonson, *The Impact of Therapist Disclosure on Patient Disclosure*, 23 J. COUNSELING PSYCH 3 (1976); Worthy, Gary & Kahn, *Self-Disclosure as an Exchange Process*, 13 J. PERSONALITY & SOC. PSYCH. 59 (1969).

[48] *See* Matarazo, *The Interview*, in HANDBOOK OF CLINICAL PSYCHOLOGY 403, 443-44 (B. Wolman ed. 1965).

[49] *See* Mehrabian, *A Semantic Space for Nonverbal Behavior*, 35 J. CONSULTING & CLINICAL PSYCH 248 (1970); Reece & Whitman, *Expressive Movements, Warmth and Verbal Reinforcement*, 64 J. ABNORMAL & SOC. PSYCH. 234 (1962).

[50] Ellsworth & Ross, *Intimacy in Response to Direct Gaze*, 11 J. EXPERIMENTAL SOC. PSYCH 592 (1975).

[51] *See* Gardner, The Effects of Body Motion, Sex of Counselor, and Sex of Subject on Counselor Attractiveness and Subject's Self-Disclosure (1973) (unpublished manuscript on file at Univ. of Wyo.).

[52] Some judges, however, may restrict the attorneys' movements by requiring, for example, that they remain behind a podium.

methods of reinforcement without appearing artificial or out of charac

As noted above, in addition to an ability to interact with the juro a warm and empathic manner, attorneys are better able to inter them in an aggressive style without compromising their role. If t terviewer suspects that a juror is lying and is unable to confir through friendly questioning, resort to aggressive tactics may be for. This tactic is supported by the results of a study on the effec duced anxiety which concludes that individuals tend to regre stressful situations and respond to stimuli as they have done i past.[53] Thus, a prospective juror with long-held prejudices migh more likely to admit them in a stressful situation engineered by the at torney's aggressive questioning. A further advantage of the occasio use of aggressive questioning is found in research on psychiatric inter views, which concludes that high anxiety questions produce a higher verbal output than do neutral questions.[54]

From a psychological viewpoint, it appears that more self-disclosure from prospective jurors would be produced by allowing attorneys, rather than the judge, to conduct voir dire. Attorneys are at a moderate social distance from the jurors thus minimizing interviewer biasing effects and they are able to modulate their interviewing behavior to positively reinforce or attack juror responses as necessary.

Ability to Prejudice Jurors Through Nonverbal Communication

In the preceding sections, it was concluded that attorneys are better suited to conduct voir dire because they are in a position to facilitate the jurors' self-disclosure. This section illustrates that exclusion of attorneys from the voir dire process may lead to bias on the part of jurors resulting from the judge's unintentional communication of whatever biases he may have. To explain this point, it is first necessary to refer to Kalven and Zeisel's classic empirical study[55] of the jury's decisionmaking process. The study, in comparing juries' actual decisions with judges' opinions of how the juries should have decided the cases, finds that juries and judges concur in their decisions about seventy-five percent of the time.[56] This level of concurrence persists even when the juries are confronted with difficult evidentiary and legal issues, which leads to the conclusion that juries are capable of understanding difficult cases.[57] There is, however, an alternative explanation for the high

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[53] *See* Beier, *The Effect of Induced Anxiety on Flexibility of Intellectual Functioning*, 65 PSYCH. MONOGRAPHS, Whole No. 326, at 17-18 (1951).

[54] Kanfer, *Verbal Rate, Eye Blink, and Content in Structured Psychiatric Interviews*, 61 J. ABNORMAL & SOC. PSYCH. 341, 347 (1960).

[55] *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

[56] *Id.* at 56, 63.

[57] *Id.*

degree of concurrence between jury and judge decisions: "[J]udge/jury concurrence may result, at least in part, because the judge subtly and unintentionally conveys to the jury his feelings about the parties and participants in the case and because the jury is influenced by his cues."[58]

The judge may communicate feelings and attitudes about the litigants to the jury through kinesic and paralinguistic behavior. Kinesic behavior, or body language, includes: facial expressions, body posture, body movements, body orientation and hand movements. Paralinguistic behavior includes aspects of speech such as: pitch and tone of voice, pauses and latencies, loudness, tempo and breathing patterns. Both types of behavior are normal components of communicative behavior. Indeed, these behaviors constitute well over half of an individual's total communicative behavior and operate to communicate interpersonal attitudes, express emotions, indicate mutual attentiveness, provide feedback and provide illustrations for speech.[59] Furthermore, these behaviors are for the most part beyond the individual's control. Thus, even if one actively attempts to hide feelings, research indicates that the attitudes and emotions will continue to escape through nonverbal behavior.[60] Not only are nonverbal cues sent by everyone, but nonverbal messages are received and interpreted by others; even untrained observers are able to accurately decode a sender's nonverbal cues.[61] The decoding process is, like the sending of cues, largely unconscious.

The significance of this communication research is enhanced when its findings are coupled with the findings of research concerning experimenter biasing effects. In the last fifteen years, there has been a considerable concern among psychologists that experimenters might be subtly influencing their subjects' responses. In fact, research shows that experimenters will often unintentionally influence the subject to make a "correct" response.[62] This phenomenon is explained by the fact that the experimenter's unintentional actions seem to be reciprocated by attempts on the part of subjects to search for and respond to the experimenter's influence. Research on evaluation apprehension demonstrates that this phenomenon is enhanced when a subject is confronted

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[58] Note, *Judge's Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1267 (1975).

[59] *See* M. ARGYLE, SOCIAL INTERACTION 110-14 (1969).

[60] *See, e.g.*, Ekman & Friesen, *Nonverbal Leakage and Clues to Deception*, 32 PSYCH. 88 (1969).

[61] P. EKMAN, W. FRIESEN & P. ELLSWORTH, EMOTION IN THE HUMAN FACE: GUIDELINES FOR RESEARCH AND AN INTEGRATION OF FINDINGS 77-108 (1972).

[62] *See* Duncan, Rosenberg & Finkelstein, *The Paralanguage of Experimenter Bias*, 32 SOCIOMETRY 207 (1969); Masling, *Differential Indoctrination of Examiners and Rorschach Responses*, 29 J. CONSULTING PSYCH. 198 (1965); Rosenberg, *The Conditions and Consequences of Evaluation Apprehension*, in ARTIFACT AND BEHAVIORAL RESEARCH 279 (R. Rosenthal & R. Rosnow eds. 1969); Rosenthal, *Interpersonal Expectations: Effects of the Experimenter's Hypothesis*, in ARTIFACT AND BEHAVIORAL RESEARCH, *supra*, at 181.

with an ambiguous situation and is apprehensive about performing well.[43]

When these various research findings are combined, they militate against a wholly judge-conducted voir dire. When a prospective juror is brought to the voir dire, he has been removed from a daily routine and subjected to a novel and ambiguous situation. The prospective juror "wants to serve and do his duty for society . . . . To be selected to judge his fellow man is indeed serious business, and he knows that he will likely be called upon for decisions that are much deeper than daily expressions of opinion."[44] Individuals placed in novel situations will often look to individuals of higher status for guidance as to the appropriate behavior.[45] Since it is obvious that the judge has the highest status of anyone in the courtroom, the jurors may well look to him for such guidance. If the judge conducts the voir dire and has negative feelings toward the parties or their counsel, the communication research indicates he will almost surely convey these feelings to the jurors through nonverbal communication. Research also indicates that the jurors will be able to interpret these nonverbal cues. Furthermore, studies on experimenter bias indicate that jurors may well adopt the attitudes and emotions of the judge as appropriate. Thus, a voir dire conducted solely by the judge may lead to a subtle inculcation of bias in the jurors toward the parties or counsel.

To be sure, attorneys are even more likely than the judge to have biases and prejudices regarding the case. They also lack compunctions against revealing their beliefs and even attempt to do so on the verbal level rather than merely on the nonverbal level. But it is precisely because attorneys are open about their biases that they should be allowed to conduct the voir dire. Jurors are aware that the attorneys are acting as advocates, and, therefore, jurors are less liable to accept their biases as absolute truth. Furthermore, the persuasive attempts of one attorney will be counterbalanced by the other. The judge, on the other hand, is presumed to be impartial and the attitudes which he conveys are more likely to be readily accepted. Also, if a judge conveys negative attitudes toward one side during the voir dire, counsel has no effective way to counter the resulting impact of such conduct on the jury.

THE METHOD OF ADDRESSING QUESTIONS TO THE PROSPECTIVE JURORS

In most jurisdictions, at least some portion of the voir dire consists of

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[43] Rosenberg, *supra* note 62, at 324-29.

[44] Brown, *A Juryman's View*, in SELECTED READINGS—THE JURY 102, 102 (G. Winters ed. 1971).

[45] Rosenthal, *On Not So Replicated Experiments and Not So Null Results*, 33 J. CONSULTING & CLINICAL PSYCH. 7 (1969).

questions addressed to the group as a whole.[66] In some voir dires, this is the predominant mode with individual questioning taking place only when a juror has affirmatively responded to a question put to the group and follow up questions are required. Many voir dires, however, start with some brief group questioning on general topics, followed by an extended period of questioning addressed to specific individuals seated within the group as a whole. Occasionally, prospective jurors are questioned out of the presence of the other members of the panel—particularly when there has been massive publicity surrounding the trial and the judge concludes that this form of voir dire is required to determine the extent to which prospective jurors have been "tainted" by the media without further biasing the other prospective jurors.[67] Individual questioning outside the presence of the other jurors may not be allowed, however, if the judge feels that it will unduly lengthen the voir dire process.

In general, the conduct and scope of voir dire is within the discretion of the judge. Determining whether the questioning should be done individually or collectively is also within the discretion of the judge, and most cases hold that a judge does not abuse that discretion by refusing to allow individual examinations.[68] Inherent in the rationale of these cases is the justified belief that group questioning will render a considerable savings of time and the questionable belief that in most cases collective questioning is capable of revealing biases and prejudices.

Social Science Research Pertaining to the Mode of Questioning

Both the group and the individual-within-a-group styles of questioning are grossly inadequate for producing honest self-disclosure because they engender conformity of responses. It seems intuitively obvious that when people are called for jury duty by a judicial summons, they feel a certain degree of anxiety at being removed from the context of their ordinary lives and ordered to perform a role which will have a significant effect on the lives of others. A variety of investigators find that anxious individuals have an increased need for affiliation while they are awaiting a threatening event.[69] Many prospective jurors perceive interroga-

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[66] *See* 2 A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 12, §§ 331-332.

[67] The American Bar Association has advocated this practice. *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.4(a) (1968).

[68] *See, e.g.*, United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *cf.* United States v. Addonizio, 451 F.2d 49, 66 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972) (trial court's refusal to examine jurors individually was not an abuse of discretion; noting, however, in dicta, that if there has been extensive pretrial publicity, jurors should be examined individually).

[69] *See* Gerard & Rabbie, *Fear and Social Comparisons*, 62 J. ABNORMAL & SOC. PSYCH. 586, 588-89 (1961); Helmreich & Collings, *Situational Determinants of Affiliative Preference Under Stress*, 6 J. PERSONALITY & SOC. PSYCH. 79 (1967); Sarnoff & Zimbardo,

tion in a public forum to determine their suitability as jurors to be such an event. In addition, conformity increases as the need for affiliation increases.[70] Thus, even before the voir dire begins, there are socio-psychological factors at work which encourage group cohesiveness and conformity of response, thereby militating against honest self-disclosure.

In the group questioning method of conducting voir dire, the entire group of prospective jurors is asked a question such as, "Would any of you be unable to be fair and impartial toward the defendant because of the media coverage which has surrounded this case?" If no one from the group responds to this question, the interviewer moves on to other areas. This technique is hardly fitted for a self-disclosure interview. Since no response is required of any particular individual and factors of group conformity are at work, it is highly unlikely that a prospective juror will respond to such a question, particularly when it would discredit him as a fair person. Even when relatively mundane questions are addressed to the prospective jurors as a group, researchers have observed that they squirm in their seats and look around to see if anyone else is going to volunteer information; if they discover that no other hands are raised, they settle back in their chairs and refuse to respond. In contrast, responses were forthcoming when attorneys later addressed the very same questions to particular individuals.

The technique of questioning an individual within a group is an improvement over group questioning but it still closely resembles the paradigm used by psychologists to study conformity. In one study on independence and conformity, it was found that when an individual was called upon to state his opinions in public after hearing the opinions stated by the majority of the group, over one-fourth of the minority individuals covertly changed their private opinions and stated their public opinions so that they matched those of the majority.[71] When the individual was not required to state an opinion in front of the group, the degree of conformity was markedly lower. Other research in this area, while differing in methodology and emphasis, supports the same conclusion.[72] This research also supports the conclusion that an individual in-

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Anxiety, Fear, and Social Affiliation, 64 J. ABNORMAL & SOC. PSYCH. 356 (1961); Zimbardo & Formica, *Emotional Comparison and Self-Esteem as Determinants of Affiliation*, 31 J. PERSONALITY 141, 161 (1963).

[70] *See* Hardy, *Determinants of Conformity and Attitude Change*, 54 J. ABNORMAL & SOC. PSYCH. 289 (1957); McGhee & Teevan, *Conformity Behavior and Need for Affiliation*, 72 J. SOC. PSYCH. 117 (1967).

[71] Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCH. MONOGRAPHS, Whole No. 416, at 11 (1956).

[72] *See, e.g.*, Deutsch & Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment*, 51 J. ABNORMAL & SOC. PSYCH. 629, 635 (1955); Sherif, *Group Influences Upon the Formation of Norms and Attitudes*, in READINGS IN SOCIAL PSYCHOLOGY 219, 224-25 (E. Maccoby, T. Newcomb & E. Hartley eds., 3d ed. 1958); *cf.* A.

terview which takes place away from the group is the best way to determine a person's opinions on a given issue[73] because "in the interest of bolstering the opinions of others, [individuals within a group] may make statements that deviate from the truth as they see it."[74]

The conformity experiments demonstrate a sizeable conformity effect when individuals are required to state their opinions in front of members of a group, even under such nonthreatening conditions as requesting each individual to judge line length.[75] This effect is likely to be even more pronounced under the conditions of anxiety which arise when an attorney challenges a juror in the courtroom. For example, when an attorney challenges a juror for cause, he may publicly accuse the juror of being biased or prejudiced because of the opinion he stated.[76] Often the judge will initially reject such a challenge and require the attorney to further question the prospective juror. This questioning can be quite brutal to a novice in the courtroom. If the individual is being questioned within a group, the other prospective jurors witness what can happen to one who makes the "wrong" response. Thus, in an attempt to avoid such close scrutiny, they may alter their responses so as not to give "wrong" answers.

Both of the predominant questioning techniques create a group situation which tends to foster conformity in the expression of personal opinions. If the goal of voir dire is honest self-disclosure, the most effective way to facilitate the achievement of that goal is to interview prospective jurors out of the presence of their fellows, thus eliminating the conformity-generating aspects of group voir dire. Collective questioning is the method least likely to encourage self-disclosure and should be avoided whenever possible.

INTERACTION DISTANCE DURING VOIR DIRE

The interaction distance between the person conducting the voir dire and the prospective jurors is usually quite large. For example, it is not uncommon to observe a distance of twenty to thirty feet between the interviewer and the prospective jurors. This large interaction distance is most prevalent when questions are addressed to the jurors as a group, probably because such a distance fosters a loud speaking voice from all

HARE, HANDBOOK OF SMALL GROUP RESEARCH 361-62 (1962) (discussing small group dynamics).

[73] *See* Chandler, *An Evaluation of the Group Interview*, 13 HUMAN ORGANIZATION 26 (Summer 1954).

[74] *Id.* at 28.

[75] *See* Asch, *supra* note 74.

[76] Most commentators, however, suggest that the attorney politely request the juror be "excused," without making it seem like an accusation. *See, e.g.*, M. BELLI, *supra* note 24, § 120.

parties, thus allowing everyone to hear the questions and answers. Although some assume a closer interaction distance when questioning prospective jurors in an attempt to establish closer rapport with them, such attempts generally are not satisfactory because, in order for everyone in the courtroom, including the court reporter, to hear what is being said, the interactants must still speak very loudly. The result is that the two interactants who are positioned fairly close together speak in stentorian voices for the benefit of others—a result which enhances the artificiality of the interaction and may even hinder the establishment of rapport. Only two voir dires where the interactants were able to maintain a social distance[77] and speak at a normal conversational level have been observed. In one of these, jurors were examined individually, out of the presence of the other jurors, and in a courtroom cleared of spectators. In the other, jurors were questioned individually in the privacy of the judge's chambers. The attorneys involved in both of these cases indicated that in their experience such procedures were extremely rare.

The issue of interaction distance between the interviewer and interviewee has not been addressed in either case law or legal literature. This is probably because whoever conducts voir dire theoretically has the option of assuming a close interaction distance with the prospective jurors. If the judge conducts the voir dire, he may ask prospective jurors to take the witness stand next to the bench while they are being questioned individually. Attorneys may approach the prospective juror whether the person is sitting in the jury box or in the witness stand. As already noted, however, the practicalities of current voir dire procedures require the interactants to speak very loudly, even if they are physically very close, and this is not conducive to self-disclosure. Thus, the issue of interaction distance during voir dire is closely tied to the issue of the appropriate environmental characteristics of the room in which voir dire is to take place. If voir dire is to take place in a large public room designed and decorated to reflect a formal atmosphere, the interaction distances which people adopt will also be formal.

Social Science Research Concerning the Effect of Interpersonal Distance on Self-Disclosure

Four main categories of interpersonal distance are used to define and maintain interpersonal relationships: intimate distance (contact to one and one-half feet); personal distance (one and one-half to four feet); social distance (four to twelve feet); and public distance (twelve or more feet).[78]

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[77] *See* E. HALL, THE HIDDEN DIMENSION 114-16 (1966); text accompanying note 78 *infra*.
[78] E. HALL, *supra* note 77, at 113-20.

Most voir dires take place with a public distance between the speakers. There is some evidence to suggest that this public distance is most conducive to persuasion, the primary function of the attorneys during the trial.[79] It is doubtful, however, that a public distance is conducive to eliciting self-disclosure during voir dire. At the close phase of public distance, around twelve feet, speakers adopt a formal style of speaking and at the more distant phases, speaking style becomes positively frozen. The frozen style of speech is for people who expect to remain strangers. Both the verbal and nonverbal aspects of the communicative process must be exaggerated at this distance with the result that communication tends to assume stereotypic forms.

It is argued that the extent to which the behavior of an interviewee is affected by the interviewer is inversely proportional to the distance, both physical and psychological, which separates one from the other.[80] This hypothesis is supported by a number of research studies on interpersonal attraction in general,[81] and self-disclosure interviews in particular.[82] These studies show that closer physical distance facilitates communication and the formation of a positive feeling. The self-disclosure studies find that when interviews are conducted at distances ranging from three to six feet, the interviewee feels more comfortable, speaks significantly more and reveals more of himself to the interviewer. In addition, one study on interaction distance indicates that interviewers are able to form much stronger impressions of the interviewee's personality at interview distances ranging from four to six feet than they are at closer and farther distances.[83] Thus, the relationship between distance and self-disclosure is not a linear function. If the interview distance is decreased to less than approximately three feet, the interviewee becomes anxious and self-disclosure decreases. A height differential between the interactants at close interpersonal distances would generate even more discomfort in the person at the lower level.

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[79] *See* Albert & Dabbs, *Physical Distance and Persuasion*, 15 J. PERSONALITY & SOC. PSYCH 265 (1970).

[80] Kleck, *Interaction Distance and Non-verbal Agreeing Responses*, 9 BRIT. J. SOC. & CLINICAL PSYCH. 180 (1970).

[81] *See* Cook, *Experiments on Orientation and Proxemics*, 23 HUMAN RELATIONSHIPS 61 (1970); Willis, *Initial Speaking Distance as a Function of the Speakers Relationship*, 5 PSYCHONOMIC SCI 221 (1966).

[82] *See* Jourard & Friedman, *Experimenter-Subject "Distance" and Self-Disclosure*, 15 J. PERSONALITY & SOC. PSYCH. 278 (1970); C. Lassen, Interaction Distance and the Initial Psychiatric Interview: A Study on Proxemics (1969) (unpublished dissertation, Yale Univ.); J. Weber, The Effects of Physical Proximity and Body Boundary Size on the Self-Disclosure Interview (1972) (unpublished dissertation, Univ. S. Cal.); *cf* Knight & Blair, *Degree of Client Comfort as a Function of Dyadic Interaction Distance*, 23 J. COUNSELING PSYCH. 13 (1976) (noting client comfort is highest at midrange distances).

[83] *See* Patterson & Sechrest, *Interpersonal Distance and Impression Formation*, 38 J. PERSONALITY 161 (1970).

Thus, if the interviewer approaches the interviewee in order to enhance self-disclosure, he should also adjust his height so as not to arouse anxiety in the interviewee. For example, if the interviewee is seated, the interviewer can adjust his height by also sitting. The evidence supporting the notion that there is an optimal interpersonal distance of three to six feet for self-disclosure interviews is substantial and consistent. The legal system should take advantage of this research and modify the voir dire procedure to allow the interviewer to question the prospective juror at this distance.

The issue of optimal interview distance also has ramifications for some of the other issues regarding voir dire procedures. Use of the optimal distance is not possible if the jurors are questioned in the traditional group or individual-within-a-group manners. Unless the individual being questioned is placed in the witness stand, it is physically impossible to approach the prospective jurors at the optimal distance in those interview contexts. The evidence concerning distance also has a bearing on the determination of whether the attorneys or the judge should conduct voir dire. When the judge does the questioning, he generally remains at the bench and is not able to approach the jurors; even if a prospective juror is brought closer to the judge and placed in the witness stand, the judge and juror will still not directly face one another. In addition, the judge looks down at the prospective jurors, further hindering juror self-disclosure. Thus, the findings on the subject of optimal interview distance add further weight to arguments in favor of individualized attorney-conducted voir dire.

ENVIRONMENTAL ASPECTS OF THE COURTROOM AND THEIR IMPACT ON JUROR SELF-DISCLOSURE

While the exact environmental characteristics of particular courtrooms will vary, in general, the courtroom may be described as a very large, public room charged with a ritualistic atmosphere and staged with props that clearly demarcate the roles assigned to the various participants. Courtrooms are devoid of any props which denote warmth and informality. When group questioning is employed, the prospective jurors are often seated in the spectator section. In such a situation, the "bar" literally acts as a physical barrier between the interviewer and prospective jurors. Frequently, a small subgroup of the prospective jurors is randomly selected to come before the bar and sit in the jury box. Although these jurors may be questioned as individuals, it is usually in the presence of the surrounding group, and, once again, there is a physical barrier created by the jury box between the interviewer and the prospective jurors. Even though the judge directs and controls the events taking place, he is physically removed from the proceedings. The

judge sits in an elevated, enclosed box which allows only his upper torso and head to be seen. Moreover, the upper torso is somewhat obscured by a voluminous, ceremonial black robe. Thus, a double set of physical barriers separates the judge and the prospective jurors—those which isolate the jurors and those which surround, elevate and obscure the judge.

Very little has been written about the environmental aspects of the courtroom from a legal perspective. Presumably, the ritualistic atmosphere is encouraged for the same reasons which support the practice of requiring witnesses to take the oath; ritual is presumed to impress upon the individual the gravity of the events which are about to transpire and, therefore, encourage candor.[84] The legal view regarding the appropriate atmosphere in which to conduct voir dire may be illustrated by considering an experiment involving an unusual voir dire practice conducted largely without a judge being present.[85] In this method of empanelment, voir dire takes place in an ordinary room which seats twenty-five prospective jurors, as well as the judge, attorneys, clerk and court reporter. When all of the parties have been assembled, the prospective jurors are sworn in. The judge explains the purpose of voir dire and the procedures to be followed and asks only a few very general questions. The judge then leaves the room and the rest of the voir dire is conducted by the attorneys. If one of the attorneys objects to the nature of the other attorney's questioning, the procedure is halted and the judge returns to resolve the dispute. Once the jury has been selected, it is then transferred to a courtroom for trial.

This procedure is highly unusual not only in the degree of latitude afforded to the attorneys, but also in that it takes place in a room which is much smaller than the courtroom and presumably does not have all of the trappings which normally furnish a courtroom. Attorneys who have participated in this type of voir dire generally approve of it.

> All say that the atmosphere allows them to become acquainted and develop a degree of rapport with the jurors that is normally not possible irrespective of whether the voir dire is conducted primarily by the judge or primarily by counsel. Every attorney stated that the system is a fair one. All agreed that it allows sufficient latitude in the examination of prospective jurors.[86]

Despite the fact that the attorneys praised the method in part because of its less formal atmosphere, the study concludes that voir dire should not be regularly conducted in an informal room.

> For a juror to respect the process it must be unmistakably "judicial" in order to convey an official and formal air. . . . Especially because

[84] *See* Levit, Nelson, Ball & Chernick, *supra* note 35, at 939, 950.
[85] *See id.* at 931-36.
[86] *Id.* at 938 (footnotes omitted).

> the voir dire comes at the very beginning of the trial, all care must be taken to assure that the tone is not one of excessive casualness."

Thus, the legal community takes the position that excessive casualness is an evil which must be guarded against in order to insure the integrity of the trial. The legal community should also be aware, however, that excessive formality during the voir dire will inhibit juror self-disclosure and thus hinder the exposition of bias and prejudice.

Social Science Research Relevant to the Environmental Aspects of the Courtroom and Their Effect on Juror Self-Disclosure

The large size of the courtroom appears to have an effect on preferred interpersonal distance which may in turn affect the amount of self-disclosure generated in the voir dire. One study proposes that an inverse relationship exists between room size and preferred interaction distance between subjects.[84] Thus, in a large room, subjects assume a close interpersonal distance, whereas in a small room, subjects tend to assume larger interaction distances. Another study suggests that interaction distances decrease in large rooms because both auditory and visual sensations diminish with the increase in room size:[85] "Screaming across a void does not make for comfortable conversation; rather than increase the volume, most people choose to decrease the void."[86] The implication for voir dire taking place in a large courtroom is that people prefer to have a fairly close interaction distance. This preference is blocked, however, either because of the physical barriers in the courtroom or because of the necessity of everyone in the courtroom being able to hear the exchange of questions and answers. The blocking of these preferred distancing patterns probably generates discomfort and anxiety for the prospective juror, thus reducing self-disclosure. If this is indeed the case, two solutions come readily to mind: either remove the voir dire from the context of the large, open courtroom or remove the physical barriers between the participants to allow closer interaction distances, thereby eliminating the necessity of loud speaking voices by the participants during the exchange.

In addition, environmental aspects may affect the jurors independently of their relation to the attorneys. Specifically, although there is a considerable distance between the interviewer and the interviewee in the typical voir dire, the distance between the various interviewees is

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[84] *Id.* at 939.

[85] *See* Sommer, *The Distance for Comfortable Conversation: A Further Study*, 25 SOCIOMETRY 111, 115 (1976).

[86] *See* White, *Interpersonal Distance as Affected by Room Size, Status, and Sex*, 95 J. SOC. PSYCH. 241, 248 (1975).

[87] *Id.*

minimal. When prospective jurors are seated in the spectator section, as is the case in most group-style voir dires, they are usually in actual physical contact with those on either side of them. Even when prospective jurors are brought into the jury box for questioning, the distance between jurors does not exceed several feet. In studying the effects of room size and crowding on stress and self-disclosure, one researcher concludes that, under conditions of crowding as, for example, where subjects are shoulder to shoulder, the subjects are significantly less comfortable, exhibit more nonverbal indicators of stress such as manipulating objects and frequently changing positions and are less willing to discuss intimate topics.[91] Thus, the seating of prospective jurors in a compact grouping probably leads to reduced self-disclosure.

It has long been the common sense view that reduced privacy leads to reduced self-disclosure. A study finding that self-disclosure in a dyad increases under conditions of isolation[92] supports this view. Other research, also supporting the common sense view, concludes that reduced privacy decreases client self-disclosure in a counseling setting and this occurs even when partial barriers such as desks or bookcases are employed to encourage the client's perception of privacy.[93] From this research, it would seem that one way to encourage self-disclosure among prospective jurors is to conduct voir dire in the most isolated setting possible, for example, in the judge's chambers. To be sure, the complete isolation of a client-counselor setting cannot be achieved since the voir dire must include, at a minimum, the juror, judge, both litigants in a civil case or the defendant in a criminal case, counsel for both sides and the court reporter. Yet, a small group setting is much more conducive to self-disicosure than a voir dire which takes place in front of fifty or more spectators.

The final aspect of the environment considered here is the degree of warmth or coldness of the room in which voir dire takes place. "Hard architecture" is described as that which is unyielding, impervious and impersonal, and it is argued that such architecture tends to foster isolation and estrangement among people.[94] The courtrooms in which voir dire is conducted can typically be characterized as "hard" rooms. Empirical data from a counseling analogue demonstrates that subjects disclose significantly more in a "soft" rather than a "hard" room.[95] This result

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[91] *See* Sundstrom, *An Experimental Study of Crowding: Effects of Room Size, Intrusion, and Goal Blocking on Nonverbal Behavior, Self-Disclosure and Reported Stress*, 32 J. PERSONALITY & SOC. PSYCH. 645 (1975).

[92] *See* Altman & Haythorn, *Interpersonal Exchange in Isolation*, 28 SOCIOMETRY 41 (1975).

[93] Holahan & Slaikeu, *Effects of Contrasting Degrees of Privacy on Client Self-Disclosure in a Counseling Setting*, 24 J. COUNSELING PSYCH. 55 (1977).

[94] R. SOMMER, TIGHT SPACES *passim* (1974).

[95] Chaikin, Derlega & Miller, *Effects of Room Environment on Self-Disclosure in a Counseling Analogue*, 23 J. COUNSELING PSYCH. 479 (1976).

might occur because hard architecture makes status differences tween client and counselor more salient, because a soft environm similar to that in which friends interact or because a soft environm more conducive to a feeling of relaxation and ease.[58] Whatev reason, both common sense and empirical data clearly demonstrate more self-disclosure is forthcoming in a warm and intimate room th a cold and impersonal one. Therefore, voir dire could be improve removing it from the courtroom and into the judge's chambers or some other room especially designed for the voir dire of prospe jurors.

RECOMMENDATIONS FOR THE LEGAL SYSTEM

The courtroom functions as a public forum in which society de mines the civil and criminal liabilities of its members through the u an adversarial system. The structure of the courtroom and the p cedures which are used in the courtroom setting have evolved to ther that function. Although voir dire is nominally a part of the ad sary system, it should be conceptualized as a separate part of the process. Since the purpose of voir dire is to obtain information from spective jurors regarding their qualifications and attitudes to issues in the case at hand, it can best be conceptualized as a self closure type of interview. The research which has been reviewed a demonstrates that self-disclosure is markedly affected by situational tors. Thus, the voir dire situation needs to be tailored to facilitate disclosure. Present voir dire practices are not designed to encourage self-disclosure and indeed seem almost intended to discourage open, honest self-revelation.

There are several specific recommendations for revising the procedures used in conducting voir dire which could encourage self-disclosure among prospective jurors. First, emphasis should be placed on individual rather than group or individual-within-a-group questioning. Second, questioning should be conducted by attorneys rather than by the judge. Third, the interviewer should conduct the interview from a distance of three to six feet from the jurors. Fourth, the questioning should take place in a smaller room than is traditionally employed, but should not result in crowding. And finally, the room where voir dire takes place should have a warmer and more intimate atmosphere than that of the cold, hard, ritualistic settings where it is presently conducted. Essentially, these recommendations urge the legal system to de-emphasize the adversarial approach to voir dire and to transform it into a more relaxed proceeding where free and open self-disclosure can take place.

[58] *Id.*

Once voir dire is moved to a more open setting, there are four other recommendations derived from the psychological literature which could be employed to facilitate disclosure. First, positive reinforcement should be given to the juror when he makes self-disclosing statements. Second, the interviewer should make self-disclosing statements about himself to the prospective juror. Third, a model of self-disclosure should be offered to the juror prior to the voir dire. And finally, jurors should be instructed to disclose information about themselves.

The first of these recommendations, the giving of positive reinforcements to increase self-disclosing statements by the juror, was mentioned previously in dealing with the issue of who should conduct voir dire. These reinforcements could take the form of verbal praise or nonverbal indicators of interest, such as increased eye contact, direct body orientation, relaxed posture, head-nodding and mm-hmming.

The second recommendation, that the interviewer disclose himself to the prospective juror during the voir dire, is based upon a considerable body of research indicating that interviewer disclosure appears to facilitate self-disclosure in interviewees.[97] There are three theoretical explanations for this phenomenon. One explanation is that the interviewer's example of self-disclosure tends to lessen the interviewee's inhibitions concerning self-disclosure.[98] In addition, there is evidence indicating that the phenomenon might be the result of the modeling aspect of the situation.[99] In other words, the interviewees use the interviewer's behavior as a discriminative cue to guide their own behavior. Finally, the phenomenon may be viewed as a social exchange process in which the disclosures follow a norm of reciprocity.[100] Whatever the cor-

[97] Davis & Skinner, *Reciprocity of Self Disclosure in Interviews: Modeling or Social Exchange?*, 29 J. PERSONALITY & SOC. PSYCH. 779, 779 (1974). There is, however, other research indicating that when subjects view interviewer self-disclosure as inappropriate to the interviewer's role, they may actually withdraw and disclose less of themselves when confronted by the interviewer's disclosures. *See* Derlega, Lovell & Chaikin, *Effects of Therapist Disclosure and Its Perceived Appropriateness on Client Self-Disclosure*, 44 J. CONSULTING & CLINICAL PSYCH. 866 (1976). Further research needs to be done to determine which interviewee personality variables are associated with this phenomenon. Empirical research is also needed to determine whether most prospective jurors would view voir dire as an inappropriate social situation for interviewer self-disclosures thereby rendering this strategy of generating juror self-disclosure untenable.

[98] *See* A. BANDURA, PRINCIPLES OF BEHAVIOR MODIFICATION 192-96 (1969). There is, however, some data indicating that interviewees maintain elevated levels of self-disclosure only if the interviewer also continues to disclose. *see* Davis & Sloan, *The Basis of Interviewee Matching of Interviewer Self-Disclosure*, 13 BRIT. J. SOC. & CLINICAL PSYCH. 359 (1974), thus militating against this disinhibitory theory.

[99] *See* Marlatt, *Exposure to a Model and Task Ambiguity as Determinants of Verbal Behavior in an Interview*, 36 J. CONSULTING & CLINICAL PSYCH. 268 (1971). However, there is also evidence indicating that interviewees do not model the content of interviewers' disclosures. *See* Davis & Sloan, *supra* note 98. This tends to negate the modeling theory.

[100] *See* Worthy, Gary & Kahn, *supra* note 47, at 59-60.

rect explanation,[101] the principle of interviewer disclosure can get out of hand. For example, one study finds that an intermediate level of interviewer self-disclosure, such as four disclosures during a thirty minute interview as opposed to none or twelve, leads to greater self-disclosure by the interviewees.[102] Thus, if the interviewer makes too many self-disclosures, the results may be counter-productive. This finding has an implication for the decision whether to question prospective jurors individually or within the group context. If individuals are questioned with the entire group present, the attorney may not be able to safely employ the self-disclosure technique since he may have overexposed himself. Thus, interviewer self-disclosure should only be employed in conjunction with a truly individual voir dire. The type of disclosure made by the interviewer also needs to be considered. Interviewees respond more to a warm therapist making demographic disclosures than to a warm therapist making personal disclosures.[103] Thus, the voir dire interviewers should not disclose information which is too personal. It is doubtful that the parties involved in voir dire would consider personal disclosures appropriate on the part of the judge or attorney anyway.

It is also recommended that a model of self-disclosure be provided to prospective jurors prior to the voir dire. In a study in which the subjects witnessed an interview of a self-disclosing stooge and were then asked how much they would be willing to disclose in the interview, it was discovered that subjects exposed to high disclosing stooges are significantly more willing to disclose information about themselves than are those exposed to low disclosing stooges.[104] There was no interaction between the interviewer and the subject or between the stooge and the subject, so that willingness to disclose in this instance must be a function of modeling rather than of a social exchange process. In addition, another study demonstrates that a model for self-disclosure on videotape can increase subject self-disclosure in subsequent interactions.[105] In some jurisdictions, prospective jurors are exposed to movies which attempt to explain the functions of the trial and the role of the juror in a trial. These movies could be adapted to include a segment showing a voir dire in which prospective jurors are highly disclosing. Based on the

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[101] It seems that self-disclosure follows a norm of reciprocity, *see* notes 97-98 *supra*, and that, therefore, self-disclosure on the part of the interviewer on a fairly continuous basis throughout voir dire would facilitate self-disclosure on the part of the prospective jurors.

[102] *See* Mann & Murphy, *Timing of Self-Disclosure, Reciprocity of Self-Disclosure, and Reactions to an Initial Interview*, 22 J. COUNSELING PSYCH. 304 (1975).

[103] Simonson, *The Impact of Therapist Disclosure on Patient Disclosure*, 23 J. COUNSELING PSYCH. 3 (1976).

[104] *See* Thase & Page, *Modeling of Self-Disclosure in Laboratory and Nonlaboratory Interview Settings*, 24 J. COUNSELING PSYCH. 35 (1977).

[105] *See* Annis & Perry, *Self-Disclosure Modeling in Same-Sex and Mixed-Sex Unsupervised Groups*, 24 J. COUNSELING PSYCH. 370 (1977).

research findings described above, this should lead to increased self-disclosure in the real voir dire.

The final recommendation for altering voir dire procedures is that the jurors be instructed to disclose information about themselves. Two studies demonstrate that descriptive instructions by themselves will significantly increase subject self-disclosure in interviews.[106] Although such instructions are sometimes given, they are frequently mentioned almost as an afterthought or in an offhand manner. The research indicates that self-disclosing instructions should always be given and emphasized prior to voir dire.

CONCLUSION

The voir dire is an important part of the trial process in which the constitutional right to an impartial jury is at stake. In order to protect that right, it is essential that attorneys obtain as much information about prospective jurors as possible so that they may challenge for cause those who are biased or prejudiced as a matter of law. Juror self-disclosure will also allow the attorney to protect his client's legal interests by permitting him to exercise his peremptory challenges on the basis of solid information rather than on speculation and guesswork. Unfortunately, current voir dire practices are not conducive to promoting juror self-disclosure. Thus, in order to further the goals of voir dire, research from the social sciences on the subject of self-disclosure interviews, should be implemented to change current voir dire practices and increase self-disclosure.

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[106] *See* McGuire, Thelen & Amolsch, *Interview Self-Disclosure as a Function of Length of Modeling and Descriptive Instructions*, 43 J. CONSULTING & CLINICAL PSYCH. 356 (1975); Stone & Gotlib, *Effect of Instructions and Modeling on Self-Disclosure*, 22 J. COUNSELING PSYCH. 288 (1975).

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Law and Human Behavior, Vol. 11, No. 2, 1987

Judge- Versus Attorney-Conducted Voir Dire

An Empirical Investigation of Juror Candor*

Susan E. Jones†

Broeder (1965) found that potential jurors frequently distort their replies to questions posed during the voir dire. Considerable controversy has arisen over whether more honest, accurate information is elicited by a judge or by an attorney. The experiment manipulated two target (judge- versus attorney-conducted voir dire) and two interpersonal style variables (personal versus formal). The dependent measure was the consistency of subjects' attitude reports given at pretest and again verbally in court. One-hundred-and-sixteen jury-eligible community residents participated. The results provide support for the hypothesis that attorneys are more effective than judges in eliciting candid self-disclosure from potential jurors. Subjects changed their answers almost twice as much when questioned by a judge as when interviewed by an attorney. It was suggested that the judge's presence evokes considerable pressure toward conformity to a set of perceived judicial standards among jurors, which is minimized during an attorney voir dire.

INTRODUCTION

The right to a fair and impartial jury of one's peers is a right guaranteed to each criminal defendent by the sixth and fourteenth amendments to the U.S. Constitution. One of the vehicles through which the court seeks to meet this obligation is a process called the voir dire.

Voir dire, literally translated as "to speak the truth" (Gifis, 1975: p. 222), is the preliminary stage of jury selection during which prospective jurors are examined to determine their suitability to hear the case before the court. The goal of

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this procedure is to excuse jurors failing to meet the criteria for jury service or holding biases or prejudices viewed as likely to interfere with their impartiality (Bush, 1976). Attorneys for either side may have a member of the jury panel (venire) removed by exercising a challenge for cause or a peremptory challenge.

Attorneys exercise causal challenges when they can demonstrate that a juror (a) fails to meet the statutory requirements for jury service, or (b) exhibits sufficient prejudice against one of the parties that the juror is unlikely to be capable of rendering a fair and impartial verdict. Peremptory challenges are made at the attorney's discretion and are generally reserved for when the attorney believes that a juror remains biased but this cannot be sufficiently demonstrated to have the juror removed for cause.

Clearly, prudent use of either type of challenge is contingent upon obtaining *honest, accurate* information from potential jurors regarding their background, attitudes, and beliefs (Bush, 1976).

According to federal and most state statutes, the questioning of potential jurors during the voir dire may be done by the judge, by the attorneys, or by some combination of the three.

The current practice in most federal courts, and in an increasing number of state courts, is one in which the judge conducts the questioning of potential jurors (Bermant & Shapard, 1978). Although counsel for both sides may submit questions, judges use their discretion regarding which, if any, of the submitted questions are posed to the jury.

This departure from attorney-conducted voir dire has created considerable controversy in the legal system. Those arguing for judge-conducted voir dire assert that a considerable amount of time and money is saved under such a system (Stanley, 1977). It is assumed that jurors are as candid, or even more so, when questions are posed by a judge rather than by an attorney. Levit, Nelson, Ball, and Chernick (1971) go so far as to suggest that the formality and gravity of the situation created by the judge's presence are likely to *increase* juror candor. They assert, without empirical support, that the respect elicited by the robed judge serves to enhance judges' effectiveness in obtaining truthful responses from jurors.

Several respected legal scholars (e.g., Babcock, 1975; Bonora & Krauss, 1979; Bush, 1976; Glass, 1977; Padawer-Singer, Singer, & Singer, 1974) dispute the assumption that the judge's active role leads to greater juror candor. Citing anecdotal and case data, they argue that the judge will be seen as an important authority figure, and as such, jurors will tend to be concerned about displeasing him or her. Such a concern is likely to cause jurors to be less than honest in their replies.

This has been an issue of considerable debate; however, no empirical studies available have systematically varied each condition (judge- versus attorney-conducted voir dire) and measured the quality and quantity of information elicited from prospective jurors.

Suggs and Sales (1981) aptly characterize the voir dire as a self-disclosure interview in which information is sought from potential jurors concerning their history, attitudes, and beliefs. Empirical investigations on self-disclosure have

repeatedly found that individuals disclose more to (a) those from whom they receive moderate self-disclosure (reciprocity effect), (b) those whom they like more, and (c) those whom they perceive as sharing equal status with themselves (status similarity) (Chelune, 1979).

Research has shown that a significant correlate of subject self-disclosure is the amount of self-disclosure he or she initially receives from a target (see, e.g., Ehrlich and Graeven, 1971; Jourard, 1959, 1969). Subjects exposed to a high self-disclosing confederate disclose at higher levels themselves within certain parameters. For example, Simonson (1976) paired subjects with interviewers who behaved in either a cold, aloof fashion or in a warm, friendly manner, and who disclosed at one of three levels: personal disclosure, disclosure of demographic information, or no disclosure. This study found that subjects exposed to a warm interviewer who disclosed demographic information (moderate disclosure) were the most effective in eliciting self-disclosure from subjects. Not surprisingly, the cold, aloof interviewers elicited little or no self-disclosure, regardless of the intimacy level of their disclosure. These and other studies prompted Archer (1979) to conclude that the reciprocity effect is one of the most robust and reliable effects in social psychology.

Liking for the target of self-disclosure also influences the degree of subjects' return self-disclosure. Subjects disclose most to the targets who are most liked and disclose least to targets who are least liked (Critelli, Rappoport, & Golding, 1976; Jourard, 1959; Worthy, Gary, & Kahn, 1969).

Finally, similarity in status and authority are important to interviewees in selecting targets of self-disclosure. Slobin, Miller, and Porter (1968) found that employees were more willing to disclose to other employees within their own hierarchical level rather than to more powerful superiors. Apparently, disclosure to a more powerful target is perceived to entail considerable risk, and subjects prefer not to reveal themselves to targets who hold substantial power. As Goodstein and Reinecker (1974) note, "we self-disclose to those who have already demonstrated that they will not punish our self-disclosure and to those who have no capacity for punishing such behavior" (p. 52).

In examining the courtroom behavior of attorneys and judges in light of the research on self-disclosure, a number of things become apparent. At the beginning of the voir dire, attorneys typically engage in moderate self-disclosure to the panel, disclosing some personal information about themselves, their background, and their faith in the judicial system (Van Dyke, 1977). Manuals on courtroom tactics encourage such behavior (e.g., Bonora & Krauss, 1979; Jordan, 1981). Judges, however, purposely attempt to maintain a formal demeanor in their courtroom interactions to avoid compromising their role as arbitrator and typically do not offer personal disclosure to the panel.

Moreover, attorneys generally attempt to appear warm and friendly to jurors in order to win favorable consideration for their clients (Bonora & Krauss, 1979; Suggs & Sales, 1981). They expend considerable effort to gain jurors' positive regard and are in a much better position than judges to succeed. As Suggs and Sales (1981) assert, "attorneys . . . have and use the flexibility to interact with jurors in a more open and personal manner, thereby influencing perceived famil-

iarity, liking and warmth" (p. 253). On the other hand, many of the requirements of the judge's role are unlikely to promote liking. The judge, cloaked in a long black robe, sits elevated and apart from the rest of the courtroom, literally looking down upon the jurors. He or she is addressed as "Your Honor," rather than with a more personal address.

Finally, judges and attorneys hold different levels of ascribed status in the courtroom. Although attorneys' social status may be higher than that of most jurors, there is less of a discrepancy between jurors and attorneys than between jurors and judges (Suggs & Sales, 1981).

As a function of their relative adherance to these respective roles, coupled with their typical courtroom behaviors, it seemed likely that jurors would perceive attorneys as more similar to themselves and report greater liking for them than for judges. These two factors, in conjunction with attorney self-disclosure (reciprocity), were predicted to interact such that attorneys would be more effective than judges in eliciting juror self-disclosure.

Finally, the present study sought a parsimonious explanation for the predicted efficacy of these three factors in facilitating self-disclosure. Fenigstein, Scheier, and Buss (1975) proposed that the degree of attention to the public aspect of the self is a mediator in the relationship between individuals' privately held attitudes and beliefs and their public expression of them. Essentially they suggest that the consistency (honesty) of individuals' self-disclosure is mediated by the degree to which they are focused on the public aspects of themselves.

Applying these hypotheses to the courtroom, it was expected that jurors who were interviewed by a judge would remain in states of relative heightened public self-awareness. Such a state would cause their self-reports of attitudes and beliefs to differ considerably from their privately held attitudes and beliefs. It was expected that individuals interacting with an attorney would show a reduction in their levels of public self-awareness. It seemed likely that the presence of the factors shown to facilitate self-disclosure (reciprocity, liking, and similarity) would function to lower jurors' relative levels of public awareness by lessening their attention to the evaluative aspects of an interaction. Buss (1980) observed that attention to the public self decreases as liking and familiarity with a target increases. Lower levels of public self-awareness have been shown to be associated with greater consistency of attitude reports across situations (Froming, Walker, & Loypan, 1982; Scheier, 1980).

Consequently, this study empirically tested the efficacy of a judge-conducted versus an attorney-conducted voir dire in eliciting honest, accurate self-reports of attitudes and beliefs from potential jurors (venirepersons). The study operationalized "honesty" as the degree of consistency between jurors' pretest attitude scores, obtained under conditions outlined by Petty and Cacioppo (1981), and their public attitude reports obtained while subjects were participating in the voir dire. Further, the interpersonal behavior of the judge and the attorney was varied to assess whether alterations in the characteristic interpersonal behavior of judges would enhance their effectiveness in eliciting information from venirepersons, if in fact, they were less successful than attorneys. Finally, the study was designed to be functionally similar to a real courtroom experience and used

jury-eligible community residents in order to overcome the most salient criticisms of court-related research (see Kerr & Bray, 1982).

In sum, the current experiment assessed the effects of two target conditions (judge- versus attorney-conducted voir dire) and two interpersonal style conditions (personal versus formal) on attitude change scores, calculated based on the difference between subjects' attitude reports given at pretest and those given verbally in court. In addition, change scores on public self-awareness were similarly calculated based on scores obtained at two intervals in the voir dire.

Hypotheses

1. Change scores for subjects in the attorney, personal voir dire condition were predicted to be significantly smaller than change scores for subjects in the judge, formal condition.

2. Change scores for subjects in the judge, personal voir dire condition were predicted to be smaller than change scores for subjects in the judge, formal voir dire condition.

3. Subjects in the attorney-conducted voir dire conditions were predicted to show greater consistency in their attitude reports from pretest to incourt than subjects in the judge conditions.

4. It was predicted that subjects who interacted with a target whose behavior included self-disclosure and other behaviors intended to influence liking (personal condition), would show greater consistency in their self-reports than would subjects who interacted with a target whose behavior was cool and aloof (formal condition).

5. It was predicted that subjects in the attorney, personal voir dire would show a greater decrease in self-awareness than subjects in the judge, formal condition.

METHOD

Subjects and Experimenters

Subjects were 116 jury-eligible community residents randomly selected from the county voter registration list. They were paid twenty dollars for their time and effort. When subjects' schedules permitted. they were randomly assigned to conditions. allowing for an equal proportion of male and female subjects and an equal proportion of minorities on each jury panel. Nine subjects could not make the designated night and they were allowed to select an alternate night. No systematic bias in assignment was detected with these few cases. Panels ranged in size from 13 to 16 jurors. There were 42 males and 69 females in the study. The author and four confederates staged the trials.

The author played the role of court clerk, administered pre- and postexperimental questionnaires, recorded subjects' responses to questions posed during the voir dire, and debriefed the subjects at the conclusion of the study. The roles

of the judge and the principal attorney were filled by two actors. Two actors were used for each condition so as to expand the generalizability of the findings and to ensure that the results obtained would be a function of the manipulations and not of some unique characteristics of the individuals. Because of the possible interactions of target and subject sex on self-disclosure, the sex of the target was held constant and male actors were used to assume the roles of judge and attorney. The first actor (Actor A), a white male in his mid-50's, was a professor of law at a major southern law school. Actor B, a white male in his late 30's, was completing his last year in law school. Both actors had considerable courtroom experience and were repeatedly rehearsed until their performances were consistent and accurate. Eight trials were held so that each principal actor could assume all four of the primary roles described below (judge/personal, judge/formal, attorney/personal, attorney/formal). The part of the bailiff was played by a white male in his mid-40's who wore an authentic sheriff's uniform rented from a local costume rental agency. Finally, the opposing attorney, who had no speaking part, was played by a law student in his early 30's.

Design

The experiment was a 2 × 2 × 2 factorial design with a repeated measure (pretest versus incourt attitude reports). The design contained a target manipulation (judge versus attorney), an interpersonal style manipulation (personal versus formal), and a nonmanipulated subject variable (male versus female).

Dependent Measures

There were two primary dependent measures. At pretest, subjects completed the Attitudes Toward Legal Issues Questionnaire (ATLIQ), an attitude scale developed specifically for the present study. The survey contained 29 statements regarding attitudes toward issues previously acknowledged by the courts as proper areas of inquiry during the voir dire (Bush, 1976; Suggs & Sales, 1981). The scale contained four subscales measuring (a) attitudes toward the treatment of minorities by the courts, (b) attitudes toward controversial sociolegal issues, e.g., abortion, legalization of marijuana, (c) attitudes toward the courts, e.g., judges, attorneys, and (d) attitudes toward deterrence. Subjects were asked to indicate their agreement or disagreement with each statement along a 10-point Likert-type scale. Total score on the ATLIQ ranged from 0 to 290. Earlier studies indicated that a high score reflected relative conservatism on the legal issues being investigated and lower scores reflected greater liberalism. Half of the items were negatively keyed and half were positively keyed. These items were embedded in 96 distractor items to minimize the possibility that subjects would become aware of the salient attitudes being measured. The 29 questions were asked again verbally in court, either by the judge or by the attorney, depending upon the appropriate experimental condition. Change scores were calculated based on absolute differences between subjects' total pretest score on the 29 relevant items on the ATLIQ and the total score obtained from their verbal replies recorded during the voir dire.

The Public Self-Awareness Questionnaire is a seven-item adaptation of the Fenigstein, Scheier, and Buss (1975) original scale and was designed to measure subjects' relative state of public self-awareness. Subjects completed the questionnaire during two planned interruptions in the voir dires, which were staged so as to appear to be typical procedural delays in the courtroom.

At posttest subjects completed a questionnaire which contained three scales that served as manipulation checks on the reciprocity effect, perceived liking and perceived similarity, and a scale measuring subjects' perceptions of the realism of the courtroom proceedings.

Independent Variables

Judge Versus Attorney Manipulation

The judge- versus attorney-conducted voir dire (target) independent variable was carefully controlled through the use of prepared scripts for each condition. After initial remarks to the panel by the judge, he or the attorney, depending upon the experimental condition, solely conducted the actual voir dire. The wording of the instructions and the statements used by the judge or the attorney remained virtually the same; the salient manipulation was who conducted the voir dire.

Interpersonal Style Manipulation

The interpersonal style variable was manipulated by variations in the scripts for the judge and the attorney, and by nonverbal, rehearsed interpersonal behaviors. In the personal condition, the judge or the attorney offered a brief personal statement to the jury panel which included three demographic disclosures; his name, residence, and number of years in practice, and a single moderate personal disclosure, the fact that he was a little uncomfortable about having to ask the panel some personal questions. In addition, the judge or attorney made eye contact with jurors as he called on them, and smiled and nodded after they replied to each statement. In the formal condition, neither the judge nor the attorney offered personal disclosure to the panel. They maintained a formal, detached demeanor, and were more concerned with recording jurors' replies than with maintaining eye contact. They responded with minimal smiling or nodding as jurors spoke.

PROCEDURE

Eight voir dires were conducted (two under each of the four conditions) on Monday through Thursday nights of two consecutive weeks in the moot courtroom of a major southern university law school. The voir dires were ordered so as to alternate judge- and attorney-conducted voir dires each night. Actor A and Actor B alternately assumed the principal role for one trial under each condition.

Upon arrival subjects were told that there would be a delay in starting the proceedings as the judge had been briefly detained. Although they were told that

they would be participating in a mock trial, they were led to believe (by the clerk and the bailiff) that the judge and the attorneys were authentic. Participants were asked if they would mind completing a survey on attitudes toward various legal issues that was being conducted as part of a study by the law school and were given the ATLIQ to complete.

When everyone was finished, the bailiff brought the jurors to the courtroom. The judge proceeded to welcome jurors. When he was almost finished addressing the panel, the attorneys would interrupt and request a hearing on a pretrial motion in the judge's chambers. During the hearing, the clerk would administer the Public Self-Awareness Questionnaire. When all parties returned to the courtroom, the proceedings resumed. At this point in the proceedings the scripts diverged, depending upon which of the four experimental conditions was being implemented.

Judge-Conducted Voir Dires

In the formal condition, the judge would return and explain to the panel that he would read a series of statements to them. They were to think about each statement, and when he called on them, they were to report whether they agreed or disagreed with each statement along a 10-point continuum ranging from disagree very strongly to agree very strongly. A copy of the alternatives was posted in view of all jurors. For each statement jurors were called on in a different order, the order randomly determined prior to the start of the experiment in order to control for any order effects of juror replies. Prior to question 24, the bailiff would inform the judge that he had an urgent phone call and the judge would announce a short break. The clerk would administer the Public Self-Awareness Questionnaire for the second time. After a short break, the judge would return and read the remaining five statements. When he had concluded, the court clerk administered the postexperimental questionnaire and debriefed the panel.

In the personal condition, the proceedings were identical to those described for the formal condition, with one important exception. After his return from the pretrial motion hearing, the judge would offer the personal disclosures and respond to jurors with the interpersonal behaviors described above.

Attorney-Conducted Voir Dires

The procedure for the four attorney-conducted voir dires was very similar. After the first break (pretrial motion), the judge would turn the examination of the panel over to the attorney. The attorney would initiate either the behaviors rehearsed for the formal condition or those for the personal condition. The attorney, speaking from the podium in front of the jury box, would similarly explain the voir dire procedures and then would read the same statements, in the same order, as were read during the judge-conducted voir dires. A similar interruption was made for the judge to take a phone call, during which the Public Self-Awareness Questionnaire was administered.

RESULTS

Analyses of Nonmanipulated Variables

Data obtained from five subjects were excluded from the data analyses because they reported knowing one of the principal actors ($n = 3$) or they had heard about the study and were able to describe the hypotheses under examination ($n = 2$). The mean age of participants in the study was 42.74 years ($SD = 16.25$) with ages ranging between 18 and 79 years. Subjects reported completing 13.30 years of formal education ($SD = 2.23$), with educational backgrounds ranging from an eighth grade education to a Ph.D. The modal income reported by participants ($n = 36$) in the study was between $20,000 and $40,000 per year. Individuals were represented from the service occupations, engineering profession, education, health care fields, the ministry, and sales. Most subjects (68%) reported that they had never served as jurors before ($n = 75$).

Manipulation Checks

No significant main effects or interactions of actor or subject sex were found on multivariate analyses of variance (MANOVA) on the three manipulation check dependent measures (perceived liking, perceived similarity, and reciprocity), thus the data were combined. A 2 × 2 (target × style) multivariate analysis of variance revealed a significant main effect of target, $F(3,105) = 2.88$, $p < .04$, and a significant main effect of interpersonal style, $F(3,105) = 27.76$, $p < .0001$, on the three manipulation check items.

Reciprocity. A 2 × 2 univariate analysis of variance on the reciprocity measure revealed a significant main effect of style, $F(1,107) = 29.72$, $p < .001$. Subjects rated target disclosure on an 11-point Likert scale, with a 6.0 indicating moderate target disclosure. Subjects perceived targets in the personal conditions ($M = 4.95$) as offering greater self-disclosure than targets in the formal conditions ($M = 2.78$).

Liking. A 2 × 2 univariate analysis of variance on the liking manipulation revealed a significant main effect of target on perceived liking, $F(1,107) = 6.09$, $p < .01$, with subjects reporting greater liking for attorneys ($M = 23.86$) than for judges ($M = 21.77$) based on a composite score of three 11-point Likert items. Additionally, a significant main effect of interpersonal style was revealed, $F(1,107) = 64.23$, $p < .001$, with subjects reporting greater liking for attorneys and judges when they behaved in a warm, personal manner ($M = 26.21$) than when they acted in a cool, aloof fashion ($M = 19.42$).

Similarity. A 2 × 2 univariate analysis of variance on the similarity measure revealed no significant main effects or interactions of the independent variables on this manipulation check. This result indicates that, contrary to predictions, jurors did not perceive attorneys as more similar to themselves than judges. Upon closer scrutiny of the manipulation check items, it seems that the items selected may have failed to measure the relevant dimensions of perceived similarity. The items asked subjects to rate how much they had in common with the targets

rather than asking how similar they perceived themselves to be to the targets in terms of social status, power, and authority.

Realism. Subjects gave the proceedings a mean rating of 7.95 (SD = 2.79) on an 11-point Likert item measuring perceived realism, suggesting that, overall, they viewed the proceedings as highly realistic.

Perceived Authenticity of the Targets. Informal analysis of subjects' comments during postexperimental discussions revealed that subjects were convinced that the judge and the attorney were, in fact, actually who they said they were, and were not merely actors. Although subjects were told that they would be hearing a mock trial, it was important that they believed that they were addressing a real judge and a real judge.

Desire to be Selected. Subjects reported that they genuinely wanted to be selected for the jury. Many subjects went to great lengths in order to be able to participate and did not want to be excused from the jury. One subject drove back from a neighboring state where he was on military duty in order to participate, a 12-hour drive. Other subjects reported exchanging work shifts with co-workers, canceling social engagements, hiring babysitters, or otherwise rearranging their schedules so they would be able to attend.

Analyses of Dependent Variables

Global Scores. A 2 × 2 × 2 (target × style × actor) univariate analysis of variance revealed no significant main effects or interactions due to a particular actor on the change scores; thus the data for both actors were combined for each of the four conditions. A 2 × 2 × 2 (target × style × sex) univariate analysis of variance revealed a significant main effect of sex, $F(1,103) = 11.80$, $p < .001$. Inspection of the means revealed that females' scores changed to a much greater degree than males' (Ms = 26.39 and 15.43, respectively). Women were considerably less consistent in their attitude reports than men. Since there were no main effects or interactions of sex with the other independent variables, the data were collapsed for further analyses.

A 2 × 2 (target × style) univariate analysis of variance (Table 1) revealed a significant main effect of target ($p < .001$). The average change score for subjects in the judge condition (M = 29.00) was almost twice the size of the change score for subjects in the attorney condition (M = 15.75).

In addition, there was a marginally significant trend ($p < .06$) toward the predicted interaction of target and style. Mean scores and standard deviations for the interaction are presented in Table 2. A pairwise comparison of the group

Table 1. Summary of 2 × 2 Univariate Analysis of Variance on Change Scores of Attitudes Toward Legal Issues Questionnaire

Source of variation	Mean square	df	F	p	η^2
Target (A)	4845.76	1	17.09	.000	.133
Style (B)	131.55	1	.46	.504	.004
A × B	1003.47	1	3.54	.059	.028
Error	283.48	107			

Table 2. Mean Scores and Standard Deviations on Change Scores on Attitudes Toward Legal Issues Questionnaire

	Personal			Formal		
Target	*n*	*M*	*SD*	*n*	*M*	*SD*
Attorney	31	11.65[a]	15.66	28	19.86[b*]	18.99
Judge	26	30.92[c*]	17.82	26	27.08[c]	14.56

Means that do not share a common superscript are significantly different at the .05 level. Higher scores indicate *greater change* from pretest to incourt attitude reports.
* Means differ significantly at .05 level by the Newman–Keuls procedure.

means comprising the interaction revealed that subjects' scores changed significantly more in the judge, formal condition than in the attorney, personal condition, as predicted, $t(55) = -3.85$, $p < .001$, one-tailed. Surprisingly, subjects' change scores did not differ significantly in the judge, personal condition and the judge, formal condition, $t(50) = .852$, n.s. Attorneys were able to positively influence juror consistency when they engaged in the planned interpersonal behaviors $t(57) = -1.80$, $p < .05$, one-tailed. Overall, subjects in the attorney, personal condition showed the greatest consistency from pretest to in-court in their attitude reports.

Subscales of ATLIQ. A multivariate analysis of variance was performed on the change scores of the four subscales of the ATLIQ in order to explore the differences found on the global scores. A 2 × 2 (target × style) MANOVA revealed a significant main effect of target, $F(4,104) = 6.84$, $p < .001$, and a significant interaction of target and style, $F(4,104) = 2.59$, $p < .04$. Univariate analyses of variance (Table 3) revealed that on three of the four subscales (measuring attitudes regarding the treatment of minorities by the police and the courts; attitudes toward sociolegal issues: and attitudes toward criminal justice personnel) subjects changed their answers to a significantly greater degree when they were asked to report their attitudes to the judge than when they were asked to report their answers to an attorney. Inspection of the means (Table 4) indicates that subjects were more consistent in their attitude reports when they were interviewed by an attorney.

A 2 × 2 (target × style) univariate analysis of variance (Table 5) revealed a significant interaction on the subscale measuring attitudes toward criminal justice

Table 3. Summary of Univariate Analysis of Variance of Target Main Effect on Four Subscales of ATLIQ

Subscale	MS	*df*	*F*	*p*
Treatment of minorities	8.96	1	4.13	.0421
Socio-legal issues	5.08	1	6.62	.0111
Criminal justice personnel	90.01	1	23.84	.0001
Deterrence through punishment	1.44	1	1.42	.2350

Table 4. Mean Change Scores on Four Subscales of Attitudes Toward Legal Issues Questionnaire[a]

	Range	Attorney *M*	Judge *M*
Treatment of minorities	0–77	6.28	9.27
Sociolegal Issues	0–44	1.29	3.54
Criminal justice personnel	0–143	6.15	15.64
Deterrence through punishment	0–55	2.06	.89

[a] Higher scores indicate *greater* change from pretest to incourt attitude reports.

personnel. Results of paired comparisons of the means comprising the interaction (Table 6) revealed a pattern similar to that found in the global scores. As predicted, subjects in the attorney, personal condition were significantly more consistent than subjects in the judge, formal condition, $t(55) = -.436$, $p < .001$, one-tailed. Attorneys were able to positively influence juror consistency by engaging in the interpersonal behaviors; the change scores for subjects in the attorney, personal condition were significantly smaller than the change scores in the attorney, formal condition, $t(57) = -2.65$, $p < .01$, one-tailed. There were no significant differences on change scores in the judge, personal and the judge, formal conditions, $t(50) = 1.27$, n.s., indicating that regardless of his interpersonal style, the judge was unable to improve on the consistency of jurors replies on this variable.

Public Self-Awareness. A 2 × 2 (target × style) analysis of variance of change scores on the PSA questionnaire revealed a significant interaction of target and style on change scores $F(1,107) = 4.625$, $p < .03$, as predicted; however, results of a planned comparison between the changes scores in the attorney, personal ($M = -2.32$) and judge, formal conditions ($M = -1.31$), revealed no significant differences, $t(55) = -1.02$, $p > .90$.

DISCUSSION

Results of the manipulation checks indicate that the study was quite successful in establishing both psychological and mundane realism. Subjects rated

Table 5. Summary of 2 × 2 (Target × Style) Univariate Analysis of Variance of Four Subscales of ATLIQ

Subscale	MS	*df*	*F*	*p*
Treatment of minorities	5.76	1	2.65	.1024
Sociolegal Issues	.52	1	.68	.5846
Criminal justice personnel	28.68	1	7.60	.0069
Deterrence through punishment	.91	1	.90	.6521

Table 6. Mean Change Scores for Target × Style Interaction on Attitudes Toward Criminal Justice Personnel Subscale of ATLIQ

Target	Personal *M*	Formal *M*
Attorney	2.58[a]	9.71[b*]
Judge	17.42[c*]	13.85[c]

Means that do not share a common superscript are significantly different at the .05 level. Higher scores indicate *greater* change from pretest to incourt attitude reports.

* Means differ significantly at .05 level by the Newman-Keuls procedure.

the trials as highly realistic; they were convinced of the authenticity of the judges and the attorneys; and the manipulations successfully elicited the attitudinal set found among most potential jurors, i.e., the desire to be selected (Broeder, 1965). Jury-eligible community residents, randomly selected from the voter registration list, were enlisted, and analysis of subjects demographic data reveals that participants represented an extremely diverse group of jurors in terms of race, sex, age, occupation, income, and education level.

The hypothesis that jurors would be more consistent in their attitude reports when interviewed by an attorney rather than a judge was supported by the presence of significant main effects of target on the global scores and on three of the four subscales of the ATLIQ. Subjects changed their answers almost twice as much when questioned by a judge as they did when interviewed by an attorney. Essentially subjects were considerably more candid in disclosing their attitudes and beliefs about a large number of potentially important topics during an attorney-conducted voir dire. Importantly, in none of the cases were judges more effective than attorneys, a finding that contradicts previous assertions that a judge-conducted voir dire will elicit greater juror candor than an attorney-conducted voir dire (Levit et al., 1971).

In reviewing the changes in subjects' answers, it appears that there may be implicit pressures in the courtroom toward conformity to a "perceived standard" that differs depending upon who conducts the voir dire. A pilot study (Jones, 1984) examined subjects' perceptions of how judges and attorneys would stand on the issues being investigated during the voir dire. Essentially, subjects were asked how they thought a judge and an attorney would answer the 29 relevant questions on the ATLIQ. Subjects perceived judges as holding extremely conservative positions on the issues, whereas attorneys were viewed as holding rather liberal opinions. Subjects' own views fell midpoint between these extremes. Applying these results to the present study, it seems from the direction and magnitude of the change scores that during a judge-conducted voir dire jurors attempted to report not what they truly thought or felt about an issue, but instead what they believed the judge wanted to hear. Essentially, in the judge voir dire conditions, subjects with moderate opinions about the issues gave very conserva-

tive replies to a very conservative target, revealing a "conservative shift." Apparently, by virtue of his status and authority, the judge was established as the standard of comparison, and jurors sought to conform their attitude reports to this standard. Interestingly this shifting was not as strong during the attorney-conducted voir dires. If subjects were attempting to conform their replies to the attorney standard, their attitude scores would have been in the opposite direction, approaching the perceived attorney norm of liberalism. This was not the case. In the attorney condition, moderate subjects gave slightly conservative replies to a liberal target. This slight conservative shift apparently stems from subjects' awareness of the presence of the judge during an attorney voir dire. Although some pressure to conform to the more powerful target remains, interactions with the attorney either put subjects more at ease, and subsequently more comfortable with giving their true opinions, or simply distracted their attention from the judge. While the judge's presence continues to exert some pressure toward conformity during an attorney-conducted voir dire, as evidenced by the slightly conservative positions taken by subjects, the pressure appears to be considerably less so than in the judge-conducted voir dire conditions.

Hypothesis 1 was concerned with the relative effectiveness of judges and attorneys in eliciting candid juror self-disclosure given their respective characteristic courtroom behaviors. Analyses of the global scores of the ATLIQ revealed a strong trend toward the predicted interaction; however, it failed to reach significance. Analyses of the subscales comprising the ATLIQ revealed a significant interaction of target and style on the subscale measuring attitudes toward criminal justice personnel.

Comparison of the means comprising the interaction on this subscale suggest that subjects in the attorney, personal condition were more honest in their replies than subjects in the attorney, formal condition, although subjects in the latter condition were still more consistent than subjects in either judge condition. Essentially, attorneys, even when they did not utilize the interpersonal behaviors found to facilitate self-disclosure, were still able to elicit greater candor than judges. Apparently, the role status of the target alone is a compelling influence on juror candor in the courtroom.

Hypothesis 2 predicted that judges could improve their effectiveness by incorporating the interpersonal behaviors found to facilitate self-disclosure. Inspection of the means comprising the interaction suggest that judges were unable to improve their effectiveness, regardless of how they related to jurors. At present it appears that interpersonal style does not make a difference for judges in facilitating self-disclosure, although it does positively influence liking. Apparently, the judge's role as an authority figure outweighs any influence that interpersonal style might have. A warm, friendly judge is just as much a judge as a cool, aloof judge, and apparently role-identity remains salient in the minds of jurors.

The predicted main effect of style on change scores (hypothesis 4) was not demonstrated on either the global score or the subscales of the ATLIQ. Although the manipulation checks revealed that subjects perceived the targets in the personal condition as offering self-disclosure to them, a single, moderate self-disclosure may not be potent enough to elicit the expected reciprocity effect.

The predicted interaction of target and style on levels of public self-awareness (hypothesis 5) was not demonstrated. Instead, subjects' levels of public self-awareness decreased significantly over the course of the voir dire under all four conditions. Habituation may have competed with target and style influences, eliminating their effectiveness.

One surprising finding in the present study was the large difference between males and females in the consistency of their attitude reports during voir dire. There was a significant main effect of sex on change scores. Females changed their attitude reports during the voir dire by an average of 26.39 points, whereas males changed their answers an average of 15.43 points. Interestingly, sex did not interact with target or style; females distorted their replies to a greater degree than males regardless of who conducted the voir dire or how they behaved. Since both targets were male, it is possible that females find disclosing their true attitudes and beliefs to a male target very difficult. Sex role socialization in Western society encourages females to be cooperative whereas males are encouraged to be independent and assertive. Thus, females may be more powerfully influenced by the implicit pressures to conform to the perceived standards than males. They may have feared appearing deviant, especially to a male target.

In sum, empirical support was found for Broeder's (1965) observation that jurors often distort their replies to questions posed during the voir dire. In the present study, inconsistency in attitude reports cut across all age, income, and occupational groups. Even three ministers in the present study significantly altered their attitude reports. Essentially, the presumption was not supported that potential jurors who have taken an oath to tell the truth, the whole truth, necessarily do so. Of course, jurors may not be deliberately distorting their answers, but instead, responding unconsciously to pressures toward social conformity. Whatever the underlying mechanisms, it is apparent that jurors are not as candid as we presumed.

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Memorandum Prepared by Judge Walter R. Mansfield

RULE 47(a): ATTORNEY ROLE IN THE VOIR DIRE

Federal Rule of Civil Procedure 47(a) gives the court broad discretion as to who conducts the voir dire examination. Specifically, Rule 47(a) provides that the judge may conduct the examination or allow the attorneys to conduct the examination. If the judge so desires, he may deny the attorneys the opportunity to ask any questions directly to the potential jurors:

> (a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

Fed. R. Civ. P. 47(a).

The American Bar Association has maintained that counsel should have the right to participate orally in the voir dire examination. The ABA has proposed a new Rule 47(a) which would provide as follows:

> (a) Examination of Jurors. The court shall permit the parties or their attorneys to conduct oral examination of prospective jurors. The court may inquire of prospective jurors as a supplement to the examination by the parties.

Quoted at 97 F.R.D. 559 (1983). A bill to amend Rule 47(a) in a similar fashion was introduced into the Senate on March 3, 1983, by Senator Heflin. That bill, S. 677, provides:

> (a) Examination of Jurors. The court shall permit the parties or their attorneys to conduct the oral examination of prospective jurors, and may, in addition to such

> examination, conduct its own examination. The court may impose such reasonable limitations as it deems proper with respect to the examination of prospective jurors by the parties or their attorneys, except that the defendant or his attorney and the attorney for the Government may each request, and shall be granted not less than thirty minutes for such examination. In cases where there is more than one defendant, the court shall allow the attorneys for such defendants an additional ten minutes for each additional defendant.

This paper analyzes the current practice of voir dire in the federal courts, the rationale supporting that practice, and the arguments favoring the ABA proposal and S. 677.

PRESENT PRACTICE

Over the past quarter century, there has been a gradual erosion of the oral participation of attorneys in the voir dire examination. Today, most federal district courts exercise their discretion under Rule 47(a) to deny attorney participation in the questioning of potential jurors. A 1977 Federal Judicial Center survey of all federal district judges found that 69% of the judges do not allow attorneys to ask questions during the voir dire. The Conduct of Voir Dire Examination: Practices and Opinions of Federal District Judges 8 (1977). In 1969, that figure was 56%, thus suggesting that attorney involvement in the voir dire examination in federal courts is decreasing. Committee on the Operation of the Jury System, Judicial Conference of the United States, Report on Voir Dire Procedures (1970).

State courts vary significantly in their practices with respect to attorney participation in the voir dire. Seven states require voir dire questioning exclusively by the judge,

twelve states contemplate questioning by both the attorneys and the judge; sixteen states contemplate questioning by the attorneys alone; and fifteen states and the District of Columbia have a rule substantially similar to Fed. R. Civ. P. 47(a). Federal Judicial Center, The Conduct of Voir Dire Examination: Practices and Opinion of Federal District Judges 17-19 (1977).

There appears to be a significant correlation between federal practice with respect to the voir dire examination and the practice of the state within which the federal court sits. An analysis of federal practice indicates that the highest level of oral participation by attorneys in the federal voir dire occurs in states with rules of procedure that favor attorney participation.

These restrictions on attorney participation in the voir dire have consistently withstood judicial scrutiny as the courts have uniformly upheld the right of federal district judges to deny attorneys the opportunity to question potential jurors directly. See, e.g., Perry v. Allegheny Airlines, Inc., 459 F.2d 1349 (3d Cir. 1974), Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972), James v. Continental Insurance Co., 424 F.2d 1264 (2d Cir. 1970). Although a few commentators have argued that attorneys and their clients have a constitutional right under the Sixth Amendment to attorney-conducted voir dire, at least in criminal trials, the court appears to have

adopted that view. See Gutman, "The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right," 39 Brooklyn L. Rev. 290 (1972). However, the courts have on occasion been willing to find that the judge-conducted voir dire was inadequate and remanded for a new trial. See, e.g., Darbin v. Nourse, 664 F.2d 1109 (9th Cir. 1981); Fietzer v. Ford Motor Co., 622 F.2d 281 (7th Cir. 1980); Kiernan v. Van Schaik, 347 F.2d 775 (3d Cir. 1965).

RATIONALE SUPPORTING RULE 47(a)

The primary purpose of the voir dire is to determine if the potential juror can impartially participate in the deliberation on the issues of the case based solely on the law and evidence as presented at trial, or whether that juror has certain biases which would hinder fair deliberation. Subsidiary to that purpose is the goal of providing the attorney with a procedure by which he may obtain information to exercise peremptory challenges intelligently. Indeed, those appeals courts which have ordered new trials on the ground of inadequate judge-conducted voir dire have done so on the ground that the voir dire examination did not adequately probe potential juror bias. See, e.g., United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); Kiernan v. Van Schaik, 347 F.2d 775 (3d Cir. 1965).

In accord with that purpose, there are two rationales supporting judge-conducted voir dire. First, proponents of the current rule argue that the judge can adequately probe

for juror bias, and can do so in a much shorter time than can the attorneys, thereby contributing to judicial economy without sacrificing important procedural protections.

Various studies have attempted to identify the difference in length of time consumed by the voir dire examination in which attorneys directly participate and those in which the attorneys do not directly participate. One study, based on civil trials and twelve-person juries, reported a mean duration for judge-conducted examinations of 64 minutes and a mean duration for combined judge-attorney examination of 111 minutes. Levit, Nelson, Ball & Chernick, "Expediting Voir Dire: An Empirical Study," 44 S.Cal.L. Rev. 916 (1971). A reanalysis of the data collected in that study, however, suggests a mean duration of 52.6 minutes for judge-conducted examinations and 68 minutes for combined examinations, a smaller difference between the two types of examinations than reported in the earlier study. National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, Department of Justice, A Guide to Jury System Management (1975). Although the actual difference in time between the two forms of examination is difficult to measure, most commentators would agree that the attorney-conducted voir dire takes longer than the judge-conducted voir dire. Proponents of the current rule thus argue that judges can do just as well as attorneys in rooting out juror bias and can do it in a shorter period of time.

Second, proponents of the current rule argue that attorneys have an additional, illegitimate purpose in wanting to participate in the voir dire examination: influencing the jury in favor of the attorney's client. There is no question that attorneys who are allowed to directly question the venire attempt to use that questioning session to foster jury sympathy. There are a number of means by which to gain this sympathy and they are clearly laid out in any trial practice textbook: establishing friendly rapport with jurors, providing the jurors with the attorney's view of the facts and law in the case, introducing damaging facts to the jury as a means of lessening the impact of those facts when they are introduced at trial, and pre-committing jurors to a particular opinion about the case. See, e.g., Ginger, Jury Selection in Criminal Trials 275-85 (1975) (discussing means by which to use the voir dire to favorably influence the jury). Indeed, reports from the Chicago Jury Project indicate that attorneys devote about half of their voir dire time to selling their case to the venire panel. H. Zeisel, H. Kalven & B. Buchholz, Delay in Court 103 n.9 (1959). Proponents of the current rule argue that these tactics are unrelated to the legitimate purpose of the voir dire -- rooting out juror bias -- and can only serve to subvert the effort to secure a fair trial for both parties. The 1977 Federal Judicial Center study indicates that those judges who do not allow attorneys to

participate directly in the voir dire examination believe that jury selection should precede the adversarial aspect of the trial, whereas those judges that do allow attorney participation in the voir dire believe that jury selection is a legitimate part of the adversarial part of the trial. The Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges 36 (1977).

OPPOSITION TO RULE 47(a)

Opposition to the denial of attorney participation in the voir dire examination centers on criticism of the judge's performance in conducting the examination. In particular, opponents of the current rule argue that the court's voir dire is generally superficial and perfunctory and inadequate in terms of probing juror bias. They argue that juror bias is difficult to detect and a careful, extensive voir dire is necessary to uncover potential bias. Without such an extensive voir dire, the attorney cannot exercis his peremptory challenges intelligently, thereby reducingthe chance that his client will receive an unbiased hearing before the jury. Another argument is that jurors are too overawed and intimidated by the judge's presence to answer his questions fully or to volunteer material information bearing on their ability to be objective, whereas they feel more comfortable and involved when questioned individually by counsel and not as inhibited by the presence of other panelists as they otherwise would be. Thus, whatever additional time is required by allowing the attorneys to participate in

the voir dire examination, the argument goes, is certainly worth it in terms of achieving a substantively better jury. The issue is therefore whether counsel, through oral participation in the voir dire, can detect bias more easily than can the judge through his examination. Indeed, if it can be said that attorney-conducted voir dire leads to a substantively better jury, small delays in the trial can surely be forgiven.

The commentators are split over the question of whether attorneys are any better than judges at detecting juror bias. Some argue that bias is inherently a nebulous concept that can never be definitively uncovered through a series of questions; others argue that questions about attitudes and life habits can place the potential juror within a cultural stereotype and allow the attorney to make a better guess with his peremptory challenges as to which jurors are more apt to be biased against his client. At best, the evidence is inconclusive. See generally Suggs and Sales, "Juror Self-Disclosure in the Voir Dire: A Social Science Analysis," 56 Ind. L.J. 245 (1981) (concluding that attorneys can better probe for bias than can judges); Babcock, "Voir Dire: Preserving 'Its Wonderful Power,'" 27 Stan. L. Rev. 545 (1975) (concluding that limitations on the voir dire limit the ability of the litigant to exercise his peremptory challenges); Okun, "Investigation of Jurors by Counsel - Its Impact on the Decisional Process," 56 Geo. L.J. 839, 848 (1968) (questioning value of attorney participation in the voir dire examination).

Opponents of Rule 47(a) further argue that even if attorney-conducted voir dire does further the adversarial purposes of the attorneys, that effect does not harm the fairness of the trial and indeed simply makes the voir dire part of the adversarial process. They argue that the net effect when opposing attorneys attempt to gain an advantage for their clients by conducting the examination in an adversarial spirit is to secure a jury with a more steadfast determination to engage in impartial fact finding than would have been developed under questioning by the judge alone. In effect, they argue that even if voir dire does serve this adversarial purpose, which it surely does, there is no harm to fairness on account of these adversarial efforts.

On the other hand, when the voir dire is considered in light of its original purpose -- the elimination of juror bias -- one questions whether adversarial positioning has any place in the voir dire. The Federal Rules of Evidence have been carefully crafted to insure the legitimacy of evidence that is placed before the jury during trial; to the extent that the attorneys attempt to characterize or construe the facts in a manner favorable to their clients during the voir dire, the protections of the Rules of Evidence are arguably undermined. The response to this, of course, is that the attorneys do just that anyway in their opening and closing statements and thus no harm is done if additional characterizations are made during the voir

dire. Again, the commentators are split on the question of whether these adversarial techniques exercised by the attorneys during the voir dire are "purposes" or "abuses" of the voir dire. See generally Babcock, "Voir Dire: Preserving 'Its Wonderful Power,'" 27 Stan. L. Rev. 545 (1975); Begam, "Voir Dire: The Attorney's Job," 13 Trial 3 (March, 1977); Broeder, "Voir Dire Examinations: An Empirical Study, 38 S. Cal. L. Rev. 503 (1965); Comment, "Voir Dire Examination--Court or Counsel," 11 St. Louis L.J. 234 (1967); Comment, "Judge Conducted Voir Dire as a Time-Saving Technique," 2 Rut.-Cam. L.J. 161 (1970); Comment, Voir Dire in California Criminal Trials: Where is it Going: Where Should it Go?, 10 San Diego L. Rev. 395 (1972-73); Craig, Erickson, Friesen & Maxwell, "Voir Dire: Criticism and Comment," 47 Den. L.J. 465 (1970); Federal Judicial Center, The Conduct of Voir Dire Examination: Practices and Opinions of Federal District Judges (1977); Gutman, "The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right," 39 Brooklyn L. Rev. 290 (1972); Lay, "In a Fair System the Lawyer Should Conduct the Voir Dire Examination of the Jury," 13 Judges J. 63 (July 1974); Levit, Nelson, Ball & Chernick, "Expediting Voir Dire: An Empirical Study," 44 S. Cal. L. Rev. 916 (1971); Okun, "Investigation of Jurors by Counsel: Its Impact on the Decisional Process," Geo. L.J. 839 (1968); Suggs & Sales, "Juror Self-Disclosure in the Voir Dire: A Social Science Analysis," 56 Ind. L.J. 245 (1981).

In short, the debate over whether to amend Rule 47(a) boils down to three issues: (1) can attorneys do a better job at

probing juror bias than can judges; (2) if so, can they do it without significantly lengthening the voir dire process; and (3) do the adversarial techniques which the attorneys invariably employ when they conduct a voir dire examination in any way harm the integrity of the judicial process. Reasonable people have differed as to the answer to those questions. Whether Rule 47(a) should be amended depends upon which set of answers are more persuasive.

If the Committee should decide that Rule 47(a) should be amended to give parties or their attorneys the right to question prospective jurors on the voir dire, the recommendations of the ABA and of S. 677 offer two alternatives. Another would be to have the rule provide that the parties or their attorneys shall have the right, after the judge examines the prospective jurors, to exmaine them with respect to any matter not explored by the judge, i.e., to engage in non-duplicative examination.

WRM
12/15/83

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 10, 1995
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at Administrative Office of the United States Courts in Washington, D.C. on April 10, 1995. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m on Monday, April 10, 1995. 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
Hon Daniel E. Wathen
Prof. Stephen A Saltzburg
Mr. Robert C Josefsberg, Esq
Mr. Darryl W. Jackson, Esq
Mr. Henry A. Martin, Esq.
Mr Roger Pauley, Jr., designate of Ms Jo Ann Harris, Asst Attorney General
Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee, Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; and Mr. James Eaglin from the Federal Judicial Center.

The attendees were welcomed by the chair, Judge Jensen who introduced a new member of the Committee, Mr. Josefsberg. Judge Jensen also noted that he had asked Judge Crow to serve as the Committee's liaison to a subcommittee of the Court Administration and Case Management Committee; that subcommittee is studying the issue of management of criminal cases. At this point, he noted, no action was required by the Advisory Committee

II. APPROVAL OF MINUTES OF OCTOBER 1994 MEETING

Judge Marovich moved that the minutes of the Committee's October 1994 meeting in Santa Fe, New Mexico, be approved Judge Wilson seconded the motion which carried by a unanimous vote

III. CRIMINAL RULES APPROVED BY THE SUPREME COURT AND FORWARDED TO CONGRESS

The Reporter informed the Committee that the Supreme Court had approved and forwarded to Congress proposed amendments to four rules, which became effective on December 1, 1994: Rule 16(a)(1)(A)(statements of organization defendants); Rule 29(b)(Delayed ruling on judgment of acquittal); Rule 32 (Sentence and Judgment), and Rule 40(d) (Conditional release of probationer). The final version of the amendments to Rule 32 included a victim allocution provision inserted by Congress

IV. RULES APPROVED BY JUDICIAL CONFERENCE AND FORWARDED TO THE SUPREME COURT

The Reporter informed the Committee that the Judicial Conference had approved several proposed amendments and forwarded them to the Supreme Court for its review. Rule 5(a)(Initial Appearance Before the Magistrate), Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice), and Rule 57 (Rules by District Courts). As of the date of the Committee's meeting, the Supreme Court had not acted on the proposed amendments

V. RULES APPROVED BY STANDING COMMITTEE FOR PUBLICATION AND COMMENT

The Committee was informed by the Reporter that written comments and testimony had been submitted on the two rules which the Standing Committee had approved publication and comment: Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements); and Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing). He informed the Committee that the deadline for submitting written comments on the proposed amendments was February 28, 1995 and that a public hearing on the proposed amendments was held on January 27, 1995 in Los Angeles, California.

A. Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements)

The Reporter informed the Committee that although several commentators approved of all of the changes in Rule 16, almost all of the comments specifically addressed the proposed amendments in Rule 16(a)(1)(F) and (b)(1)(D) dealing with disclosure of witness names and statements. All of the comments expressed support for the proposed amendments; but some suggested changes to the text. No commentator expressed disagreement with the provision governing discovery of experts in Rule 16(a)(1)(E) and 16(b)(1)(C)..

Following a brief summary of the written comments and testimony, Judge Crigler raised the question of whether the provision addressing disclosure of witness names and statements should apply to misdemeanor cases. He noted that the trial of petty offense and misdemeanor cases does not lend itself to the notification provision proposed in the rule Other members agreed with Judge Crigler, who ultimately moved that the rule be limited to felony trials. Judge Davis seconded the motion Following additional brief discussion, which focused on the issue of whether the disclosure provision would ever be practicable in misdemeanor cases, because of the highly abbreviated pretrial processing times, the Committee adopted the proposed change to the amendment by a unanimous vote.

Regarding the seven-day provision in the proposed amendment, Mr. Pauley urged the Committee to reduce the time to three days. He noted that United States attorneys often do not know for sure who their witnesses will be within seven days of trial. In those cases, he stated, the defense will argue that the government has not complied with the rule. He recommended that preclusion of testimony should only take place where the government has intentionally failed to disclose the information. In response to a comment from Professor Saltzburg, Mr Pauley stated that the Department of Justice's proposed changes were not being offered as a compromise, but rather to improve the rule. Even if all of the amendments were adopted, he said, the Department's opposition to the rule would remain.

Judge Marovich expressed concern about any further delays in considering DOJ proposed changes. The question, he said, is whether the federal courts should adopt a system which is widely used and accepted in the state courts and in most federal trials. In his view, the current draft of the amendment gives the government absolute control over disclosure. The timing issue, he said, was simply a red herring.

Judge Smith echoed the concerns expressed by Professor Saltzburg and Judge Marovich but observed that the Department of Justice had a right to be heard on the issues being discussed. Judge Wilson responded that the Department was making a political issue out of the proposed amendment.

Judge Dowd indicated that perhaps the rule should be amended to extend the time to a period of 14 days before trial. Judge Jensen noted that other rules include a 10-day notice provision. Judge Marovich indicated that at worst, a late disclosure would delay the trial. Mr. Pauley reminded the Committee that Congress has adopted a three-day notice provision in capital cases. Judge Jensen observed that the Department had supported 15-day notice provisions in newly enacted rules of evidence governing use of propensity evidence in sexual assault cases -- Rules 413-415.

Professor Saltzburg observed that the Department of Justice did not oppose the seven-day notice provision in the amendments to Rule 32 dealing with sentencing and he encouraged the Committee to reject any amendment which would focus on the willfulness of delayed notification. Mr. Pauley responded that the Department was not as concerned about losing discovery motions as it was about the practicality of the seven-day provision. Justice Wathen observed that in his experience the parties deal with a more realistic list of witnesses. Judge Marovich added that the hallmark of a federal prosecution should be a good witness list.

Mr. Pauley moved that the rule be amended to reflect a three-day notice provision The motion failed for lack of a second.

Responding to several commentators who urged the Committee to include provision for disclosure of government witnesses' addresses, Judge Jensen reminded the Committee that the provision had been in an original draft but removed at the urging of the Department of Justice. Judge Crigler expressed serious reservations about requiring the government to produce the witnesses for defense interviews. And Mr. Martin indicated that the Committee Note is silent regarding the Department's assurance that it would assist the defense in speaking to witnesses

In the absence of any motion to change the draft with regard to disclosure of witness addresses, the discussion turned to the question of whether the rule or the accompanying note should specifically include reference to FBI 302's which may include witness statements. Several members questioned whether such documents were statements within the meaning of Rule 26.2. Judge Jensen pointed out that including such reports within the definition at this point might be considered a major change to the proposed amendment which would probably require re-publication for public comment. Following further discussion, the consensus was that the matter should not be included in the current amendment

Judge Jensen advised the Committee that several commentators had raised the issue of what was meant by "unreviewable" in the proposed amendment; a number expressed concern that that language placed too much power in the hands of the prosecutor. Judge Wilson responded that the current language was a workable package which would be acceptable to Congress Judge Marovich noted that the current language

was a major compromise. Mr. Martin raised the question of whether a judge might see nondisclosed evidence in such nonreviewable statements which might later be considered on sentencing. Judge Jensen responded that if the sentencing judge is considering such factors, he or she must disclose that information to the defense.

Following a discussion on how much information the prosecutor should disclose under the amendment, the Reporter suggested a minor amendment in the language. The Committee ultimately voted 9 to 0, with two abstentions, to substitute the following language: "an unreviewable written statement indicating why the government believes in good faith that either the name or statement of a witness cannot be disclosed."

Mr. Pauley expressed concern that in certain types of cases, such as in civil rights cases, a witness may fear economic reprisals, which is not a reason under the proposed amendment for not disclosing the witness' name or statement. Professor Saltzburg pointed out that the Department's position would swallow the rule because the exception proposed would be entirely too large. Judge Marovich noted that the names will become known when the witnesses are called so at the most, the witness may receive some pretrial protection from disclosure. Judge Crigler noted that the Department should protect its witnesses and Judge Smith noted that the same potential problem exists with regard to disclosing the names of jurors. Mr. Jackson observed that the defendant has a strong interest in being presumed innocent.

In the absence of any motion to amend the proposal, Mr. Pauley commented on his continuing concern with the potential conflict with the Jencks Act. He stated that the Advisory Committee had not yet tested the supersession clause in the Rules Enabling Act and argued that the judiciary should pursue the legislative process for seeking a change. Mr. Martin responded by pointing out that the Department's argument had been implicitly rejected in the procedures for establishing and amending the sentencing guidelines. Professor Saltzburg added that the Standing Committee's amendment several years ago to Federal Rule of Evidence 609 was clearly an example of offering an amendment to rules specifically promulgated by Congress.

Judge Dowd raised again the question of whether FBI 302's would be covered under the proposed amendment to Rule 16. Judge Jensen suggested that the matter should be considered at the Committee's next meeting as a possible amendment to Rule 26.2(f). Judge Dowd moved that the Rule 16 be amended to substitute the words, "a brief summary of the witness' testimony." The motion failed for lack of a second. The Reporter indicated that the issue could be addressed in the Committee's report to the Standing Committee.

The discussion turned to the issue of reciprocal discovery under the proposed amendment. The consensus was that the proposed language presented a workable compromise. Mr. Martin moved that the amendment requiring reciprocal defense discovery be revised to make an exception for "impeachment witnesses." The motion

failed for lack of a second. Judge Dowd noted that the defense may not always know who its witnesses will be and Professor Saltzburg responded that both sides have a continuing duty to disclose.

Judge Marovich moved that the amendments to Rule 16 be forwarded to the Standing Committee with a recommendation to approve and forward them to the Judicial Conference. Judge Crow seconded the motion which carried by a vote of 11 to 1.

C. Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing)

The Reporter summarized the few comments which had been received on the proposed amendment to Rule 32, including a number of proposed changes from the Department of Justice. Mr. Pauley noted the Department's changes focused on three areas. First the newer version of the rule would permit the forfeiture proceedings to begin earlier in the process; second, the newer version of the amendment would remove the requirement of a hearing; and third, the rule would require the judge to enter an order as soon as practicable. He explained that the newer version tracked a version sent to Congress by the Department.

Professor Saltzburg raised the question about the political reality of the Department's proposal. Mr. Pauley responded that he was not sure what Congress would do with the Department's proposed amendment.

Judge Dowd noted that the question about forfeiture proceedings only arises if the indictment raises the issue, the Ninth Circuit has ruled that if the forfeiture proceeding is conducted separately it violates double jeopardy. Following brief discussion about whether the proposed changes by the Department of Justice amounted to major changes, Judge Crigler moved that the amendment, as changed, be forwarded to the Standing Committee. Judge Davis seconded the motion, which carried by a vote of 11 to 0, with Mr. Josefsberg abstaining. It was also suggested that the Committee Note include reference to the fact that the final order might include a modification of the court's preliminary order and that the amendment would benefit the defense because counsel will now know what procedures are to be used.

VI. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 11(d). Questioning Defendants re Prior Discussions with Attorney for the Government

The Reporter informed the Committee that Judge Sidney Fitzwater had suggested that the Committee consider amending Rule 11(d), which currently requires the court as part of the providency inquiry to ask whether the defendant has engaged in prior discussions with an attorney for the government. Judge Fitzwater believes that the question is often confusing to the defendant. The Reporter provided a brief overview of the requirement, which was added in a 1974 amendment to Rule 11 in an attempt to insure that guilty pleas are voluntary.

Judge Jensen observed that the purpose of the requirement in Rule 11 seemed to serve a sound purpose. Other members expressed the same view.

There was no motion to amend Rule 11.

B. Rule 24(a). Trial Jurors; Proposal re Voir Dire by Counsel

The Reporter and Judge Jensen reviewed the topic of possible amendments to Rule 24(a) regarding attorney participation. They noted that a similar proposal had been considered by the Civil Rules Committee, that a considerable amount of material, including relevant articles and survey materials, had been sent to the Committee members They added that opposition had been expressed to any attempts to increase the level of participation by attorneys or the parties Judge Crigler noted that there was strong opposition from the judges in the Fourth Circuit.

Judge Jensen also noted that Judge Easterbrook had forwarded the results of his poll of Seventh Circuit judges; but Judge Jensen raised the questioned whether there should also be some input from the practicing bar. Mr. Josefsberg agreed that non-judges should be polled Judge Wilson pointed out that there was another important issue which should be addressed, the perception of justice. He noted that people generally do not believe that they are being treated fairly when they cannot take part. Judge Davis agreed with that position but noted that many judges fear the slippery slope of counsel participation. Judge Jensen added that he could not agree with the apparent competition to reduce the time used to select a jury because picking a jury was much too important for that.

Judge Crigler stated that in his experience all judges do permit some supplemental questioning, a point to which Mr. Josefsberg responded that as with the amendments to Rule 16, there was a need to promote consistency re questioning by counsel. Justice Wathen observed that his state does not permit voir dire by counsel, but trial judges permit it anyway.

Judge Marovich provided additional comments about the background of attorney-conducted voir dire and Professor Saltzburg stated that while he believes in participation by counsel, he was generally not in favor of any amendment to Rule 24. He subsequently

moved that a draft amendment presented by the reporter be considered by the Committee. Mr. Jackson seconded the motion. Following additional discussion on the draft and possible amendments to it, the Committee voted 9-2 to forward the amendment to the Standing Committee with the recommendation that the amendment be published for public comment

C. Rule 26. Proposed Amendment to Require Notification to Defendant of Right to Testify.

The Reporter informed the Committee that Mr. Robert Potter had written to the Committee recommending that the Federal Rules of Criminal Procedure should be amended to require the trial court to advise the defendant of the right to testify. Mr. Potter noted that such an amendment would greatly reduce post-conviction attacks based on the ground that the defendant was never told, by counsel or the court, of the right to testify at trial

Judge Jensen raised the practical question of how the trial court is supposed to learn whether or not a defendant has been advised of the right. And Judge Marovich observed that it is normally assumed that the defendant is aware of his or her right to testify. While Judge Wilson noted that he might start asking defendants if they are aware of the right, Judge Davis noted that doing so might unnecessarily infringe upon the attorney-client relationship. Mr. Pauley added that the majority of the cases do not support the proposed amendment. While such questioning by the court might be sound practice, if it is started, how could it be determined that failure to give the advice was harmless error. Justice Wathen believed that the proposal was illusory and Judge Dowd indicated that if the court believes that there may be a problem, it may consult with the defense counsel in the same way that counsel may be consulted about proposed instructions where the defendant has not taken the stand. Mr. Josefsberg stated that he was not sure that there was a problem worthy of an amendment; he added that to inquire into whether the defendant had received the advice would be very delicate vis a vis the role of counsel, especially where the defendant wants to be untruthful.

There was no motion to amend the Rules.

D. Rule 35(c). Possible Amendment to Clarify the Term "Imposition of Punishment."

The Reporter indicated that in response to a recent decision from the Ninth Circuit, *United States v. Navarro-Espinosa*, 30 F.3d 1169 (9th Cir. 1994), a question had been raised whether the timing requirements in Rule 35(c) for correcting a sentence ran from the date of the court's oral announcement of the sentence or from the formal entry of the judgment. He noted that his review of the Committee's notes and correspondence had

failed to provide any definitive answer to what the Committee had intended. He added that in any event, a specific amendment to Rule 4 of the Appellate Rules of Procedure provided that filing a notice of appeal does not divest the trial court of jurisdiction to correct its sentence. Following brief additional discussion, it was decided that if any amendment was to be made, it could be made during any subsequent global amendments of the rules.

E. Rule 58. Possible Amendment to Clarify Whether Forfeiture of Collateral Amounts to Conviction.

Magistrate Judge Lowe had recommended that the Committee consider an amendment to Rule 58 to clarify whether forfeiture of collateral amounted to a conviction. Judge Crigler noted that the issue is not covered by Rule 58 and recommended that because the practice seems to vary, it might be better for now not to address the issue in Rule 58 The Committee generally agreed with that view.

VII. RULES AND PROJECTS PENDING BEFORE STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Status Report on Local Rules Project; Compilation of Local Rules for Criminal Cases

The Reporter indicated that Professor Coquillette was still working on the project of compiling local rules dealing with criminal trials At this point no further action was required by the Advisory Committee.

B. Status Report on Pending Crime Bill Amendments Affecting Rules of Criminal Procedure.

Mr. Pauley and Mr. Rabiej provided a brief review of possible amendments pending in Congress. None required action or attention by the Advisory Committee.

C. Status Report on Federal Rules of Evidence Pending in Congress.

Mr. Rabiej indicated that the Judicial Conference's proposed changes to Federal Rules of Evidence 413-415 had been forwarded to Congress and that although there had been some initial discussions with staffers about the proposals, no action had yet been taken by Congress on the matter.

VIII. MISCELLANEOUS

A. Appointment of Liaisons to Advisory Committees.

The Reporter indicated that the Committee had been contacted by members of the American Bar Association that a formal liaison be recognized by the Committees. Mr McCabe noted that the matter had been considered by the Civil Rules Committee and that it was not possible to formally appoint any liaisons to the Advisory Committees. Instead, the Committee could informally treat certain persons as points of contact with a particular organization He indicated that a letter to that effect had been prepared.

B. Forums Conducted by Advisory Committees

The Reporter indicated that the Civil Rules Committee had conducted a successful forum discussion on the Rules of Civil Procedure and questioned whether the Criminal Rules Committee might be interested in a similar project The Committee members generally agreed that the matter was worth pursuing

C. Comments on Long Range Planning Report.

Finally, the Reporter reminded the Committee that any comments about the Long Range Planning Subcommittee's Report should be forwarded to Professor Baker. Following brief discussion on the matter, there was a general consensus on the key points raised in the report, especially those portions dealing with the respective roles of the Standing and Advisory Committees

IX. CONCLUDING REMARKS; DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee was reminded that its next meeting would be held at the Equinox Hotel in Manchester, Vermont on October 16th and 17th.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

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

Print

June 5, 1995

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: *Uniform Numbering System for Local Rules*

Proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure that take effect on December 1, 1995, will require all local rules to "conform to any uniform numbering system prescribed by the Judicial Conference of the United States."

The Standing Committee considered the recommendation of the local rules project to adopt a uniform numbering system based in large measure on the Federal Rules of Civil Procedure at its meeting in June 1988. At its September 1988 session the Judicial Conference was advised by the Standing Committee that as part of its study of local rules it noted "there is no uniform numbering system for federal district court local rules." Because of the inherent advantages of such a system the Conference "approved and urged each district court to adopt a Uniform Numbering System for its local rules, patterned upon the Federal Rules of Civil Procedure."

In April 1989, the final report of the local rules project was sent to each district court, including a recommendation to adopt a uniform numbering system based on the Federal Rules of Civil Procedure. A letter following up on the final report was sent to circuit executives on July 20, 1989. Because not all courts adopted a uniform numbering system, the former chair of the Standing Committee, Judge Robert E. Keeton, wrote to all courts on August 25, 1992, reminding them of the Judicial Conference's action and included an example of uniform numbering. (Copy is attached.) Since then, the reporter Professor Daniel R. Coquillette and the local rules project director Professor Mary P. Squiers, have monitored and assisted courts in implementing the recommendations contained in the local rules project, including adoption of a uniform numbering system.

Status of the Uniform Numbering System for Each Set of Rules

Civil - A model uniform numbering system was circulated to each court in 1989. Since the Judicial Conference action in September 1988, a substantial

number of courts have revised their local rules dealing with procedures in civil cases based on the model approved by and circulated by the Standing Committee.

Appellate - A report on uniform numbering system for local appellate rules, including a model numbering system, was circulated to the Chief Judges of the courts of appeals in 1991 for comment.

Bankruptcy - As discussed in more detail in the Report of the Advisory Committee on the Rules of Bankruptcy Procedure, the Bankruptcy Advisory Committee has agreed, in general, on a uniform numbering system. The advisory committee is refining that system and is expected to submit a model to the Standing Committee at its next meeting.

Criminal - Professor Squiers has completed working on the uniform numbering system for local criminal rules. It is included in her materials on the local rule project sent under a separate mailing.

Implementation of Uniform Numbering Systems

The courts have had access to and experience with the model uniform numbering system for civil cases since 1989 and appellate cases since 1991. A model uniform numbering system for bankruptcy cases is being finalized by the Advisory Committee on Bankruptcy Rules, while a model numbering system for criminal cases is now before the committee for its consideration.

The numbering systems for all sets of rules will thus have been completed by the Standing Committee's January 1996 meeting. At that time, the committee can consider recommending to the Judicial Conference at its March 1996 session that it prescribe uniform numbering systems for each set of rules based on the applicable Federal Rules of Appellate, Bankruptcy, Civil, or Criminal Procedure in accordance with the rules amendments that take effect on December 1, 1995. Meanwhile, copies of the pertinent model uniform numbering systems will also have been circulated to all courts.

John K. Rabiej

Attachment

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

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

M E M O R A N D U M

TO: Chief Judges, United States District Courts

INFORMATION COPIES TO: Chief Circuit Judges
Circuit Executives
Members of Circuit Councils
Members of Circuit Committees on District Plans for Expense and Delay Reduction (Established Under 28 U.S.C. §474(a))

FROM: Robert E. Keeton

DATE: August 25, 1992

SUBJECT: Local Rule Renumbering; Integration of Civil Justice Delay and Expense Reduction Plan

In September of 1988, the Judicial Conference of the United States "urged each district court to adopt a Uniform Numbering System for its local rules, patterned upon the Federal Rules of Civil Procedure." Report of the Judicial Conference, 103 (Sept. 1988). Both the need for and the usefulness to the bar and bench of uniform numbering of local rules have become more compelling as district Expense and Delay Reduction Plans have been or will be developed in response to the Civil Justice Reform Act of 1990, 28 U.S.C. §§471 et sequitur.

The Judicial Conference assigned to the Standing Committee on Rules of Practice and Procedure a responsibility for overseeing the Local Rules Project and its work in aid of implementation of the Uniform Numbering System.

Although the Committee on Rules of Practice and Procedure has an ongoing responsibility regarding recommendations to the Judicial Conference, we are sensitive to the fact that we do not have authority with respect to implementation of the Judicial Conference Resolution or with respect to oversight of Expense and Delay Reduction Plans of the various districts. Rather, we understand that authority to be partly in the Circuit Councils, partly in the Circuit Chief Judges and Circuit Committees as provided in the Act of 1990, and partly in the Judicial Conference Committee to which the Conference has delegated responsibility under the 1990 Act -- that is, the Committee on Court Administration and Case Management, chaired by Judge Robert Parker, with whom I have conferred and to whom I am sending a copy of this memorandum. For information, I have attached a memorandum summarizing the statutory provisions in which all these different assignments of responsibility for oversight of local rules are rooted. Also included is the Judicial Conference Resolution on uniform numbering of local rules.

The Committee on Rules of Practice and Procedure is acutely conscious of how much time and effort of judges, staff, and members of the bar in each district are required for full compliance with the Judicial Conference Resolution regarding uniform numbering, and of the added burden incident to keying provisions of Expense and Delay Reduction Plans to the uniform numbering system. We have asked our Reporter, Dean Coquillette, and our Consultant, Professor Mary Squiers, to examine some of the draft Plans now under consideration and to confer with district representatives about keying them into the uniform numbering system. They have prepared a new outline of the Uniform Numbering System that incorporates recommendations about ways of designating rules adopted as parts of a district Expense and Delay Reduction Plan. Their new outline and a memorandum from Professor Squiers on this subject are being sent to you along with this memorandum.

I request your help in achieving the Judicial Conference goal of Uniform Numbering. If Dean Coquillette, Professor Squiers or I can be helpful in any way to you or to any group in your district that is working on this matter, we would welcome a letter or call from you.

Robert E. Keeton

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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BANKRUPTCY RULES

Memorandum

TO: Hon. Robert E. Keeton

FROM: Mary P. Squiers

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

DATE: August 19, 1992

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

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

This memorandum consists of three sections: 1. Proposed Numbering; 2. Renumbered Local Rules; and, 3. Alphabetical List of Local Rule Topics. I believe the first section setting forth the proposed numbering is quite easy to follow. The rules of the fictitious jurisdiction are listed down the left side of the page. The proposed numbering, in compliance with the recommendation of the Local Rules Project and the Judicial Conference, is on the right side of the page. The second part of the document actually sorts the local rules in this fictitious jurisdiction as they would appear after the renumbering. The new numbers are listed down the left side of the page in order. On the right side of the page are the titles of the rules with the old numbers in parentheses. The third part is simply an alphabetical list of the local rule topics used by the fictitious jurisdiction. To the left of each of the topics is a reference to the cognate local rule.

Part 1. Proposed Numbering

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

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

Chapter II—Civil Rules

200.	Institution of Civil Proceedings.	
	200-1. Identification of Counsel.	LR11.1
	200-2. Caption and Title.	LR10.1
	200-3. Jury Demand.	LR38.1
	200-4. Class Actions.	LR23.1
	A. Complaint.	
	B. Class Certification.	
	C. Restrictions Regarding Communications with Actual or Potential Class Members.	
	200-5. Three-Judge Court.	LR9.2
	200-6. Claim of Unconstitutionality.	LR24.1
	200-7. Social Security Cases.	LR9.1
205.	Differentiated Case Management[1]	
	205-1. Purpose and Authority.	LR16.2CJ or LR40.1CJ
	205-2. Definitions.	LR16.2CJ
	205-3. Date of DCM Application.	LR1.1CJ
	205-4. Conflicts with Other Rules.	LR1.1CJ
	205-5. Tracks and Evaluation of Cases.	LR16.2CJ
	205-6. Case Information Statement.	LR16.2CJ
	205-7. Track Assignment and Case Management Conference.	LR16.2CJ
	205-8. Status Hearing and Final Pretrial Conference.	LR16.2CJ
	205.9. Alternative Dispute Resolution.	LR16.2CJ

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[1] Some jurisdictions may provide for assignment of a trial date at a pretrial hearing or in a pretrial order so that placing this rule under Federal Rule 16 is appropriate. Others may prefer that such a local directive be placed under Federal Rule 40 on assignment of cases for trial. This decision is left to the individual districts to better conform to local practice. Most of the provisions of Local Rule 205, then, can be placed in one of two places; Local Rule 205-1 is illustrative. *See also* Local Rules 206 and 255.

		Proposed Numbering
206.	Early, Firm Trial Dates[2]	
206-1.	Presumptive Trial Date.	LR16.3CJ or LR40.2CJ
206-2.	Firm Trial Date for Track "A" Cases.	LR16.3CJ
206-3.	Firm Trial Date for Track "B" and "C".	LR16.3CJ
206-4.	Continuances After Firm Trial Date is Set.	LR16.3CJ
206-5.	Parties Informed of Case Status.	LR16.3CJ
210.	Service of Pleadings and Other Papers.	
210-1.	Service by Mail.	LR4.1
210-2.	Proof of Service.	LR5.2
210-3.	Filing with the Court.	LR5.1
215.	Motion Practice.[3]	
215-1.	Motions; to Whom Made.	LR7.1
215-2.	Notice and Supporting Papers.	LR7.1
215-3.	Opposition and Reply.	LR7.1
215-4.	Briefs and Memoranda.	LR7.1
A.	When Required.	
B.	Form of Briefs, Memoranda, and Appendices.	
C.	Contents of Briefs.	
D.	Contents of Appendices.	
E.	Number of Papers.	
215-5.	Nonconforming Papers Rejected.	Deleted
215-6.	Filing.	LR7.1
215-7.	Affidavits.	LR7.1
215-8.	Temporary Restraining Orders.	LR65.2
215-9.	Preliminary Injunctions.	LR65.1
215-10.	Continuances and Withdrawal of Motions.	LR7.1
215-11.	Extensions, Enlargements, or Shortening of Time.	LR7.1
215-12.	Submission of Orders to a Judge.	LR7.1
220.	Prejudgment Remedies.	
220-1.	Receivers.	LR66.1
225.	Discovery Filing and Service Practice.	
225-1.	Filing.	LR5.5
225-2.	Service.	LR5.5

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2 The provisions of Local Rule 206 can be placed in one of two places, either under Federal Rule 16 or 40, depending upon the preference of the district court. *See also* Local Rules 205 and 255.

3 If these rules refer to specific motions such as those pursuant to Rules 12 or 56, one of two options can be exercised. A notation can be made at the other rule locations, such as at LR56.1 referring the reader to LR7, or there can be multiple local rules on the subject of motions: one for motions generally at LR7 and rules relating to such specific motions at LR12 and LR56.

		Proposed Numbering
230.	Discovery.	
	230-1. Form of Certain Discovery Documents.	LR26.1
	230-2. Interrogatories.	LR33.1
	230-3. Requests for Production.	LR34.1
	230-4. Requests for Admission.	LR36.1
	230-5. Depositions.	LR30.1
	A. Who May Attend Depositions.	
	B. Videotape Depositions.	
	230-6. Physical and Mental Examination.	LR35.1
	230-7. Form of Discovery Motions.	LR37.2
	230-8. Informal Conference to Settle Discovery Disputes.	LR37.1
	230-9. Preliminary Discovery.	LR26.2CJ
235.	Pretrial and Setting for Trial.	
	235-1. Status Conference.	LR16.1
	235-2. Status Conference Order.	LR16.1
	235-3. Pretrial Conference.	LR16.1
	235-4. Pretrial Conference Statement.	LR16.1
	235-5. Pretrial Order.	LR16.1
	235-6. Objections to Proposed Testimony and Exhibits	LR16.1
	235-7. Dismissal for Lack of Prosecution.	LR41.1
240.	Settlement.	
	240-1. Settlement Conference.	LR16.4
245.	Jury	
	245-1. Six-Person Juries.	Delete
	245-2. Voir Dire.	LR47.1
	245-3. Proposed Instructions.	LR51.1
	245-4. Objections to Proposed Instructions.	LR51.1
	245-5. Assessment of Jury Costs.	LR54.2
250.	Exhibits.	
	250-1. Use of Exhibits.	LR39.3
255.	Trial Date.[4]	
	255-1. Continuance of Trial Date.	LR16.5 or LR40.3
260.	Conduct in the Courtroom.	
	260-1. Courtroom Decorum.	LR83.3
	260-2. Examination of Witnesses.	LR43.1
	260-3. Communication with Jurors.	LR47.2

[4] The provisions of Local Rule 255 can be placed in one of two places, either under Federal Rule 16 or 40, depending upon the preference of the district court. *See also* Local Rules 205 and 206.

		Proposed Numbering
265.	Judgment.	
	265-1. Form of Judgment.	LR58.1
270.	Taxation of Costs.	
	270-1. Procedure for Taxing Costs.	LR54.1
275.	Attorneys' Fees.	
	275-1. Procedure for Determining Attorneys' Fees.	LR54.3
280.	Executions.	
	280-1. Procedure for Execution.	LR58.2
285.	Petitions to Stay Execution of State Court Judgments.	
	285-1. Procedure to Stay Execution of State Court Judgments.	LR62.1
290.	Bonds and Sureties.	
	290-1. When Required.	LR65.1.1
	290-2. Qualifications of Surety.	LR65.1.1
	290-3. Removal Bond.	Delete
	290-4. Examination of Sureties.	LR65.1.1
	290-5. Supersedeas Bonds.	LR62.2

Chapter III—Magistrate Judges

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

Chapter IV—Alternative Dispute Resolution.

400.	General Provisions.	
	400-1. General Provisions.	LR16.6CJ

		Proposed Numbering
405.	Mandatory Arbitration.	
	405-1. Actions Subject to Mandatory Arbitration.	LR16.7CJ
	405-2. Procedure for Referral to Arbitration.	LR16.7CJ
	405-3. Selection and Compensation of Arbitrators.	LR16.7CJ
	405-4. Award and Judgment.	LR16.7CJ
	405-5. Trial De Novo.	LR16.7CJ
410.	Voluntary Arbitration.	
	410-1. General Provisions.	LR16.8CJ
415.	Early Neutral Evaluation.	
	415-1. General Provisions.	LR16.9CJ
420.	Mediation	
	420-1. General Provisions.	LR16.10CJ
425.	Summary Jury Trial	
	425-1. General Provisions.	LR16.11CJ
430.	Summary Bench Trial	
	430-1. General Provisions.	LR16.12CJ
435.	Other ADR Procedures	
	435-1. General Provisions.	LR16.13CJ
440.	Civil Justice Delay and Expense Reduction Plan. [The last local rule for the district consists of a table of cross references for each of the directives in the Plan to its local rule number.[5]]	LR83.7CJ

Part 2. Renumbered Local Rules

LR1.1	Title.(100-1)	
LR1.1	Scope of Local Rules. (100-2)	
LR1.1	Definitions. (100-4)	
LR1.1	Effective Date; Transitional Provisions. (100-5)	
LR1.1CJ	Date of Differentiated Case Management (DCM) Application.	(205-3)
LR1.1CJ	Conflicts of DCM with Other Rules. (205-4)	
LR1.3	Sanctions and Penalties for Noncompliance. (100-3)	

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[5] An alternative that a district may wish to consider is to omit "CJ" from all rules but include as an Appendix to the local rules of the district two tables of cross-references—one organized in the sequence of the Plan and showing corresponding local rule numbers, and the other organized in the sequence of the local rules and showing corresponding sections of the Plan.

LR3.2 Number of Divisions. (102-1)
LR3.2 Transfer of Civil Actions Among Divisions. (102-2)

LR4.1 Service by Mail. (210-1)

LR5.1 Filing with the Court. (210-3)
LR5.1 Form; Legibility of Pleadings and Other Papers. (130-1)
Deleted Filing by Clerk—Nonconforming Documents Rejected. (130-2)

LR5.2 Proof of Service. (210-2)

LR5.5 Discovery; Filing. (225-1)
LR5.5 Discovery; Service. (225-2)

LR6.1 Computation of Time Periods. (131-1)

LR6.2 Extensions of Time by Clerk. (131-2)

LR7.1 Motions; to Whom Made. (215-1)
LR7.1 Motions; Notice and Supporting Papers. (215-2)
LR7.1 Motions; Opposition and Reply. (215-3)
LR7.1 Motions; Briefs and Memoranda. (215-4)
A. When Required.
B. Form of Briefs, Memoranda, and Appendices.
C. Contents of Briefs.
D. Contents of Appendices.
E. Number of Papers.
Deleted Motions; Nonconforming Papers Rejected. (215-5)
LR7.1 Motions; Filing. (215-6)
LR7.1 Motions; Affidavits. (215-7)
LR7.1 Motions; Continuances and Withdrawal. (215-10)
LR7.1 Motions; Extensions, Enlargements, or Shortening of Time. (215-11)
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LR23. Class Actions.
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LR79. Files; Custody and Withdrawal.

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LR77. Library.

LR72. Magistrate Judges; Assignment of Duties.
LR72. Magistrate Judges; Duties.
LR72. Magistrate Judges; Duties of Chief Magistrate Judge.
LR73. Magistrate Judges; Effect of Magistrate Judge's Result.
LR73. Magistrate Judges; Procedure for Obtaining Consent to Trial.
LR74. Magistrate Judges; Procedure for Review.
LR72. Magistrate Judges; Responsibilities.
LR72. Magistrate Judges; Selection of Chief Magistrate Judge.
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LR77.	Sessions of the Court.
LR16.	Settlement Conference.
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LR9.	Social Security Cases.
LR62.	Stays of Execution of State Court Judgments.
LR16.	Summary Bench Trial; General Provisions.
LR16.	Summary Jury Trial; General Provisions.
LR62.	Supersedeas Bonds.
LR54.	Taxation of Costs; Procedure.
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LR16.	Trial Date; Firm for Track "A" Cases.
LR16.	Trial Date; Firm for Track "B" and "C".
LR16.	Trial Date; Parties Informed of Case Status.
LR16.	Trial Date; Presumptive.
LR39.	Use of Exhibits.
LR83.	Weapons Not Permitted.

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

48 Wht

June 2, 1995

TO: Committee on Rules of Practice and Procedure (Standing Committee)

Dear Colleagues:

The Advisory Committee brings four items requiring action of the Standing Committee. Please refer to the relevant portions of the Minutes of the Advisory Committee meeting for greater detail regarding each item. The first is a recommendation for transmission to the Judicial Conference. The other three are recommendations of rules to be published for comment.

Rule 5(e) (see Minutes pp.6-8)

We recommend forwarding to the Judicial Conference the attached proposed changes to 5(e) with committee note. A draft amendment of Rule 5(e) was published for comment on September 1, 1994. The Committee agreed to the changes to the published draft at its October 1994 and April 1995 meetings and those changes are reflected in the draft now before you.

Rule 26(c) (see Minutes pp. 9-10)

We recommend for publication proposed changes to Rule 26(c). The Judicial Conference at its March 1995 meeting returned to the Standing Committee for further consideration the amendments to Rule 26 recommended by the rules committees. Judge Stotler referred the matter to the Advisory Committee, which considered the rule and the conference action at its meeting in New York in April. The Advisory Committee decided to request that the Standing Committee publish for comment the proposed amended rule as submitted to the Judicial Conference.

The Judicial Conference voted to delete the words "on stipulation of the parties" from the rule and later voted to return the proposal for further consideration, but did not formally disclose its reasons. Press accounts and statements of Conference members expressed concern that the proposed rule would change existing practice by allowing entry of protective orders without a

showing of good cause; that it would tie the hands of trial judges reluctant to accept agreed orders. Several special interest groups launched a campaign with the Conference over the weekend before its meeting, supported by an editorial comment in the New York Times' Saturday edition. These groups criticized the decision not to submit the proposal for a second round of public comment given the addition after the first comment period of the "on stipulation" language. Several members of the Conference also expressed a similar concern. Apparently other provisions in the proposal, including the explicit provision for intervention by non-parties, were not discussed.

The amended rule recommended by the Advisory Committee and returned by the Judicial Conference was a delicate balance of privacy and public interest specifically, and the private and public character of civil litigation in general. The Advisory Committee was persuaded that the rule should contain an explicit statement that the proposed changes in Rule 26 were not intended to end the practical and significant role of agreed orders as a necessary balance to the provisions for intervention and expansion of the definition of the public interest. The explicit statement in the rule did not inhibit any judge from insisting upon a showing of good cause beyond the stipulation. In the Advisory Committee's view, it is not the case that the language would change present practice. Indeed, the Manual for Complex Litigation has recognized use of agreed protective orders for years.

Deleting the language regarding stipulations creates a record lending support to an argument that the rule would now require a trial judge to conduct a hearing to determine the "public interest" despite the fact that no litigant before the court wishes to contest the matter. This role of judicial ombudsman would be required by the bill introduced by Senator Kohl, legislation the Advisory Committee has not supported. The Advisory Committee was originally persuaded that clearly stated generous rights of intervention would achieve the desired goal of identifying protective orders that are not in the public interest with the benefit of adversary development of the issues. Relatedly, the Advisory Committee was persuaded that this broad gauged hostility toward protective orders fails to grasp their range of use and instead focuses on product liability claims. The reality, based on empirical study of the Federal Judicial Center conducted at the request of the Advisory Committee, is that protective orders are entered in civil rights cases over products cases by a two to one margin. This is not to quarrel with the action of the Judicial Conference. It is rather to explain, with all deference, why the Advisory Committee saw the proposed rule language as a closely laced and interrelated set of interest reconciliations.

The Advisory Committee accepts with due deference the decision by the Judicial Conference to delete the language regarding stipulations. Whatever its purpose, and regardless of its wisdom, the Conference's decision undid the compromise of the Advisory Committee, and the Committee is not prepared to recommend adoption of Rule 26 in the form returned to it by the Judicial Conference. At the same time, because an asserted absence of an opportunity for public comment regarding the stipulation language was at least one of the substantial concerns expressed by the Judicial Conference, we are also persuaded that the best course is to provide for this public comment. First, this is the only direct cure for this concern. Second, to fully meet the Conference request to consider the rule again, we did not want to end the effort to improve Rule 26 without full exploration of other ways to achieve a balanced and nuanced response to the problems of protective orders.

I explained the recommendation of the Advisory Committee in a recent letter to Chief Judge Merritt, Chair of the Executive Committee of the Judicial Conference. A copy is attached.

Rule 9(h) (see Minutes pp. 8 & 9)

We recommend for publication revised 9(h) with committee note attached.

Rule 47(a) (see Minutes pp. 10-16)

We recommend for publication the draft of 47(a) with committee note. We discussed this rule change at the last meeting of the Standing Committee. The discussion was limited, however, by time constraints and the decision that any change in the civil rule should proceed in tandem with any proposed change in the criminal rules, a decision I supported. The proposed rule also contains changes made by the Advisory Committee at its April 1995 meeting.

Despite the fact that a majority of the district judges in the United States follow a practice the proposed rule would require, it is opposed by many district judges. There are two words of caution about both the measure of opposition by judges and its present relevance. Much of the correspondence directed to me was solicited by a few judges opposed to any change in the rules. Many of these early letters expressed opposition despite the fact that the judges did not know what was proposed. At the same time, many judges expressed thoughtful and considered views in opposition to the rule. While it seems plain that many judges oppose any change, the majority have not been heard from.

The second caution is that in conscientious efforts to solicit the views of judges, we have given many judges an opportunity to comment before publication, an opportunity not given to the bar and academic community. The criticism of the adequacy of voir dire now being conducted in civil cases from the lawyer members of the Advisory Committee, including representatives of the American College of Trial Lawyers and the Litigation Section of the American Bar Association, was direct and strong. The decision whether to publish for comment should consider this possible unfairness in access to the system, an inequality in access that none of us intended.

Both the Civil and Criminal Rules Committees by overwhelming votes have concluded that the recommended change is required in the interest of justice. Publication will allow full opportunity to hear the range of views. For example, some of the judges expressed a preference for questionnaires over oral interrogation of venirepersons. Others expressed concern over the extensive probing in many questionnaires. The comment period will allow exploration of these issues. In short, the Advisory Committee does not see publication as an event that might polarize the bench and bar. To the contrary, the Advisory Committee views vigorous debate as a productive and healthy process.

Information Items
Rule 23

The Minutes describe the activity of the Advisory Committee over the past several months, and I will not repeat that description. Much of the Committee's energy has been directed toward Rule 23. The Advisory Committee participated in conferences held at the University of Pennsylvania, S.M.U., and N.Y.U. These conferences brought together judges, lawyers, and academics, all students of class actions and the current phenomenon of aggregation. Our regimen for this look at Rule 23 began with "in-house" presentations of experts followed by the three conferences. It now moves to the decision phase.

We have listened to an array of ideas, many intriguing. We are winnowing the numerous suggested reforms. Our narrowing process is now underway and will be completed this summer. I am attaching as an information item a questionnaire directed to members of the Advisory Committee. Surviving ideas will be translated into rule language in the early fall and considered at the Fall Meeting of the Advisory Committee. Possibilities range from the recommendation of no change, to large and significant changes. Some ideas have persisted throughout these discussions, including incorporating some look at the merits of a claim as an

element of class certification. This might be something like the requirement of a likelihood of success on the merits for a preliminary injunction. A second persistent idea is that there should be a right to appellate review of the class certification decision. Two large questions continue to overarch the myriad ideas for change: whether to make separate provision for settlement classes, and whether to respond directly to the large mass tort classes. We continue to work and, as always, welcome your ideas.

Congress

The Committee has also spent considerable time monitoring federal legislation. This has taken many forms and I will not attempt to describe them beyond the explanation that we have informally responded to Congressional staff as well as members of Congress. One example of our work warrants specific mention. I asked Tony Scirica to chair a subcommittee with Tom Rowe, David Doty, and Roger Vinson, charged to monitor Congressional efforts to address class actions in the securities field. Their work has been largely with the SEC and the Senate Committee on Banking, Housing, and Urban Affairs. For example, Ed Cooper, Tom Rowe, Tony Scirica, Phillip Wittmann, the always present John Rabiej, and I recently spent several hours with senior staffers of its majority and minority members reviewing the Committee's proposed legislation. We continue to respond to inquiries as the legislative progress of this Congress and its impact on the civil rules unfolds.

Sincerely yours,

Patrick E. Higginbotham

United States Court of Appeals
for the Fifth Circuit

April 27, 1995

PATRICK E. HIGGINBOTHAM
CIRCUIT JUDGE

UNITED STATES COURTHOUSE
1100 COMMERCE STREET
DALLAS, TEXAS 75242

Honorable Gilbert S. Merritt, Chair
Executive Committee
Judicial Conference of the United States
Washington, D.C. 20544

Re: Fed. R. Civ. 26(c)

Dear Chief Judge Merritt:

At its April 20, 1995 meeting, the Advisory Committee on Civil Rules voted unanimously to republish the proposed amendments to Rule 26(c) of the Federal Rules of Civil Procedure (Protective Orders) as they were submitted to the Judicial Conference in March. The recommendation will be transmitted to the Standing Rules Committee for consideration at its July 5-7, 1995 meeting. The proposed amendments will be published for public comment in early Fall 1995 if the Standing Committee approves our recommendation.

We hope that an additional comment period will enhance understanding of the use of protective orders, particularly in light of the concerns expressed by some members of the Judicial Conference. We accept, respectfully, the judgment of the conference, although both the Advisory Committee and Standing Committee were unanimously of a different view.

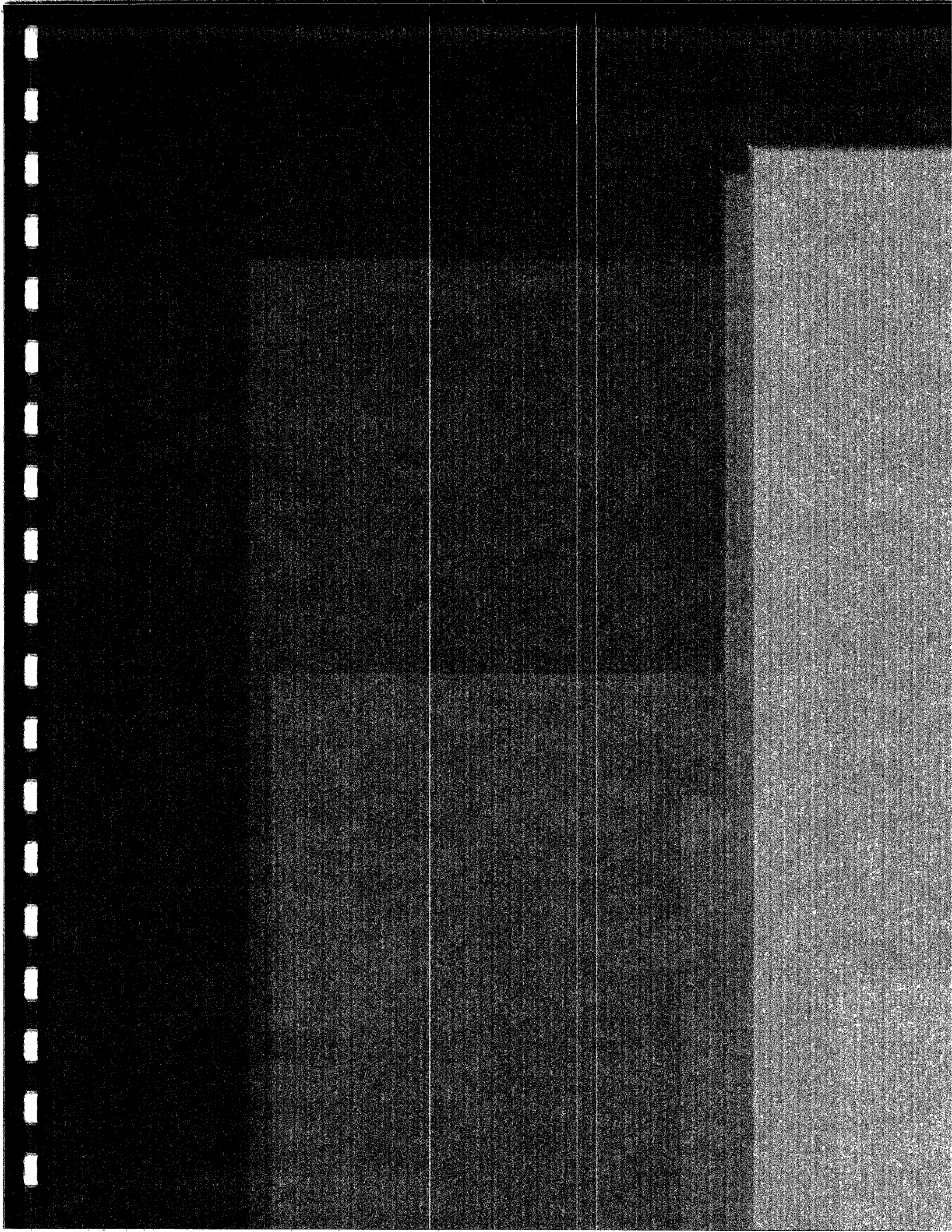
Our view is undoubtedly influenced by the manner in which we conduct our business. We reach for the views of the bench and bar and academic community. Representatives of the American College of Trial Lawyers and the Litigation Section of the American Bar Association participate in our meetings as they did in our decisions regarding Rule 26. Free and open discussion, sometimes robust and illuminating and sometimes otherwise, has been the hallmark of our work. In this spirit we are persuaded that the appropriate response to concern over a lack of opportunity for public comment is to provide that opportunity.

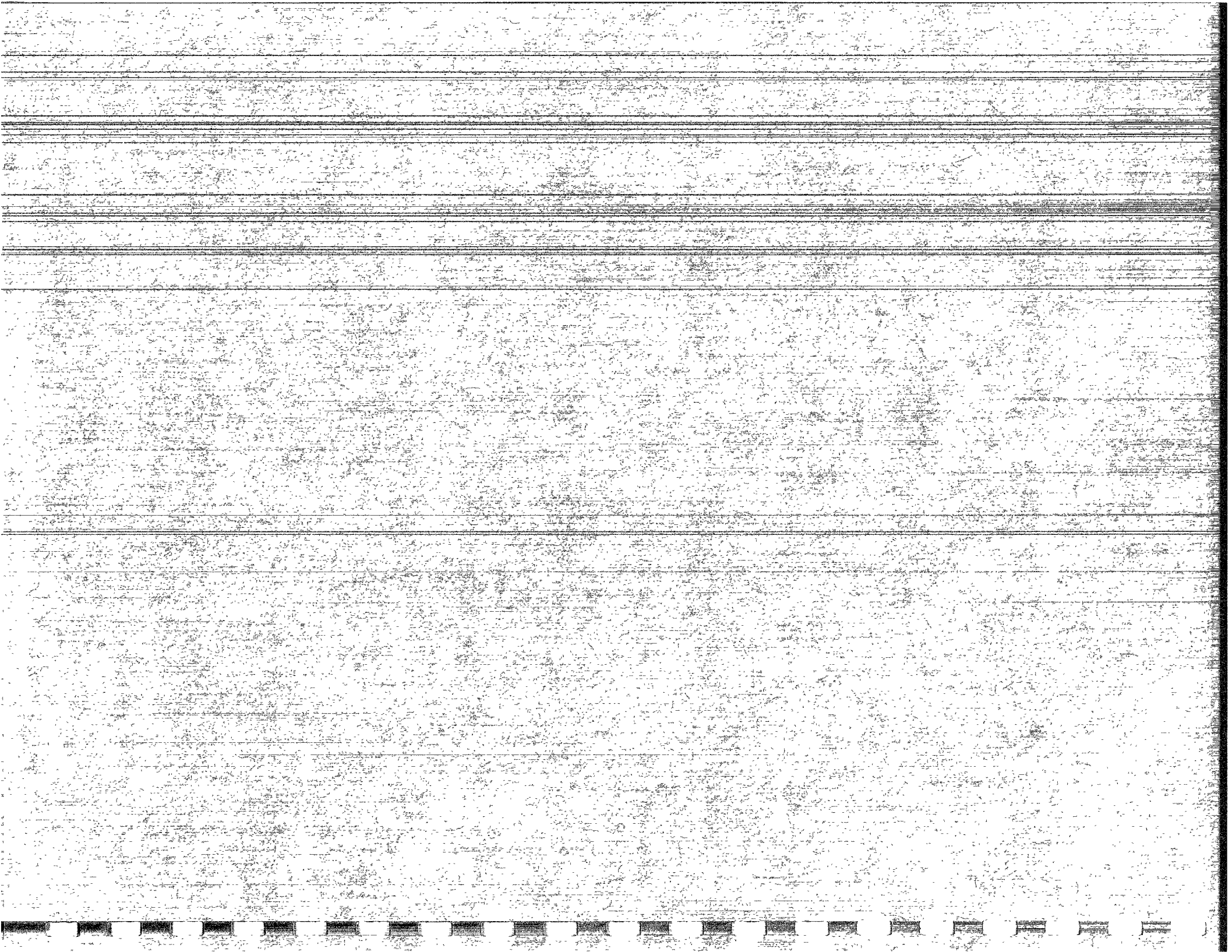
Please do not hesitate to call me for any additional information.

Sincerely yours,

Patrick E. Higginbotham
United States Court of Appeals

cc: Honorable Alicemarie H. Stotler





Rule 5. Service and Filing of Pleadings and Other Papers

* * *

(e) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may, by local rule, permit papers to be filed, signed, or verified by ~~facsimile or other~~ electronic means, ~~if such means are authorized by and~~ which must be consistent with any technical standards ~~established by~~ that the Judicial Conference of the United States may establish. [An electronic filing under a local rule has the same effect as a written filing.] The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

COMMITTEE NOTE

The present Rule 5(e) has authorized filing by facsimile or other electronic means on two conditions. The filing must be authorized by local rule. Use of this means of filing must be authorized by the Judicial Conference of the United States and must be consistent with standards established by the Judicial Conference. Attempts to develop Judicial Conference standards have demonstrated the value of several adjustments in the rule.

The most significant change discards the requirement that the Judicial Conference authorize local electronic filing rules. As before, each district may decide for itself whether it has the equipment and personnel required to establish electronic filing, but a district that wishes to establish electronic filing need no longer await Judicial Conference action.

The role of Judicial Conference standards is clarified by specifying that the standards are to govern technical matters. Technical standards can provide nationwide uniformity, enabling ready use of electronic filing without pausing to adjust for the otherwise inevitable variations among local rules. Judicial Conference adoption of technical standards should prove superior to specification in these rules. Electronic technology has advanced with great speed. The process of adopting Judicial Conference standards should prove speedier and more flexible in determining the time for the first uniform standards, in adjusting standards at appropriate intervals, and in sparing the Supreme Court and

Congress the need to consider technological details. Until Judicial Conference standards are adopted, however, uniformity will occur only to the extent that local rules deliberatly seek to copy other local rules.

It is anticipated that Judicial Conference standards will govern such technical specifications as data formatting, speed of transmission, means to transmit copies of supporting documents, and security of communication. Perhaps more important, standards must be established to assure proper maintenance and integrity of the record and to provide appropriate access and retrieval mechanisms. Local rules must address these issues until Judicial Conference standards are adopted.

The amended rule also makes clear the equality of filing by electronic means with written filings. An electronic filing that satisfies the local rule satisfies all requirements for filing on paper, signature, or verification. An electronic filing that otherwise satisfies the requirements of 28 U.S.C. § 1746 need not be separately made in writing. Public access to electronic filings is governed by the same rules as govern written filings.

The separate reference to filing by facsimile transmission is deleted. Facsimile transmission continues to be included as an electronic means.

Rule 5(e)

A draft amendment of Rule 5(e) was published for comment on September 1, 1994. The Committee agreed on changes to the published draft at the October, 1994 meeting, as described in the minutes for that meeting.

Discussion began by observing that a change should be made in the third sentence of the first paragraph of the published Committee Note. The statement that "the local rule" must be authorized by the Judicial Conference is a misleading summary of the present rule. The Note should say instead that "Use of this means of filing" must be authorized by the Judicial Conference. The reference to "three conditions" also will be changed to "two conditions" rather than worry overmuch about the number of conditions that must be met to permit electronic filing under present Rule 5(e).

Comments on the published draft by the Association of the Bar of the City of New York led to discussion of the availability to the public of papers filed by electronic means. The Committee recognized two quite distinct issues. One issue is whether the right of public access is in any way affected by electronic filing. The Committee agreed clearly and emphatically that electronic filing does not in any way affect the right of public access. This answer is so plain that there is no need to provide any statement in the text of the rule, just as the rules have not had to spell out the right of public access to documents initially filed in tangible form. The other issue is the means of accomplishing actual exercise of the right of public access, recognizing that the public includes people without computer skills and that simply providing a public terminal in the clerk's office will not respond to all needs. It was concluded that this problem is one that should be addressed by a combination of the Judicial Conference standards process and by local rules. The means of access issue is obviously tied to the technical standards for filing, and is as obviously tied to such provisions as local rules

may make for requiring supplemental filings in tangible form.

The Committee was advised that the Administrative Office will attempt to help the Judicial Conference and its committees to draft technical standards quickly. Although it is clear that the amendments would authorize local rules that permit electronic filing before Judicial Conference Standards are adopted, it is possible that the standards will be available soon after the amended Rule 5(e) could take effect, and possibly even by the effective date.

There was renewed discussion of the October decision to delete from the published draft the sentence stating: "An electronic filing under this rule has the same effect as a written filing." The version published by the Appellate Rules Committee provides: "A paper filed by electronic means in accordance with this rule constitues a written paper for the purpose of applying these rules." Concern was expressed that the reference to "this rule" might invalidate filings authorized by local rule, even though filing in compliance with a valid local rule would seem to be authorized by the rule. It was suggested that it would be better to refer to a filing "in accordance with," or "under," a local rule. The belief that the entire sentence is unnecessary was again expressed, in light of the fundamental authorization to file, sign, or verify documents by electronic means. The conclusion of this discussion was that the Chair and Reporter were authorized to coordinate language under the auspices of the Standing Committee to achieve uniform provisions in the Appellate, Bankruptcy, and Civil Rules.

It was agreed that the final two sentences of the published Committee Note should be deleted. These sentences disparaged filing by facsimile means, an enterprise that may be unnecessary if it is right that routine facsimile filing will prove attractive to few courts, but may prove wrong if facsimile filing proves more attractive to many courts than more advanced means of electronic filing.

The suggestion was made by the Eastern District of Pennsylvania, through the court clerk, several judges, and many lawyers, that Rule 5(b) should be amended to permit service by electronic means. The Committee has considered this question recently. Discussion confirmed the earlier conclusion: it seems better to await developing experience with electronic filing before pursuing the potentially more difficult problems that may surround electronic service.

The Eastern District of Pennsylvania also suggested that Rule 77(d) should be amended to permit a court clerk to effect service by electronic means. Although this question has not been considered by the Committee, and seems to pose fewer potential problems than electronic service among the parties, the conclusion

was the same. Greater experience is needed before it will be time to move in this direction.

Rule 9. Pleading Special Matters

* * *

(h) **Admiralty and Maritime Claims.** A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. ~~The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)~~ A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

Section 1292(a)(3) of the Judicial Code provides for appeal from "[i]nterlocutory decrees of * * * district courts * * * determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

Rule 9(h) was added in 1966 with the unification of civil and admiralty procedure. Civil Rule 73(h) was amended at the same time to provide that the § 1292(a)(3) reference "to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9(h)." This provision was transferred to Rule 9(h) when the Appellate Rules were adopted.

A single case can include both admiralty or maritime claims and nonadmiralty claims or parties. This combination reveals an ambiguity in the statement in present Rule 9(h) that an admiralty "claim" is an admiralty "case." An order "determining the rights and liabilities of the parties" within the meaning of § 1292(a)(3) may resolve only a nonadmiralty claim, or may simultaneously resolve interdependent admiralty and nonadmiralty claims. Can appeal be taken as to the nonadmiralty matter, because it is part of a case that includes an admiralty claim, or is appeal limited to the admiralty claim?

The courts of appeals have not achieved full uniformity in

applying the § 1292(a)(3) requirement that an order "determin[e] the rights and liabilities of the parties." It is common to assert that the statute should be construed narrowly, under the general policy that exceptions to the final judgment rule should be construed narrowly. This policy would suggest that the ambiguity should be resolved by limiting the interlocutory appeal right to orders that determine the rights and liabilities of the parties to an admiralty claim.

A broader view is chosen by this amendment for two reasons. The statute applies to admiralty "cases," and may itself provide for appeal from an order that disposes of a nonadmiralty claim that is joined in a single case with an admiralty claim. Although a rule of court may help to clarify and implement a statutory grant of jurisdiction, the line is not always clear between permissible implementation and impermissible withdrawal of jurisdiction. In addition, so long as an order truly disposes of the rights and liabilities of the parties within the meaning of § 1292(a)(3), it may prove important to permit appeal as to the nonadmiralty claim. Disposition of the nonadmiralty claim, for example, may make it unnecessary to consider the admiralty claim and have the same effect on the case and parties as disposition of the admiralty claim. Or the admiralty and nonadmiralty claims may be interdependent. An illustration is provided by *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292 (2d Cir. 1990). Claims for losses of ocean shipments were against two defendants, one subject to admiralty jurisdiction and the other not. Summary judgment was granted in favor of the admiralty defendant and against the nonadmiralty defendant. The nonadmiralty defendant's appeal was accepted, with the explanation that the determination of its liability was "integrally linked with the determination of non-liability" of the admiralty defendant, and that "section 1292(a)(3) is not limited to admiralty *claims*; instead, it refers to admiralty *cases*." 899 F.2d at 1297. The advantages of permitting appeal by the nonadmiralty defendant would be particularly clear if the plaintiff had appealed the summary judgment in favor of the admiralty defendant.

It must be emphasized that this amendment does not rest on any particular assumptions as to the meaning of the § 1292(a)(3) provision that limits interlocutory appeal to orders that determine the rights and liabilities of the parties. It simply reflects the conclusion that so long as the case involves an admiralty claim and an order otherwise meets statutory requirements, the opportunity to appeal should not turn on the circumstance that the order does – or does not – dispose of an admiralty claim. No attempt is made to invoke the authority conferred by 28 U.S.C. § 1292(e) to provide by rule for appeal of an interlocutory decision that is not otherwise provided for by other subsections of § 1292.

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~Examining Jurors. The court ~~may~~ must ~~permit the parties or their attorneys to~~ conduct the examination of prospective jurors ~~or may itself conduct the examination~~. The court must permit the parties to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter determined by the court in its discretion. ~~In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

Committee Note

Rule 47(a) in its original and present form permits the court to exclude the parties from direct examination of prospective jurors. Although a recent survey shows that a majority of district judges permit party participation, the power to exclude is often exercised. See *Shapard & Johnson, Survey Concerning Voir Dire* (Federal Judicial Center 1994). Courts that exclude the parties from direct examination express two concerns. One is that direct participation by the parties extends the time required to select a jury. The second is that counsel frequently seek to use voir dire not as a means of securing an impartial jury but as the first stage of adversary strategy, attempting to establish rapport with prospective jurors and influence their views of the case.

The concerns that led many courts to undertake all direct examination of prospective jurors have earned deference by long tradition and widespread adherence. At the same time, the number of federal judges that permit party participation has grown considerably in recent years. The Federal Judicial Center survey shows that the total time devoted to jury selection is virtually the same regardless of the choice made in allocating responsibility between court and counsel. It also shows that judges who permit party participation have found little difficulty in controlling potential misuses of voir dire. This experience demonstrates that the problems that have been perceived in some state-court systems of party participation can be avoided by making clear the discretionary power of the district court to control the behavior of the party or counsel. The ability to enable party participation at low cost is of itself strong reason to permit party participation. The parties are thoroughly familiar with the case

by the start of trial. They are in the best position to know the juror information that bears on challenges for cause and peremptory challenges, and to elicit it by jury questioning. In addition, the opportunity to participate provides an appearance and reassurance of fairness that has value in itself.

The strong direct case for permitting party participation is further supported by the emergence of constitutional limits that circumscribe the use of peremptory challenges in both civil and criminal cases. The controlling decisions begin with *Batson v. Kentucky*, 476 U.S. 79 (1986) and continue through *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994). Prospective jurors "have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *J.E.B.*, 114 S.Ct. at 1428. These limits enhance the importance of searching voir dire examination to preserve the value of peremptory challenges and buttress the role of challenges for cause. When a peremptory challenge against a member of a protected group is attacked, it can be difficult to distinguish between group stereotypes and intuitive reactions to individual members of the group as individuals. A stereotype-free explanation can be advanced with more force as the level of direct information provided by voir dire increases. As peremptory challenges become less peremptory, moreover, it is increasingly important to ensure that voir dire examination be as effective as possible in supporting challenges for cause.

Fair opportunities to exercise peremptory and for-cause challenges in this new setting require the assurance that the parties can supplement the court's examination of prospective jurors by direct questioning. The importance of party participation in voir dire has been stressed by trial lawyers for many years. They believe that just as discovery and other aspects of pretrial preparation and trial, voir dire is better accomplished through the adversary process. The lawyers know the case better than the judge can, and are better able to frame questions that will support challenges for cause or informed use of peremptory challenges. Many also believe that prospective jurors are intimidated by judges, and are more likely to admit potential bias or prejudgment under questioning by the parties.

Party examination need not mean prolonged voir dire, nor subtle or brazen efforts to argue the case before trial. The court can undertake the initial examination of prospective jurors, restricting the parties to supplemental questioning controlled by direct time limits. Effective control can be exercised by the court in setting reasonable limits on the manner and subject-matter of the examination. Lawyers will not be allowed to advance arguments in the guise of questions, to seek committed responses to hypothetical descriptions of the case, to assert propositions of law, to intimidate or ingratiate, or otherwise turn the opportunity to seek information about prospective jurors into improper adversary strategies. The district court has ample power to

control the time, manner, and subject matter of party examination. The process of determining the limits continues throughout the course of each party's examination, and includes the power to terminate further examination by a party that has misused or abused the right of examination. Among other grounds, termination may be warranted not only by conduct that may impair the trial jury's impartiality but also by questioning that is repetitious, confusing, or prolonged, or that threatens inappropriate invasion of the prospective jurors' privacy. The determination to set limits or to terminate examination is confided to the broad discretion of the district court. Only a clear abuse of this discretion — usually in conjunction with a clearly inadequate examination by the court — could justify reversal of an otherwise proper jury verdict.

The voir dire process can be further enhanced by use of jury questionnaires to elicit routine information before voir dire begins. Questionnaires can save much time, and may improve in many ways the development of important information about prospective jurors. Potential jurors are protected against the embarrassment of public examination. A potential juror may be more willing to reveal potentially embarrassing information in responding to a questionnaire than in answering a question in open court. Written answers to a questionnaire also may avoid the risk that answers given in the presence of other prospective jurors may contaminate a large group.

Questionnaires are not required by Rule 47(a), but should be seriously considered. At the same time, it is important to guard against the temptation to extend questionnaires beyond the limits needed to support challenges for cause and fair use of peremptory challenges. Just as voir dire examination, questionnaires can be used in an attempt to select a favorable jury, not an impartial one. Potential jurors must be protected against unwarranted invasions of privacy; the duty of jury service does not support casual inquiry into such matters as religious preferences, political views, or reading, recreational, and television habits. Indeed the list of topics that might be of interest to a party bent on manipulating the selection of a favorable jury through the use of sophisticated social-science profiles and personality evaluations is virtually endless. Selection of an impartial jury requires suppression of such inquiries, not encouragement. The court's guide must be the needs of impartiality, not party advantage.

PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE*

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(c) Protective Orders.(1) ~~Upon~~ On motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, ~~and for good cause shown,~~ the court ~~in which~~ where the action is pending ~~or~~ — and ~~alternatively~~, on matters relating to a deposition, also the court in the district where the deposition ~~is to~~ will be taken — may, for good cause shown or on stipulation of the parties, make any order ~~which~~ that justice requires to protect a

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

party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(~~1~~A) ~~that~~ precluding the disclosure or discovery ~~not be had~~;

(~~2~~B) ~~that~~ specifying conditions, including time and place, for the disclosure or discovery ~~may be had only on specified terms and conditions, including a designation of the time or place~~;

(~~3~~C) ~~that the discovery may be had only by~~ prescribing a discovery method ~~of discovery~~ other than that selected by the party seeking discovery;

(~~4~~D) ~~that~~ excluding certain matters ~~not be inquired into~~, or ~~that~~ limiting the scope of ~~the~~ disclosure or discovery ~~be limited~~ to certain

matters;

(~~5~~E) designating the persons who may be present while ~~that~~ the discovery is ~~be~~ conducted ~~with no one present except persons designated by the court~~;

(~~6~~F) ~~that a deposition, after being sealed,~~ directing that a sealed deposition be opened only ~~by order of the~~ upon court order;

(~~7~~G) ordering that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; ~~and~~ or

(~~8~~H) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes, to be opened as ~~directed by~~ the court directs.

(2) If ~~the~~ a motion for a protective order is wholly or partly denied ~~in whole or in part~~, the court may, on ~~such~~ just terms ~~and conditions as are just~~, order that any party or ~~other~~ person provide or permit discovery or disclosure. ~~The provisions of~~ Rule 37(a)(4) apply~~ies~~ to the award of expenses incurred in relation to the motion.

(3) (A) The court may modify or dissolve a protective order on motion made by a party, a person bound by the order, or a person who has been allowed to intervene to seek modification or dissolution.

(B) In ruling on a motion to dissolve or modify a protective order, the court must consider, among other matters, the following:

(i) the extent of reliance on the order;

(ii) the public and private interests affected by the order, including any risk to public health or safety;

(iii) the movant's consent to submit to the terms of the order;

(iv) the reasons for entering the order, and any new information that bears on the order; and

(v) the burden that the order imposes on persons seeking information relevant to other litigation.

* * * * *

Committee Note

Subdivisions (1) and (2) are revised to conform to the style conventions adopted for simplifying the present rules. No change in meaning is intended by these style changes.

Subdivision (1) also is amended to confirm the common practice of entering a protective order on

stipulation of the parties. Stipulated orders can provide a valuable means of facilitating discovery without frequent requests for action by the court, particularly in actions that involve intensive discovery. If a stipulated protective order thwarts important interests, relief may be sought by a motion to modify or dissolve the order under subdivision (3).

Subdivision (3) is added to the rule to dispel any doubt whether the power to enter a protective order includes power to modify or vacate the order. The power is made explicit, and includes orders entered by stipulation of the parties as well as orders entered after adversary contest. The power to modify or dissolve should be exercised after careful consideration of 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.

Modification of a protective order may be sought to increase the level of protection afforded as well as to reduce it. Among the grounds for increasing protection might be violation of the order, enhanced appreciation of the extent

to which discovery threatens important interests in privacy, or the need of a nonparty to protect interests that the parties have not adequately protected.

Modification or dissolution of a protective order does not, without more, ensure access to the once-protected information. If discovery responses have been filed with the court, access follows from a change of the protective order that permits access. If discovery responses remain in the possession of the parties, however, the absence of a protective order does not without more require that any party share the information with others.

Despite the important interests served by protective orders, concern has been expressed that protective orders can thwart other interests that also are important. Two interests have drawn special attention. One is the interest in public access to information that involves matters of public concern. Information about the conduct of government officials is frequently used to illustrate an area of public concern. The most commonly offered example focuses on information about dangerous products or situations that have caused injury and may continue to cause injury until the information is widely disseminated. The other interest involves the efficient conduct of related litigation, protecting adversaries of a common party from the need to engage in costly duplication of discovery efforts.

The first sentence of subparagraph (A) recognizes that a motion to modify or dissolve a protective order may be made by a party, a person bound by the order, or a person allowed to intervene for this purpose. A motion to

intervene for this purpose is made for the limited purpose of establishing standing to pursue the request for modification or dissolution. Intervention should be granted if the applicant asserts an interest that justifies full argument and consideration of the motion to modify or dissolve. Because intervention is for this limited purpose, there is no need to invoke the Rule 24 standards that would apply to a request to intervene as a party. Several courts have relied on limited intervention in this setting, and the procedure has worked well.

Subparagraph (B) lists some of the matters that must be considered on a motion to dissolve or modify a protective order. The list is not all-inclusive; the factors that may enter the decision are too varied even to be foreseen.

The most important form of reliance on a protective order is the production of information that the court would not have ordered produced without the protective order. Often this reliance will take the form of producing information under a blanket protective order without raising the objection that the information is not subject to disclosure or discovery. The information may be protected by privilege or work-product doctrine, the outer limits of Rule 26(b)(1), or other rules. Reliance also may take other forms, including the court's own reliance on a protective order less sweeping than an order that flatly prohibits discovery. If the court would not have ordered discovery over proper objection, it should not later defeat protection of information that need not have been produced at all. Reliance also deserves consideration in other settings, but a finding that information is properly discoverable directs

attention to the question of the terms — if any — on which protection should continue.

The public and private interests affected by a protective order include all of the myriad interests that weigh both for and against discovery. The question whether to modify or dissolve a protective order is, apart from the question of reliance, much the same as the initial determination whether there is good cause to enter the order. An almost infinite variety of interests must be weighed. The public and private interests in defeating protection may be great or small, as may be the interests in preserving protection. Special attention must be paid to a claim that protection creates a risk to public health or safety. If a protective order actually thwarts publication of information that might help protect against a significant threat of serious injury to person or property, only compelling reasons could justify protection. Claims of commercial disadvantage should be examined with particular care. On the other hand, it is proper to demand a realistic showing that there is a need for disclosure of protected information. Often there is full opportunity to publicize a risk without access to protected discovery information. Paradoxically, the cases that pose the most realistic public risk also may be the cases that involve the greatest interests in privacy, such as a yet-to-be-proved claim that a party is infected with a communicable disease.

Consent to submit to the terms of a protective order may provide strong reason to modify the order. Submission to the terms of the order should include submission to the jurisdiction of the court to enforce the order. Submission,

however, does not establish an automatic right to modification. The court still must balance the need for access to information against the interests of privacy. If the need for access arises from pending or impending litigation of parallel claims, it may prove better to defer to the protective order discretion of the court responsible for the other litigation, or even to work out a cooperative approach that allows each court to consider the factors most familiar to it.

The role of the court in considering the reasons for entering the protective order is affected by the distinction between contested and stipulated orders. If the order was entered on stipulation of the parties, the motion to modify or dissolve requires the court to consider the reasons for protection for the first time. All of the information that bears on the order is new to the court and must be considered. If the order was entered after argument, however, the court may justifiably focus attention on information that was not considered in entering the order initially.

Rule 26(c)(3) applies only to the dissolution or modification of protective orders entered by the court under subdivision (c)(1). It does not address private agreements entered into by litigants that are not submitted to the court for its approval. Nor does Rule 26(c)(3) apply to motions seeking to vacate or modify final judgments that occasionally contain restrictions on the disclosure of specified information. Rules 59 and 60 govern such motions.

CB Draft

DRAFT MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

APRIL 20, 1995

The Advisory Committee on Civil Rules met on April 20, 1995, at New York University School of Law. The meeting was held in conjunction with the April 21 and 22 Research Conference on Class Actions and Related Issues in Complex Litigation, held by the Institute of Judicial Administration at New York University School of Law. Members of the Advisory Committee also attended the Conference. The Advisory Committee meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge David S. Doty, Justice Christine M. Durham, 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, and Judge C. Roger Vinson. Edward H. Cooper was present as Reporter. Judge Alicemarie H. Stotler attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. John K. Rabiej and Mark D. Shapiro represented the Administrative Office. Thomas E. Willging represented the Federal Judicial Center. Observers included Professor Linda Silberman and Professor Samuel Estreicher, Robert S. Campbell, Jr., Esq., Alfred W. Cortese, Jr., Esq., Fred S. Souk, Esq., Laura S. Unger, Esq., and H. Thomas Wells, Jr., Esq.

Professor Silberman welcomed the Committee to the NYU School of Law and to the Conference; the welcome was later repeated by Professor Estreicher.

The Committee approved the draft Minutes for the meetings of October 20 and 21, 1994, and February 16 and 17, 1995.

Judge Higginbotham opened the meeting by noting that this is the last in a series of meetings designed to increase the Committee's knowledge of class actions. The history of the 1993 draft was recalled: the Committee had approved it with a recommendation that the Standing Committee approve publication for public comment. During the meeting of the Standing Committee, however, it was decided that the public agenda of civil rules was so full that it might be better to defer action on Rule 23 for a while; particular concern was felt about the impact of the discovery and disclosure amendments then awaiting study and approval by Congress. Since then, rapid developments in the use of Rule 23 to address dispersed mass tort litigation have provided the occasion for further consideration of Rule 23. The settlement plans worked out in different asbestos actions and the silicone gel breast implant action are examples of these developments that have not yet fully played out. Rule 23 was the subject of active study at the Advisory Committee meetings in April, 1994, and February, 1995. Many members of the Committee also attended the March, 1995

Conference on the Federal Rules of Civil Procedure sponsored by Southern Methodist University School of Law and the Southwestern Legal Foundation in Dallas. Research help has been sought from the Federal Judicial Center.

Congress has been examining the large social problems that give rise to a substantial share of the litigation brought as class actions. Although the Committee hopes to be able to coordinate with Congress, and to inform its work just as the work of Congress informs the Committee's efforts, Congress operates on a different time line than the Committee. The Committee, moreover, must maintain its independence and credibility — work on Rule 23 might easily be perceived as arising from particular positions or viewpoints on the larger substantive and social problems, and everything possible must be done to defuse any such perceptions. It is also important to continue to find ways to defeat the common perception that Committee processes are closed to the public; the widespread circulation of the current Rule 23 draft and the efforts to bring experienced class action lawyers into Committee deliberations have provided a beginning. The repeated focus on the current draft at the Institute of Judicial Administration conference also should help.

A report also was provided on the Dallas Conference on the Federal Rules of Civil Procedure. It was observed that the academicians were not much interested in the discussion of pleading and discovery. They tended to assume the continuing wisdom of the 1938 decision to subordinate pleading to discovery. The lawyers who participated in the second day of the conference, however, were more interested in seeing what might be done. Possible means of controlling discovery were discussed, including work underway in Texas to substantially curtail the amount of time that can be spent on depositions, with particularly dramatic limits for cases that involve only damages in small amounts. The possibility of imposing responsibilities on counsel for supervising and certifying the completion of a party's document production also was discussed. Pleading devices that may deserve further study include development of the reply. The Fifth Circuit has found the requirement of a reply helpful in shaping the pleadings with respect to defenses of official immunity, in the wake of tightening restrictions on heightened pleading requirements, and the device might be useful in more general ways. A specific suggestion at the Dallas conference was that some form of statement be required as a supplement to pleadings. The central idea seems to be a statement of position and summary of evidence that does not carry the consequences of pleading but that does illuminate the case in the way that might be expected of a well-conducted Rule 26(f) discovery planning conference. As to a plaintiff, for example, the requirement might be a form of disclosure that requires a statement of the facts the plaintiff expects to prove at trial and summaries of the testimony

that will be used for proof. Defendants would have similar obligations.

This summary developed into discussion of the relationships between pleading, discovery, and judicial management. It was observed by several Committee members that pleading is not very helpful — and at times useless — and discovery at times seems unmanageable, but that increased involvement by a judge can help a great deal. If a judge takes charge of a suit at the very beginning, great benefits follow not only with respect to pleading and discovery but also in the general behavior of the lawyers. Questions of judicial management were viewed from many perspectives, with a common thread in the observation that there are enough formal court rules to support effective management. The problems seem to be not so much a lack of rules as docket pressures, and at times the views of some judges that active management is not desirable. Docket pressures were repeatedly noted; one member judge noted that he once went for three years without a civil trial, and during the same period had a criminal trial on almost every working day. This discussion included accounts of experience with the "rocket docket" system in Virginia, which includes an assumption that each case is an institutional responsibility of the full court. A firm trial date is set for 6 to 8 months after filing. The process can be rushed; it is difficult to get an extension of time, and perhaps occasionally the denials are unwise in relation to the needs of case preparation. The system can be implemented — as it has been — without the need to amend any of the Civil Rules. Experience with a somewhat similar fast track system in California state courts also was noted, with the observation that it seems to work well. It was suggested that perhaps similar docket systems should be tried in half a dozen pilot districts to learn whether they can be successful in other courts that face different circumstances.

The discussion continued along tracks that moved among the three topics of pleading, discovery, and judicial management. The system is built on the assumption of open discovery, ideally managed by lawyers rather than the courts. Lawyers can be made to behave in disciplined ways by setting and adhering to a firm trial date. But some courts are not in a position to be able to enforce firm trial dates. Case loads continue to shift, and will continue to shift in ways that cannot be fully predicted. For the time being, there seems to be a flattening of general civil cases, a slight reduction in the number of criminal prosecutions, and rapid growth in the number of civil actions filed by prisoners that do not challenge the conviction or sentence. Measured by numbers of cases, such prisoner cases account for startling portions of many appellate dockets, and seem to continue to grow as the numbers of prisoners grow.

An observer suggested that the Dallas conference showed that

really experienced lawyers divide on the question whether the problem lies in pleading, discovery, or judicial management, and that the problem probably lies in all three. The relationship among all three should be examined further. The "rocket docket" works beautifully in the Eastern District of Virginia, but it is unique to that court. The rules must be rewritten.

The recurrent suggestion that the rules must be rewritten was recurrently met by the suggestion that the discovery rules have been amended recently, and that it is too early to amend them yet again. One Committee member who expressed a preference for a return to some measure of fact pleading agreed that it is even more important not to change the rules too often. Another member echoed the view that many judges and lawyers agree that we should not change Rule 26 again so soon. This may be true whether the changes involve minor tinkering or fundamental revision.

Robert Campbell stated that the Federal Rules Committee of the American College of Trial Lawyers likely would agree that "the rules aren't broke." They will operate if the courts will enforce them. Lawyers need initial rulings; a Rule 16(b) conference early in the litigation; and a follow-up conference. It helps if the judge is willing to express a view on the nature of the case — whether, for example, it really presents a viable claim under an oft-overused statute.

Another observer noted that the CJRA advisory group in the District of Columbia had studied all these issues, and had not proposed any radical changes. Other districts have developed more dramatic local rules. Much will be learned as information is gathered about experience with the different CJRA plans. Perhaps the most radical suggestion, not implemented anywhere, has been that discovery should be eliminated. On this view, "the system is broke." Massive resources are poured down the drain of civil discovery. Fact pleading, no discovery, and speedy trials may be the better way.

It was suggested again that if the judge has the time and uses it to manage litigation, the problems are controllable. But the problem of judge time must be dealt with. Without sufficient judge time, other reforms are simply spinning the wheels. If indeed it is true — as judges have been taught for years — that the one fair and effective control is setting a firm trial date, why doesn't this happen? If it does not happen because it cannot happen, because judges cannot effectively meet firm trial dates, solutions may lie outside the rules of procedure.

In a more optimistic vein, it was noted that empirical studies of discovery show that in most cases, discovery is not a problem. There is no discovery at all in many cases, and only limited resort to discovery in many more. We must be careful to avoid disrupting a system that works well most of the time in the process of

attempting to cure the problems that arise in a small proportion of all cases.

In a more cautious vein, it was noted that bar associations everywhere are now addressing the problem of lawyer behavior. There is unacceptable behavior by too many lawyers — including a handful who always cause problems, particularly when matched up against each other.

One of the perennial proposals for reform was again advanced, cutting back from the Rule 26(b)(1) permission for discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." The reference to subject matter would be replaced by limiting discovery to matters relevant to the issues framed by the pleadings. It was recognized that the pleading issues standard would be difficult in cases in which the pleadings do not frame issues — in such cases, discovery would continue to be about whatever discovery comes to be about. One way out of this interdependence with notice pleading might be to define the scope of issues by other means, most likely through Rule 16(b). Rule 16(b) indeed is used to affect and even control the scope of discovery. Initial scheduling orders, combined with Rule 26(f) discovery conferences, may be able to accomplish significant definition of issues and thereby support limitations on discovery.

The argument for narrowing the broad Rule 26(b)(1) scope of discovery was related to the ongoing debates about the scope of discovery protective orders. The availability of effective protection is an essential counterbalance for the broad scope of discovery, particularly as discovery is pushed beyond matters plainly relevant to issues clearly framed in the action. This connection exists not alone as a matter of the quid pro quo considerations that have shaped development of the rules as they stand, but also as an essential protection of privacy. Should ongoing efforts to reduce the effective operation of protective orders succeed in some measure, the need to protect against unwarranted invasions of privacy will substantially strengthen the case for curtailing the scope of discovery.

H. Thomas Wells stated that similar debates are occurring in the ABA Litigation Section. Attention has focused not only on specific pleading, but also on the question whether disclosure might be broadened to include more information about a party's own case. From his experience with three different disclosure rules in the three districts of Alabama, the Rule 26(f) discovery meeting is a good device if there is a good complaint. If the complaint is not well drawn, the meeting is not effective. But it is possible to link the scope of discovery to the pleadings.

This discussion of disclosure prompted the suggestion that perhaps the general scope of discovery should be narrowed to the present scope of Rule 26(a)(1) disclosure.

A desire was expressed to find out more general information about what is happening, particularly with early experience on disclosure. The Rand study of CJRA plans should help. The Federal Judicial Center is evaluating experience in five "demonstration" districts that include at least one — the Northern District of California — that has adhered to disclosure requirements essentially the same as Rule 26(a)(1). Once these studies are done, it will be time to reexamine the provisions of Rule 26(a)(1) that permit local options on disclosure.

This discussion concluded with the observation the Committee would welcome any study and expression views that might be undertaken by the Federal Rules Committee of the American College of Trial Lawyers or the Litigation Section of the ABA.

Rule 5(e)

A draft amendment of Rule 5(e) was published for comment on September 1, 1994. The Committee agreed on changes to the published draft at the October, 1994 meeting, as described in the minutes for that meeting.

Discussion began by observing that a change should be made in the third sentence of the first paragraph of the published Committee Note. The statement that "the local rule" must be authorized by the Judicial Conference is a misleading summary of the present rule. The Note should say instead that "Use of this means of filing" must be authorized by the Judicial Conference. The reference to "three conditions" also will be changed to "two conditions" rather than worry overmuch about the number of conditions that must be met to permit electronic filing under present Rule 5(e).

Comments on the published draft by the Association of the Bar of the City of New York led to discussion of the availability to the public of papers filed by electronic means. The Committee recognized two quite distinct issues. One issue is whether the right of public access is in any way affected by electronic filing. The Committee agreed clearly and emphatically that electronic filing does not in any way affect the right of public access. This answer is so plain that there is no need to provide any statement in the text of the rule, just as the rules have not had to spell out the right of public access to documents initially filed in tangible form. The other issue is the means of accomplishing actual exercise of the right of public access, recognizing that the public includes people without computer skills and that simply providing a public terminal in the clerk's office will not respond to all needs. It was concluded that this problem is one that should be addressed by a combination of the Judicial Conference standards process and by local rules. The means of access issue is obviously tied to the technical standards for filing, and is as obviously tied to such provisions as local rules

may make for requiring supplemental filings in tangible form.

The Committee was advised that the Administrative Office will attempt to help the Judicial Conference and its committees to draft technical standards quickly. Although it is clear that the amendments would authorize local rules that permit electronic filing before Judicial Conference Standards are adopted, it is possible that the standards will be available soon after the amended Rule 5(e) could take effect, and possibly even by the effective date.

There was renewed discussion of the October decision to delete from the published draft the sentence stating: "An electronic filing under this rule has the same effect as a written filing." The version published by the Appellate Rules Committee provides: "A paper filed by electronic means in accordance with this rule constitues a written paper for the purpose of applying these rules." Concern was expressed that the reference to "this rule" might invalidate filings authorized by local rule, even though filing in compliance with a valid local rule would seem to be authorized by the rule. It was suggested that it would be better to refer to a filing "in accordance with," or "under," a local rule. The belief that the entire sentence is unnecessary was again expressed, in light of the fundamental authorization to file, sign, or verify documents by electronic means. The conclusion of this discussion was that the Chair and Reporter were authorized to coordinate language under the auspices of the Standing Committee to achieve uniform provisions in the Appellate, Bankruptcy, and Civil Rules.

It was agreed that the final two sentences of the published Committee Note should be deleted. These sentences disparaged filing by facsimile means, an enterprise that may be unnecessary if it is right that routine facsimile filing will prove attractive to few courts, but may prove wrong if facsimile filing proves more attractive to many courts than more advanced means of electronic filing.

The suggestion was made by the Eastern District of Pennsylvania, through the court clerk, several judges, and many lawyers, that Rule 5(b) should be amended to permit service by electronic means. The Committee has considered this question recently. Discussion confirmed the earlier conclusion: it seems better to await developing experience with electronic filing before pursuing the potentially more difficult problems that may surround electronic service.

The Eastern District of Pennsylvania also suggested that Rule 5(d) should be amended to permit a court clerk to effect service by electronic means. Although this question has not been considered by the Committee, and seems to pose fewer potential problems than electronic service among the parties, the conclusion

was the same. Greater experience is needed before it will be time to move in this direction.

Rule 9(h)

The final sentence of Rule 9(h) provides: "The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)." It is not clear what is meant by the statement that "cases" means "claims." The ambiguity arises in cases that include both admiralty claims and nonadmiralty claims. The Rule may mean that only the admiralty claims qualify for appeal under § 1292(a)(3). But it also may mean that if the case includes an admiralty claim, an order that disposes of any claim in the case and that meets the terms of § 1292(a)(3) can be appealed, even though the claim is not an admiralty claim. The only known case to address the issue squarely is Roco carriers, Ltd. v. M/V Nurnberg Express, 2d Cir.1990, 899 F.2d 1292. The court in that case allowed a § 1292(a)(3) appeal by a party who was not involved with any of the admiralty claims in the case, concluding that a pendent party should be able to appeal an order that could be appealed by another party. It found that the order establishing the appellant's liability was "integrally linked with the determination of non-liability" of the party to the admiralty claim.

The prospect of amending Rule 9(h) was discussed extensively at the October, 1994 meeting. Further discussion focused on the desirability of interlocutory appeals. Opinion was divided on the need for § 1292(a)(3), a matter beyond the Committee's authority. Some members believe that interlocutory appeal is a good thing, and that statutory opportunities should be developed in ways that maximize the ability to appeal. Others believe that admiralty cases do not involve any special justification for interlocutory appeal that distinguishes them from other complex litigation. Even some of those who doubted the wisdom of § 1292(a)(3) believed that so long as it is available, it should be made as sensible as possible. They found persuasive the concern expressed in the Roco case that interlocutory appeal opportunities that are available to some parties or as to some claims should be equally extended to all.

By vote of 7 to 3, the Committee approved a motion to strike the present final sentence of Rule 9(h) and substitute a new final sentence as follows:

> ~~The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).~~ A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

A Committee Note will be drafted by the Reporter and circulated to members of the Committee for comment.

Rule 26(c)

On recommendation of this Committee, the Standing Committee recommended to the Judicial Conference that it send to the Supreme Court an amended Rule 26(c) that grew out of discussions at this Committee's meeting in October, 1994, and an ensuing mail vote. The Judicial Conference first voted to delete the reference to stipulated discovery protective orders in the proposed Rule 26(c)(1), and then voted to recommit the proposed rule to the Advisory Committee.

Discussion of the apparent reasons for the remand began with the observation that a concerted lobbying effort was directed at the Judicial Conference in the last few days before its meeting. The lobbying addressed only the stipulation aspect of the proposed rule. This viewpoint ran parallel to the aspect of recent legislative proposals that would require specific findings by the court to support every protective order.

It was suggested that in the flurry of last-minute representations, the Conference was not able to fully understand the nature of the proposed rule. This Committee sought a balanced rule that recognizes the present important practice of stipulated protective orders, but that recognizes the interests of nonparties by making clear the right to intervene to seek modification or dissolution. The draft does not require a judge to accept a stipulated order. Among the many analogies to other established practices, Rule 35 physical examinations provide an easy illustration. A court must find good cause before ordering a party to submit to a physical examination. The parties, however, can agree that a party will submit to a physical examination without a court order. In the same way, the parties can agree to exchange information entirely outside the channels of formal discovery. If they choose instead to proceed through discovery, they may agree to submit a stipulated protective order. The court, however, "may" — but also may not — enter the order. In this form, the rule not only recognizes well established current practice. It also recognizes the need to honor the balance struck by the central role of protective order practice in the overall plan of discovery. Discovery has been made very broad, permitting inquiry into vast private areas that would be protected against any other mode of inquiry, public or private. This sweeping reach is tolerable only if means exist for limiting the invasion of privacy to the needs of the litigation. The Committee requested the Federal Judicial Center to study the actual use of protective orders. This study, now nearly complete, shows that stipulated protective orders are common, as are orders based on unopposed motions. Defective products — the focus of much of the current debate — are involved

only in a small minority of protective orders. Civil rights cases are the single most common category of cases involving protective orders, protecting against general access to highly personal information that may relate to nonparties as well as parties.

Discussion of the appropriate next step opened with the reminder that many observers have doubted the need for any amendment of Rule 26(c), and that the Committee has shared these doubts. There is much to be said for the conclusion that it would be better not to pursue amendment further than to risk eventual adoption of amendments that would upset the sensitive balance established by present practice.

Further discussion of the next step noted that concern had been expressed in the Judicial Conference that the proposed amendments varied to some extent from the draft that had been published for public comment. Republication of the proposal in the form submitted to the Judicial Conference may elicit additional comments that can further inform the Committee, either supporting present views or stimulating reconsideration and changes of position. Public comment may illuminate the decision whether to pursue the proposed amendment at all, as well as the more specific issues that surround stipulated protective orders.

It was noted that the Rule 26(c) proposal does not affect access to materials that are used as part of a judicial proceeding. Discovery information submitted at trial, for example, becomes part of the public trial record, subject to sealing only under the quite different standards that apply to trial records. Materials submitted to the court for consideration in connection with any other order likewise become part of the public record, moving free of the scope of a discovery protective order; if use of the materials violates a protective order, that fact may be considered in determining what to do about access, but cannot be controlling.

The Committee unanimously approved a motion to recommend to the Standing Committee republication of the version of Rule 26(c) that was transmitted to the March, 1995 meeting of the Judicial Conference.

At the end of this discussion, it was voted to carry forward for further consideration a draft Rule 5(d) that would regulate agreements to return or destroy discovery materials that are not filed with the court.

Rule 47(a)

The Committee agreed at the October, 1994 meeting to submit to the Standing Committee for publication amendments to Rule 47(a) that would establish the parties' right to participate in voir dire examination of prospective jurors to supplement the initial examination by the court. The Standing Committee discussed the

proposal at its January, 1995 meeting, but deferred action pending deliberation by the Criminal Rules Advisory Committee on parallel changes to Criminal Rule 24(a)(2). Early in April, 1995, the Criminal Rules Advisory Committee approved, by vote of 9 to 2, a draft Criminal Rule 24(a)(2) that – like the proposed version of Civil Rule 47(a) – would require the trial court to permit the parties to supplement the court's examination. There are many drafting differences between the two proposals. Discussion of the drafting differences, and of initial reactions from judges who have seen the Rule 47(a) proposal, led to extended further discussion of the initial proposal.

The Rule 47(a) proposal is seen as part of a package with the proposal, approved by the Standing Committee, to publish for comment a revision of Rule 48 that would restore the 12-person jury. The combined effect of the two proposals could go far toward restoring civil jury trial as a fair and rational means of resolving disputes.

Much discussion was devoted to early reactions from judges who have seen the Rule 47(a) proposal. There is widespread concern that lawyers will take control of the jury selection process, converting it into an opportunity to influence the jury and distort the impartiality that the selection process is supposed to foster. Written response has come especially from judges in the Fourth Circuit, and most particularly from judges in Virginia, but has come from other quarters as well. One committee member reported attending a meeting of chief judges in the Ninth Circuit who, on hearing a description of the proposal, were unanimously opposed. Another reported that several members of the Fourth Circuit had, within the first week after the meeting of the Criminal Rules Advisory Committee, commented negatively on the draft Criminal Rule 24(a).

It was agreed that the early response from judges is likely to be borne out as additional comments come in. Even though the Federal Judicial Center survey in 1994 showed that approximately 60% of federal judges permit direct lawyer participation in voir dire – a sharp increase from the number found in an earlier survey – they are opposed to requiring that participation be permitted. There is not yet, however, any evidence that judges who do not permit lawyer participation have reached this position because of bad experiences with their own initial efforts to permit and control lawyer participation. The opposition may rest in part on concern about interfering with the autonomy of individual judges to adhere to traditional local practices and to methods that work well in their own courts. It also surely rests on concern that lawyers will be difficult to control. The motives of lawyers are to act as advocates, and the impulse to bring advocacy into the voir dire process will have to be cabined by the trial judge.

The opposition of many federal judges will ensure that the Rule 47(a) proposal is controversial. One committee member suggested that if there are problems with present practice, they do not involve a system that is "broke," but only one that is "broke at the edges." Opening the topic is sure to bring controversy. If, as many expect, members of the bar will strongly support the proposed amendment, there is a chance that whatever is done in the Enabling Act process will be taken to Congress. Perhaps the time is not ripe for taking on a controversial topic without demonstrated need.

The concern about controversy was met by the observation that we have not yet heard from the practicing bar. The Committee should not shy away from controversy when there is a real need to be addressed. Many experienced lawyers have told the Committee, directly and indirectly, that there is a serious problem. Voir dire conducted by some judges is simply not adequate to support informed efforts to select an impartial jury. The Committee was unanimous in making the proposal. The Criminal Rules Advisory Committee divided 9 to 2 in favor of the parallel proposal. If the Committee hesitates, the lawyers who have addressed the Committee will return to Congress to renew longstanding efforts to secure legislation. Concerns about expending political capital must recognize that the proposal has been launched, and launched for good reasons.

The need to revise Rule 47(a) was revisited in more general terms as well. The central theme was that the parties have a right to the fairest jury possible. Many lawyers reject the view that court-conducted voir dire is adequate to the task. Particularly on the criminal side, there are many cases in which judges have refused to ask questions that are very basic. Challenges for cause require careful examination that is well-informed by knowledge of the case. We are, moreover, still in the early stages of experience with the new rules that prohibit discriminatory exercise of peremptory challenges. Courts are likely to require articulation of nondiscriminatory reasons to support a peremptory challenge that in turn require support in voir dire examination. There is little reason to fear that party participation will unduly lengthen voir dire if courts conduct effective initial examinations and make it clear that misuse of party examination will be quickly corrected. The FJC study in 1994 shows no more than de minimis variations in the time required for voir dire no matter how examining responsibility is allocated between court and parties. A Committee member reported that a similar conclusion was reached by the National Center for State Courts in an earlier survey. The views of the Criminal Rules Advisory Committee bolster this Committee's original conclusion that there is a real need for reform, and particularly that there is a need to hear reactions to a published proposal.

Discussion of the differences between the Rule 47(a) draft and the Criminal Rule 24(a) draft turned first to the provision in Criminal Rule 24(a)(2) that: "The court may terminate supplemental examination if it finds that such examination may impair the jury's impartiality." This provision, and a parallel provision suggested by the Committee Reporter in earlier correspondence with members of the Standing Committee and the Chair and Reporter of the Criminal Rules Advisory Committee, are intended to make it clear that abusive questioning can be terminated. Some members of the Committee thought it would be desirable to add to Rule 47(a) a new final sentence: "The court may terminate further examination by a party whose examination may impair the jury's impartiality." The need for this provision, however, was questioned. The Rule 47(a) draft explicitly permits the trial court, in its discretion, to set reasonable limits of time, manner, and subject matter. These limits can be invoked as the need arises from misuse or abuse of the right of supplemental examination. This broad general power is more effective than the proposed Rule 47(a) addition or the Criminal Rule 24(a)(2) draft. The Rule 24(a)(2) draft, moreover, may imply undesirable limits on the right to terminate party examination. It seems to require a finding that the examination may impair the jury's impartiality, implying that examination may not be cut off for other reasons. On the other hand, it does not require that examination be cut off even when there is a threat to jury impartiality. It also could be read to provide for termination of examination by all parties, not the offending party alone. Although correspondence with the Criminal Rules Advisory Committee Reporter indicates that the draft was intended to ensure that all parties at least have the opportunity to begin examination, by referring to the power to "terminate," there also was some concern that termination might be ordered at the very outset before the finding of a threat to impartiality could be based on actual behavior rather than anticipated behavior. At the end of this discussion, it was concluded that the best course would be to adhere to the current Rule 47(a) draft. The Committee Note, however, should be fleshed out with an express statement that the power to establish reasonable limits includes the power to terminate further examination by a party who misuses or abuses the opportunity.

Another feature of the Criminal Rule 24(a) draft that drew active discussion was the requirement that a party make a "timely request" to enjoy the right to examine prospective jurors. This limitation was adopted in response to the concerns of a member of the Criminal Rules Advisory Committee who prepares a lengthy questionnaire for prospective jurors, tailored to each individual case, and who believes that in shaping the questionnaire it will be important to know whether the parties plan to examine the jurors. The thought also was expressed that timely advance request might enable the judge to anticipate more accurately the amount of time

that must be set aside for the jury selection process. One member of the Committee initially was attracted to this limitation, but at the conclusion of the discussion joined the unanimous consensus that the limitation is not desirable. In various ways, committee members observed that a timely request requirement will prove only a trap for the unwary. All lawyers will know that they cannot anticipate the need for examination until the court has concluded its own examination. All but the ill-advised or forgetful therefore will make automatic requests that they hope will be timely. The forgetful and the diligent alike, moreover, will be at risk that even an express pretrial request will be found not timely, particularly when there is no attempt to set a clear measure of timeliness. The actual decision whether to undertake supplemental examination, however, will be made only after completion of the court's examination shows whether there is a need for supplemental examination. The result will be that automatic advance requests do not provide any useful information to the court. For that matter, the court itself should be able to anticipate that the nature and extent of supplemental examination will be shaped by the results of its own examination.

The Committee expanded on the October, 1994 discussion of the use of questionnaires as part of the examination of prospective jurors. The values of questionnaires were noted. One committee member noted regular successful experience with questionnaires in state court practice. The answers generally support many challenges for cause. The process can save time; prevent contamination of a jury panel by answers openly given in the presence of other prospective jurors; avoid the embarrassment that can occur when a prospective juror is forced to answer questions in public; and encourage prospective jurors to provide honest answers that might be too embarrassing for public announcement.

Questionnaires, on the other hand, also have a potential for mischief. Just as voir dire examination, they can be used in attempts to select a favorable jury, not an impartial one. Several committee members have had experience with lengthy questionnaires that invade juror privacy across a wide range of topics, designed not to support challenges for cause or intelligent use of peremptory challenges but to support the efforts of "jury consultants" to gerrymander a favorable jury. Inquiries may be attempted into reading habits, religious preferences, political views, and other matters far afield from matters that are properly allowed on voir dire examination.

The discussion of questionnaires concluded with the direction that the Committee Note be expanded to reflect not only the virtues of questionnaires but also the potential dangers.

Robert Campbell stated that the Federal Rules Committee of the American College of Trial Lawyers thinks that the draft Rule 47(a)

properly controls the "tension between court and lawyer." The draft clearly establishes a right only to supplement the court's examination, within limits, not the right to take over. The lawyer will not be permitted to try the case at voir dire. The power to set reasonable limits includes the power to terminate, and need not be supplemented by a possibly limiting separate statement of the power to terminate examination upon demonstrated misuse. The Criminal Rule 24(a) requirement of "timely request" seems dangerous, because it may be used to defeat the right without achieving any significant benefit. The court knows that it has the power to limit, and does not need any advance notice of the intent to exercise the right.

Two changes in the language of the draft rule were then approved by consent. The statement that the parties are entitled to examine prospective jurors to supplement the court's examination was changed to a statement that the court must permit supplemental examination. The reference to reasonable limits "set" by the court was changed to "determined;" the Committee Note should be revised to state that the limits can be determined as examination by the parties progresses, including termination of examination by a party who misuses or abuses the right to examine. The power to terminate examination extends beyond abuses that threaten the ability to seat an impartial jury to include other misuses or abuses, such as unduly confusing, repetitious, or lengthy examination, or examination that threatens unwarranted invasion of privacy.

The Committee further concluded that every effort should be made to get responses to Rule 47(a) as broad and detailed as possible during the course of the public comment period if the draft rule is published.

The Committee was reminded that a recommendation to the Standing Committee for publication represents the Committee's judgment that there is a genuine need to correct present practice, and that the proposal is the Committee's best answer pending consideration of the information gained as the process moves forward. A motion to renew the recommendation of Rule 47(a) to the Standing Committee for publication passed unanimously.

The Reporter was directed to report to the Chair and Reporter of the Criminal Rules Advisory Committee the Committee's reasons for going forward the the language of Rule 47(a) rather than adopting the language of proposed Criminal Rule 24(a). In addition to the differences discussed in detail, several other matters were noted. Rule 24(a) refers to the "preliminary" voir dire, a word that may seem to subordinate the importance of the court's primary responsibility for effective voir dire examination; the Committee prefers to avoid this possible implication. Rule 24(a) speaks in the first sentence of "examination of the trial jurors," rather than prospective jurors; if this term is appropriate for some

reason of criminal practice, such as the need to distinguish grand jurors from trial jurors, there is no parallel need in civil practice. Rule 24(a) states that the court must permit the defendant or the defendant's attorney to examine prospective jurors, language that may create an impression that a defendant who is represented by an attorney nonetheless may conduct the examination in person. Rule 24(a)(1) omits reference to the court's discretion in describing the power to set reasonable limits on the supplemental examination; the explicit Rule 47(a) reference to limits set "by the court in its discretion" was adopted to assuage fears that efforts to control party behavior would become the occasion for intrusive appellate review and reversal. The appropriate course may be to publish both draft rules for comment in their present forms, facilitating public reaction to these and perhaps other differences of drafting.

Rule 23 Study

Thomas Willging provided a brief report on the progress of the Federal Judicial Center study of Rule 23 to supplement the partial draft report that was provided with the Committee materials and the presentation to be made at the IJA Conference the following day. He noted that data collection in the Northern District of Illinois and the Southern District of Florida will be completed in May and June. They hope to have a final report by the end of summer. Among the preliminary findings of experience in the Northern District of California and the Eastern District of Pennsylvania, he noted that class certification is granted in only about half of the cases brought on for certification, and that defendants often are successful in winning partial or complete dismissal under Rule 12(b)(6) or by summary judgment.

Legislative Activity

A report was provided by the subcommittee of Committee members Doty, Vinson, and Wittmann, chaired by Scirica and reported by Rowe, dealing with the procedural aspects of pending securities legislation. It was suggested that the central issue at the outset will be whether Congress shares the view of the SEC that private actions are essential to protect the integrity of the securities markets. If Congress disagrees with this view, it is likely to make many substantive changes and blend procedural changes in with them. If Congress shares this view, on the other hand, it may find less sweeping means of addressing any abuses that it may find in present patterns of private enforcement. At least some of the problems that Congress is addressing deal with matters within the reach of the Rules Enabling Act. The Committee can provide for such matters as a threshold showing on the merits as a prerequisite to class certification; permissive interlocutory appeal from certification rulings; means of regulating races to file class actions; and perhaps the specific pleading standards of Rule 9(b).

As to such matters, and others within the Committee's reach, it will be important to discover whether the Committee and Congress can and should find means of working together.

Laura S. Unger described several of the concerns of Congress, with particular emphasis on the perspectives of the Senate, where she works. It does not seem likely that Congress will want to defer to the SEC and the rules committees, but the committees of Congress would like to be able to gain the advantage of rules committee knowlege and experience just as they gain much advantage from working with the SEC. There is considerable frustration with lax pleading, races to the courthouse, and the cost of discovery while motions to dismiss remain pending unresolved. There is a desire to find a way to force institutional investors, who typically have the largest stakes, to opt in or out of securities class actions. Such a system likely would encourage the institutions to opt out of weak actions, greatly reducing the incentives to bring weak actions. At the same time, it would encourage the institutions to opt into strong actions, preventing them from getting a free ride on the efforts of others and perhaps contributing valuable information to the progress of the action.

This concern with weak actions was echoed in the Committee. It was noted that the problem is with actions that pass the hurdles of Rule 11 frivolousness, motions to dismiss for failure to state a claim, and motions for summary judgment, but that nonetheless are quite weak.

Miscellaneous Rules

Rule 4. Suggestions have been made from various sources for amendments of the 1993 version of Rule 4. In addition to earlier proposals, proposals this time suggested revision of Rule 4(d)(2) to provide for use of the waiver-of-service procedure against the United States as defendant; revisions of subdivisions (e) and (f) in some indeterminate manner to improve service on foreign governments; and amendment of Rule 4(m) to specify a clear error standard for reviewing the determination whether good cause has been shown for a failure to effect service in timely fashion. The Committee concluded that it is too early to consider further amendments of Rule 4. The various suggestions should be accumulated for joint consideration in a few years.

Rules 8, 9, 12: Particularized Pleading. It has been suggested that the rules be amended in some way to restore the "heightened pleading" requirement that was prohibited by the decision in Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 1993, 113 S.Ct. 1160. The Committee noted that it has considered this specific question and has concluded that it would be premature to address it before lower courts have had an opportunity to develop practice further in light of the Leatherman decision. It also noted that the combined topics of pleading and

discovery continue to occupy the Committee on an ongoing basis.

Rule 12. A suggestion has been made that a new rule be adopted that "would require that dispositive motions by defendants in civil rights cases on grounds of qualified immunity be filed and ruled upon prior to the commencement of trial." The Committee concluded that this suggestion is not sound. Other defenses may be raised for the first time at trial, under the liberal amendment policies of Rule 15, and there is little reason to distinguish official immunity defenses.

Rule 15(a). Rule 15(a) establishes the right to amend a pleading to which a responsive pleading is required that endures until the responsive pleading is served. The result is that a motion to dismiss does not terminate the right to amend as a matter of course, while an answer that includes grounds that might have been advanced by motion does terminate the right to amend. It has been suggested that it is not clear why a motion and an answer should have different consequences for this purpose. The suggestion was advanced from the perspective of urging that a responsive motion should cut off the right to amend just as an answer does. Brief discussion included the observation that leave to amend is almost never denied unless the underlying claim is patently frivolous. The Committee concluded that this topic should be carried on the agenda for further discussion, including consideration of alternatives that would expand the right to amend as a matter of course, treat responsive motions in the same way as responsive pleadings are now treated, establish tighter limits on the right to amend as a matter of course, or abolish the right to amend as a matter of course.

Rule 23(e). A suggestion that Rule 23(e) should be amended to develop further the court's responsibilities in approving class action settlements was met with the conclusion that this topic is one of the central matters being studied in the ongoing study of Rule 23. It will continue to be a major topic in developing possible revisions of Rule 23.

Rule 26(a). A plea has been received to repeal present Rule 26 in favor of the version that was replaced on December 1, 1993. The Committee concluded that it is too early to consider such proposals. Experience with Rule 26 and local variations will be a major focus of the ongoing study of local Civil Justice Reform Act plans. Further study will be undertaken on completion of the study.

Rule 39(c). The question has been raised whether a court should be required to state by the beginning of trial whether a jury will be treated as an advisory jury as to any matter that does not involve a constitutional or statutory right to jury trial. The Committee

concluded that no reason exists to undertake amendment of the rule at this time.

Rule 43(f). Rule 43(f) provides that a court may appoint an interpreter, but does not address the question whether there are circumstances in which a court should be required to appoint an interpreter. An interpreter may be necessary not only to enable the trier of fact to understand a witness, but also to enable a party to understand a witness. It has been suggested that appointment of an interpreter may be required by the Americans With Disabilities Act, the Rehabilitation Act of 1973, or more general principles of due process. The Committee concluded that before considering these questions further, an effort should be made to find out more about present practices that may supplement the bare text of Rule 43(f). The topic will remain on the agenda for consideration at a future meeting.

Rule 56(c). Rule 56(c), on its face, establishes implausible time periods for notice of a summary judgment and response to the motion. Many courts have adopted local rules establishing more sensible periods, and also providing procedures that require specification of the facts claimed to be established beyond genuine issue and identification of supporting materials. It may be time to adopt uniform national standards. The Committee concluded that this topic should be set for further discussion on the agenda for the fall meeting.

Rule 60(b). A plea was received to amend Rule 60(b) "to provide that where the prevailing party in a judgment, order or proceeding, cites that judgment in any other proceeding as evidence of its position, the parties to such other litigation shall be entitled to challenge the basis and result of such judgment, order or proceeding as if they had been parties thereto." The Committee was unable to discern the purpose or impact of the proposal, and concluded that it does not deserve further consideration.

Rule 81(c). It has been pointed out that Rule 81(c) continues to refer to the "petition" to remove an action from state court. The procedure for removal has been changed from a petition to a notice of removal. The Committee agreed that revision is appropriate, but also concluded that minor technical matters of this sort may better be accomplished by legislation than by the lengthy Rules Enabling Act process. It was concluded that the appropriate procedure is to accumulate proposals of this sort, to be submitted to the Standing Committee for recommendations to Congress.

Copyright Rules of Practice. The Copyright Rules of Practice have not been considered since 1966. In 1966, the Committee expressed doubts about "the desirability of retaining Rules 3-13 for they appear to be out of keeping with the general attitude of the Federal Rules of Civil Procedure * * * toward remedies anticipating decision on the merits, and objectionable for their failure to

require notice or a showing of irreparable injury to the same extent as is customarily required for threshold injunctive relief." It refrained from acting at that time because Congress had begun the deliberative process that led to enactment of the 1976 Copyright Act. The 1976 act includes discretionary impoundment procedures, 17 U.S.C. §503(a), that seem to be inconsistent with the Rules of Practice. These Rules are unfamiliar territory to present members of the Committee. The topic will be carried forward on the agenda while additional means of information are sought.

Admiralty Rules B and C. It has been proposed that Admiralty Rule B should be amended to adopt the reduction of the requirement for service by a Marshal that was recently made in Rule C. This proposal will be set on the October agenda with specific language to show the change.

Next Meeting

Rule 23 revisions will form the major item for discussion at the fall meeting. The meeting probably will be set in October. The period from October 19 to 21 has been ruled out. Every effort will be made to select the dates that create as few conflicts as possible for presently known schedules of Committee members. The site will be Tuscaloosa, Alabama.

In preparing for discussion of Rule 23, the Committee should work throughout the summer in exchanges that focus on gradually more specific proposals. This process will help to decide whether any revision should be attempted, whether drastic changes are desirable, or whether modest reforms are worthwhile and the limit of prudent proposals. A docket of proposals will be prepared by the Reporter, beginning with lists of topics that seem certain to warrant further discussion and other topics that will warrant further discussion only if Committee members believe that is desirable. Some of the "no-discussion" items may include suggested amendments that can be considered at the October meeting without further correspondence over the summer. Once a list of topics for summer discussion is created, more specific questions will be framed for continued collegial exchange, for a self-study process that will not attempt to reach any specific decisions. The thought is that focusing for the first time on a detailed draft at a meeting, without advance preparation, will not provide a solid foundation for effective progress. Although it is hoped that a detailed draft rule can be provided for consideration, perhaps even for recommendation by the end of the meeting to the Standing Committee for publication, the draft itself will be intended to focus the results of the summer exchanges, not to preempt further

detailed discussion and revision. Detailed language will facilitate discussion, without freezing it.

Respectfully submitted,

Edward H. Cooper, Reporter

United States Court of Appeals
for the Fifth Circuit

Item 8D

May 8, 1995

PATRICK E. HIGGINBOTHAM
CIRCUIT JUDGE

UNITED STATES COURTHOUSE
1100 COMMERCE STREET
DALLAS, TEXAS 75242

TO: Members of the Advisory
Committee on Civil Rules

Dear Colleagues:

Those attending the N.Y.U. symposium heard the plan for discussing issues over the summer leading to their formal consideration at the fall meeting. Ed Cooper and I have been preparing that plan. Ed's paper for the N.Y.U. symposium treats proposals the committee has been discussing over the past several months. Reflecting Ed's exam mode, I enclose a series of multiple choice questions prepared by Ed and designed to begin the organization of our discussion.

Please respond to these questions at the level of detail you think appropriate and identify any additional issues that should be considered by the committee. Our effort is not to foreclose consideration of any proposal. These are the ones that have received the most attention. If you have other ideas, please put them on the table. I emphasize the importance of putting any additional suggestions on the table now. The committee will have only one more round at these ideas before the draft in early fall. A draft will draw our attention and tend to push aside other possibilities. This is not a request for ideas that do not appeal to you. Rather, I urge that now is the time for those that do.

Please organize your responses by question and forward your responses to me and Ed, with a copy to all other members of the committee, by Friday, June 9, 1995.

The fall meeting of the committee will be at the University of Alabama in Tuscaloosa, Alabama. We are looking at late October or early November and will forward alternate dates shortly.

Sincerely yours,

Pat

Patrick E. Higginbotham

Rule 23 Agenda: The First Pass

The Committee decided at the April, 1995 meeting that the time has come to attempt to move from gathering information about Rule 23 toward drafting. The first task must be to set an agenda of issues to be considered. A lengthy version of an agenda is set out in the attached draft of *Rule 23: Challenges to the Rulemaking Process*. Focus is better provided, however, by setting out a more succinct list of topics that for the most part avoids detailed development. Cross-references are provided to the *Challenges* piece to supply greater detail. The question for this first stage is whether we should be thinking at all about various topics; it will be time enough for detailed discussion when the major topics are addressed.

In an effort to keep this first pass simple, the topics are followed by a list of summary responses. The hope is that some items will yield a strong consensus that sorts out at least a few issues that can be put aside, at least for the time being. However that works out, it is even more important to have freeform responses suggesting items that should be explored and others that should be jettisoned. This form is intended to prod suggestions, not stifle them.

The Do-Anything Question

The first question is whether we should attempt to do anything about Rule 23:

(1) We should act now to improve Rule 23.

(2) We should keep it in play before deciding whether to drop it.

(3) We should forget it.

The Big, Structural Questions

Cut Back on Small-Claims Classes: Among many possibilities for cutting back on small-claims classes, see pp. 5-12, two stand out:

A court should be empowered to determine that class-action enforcement of an asserted right is not worth the burdens in light of the benefits to individual class members and the social values of enforcement, p. 8:

(1) We should consider including this as a factor.

(2) This is not worth further consideration.

A court should consider the probable success of the class claim on the merits as a factor in determining whether to certify the class, pp. 8-12, a lateblooming suggestion that has drawn strong support from many observers:

(1) The probable success factor should be included, and modeled on the preliminary injunction analogy.

(2) The probable success factor should be included, but drafted on independent Rule 23 grounds.

(3) Probable success should not be a factor.

Dispersed Mass Torts: pp. 12-17. There are many possibilities for addressing dispersed mass torts. Among the more obvious would be an attempt to cut back on the innovative efforts that have been made in the last few years to resolve such problems as those presented by asbestos and silicone gel breast implant litigation. The equally obvious alternative is to attempt to build a new rule on these efforts, attempting to create a framework that can be generalized to other mass torts as they come to maturity. A middle ground is presented by the current draft Rule 23, or some variation of it: provisions for opting out or in are made more flexible, conditions may be imposed on opt-outs or opt-ins, and issues classes are emphasized. The choices are too multifarious to present easy choices. Instead they may be sketched as follows, recognizing that multiple votes may make sense:

(1) We should ignore mass torts

(2) We should attempt to repeal present mass tort experiments

(3) We should attempt to create a bold new rule

(4) We should undertake modest changes that support continuing experimentation.

Control Counsel: The continuing perception that class actions often involve lawyers without clients, pp. 17-20, leads to a variety of suggestions for establishing some means of control. Many means are possible within the framework of present Rule 23(a), focusing on adequacy of representation. A solicited representative client, for example, could be found inadequate. Courts could undertake more active supervision of a representative's understanding of the action and involvement in it, or to regulate the process of selecting counsel. Other means may require amendment of Rule 23, including proposals for steering committees, class guardians, or the like. One of the central questions is how far class actions should make courts responsible for supervising one side of an adversary contest.

(1) We should not worry further about adequate representation

(2) We should emphasize the court's general responsibility to ensure adequate representation, but not attempt detailed regulation.

(3) We should consider additional means of ensuring adequate

representation, such as:

Class as entity: pp. 17-25: It may be possible to draft a rule that in some ways treats a certified class as an entity separate from the individual members. This separation might encourage clearer thinking about some of the incidents of certification, and at the same time emphasize the need to focus on the interests of each individual class member as something separate from the class. It also might confuse thinking beyond any likely benefit.

(1) It is worthwhile to continue to think about treating the class as an entity.

(2) Give up on it.

Specific Draft Questions

The current draft Rule 23 presents several occasions for focusing many of the suggestions that have been made for developing practice without making substantial departures from the basic approach now followed. See pp. 25 ff. The first questions obviously grow out of the proposed revisions; the later questions simply ask whether greater changes should be proposed.

Opt-out, Opt-in: The draft would permit the court to allow opting out of what now are (b)(1) and (b)(2) classes, and to prohibit opting out of what now is a (b)(3) class. It also would permit creation of an opt-in class. It includes a relatively detailed but incomplete provision permitting the court to control the res judicata consequences of opting out. Opt-in classes might be particularly useful with respect to claims that are so significant as to support individual litigation, as a means of achieving choice-of-law or like ends, or as a means of regularizing defendant classes. Opting out may be attractive as a means of addressing class conflicts even in (b)(1) and (b)(2) classes.

(1) We should continue to work on more permissive opting out

(2) We should continue to consider opt-in classes

(3) The present structure is better

Notice: The draft requires some form of notice in all class actions, but relaxes the requirement of individual notice now attached to (b)(3) classes. It may be attacked on the ground that individual notice is required at least when there is an opportunity to opt out, and the rule should make the nexus explicit. It may be defended on the ground that notice calculated to reach most members of a class is sufficient to provide opportunity to police the

adequacy of representation, and that the right to opt out can be assured by other means whenever there is a realistic prospect that individual litigation will be brought.

(1) It is good to make explicit the requirement that some notice be provided in all class actions

(2) Individual notice should be required in all opt-out classes

(3) It is good to permit relaxation of the individual notice requirement even for opt-out classes.

Collapsing Categories: The draft collapses the now separate categories of class actions, see pp. 29-30, converting the present distinctions into factors to be considered in determining whether a class action is a superior means of resolving a dispute. The FJC study seems to be puncturing the argument that this step is desirable because much time is now wasted by indirectly litigating notice and opt-out questions through artificial arguments about which class category applies. Notice, opt-out, and opt-in questions can be addressed without collapsing the distinctions among the categories, and it may be desirable to maintain the tradition embodied in (b)(1) and the moral force reflected in (b)(2) classes. At the same time, the draft has a strong functional attraction, and offers a neat drafting chore already accomplished.

(1) We should redraft in an attempt to preserve the traditional (b)(1), (2), and (3) categories.

(2) It is too early to choose.

(3) The draft should be maintained for the time being.

Issues Classes: see pp. 45-46. The draft emphasizes issues classes in part as a means of cautiously approaching mass torts. This is only a change in emphasis, not a direction for any particular departures from present practice.

(1) Added emphasis on issues classes seems useful.

(2) Why encourage separate litigation of issues in ways that may only complicate or distort separate litigation of the individual issues that remain to be litigated?

Defendant Classes: see pp. 30-33. This discussion has been triggered by the draft Rule 23(a)(4) requirement that the class representatives and their attorneys be "willing" to represent the class. It also involves the redrafting of (b)(2) to make it clear that a defendant class may be appropriate in an action for an

injunction, and the suggestion in the Note that an opt-in class may be desirable for defendants. The willingness requirement is an indirect way of approaching the problems that surround defendant classes. There are several possible approaches, and it is difficult to present a short list of alternatives because none of the possibilities seems particularly compelling. Free-form comment on this question may be particularly helpful, but a few choices might help get it started:

(1) Willingness should stay;

(2) Willingness should go.

(3) Rule 23 should state separate requirements for defendant classes.

(4) Rule 23 need not state separate requirements, but the Note should offer advice on the special problems of defendant classes

(5) This is too complicated to think about; we should leave it to continued judicial development

Fiduciary Responsibility: see pp. 33-35. Draft (a)(4) casually refers to the fiduciary duty of class representatives and counsel. It is fair to question the wisdom of this reference-without-guidance, as many have done. There might be real advantages in attempting to provide more guidance in Rule 23, but the task of providing wise guidance is a formidable challenge.

(1) We should keep the fiduciary duty reference and let it rest with that.

(2) We should abandon the fiduciary duty reference and not attempt any regulation of fiduciary responsibility.

(3) We should attempt to provide some guidance on the nature of the fiduciary responsibilities of representatives and counsel.

Settlement: see pp. 35-38. Draft Rule 23(e) deals with this in part, particularly with the provision for reference to a magistrate judge or master. Judge Schwarzer has made detailed suggestions for regulating the judicial approval process. The question of settlement classes lurks close to the surface. This is a topic that surely deserves further consideration and a draft.

(1) I disagree - let's not try anything more on settlement.

(2) I agree we should do more with Rule 23(e). My specific suggestions are set out in my freeform response.

Control Representatives: In many ways, reflected in part with the discussion of controlling counsel, concern has focused on the role of the class-member representative. The securities bill provisions for guardians or steering committees are prominent examples. An approach akin to the guardian approach, but in some ways less troubling, would be to require the court to appoint representatives – an approach that might give renewed importance to the "willing" representative requirement. Alternatively, courts might demand that representatives show actual understanding of the litigation and remain actively involved as clients; this, and other measures such as a simple inquiry into the circumstances that brought representative and attorney together, could be accomplished without amending Rule 23.

(1) We should attempt to do something to bolster the role of class representatives.

(2) These problems should be left to continuing judicial elaboration of the adequate representation requirement.

Class Member Participation: See pp. 47-48. The question is whether the rule should include provisions that encourage and support greater participation by nonrepresentative members of the class.

(1) We have enough participation without encouraging more.

(2) This prospect should remain on the agenda.

Overlapping Classes: see pp. 49-50. Although the problems of overlapping classes involve many matters outside the Enabling Act process, including antisuit injunctions, de facto surrender of jurisdiction by yielding priority to another action, intercourt and intersystem consolidation, and the like, it would be possible to approach the question in part through Rule 23. The simplest means would be to add a factor to the draft Rule 23(b) list, authorizing a court to consider the pendency of related class actions as a factor in ruling on certification or decertification. This question also might be added to the matters considered in approving settlement.

(1) We should see whether we can draft something that helps courts respond to the problems of overlapping classes.

(2) Enough already.

Rule 23: Challenges to the Rulemaking Process

Introduction

For some time now, the Civil Rules Advisory Committee has been studying the possibility of amending Civil Rule 23. Following suggestions of an American Bar Association Committee, a comprehensive draft was prepared during the time when the Committee was chaired by Judge Sam Pointer. A copy of that draft is attached as an appendix. It seems fair to describe the draft as in many ways a modest revision that would clean up many aspects of the rule, and – through deliberately flexible drafting – leave the way open for some measure of future growth. By now, the draft has been reviewed informally by a goodly number of practicing lawyers, judges, and academics. Reactions have varied. The academics, and to some extent the judges, have viewed the draft as indeed modest, a conservative but worthwhile effort to improve some obvious rough spots that does not attempt to take on the larger or more difficult questions. The practicing lawyers also have tended to view the draft as modest, but believe that the cost of adoption would far exceed the possible benefits. In their eyes, it has taken nearly three decades to beat Rule 23 into a workable instrument, an achievement that would be set back at least a decade if they were given the chance to litigate and strategize about the proposed changes.

These mixed reactions point up the questions that, in the end, are most important: Has the time come to attempt any changes in Rule 23? If so, what – and how dramatic – should they be?

Even this articulation of the questions assumes that it is appropriate to study Rule 23 with an eye to possible improvement. That assumption, at least, seems sound. The unspoken barrier that shielded Rule 23 from Enabling Act scrutiny for many years has come down. Rule 23 was last revised in 1966. The 1966 version of the rule has taken on a life that would have astonished the Advisory

Committee. Answers have been given to many questions that were not, could not, have been foreseen. A comprehensive review of this experience is now appropriate. It would be astonishing if this review were to show that we have, by a common-law process of elaborating Rule 23, developed an ideal class-action procedure. Surely there is room, both here and there, to improve the rule.

The conclusion that this is an appropriate time to study Rule 23 does not mean that this is an appropriate time to change Rule 23. Improvement carries its own costs as lawyers and judges struggle to understand, implement, amplify, and take strategic advantage of the intended changes. And if there is room to improve, there also is room to confuse, weaken, or even do great harm. Perhaps more to the point, seizing the opportunity to make modest improvements today will surely mean that Rule 23 will not be revisited for many years. If more significant or better improvements might be made in five years, or ten, it likely would be better to defer present action. There is no imperative to act once a problem is studied, no shame in inaction. Much depends on the state of present knowledge and the quality of present foresight. Foresight is particularly important, not only in developing wise answers but also in drafting them into a rule that will deliver those answers in the face of determined attempts by adversary lawyers to wrest different answers from it.

A question framed in this way cannot be answered without also determining the measure of risk aversion appropriate to the Enabling Act process. The rulemaking process works best when it generalizes the lessons of actual experience in a smaller arena. That comforting security, however, is not always available. Rule 23 might never be amended if first we must have controlled experiments, or clear empirical measurement of actual local experience with a new provision. The Enabling Act process has often relied successfully on less rigorous evidence. The aggregated experience of all of those engaged in the formal

rulemaking process, as well as the many insights provided by public comment and less formal processes such as this Research Conference, can provide a secure foundation. But judgments can and do differ about the lessons of experience. There are seldom likely to be changes to any rule that do not encounter some risk, however small the rule and the changes may seem. Some risks are properly accepted. If there is a clear problem and no experience-tested solution, real risks may justifiably be run. If there is no clear problem, an esthetic desire to pretty up a rule does not justify any significant risk. The urgency of the need is as important an element as the state of knowledge and quality of foresight.

In many ways, the pending reconsideration of Rule 23 provides a good test of the Enabling Act process. If the process can operate only when there are rigorous and clear answers to the important questions about present experience, Rule 23 must remain out of reach. If the process requires rigorous and clear predictions as to the effects of any changes, Rule 23 is even further beyond our reach. Prediction of the effects of a new rule in comparison to continued judicial evolution of the present rule, to development of other possible methods of aggregation, or to individual litigation, never will be precise. And it is simply impossible to reckon with such questions as the possible impact of new court rules in encouraging or discouraging procedural or substantive lawmaking by Congress or state legislatures.

As if these questions were not difficult enough, it also should be reflected that consideration should extend beyond the federal courts. State courts too are in the class-action business, and many are likely to adapt their rules to the federal rules. It is proper at least to consider the experience of state courts, and to attempt to draft a rule that recognizes the role of state-law claims not only in federal court but also in state courts.

The final caution is that there always is a temptation to do more than really should be done by rule. Even if firm answers can

be found for all the questions, large and small, it is better to avoid complicating the rule with answers to all the small questions. Once the framework is established, judicial evolution may provide good – perhaps better – answers, and can be better than the formal rulemaking process at adapting the answers to changing needs. The Manual for Complex Litigation enjoys similar advantages in helping to shape developing practice.

As to Rule 23, my own mood at the moment is one of optimistic caution. The caution arises from the staggering array of questions any of us can address to the state of present knowledge without receiving clear answers. Many of these questions are described below. Caution also arises from the dramatic new uses that are being made of Rule 23 in dispersed mass injury cases. In that field, a perfect grasp of today's reality would be superseded before it could be captured in a clear rule. The optimism arises from the belief that there are some ways at least in which Rule 23 can be improved without great cost. The optimism also is the shiny back side of a darker view that it will be at least ten years before we know enough to be able to undertake more sweeping changes within the confines of the Rules Enabling Act process.

Big Changes

There are two obvious occasions for potentially big changes in Rule 23, one negative – from the perspective of class action fans – and one positive. The negative changes would seek substantial curtailment of class action practice. The positive changes would seek to capture and perhaps improve the growing efforts to adapt the present rule to the needs of dispersed mass injuries. There also may be room for a third and essentially conceptual change, perhaps not so big but potentially important. This change would recognize openly that the class – amorphous, defined in the end only by judicial fiat – is an entity apart from those who volunteer (or may be coerced) to speak for it. It is, to be sure, a juridically created entity, and must speak through people just as

a corporation must speak through people. But it may help to sharpen the focus on class as client, speaking through one set of agents to another. These possible changes are addressed at the outset, before turning to the more detailed, even niggling questions that may be addressed whatever is done about the larger issues. The big changes will be described in terms that reflect assumptions about current experience that are widely shared but unreliable. One of the most important tasks is to learn more about the realities that underlie these and other assumptions, a task that the Federal Judicial Center is attempting. Reality may be different from perception, and perhaps markedly different. But large questions may provoke more diligent inquiry into reality, and thereby serve a purpose even if the questions prove irrelevant in the real world.

Cutting Back on Rule 23. Virtually all of the current discussion assumes that there is little need even to tinker with the core of (b)(1) and (b)(2) classes. This tacit assumption is hardly surprising. There may be room to change such incidents as notice and the opportunity to opt out. Creation of an opportunity to opt out would provide an indirect means of addressing the conflicts among individual members of the groups that, because of similarities that at times may be only superficial, are assumed to constitute homogeneous classes. But there is no perceived need to rethink the justification for these classes. To the contrary, it is widely assumed that (b)(1) and (b)(2) classes represent the traditional and persistently legitimate core of Rule 23. They also account for a relatively small minority of all class actions.

It may be surprising, on the other hand, that there have been few suggestions that the time has come to rethink the public enforcement function of (b)(3) classes. It is commonly accepted that (b)(3) classes, by providing a means for aggregating small claims that would not bear the cost of individual enforcement, have significantly expanded the effective reach of many substantive

principles. This effect is not beyond examination, both to assess whether it is as pervasive as some observers assert and to determine whether it is desirable. Because the question is not at the front of discussion, it deserves only brief and preliminary expansion.

One consequence of (b)(3) classes can be likened to the "freeway effect." One lesson from the early years of urban freeway construction was that pre-freeway traffic volumes expanded quickly as freeways were opened. Given an opportunity for more convenient driving, more people drove more places. The same consequence flows from procedural devices that aggregate small claims into more convenient litigating units. This effect obviously touches the aggregation court – claims that otherwise would be filed elsewhere are brought to the aggregation court. It is widely believed that beyond this reallocation of business among courts, aggregation also increases the number of claims that are made in any court. It cannot be assumed that the result always is "more justice," even accepting the underlying substantive rules at full value. One obvious risk is that defeat of aggregated claims will obliterate many claims that would have been justly vindicated in individual actions. That this risk is seldom discussed reflects the realistic assumption – of which more later – that aggregation creates a nearly irresistible force to award something to the claimants. Another risk is found in the common cynical observation that individual actions may be brought on ten or twenty percent of valid claims, while aggregated actions may be brought on one hundred and twenty percent of valid claims. Creating aggregating mechanisms that accurately sort out the unfounded individual claims may reduce the values of aggregation substantially.

A more troubling concern is that many of our substantive rules are tolerable only so long as they are not fully enforced. One version of this concern is that full enforcement simply costs more than it is worth. One illustration, not fanciful, is provided by

the class action to recover on behalf of consumers who had been duped into buying recorded music "performed" by a group that lip-synched to a performance by other artists. Putting aside any lingering doubts about the nature of the injury, great cost is incurred in mounting the action, supervising it, possibly deciding it on the merits should settlement fail, and distributing relief. It is a real question whether the cost is justified by the individual benefits of the actual award, or the aggregate benefits from deterring similar behavior. In some settings, these costs can be reduced by finding substitute means of relief – the offending musicians stage a free concert or reduce the price for the next record they actually perform themselves (if anyone will buy it), or a monetary recovery is awarded to a plausibly relevant charity, or whatever.

Whatever ingenuity might devise by way of "fluid," "cy pres," or "class" recoveries, they present a question that can be articulated in at least two ways. The direct mode is to ask whether such dispersed benefits stray too far from the connection that justifies imposing private remedies for private wrongs. The more diffuse mode is to ask whether all substantive principles really merit pervasive enforcement. Many of our substantive principles are tolerable only if they are not fully enforced. I do not offer any examples because each of my examples would offend some, whose counterexamples might at times offend me.

One response to this question would be to inquire whether three decades of experience with broad enforcement of at least some substantive rules through (b)(3) class actions justifies significant retrenchment. The absence of any suggestion that this inquiry should be undertaken may reflect general satisfaction with Rule 23 as a private enforcement means for public values. Surely there are many who do feel satisfied. Perhaps even those who are not satisfied have become reconciled. However that may be, there is a separate problem for the rulemaking process. Rule 23 has

grown into a device with sweeping substantive consequences. Substantive consequences flow from good procedure as well as bad; it is not ground for shrinking from a procedural improvement that it will facilitate more thorough enforcement of substantive principles. It is too late to argue that the 1966 creation of present Rule 23(b)(3) is invalid because of its profound substantive impact. But it would be different to cut back on Rule 23(b)(3) because of concern that it leads to over-enforcement of substantive rules. Revising Rule 23 to cut back its substantive consequences may be as much within the Enabling Act as its original adoption and subsequent amendment, but the motive would be perceived – and correctly so – as a desire to abridge substantive rights as they are now enjoyed. It may seem a paradox, but use of the Enabling Act process to correct its own excesses, even unanticipated excesses, is fraught with real controversy.

Two relatively modest steps might be taken toward cabining the substantive effects of Rule 23. One, by far the simpler, would be to permit consideration of the balance between the need for private enforcement of public values through Rule 23 and the costs of the proceeding. A court might be permitted to conclude that regardless of the merits, certification is inappropriate in light of the effort required to superintend the litigation, the trivial nature of individual benefits, and the insignificant character of the alleged wrong. Using a term perhaps not appropriate for the language of a formal court rule, this approach would enable a court to refuse certification because a class action "just ain't worth it." As compared to the second approach, certification could be denied even on the assumption that the class has a strong claim on the merits.

The second limiting approach, in some ways related, would be to undo present doctrine and permit or require preliminary consideration of the probable outcome on the merits. Although motions to dismiss for failure to state a claim or for summary

judgment are more effective than many have thought in defeating suits brought as class actions, there is genuine concern that very weak claims can survive such preliminary challenges. At least two purposes would be served by looking beyond these devices for means to consider the probable outcome, each reflecting the burdens imposed by class certification. If the class claim is likely to lose, it may be doubted whether a substantial share of scarce judicial resources should be devoted to it. And certification of weak claims can exert a strong pressure to settle, notwithstanding likely failure on the merits, because of the costs of defending a class action and even a small risk of a large judgment.

It is tempting to analogize preliminary consideration of the merits to the approach taken in deciding whether to issue a preliminary injunction. The comfort provided by this analogy unfortunately proves illusory on examination. Each of the factors in the familiar injunction formula must be considered differently. This should be no surprise, since the function of the inquiry differs in the two settings. The primary objective of a preliminary injunction is to preserve the opportunity to grant effective relief after trial, to preserve a meaningful opportunity to resolve the claim on the merits. The primary objective of refusing certification for class pursuit of claims that do not bear the freight of individual litigation is to protect against the burdens and corresponding pressures of class action litigation. This difference affects each of the four familiar factors.

There is no reason to suppose that the threshold probability of success on the merits should be measured in the same way in the two settings. At the outset, the preliminary injunction question is likely to be addressed at the beginning of the litigation on the basis of procedures affected by the need for promptness; more deliberate procedures, often including controlled discovery, are likely to be available in addressing the class certification question. More important, the required level of probability is

likely to fluctuate around a lower point in the class certification setting, particularly when it seems highly probable that individual claims never will be resolved on the merits absent certification. Reducing the required probability of success also seems justified by the differences in consequences between class certification and preliminary relief, as reflected in the remaining three factors.

The harm of denying relief must be measured in the class setting more by appraising the merits of the class claim than by the real-world impact of ongoing conduct that might be controlled by injunction. It also is possible to develop a test that considers not only the prospect of class success but also the importance of class success, akin to the first suggestion. If little individual harm is done by denying relief, a relatively strong prospect of success might be demanded.

The harm of granting relief must be measured in the class setting by the burdens of the class litigation process and the pressure to settle out of the litigation burdens, again not the real-world impact of controlling primary human activity. The importance of class success affects this assessment inseparably from the assessment of the harm of denying class relief.

The public interest, finally, must play a far larger role in class certification determinations than ordinarily occurs with preliminary injunction decisions. Class actions that aggregate small claims that cannot effectively be enforced one-by-one are more important as means of vindicating and enforcement the underlying public purposes of regulating legal rules than as means of providing often trivial relief to individual claimants. Perhaps because it is so important, measurement of the public interest must begin with the question whether it is proper for courts to distinguish – or, in a less flattering word, discriminate – between the levels of public importance represented by different underlying legal rules and by different asserted violations of those rules.

No real comfort can be found in the preliminary injunction analogy. The suggestion that class certification should be affected by a preliminary look at the merits also must reckon with the collateral consequences of taking a look. The time for making the certification decision, for example, is likely to be postponed in order to provide an adequate basis for going beyond the showings required on motion to dismiss. Often it may be possible to rely on a summary judgment record for the conclusion that although summary judgment is not warranted, the case is so thin that class certification can be denied. But at other times a summary judgment motion may focus on only some parts of the case, leaving the need for more global exploration and appraisal. If a significant prospect of success is required, it may be appropriate to reconsider the question whether a defendant should bear some part of the costs of notifying a plaintiff class. The proposal to create an opportunity for permissive intelocutory appeal from class certification decisions is another example — if appraisal of the merits affects the certification decision, the nature of the appeal will be changed, the probable delay increases, and the court of appeals must wrestle with the prospect that permitting appeal will embroil it in consideration of issues that will reappear on a later appeal. Many other effects are likely to emerge, some that can be foreseen with diligent imagination and others that are beyond our powers of prediction.

Either of these proposals for cutting back on Rule 23(b)(3) may be challenged as inviting improper judicial discrimination among favored and disfavored substantive principles. An unadorned provision allowing consideration of the probable outcome on the merits would be least subject to this charge, but would not be immune. Consideration of the probable outcome has strong attractions nonetheless. The simplest form would add probable outcome on the merits as one of the factors to be considered with all other factors in deciding on certification. Whether in this simple form or some more complex variation, much good might be done

in protecting against the risk – however symbolic or real – that weak claims can impose heavy burdens and, through the burdens, coerce unjust settlements.

The mood of the moment, at any rate, seems to be that Rule 23 should not be cut back significantly. At most, some support might be found for permitting consideration of the probable merits of the class claim. The questions are whether it should be expanded, or at least made to work more effectively within its present sphere.

Mass Torts. A great deal of attention is being focused on "mass torts," carefully distinguishing between "single event" cases and those that arise out of more dispersed injuries. The single event cases are exemplified by hotel fires, airplane crashes, bridge collapses, and other circumstances in which a concluded transaction has generated a known and identifiable universe of claimants. The dispersed injuries are exemplified by environmental contamination and product injuries – most prominently asbestos – in which a prolonged course of conduct produces effects that may span periods of years or even decades, generating unknown and perhaps unpredictable numbers of claimants who suffer a wide variety of injuries that range from trifling to serious or fatal. Whether or not the consequences of such events are well-suited to resolution through any variation of our adversary judicial process, courts have had to cope with them. The starting point has been traditional enough: as compared to the small claims that will not bear the costs of individual litigation, mass torts give rise to large numbers of individual actions. The questions arise from efforts to reduce the staggering costs of proceeding case-by-case, costs that include not only transaction costs but the inconsistent treatment of claimants who on any rational ground should be treated consistently. Many ingenious efforts have been made, often outside Rule 23, at times within the scope of Rule 23, and at times nominally within the scope of Rule 23 but well beyond the reach that anyone would have imagined until two or three years ago.

The mass tort phenomenon provides a particularly inviting opportunity for creative rulemaking. In broad terms, the question is whether we can invent an aggregating procedure that, as compared to present procedures, affords better net results to most claimants than now flow from individualized litigation. Many lawyers would say that present practices have not achieved this goal – that given a choice, an individual whose claim is sufficient to support individualized litigation usually is better off opting out of an aggregated proceeding. It would be a stunning triumph to develop a procedure that supersedes this judgment. The triumph would be stunning, however, because the difficulties are so great. Perhaps three groups of these difficulties merit attention – lack of knowledge, limits of the Enabling Act process, and the intrinsic limits of judicial procedure.

Lack of knowledge needs the least emphasis. We are in the infant stages of aggregating mass tort litigation. Many different approaches are being tried. The wisdom and long-run success of these improvisations cannot be measured for years to come. The only thing that can be said with confidence is that some approaches are dispatching cases. The most recent and dramatic examples seek to resolve tens of thousands of cases and incipient ("futures") cases through class-based settlements that are driven by the defendants' needs to buy "global peace." Dispatching cases, and on a reasonably uniform basis, is a great virtue. But the most dramatic approaches also are the most improvisatory. They also veer furthest from traditional judicial methods and closest to administrative systems. In one variation or another they are being applied to problems that are similar only in presenting large numbers of claims. Some settings have matured in the senses that the facts are (or seem to be) fully developed, the law is clear, and there is substantial experience with individual litigation that demonstrates the realistic strategic value of individual claims. Some settings may generate the particularly difficult questions of marshalling limited assets to meet competing present and future

claims. Other settings have none of these characteristics. But all have it in common that we are nowhere near the point of understanding evaluation.

It is confounding, for example, to contemplate the question of "maturity." The nature of dispersed torts virtually forecloses aggregation before some individual actions have been tried. If the plaintiffs should win all of a substantial number of individual actions, an aggregated adjudication that establishes liability seems sensible if courts should shy away from nonmutual issue preclusion. This approach becomes more troubling as the proportion of defense victories increases, and becomes more troubling in a complicated way. An aggregated once-for-all adjudication is not attractive at the other end of the spectrum at which plaintiffs should lose all of the same number of individual actions. If the aggregated litigation should impose liability in favor of all remaining class members, we would be troubled by doubts as to the correctness of the result, and troubled also by the prospect that the earlier losers should remain without redress when many others are compensated through the class adjudication. Our doubts as to the correctness of the result might well be enhanced by fear that the unnerving prospect of denying all recovery to every plaintiff may itself exert significant pressure to impose liability. And the alternative of a settlement that in effect establishes partial liability does not gladden all hearts. As much as we value private peacemaking, the compromise may reflect either the overwhelming power of the defendant to defeat claimants in one-on-one litigation or the overwhelming power of class litigation to coerce capitulation. Surely the outcomes of individual actions that have been tried to judgment should be considered in determining whether and how to aggregate remaining claims; the means of weighing this factor, however, cannot be easily described.

The limits of the Enabling Act are equally obvious. The Civil Rules cannot directly affect the subject-matter jurisdiction limits

that may impede thorough-going aggregation in federal courts. Indirect effects might be possible, most likely through clarifying the conceptual character of class litigation, but this prospect is uncertain at best. There may be greater hope for addressing questions of personal jurisdiction, subject only to Fifth Amendment due process constraints; Civil Rule 4(k)(2) may provide reassurance on this score. The Civil Rules cannot do anything direct about the choice-of-law problems that beset aggregation, particularly through class actions. Indirect effects may be more plausible in this area, by such devices as opt-in classes for those who agree to abide a specified choice of law or narrow issues classes that seek to resolve fact issues or lowest-common-denominator issues of law application. Such indirect effects may help, but fall far short of giving coherent focus to the traditional forces that generate widely disparate consequences, state by state, for a common course of activity pursued on a regional or national level. One approach may be to attempt a closer integration of the Enabling Act process with Congress, working toward simultaneous solutions in which new rules and new legislation follow parallel paths. Any such approach must be undertaken with great care, however, lest the great virtues of Enabling Act independence be gradually diminished.

The intrinsic limits of judicial process require reflection on what can be and on what ought to be. What is possible depends not only on procedure but also on structure: it would be possible to provide prompt individual trials by traditional procedures to all asbestos claimants, for example, if only there were enough judges – and lawyers – to handle them. Fewer lawyers and judges would be needed if common liability issues were resolved by preclusion, whether arising from a global class determination, nonmutual preclusion based on individual litigation, consent to "belwether" litigation, or some other means. To note this possibility is not to champion it even as an abstract possibility. In fact, no government is going to assume the direct costs, quite apart from a lingering wonder about the uses to be found for all those lawyers

and judges when the asbestos cases are cleaned up. More important for our purposes, it may be wondered whether traditional adjudication of such a mass of cases is desirable at all. If liability remains open in each case, there will be inconsistent determinations of liability – very few as time goes on, but some nonetheless. Even if liability is taken as established, like injuries will win dramatically different awards. We live with the inconsistencies and irrationalities that are inevitable in our system when they occur on small levels of low visibility. It is more difficult to accept them on a large and highly visible scale.

In the real world, individual litigation of all asbestos claims will not occur. If they are to be decided by courts – as they must be for default of any alternative – some expediting device must be found. Aggregation seems to be the answer, whether it is as modest as joint trial of ten or twelve cases at a time, as imaginative as projection of a selected sample of damages verdicts to a universe of claimants, or as ambitious as class-based settlement of tens of thousands of cases at one time. These and other aggregating devices share the virtues not only of saving costs but also of promoting consistent outcomes. They also reduce or eliminate individual control of individual litigating destiny, and move courts away from the traditional roles that give reassurance of legitimacy. In the more dramatic forms, they may involve courts in relatively remote supervision of administrative tasks and structures such as claims resolution facilities that bear scant resemblance to traditional adjudication. The departure from traditional structures and procedures reflects a carefully considered judgment that new means must be found to meet new needs, but the departure remains substantial.

Volumes have been written about mass tort litigation, and whole shelves will be filled. Every branch of the bench and bar is contributing. The question for the rulemaking process is whether the successful beginnings can be identified and captured in a few

hundred words that consolidate the good, discard the weak, and above all provide the flexibility needed for future growth. It is not particularly important whether the words are placed in Rule 23 or in some new Rule "23.3." But it is vitally important to know where to start. The most cautious approach is that embodied in the current draft. The draft includes an increased emphasis on issues classes, and creates opt-in classes as well as expanded opportunities for opting out or defeating any opting out. These features were deliberately designed to support further development of Rule 23 in mass tort cases without attempting to predict the direction or extent of the development. A bolder approach may be justified, but the information base must be secure.

Class as entity and client. Rule 23 requires that a class be represented by a "member" of the class whose claims or defenses are "typical" and who will "fairly and adequately protect the interests of the class." Courts rightly seek to ensure adequate representation. Representation, however, can be provided by counsel. The role of the member-representative is more ambivalent. At times courts seem to want member-representatives who can fulfill the role of sophisticated client, exercising a wise and restraining judgment. At other times courts seem more concerned with the member-representative as a token, offered up to appease memories of a superseded model of client-adversary that lingers only in tradition and the formal trappings of Rule 23(a). Representatives with no significant stake and no plausible understanding of the litigation may be accepted with good cheer. Nowhere is the ambiguity more obvious than in the decisions that recognize continued representation by a class member whose individual claim has been mooted.

The questions that surround the individual representative are reflected in current congressional attempts to revise class action procedures for claims under the securities laws. One proposal would require appointment of a guardian for the class; another

would require appointment of a steering committee of class members with very substantial individual stakes. These proposals evidently spring from a fear that there are no real clients in these actions, and – the important point – that the system suffers for the lack.

Class representation could be sought in many quarters. Many different forms of public representation are possible; none seems a likely candidate for adoption by amending Rule 23. The familiar alternatives include class members, organizations that represent group interests more than individuals, and class counsel.

The difficulties that surround class representation by a class member vary across a broad range, reflecting the broad range of class actions. When challenged acts have inflicted relatively trifling injury on many people, there is little incentive to devote any significant time or energy, much less money, to the common cause; if member representatives are not literally hard to find, the likely reason is that counsel who find representatives assure them that they need not really bother with things. Or perhaps other rewards are involved. When significant numbers of people have suffered individual injuries that would support individual litigation, the problems are quite different. There are likely to be conflicts of interest, more or less acute, beginning with selection of the forum, definition of the class, choice of counsel, setting the goals of litigation, and straight on to the end. These conflicts run almost indifferently among class members, representative class members, and counsel. Resolution is most likely to be effected by counsel, at times explicitly but often implicitly in the course of making tactical decisions. Quite different problems may be involved with "institutional reform" litigation. An employment discrimination class, for example, may include people of divergent interests and beliefs; representative members may not be aware of the divergences, or may prefer to present the image of a homogeneous class.

Organizations that maintain class actions behind the facade of

individual representatives often provide highly effective representation, driven by commitment to lofty ideals and fueled by experience and sophistication. There is a risk, however, that ideological commitment may create as much conflict with the views and interests of class members as ever arises from divergences among class members themselves. There is little reason to believe that all problems disappear when an interest group assumes the role of client.

Class counsel often enough provide the originating genius of class actions. Very often they are the only source of informed, sophisticated judgment about the goals to be pursued, and in all but the exceptional case must choose the means of pursuit. In most cases, effective representation will be provided by counsel, without substantial let or hindrance, or it will not be provided at all. Adverse reactions to this phenomenon arise from an array of concerns. A familiar concern is that class counsel in fact are the class: they seek out token representatives, pursue the class claim primarily for the sake of fees, and measure success by their own fees rather than class relief. A somewhat different concern is that ideologically driven counsel may persist in pursuing imagined class goals far beyond the point of optimum class benefit. In greater extremes, there may be a concern that nearly frivolous claims are pursued for nuisance or strike value, without any thought of class benefit.

These tensions surrounding adequate representation will not be resolved by any likely revision of Rule 23. Some help might be found, however, in subtle changes that focus on the class more and the member representatives less. One direct approach would be to focus directly on representation of class interests, considering the involvement of class members as simply one factor bearing on adequacy. The class would be regarded as the client, and adequate representation by counsel as the test. The greatest virtue of this approach may be derided as little more than esthetic – it would

greatly reduce the unseemly spectacle of recruiting representatives who know little or nothing of the dispute and are no more than token clients. But esthetics count for something; the cynicism that readily surrounds representative class members can taint the occasional genuinely representative member. More important, this common sham can exert a gradual corrosive effect that weakens more important constraints on the behavior of counsel. Beyond the esthetics, focus on the class as the client might improve our approach to other problems. Mootness doctrine could focus solely on the life and death of the class claim, without the complicated doctrines of relation back, continued representation by a mooted representative, and the like that now cloud the picture. Discarding the image of the representative's claims as typical might encourage a more direct focus on the definition of the class and on the conflicts that may require multiple classes or subclasses. And courts would become more obviously responsible for ensuring adequate representation.

The entity concept of the class might afford one useful perspective for addressing the question whether class counsel also should represent individual class members. At least when individual class members have claims that would support individual litigation, there is a risk that duties to an individual client and prospects of personal attorney advantage may conflict with duties to the class. Even if individual claims would not support individual litigation, there is a risk of conflict if class reprsentatives are allowed compensation for the effort devoted to pursuing the class claim. If the class is seen as a separate client, these questions can be addressed more thoughtfully.

Quite different advantages might flow from treating the class as an entity in dealing with questions of jurisdiction. A Rule 23 amendment that defined the class as an entity might of itself be sufficient to establish the class claim as the measure of the amount in controversy required for diversity jurisdiction. A

rather neat intellectual trick would be required, justifying interpretation of the amount-in-controversy requirement as a means of identifying the cases suitable for federal adjudication by the total amount involved and the importance of the defendant's stake, while simultaneously continuing to permit focus on individual representatives to avoid the frequently disabling impact of the complete diversity requirement.

Focus on the class as party also might influence thinking about due process constraints on exposing individual claimants to adjudication in a distant forum having no apparent contact with their individual claims. Connections to the interrelated events underlying all claims can be viewed as connections to the class, and membership in the litigating class as itself a tie to the forum. Jurisdictional concepts are thoroughly – and often foolishly – conceptualistic. Providing a clear concept is proper business for the Enabling Act process.

Really imaginative use of the entity concept might even support a more rational approach to choice of law. Viewing a class of victims as a whole, it is very difficult to understand why different people should win or lose, or win more or less, because different sources of law are chosen to govern the self-same conduct. If it were possible to imagine a class claim, it would be possible to choose a single law to govern the single claim, or – more likely – to choose a single law to govern the claim as to each defendant. It need not matter which variation of choice-of-law theory is selected after that point. As attractive as this prospect might seem to a true heretic, it probably reaches too far for present acceptance. It is too easy to argue that class certification can do no more than take individual claims as they exist in the nature of individual choice-of-law processes, however much those processes depend on the choice of forum. As a mere procedural device, class treatment cannot alter the conceptual substance of the individual claim, no matter how drastically the

claim is affected in fact. Separate sovereignties account for the unseemly differences in outcome, and their interests cannot be thwarted by this trick.

Entity treatment also might help in confronting the preclusion consequences of a class action judgment. In one direction, it would underscore the proposition that the claim pursued by the class often is narrower than the claim that would be defined for purposes of individual litigation. Although an individual would, for example, be expected to join statutory discrimination and contract theories in a single action for wrongful termination, a class action for discrimination often should leave the way free for an individual contract action. This benefit could become particularly important in settings that involve many claimants with small damages and a few with large damages growing out of the same setting. Illustrations are offered by the purchasers of defectively designed motor vehicles. Many will have relatively small claims based on depreciated value; a few will have large claims based on personal injury. It is unthinkable that either settlement or litigated judgment in a class action on behalf of all should preclude individual actions by those who suffer personal injuries, either before or after the class judgment. Recognizing that the class claim is limited to the common injury would help to express and ensure this conclusion. Matters are more confused in another direction. Class actions may augment the risks of litigation that is premature in relation to advancing knowledge. A claim on behalf of millions of users of an over-the-counter drug might be brought and fail because of inability to prove that it causes a particular side-effect. Ten years later, convincing proof might become available, and be most convincing as to users who were members of the original class. We are prepared to accept preclusion in individual cases that present this problem. It is not clear whether we should be prepared to accept preclusion by representation on such a grand scale. Open recognition of the distinctive character of class litigation would at least help open

the question for direct investigation and response.

Attempts to pursue overlapping or successive class actions are less likely to yield to an entity vision of the class, but some progress might be made even in this direction. Certification of a class in one court could be found to engage the class claim, invoking the rules that are appropriate when two or more actions are brought by the same plaintiff on the same claim. Courts are often surprisingly willing to allow two actions to proceed on parallel tracks, however, and it may be unduly optimistic to hope that a different approach would be taken when different representatives presume to voluntarily submit the same class claim to different court. Successive attempts to certify a class after failing in one action may prove even more difficult to control. It would be convenient to assert that the asserted class is bound by the determination that it does not exist, but the seeming self-contradiction will be difficult to accept. The initial refusal to recognize the class as an entity seems to leave no one to be bound when a different putative representative appears with a second request for recognition.

Entity treatment of the class also could provide the paradoxical benefit of encouraging more careful thought about the individuals who constitute the class. Because the entity is obviously artificial, its separation makes it more difficult to pretend that the class <u>is</u> its members. Greater care may be taken in addressing questions of class membership and conflicts of interest, and in considering whether to frame the action as a mandatory, opt-out, or opt-in class. The sharp distinction between the class as entity and its constituting members, moreover, may underscore the need to think clearly about the members' rights to participate both individually and through influence on class counsel.

Increasing judicial responsibility for adequate class representation may be the most important single reason for

rejecting a change that would define the class as the client. Although courts now are responsible for policing adequacy, treating the class as entity would make it clear that this responsibility is not shared with any particular class representative. It also would be clear that the representatives cannot be relied upon to make the initial selection of counsel (or, perhaps more realistically, ratifying self-selection by counsel who sought them out). At the outset, courts would be more responsible for the identity of counsel. There is no reason to allow class counsel to be selected by the first representative who appears, much less by a representative recruited by would-be class counsel. At a minimum, the court could be required to give notice of any action seeking class certification and to invite competing applications to appear as counsel for the class. As exciting as it may be to contemplate such devices as auctioning the oppportunity to represent the class, judicial responsibility for selecting counsel for one of the adversaries makes substantial inroads on a system that relies on the court to remain impartial between adversaries who appear before it on their own motion. Even more troubling, courts would remain responsible throughout the litigation, taking on a role that necessarily involves particular consideration of the interests and position of one party. Maintaining a distinction between neutral assurance of adequate representation and acting as guardian of class interests must be difficult, and perhaps not fully possible. The token class member representative may not do much to assure adequate representation, and courts now are responsible for assuring adequate representation, but the change could be troubling nonetheless.

If focus on the class as client might have esthetic advantages, moreover, it also might have symbolic disadvantages. We can pretend that class member representatives are clients. It is more difficult to pretend that a class is a real client. Cries of barratry, champerty, and maintenance – or the more contemporary buccaneering – would redouble.

And of course the urge to focus on the class as client provides another illustration of generalizing from one or two class action phenomena. The need for a client is most real in cases that aggregate large numbers of small claims and do not win the involvement of any class members with substantial stakes. Entity treatment may seem most promising in such cases. Yet it is possible - although just barely - that in fact named representatives often monitor counsel in genuine and important ways, a proposition that will be almost impossible to disprove by any readily available means of empirical research. The problems that arise from actions brought by organizations that may not speak for the purported class are quite different, while the problems that arise from aggregation of large numbers of substantial individual claims are of a still different order. For that matter, defendant classes should not be overlooked. The idea of suing a class without naming at least one real defendant-representative is not plausible.

The Current Draft

An Outline. This is not the occasion for a detailed review of the current Rule 23 draft. In broadest terms, it would make three major changes in present practice. The present line between "mandatory" classes and opt-out classes would be blurred by empowering the court to permit opting out from any class, to deny opting out from any class, or to certify an opt-in class. Notice provisions would be generalized, explicitly requiring notice in all class actions but relaxing to some extent the strict requirements now exacted in (b)(3) classes. And the present opportunities for certifying subclasses and "issues" classes would be emphasized. These changes inevitably blur the sharp differences in consequence that have flowed from the choice between (b)(1), (b)(2), and (b)(3) classes. They need not necessarily blur the conceptual differences between these categories of classes; it is possible to craft a rule that allows opt-out of a (b)(1) class, that explicitly requires

notice in all classes, and so on, without collapsing the categories. Nonetheless, the draft transforms the "superiority" requirement of present subdivision (b)(3) into a subdivision (a) prerequisite for any class. The (b)(1), (2), and (3) categories become merely factors to be considered in determining superiority, adding the "matters pertinent" of present (b)(3) to the list of superiority factors. In addition to these changes, a number of smaller changes also deserve note.

The Changes. One item that has drawn strong reaction is the addition of a requirement that a representative party be "willing" to represent the class. It is widely believed that this requirement will sound the death knell of defendant classes -- except perhaps for the most dangerous case in which a named defendant is willing to "represent" the class because its interests diverge from class interests, and may even converge with the plaintiff's interests.

Quite different reactions are provoked by the allied requirement that the representative member "protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty." This provision is intended to underscore the fiduciary responsibilities borne by a representative party. It does not, however, explain in any way the nature or extent of those duties. There is no indication of any specific change in present practice. Practicing lawyers in particular react to the provision with dismay. They view present understanding of the fiduciary responsibilities of counsel and representatives as satisfactory, and fear that this opaque invocation will generate much contention and no improvement.

Subdivision (b)(2) is rewritten to make it clear that it is proper to certify a defendant class in an action for injunctive or declaratory relief. Apart from the question whether a willing representative should be required, this change seems noncontroversial.

The subdivision (b)(3) requirement that common questions of fact or law predominate is mollified, making "the extent to which" common questions predominate one factor in calculating superiority. This change is one of many that are intended to ease the path toward certification of issues classes.

Difficulties in management are made relevant to the classes that were (b)(1) and (b)(2) classes as well as (b)(3) classes, but essentially are subordinated by requiring comparison to the difficulties that will arise from adjudication by other means.

The new opt-out and opt-in provisions are set out in subdivision (c)(1)(A), perhaps the single most important portion of the revised rule. The list of "matters pertinent to this determination" is intended to discourage opt-out (b)(1) or (b)(2) classes, but not to forbid them. Opting out of such classes is designed, at least in part, as a means of revealing the conflicts of interest that may lurk in a class that seems homogeneous to the court. The illustration in the Note is an employment discrimination action in which employees who are members of the class as defined by the court may prefer to align with the employer on questions of liability or relief. Provision is made for imposing conditions on those who opt out, including a bar against separate actions or denial of nonmutual issue preclusion should the class win. (The bar against separate actions may need to account for class judgments that do not bar separate actions by those who remain class members.) Opt-in classes are proposed as solutions for at least two sets of problems. Opt-in defendant classes may prove plausible in some circumstances, greatly reducing the difficulties that now appear in defendant classes. Opt-in plaintiff classes may be particularly useful as to classes that include many members whose claims would support individual actions, and may help avoid problems beyond the reach of the Enabling Act. Those who opt into a class, for example, would surrender any objections to "personal jurisdiction" and could be forced to

acquiesce in a stated choice of law. For all that appears on the face of the draft, finally, it may be possible to combine all features in a single class: opting out could be prohibited to some claimants and permitted to others, while defining a class that includes nonmembers only if they choose to opt in. As one possible illustration, the class might be mandatory as to small-stakes claimants, optional as to large-stakes claimants, and defined to exclude those who already have suits pending unless they choose to opt in.

The new notice provisions are set out in subdivision (c)(2). Notice of class certification is required in all class actions. The court has discretion in determining "how, and to whom, notice will be given," considering among other factors the nature of the class, the importance of individual claims, the expense and difficulty of providing individual notice, and the nature and extent of any adverse consequences from failure to receive actual notice. There has been no adverse reaction to the choice to adopt explicit notice requirements for what now are (b)(1) and (b)(2) classes, nor, perhaps surprisingly, to the softening of individual notice requirements in what now are (b)(3) classes.

Subdivision (c)(4) is the focal point for a phrase that recurs throughout the draft amendments. A class may be certified as to particular "claims, defense, or issues." Although subdivision (c)(4) now provides for issues classes, there is a deliberate attempt to focus attention on, and to encourage, this practice. Once again, mass torts are not far from view. One potential use of issues classes would be to resolve common elements of liability, leaving for separate actions resolution of individual elements of liability such as comparative fault and damages. Adroit definition of the "issue" also might help to reduce choice-of-law problems, particularly with respect to fact-dominated issues such as general causation.

A new subparagraph (d)(1)(B) expressly recognizes a practice

followed in most courts, permitting decision of motions under Rules 12 or 56 before the certification determination. This confirmation of general practice seems unexceptionable.

Subdivision (e) is amended to make it clear that court approval is required for dismissal of an action in which class allegations are made whether dismissal is sought before determination of the certification question or after certification is made. It also provides that a proposal to dismiss or compromise a certified class action may be referred to a magistrate judge or "other special master." The role of the special master is not defined. The Note refers to "investigation" of the fairness of a proposed dismissal or settlement, to the need to consider sensitive information, and to the problem that when all parties seek approval of a settlement the court cannot rely on genuinely adversary presentation of information that might undercut the proposal. There could be real advantages in independent investigation by a master, but the more independent and thorough the investigation the greater the departure from the ordinary role of court officers. There may be real advantages as well in confidential submissions to an officer who will not be called upon to decide the merits if the settlement should fail, but to preserve this advantage the master may need to report to the judge in terms that do not allow effective evaluation of the master's own recommendations.

New subdivision (f), finally, authorizes the court of appeals to permit an appeal from an order granting or denying certification. The only change is to eliminate the requirement of district court certification that may defeat appeal under 28 U.S.C. § 1292(b). This subdivision rests on two judgments. The first is that interlocutory review of the certification decision can be very important, to protect against both the "death knell" effects of a refusal to certify and the "in terrorem" (reverse death knell) effects of certification. The second is that the courts of appeals will exercise sound judgment, granting permission to appeal only in

cases in which the certification determination is manifestly important and at least subject to fair debate. Routine determinations in mature areas of class action practice are not likely subjects for permission. This provision has drawn strong support but also, although less often, vigorous disagreement.

Some Obvious Questions. The outline of the amendments suggests the most obvious questions.

Should the now-accepted (b)(1), (2), and (3) distinctions be collapsed? The direct reason for the collapse is the desire to change opt-out practice, create an opt-in practice, and improve the notice provisions. This reason ties to a second reason, the belief that unnecessary energy is wasted on disputing the choice of class category as an indirect means of affecting notice and opt-out decisions. This second reason may be unimportant – even if there is significant litigation of class category determinations in areas that have not developed a routinized class practice, direct changes in the opt-out, opt-in practice, and in notice, should redirect energy toward the intended target.

The risk of collapsing class categories may lie in part in surrender of the legitimacy lent by the traditions that underlie (b)(1) and the moral force lent by the contemporary civil rights uses of (b)(2). More important risks may arise from the prospect that class members might be allowed to opt out, particularly from (b)(1) classes. Equally important risks may arise from the opportunity to defeat opting out from (b)(3) classes, particularly as to class members who wish to pursue individual litigation in hopes of better results. Flexibility and discretion have carried us far in modern procedure, but perhaps these are situations that call for the rigidity of present rules. Even if more flexibility is appropriate, the rule should provide as much guidance as possible for its exercise.

The question whether class representatives should be willing

has focused attention on defendant classes. There are many reasons why a defendant should be unwilling to assume the obligations of class representative. As representative, the defendant has fiduciary obligations to the class. Presumably one duty is to defend vigorously in proportion to the stakes – and the stakes are expanded, perhaps exponentially, by class certification. (Even if the representative is theoretically subject to joint liability for the plaintiff's entire claim, the very reason for pursuing a defendant class is to enhance the prospects of actual recovery.) Freedom to settle or even abandon the defense is sharply curtailed. And if the representative defendant is allowed to escape the duties of representation by settling individual liability alone, the burdens of representation may exert a coercive force to settle on unfair terms. Barring an extraordinary congruence of interest between the representative and all other class members, the duty of counsel is changed and made more difficult (if not impossible): fiduciary obligations run to absent class members as well as the original client. And any attempt to find means of compensating the representative for these added burdens will remain difficult. Opt-in defendant classes make clear sense; opt-out classes that involve sophisticated defendants with clear actual notice can make equal sense; in other settings, these problems seem acute. Addressing them by adding a "willing" representative requirement may not be as effective as some alternative.

It is not clear, moreover, that a willing representative is any more to be welcomed. Long ago I stumbled across a case that certified a (b)(2) defendant class in an action to enjoin patent infringement. Quite apart from individual questions of infringement, different infringers may have very different stakes in the question of validity; the representative defendant, for example, could enjoy a technology that yields a scant 5% cost saving with practice of the invention, while all other class members compete with an older technology that yields a 25% cost saving with practice of the invention. The representative

defendant may be made better off by a holding of validity that binds the industry. The potential conflicts may be much more subtle than this simple illustration, but equally dangerous.

The willing representative requirement also provokes the question whether defendants should be able to force plaintiff class treatment. The idea may seem far-fetched, but it is not clear whether it should be hobbled by dropping a willingness requirement into Rule 23(a)(4). The question can easily be turned back to the defendant class issue, moreover, by the device of a transposed parties action in which the plaintiff names a defendant class and seeks a declaration of nonliability. In some settings this device would be ludicrous. Imagine, for example, an action by a government official against a class of public benefit recipients for a declaration that a new restrictive regulation is valid.

This illustration suggests that it may be appropriate to think about defendant class actions in terms that extend beyond the immediate problems of the representative defendant. Concerns about the willing representative requirement have been expressed by pointing to situations in which defendant classes seem important. The most common examples include securities law actions against underwriting groups and actions against many-membered partnerships. These examples are particularly persuasive because the class members have formed a real-world entity whose activities give rise to the claim; recognizing the entity for this limited legal purpose, even if for no other legal purpose, is appropriate. A more exotic example is an action to resolve the identical rights of hundreds or thousands of owners of fractional interests in mineral rights leases. This example seems persuasive because the class members have willingly engaged in a set of closely related and indistinguishable transactions. Another setting that has posed difficulties under present Rule 23(b)(2) is an action against numerous public officials pursuing seemingly identical policies but so far independent that there is no common superior to name as

defendant. The classic illustration was an action against county sheriffs who, in defiance of local federal decisions and state policy, denied contact visits to pretrial detainees. This illustration may seem persuasive because there is a strong suspicion of conscious parallelism, if not outright conspiracy, and because of the clarity of the violations both in law and in fact. The question is whether Rule 23 should attempt to capture these features in a way that clearly distinguishes between the requirements for certifying plaintiff and defendant classes.

One possibility would be to limit defendant classes by a "transaction or occurrence" requirement similar to the Rule 20 requirement for joining defendants. Others would be to stiffen the Rule 23(a) requirements of typicality and adequacy of representation, to require individual notice to all defendant class members, or to expand the right of individual participation to the limits that would be applied had all class members been joined as individual defendants. Or the plaintiff might be required to name several representative defendants, and to name those who have the most substantial stakes if class members have substantially different levels of interest in the outcome. It might even prove feasible to require the plaintiff to name all members of the defendant class that can be identified with reasonable effort - including preliminary discovery - so that the court can select a group of representatives and develop a cost-sharing plan.

Perhaps better approaches will come to hand. The important point is that we cannot blithely rely on the abstract assertion that there is no difference between precluding a potential right and imposing a liability. We must reflect on the human intuition that there is a difference, whether expressed as the psychological reality of present endowments, as the ephemeral character of "individual" rights that practically can be asserted only on a group basis, or as some more profound perception.

The almost casual reference to fiduciary responsibility may

touch too lightly on the single most troubling set of class-action issues. It is not enough to assert that everyone understands that both representative class members and class counsel have fiduciary responsibilities to the class. The trick is to elaborate that principle in ways that respond to the special difficulties of class actions, difficulties that arise whenever there are possible conflicts of interest between individuals joined as if a homogeneous class in which anything that advances the interests of one must automatically advance the interests of all others in equal measure. The most familiar analogy may be to the problems that confront a single lawyer who represents two plaintiffs, each of whom seeks to win the maximum possible individual advantage in litigating or settling with a common defendant. The problems of class representation, however, are far more complex. The lawyer with two clients can help each client to develop and articulate that client's own best understanding of personal needs; each of the two clients at least is in a position to supervise the lawyer's representation. Counsel for the class seldom is in a position to consult with each class member to determine inidividual interests and needs, or to measure and reconcile the conflicts among individual interests and needs. Many class members likely will prove unable to supervise the class lawyer at all, and reliance on the representative class members provides a pale substitute.

The difficulties presented by the attorney-class client relationship are exacerbated by the wide variousness of classes. Much current debate focuses on settlement classes that join mind-boggling numbers of members whose individual claims would support the costs of individual litigation, but who paradoxically may fall into the group of "futures" claimants who do not yet even know that they may have been injured. Such settings may present the most troubling opportunities for truly irreconcilable conflicts, and for conflicts that are not easily resolved by creating subclasses. Rigorous notice requirements and clearly explained multiple opportunities to opt out may help. The same devices may not help

in other settings, particularly if the typically small size of individual claims makes opting out the equivalent of surrendering any individual claim. And quite different problems are likely to arise if the class action actually goes to trial, although the relative infrequency of trials provides little foundation for speculating even about the nature of the problems, much less about the nature of possible solutions.

Rule 23 is silent on the nature of the fiduciary duties borne by class representatives and counsel. There would be real advantages in addressing these questions through the rule. Federal courts would be released from the common reliance on state law to govern issues of professional responsibility, although as members of state bars lawyers might face dual regulation. In addition, it may be possible to free these questions from the constraining impact of association with matters of "ethics" – it is easier to discuss the question whether a lawyer has conformed to a procedural rule than to frame the debate in terms of ethical behavior, as discussions of current class settlements demonstrate. Yet it will be extraordinarily difficult to articulate any explicit provisions. Since outright repeal of Rule 23 does not seem to be an option, it seems responsible to make other improvements even if ignorance forces continued silence. The challenge that may be made by those who hope for some guidance in the rule, however, is daunting and must be addressed even if it is not accepted.

The encouragement of resort to masters to evaluate proposed settlements raises broader questions about judicial review of class settlements. These questions become all the more important as we enter an era in which settlement classes are sought out by defendants, eager to buy global peace by agreement with volunteer representatives of thousands or tens of thousands of claimants. Extraordinarily complex arrangements are being made, at the cost of pushing Rule 23 beyond all of the limits that would have seemed invulnerable until tested by the force of so many claims. In some

of these cases the uncertainties seem so great that reasoned evaluation of fairness may not be possible by any means. In others there is a strong attraction to independent investigation and report, but the means seem elusive. A master, charged as the court to be impartial but armed as a party to undertake independent investigation, is one possibility. Developing practice with judgment-enforcement masters in institutional reform litigation may provide some guidance. Another possibility is to appoint an independent representative for the class, whether or not called a guardian, charged with reviewing the settlement in ways that duplicate the responsibilities of class counsel but work free from the fear of self-interest. Reliance on a master may help solve the problems of judicial time, but does little to address the questions that arise from blending advocacy and investigation with the judicial role. Reliance on a class guardian may confuse the roles of counsel and representative members, and create a framework that conduces to inadequately informed second-guessing. If the problem is real, the most obvious solutions all seem weak.

A quite different settlement role involves the familiar use of masters to facilitate settlement. Involvement of a master in the process that leads to a settlement agreement may not only improve the process but also provide a measure of reassurance that the settlement is reasonable. Good experience with this practice ensures that it will continue, even without explicit provision in Rule 23 or any obvious support in Rule 53. It may be desirable, however, to consider the question whether a master who has promoted a settlement should be responsible for advising the court on the fairness of the settlement. Despite the great advantages of familiarity, it might be better to rely on a magistrate judge or a new and independent master if the court, unwilling to rely entirely on class member objectors, seeks advice from people who do not have a stake in the settlement.

The provision for invoking the aid of masters or magistrate

judges hints at the more pervasive provisions that might be created to spell out the process of reviewing and approving class-action settlements. The first set of questions arise from the common resort to "settlement classes," either by an initial certification that makes it clear that the class may be decertified if settlement is not reached, or by simultaneous presentation of a motion for certification and a motion to approve a settlement already negotiated. The most basic question is whether the basic criteria for certification should apply differently to class settlement than to class litigation. It seems difficult to argue that there should be any significant differences in the prerequisites of numerosity, commonality, typicality, and effective representation. If superiority becomes an additional prerequisite, however, there may be more room to argue that there are very substantial differences between the superiority of class settlement and the potential superiority of class litigation. Application of the other factors that bear on a determination of superiority, moreover, is likely to be quite different with respect to settlement than with respect to litigation. Not all of the differences favor settlement; the court's ability to determine the importance of individual litigation, for example, may be much better informed by adversary argument than by the cooperative presentation made when class and adversary join to urge acceptance of a settlement. And at a deeper level, it has been argued that counsel for a class that has been certified only for purposes of settlement bargains at a great disadvantage, and perhaps with a conflict of interest. The defendant's incentive to settle is no longer the prospect of trying this case on the merits, but instead the hope of avoiding vast numbers of individual cases. And counsel for the class stands to gain nothing if settlement fails, a prospect that becomes most unsettling when class certification is sought simultaneously with a "done deal" with a defendant who might have aborted all negotiations with that counsel.

Many other details could be added to Rule 23 to spell out the

nature of the court's duties in reviewing and approving class settlements. Among them is the question whether class members should be allowed to opt out of a settlement. By far the cleanest way to draft such a provision would be to recognize a right to opt out that in form extends to all class actions; it would be difficult to justify any provision that allowed the court to distinguish between class members who might reasonably bring individual actions and those who might not. An unconditional right to opt out of a settlement might, however, impose unreasonable notice costs. Perhaps this problem can be met by an indirect qualification of the right, giving the court discretion as to the means of notice to be employed, anticipating that aggregate methods of notice would be used only when individual claims are small, and perhaps relying on actual notice to a substantial sampling of class members on the theory that a significant opt-out rate should prompt reconsideration of the adequacy of the settlement. If we come to accept classes of people who have not yet experienced injury, moreover, the right to opt out might properly carry forward to the time when injury occurs and the class member chooses whether to participate in the class settlement or to pursue an individual remedy.

Other proposals for regulating settlement include various means of bringing more lawyers into the negotiation on behalf of different subclasses, bargaining for allocation among differently situated members of a nonhomogeneous "class"; providing some means of representation independent of the lawyers who have been recognized as class counsel; improving the information made available to objectors, both by detailed notice to all class members of settlement terms and by more specific response to objectors, before they are forced to articulate their grounds for objecting; and recognizing the court's power to modify the terms of settlement so long as the defendant's total obligation is not materially increased.

Discussion of settlement also involves issues of attorney fees. Simultaneous negotiation of class relief and fees creates manifest conflict-of-interest problems. Partial solutions might be found in requiring that the basis for fee determinations be determined before settlement can be undertaken, or that fee issues be settled only after approval of settlement on the merits. The obstacles that either approach might create to settlement might be reduced by simply considering the occasion for fee negotiations as part of the process of approving settlement and any fee award.

These and related possibilities deserve to be a major focus of the continuing study.

Many other questions could be put to the details of the draft. They get caught up, however, in the long list of questions set out next. These questions are among the number that may fairly be addressed to present practice. For the most part, they recast as questions a welter of anecdotal information, the things that experience has suggested as today's truths to more or fewer class action observers and practitioners. Taken together, they pose the embarrassing question whether we really know enough about Rule 23 to be able to make sound predictions as to the effect of the current draft or any other.

What We Might Wish To Know of Current Experience

When asked for reactions to the current state of Rule 23, one very thoughtful committee replied that it was difficult to achieve any consensus wisdom because its members individually had experience with only a few fields of class litigation. Those with substantial experience in securities litigation did not have any working knowledge of employment discrimination litigation, and so on. This response is a useful warning. The Committee must hear from many voices, reflecting the full spectrum of experience, if it is to learn much. It also must hear voices that speak with as much candor and disinterest as possible. And, to the extent possible,

it must encourage independent investigations of the sort now underway at the Federal Judicial Center. The following collection illustrates the array of assumptions that should be questioned.

Individual Actions and Aggregation. What relationships can be identified between aggregation and numbers of individual actions growing out of the same transactional setting? Does it often happen that large numbers of individual actions proceed in the same court, or in different courts, without any attempt at aggregation? Is it possible to identify elements that encourage or discourage consolidation, considering such things as relative filing dates, progress toward disposition, identity of counsel, size of claims, numbers of claimants, substantive principles, and the like? What elements — the same, or others — influence the means of aggregation? Is actual consolidation ever pursued across the lines that separate different court systems? Are class actions more likely to be pursued after some experience with individual adjudication, or does this depend very much on the substantive area: are class actions the first resort in some fields, as may be in some areas of securities law, and a last or never resort in other fields? How often is class certification denied because it is not desirable to concentrate litigation in one forum, because of the importance of individual control of individual actions, because of the advanced progress of many individual actions, or because of a judgment that individual actions — perhaps bolstered by nonmutual preclusion, or tacit acquiescence in belwether litigation — will prove more manageable?

A quite different question is how many members of certified classes would have maintained individual actions absent the class action. A clear answer in general terms would help shape a good general rule; the expectation that clear answers could be given for individual cases would justify a rule that delegates case-by-case discretion to individual judges. But clear answers are likely to remain elusive, even if shrewd guesses may be possible in some

settings. For that matter, it would be even nicer to know what would have been the outcomes of individual actions, how frequently conflicting results would be reached on the merits, whether results on the merits would tend to converge over time, and how to measure the recoveries both in the aggregate and in individual cases.

Routine Class Actions. One common hypothesis is that a substantial portion of all actions filed with class allegations are virtually invisible because they are somehow standard or routine. This hypothesis may be translated into the judgment that Rule 23 is working well in most applications, that we should not be misled as to the need for reform by the occasional dramatic departures. The hypothesis seems to have at least two parts. The first part, encountered most often in speculation about the reasons that may explain the substantial under-reporting of class action filings recently uncovered by the Federal Judicial Center study, is that boilerplate class allegations are routinely ignored or dispatched without fuss. The second part, encountered regularly in the reactions of experienced class-action lawyers from various fields, is that Rule 23 has been beat into shape by the bench and bar and presents few grounds for dispute in most cases. Everyone recognizes the appropriateness of (b)(3) certification in securities law cases, understands the notice drill, knows how to present and win approval of a settlement and fee awards, and so on. It seems likely that indeed many actions play out in one of these ways. But it would be nice to know, and particularly to know more about the correlations between easy application of Rule 23 and the substantive subjects of dispute. It also would be nice to know what happens in the routine applications: how often is certification granted? What is the relationship between certification and settlement? How often do certified classes go to trial, and how often do they win? Is there any way to get behind bare numbers? Suppose, for instance, it should be found that the same distribution of outcomes occurs in all actions with class allegations as in all other actions, and that the distribution also

is the same for actions in which certification is granted, denied, or ignored – could we know what this really means for common protests that class actions exert a pressure that subordinates the merits of the action to the need to escape alive? True confidence would require an unattainable measure of the merits of all the cases compared; is it enough to assume that class allegations are not added deliberately to bolster weak claims, and that class action procedure – including the cost of notice in (b)(3) cases – is sufficiently hospitable to strong claims?

Whatever can be made of these questions, we should be able to learn more about smaller issues. What is the frequency of (b)(1), (2), and (3) classes? The rate of certifications granted, denied, or ignored? The correlation between substantive area and frequency of class allegations and certifications? The time consumed by class actions (and, would that it could be known, the time that would have been devoted to separate actions)?

Race To File. The lore includes tales of "parachutists," who scramble madly to be the first to file class claims in hopes of assuming a lead role in managment and fees. How often are securities class actions filed immediately upon announcement of a disappointing earnings report, or single-event tort actions before the ashes have cooled? Is there support for the claim that immediate filing is necessary to preserve evidence, particularly in the tort cases, and are class allegations important to achieving that result? Is anything lost, apart from seemliness – are inconvenient forums chosen, is first-filing negatively correlated with the strength of the claim or ability of counsel, do overlapping actions cause unnecessary confusion and clean-up costs? Is there, on the other hand, any reason to reject a simple rule that there is no presumption that counsel who files first should be counsel for the class, and that there must be a competition to select class counsel?

Representatives: Who? Whence? Why? The role of class-member

representative parties is one of the richest sources of anecdotes, and particularly cynical anecdotes. Pending securities litigation reform bills implicitly reflect the view that class-member representatives do not adequately fill the role of client under present practice. It has become a bromide that the beauty of many class actions is that the lawyers don't have any clients to get in the way. These occasionally querulous observations raise many questions.

Perhaps the first question is where representatives come from. Do they search out counsel, or are they recruited by counsel? How are they recruited – what reality, if any, underlies the provision in the pending securities litigation reform bills that would prohibit brokers from accepting remuneration for assisting an attorney in obtaining the representation of a customer? Are there "professional" representatives who appear repeatedly, at least in particular subject areas? How often do representatives have more than nominal interests? Is there a correlation between the stakes of individual representatives and the form of action – are (b)(1) actions more likely to draw representatives with substantial stakes than (b)(3) actions? Are representatives in (b)(2) actions for injunctions more likely to be as much affected by the outcome as other class members? And how often are they recruited by interested organizations because they present particularly attractive illustrations of a group interest or injury? What is the real impact of the requirement that the representative's claims or defenses be typical of the class – does it really add weight to the requirements of common questions and adequate representation? Does it at least provide one illustrative bundle of facts that may facilitate discovery and trial?

Most directly, what are the working relationships between representative class members and class counsel? Do the representatives play any role as clients, participating in the decisions that shape the litigating goals and strategies? How much

time, effort, and expense do representatives actually devote to the litigation? Do courts often attempt to supervise this dimension of adequate representation after the adequacy determination, and, if so, how? In place of reviewing representation directly, do courts attempt to rely on substitutes such as seeking out additional representatives who are not nominated by class counsel, forming class-member committees, or even appointing independent counsel or guardians to represent the class in dealing with class counsel?

Are there significant efforts to supervise class representation by evaluating the performance of class counsel directly? What means of evaluation are chosen, and what steps are taken to reduce the implicit intrusion on the adversary process?

What do representatives get out of it all, whatever the "all" may be? Simply the satisfaction of pursuing justice, and doing good for others when the class claim succeeds? Are they rewarded in some measure for the time and perhaps risk involved in their roles by recoveries that are more favorable than other class members win?

Time of Certification. Is there any pattern to the point at which the first certification decision is made? How often are actions filed simultaneously with proposed settlements and motions for certification? How often are preliminary motions on the merits decided before addressing certification? What is the effect of local rules requiring that a motion for certification be made within a stated period, perhaps 90 or 100 days – do they impede settlement efforts, encourage prompt resolution, or have little effect? How regularly is discovery controlled and focused on the certification question – is it more feasible in some substantive areas than others to separate discovery on the merits from certification discovery? How often are class definitions changed after an initial certification, is an initial denial followed by later certification, or an initial certification by decertification?

Certification Disputes. How much time is spent contesting certification? Are there correlations between the subjects of litigation and certification disputes? Is much effort devoted to contesting the choice between (b)(1), (b)(2), and (b)(3) classes, and does this correlate to the subject of litigation? How much thought – expressed or unexpressed – is given to the impact of the class definition on the prospects for settlement?

Plaintiff Classes. Do defendants ever seek and win plaintiff class certification over opposition of plaintiffs? How often do defendants acquiesce in certification of a plaintiff class, apart from settlement classes? How frequently do defendants agree to settlements that include chancy class certifications that may not deliver the hoped-for preclusion benefits?

Defendant Classes. How common are defendant classes? Are there identifiable but narrow settings in which they are most likely? What happens if a (b)(3) class is certified – do class members opt out in great numbers? Have means been found to alleviate the added burdens inflicted on representative defendants? Are there formal or informal means of costsharing? How often are defendants willing to represent a class? Are unwilling representatives effective? Are willing representatives to be trusted? How do counsel identify potential conflicts between obligations to the representative client and obligations to the class, and how are the conflicts resolved?

Issues Classes and Subclasses. How frequently, and in what settings, are issues classes used? Subclasses? How diligent and sophisticated is the inquiry into possible conflicts of interest within a class whenever relief is (or should be) more complicated than winning the maximum number of dollars to be distributed according to the only possible measure of uniformity? Consider a securities fraud action in which, inevitably, different class members bought and sold different numbers of shares at different times; a "class" of all may disguise differing interests in proving

the ways and times at which the fraud affected the market. Are such subtleties routinely ignored? Is it in fact better to ignore such complications, because the costs of making distinctions outstrip the benefits? What of actions that touch deeper social interests, such as surviving school desegregation cases in which a "class" of all students, or all minority students, almost inevitably includes people with a wide range of views about appropriate remedies?

Is there any experience at all to illuminate the post-class experience with issues classes? How often is a class-based resolution of some issue of liability followed by independent actions in different courts? How are these actions coordinated with any appeals in the issues class? Are any efforts made to ensure that subsequent proceedings to not effectively thwart the class determination? Do the results of individually litigating individual issues diverge substantially — for example, do claimants in some states or regions win systematically greater or lesser recoveries than those in other states or regions?

More fundamentally, is enough care taken to ensure that issues certified for class treatment are usefully separate from issues that remain for individual disposition? It is frequently suggested, for example, that issues of fault and general causation are suitable for class treatment, leaving issues of comparative fault, individual cause, and proximate cause for case-by-case resolution. But how is fault to be compared without retrying the issue of fault, and perhaps implicitly impugning the class finding? And how are individual and proximate cause issues to be resolved without retrying the evidence of general causation? If the answer is found in brute force, will the results in fact achieve sufficient uniformity to justify the attempt?

Notice. What types of notice, at what cost, are required in (b)(1) and (b)(2) actions? Is there any reason to believe that notice in (b)(3) actions is not generally adequate? How much does notice

cost, and does the cost defeat legitimate actions seeking small individual recoveries on behalf of many claimants? Is much effort devoted to litigating notice issues? How often is notice provided of steps other than certification, at what cost, and with what benefit? Do notices of impending settlement provide sufficient detail to enable intelligent appraisal, if any class member should wish to undertake or hire it? And, of course, how many class members even attempt to read the notices?

Opt-Outs. How frequently do members opt out of (b)(3) classes? Can this be correlated with specific subject areas, size of typical individual claims, or something else? Why do members choose to opt out or remain in? Does the fear of involvement conduce more toward doing nothing, or toward getting out? How many opt-outs bring independent actions, and again what correlations might be found? How often is (b)(2) stretched, or (b)(1) distorted, to defeat opt-out opportunities? Is there any significant converse practice, such as defining subclasses in (b)(1) or (b)(2) actions that effectively permit opting out? Is it common to structure settlements that allow the defendant to opt out of the settlement after finding out how many plaintiff class members opt out?

Opt-Ins. Are devices employed to create what essentially are opt-in classes, by such means as defining the class to include only those members who file claims?

Individual Member Participation. How frequently do nonrepresentative class members seek to participate before the settlement stage? What resistance do they meet from designated representatives, class counsel, and the party opposing the class? How much communication is there between class counsel and nonrepresentative members? If nonrepresentative members attempt to seek out class counsel, how are they received? How often to nonmembers challenge settlements? Seek to appeal judgments? Intervene for any purpose? Is there any working concept of the right in a (b)(3) class action to enter an appearance through

counsel that distinguishes it from intervention? Is there experience with this concept that might show whether it should apply to all forms of class actions?

Settlement. Many of the questions have been touched above. Does certification coerce settlement of frivolous or near-frivolous claims? What means have been used to support effective judicial supervision when all parties submit information in support of settlement? And if certification is first sought at the settlement stage, is the attempt to ensure compliance with notice and certification requirements more effective than the attempt to evaluate the merits of the settlement? How frequently do nonrepresentative class members appear to contest settlement, and with what effect? Are significant problems of conflicting interests within the class papered over? Do settlements often include provisions that are, by some reasonable measure, disproportionately favorable to class representatives?

Trial. How often are certified class actions actually tried on the merits? With what results? Is there a correlation with subject matter and class type — are trials more common in (b)(2) actions that pursue still developing legal theories, less common in (b)(3) actions with large sums at stake?

Small Claims Classes. How frequently do certified (b)(3) classes result in relatively trivial relief for individual class members, measured by mean, median, or mode recoveries? Is it possible to guess at the social enforcement value of a significant total parcelled out in many small shares? Are there meaningful parallel questions for other class types, such as trivial injunctive relief in a (b)(2) action, perhaps coupled with significant fees? How often do courts experiment still with substitute modes of recovery, such as distribution to charitable institutions?

Fee-Recovery Ratios. Another cynical belief is that many class actions serve only to confer benefits on class counsel. Token

class benefits are accompanied by handsome fee awards. The pattern of relationships between fee awards and total class recovery will be interesting. The FJC study of a very small number of cases from a sample chosen for other purposes suggested that class benefits regularly exceed fees, and that fees are a larger percentage of class recovery in cases that yield small total recoveries. If this pattern is generally true, it provides substantial reassurance. Additional reassurance would be supplied if there are enough cases tried on the merits to support meaningful comparison of the fee awards and ratios with settled cases.

A more elusive concern lies beyond the simple ratios. A high ratio of fees to recovery may reflect high-quality work done to support weak but deserving claims. It also may reflect the coercive benefits of pursuing undeserving claims, or the betrayal of strong class claims by bargain settlements. This concern may prove almost impossible to test.

If there is any experience to measure, it also would be useful to learn the means by which courts have attempted to regulate fees beyond use of a "lodestar" approach. How often is special importance attached to the actual benefits won for the class? Is there any significant attempt, by auction or otherwise, to stimulate competing offers of representation?

Is there any way to get at such intriguing information as a comparison between the economic gains from representing classes as compared to the economic gains from opposing classes? And is there anything to be learned from such information if it can be found: if, for example, it were concluded that class counsel average a higher return per hour of apparently equal effort, would that tell us more than an equal or lower average rate of return?

Overlapping Classes. How often are overlapping class actions brought in different courts? What means are found to arrange a coherent resolution that avoids parallel proceedings? Are the

problems more severe if one or more overlapping actions are filed in state courts? One description has painted a startling picture of competing class actions, in which the proposed settlement in an opt-out class is met by formation of a rival class with promises of better results: does this really happen? If it does, what are the results for class members? What about more imaginative possibilities, such as formation of a rival class and delegation to the class representatives of the power to opt out of the initial class on behalf of all members of the new class?

Counterclaims and Discovery. There does not seem to be much concern with the prospect of counterclaims and discovery involving nonrepresentative class members. Is there regular acceptance that these devices are not worthwhile? That they are employed, but only in special settings – individual discovery of individual liability or damages issues, for example, is disciplined and occurs only when it becomes immediately relevant? Are there unknown problems that should be addressed?

Res Judicata. Peace is the tradeoff for a class judgment, win or lose. The theory is reasonably clear. But reported cases do not give much sense of actual impact. To the extent that class actions involve claims that would not support individual litigation in any event, there is little reason for concern. But it would be useful to know how often class judgments deter individual actions that otherwise would have been brought; how often individual actions are attempted but fail on preclusion grounds; and how often individual actions overcome preclusion defenses because of direct limits on preclusion, inadequate representation, inadequate notice, or other grounds.

Summary

Several purposes are served by posing a daunting list of questions that are difficult or impossible to answer. The one that may be most important is to demonstrate a central challenge of the

rulemaking process. Courts have cases and must decide them. Procedure must be adapted as well as can be to changing circumstances and needs. If all procedural reform were held hostage to the slow progress of information that meets the rigorous standards of good social science, there would be precious little reform. Nowhere is this prospect more evident than with class actions. What is needed is wise judgment on the balance between the enthusiasm arising from perceived needs for change and the caution engendered by perceived ignorance, and recognition that more confident judgment is needed to justify more dramatic departures from practices proved by at least some experience. When rigorous evidence is lacking, judgment is properly informed by a consensus of anecdotes, encouraging as much anecdotal input, drawing from as much shared experience, as can be. At the same time, judgment is restrained by recognition of the inadequacies of present knowledge and the fallibilities of prediction.

Individual judgments will differ on the results of the last leap into the unknown with Rule 23. The career of the 1966 amendments surely teaches a humbling lesson on the fallibility of foresight, however good the unforeseen consequences may be. Perhaps we know enough to justify modest changes in Rule 23. Possibly we should have the courage to experiment with more drastic changes. If no changes are made, we never will know their fate. If changes are made, it will be years before we even think we know. The greatest cause for concern in the midst of all this is that there seems to be little collective sense of any need for signifcant change, apart from the area of mass torts. There is a real sense that we need to find better means of addressing mass torts, but almost no sense yet as to the blend of substantive and procedural means that will prove better. Rule 23 is only one alternative, and the foundation that might securely anchor a new structure still needs to be sunk.

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WASHINGTON, D.C. 20544

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To: Hon. Alicemarie H. Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

From: Hon. Ralph K. Winter, Chair
Advisory Committee on Evidence Rules

Date: June 7, 1995

I. Proposed Amendments to the Rules of Evidence

The Advisory Committee has proposed amendments to Federal Rules of Evidence 801(d)(2), 803(24), 804(b) and Rule 806. It has also proposed a new Rule 807. The Advisory Committee requests the Standing Committee's approval of these amendments for publication and comment.

II. Tentative Decisions Not to Amend

The Advisory Committee has tentatively decided not to propose amendments to the following Rules of Evidence and asks the Standing Committee to submit these tentative decisions for publication and comment:

Rule 103(a), (b), (c), (d) (Rulings on Evidence)
Rule 104 (Preliminary Questions)
Rule 408 (Compromise or Offers to Compromise)

Rule 411 (Liability Insurance)
Rule 801(a), (b), (c), (d)(1) (Definitions)
Rule 802 (Hearsay Rule)
Rule 803(1) - (23) (Hearsay Exceptions; Availability of Declarant Immaterial)
Rule 804(a), (b) (1) - (4) (Hearsay Exceptions; Declarant Unavailable)
Rule 805 (Hearsay Within Hearsay)
Rule 806 (Attacking and Supporting Credibility of Declarant)
Rule 901 (Requirement of Authentication or Identification)
Rule 902 (Self-Authentication)
Rule 903 (Subscribing Witness' Testimony Unnecessary)
Rule 1001 (Definitions)
Rule 1002 (Requirement of Original)
Rule 1003 (Admissibility of Duplicates)
Rule 1004 (Admissibility of Other Evidence of Contents)
Rule 1005 (Public Records)
Rule 1006 (Summaries)
Rule 1007 (Testimony or Written Admission of Party)
Rule 1008 (Functions of Court and Jury)
Rule 1101 (Applicability of Rules)
Rule 1102 (Amendments)
Rule 1103 (Title)

The Advisory Committee requests that the Standing Committee submit for publication and comment these tentative decisions, utilizing the same procedure followed at previous Standing Committee meetings.

Rule 801. Definitions

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(d) Statements which are not hearsay.

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(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement may be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

COMMITTEE NOTE

Rule 801(d)(2) has been amended in order to respond to three issues raised by Bourjaily v. United States, 483 U.S. 171 (1987). First, the amendment codifies the holding in Bourjaily by stating expressly that a court may consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to Bourjaily, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.

Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. See, e.g., United States v. Beckham, 968 F.2d 47, 51 (D.C.Cir. 1992); United States v. Sepulveda, 15 F.3d 1161, 1181-82 (1st Cir. 1993), cert. denied, 114 S.Ct. 2714 (1994); United States v. Daly, 842 F.2d 1380, 1386 (2d Cir.), cert. denied, 488 U.S. 821 (1988); United States v. Clark, 18 F.3d 1337, 1341-42 (6th Cir.), cert. denied, 115 S.Ct. 152 (1994); United States v. Zambrana, 841 F.2d 1320, 1344-45 (7th Cir. 1988); United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988); United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988); United States v. Hernandez, 829 F.2d 988, 993 (10th Cir. 1987), cert. denied, 485 U.S. 1013 (1988); United States v. Byrom, 910 F.2d 725, 736 (11th Cir. 1990).

Third, the amendment extends the reasoning of Bourjaily to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In Bourjaily, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

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(24) ~~Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rule and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

COMMITTEE NOTE

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Rule 804. Hearsay Exceptions; Declarant Unavailable

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(b) Hearsay exceptions

* * * * *

~~(5) Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rule and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

(6) Waiver by misconduct. A statement offered against a party who has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

COMMITTEE NOTE

Subdivision (b)(5). The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Subdivision (b)(6). Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984).

Every circuit that has resolved the question has recognized the principle of waiver by misconduct, although the tests for determining whether there is a waiver have varied. See, e.g., United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Potamitis, 739 F.2d 784, 789 (2d Cir.), cert. denied, 469 U.S. 918 (1984); Steele v. Taylor, 684 F.2d 1193, 1199 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980); United States v. Carlson, 547 F.2d 1346, 1358-59 (8th Cir.), cert. denied, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. Contra United States v. Thevis, 665 F.2d 616, 631 (5th Cir.) (clear and convincing standard), cert. denied, 459 U.S. 825 (1982). The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)~~,~~ (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Committee Note

The amendment is technical. No substantive change is intended.

Rule 807. Other Exceptions

A statement not specifically covered by ~~any of the foregoing exceptions~~ Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rule and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

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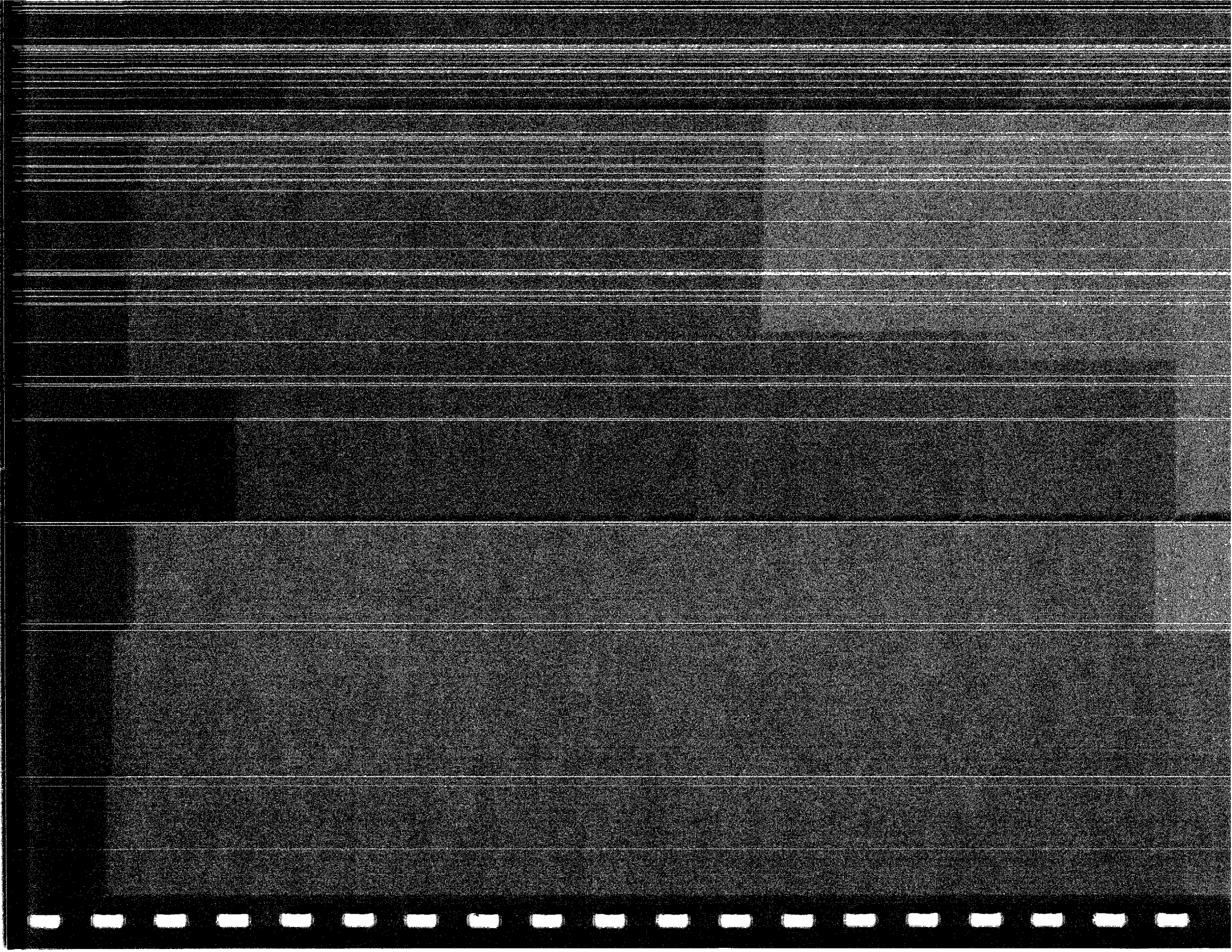

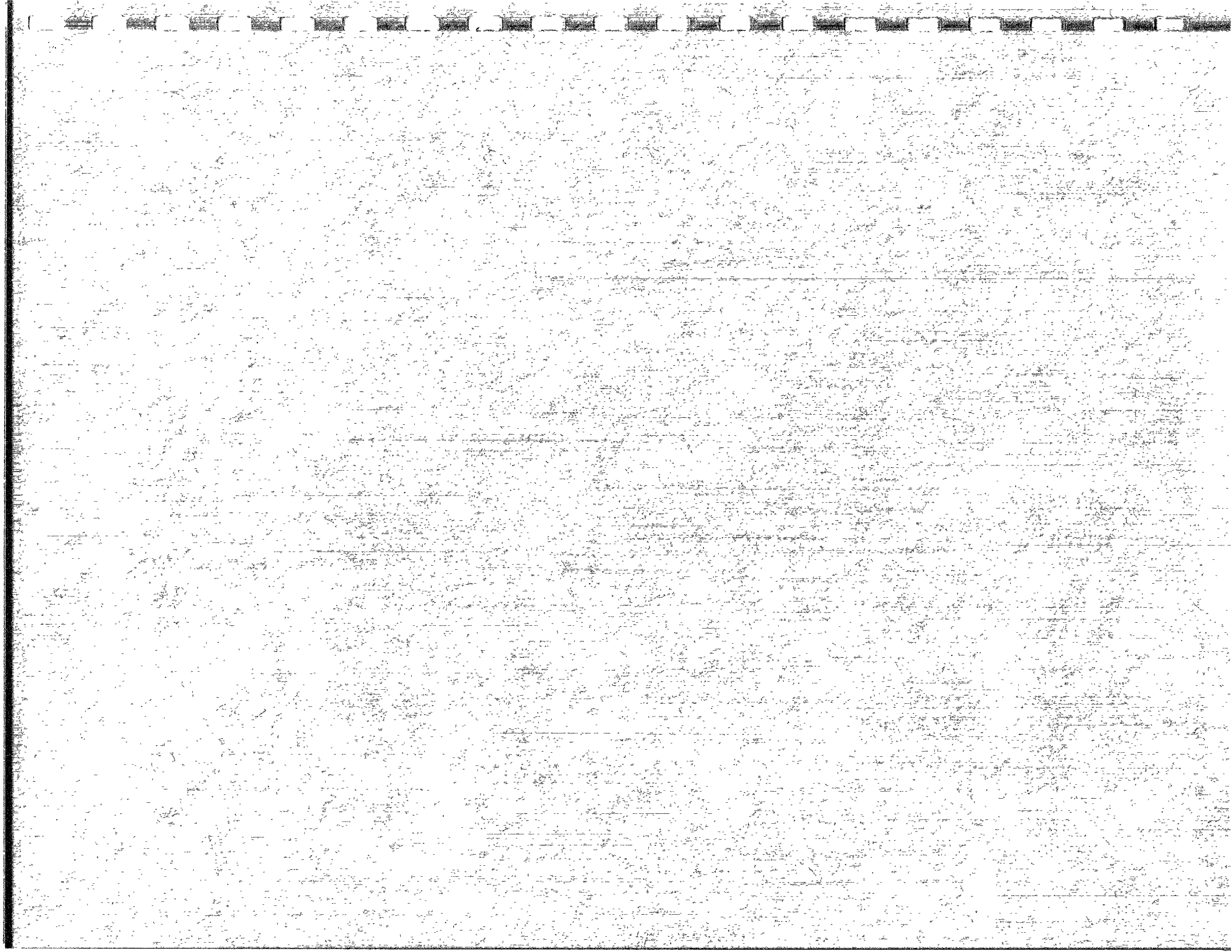

Rule 103. Rulings on Evidence

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(e) Effect of Pretrial Ruling. A pretrial objection to or proffer of evidence must be timely renewed at trial unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final.

COMMITTEE NOTE

Since the Federal Rules of Evidence became effective, litigants have increasingly relied on pretrial motions to raise issues about the admissibility of evidence. As enacted, Rule 103 did not specifically address whether a losing party had to renew its objection or offer of proof at trial in order to preserve an issue for appeal.

Subdivison (e) has been added in order to clarify differing approaches that spell uncertainty for litigants and create unnecessary work for the appellate courts. See, e.g., United States v. Vest, 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is "fatal"), cert. denied, 488 U.S. 965 (1988); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992) ("the law in this circuit is that an unsuccessful

motion in limine does preserve the issue for appeal"); American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the courts' attention to a matter it need consider."); Palmerin v. City of Riverside, 794 F.2d 1409, 1411 (9th Cir. 1986) (circuit's position is "unclear).

Subdivision (e) states as a default rule that counsel for the losing party must renew any pretrial objection or proffer at trial. Renewal is not required if "the court expressly states on the record, or the context clearly demonstrates," the finality of the pretrial ruling. Counsel bears the responsibility for obtaining the requisite ruling or renewing the objection and bears the risk of waiving an appealable issue if these procedures are not followed. The Committee considered but rejected an alternative general rule that would not require renewal of a motion at trial.

Rule 103(e) does not excuse a litigant from having to satisfy the requirements of Luce v. United States, 469 U.S. 28 (1984) to the extent applicable. In Luce, the Supreme Court held that an accused must testify at trial in order to preserve for appeal any Rule 609 objection to a trial court's ruling on the admissibility of the accused's prior convictions for impeachment. Some circuits have extended the Luce rule beyond the Rule 609 context. See United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (Rule 608(b)), cert. denied, 479 U.S. 831 (1986); United States v. Sanderson,

966 F.2d 184, 189-90 (6th Cir. 1992) (same); United States v. DiMatteo, 759 F.2d 831, 832-33 (11th Cir. 1985) (per curiam) (same), cert. denied, 474 U.S. 860 (1985); United States v. Griffin, 818 F.2d 97, 105 (1st Cir. 1987) (Rule 403), cert. denied, 484 U.S. 844 (1987).

RULE 407. Subsequent Remedial Measures.

When, after an injury or harm allegedly caused by an event, measures are taken ~~which~~ that, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event. This rule does not require the exclusion of~~ Evidence of subsequent measures may be ~~when~~ offered for another purpose, such as impeachment or ~~if controverted, proving~~ proof of ownership, control, or feasibility of precautionary measures ~~if controverted, or impeachment~~. * * * * *

COMMITTEE NOTE

The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988).

Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product or its design, or that a warning or instruction should have accompanied a product." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See Raymond v. Raymond Corp., 958 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v.

Armstrong World Industries, Inc., 995 F.2d 343 (2d Cir. 1993); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelley v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn,Inc., 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).

Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

II. Tentative Decisions Not to Amend

The Advisory Committee has tentatively decided not to propose amendments to the following Rules of Evidence and asks the Standing Committee to submit these tentative decisions for publication and comment:

Rule 103(a), (b),(c), (d) (Rulings on Evidence)
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The Advisory Committee requests that the Standing Committee submit for publication and comment these tentative decisions utilizing the same procedure followed at previous Standing Committee meetings.

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ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of May 4 and 5, 1995

New York, New York

The Advisory Committee on the Federal Rules of Evidence met on May 4 and 5, 1995 at the federal courthouse in Foley Square in the Southern District of New York.

The following members of the Committee were present:
Circuit Judge Ralph K. Winter, Jr., Chair
Circuit Judge Jerry E. Smith
District Judge David S. Doty
District Judge Fern M. Smith
Federal Claims Judge James T. Turner
Dean James K. Robinson
Professor Kenneth S. Broun
Gregory P. Joseph, Esq.
Fredric F. Kay, Esq.
John M. Kobayashi, Esq.
Mary F. Harkenrider, Esq., and Roger Pauley, Esq., Department of Justice
Professor Margaret A. Berger, Reporter
Chief Judge Covington and Judge Shadur were unable to attend.

Also present were:
Honorable Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure
Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure
Circuit Judge C. Arlen Beam
Peter G. McCabe, Esq., Secretary, Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Administrative Office
Paul Zingg, Esq., Administrative Office

Judge Winter called the meeting to order at 8:30 a.m. He reported to the Committee on a number of developments.

The Standing Committee. Judge Winter informed the Committee that the Standing Committee had voted to send out the amendments to Rules 103 and 407 for public comment. He also reported that some members of the Standing Committee feared that the amendment to Rule 103 might prove a trap for lawyers, and had expressed a preference for a default rule that would relieve the losing attorney from having to renew the motion at trial. A motion to revise the amendment accordingly was defeated, but it was agreed that the Committee Note to Rule 103 would indicate that such an

alternate version had been considered and rejected.

Congress. Judge Winter reported that he met with a number of persons on the Hill with regard to Rules 413-415. Staff counsel to Senator Biden indicated that the Democrats would have no objection to the Evidence Committee redraft. Judge Winter also met with four Republican staffers and suggested to them that admissibility should be limited to conduct resulting in a conviction. He reported that the House side had been surprisingly receptive. The Senate staffers acknowledged that the Evidence Committee draft might well be an improvement on the congressional version but that a revision of Rules 413-415 could not be accomplished through the Crime Bill. If at all, the Committee's draft would have to be presented as a technical amendment at the request of Congress; it might possibly pass "on consent." The House might perhaps hold hearings. Although Judge Winter was somewhat encouraged by thee meetings, he thought that at this time there was less than a 50% chance that Congress would take any action to modify Rules 413-415.

At these meetings, Judge Winter also discussed the congressional initiative to amend Rule 702. He reported that he had advised the participants that the Committee viewed Daubert as a good decision with great potential and that an attempt to codify the opinion at this point would create problems. The Committee agreed that it would be unwise to react to each congressional proposal to amend a rule of evidence by submitting its own preferred redraft. The Committee decided to take no action on Rule 702 at this time.

The Committee then returned to its consideration of the hearsay rule.

Rule 803(4). The Committee agreed to recommend not amending Rule 803(4).

Rule 801(d)(2). At the previous meeting, the Committee had directed the Reporter to prepare a draft of Rule 801(d)(2)(E) that would deal with issues raised by the Supreme Court's decision in Bourjaily v. United States, and to also consider the effect of Bourjaily on Rules 801(d)(2)(C) and (D). The Reporter presented a number of alternate proposals for either amending each of the subdivisions separately or for language that would apply to all three.

The Committee then engaged in an extensive discussion. Professor Saltzburg, who had not been at the previous meeting, urged the Committee to codify pre-Bourjaily practice as the better rule. Professor Broun also expressed reservations about codifying any part of Bourjaily and extending its doctrine to civil cases. Dean Robinson suggested a corroboration requirement, such as appears in Rule 804(b)(3,) instead of an independent

evidence requirement. Mr. Kobayashi was in favor of a requirement that would explicitly require the trial judge to examine the evidence offered pursuant to Rule 104(a) to establish the requisite preliminary facts and to make a finding as to whether the conditions for the exception are satisfied.

The Committee voted on three alternative approaches to Rule 801(d)(2)(E):

1. To not amend the rule - 3 votes
2. To add an independent evidence requirement - 7 votes
3. To codify the common law rule requiring that the statement must be set aside in making the preliminary - 2 votes.

The Committee decided not to draft the amendment in terms of corroboration but rather to specifically state that the statement could be considered but would not suffice in the absence of some independent evidence. The Committee then voted to extend this approach to subdivisions (C) and (D). It also agreed that it would review and vote on the text of the proposed amendment as well as the accompanying Committee Note at the next day's meeting.

The Committee also discussed whether a personal knowledge requirement should be added to either Rule 801(d)(2)(C) or Rule 801(d)(2)(D). The Committee declined to do so. Members of the Committee suggested that it was not unfair to shift to the opponent the burden of explaining to jurors how probative value was affected by the absence of personal knowledge, and that in some cases in which the declarant clearly lacked personal knowledge Rule 403 might be used to exclude the evidence.

Rule 803(3). The Committee had asked the Reporter to prepare a memorandum on the Hillmon doctrine, directed to the question of whether the Rule ought to be amended to prohibit evidence of declarant's intent to commit a future act when the act could not be performed without the participation of the party against whom the evidence is offered. The prime example that has disturbed some commentators is the homicide victim's statement that he or she is intending to meet the defendant. After discussion, the Committee decided not to amend the rule.

Rule 803(8). The Committee first discussed whether to amend the rule to state explicitly that evidence which would be barred by subdivisions (B) and (C) when offered against an accused may be admissible pursuant to another hearsay exception, or whether to adopt the reasoning of a Second Circuit opinion, United States v. Oates, 560 F.2d 45 (2d Cir. 1977), that barred such evidence absolutely. The Committee discussed the Reporter's memorandum about how the Circuits are handling this issue. It appears that routine evidence of governmental activity, such as recording license plate numbers, that falls literally within the

prohibitions of subdivisions (B) and (C) is admitted by most circuits pursuant to Rule 803(5). Furthermore, the circuits also admit some evidence barred by Rule 803(8) pursuant to Rule 803(6) when the declarant is available to testify. These cases do not suggest that the courts are permitting the government to put in crucial aspects of its case through hearsay testimony. The Committee concluded that there was no need to amend the rule.

The Committee then discussed whether Rule 803(8)(B) should be amended to permit a criminal defendant to offer against the government evidence which falls within the scope of the exception. Rule 803(8)(C) specifically provides that the evidence made admissible by that provision is admissible "against the Government in criminal cases." The omission in Rule 803(8)(B) may have occurred as a drafting error when Congress revised the rule. The few cases that have considered the issue have allowed the defendant to introduce evidence that otherwise satisfies subdivision (B). Consequently, the Committee saw no need to amend the provision.

Waiver by misconduct. The Committee next considered whether it should codify the generally recognized principle, that hearsay statements become admissible on a waiver by misconduct notion when the defendant deliberately causes the declarant's unavailability. The Committee debated a number of issues: the degree to which defendant must have participated in procuring the declarant's unavailability; the burden of proof that the government must meet in proving the defendant's misconduct; the consequences of a waiver finding; and the appropriate rule of evidence in which to place such a provision. The Committee agreed that codifying the waiver doctrine was desirable as a matter of policy in light of the large number of witnesses who are intimidated or incapacitated so that they do not testify. Consequently, the Committee chose a version of the rule that would not require having to show that the defendant actively participated in procuring the declarant's unavailability. Acquiescence will suffice. In addition, the Committee rejected imposing a "clear and convincing" burden of proof on the prosecution, as is required in the Fifth Circuit, in favor of the usual preponderance of the evidence standard used in connection with preliminary questions under Rule 104(a) even when a constitutional rule is at issue. The federal circuits other than the Fifth, currently use a preponderance standard with regard to finding waiver by misconduct.

The Committee agreed that the consequence of a finding of waiver is that the declarant's hearsay statement becomes admissible to the extent that it would have been admissible had the declarant testified at trial. For example, hearsay contained in the hearsay statement is not admissible unless it satisfies some other hearsay exception, the declarant must have had personal knowledge, and the evidence may be subject to exclusion

under Rule 403.

The Committee debated at length where to place this new exception. Some members of the Committee argued in favor of Rule 801 because subdivision (d) of that rule contains a number of provisions that are distinct from the traditional class exceptions dealt with in Rules 803 and 804. Furthermore, statements admissible on a waiver theory resemble admissions in being admissible only against the defendant and not against the world. On the other hand, other members were concerned that placement in the rule containing admissions would suggest that a personal knowledge requirement does not apply. In addition, the unavailable declarant is the subject of Rule 804.

In the course of discussing appropriate placement of the waiver principle, some members also expressed concern that adding the provision to Rule 804 would upset that rule's numbering scheme. The new provision clearly would have to appear before the residual exception in subdivision (b)(5) which is entitled, "Other exceptions." On the other hand, numbering the new provision "(b)(5)" would require renumbering the residual exception as "(b)(6)." This possibility disturbed some members of the Committee who felt that this would cause problems with computerized searches. Furthermore, the Committee realized that this renumbering problem would arise whenever a new exception was added to either Rule 803 or 804. Judge Winter suggested that the two residual exceptions should be combined and moved into a new Rule 807. No change in meaning would be intended by this transfer; it would be done solely to leave room for new exceptions and to minimize the impact on computer research when a new exception is added. The Committee adopted this suggestion.

Mr. McCabe then informed the Committee that when a provision is moved out of a Federal Rule its number is not reassigned to new material that is added to the rule from which it was removed. The Committee agreed that (b)(5) should remain blank in Rule 804 and that the waiver provision would be numbered Rule 804(b)(6).

Rule 804(b)(1). The Reporter had been asked to advise the Committee about judicial interpretations of the "predecessor in interest" provision. The Reporter informed the Committee of a number of cases, particularly in the Sixth Circuit, that hold that the provision is satisfied when the party against whom the evidence was offered at the first proceeding had a similar motive and opportunity to cross-examine as the party against whom the evidence is now being offered. Such an interpretation essentially renders superfluous the "predecessor in interest" provision. This approach has, however, been utilized almost exclusively in asbestos cases to admit deposition testimony given by the medical director of one manufacturer against a different manufacturer. It appears likely that the evidence could have been admitted instead pursuant to the residual hearsay exception.

A second possible issue that arises with regard to the "predecessor in interest" requirement is whether it applies in a criminal case. Dictum in one circuit suggests that under specialized circumstances such evidence might be admitted against a criminal defendant, and there is some uncertainty expressed in the cases as to whether evidence may be offered against the government as a "predecessor in interest." There is no indication, however, that these cases are causing problems for the courts or litigants.

The Committee agreed not to amend Rule 804(b)(1).

Rule 804(b)(3). The Reporter had been asked to look at cases construing the corroboration requirement for exculpatory declarations against interest. The Committee was particularly interested in determining if the requirement was being interpreted too rigidly, and if a similar provision ought to be added for inculpatory statements. The Reporter distributed a number of recent cases to the Committee, and the Committee concluded that the corroboration requirement did not seem to be causing difficulties. Furthermore, in light of the Supreme Court's recent opinion in Williamson v. United States, 114 S.Ct. 2431 (1994), which restricted the use of inculpatory declarations against interest, the Committee saw no need to extend the corroboration requirement to inculpatory declarations at this time.

Articles 9 and 10. The Committee had asked the Reporter to consider a number of issues with regard to these two articles. The Committee agreed that the definition of "writings and recordings" that appears in Rule 1001(1) does not have to be added to Article 9. Rule 901(b) which specifically states that it is illustrating and not limiting methods of authentication is sufficiently flexible to deal with all of the items covered by the Rule 1001 definition.

The Committee also agreed that the certification requirement provided for foreign business records in 18 U.S.C. §3502(a) ought not to be extended to domestic records. In the case of domestic records, litigants will invariably handle authentication issues by stipulation except in instances in which a problem exists. When there is a problem and the witnesses are available in the United States they ought to be produced; allowing authentication by certification would be inappropriate.

Two issues were presented with regard to Rule 1006. 1) whether the rule should be clarified to state that summaries satisfying the rule will ordinarily be sent to the jury room, and 2) whether the text should be amended to explain that Rule 1006 does not apply to summaries that recapitulate evidence that has otherwise been admitted. The Committee decided not to propose an amendment to Rule 1006.

Rule 104. The Committee had determined not to consider possible amendments to Rule 104 until it was finished with its survey of the articles of the Federal Rules of Evidence other than Article 5. Now that the Committee had completed that agenda, it agreed that no amendment to Rule 104 was required.

Rape counselor privilege. The Crime Bill required the Judicial Conference to report to the Attorney General on the advisability of enacting a rape counselor privilege for the federal courts. A subcommittee consisting of Judge Fern Smith, Professor Broun, Ms. Harkenrider, Mr. Joseph and the Reporter analyzed rape counselor provisions that are presently in effect in twenty-four states. After a conference call among members of the subcommittee, Mr. Joseph drafted a qualified privilege that contained those features that the subcommittee considered least objectionable.[1] No one on the subcommittee, however, was in favor of recommending that a rape counselor privilege ought to be enacted for the federal courts. The Committee agreed with the subcommittee. In particular, members thought it would be inappropriate to have a rape counselor privilege as the only specifically codified privilege. especially in light of the case load of the federal courts which rarely includes rape cases.

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[1] It provided:

(a) Sexual assault counselors may not be compelled to testify about any opinion or information received from or about the victim without the consent of the victim. However, a counselor may be compelled to identify or disclose information if the court determines that the public interest and the need for the information substantially outweigh any adverse effect on the victim, the treatment relationship, and the treatment services if disclosure occurs.

(b) "Sexual assault counselor" for the purpose of this rule means a licensed medical professional, a licensed psychotherapist, or a person who has undergone at least [20 - 40] hours of counseling training and works under the direction of a supervisor in an organization or institution, or a division of an organization or institution, whose primary purpose is to render advice, counseling, or assistance to victims of sexual assault.

An alternate version of subdivision (a) was also suggested:

A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made to a sexual assault counselor unless the court determines that the public interest and the need for the information substantially outweigh any adverse effect on the victim, the treatment relationship, and the treatment services if disclosure occurs.

Consequently, no recommendation to enact a rape counselor privilege will be made.

Review of proposed amendments and notes. Before the Committee adjourned, the amendments and proposed Committee Note to Rule 801(d)(2) and 804(b)(6) were distributed. The Committee unanimously voted to send them to the Standing Committee. The Committee also approved combining and transferring the text of the residual exceptions in Rule 803(24) and 804(b)(5), and directed the Reporter to add a Committee Note stating that no change in meaning was intended.

Respectfully submitted,

Margaret A. Berger
Professor of Law
Reporter

ADVISORY COMMITTEE ON EVIDENCE RULES

Minutes of the Meeting of January 9 and 10, 1995

Coronado, California

The Advisory Committee on the Federal Rules of Evidence met at the Hotel del Coronado in Coronado, California on January 9 and 10, 1995.

The following members of the Committee were present:
Circuit Judge Ralph K. Winter, Jr., Chairman
Circuit Judge Jerry E. Smith
District Judge Fern M. Smith
District Judge Milton I. Shadur
Federal Claims Judge James T. Turner
Dean James K. Robinson
Professor Kenneth S. Broun
Gregory P. Joseph, Esq.
John M. Kobayashi, Esq.
Frederic F. Kay, Esq.
Mary F. Harkenrider, Esq., and Roger Pauley, Esq., Department of Justice
District Judge David S. Doty
Professor Margaret A. Berger, Reporter

Chief Justice Covington received word of her appointment to the Committee too late for her to make arrangements to attend.

Also present were:
Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure
Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure
Circuit Judge C. Arlen Beam
William B. Eldridge, Esq. Federal Judicial Center
Peter G. McCabe, Esq., Secretary
John K. Rabiej, Esq., Administrative Office
Mark D. Shapiro, Esq., Administrative Office

Judge Winter called the meeting to order at 8:30 a.m. on January 9. He announced that the Committee would be meeting next on May 4-6 in New York. He then set forth the agenda for the present meeting: the Committee would discuss some provisions in the Contract with America, the desirability of a rape-counselor privilege for the federal courts, an amendment to Rule 408 proposed by John Kobayashi, and then turn to a consideration of Articles 8, 9 and 10 of the Federal Rules of Evidence.

Contract with America. The Committee first considered a proposed amendment to Rule 702 that would impose a new test for expertise based on "scientific knowledge." Judge Winter reminded

the Committee that at its last meeting it had unanimously agreed that it would be counterproductive to amend the expert witness rules until the courts had an opportunity to respond to the Supreme Court's 1993 opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc. Mr. Joseph reported that although the drafters of the proposed amendment had stated that their objective was to codify Daubert, the Litigation Section of the American Bar Association did not agree with this description. The proposed amendment specifically applies only to "scientific knowledge" although some courts apply Daubert to other types of expert proof; imposes separate requirements of validity and reliability which the Daubert court explicitly refused to do; and provides for a new balancing test in which the usual Rule 403 burden is reversed. Members of the Committee also noted that there is no need to codify a Supreme Court opinion.

The next provision to which the Committee turned was an additional amendment to Rule 702 that would exclude the testimony of an expert who is to be paid on a contingent fee basis. Judge Winter stated that while the gist of this proposal is generally consistent with the thrust of DR 71, the manner in which this new section is framed may lead to unanticipated consequences that require further study. Furthermore, there is a difference in providing for the inadmissibility of evidence instead of handling the problem through a disciplinary rule. Members expressed concern about the applicability of the proposed rule in cases in which the opponent of the expert can show that the party for whom the expert would testify has no money absent a recovery, and about the possibility that the proposed rule might repeal sub silentio the numerous statutory provisions that shift the fees of experts for prevailing parties to the loser. It was also pointed out that the mode of the expert's payment can now be explored before the jury, and that an exclusionary rule is not needed. Committee members agreed that contracts with experts providing for payment on a contingent fee basis are highly undesirable and should be usable for impeachment and disciplinary action. They would have no problem with a rule that excludes expert testimony in this narrow situation where the expert's contingent fee is contractual.

Rape counselor privilege. Mary Harkenrider explained that the main thrust of the provision in the Crime Bill (Pub. L. 103-322 (1994)) was directed at the states. Section 40153(a) requires the Attorney General to develop model legislation. Subsection (c) was added for the sake of completeness; it requires the Judicial Conference to submit a report to Congress with regard to the need for inserting such a privilege in the Federal Rules of Evidence. While the Attorney General's report is due within a year (September 1995), no time limit was imposed with regard to the federal report and recommendations.

Members of the subcommittee that had been created at the previous meeting of this committee made a number of additional comments. Ms. Harkenrider reported that the Attorney General's office was just beginning the process of model legislation for the states. Judge Fern Smith reported that although a rape counselor privilege providing for an in camera proceeding and a balancing test has been in effect in California since 1980, she had been able to find only two reported cases. Professor Broun reported that most states provide for in camera review in cases in which particularized need is shown, and that a few state court opinions seem to indicate that the privilege is treated as absolute.

Judge Winter inquired about how such a privilege would operate in criminal and civil proceedings, and whether a rape counselor privilege is really the only detailed privilege that ought to exist in federal courts? Other questions were raised about the interrelationship with hearsay rules, such as Rule 803(3), and an expert's testimony about a victim's rape trauma syndrome.

Ms. Harkenrider agreed to keep track of the state model legislation. A draft and commentary will be prepared by the reporter for the May meeting that will address the alternatives of an absolute or qualified privilege or no privilege, provide definitions, and consider whether the privilege should extend to communications with psychiatrists, psychologists, social workers or others.

Report on Committee's Recommendations to the Standing Committee. Rules 413-415. Judge Winter reported that Rules 413-415 were transmitted to the Standing Committee. In accordance with the Evidence Committee's views at its October meeting, the Standing Committee was advised that this Committee would prefer congressional annulment of the rules. In the event, however, that Congress disagrees, the Evidence Committee requested of the Standing Committee that it ask the Judicial Conference to recommend to Congress this Committee's rewriting of Rules 404 and 405. This revision incorporates the substance of Rules 413-415, but avoids the troubling problems identified in the Evidence Committee's accompanying comment.

Rules 103(e) and 407. Judge Winter further advised the Committee that our proposed revisions of Rules 103(e) and 407 had been sent to the Standing Committee with the request that they be approved for public comment.

Rules 406, 605, 606. The Standing Committee was advised that the Evidence Committee had tentatively determined at this time not to amend Rules 406, 605 and 606. The Standing Committee was asked to make this information public as it had done with other evidence rules that the Committee had declined to amend,

and to request that any dissenting views be sent to the Evidence Committee.

Review of Agenda. At this time, the Evidence Committee is still considering the following rules in articles it has already reviewed: Rule 104, Rules 404, 405, 407 and 408. The Rules Enabling Act requires that amendments to privilege rules contained in Article 5 must be made by Congress so that the Committee will consider possible changes in Article 5 (other than the rape counselor privilege) only after it finishes reviewing all the other articles in the Federal Rules. The Committee had concluded at its previous meeting that in light of the recency of Daubert v. Merrell Dow Pharmaceuticals, Inc., Article VII should not be amended until the courts have an opportunity to react to the Supreme Court's opinion. Articles 8 through 11 have not yet been reviewed by the Committee.

Article 8. The Committee agreed not to undertake a wholesale overhaul of the hearsay rules as any such action would require a massive reeducation of the Bar. Instead, the Committee decided to focus on discrete problems that have emerged.

Agency admissions. The Committee discussed whether either Rule 104 or Rule 801(d)(2) should be amended to state that the foundational requirements essential to the admissibility of a coconspirator's statement may not be established solely by the statement itself. The Supreme Court's decision in Bourjaily v. United States, 483 U.S. 171 (1987) held that the statement could be considered in conjunction with independent evidence, and reserved decision on whether the statement alone would suffice. The Committee debated at length whether it would be desirable to require independent evidence only (the pre-Bourjaily rule), or whether the statement itself could be used as partial corroboration. The Committee asked the reporter to prepare a draft that would permit the statement to be considered in conjunction with independent proof.

The reporter was also asked to consider extending this corroboration approach to proving authority, and scope of agency or employment with regard to authorized and vicarious admissions.

The Hillmon doctrine. The Committee asked the reporter to draft language that would restrict use of the hearsay exception when a statement of intent is being offered to prove the conduct of someone other than the declarant. It was suggested that language from some of the better cases might be helpful.

Rule 803(4). The reporter agreed to review critical commentary and report to the Committee whether possible amendments to Rule 803(4) should be explored.

Hearsay evidence in the jury room. The Committee discussed at length the special provisions in Rules 803(5) and 803(18) that govern which evidence is allowed into the jury room. The Committee considered whether these rules make sense, and whether they are consistent with other rules that impose no such requirement even though the evidence admitted may have a similar impact on the jury (e.g. governmental investigative reports admitted pursuant to Rule 803(8)(C)). A majority of the Committee ultimately voted not to amend the existing rules.

Rule 803(8). Members of the Committee commented that the difference in wording between subdivisions (B) and (C) was unintended and that subdivision (B) should be amended. The rule was not intended to keep accused from offering business records of matters observed, and the government should not be prevented from offering records about routine matters. The Committee agreed that governmental findings should be admissible as held by the Supreme Court in Beach Aircraft v. Rainey.

The overlap between Rule 803(5), 803(6) and 803(8). The Committee asked the Reporter to clarify at the next meeting the extent to which circuits admit evidence against an accused pursuant to Rules 803(5) or (6) that is barred by the specific provisions in Rule 803(8)(B),(C). The Committee wished to know if there was a split in the circuits. Judge Shadur was also concerned with possible motivational problems in §1983 cases in which law enforcement personnel have been charged.

Application to misdemeanors. Jim Robinson suggested that an exception should be carved out of Rule 801(d)(1)(A) for statements made in connection with pleas in misdemeanor cases. He promised to furnish information regarding such a provision in the Michigan Rules of Evidence.

Roger Pauley suggested amending the Rule 803(22) limitation to "a crime punishable by death or imprisonment in excess of one year" to six months because the present rationale does not make sense. Reducing the time limit would allow evidence of all convictions to be used as to which the right to counsel had attached. The Committee decided to consider this further at the May meeting.

Residual exceptions. The Committee agreed that the residual exceptions in Rules 803 and 804 should not be amended.

Rule 804(a). The Committee asked the reporter to consider whether a "due diligence" requirement ought to be inserted into subdivision (a)(5) that would require the proponent of the evidence to show more than an attempt "by process or other reasonable means" to obtain the presence of the declarant at trial.

The Committee also wished consideration of whether the present language in the last sentence of subdivision (a) should be amended to cover issues raised by opinions such as United States v. Mastrangelo, 722 F.2d 13 (2d Cir. 1983) when the defendant has prevented the declarant from testifying.

Rule 804 issues. The Committee wished additional information about how the "predecessor in interest" provision in subdivision (b)(1) is being interpreted, and whether there are problems because the corroboration requirement with regard to exculpatory declarations against penal interest in subdivision (b)(3) is not explicitly required for inculpatory statements. The reporter was asked to distribute cases to the Committee.

Rule 805. The Committee wished to know whether there are aberrant cases that refuse to apply the rule regarding hearsay within hearsay when one part of a combined statement is exempted from the hearsay rule pursuant to Rule 801(d).

Articles 9 and 10. It was suggested that the two articles should be read in tandem to see whether public records are treated consistently. One suggestion was that the article 10 definition of writings, which includes data compilations, ought to be extended to Rule 901(7) which deals with the authentication of "writings" that are required by law to be recorded or filed but does not refer to data compilations. Roger Pauley also suggested that the provisions of 18 U.S.C. §3505 ought to be incorporated into Rule 902. These matters will be reviewed at the May meeting.

William Eldridge offered to have the Federal Judicial Center review the adequacy of the terminology used in Article 10 with regard to new forms of data.

The Committee also wished to consider further at the May meeting whether Rule 1006 ought to be amended to deal with two issues: 1) explicitly stating that a Rule 1006 summary is admissible to the same extent as the underlying writings, recordings and photographs that are being summarized; and 2) discussing when and whether the summary goes to the jury.

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

FROM: Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

DATE: June 1, 1995

RE: Report of the Advisory Committee on Bankruptcy Rules

Item 104

Introduction

The Advisory Committee on Bankruptcy Rules met on March 30-31, 1995, in Lafayette, Louisiana. The Committee considered public comments regarding the proposed amendments to the Bankruptcy Rules that were published in September, 1994. After making several changes to the proposed amendments, the Committee approved them for presentation to the Standing Committee for final approval. The Committee then approved another package of proposed amendments for presentation to the Standing Committee with a request for publication for comment by the bench and bar. Most of the proposed amendments presented with a request for publication are designed to implement provisions of the Bankruptcy Reform Act of 1994. Both packages of proposed amendments are discussed in the section of this report on "Action Items."

I. Action Items

A. Proposed Amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006 Submitted for Approval by the Standing Committee and Transmittal to the Judicial Conference.

These proposed amendments were published for comment by the bench and bar in September 1994. Letters were received from eleven commentators (nine letters were received prior to the March meeting; two were received after the March meeting because they were mailed to the House Judiciary Committee). Eight letters commented on particular rules (Rules 2002, 3002, 5005, and 7004) and are discussed below following the text of the relevant proposed amendment. The following three letters contain only general statements regarding all published rules:

(1) Robert L. Jones III, President of the Arkansas Bar Association commented that "[w]e agree with the proposed amendments to the Federal Rules of Bankruptcy Procedure."

(2) Lee Ann Huntington, Chair of the Committee on Federal Courts of the State Bar of California, wrote that the Committee on Federal Courts "enthusiastically support the proposed amendments."

(3) Raymond A. Noble, Esq., Director of Legal Affairs, New Jersey State Bar Association, dated February 24, 1995, informed the Advisory Committee that the Bankruptcy Practice Section of the State Bar Association "concluded that the changes that affect bankruptcy practice are ministerial and do not require comment."

Bryan Garner, consultant on style, also suggested certain stylistic improvements. These suggestions were considered by the Advisory Committee at its March 1995 meeting and, as a result, a number of Mr. Garner's suggestions have been implemented.

1. Synopsis of Proposed Amendments

(a) 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).

(b) 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 are treated as filed in the converted case only if the case was in chapter 7 prior to conversion. Since 1991, the same official forms for schedules and statements have been used in all cases and, therefore, limiting this provision to cases that were in chapter 7 prior to conversion is no longer necessary.

(c) Rule 1019(7) is abrogated. Subdivision (7) provides that, in a case converted to chapter 7, an extension of time to file claims against a surplus granted pursuant to Rule 3002(c)(6) shall be applicable to postpetition, pre-conversion claims. This subdivision is abrogated to conform to the abrogation of Rule 3002(c)(6).

(d) Rule 2002, which governs notices, is amended in several respects. Subdivision (a)(4) -- requiring notice of the time for filing claims against a surplus in a chapter 7 case -- is abrogated to conform to the abrogation of Rule 3002(c)(6) (see below). To reduce expenses in administering chapter 7 cases, subdivision (f)(8) is amended to eliminate the need to mail to all parties copies of the summary of the chapter 7 trustee's final account. Subdivision (h), which permits the court to eliminate the need to send notices to creditors who have failed to file claims, is revised in several ways: (1) to clarify that such an order may not be issued if creditors still have time to file claims because it is a "no asset" case and a "notice of no dividend" has been sent; (2) to clarify that an order under this subdivision does not affect notices that must be sent to parties who are not creditors; (3) to provide that a creditor who is an infant, an incompetent person, or a governmental unit is entitled to receive notices if the time for that creditor to file a claim has been extended under Rule 3002(c)(1) or (c)(2); and (4) to delete cross-references to Rule 2002(a)(4) and Rule 3002(c)(6), which are being abrogated.

(e) Rule 2015(b) and (c) are amended to clarify that a debtor in possession or trustee in a chapter 12 case, or a debtor engaged in business in a chapter 13 case, does not have to file an inventory of the debtor's property unless the court so directs.

(f) Rule 3002 is amended to conform to the new section 502(b)(9) that was added to the Code by the Bankruptcy Reform Act of 1994 and which governs objections to tardily filed claims. Rule 3002(c)(1) is amended to conform to the new section 502(b)(9) to the extent that it provides that a proof of claim filed by a governmental unit is timely if it is filed not later than 180 days after the order for relief. Rule 3002(c)(1) is also amended to delete any distinction between domestic and foreign governmental units. Rule 3002(c)(6) is abrogated to make the rule consistent with section 726 of the Bankruptcy Code which provides that, under certain circumstances, a creditor holding a claim that has been tardily filed may be entitled to receive a distribution in a chapter 7 case.

(g) Rule 3016(a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a chapter 11 plan without the court, after notice and a hearing, finding cause for an extension as is required by section 1121(d) of the

Bankruptcy Code.

(h) 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.

(i) 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.

(k) 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.

(l) 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.

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

2. Text of Proposed Amendments, GAP Report, and Summary of Comments Relating to Particular Rules:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

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 under 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 court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition.

(3) *Postponement of Attorney's Fees.* The filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney or any other person who renders services to the

48 debtor in connection with the case.

COMMITTEE NOTE

The Judicial Conference prescribes miscellaneous fees pursuant to 28 U.S.C. § 1930(b). In 1992, a $30 miscellaneous administrative fee was prescribed for all chapter 7 and chapter 13 cases. The Judicial Conference fee schedule was amended in 1993 to provide that an individual debtor may pay this fee in installments.

Subdivision (a) of this rule is amended to clarify that every petition must be accompanied by any fee prescribed under 28 U.S.C. 1930(b) that is required to be paid when a petition is filed, as well as the filing fee prescribed by 28 U.S.C. § 1930(a). By defining "filing fee" to include Judicial Conference fees, the procedures set forth in subdivision (b) for paying the filing fee in installments will also apply with respect to any Judicial Conference fee required to be paid at the commencement of the case.

Public Comments on Rule 1006. None.

GAP Report on Rule 1006. No changes since publication, except for a stylistic change in subdivision (a).

Rule 1007. Lists, Schedules and Statements; Time Limits

* * * * *

1 (c) TIME LIMITS. The schedules and
2 statements, other than the statement of
3 intention, shall be filed with the
4 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~~ under § 705 or appointed ~~pursuant to~~ under § 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.

COMMITTEE NOTE

Subdivision (c) is amended to provide that schedules and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case, whether or not the case was a chapter 7 case prior to conversion. This amendment is in recognition of the 1991 amendments to the Official Forms that abrogated the Chapter 13 Statement and made the same forms for schedules and statements applicable in all cases.

This subdivision also contains a technical correction. The phrase "superseded case" creates the erroneous impression that conversion of a case results in a new case that is distinct from the original case. The effect of conversion of a case is governed by § 348 of the Code.

Public Comments on Rule 1007(c). None.

GAP Report on Rule 1007(c). No changes since publication, except for stylistic changes.

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).

Public Comments on Rule 1019. None.

GAP Report on Rule 1019. No changes were made to the text of the rule. The Committee Note was changed to conform to the proposed changes to Rule 3002 (see GAP Report on Rule 3002 below).

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this

rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees ~~not less than 20 days~~ at least 20 days' notice by mail of:

(1) the meeting of creditors ~~pursuant to~~ under § 341 of the Code;

(2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice;

(3) the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent;

~~(4) the date fixed for the filing of claims against a surplus in an estate as provided in Rule~~

~~3002(c)(6);~~

~~(5)~~ (4) in a chapter 7 liquidation, a chapter 11 reorganization case, and a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case, unless the hearing is ~~pursuant to~~ under § 707(b) of the Code, or the conversion of the case to another chapter;

~~(6)~~ (5) the time fixed to accept or reject a proposed modification of a plan;

~~(7)~~ (6) hearings on all applications for compensation or reimbursement of expenses ~~totalling~~ totaling 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: (1) the order for relief;

* * * * *

and (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 first date set for the meeting of creditors ~~pursuant to~~ under § 341 of the Code, the court may direct that all notices required by subdivision (a) of this rule~~, except clause (4) thereof,~~ be mailed only to the debtor, the trustee, all indenture trustees, creditors ~~whose claims~~ that hold claims for which proofs of claim have been filed, and creditors, if any, ~~who~~ that are still permitted to file claims by reason of an extension granted ~~under Rule 3002(c)(6)~~ pursuant to Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.

(i) NOTICES TO COMMITTEES. Copies of all notices required to be mailed ~~under~~ pursuant to this rule shall be

mailed to the committees elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and ~~(7)~~ (6) of this rule be transmitted to the United States trustee and be mailed only to the committees elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be mailed to them. A committee appointed ~~pursuant to~~ under § 1114 shall 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 otherwise, 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~~ requires 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

160 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 are amended accordingly.

Paragraph (f)(8) is amended so that a summary of the trustee's final account, which is prepared after distribution of property, does not have to be mailed to the debtor, all creditors, and indenture trustees in a chapter 7 case. Parties are sufficiently protected by receiving a summary of the trustee's final report that informs parties of the proposed distribution of property.

Subdivision (h) is amended (1) to provide that an order under this subdivision may not be issued if a notice of no dividend is given pursuant to Rule 2002(e) and the time for filing claims has not expired as provided in Rule 3002(c)(5); (2) to clarify that notices required to be mailed by subdivision (a) to parties other than creditors must be mailed to those entities despite an order issued pursuant to subdivision (h); (3) to provide that if the court, pursuant to Rule 3002(c)(1) or 3003(c)(2), has granted an extension of time to file a proof of claim, the creditor for whom the extension has been granted must continue to receive notices despite an order issued pursuant to subdivision (h); and (4) to delete references to subdivision (a)(4) and Rule 3002(c)(6), which have been abrogated.

Other amendments to this rule are stylistic.

Public Comments on Rule 2002.

(1) Susan J. Lewis, Legal Editor at Matthew Bender & Company, Inc., in her letter of January 23, 1995, pointed out a typographical error in the committee note.

(2) Glenn Gregorcy, Chief Deputy Clerk, United States Bankruptcy Court for the District of Utah, in his letter of December 5, 1994, commented that the proposed amendment to Rule 2002(f)(8) (deleting the words "and account" from the requirement that the trustee send creditors "a summary of the trustee's final report and account in a chapter 7 case if the net proceeds realized exceed $1,500") "does nothing whatsoever" because "in a vast majority of the districts" only one notice (not two) are being sent under the present rule. That is, in most districts, the final report and the final account are the same document. He also recommends that Rule 2002(f)(8) be amended to provide that the summary of the trustee's final report be sent only to creditors who have previously filed claims in the case.

(3) James T. Watkins, Esq., of Becket & Watkins, Malvern, Pa., which represents "ten of the top twenty-five national issuers of credit cards in their bankruptcy cases nationwide," in his letter dated February 28, 1995, urged the Committee to abandon the proposed amendments to Rule 2002(f)(8). His firm regularly reviews the trustee's final reports and accounts to verify that distributions stated have been received. "In this process, we occasionally identify cases where Proofs of Claim were timely filed but not reflected in the trustee's account, or, far less often, the amounts of the claims, and thus the distributions, are incorrect." If the proposed amendment is not abandoned, he suggests that the summary of the trustee's final report should include the creditor's allowed

claim amount and address.

(4) Richard M. Kremen, on behalf of the Maryland Bar Association Committee on Creditors' Rights, Bankruptcy and Insolvency, in his letter dated February 23, 1995, offered stylistic improvements to the proposed amendments to Rule 2002(h).

(5) Mary S. Elcano, Senior Vice President, General Counsel, of the United States Postal Service, in her letter dated February 24, 1995, suggests that Rule 2002 be amended to require that the notice of dismissal of the case be served on the debtor's employer to make sure that the employer does not erroneously reject a subsequent garnishment request.

GAP Report on Rule 2002. No changes since publication, except for stylistic changes and the correction of a typographical error in the committee note.

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

Subdivision (a)(1) provides that 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 property within 30 days after qualifying as trustee or debtor in possession, unless such an inventory has already been filed. Subdivisions (b) and (c) are amended to clarify that a debtor in possession and trustee in a chapter 12 case, and a debtor in a chapter 13 case where the debtor is engaged in business, are not required to file and transmit to

the United States trustee a complete inventory of the property of the debtor unless the court so directs. If the court so directs, the court also fixes the time limit for filing and transmitting the inventory.

Public Comments on Rule 2015. None.

GAP Report on Rule 2015. No changes since publication, except for a stylistic change in the first sentence of the committee note.

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~~ is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called

under ~~pursuant to~~ § 341(a) of the Code, except as follows:

(1) A proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief. On motion of ~~the United States, a state, or subdivision thereof~~ a governmental unit before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the ~~United States, state or subdivision thereof~~ governmental unit.

*****

~~(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.~~

COMMITTEE NOTE

The amendments are designed to conform to §§ 502(b)(9) and 726(a) of

the Code as amended by the Bankruptcy Reform Act of 1994.

The Reform Act amended § 726(a)(1) and added § 502(b)(9) to the Code to govern the effects of a tardily filed claim. Under § 502(b)(9), a tardily filed claim must be disallowed if an objection to the proof of claim is filed, except to the extent that holder of a tardily filed claim is entitled to distribution under § 726(a)(1), (2), or (3).

The phrase "in accordance with this rule" is deleted from Rule 3002(a) to clarify that the effect of filing a proof of claim after the expiration of the time prescribed in Rule 3002(c) is governed by § 502(b)(9) of the Code, rather than by this rule.

Section 502(b)(9) of the Code provides that a claim of a governmental unit shall be timely filed if it is filed "before 180 days after the date of the order for relief" or such later time as the Bankruptcy Rules provide. To avoid any confusion as to whether a governmental unit's proof of claim is timely filed under § 502(b)(9) if it is filed on the 180th day after the order for relief, paragraph (1) of subdivision (c) provides that a governmental unit's claim is timely if it is filed not later than 180 days after the order for relief.

References to "the United States, a state, or subdivision thereof" in paragraph (1) of subdivision (c) are changed to "governmental unit" to avoid different treatment among foreign and domestic governments.

Public Comments on Rule 3002.

(1) Richard M. Kremen, on behalf of the Maryland Bar Association Committee on Creditors' Rights, Bankruptcy and Insolvency, in his letter dated February

23, 1995, suggested changes to the published draft designed to implement amendments to § 502(b)(9) of the Bankruptcy Code resulting from the Bankruptcy Reform Act of 1994.

(2) Jon M. Waage, Esq., of Denton, Texas, in his letter dated February 21, 1995 (sent to the House Judiciary Committee and received by the Advisory Committee after its March meeting), recommended another amendment to require a creditor who files a proof of claim to serve a copy thereof on the debtor and the debtor's attorney.

(3) Donald Ross Patterson, Esq., of Tyler, Texas, in his letter dated March 6, 1995 (sent to the House Judiciary Committee and received by the Advisory Committee after its March meeting), makes the same recommendation as that made by Mr. Waage.

[At the March 1995 meeting, the Advisory Committee decided to postpone until the September 1995 meeting a Committee member's recommendation that notice of a tardily filed claim be served on the debtor and the trustee together with a copy of the proof of claim. The Advisory Committee will also consider at the September 1995 meeting the similar recommendations of Mr. Waage and Mr. Patterson]

GAP Report on Rule 3002. After publication of the proposed amendments, the Bankruptcy Reform Act of 1994 amended sections 726 and 502(b) of the Code to clarify the rights of creditors who tardily file a proof of claim. In view of the Reform Act, proposed new subdivision (d) of Rule 3002 has been deleted from the proposed amendments because it is no longer necessary. In addition, subdivisions (a) and (c) have been changed after publication to clarify that the effect of tardily filing a proof of claim is governed by § 502(b)(9) of the Code, rather than by this rule.

The amendments to § 502(b) also provide that a governmental unit's proof of claim is timely filed if it is filed before 180 days after the order for relief. Proposed amendments to Rule 3002(c)(1) were added to the published amendments to conform to this statutory change and to avoid any confusion as to whether a claim by a governmental unit is timely if it is filed on the 180th day.

The committee note has been re-written to explain the rule changes designed to conform to the Reform Act.

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~~ under § 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.

The amendment to subdivision (c) is stylistic.

Public Comments on Rule 3016. None.

GAP Report on Rule 3016. No changes since publication, except for a stylistic change.

Rule 4004. Grant or Denial of Discharge

* * * * *

(c) GRANT OF DISCHARGE.

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e), the court shall forthwith grant the discharge unless:

~~(1)~~ (a) the debtor is not an individual,

~~(2)~~ (b) a complaint objecting to the discharge has been filed,

~~(3)~~ (c) the debtor has filed a waiver under § 727(a)(10), ~~or~~

~~(4)~~ (d) a motion to dismiss the case ~~under~~ pursuant to Rule 1017(e) is pending,

(e) a motion to extend the time for filing a

complaint objecting to discharge is pending, or

(f) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

(2) Notwithstanding ~~the foregoing~~ Rule 4004(c)(1), on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within ~~such~~ that period, the court may defer entry of the order to a date certain.

* * * * *

COMMITTEE NOTE

Subsection (c) is amended to delay entry of the order of discharge if a motion pursuant to Rule 4004(b) to extend the time for filing a complaint

objecting to discharge is pending. Also, this subdivision is amended 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.

The other amendments to this Rule are stylistic.

Public Comments on Rule 4004. None.

GAP Report on Rule 4004. No changes have been made since publication, except for stylistic changes.

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

(1) *Place of Filing.* The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and

they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

(2) *Filing by Electronic Means.* A court by local rule may permit documents to be filed, signed, or verified by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States. A document filed by electronic means in accordance with this rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

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 formatting or presentation of electronically transmitted data, to the extent that they do not conform to the Official Forms, would be an appropriate alteration within the meaning of Rule 9009.

These rules require that certain documents be in writing. For example, Rule 3001 states that a proof of claim is a "written statement." Similarly, Rule 3007 provides that an objection to a claim "shall be in writing." Pursuant to the new subdivision (a)(2), any requirement under these rules that a paper be written may be satisfied by filing the document by electronic means, notwithstanding the fact that the clerk neither receives nor prints a paper reproduction of the electronic data.

Section 107(a) of the Code provides that a "paper" filed in a case is a public record open to examination by an entity at reasonable times without charge, except as provided in § 107(b). The amendment to subdivision (a)(2) provides that an electronically filed document is to be treated as such a public record.

Although under subdivision (a)(2) electronically filed documents may be treated as written papers or as signed or verified writings, it is important to emphasize that such treatment is only for the purpose of applying these rules. In addition, local rules and

Judicial Conference standards regarding verification must satisfy the requirements of 28 U.S.C. § 1746.

Public Comments on Rule 5005.

(1) Patricia M. Hynes, Esq., Chair of the Committee on Federal Courts of the Association of the Bar of the City of New York, together with her letter dated February 27, 1995, submitted comments of the Committee on Federal Courts that are specifically addressed to proposed amendments to Civil Rule 5(e) regarding electronic filing. She suggested that these comments also be considered in connection with the proposed amendments to Bankruptcy Rule 5005(a) that are similar, but not the same, as Civil Rule 5(e). The Federal Courts Committee is concerned that the proposed rule on electronic filing would leave to each district an uncontrolled discretion to adopt local rules that may not adequately take into consideration the following "potentially serious problems:" Access to electronically filed documents; system compatibility; authenticity and accuracy; and security of court files.

Although these issues are mentioned in the Advisory Committee note, the concern is that the note is too general to provide sufficient guidance to local courts without any oversight over local experimentation. To address these concerns, they suggest one of two alternatives: (1) include in the rule itself a specific reference to the need for adequate consideration of these problems in any local rule, or (2) address these concerns more explicitly in the Committee Note. The final recommendation is to put in place some effort for ongoing monitoring, possibly by the Judicial Conference, of local rules governing electronic filing.

GAP Report on Rule 5005. No changes since publication.

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~~ at least 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. Except as provided in subdivision (h), 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 a defendant in the courts of general jurisdiction of that state. The summons and complaint in that ~~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 regularly conducts a business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service

of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to ~~also~~ the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that ~~such~~ officer or agency. The court shall allow a reasonable time for service pursuant to 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.

(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 pursuant to 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 the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in

which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing ~~copies~~ a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing 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 general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(e)(2)(C)(i) or (e) F.R.Civ.P.~~

~~(f)~~ (e) SUMMONS: TIME LIMIT FOR SERVICE. If service is made pursuant to Rule ~~4(d)(1)-(6)~~ 4(e)-(j) F.R.Civ.P. it shall be made by delivery of the summons and complaint within 10 days following

issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

(f) PERSONAL JURISDICTION. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

(g) ~~EFFECT OF AMENDMENT TO RULE 4 F.R.CIV.P. The 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.~~ [abrogated].

(h) SERVICE OF PROCESS ON AN INSURED DEPOSITORY INSTITUTION. -- Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless --

(1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to

service by certified mail by designating an officer to receive service.

COMMITTEE NOTE

The purpose of these amendments is to conform the rule to the 1993 revisions of Rule 4 F.R.Civ.P. and to make stylistic improvements. Rule 7004, as amended, continues to provide for service by first class mail as an alternative to the methods of personal service provided in Rule 4 F.R.Civ.P., except as provided in the new subdivision (h).

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 pursuant to 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 F.R.Civ.P. 4 is sufficient to establish personal jurisdiction over the defendant. See the committee note to the 1993 amendments to Rule 4 F.R.Civ.P.

Subdivision (g) is abrogated. This subdivision was promulgated in 1991 so that anticipated revisions to Rule 4 F.R.Civ.P. would not affect service of process in adversary proceedings until further amendment to Rule 7004.

Subdivision (h) and the first phrase of subdivision (b) were added by § 114 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

Public Comments on Rule 7004.

(1) Mary S. Elcano, Senior Vice President, General Counsel, of the United States Postal Service, in her letter dated February 24, 1995, suggested that Rule 7004 be amended to require service on "the particular department, office, or unit of an agency out of which the debt in question arose." The reason for this suggestion is explained by relating the experience of the Postal Service. "It is not always clear why the Postal Service is listed as a creditor in a particular action. The debtor, for example, may have written a bad check to cover a mailing, postage put on a meter machine, a stamps-on-consignment debt, or a

delinquent Express Mail account at any one of a number of post offices. Without service on the office out of which the debt arose, counsel is hard-pressed to locate the source of the debt in order to file a proof of claim."

GAP Report on Rule 7004. After publication of the proposed amendments, Rule 7004(b) was amended and Rule 7004(h) was added by the Bankruptcy Reform Act of 1994 to provide for service by certified mail on an insured depository institution. The above draft includes those statutory amendments (without underlining new language or striking former language). No other changes have been made since publication, except for stylistic changes.

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~~ is not timely unless the papers are received by the clerk within the time fixed for filing, except that briefs ~~shall be~~ are 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 amendments to Rule 5005. Other amendments to this rule are stylistic.

Public Comments on Rule 8008. None.

GAP Report on Rule 8008. No changes since publication, except for stylistic changes.

Rule 9006. Time

* * * * *

(c) REDUCTION.

* * * * *

(2) *Reduction Not Permitted.* The court may not reduce the time for taking action ~~under~~ pursuant to Rules ~~2002(a)(4) and (a)(8)~~ 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

* * * * *

COMMITTEE NOTE

Subdivision (c)(2) is amended to conform to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8) to Rule 2002(a)(7).

The substitution of "pursuant to" for "under" is stylistic.

Public Comments on Rule 9006. None.

GAP Report on Rule 9006. No changes since publication, except for a stylistic change.

amendments to Civil Rule 11, except that the safe harbor provision which prohibits the filing of a motion for sanctions unless the challenged paper is not withdrawn or corrected within a prescribed time after service of the motion, does not apply if the challenged paper is a bankruptcy petition.

(p) Rule 9015 is added to provide procedures relating to jury trials in bankruptcy cases and proceedings, including procedures for consenting to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) that was added by the Bankruptcy Reform Act of 1994;

(q) Rule 9035 is amended to clarify that the Bankruptcy Rules do not apply to the extent that they are inconsistent with federal statutory provisions relating to bankruptcy administrators in the judicial districts in North Carolina and Alabama, even if such statutory provisions are not included in title 11 or title 28.

(2) Text of Proposed Amendments:

PROPOSED AMENDMENTS TO THE BANKRUPTCY RULES SUBMITTED FOR APPROVAL TO PUBLISH

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:

****

(3) CLAIMS FILED <u>BEFORE CONVERSION</u> ~~IN SUPERSEDED CASE~~. All claims actually filed by a creditor ~~in the superseded case~~ <u>before conversion of the case are</u> ~~shall be~~ deemed filed in the chapter 7 case.

****

(5) FILING FINAL REPORT AND SCHEDULE OF POSTPETITION

DEBTS.

(A) *Conversion of Chapter 11 or Chapter 12 Case.* Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion, shall:

(i) not later than 15 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) not later than 30 days after conversion of the case, file and transmit to the United States trustee a final report and account;

(B) *Conversion of Chapter 13 Case.* Unless the court directs otherwise , if a chapter 13 case is converted to chapter 7,

(i) the debtor, not later than 15 days after conversion of the case, shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) the trustee, not later than 30 days after conversion of the case, shall file and transmit to the United States trustee a final report and account;

(C) *Conversion After Confirmation of a Plan.* Unless the court orders otherwise, if a chapter 11, chapter 12, or chapter 13 case is converted to chapter 7 after confirmation of a plan, the debtor shall file:

(i) a schedule of property not listed in the final report and account acquired after the filing of the petition but before conversion, except if the case is converted from chapter 13 to chapter 7 and § 348(f)(2) does not apply;

(ii) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before the conversion; and

(iii) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the petition but before conversion.

(D) *Transmission to United States Trustee.* The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to Rule 1019(5).

~~Unless the court directs otherwise, each debtor in possession or trustee in the superseded case shall: (A) within 15 days following the entry of the order of conversion of a chapter 11 case, file a schedule of unpaid debts incurred after commencement of the superseded case including the name and address of each creditor; and (B) within 30 days following the entry of the order of conversion of a chapter 11, chapter 12, or~~

~~chapter 13 case, file and transmit to the United States trustee a final report and account. Within 15 days following the entry of the order of conversion, unless the court directs otherwise, a chapter 13 debtor shall file a schedule of unpaid debts incurred after the commencement of a chapter 13 case, and a chapter 12 debtor in possession or, if the chapter 12 debtor is not in possession, the trustee shall file a schedule of unpaid debts incurred after the commencement of a chapter 12 case. If the conversion order is entered after confirmation of a plan, the debtor shall file (A) a schedule of property not listed in the final report and account acquired after the filing of the original petition but before entry of the conversion order; (B) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before entry of the conversion order; and (C) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the original petition but before entry of the conversion order. The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to this paragraph.~~

COMMITTEE NOTE

The amendments to subdivisions (3) and (5) are technical corrections and stylistic changes. The phrase "superseded case" is deleted because it creates the erroneous impression that conversion of a case results in a new case that is distinct from the

original case. Similarly, the phrase "original petition" is deleted because it erroneously implies that there is a second petition with respect to a converted case. See § 348 of the Code.

Rule 1020. Election to be Considered a Small Business in a Chapter 11 Reorganization Case

In a chapter 11 reorganization case, a debtor that is a small business may elect to be considered a small business by filing a written statement of election not later than 60 days after the date of the order for relief or by a later date as the court, for cause, may fix.

COMMITTEE NOTE

This rule is designed to implement §§ 1121(e) and 1125(f) that were added to the Code by the Bankruptcy Reform Act of 1994.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least ~~not less than~~ 20 days' ~~days~~ notice by mail of:

(1) the meeting of creditors under ~~pursuant to~~ § 341 or § 1104(b) of the Code;

* * * *

(n) CAPTION. The caption of every notice given under

this rule shall comply with Rule 1005. The caption of every notice required to be given by the debtor to a creditor shall include the information required to be in the notice by § 342(c) of the Code.

COMMITTEE NOTE

Paragraph (a)(1) is amended to include notice of a meeting of creditors convened under § 1104(b) of the Code for the purpose of electing a trustee in a chapter 11 case. The court for cause shown may order the 20-day period reduced pursuant to Rule 9006(c)(1).

Subdivision (n) is amended to conform to the 1994 amendment to § 342 of the Code. As provided in § 342(c), the failure of a notice given by the debtor to a creditor to contain the information required by § 342(c) does not invalidate the legal effect of the notice.

Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case

(a) ORDER TO APPOINT TRUSTEE OR EXAMINER. In a chapter 11 reorganization case, a motion for an order to appoint a trustee or an examiner ~~pursuant to~~ under § 1104(a) or § ~~1104(b)~~ 1104(c) of the Code shall be made in accordance with Rule 9014.

(b) ELECTION OF TRUSTEE.

(1) *Request for an Election.* A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Rule 5005 within the time prescribed by § 1104(b) of the Code. Pending court approval of the

person elected, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee.

(2) *Manner of Election and Notice.* An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given as provided in Rule 2002. The United States trustee shall preside at the meeting. A proxy for the purpose of voting in the election may be solicited only by a committee of creditors appointed under § 1102 of the Code or by any other party entitled to solicit a proxy pursuant to Rule 2006.

(3) *Appointment and Resolution of Disputes.* If it is not necessary to resolve a dispute regarding the election or if the court has resolved all such disputes, the United States trustee shall promptly appoint the person elected to be trustee and file an application for approval of the appointment in accordance with subdivision (c) of this rule. If it is necessary to resolve a dispute regarding the election, the United States trustee shall promptly file a report informing the court of the dispute. Not later than the date on which the report is filed, the United States trustee shall mail a copy of the report to any party in

interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and to any committee appointed under § 1102 of the Code. Unless a motion for the resolution of the dispute is filed not later than 10 days after the United States trustee files the report, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee.

~~(b)~~ (c) APPROVAL OF APPOINTMENT. An order approving the appointment of a trustee elected under § 1104(b) or appointed under § 1104(d), or the appointment of an examiner ~~pursuant to § 1104(c)~~ under § 1104(d) of the Code, shall be made ~~only~~ on application of the United States trustee~~,~~. The application shall state ~~stating~~ the name of the person appointed~~, the names of the parties in interest with whom the United States trustee consulted regarding the appointment,~~ and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, and persons employed in the office of the United States trustee. Unless the person has been elected under § 1104(b), the application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be accompanied by a

verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee.

COMMITTEE NOTE

This rule is added to implement the 1994 amendments to § 1104 of the Code regarding the election of a trustee in a chapter 11 case.

This rule requires the United States trustee to file an application for court approval of the appointment of the elected person in accordance with Rule 2007.1(c). Court approval is necessary primarily because of the requirement under § 1104(b) that the person be disinterested.

The procedures for reporting disputes to the court derive from similar provisions in Rule 2003(d) applicable to chapter 7 cases. An election may be disputed by a party in interest or by the United States trustee. For example, if the United States trustee believes that the person elected is ineligible to serve as trustee because the person is not "disinterested," the United States trustee may file a report disputing the election.

The word "only" is deleted from subdivision (b), redesignated as subdivision (c), to avoid any negative inference with respect to the availability of procedures for obtaining review of the United States trustee's acts or failure to act pursuant to Rule 2020.

Rule 3014. Election ~~Pursuant to~~ Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or ~~and~~ Chapter 11 Reorganization Case ~~Cases~~

An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a chapter 9 or 11 case may be made at any time prior

to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. If the disclosure statement is conditionally approved pursuant to Rule 3017.1, and a final hearing on the disclosure statement is not held, the election of application of § 1111(b)(2) may be made not later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.

COMMITTEE NOTE

This amendment provides a deadline for electing application of § 1111(b)(2) in a small business case in which a conditionally approved disclosure statement is finally approved without a hearing.

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

(a) HEARING ON DISCLOSURE STATEMENT AND OBJECTIONS ~~THERETO~~. Except as provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b) ~~Following the filing of a disclosure statement as provided in Rule~~

~~3016(c)~~, the court shall hold a hearing on ~~not less than~~ at least 25 ~~days~~ days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider ~~such~~ the disclosure statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission, and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the trustee, any committee appointed under the Code, and any ~~such~~ other entity ~~as may be~~ designated by the court, at any time before the disclosure statement is approved ~~prior to approval of the disclosure statement~~ or by ~~such~~ an earlier date as the court may fix. In a chapter 11 reorganization case, every notice, plan, disclosure statement, and objection required to be served or mailed pursuant to this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.

(b) DETERMINATION ON DISCLOSURE STATEMENT. Following the hearing the court shall determine

whether the disclosure statement should be approved.

(c) DATES FIXED FOR VOTING ON PLAN AND CONFIRMATION. On or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.

(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS, AND EQUITY SECURITY HOLDERS. Upon ~~On~~ approval of a disclosure statement, ~~unless~~ -- except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders~~,~~ -- the debtor in possession, trustee, proponent of the plan, or clerk as ~~ordered by~~ the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee,

(1) the plan~~,~~ or a ~~court approved~~ court-approved summary of the plan;

(2) the disclosure statement approved by the court;

(3) notice of the time within which acceptances and rejections of ~~such~~ the plan may be filed; and

(4) any ~~such~~ other information as the court may direct, including any court opinion ~~of the court~~ approving the disclosure statement or a ~~court approved~~ court-approved summary of the opinion. In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders in accordance with ~~pursuant to~~ Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. ~~In the event~~ If the ~~opinion of the~~ court opinion is not transmitted or only a summary of the plan is transmitted, the ~~opinion of the~~ court opinion or the plan shall be provided on request of a party in interest at the plan proponent's expense ~~of the proponent of the plan~~. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense ~~of the proponent of the plan~~, shall be mailed to members

of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record on ~~at~~ the date the order approving the disclosure statement is ~~was~~ entered or another date as the court may, after notice and a hearing, for cause fix.

(e) TRANSMISSION TO BENEFICIAL HOLDERS OF SECURITIES. At the hearing held pursuant to subdivision (a) of this rule, the court shall consider the procedures for transmitting the documents and information required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes, and other securities, ~~and~~ determine the adequacy of the ~~such~~ procedures, and enter any ~~such~~ orders ~~as~~ the court deems appropriate.

COMMITTEE NOTE

Subdivision (a) is amended to provide that it does not apply to the extent provided in new Rule 3017.1, which applies in small business cases.

Subdivision (d) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive documents pursuant to this subdivision. For example, if there may

be a delay between the oral announcement of the judge's order approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents.

The court may set a record date pursuant to subdivision (d) only after notice and a hearing as provided in § 102(1) of the Code. Notice of a request for an order fixing the record date may be included in the notice of the hearing to consider approval of the disclosure statement mailed pursuant to Rule 2002(b).

If the court fixes a record date pursuant to subdivision (d) with respect to the holders of securities, and the holders are impaired by the plan, the judge also should order that the same record date applies for the purpose of determining eligibility for voting pursuant to Rule 3018(a).

Other amendments to this rule are stylistic.

Rule 3017.1 Court Consideration of Disclosure Statement in a Small Business Case

(a) CONDITIONAL APPROVAL OF DISCLOSURE STATEMENT. If the debtor is a small business and has made a timely election to be considered a small business in a chapter 11 case, the court may, on application of the plan proponent, conditionally approve a disclosure statement filed in accordance with Rule 3016(b). On or before conditional approval of the disclosure statement, the court shall:

(1) fix a time within which the holders of claims and interests may accept or reject the plan;

(2) fix a time for filing objections to the disclosure statement;

(3) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and

(4) fix a date for the hearing on confirmation.

(b) APPLICATION OF RULE 3017. Rule 3017(a), (b), (c), and (e) do not apply to a conditionally approved disclosure statement. Rule 3017(d) applies to a conditionally approved disclosure statement, except that conditional approval is considered approval of the disclosure statement for the purpose of applying Rule 3017(d).

(c) FINAL APPROVAL.

(1) *Notice.* Notice of the time fixed for filing objections and the hearing to consider final approval of the disclosure statement shall be given in accordance with Rule 2002 and may be combined with notice of the hearing on confirmation of the plan.

(2) *Objections.* Objections to the disclosure statement shall be filed, transmitted

to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix.

(3) *Hearing*. If a timely objection to the disclosure statement is filed, the court shall hold a hearing to consider final approval before or combined with the hearing on confirmation of the plan.

COMMITTEE NOTE

This rule is added to implement § 1125(f) that was added to the Code by the Bankruptcy Reform Act of 1994.

The procedures for electing to be considered a small business are set forth in Rule 1020. If the debtor is a small business and has elected to be considered a small business, § 1125(f) permits the court to conditionally approve a disclosure statement subject to final approval after notice and a hearing. If a disclosure statement is conditionally approved, and no timely objection to the disclosure statement is filed, it is not necessary for the court to hold a hearing on final approval.

Rule 3018. Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the

time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or on another date fixed by the court, for cause, after notice and a hearing. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to vote on the plan. For example, if there may be a delay between the oral announcement of the judge's decision approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date for voting purposes so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents in connection with the solicitation of votes.

The court may set a record date pursuant to subdivision (a) only after notice and a hearing as provided in § 102(1) of the Code. Notice of a request for an order fixing the record date may be included in

the notice of the hearing to consider approval of the disclosure statement mailed pursuant to Rule 2002(b).

If the court fixes the record date for voting purposes, the judge also should order that the same record date shall apply for the purpose of distributing the documents required to be distributed pursuant to Rule 3017(d).

Rule 3021. Distribution Under Plan

After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to interest holders ~~of stock, bonds, debentures, notes, and other securities of record at the time of commencement of distribution whose claims or equity security~~ whose interests have not been disallowed, and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) ~~and which~~ that have been allowed. For the purpose of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution unless a different time is fixed by the plan or the order confirming the plan.

COMMITTEE NOTE

This rule is amended to provide flexibility in fixing the record date for the purpose of making distributions to holders of securities of record. In a large case, it may be impractical for the debtor to determine the holders of record with respect to publicly held securities and also to make distributions to those holders at the same time. Under this amendment, the plan or the order confirming the plan may fix a record date for distributions that is earlier

than the date on which distributions commence.

This rule also is amended to treat holders of bonds, debentures, notes, and other debt securities the same as any other creditors by providing that they shall receive a distribution only if their claims have been allowed. Finally, the amendments clarify that distributions are to be made to all interest holders -- not only those that are within the definition of "equity security holders" under § 101 of the Code -- whose interests have not been disallowed.

Rule 8001. Manner of Taking Appeal; Voluntary Dismissal

(a) APPEAL AS OF RIGHT; HOW TAKEN. An appeal from a ~~final~~ judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure ~~Failure of an appellant~~ to take any step other than ~~the~~ timely filing ~~of~~ a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall (1) conform substantially to the appropriate Official Form, (2) ~~shall~~ contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.

(b) APPEAL BY LEAVE; HOW TAKEN. An appeal from an interlocutory judgment, order, or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

* * * * *

(e) ELECTION TO HAVE APPEAL HEARD BY THE DISTRICT COURT ~~CONSENT TO APPEAL TO BANKRUPTCY APPELLATE PANEL. Unless otherwise provided by a rule promulgated pursuant to Rule 8018, consent to have an appeal heard by a bankruptcy appellate panel may be given in a separate statement of consent executed by a party or contained in the notice of appeal or cross appeal. The statement of consent shall be filed before the transmittal of the record pursuant to Rule 8007(b), or within 30 days of the filing of the notice of appeal, whichever is later.~~ An election to have an appeal heard by the district court under 28 U.S.C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U.S.C. § 158(c)(1).

COMMITTEE NOTE

This rule is amended to conform to the Bankruptcy Reform Act of 1994 which amended 28 U.S.C. § 158. As amended, a party may -- without obtaining leave of the court -- appeal from an interlocutory order or decree

of the bankruptcy court issued under § 1121(d) of the Code increasing or reducing the time periods referred to in § 1121.

Subdivision (e) is amended to provide the procedure for electing under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court.

Rule 8002. Time for Filing Notice of Appeal

* * * * *

(c) EXTENSION OF TIME FOR APPEAL.

(1) The bankruptcy judge may extend the time for filing the notice of appeal by any party ~~for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule~~ , unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363;

(C) authorizes the obtaining of credit under § 364;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365;

(E) approves a disclosure statement under § 1125, or;

(F) confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later ~~request made no more~~ than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect ~~if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.~~ An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time period. This amendment will avoid

uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

The amendments also give the court discretion to permit a party to file a notice of appeal more than 20 days after expiration of the time to appeal otherwise prescribed, but only if the motion was timely filed and the notice of appeal is filed within a period not exceeding 10 days after entry of the order extending the time. This amendment is designed to protect parties that file timely motions to extend the time to appeal from the harshness of the present rule as demonstrated in In re Mouradick, 13 F.3d 326 (9th Cir. 1994), where the court held that a notice of appeal filed within the 3-day period expressly prescribed by an order granting a timely motion for an extension of time did not confer jurisdiction on the appellate court because the notice of appeal was not filed within the 20-day period specified in subdivision (c).

The subdivision is amended further to prohibit any extension of time to file a notice of appeal -- even if the motion for an extension is filed before the expiration of the original time to appeal -- if the order appealed from grants relief from the automatic stay, authorizes the sale or lease of property, use of cash collateral, obtaining of credit, or assumption or assignment of an executory contract or unexpired lease under § 365, or approves a disclosure statement or confirms a plan. These types of orders are often relied upon immediately after they are entered and should not be reviewable on appeal after the expiration of the original appeal period under Rule 8002(a) and (b).

Rule 8020. Damages and Costs for Frivolous Appeal

If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may,

after a separately filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

COMMITTEE NOTE

This rule is added to clarify that a district court hearing an appeal, or a bankruptcy appellate panel, has the authority to award damages and costs to an appellee if it finds that the appeal is frivolous. By conforming to the language of Rule 38 F.R.App.P., this rule recognizes that the authority to award damages and costs in connection with frivolous appeals is the same for district courts sitting as appellate courts, bankruptcy appellate panels, and courts of appeals.

Rule 9011. Signing ~~and~~ of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) SIGNATURE. Every petition, pleading, written motion and other paper ~~served or filed in a case under the Code on behalf of a party represented by an attorney~~, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. ~~whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number.~~ Each paper shall state the signer's address and telephone number, if any. ~~The signature of an attorney or a party~~

~~constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it~~ An unsigned paper shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of the ~~person whose signature is required~~ attorney or party. ~~If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.~~

(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the

circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(A) *By Motion.* A motion for sanctions

under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) *On Court's Initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or , if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

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

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a)

through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

~~(b)~~ (e) VERIFICATION. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

~~(c)~~ (f) COPIES OF SIGNED OR VERIFIED PAPERS. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

COMMITTEE NOTE

This rule is amended to conform to the 1993 changes to F.R.Civ.P. 11. For an explanation of these amendments, see the advisory committee note to the 1993 amendments to F.R.Civ.P. 11.

The "safe harbor" provision contained in subdivision (c)(1)(A), which prohibits the filing of a motion for sanctions unless the challenged paper is not withdrawn or corrected within a prescribed time after service of the motion, does not apply if the challenged paper is a petition. The filing of a petition has immediate serious consequences, including the imposition of the automatic stay under § 362 of the Code, which may not be avoided by the subsequent withdrawal of the petition. In addition, a petition for relief under chapter 7 or chapter 11 may not be withdrawn unless the court orders dismissal of the case for cause after notice and a hearing.

Rule 9015. Jury Trials

(a) APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE. Rules 38, 39, and 47-51 F.R.Civ.P., and Rule 81(c) F.R.Civ.P. insofar as it applies to jury trials, apply in cases and proceedings, except that a demand made pursuant to Rule 38(b) F.R.Civ.P. shall be filed in accordance with Rule 5005.

(b) CONSENT TO HAVE TRIAL CONDUCTED BY BANKRUPTCY JUDGE. If the right to a jury trial applies, a timely demand has been filed pursuant to Rule 38(b) F.R.Civ.P., and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) by jointly or separately filing a statement of consent within any applicable time limits specified by local rule.

COMMITTEE NOTE

This rule provides procedures relating to jury trials. This rule is not intended to expand or create any right to trial by jury where such right does not otherwise exist.

Rule 9035. Applicability of Rules in Judicial Districts in Alabama and North Carolina

In any case under the Code that is filed in or transferred to a district in the State of Alabama or the State of North Carolina and in which a United States trustee

is not authorized to act, these rules apply to the extent that they are not inconsistent with any federal statute ~~the provisions of title 11 and title 28 of the United States Code~~ effective in the case.

COMMITTEE NOTE

Certain statutes that are not codified in title 11 or title 28 of the United States Code, such as § 105 of the Bankruptcy Reform Act of 1994, Pub. L. 103-394, relate to bankruptcy administrators in the judicial districts of North Carolina and Alabama. This amendment makes it clear that the Bankruptcy Rules do not apply to the extent that they are inconsistent with these federal statutes.

II. Information Items

A. Status of Matters Under Consideration

1. Proposed Uniform Numbering System for Local Bankruptcy Rules

Proposed amendments to Bankruptcy Rules 9029 and 8018 that require local rules to conform to any uniform numbering system prescribed by the Judicial Conference of the United States have been promulgated by the Supreme Court and, in the absence of Congressional action, will become effective on December 1, 1995.

At the Standing Committee's request, the Advisory Committee -- through the efforts of its Subcommittee on Local Rules and with support from the Bankruptcy Judges Division of the Administrative Office -- has developed a preliminary draft of a uniform numbering system for local bankruptcy rules that coordinates with the numbering system of the Federal Rules of Bankruptcy Procedure.

The preliminary draft of the proposed local

rule numbering system uses the four-digit national Bankruptcy Rule numbers followed by a dash and a numeral to identify the topic that relates to the national rule. Local rules that do not relate to specific national rules have been assigned numbers that relate to the part of the Bankruptcy Rules (Parts I - IX) to which the local rule seems most closely related, but the four-digit prefix is not related to any specific national rule.

The preliminary draft of the proposed uniform numbering system was published in November 1994 with a request for comments by March 15, 1995. The published draft was accompanied by a memorandum containing a detailed explanation of the proposed system and a description of the methodology used to develop the system.

The Committee received 12 letters commenting on the proposed numbering system and one oral comment from a former Advisory Committee member and reporter. The comments were generally favorable (except for two letters that disapproved of both the proposed system and the entire concept of uniform numbering), but most letters contained suggestions for some modification.

As a result of the comments received and further consideration by the Subcommittee on Local Rules, the Advisory Committee decided to amend the preliminary draft of the proposed numbering system by deleting all references to subdivisions of national rules. The Committee also voted to include cross-references to make the system easier to use. The Committee approved the proposed numbering system subject to these changes. Another draft, excluding subdivisions and including cross-references, is being prepared for consideration by the Advisory Committee at its September 1995 meeting.

2. Alternative Dispute Resolution.

The Subcommittee on Alternative Dispute

Resolution met in Chicago on May 24, 1995, to discuss possible amendments to the rules relating to the use of mediation and other alternative dispute resolution techniques. In particular, suggested amendments to Bankruptcy Rule 9019 (Compromise and Arbitration) were considered.

3. Official Bankruptcy Forms

The Subcommittee on Forms met in Chicago on May 25, 1995, to continue its work reviewing the Official Bankruptcy Forms with a view toward simplifying language and making them more understandable to the general public.

B. Other Matters.

1. Long-Range Planning.

The Subcommittee on Long-Range Planning, together with the Federal Judicial Center, has conducted a survey designed to determine whether members of the bench and bar believe that the Bankruptcy Rules need fundamental and thorough reorganization or only focussed attention in discrete problem areas. Preliminary results of the survey indicate no strong demand for complete restructuring, but a desire to improve the rules in the area of motion practice and the interplay between Part VII (adversary proceedings) and Part IX (general provisions).

Attachments:

Draft of minutes of Advisory Committee meeting of March 30-31, 1995.

DRAFT

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 30-31, 1995

Lafayette, Louisiana

Minutes

The Advisory Committee on Bankruptcy Rules met in the Lafayette Hilton Hotel in Lafayette, Louisiana, March 30-31, 1995. 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 Donald E. Cordova
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge James W. Meyers
Kenneth N. Klee, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Leonard M. Rosen, Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Charles J. Tabb
Professor Alan N. Resnick, Reporter

Joseph Patchan, Director, Executive Office for United States Trustees, and R. Neal Batson, Esquire, were unable to attend.

The following representatives of the Committee on Rules of Practice and Procedure also attended:

District Judge Alicemarie H. Stotler, Chair
District Judge Thomas S. Ellis, III, liaison to the Advisory Committee

The following additional persons attended the meeting: Judge Edward Leavy, United States Court of Appeals for the Ninth Circuit and former chairman of the Advisory Committee; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Channon and James H. Wannamaker, Bankruptcy Judges Division, Administrative Office of the United States Courts; Mark D. Shapiro, Rules Committee Support Office, Administrative Office of the United States Courts; and Elizabeth C. Wiggins, Federal Judicial Center.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in

the office of the Secretary to the Committee on Rules of Practice and Procedure. Unless otherwise indicated, all memoranda referred to were included in the agenda book for the meeting.

Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold**.

INTRODUCTORY MATTERS

The Chairman introduced Judge Leavy, the former chairman of the Advisory Committee. The Chairman also welcomed Judge Stotler and Judge Ellis to the meeting. **The Committee approved a resolution of thanks to the host committee chaired by Bankruptcy Judge Gerald H. Schiff.**

Minutes of Previous Meetings. Mr. Klee moved to approve the minutes of the September 1994 and December 1994 meetings with the substitution of the word "March" for "February" in the second line of page 9 of the September minutes. **The Committee approved the minutes, as amended, without dissent.**

Standing Committee Meeting. The Reporter stated that the Standing Committee had ratified the three suggested interim rules approved by the Advisory Committee at its December meeting. The suggested interim rules were distributed to the courts with a letter dated January 17, 1995, from Judges Stotler and Mannes. The amendments to the Official Forms to conform to the Bankruptcy Reform Act of 1994 were approved by the Standing Committee in January and by the Judicial Conference on March 14.

The Reporter said the Standing Committee thought the Advisory Committee's request for authority to approve future increases in dollar amounts on the Official Bankruptcy Forms was premature because the next three-year adjustment required by 11 U.S.C. § 104(b), as amended, is not due until 1998. Since the statute requires that the Judicial Conference adjust the dollar

amounts in several sections of the Bankruptcy Code after public notice, revision of the Official Forms can be included in the same resolution presented to the Conference. Judge Stotler asked that the Advisory Committee monitor the matter of the dollar adjustments.

The Reporter said the Standing Committee agreed to the Advisory Committee's request to communicate directly with the Bankruptcy Review Commission. In addition, members of the Advisory Committee were invited to communicate directly with Professor Thomas E. Baker concerning their response to the Self-Study of Federal Judicial Rulemaking undertaken by the Long Range Planning Subcommittee of the Standing Committee. Copies of the self-study were distributed at the meeting.

RULES

Comments on Proposed Amendments. The Reporter reviewed the comments on the proposed amendments to Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006, which were published in 1994. The first six letters commenting on the proposed amendments are discussed in the Reporter's memorandum of February 28, 1995. The three comments received later are covered by the Reporter's memorandum of March 15, 1995, which was distributed at the meeting. In addition, Bryan A. Garner, consultant to the Style Subcommittee of the Standing Committee, submitted a number of suggestions for stylistic changes in the proposed amendments.

The Reporter recommended no action on the general comments of Raymond A. Noble, Director of Legal Affairs for the New Jersey State Bar Association; Robert L. Jones, III, President, Arkansas Bar Association; and Lee Ann Huntington, Chair, Committee on Federal Courts, State Bar of California.

Susan J. Lewis, Legal Editor, Matthew Bender & Company, Inc., pointed out a typographical error in the reference to Rule 3003(c)(2) in the Committee Note to the proposed amendment to Rule 2002(h). The reference should be to Rule 3002(c)(2). **The Advisory Committee agreed to make the correction.**

Glenn Gregorcy, Chief Deputy Clerk, United States Bankruptcy Court for the District of Utah, commented that the proposed deletion of the words "and account" from Rule 2002(f)(8) "does nothing whatsoever" because, he wrote, only one notice is sent under the current rule in most courts. In other words, he stated, in most districts, the trustee's final report and the final account are the same document. James T. Watkins, who stated that his law firm represents 10 of the top 25 national issuers of credit cards in their bankruptcy cases nationwide, urged the Advisory Committee to abandon the proposed amendment. He stated that his firm regularly reviews the trustee's final report and account in order to verify that the stated distributions have been received.

The Reporter said that, while Mr. Gregorcy assumes that the trustee's final report and account are one document in most courts, Mr. Watkins' comments indicate that there are two separate documents -- both of which may be helpful to creditors. **After a brief discussion, the committee took no action on the two comments.**

Richard M. Kremen offered a redraft of the proposed amendment to Rule 2002(h) on behalf of the Maryland Bar Association Committee on Creditors' Rights, Bankruptcy, and Insolvency. Judge Batchelder stated that Mr. Kremen's redraft appeared preferable for clarity. The Reporter suggested revising Mr. Kremen's redraft by substituting "under" for "pursuant to" in line 11; moving the phrase "the court may," from line 12 to line 14 before the word "direct"; and substituting the phrase "mailed

only to the entities listed in the preceding sentence" for the phrase "limited as set forth above" in the final line. Judge Meyers moved the acceptance of Mr. Kremen's redraft, as revised. Mr. Rosen suggested changing the word "listed" in the revision to "specified." Judge Meyers agreed to the change. **The motion was approved without dissent.**

Mr. Kremen also suggested a change in the proposed amendment to Rule 3002 in order to implement the amendment to 11 U.S.C. § 502(b)(9) in the Bankruptcy Reform Act of 1994. The Reporter presented an alternative amendment to Rule 3002. The Reporter asked whether the revised amendments to Rules 3002 and 7004, which was amended directly by the Congress, should be published for comment. He said he believes publication is not required because the revisions just conform the rules to statutory changes in the Bankruptcy Reform Act of 1994. **The Committee agreed.**

Mary S. Elcano, Senior Vice President, General Counsel, United States Postal Service, suggested that Rule 2002 be amended to require service of a notice of dismissal on the debtor's employer and that Rule 7004 be revised to require service on the particular department, office, or unit of an agency out of which the debt in question arose. She stated this is needed so the agency can locate the source of the debt and file a proof of claim. The Reporter stated that the suggested change to Rule 2002 was unrelated to the proposed amendment published and would require separate publication. The Reporter stated that Ms. Elcano's concern about locating the source of a debt appeared to relate to notice of the bankruptcy filing and of the meeting of creditors pursuant to Rule 2002(a), not service of process under Rule 7004. He recommended no action on these comments.

Commenting on the proposed amendment to Civil Rule 5(e), and indirectly on a similar amendment to Rule 5005(a), as well as on electronic filing in general, Patricia M. Hynes, Chair, Committee

on Federal Courts, Association of the Bar of the City of New York, expressed concern about access to electronic filing and electronic records, system compatibility, the authenticity and accuracy of electronic records. The Reporter stated that the Advisory Committee's Technology Subcommittee had focused on these same concerns in drafting the proposed amendment to Rule 5005 and the accompanying Committee Note. The proposed amendment mandates public access by reference to 11 U.S.C. § 107. The Reporter recommended no further action on Ms. Hynes' comments.

The Reporter stated that he had reviewed Mr. Garner's proposed stylistic changes and had included a number of the suggestions in a revised draft of the proposed amendments. Judge Duplantier stated that "under" does not mean the same thing as "pursuant to." The Reporter said that a number of years ago the Advisory Committee rejected the universal substitution of "under" for "pursuant to." Judge Restani moved to approve the Reporter's substitution of "under" for "pursuant to" in his revised draft. **After further discussion of the proposed stylistic changes, the Committee rejected the motion with two dissenting votes.** Judge Batchelder suggested that the Advisory Committee's Style Subcommittee consider the drafting conventions used in the proposed amendments to the Supreme Court Rules. **The Chairman requested that she review the proposed amendments to the Supreme Court Rules.**

The Advisory Committee then considered the Reporter's revised draft of each of the proposed amendments, including his post-publication changes.

Rule 1006. Judge Duplantier suggested deleting "that is to be" from lines 10-11 on page 1 of the Reporter's revised draft. After a discussion, he withdrew the motion. **A motion to approve the proposed amendment as published carried unanimously.**

Rule 1007. **The Advisory Committee approved the proposed amendment as published. The Committee subsequently agreed to change "pursuant to" to "under" in lines 25 and 26 on page 5.**

Rule 1019. **The Advisory Committee approved the proposed amendment as published. The Advisory Committee deleted the part of the Committee Note after "3002(c)(6)" in line 3 on page 8 and approved the remaining portion of the Committee Note.**

Rule 2002. Judge Meyers moved to retain "as the court may direct" on lines 4-5 of page 8 rather than substituting "whom the court directs." **The Advisory Committee agreed.** Mr. Smith moved to accept the substitution of "at least 20 days'" for "not less than 20 days" on lines 8-9. **The motion carried with one dissenting vote.** Judge Batchelder moved to accept each of the changes suggested by the Reporter and incorporated in the revised proposed amendments unless the Advisory Committee votes to make a specific modification in the revised proposed amendments. **The Advisory Committee agreed. The Advisory Committee agreed to substitute "that" for "who" on line 93 of page 13.** Mr. Sommer moved to substitute "under" for "pursuant to" on lines 102 and 103 of page 13 in order to track the language used in the Bankruptcy Code for the appointment or election of a committee. **The motion carried by a vote of 5-3. The Advisory Committee agreed to substitute "under" for "pursuant to" on lines 111, 112, and 119 on page 14. The Advisory Committee agreed to retain "pursuant to" rather than substituting "under" on lines 10 and 21 of page 9.** It was moved to delegate to the Reporter to review all of the revised proposed amendments and to use either "pursuant to" or "under" as is consistent with the Bankruptcy Code and to use "pursuant to" when the Code is not specific. **The motion passed by acclamation.**

Rule 2015. There were no changes in the proposed amendment.

Rule 3002(d). In response to the Advisory Committee's request, the Reporter prepared and distributed a draft of a new subsection (d). The new subsection would require a creditor that tardily files a claim in a chapter 12 or chapter 13 case to mail copies of the tardy claim to the trustee and debtor. The Reporter stated that he prepared the draft to focus the discussion but opposed the proposal because of uncertainty about the sanction for failing to give the notice. He said the new subsection would require publication for comment.

The Reporter said that the debtor could provide for tardily-filed claims in its plan and the trustee could periodically check the claims register for tardy claims. Mr. Sommer stated that the notice requirement might create a new area of litigation. He said that, if a party learns about the bankruptcy, it should find out about the deadlines, especially a party with an important priority or administrative claim.

The Committee discussed whether the clerk or the creditor should be responsible for noticing a late-filed claim. The Reporter stated that the creditor may not know that its claim was received after the deadline and that requiring the clerk to give the notice would ensure that it is done. Judge Meyers and Mr. Heltzel said it is easier for the clerk to send every claim than to sort them and just send the tardy ones. **At the Chairman's suggestion, the Committee agreed to set the matter over to the September meeting.**

Rule 3002. The Reporter stated that he had deleted subsection (d) of the published amendment to Rule 3002 and revised subsection (c) and the Committee Note in order to conform the rule to the statute, as amended by the Bankruptcy Reform Act of 1994. He said he believed the revisions did not require publication. Mr. Klee moved to substitute "not later" for "no later" on line 14 of page 20. **The Advisory Committee agreed.** It

was moved to substitute "not later than" for "before" in line 21 on page 21 and explain in the Committee Note that the change was made to clarify a possible ambiguity in the statute. **After discussing whether this extended the deadline, the Advisory Committee voted, with one dissent, to approve the motion. With one dissent, the Advisory Committee approved a motion to submit the revised draft of Rule 3002 to the Standing Committee without further publication.**

The Reporter offered an additional paragraph to be included in the Committee Note on page 22 to explain that "not later than" is used to avoid any confusion over whether a governmental unit's claim is timely filed if the claim is filed on the 180th day. **The Advisory Committee agreed to the inclusion.**

Rule 3016. **The Advisory Committee agreed to delete the Reporter's stylistic changes of "pursuant to" to "under" where not consistent with the usage in the Bankruptcy Code.**

Rule 4004. Mr. Klee suggested inserting "other" after "any" in line 29 on page 26 in order to be consistent with the statute and to move the word "also" to the beginning of the second sentence of the Committee Note. **The Advisory Committee agreed to the stylistic changes.**

The Committee on the Administration of the Bankruptcy System had requested Rule 4004 be further amended to provide that the court may delay issuing a discharge to a chapter 7 debtor who has not paid in full the proposed $15 trustee surcharge fee which is due when a case is converted to chapter 7. The Chairman asked whether the debtor's discharge should be denied over $15. The Reporter stated that the proposed revision should be published for comment if there is any controversy. Mr. Sommer moved to table the matter. **The motion carried without dissent.**

Rule 5005. There were no changes in the proposed amendment.

Rule 7004. The Reporter stated that the changes in this rule subsequent to its publication were stylistic except for specifying that subsection (g) was abrogated, incorporating the new subsection (h), and including the new introductory phrase in subsection (b) added by the Bankruptcy Reform Act of 1994.

Rule 8008. The post-publication changes are stylistic.

Rule 9006. The Reporter said changing "may not" to "shall" in line 4 on page 49 made the meaning clearer. Mr. Klee said the rule of construction in section 102 of the Bankruptcy Code dictates the use of "may not." The Reporter agreed to restore "may not."

Amendments to be submitted for publication. The Reporter presented proposed amendments to Rules 1020, 2002(a), 2002(n), 2007.1, 3018, 3021, 8001(a), 8001(e), 8020, 9015, and 9035 for submission to the Standing Committee with a request for publication. Judge Meyers asked the purpose of the amendment to Rule 3021. The Reporter said it is to provide flexibility in fixing the record date for the purpose of making distributions to holders of securities of record. Judge Restani commented on the frequency of amendments to Rule 2002. The Reporter stated that the Advisory Committee deals with Rule 2002 by subsection to avoid confusion. He said many of the amendments conform Rule 2002 to changes in other rules.

The Reporter stated that he received a number of suggestions for stylistic changes in the proposed amendments from Mr. Garner the night before the meeting. Judge Batchelder said the Advisory Committee should deal with substantive matters and refer the suggested stylistic changes to the Style Subcommittee. It was moved to submit the proposed amendments to Rules 1020, 2002(a),

2002(n), 3018, 3021, 8001(a), 8001(e), 8020, 9015, and 9035 for publication along with the proposed amendment to Rule 3017 included in Agenda Item 7. The Style Subcommittee is to review the proposed amendments and circulate its changes to the committee members, who will have one week to object to the stylistic changes. As restyled, the proposed amendments then will be submitted to the Standing Committee for publication. **The Advisory Committee approved the proposed arrangements.**

Rule 2007.1. At its December meeting, the Advisory Committee approved Interim Bankruptcy Rule 1, which provides that the United States trustee will appoint the person elected as a chapter 11 trustee, subject to court approval. This comports with the other references in chapter 11 to the appointment of a trustee.

Marvin E. Jacob and Una M. O'Boyle had suggested in a letter a number of changes in the interim rule. In drafting proposed Rule 2007.1, the Reporter incorporated their suggestions that copies of the United States trustee's report of a disputed election go to the party who requested the election and to the creditors' committee (line 34) and that the ten-day period for moving to resolve a disputed election run from the filing of the report (line 40).

Mr. Sommer expressed concern that other parties may need notice of the report of disputed election. The Reporter suggested substituting "has made a request to convene a meeting under § 1104(b) or to receive a copy of the report," for "made a request under § 1104(b)". Judge Restani moved to approve the Reporter's suggested change. Judge Robreno suggested adding "all persons for whom ballots were cast". The Reporter said the suggested phrase would include creditors for whom a proxy vote is cast. He said trustee candidates probably would request a copy. **Judge Restani's motion carried with one dissent.**

The Reporter recommended substituting "United States trustee files the report" for "date of the creditors' meeting called under § 1104(b) of the Code". Mr. Rosen so moved. After a colloquy with Mr. Klee, the Reporter agreed to substitute "Unless a" for "If no" in line 38 on page 4, "not later than" for "within" on line 39, and "any" for "a" on line 42. Judge Restani moved for the approval of the revision. **The motion carried without dissent.**

Mr. Klee suggested substituting the language in lines 42 - 45, as revised, for the phrase "a person appointed trustee under § 1104(d) shall serve as trustee" on lines 12 - 13 on page 3. **Mr. Rosen's motion to make the change was approved without dissent.** The Reporter stated that the rule should specify that equity security holders can not convene a meeting to elect a trustee or solicit proxies. **Accordingly, the Advisory Committee agreed without dissent to add the word "only" after "solicited" on line 21 on page 3 and "of creditors" after "committee" on the same line.**

Mr. Rosen asked if someone other than the United States trustee could file a report of a disputed election. The Reporter said they could object to the United States trustee's report. In order to allow a party to object without waiting for the report, Mr. Klee suggested substituting "not later than" for "within" on line 39 of page 4. **The Advisory Committee agreed.** Professor Tabb suggested substituting "Unless a" for "If no" on line 38 of page 4. **Judge Restani moved to make the change and the Advisory Committee approved her motion without dissent.** Mr. Smith suggested deleting "approval of" from line 24 on page 3. **The Advisory Committee agreed.**

The General Counsel for the Executive Office for United States Trustees has expressed concern about the authority of the United States trustee to preside at the election of a chapter 11

trustee. **In response, the Advisory Committee voted unanimously to insert the sentence "The United states trustee shall preside at the meeting." after "2002" on line 20 on page 3.**

After the December meeting and lengthy discussions with Mr. Patchan concerning the application of proposed Rule 2007.1, the Reporter revised the Committee Note to explain the need for court approval of the appointment of the elected trustee. The revised Committee Note, which was distributed at the meeting, includes an example of a situation in which the United States trustee might dispute the election, i.e., the United States trustee believes the person elected is not "disinterested." Mr. Klee suggested changing "not eligible" to "ineligible" in the sixth line of the fourth paragraph and "should" to "may" in the penultimate line of that paragraph. **The Advisory Committee agreed.**

After the Advisory Committee discussed various changes in the paragraph which begins "The rule", Professor Tabb moved to approve the Committee Note with the insertion of "appointment of the" after "the" in the first sentence of the paragraph; Mr. Klee's two stylistic changes in the next paragraph; and the deletion of "(2)" in "§1104(b)(2)". At Mr. Klee's request, Professor Tabb agreed to the insertion of "primarily" after "necessary" in the penultimate line of the paragraph. At Mr. Rosen's suggestion, Professor Tabb agreed to the deletion of "of the appointment of the elected person after the disclosures required under Rule 2007.1(c)". **The amended motion carried without dissent.**

Rules 3017, 3017.1, 3018. At its September meeting, the Advisory Committee approved amendments to Rules 3017 and 3018 to provide flexibility in fixing the record date for the purpose of determining the parties entitled to receive solicitation materials and to vote on a chapter 11 plan. At its December meeting, the Advisory Committee approved the substance of a new

Rule 3017.1 for court consideration of a disclosure statement in a small business case. Judge Kressel moved to approve the Reporter's draft of Rule 3017.1 **The motion carried unanimously.**

Mr. Rosen suggested adding "Other Than Small Business Cases" to the caption of Rule 3017. **The Advisory Committee agreed.** Judge Kressel stated that Rule 3017 does apply in small business cases if the debtor does not make a timely election to be treated as a small business. **The Advisory Committee reconsidered and withdrew the amendment to the caption.** Judge Robreno moved to delete "new. It is" from line 1 of the Committee Note on page 7. **The Advisory Committee agreed.**

Mr. Klee stated, that as the result of the deletion of subsection 1124(a)(3) in the Bankruptcy Reform Act of 1994, classes will be impaired even if they receive cash equal to the full, allowed amount of their claims. He said the rules should give the court discretion to dispense with sending out the disclosure statement if the plan proponent plans to go straight to cramdown on such a class. The Reporter asked if he would limit the amendment to former subsection 1124(a)(3) or make it applicable to any impaired class. Mr. Klee said the procedure should be available for any class not solicited.

Mr. Smith said that, as a matter of due process, members of an unsolicited class should get a one-page summary of what is being done to them and why their votes are not being sought. **The Reporter agreed to prepare a memorandum on the matter for the next meeting.**

Rule 3014. The Reporter prepared an amendment to Rule 3014 to provide a deadline for a section 1111(b) election in small business cases. He said he was unsure whether the deadline should be determined by reference to the date fixed pursuant to subsection (a)(2), (a)(3), or (a)(4) of Rule 3017.1. **After**

discussing the importance of fixing a date, the Advisory Committee agreed that the election "may be made no later than the date fixed under Rule 3017.1(a)(2) or another date the court may fix." The Advisory Committee approved the proposed amendment, as revised.

Rule 9011. At its September 1994 meeting, the Advisory Committee discussed and approved a recommendation to amend Rule 9011 so that it conforms substantially to the 1993 amendments to Civil Rule 11. The Reporter was directed to draft appropriate language for the rule and Committee Note to provide that the 21-day "safe harbor" provision would not apply to motions for sanctions for the improper filing of a petition.

The Advisory Committee discussed revising lines 69 - 70 on page 4 to provide "A motion for sanctions for the filing of a petition in violation of subdivision (b) may be filed at any time. Any other". Several committee members expressed concern about the statement that Rule 9011 motions "may be filed at any time." It was proposed to delete lines 69 - 70, insert "The" at the beginning of line 71, and insert ", except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subsection (b)" after "corrected" on line 76. **The proposal was approved with one dissenting vote.** The Reporter agreed to correct typographical errors by inserting the word "to" at the beginning of line 37 and substituting "withdrawn" for "withdraw" on line 16 of the Committee Note on page 7.

Rule 1019. In February 1994, the Advisory Committee voted to delete the phrase "superseded case" in Rules 1007(c) and Rule 1019(3) and (4) because the use of the phrase gives the erroneous impression that conversion of a case results in a new case. The changes in Rule 1007(c) were part of the package of proposed rule amendments published for comment in September 1994. In addition

to deleting "superseded" from Rule 1019, the Advisory Committee asked the Reporter to restyle the rule and divide it according to applicable Code chapter.

Mr. Klee said "within" on line 31 of page 4 should be "not later than". The Reporter agreed that "not later than" should be substituted for "within" throughout the proposed amendment. **The Advisory Committee accepted the change.** Mr. Klee said lines 19 and 31 should refer to a "holder of a claim" rather than a "creditor." **The Advisory Committee agreed.**

Judge Kressel said "a debtor" should be inserted after "not" in line 14 on page 3. **The Advisory Committee agreed.** Mr. Sommer expressed concern that lines 39 - 41 of the draft appear to take a substantive position on the interpretation of 11 U.S.C. § 348 as amended by the Bankruptcy Reform Act of 1994. **The Advisory Committee agreed that subsection (C)(i) on page 4 should be revised to implement the 1994 amendment to section 348. The Advisory Committee approved the proposed amendment, as revised.**

Rules 8002(c), 7062. In September 1993, the Advisory Committee voted to amend Rule 8002(c) to clarify that a motion for an extension of the time to file a notice of appeal must be "filed" -- rather than "made" -- within the ten-day period. In view of the Ninth Circuit's decision in In re Mouradick, 13 F.3d 326 (9th Cir. 1994), the Advisory Committee approved additional amendments at its September 1994 meeting designed to give a party that files a timely extension motion the benefit of an order granting the motion, regardless of when the extension motion is granted.

After the approval of the September 1994 amendments, the Committee asked the Reporter to compile an appropriate list of orders with respect to which the time to appeal may not be extended at all. In compiling the list the Reporter considered

the orders listed in Rule 7062 as exceptions to Civil Rule 62's ten-day automatic stay of enforcement or execution with respect to a judgment. As a result, he proposed amending both Rule 8002(c) and Rule 7062.

Judge Kressel suggested transposing the numbers "1325" and "1225" in lines 19 and 20 on page 8 and in lines 15 and 16 on page 10. **The Advisory Committee agreed to make the correction. The Advisory Committee agreed to substitute "change the effect of" or similar language for "overrule" in the second sentence of the Committee Note to Rule 8002(c) on page 9.** Judge Restani suggested inserting "the automatic stay under" after "to" in line 2 on page 10. **The Advisory Committee agreed.** Mr. Sommer suggested substituting "may" for "must" in line 36 on page 8. **The Advisory Committee agreed.**

Mr. Smith asked if the court has the ability to make an order effective immediately even if the order otherwise would be stayed for ten days. The Reporter said he believes the phrase "unless the court otherwise directs" in Rule 9014 authorizes the court to waive the application of Rule 7062 in a contested matter. Mr. Smith said Rule 7062 should give the court explicit discretion to except other orders from the ten-day stay, as Civil Rule 62 does. Mr. Klee said the parties should have an opportunity to get a stay pending appeal, even if an order is effective immediately, in order to preserve the constitutional right to consideration by an Article III judge.

Judge Kressel said Civil Rule 62 does not make sense in the bankruptcy context, which causes many of the problems with the bankruptcy rule. Professor Tabb said there should be a separate stay rule for contested matters. Mr. Klee said Rule 7062 should be published for comment as drafted while the Long Range Planning Subcommittee considers rationalizing Rules 9014 and 7062.

Mr. Klee moved to approve the proposed amendment to Rule 8002(c) with the changes made during the discussion. **The motion was approved unanimously.** Mr. Klee moved to approve the proposed amendment to Rule 7062 with the addition of a subsection (f) which states "any other order as the court may direct." **The Advisory Committee approved the motion by a 7-4 vote.**

Rule 2002. Attorney General Janet Reno proposed an amendment to Rule 2002(j)(4) in order to provide more effective notice to the United States. (Copies of her letter were distributed separately.) The proposed amendment, which is fashioned after local rules in several districts, was modified after a series of conversations between Mr. Kohn and the Reporter. The revised proposal would require that the notice to the United States attorney identify the agency through which the debtor became indebted and that the notice to the federal agency be addressed as the United States attorney directs in a filed request. Mr. Kohn said bankruptcy notices sent to the United States attorney often are ignored because there is no practical way to identify the agency and that notices sent to a federal agency often go to the address where the debtor makes payments.

Mr. Klee said he is sympathetic to the government's problem but that the proposed amendment goes to the heart of the bankruptcy process and puts the burden on the debtor to apprise the creditor of the nature of its claim. He said the debtor ought to be required to make a good faith effort to identify the agency, if it knows the name, but that the debtor should not risk losing its discharge. Mr. Smith said the emphasis should be on effective notice, not perceived due process questions. He stated that the government is a major creditor and millions of dollars are at stake. Mr. Smith said the proposed amendment is good for the debtor because compliance with the proposal is fairly easy and compliance should avoid challenges to the discharge.

Mr. Klee said the Congress wrestled with the issue of effective notice to creditors in considering the Bankruptcy Reform Act of 1994. The lawmakers compromised by requiring the debtor's Social Security number or taxpayer ID (instead of the debtor's account number) but excluding challenges to the discharge. The Reporter stated that the 1994 amendments gave the government 180 days to file a claim, which should be enough time to get the notice to the right place. Mr. Kohn said it is better to get the notice on the first day.

Mr. Klee suggested inserting "to the mailing address" after "addressed" on line 5 on page 5 to avoid any implication that the United States attorney could require the use of an account number. **The Advisory Committee agreed. A motion to approve the proposed amendment failed. The Chairman asked Mr. Kohn to revisit the matter and consider preparing another draft for the next meeting.**

The Chairman suggested that the Department of Justice consider preparing a national register of addresses to be used for bankruptcy notices to government agencies. Mr. Kohn said that would be very difficult because federal agencies' procedures for handling bankruptcy notices vary from district to district and agency to agency. Several committee members expressed sentiment for the development of local federal agency address registers similar to the ones which have been published as addendums to some local rules. Mr. Klee suggested requiring the sender to designate the agency only if known to the sender. The Advisory Committee discussed whether the sender or the debtor should be responsible for making sure the right address is used. Mr. Heltzel said the deputy clerk putting the creditor addresses into the court's computer system should not be required to recognize that a government agency's address needs to be changed.

Rule 6007(a). The Attorney General also requested in her

letter that Rule 6007(a) be amended to require notice to the Environmental Protection Agency (EPA) of any proposed abandonment or disposition of estate property with respect to which there may be claims or obligations under statutes or regulations administered by the EPA. After a series of discussions between Mr. Kohn and the Reporter, the proposal was limited to the abandonment of nonresidential real property and the abandonment of hazardous substances and hazardous waste and broadened to include notice to state environmental agencies.

The Reporter stated that it may be difficult for trustees to comply with the proposed notice requirement because the referenced statutory definition of hazardous substances contains cross-references to a number of other environmental statutes. Several committee members questioned the meaning of the phrase "to which there is or may be a claim or cleanup obligation under any law administered by the United States Environmental Protection Agency or a state environmental unit" on lines 14 - 16 on pages 9 - 10.

The Reporter said it might be better to require notice to the EPA of any abandonment of nonresidential real property. Judge Restani stated that requiring notice of every abandonment effectively would be no notice at all. Mr. Klee stated that he favors the current requirement, which is limited to known claims or cleanup obligations. **The Chairman asked Mr. Kohn to revise the proposed amendment so that the notice requirement in subsection (a)(2) is limited to known claims.**

Rule 9006(b)(1). In In re Village Green Associates, No. AZ-94-1232-ZRH, slip op. (Bankr. 9th Cir. August 8, 1994), the Bankruptcy Appellate Panel of the Ninth Circuit found several ambiguities in Rule 9006(b)(1). The Reporter stated that the issues raised by the decision can be analyzed by considering two questions: 1) Should a court have the discretion to act, in the

absence of a request, to extend a chapter 11 claims bar date or another deadline before the time period expires? and 2) Should a court have the discretion to act sua sponte -- for cause but without finding excusable neglect -- to extend a chapter 11 claims bar date or another deadline for all parties after the time period has expired? The Reporter stated that the rule could be revised to specify that the court has no discretion to extend the deadline after the time has expired absent a motion and a showing of excusable neglect, or to specify that the court can extend the deadline for everyone for cause.

Professor Tabb moved to adopt the second, more liberal alternative. The motion was amended to require an initial vote on whether to amend the rule at all. Judge Meyers stated that Village Green Associates was an unpublished decision. **With one dissent, the Advisory Committee voted against making any changes in the rule.**

Rule 2014. Harvey R. Miller, of the law firm of Weil, Gotshal & Manges in New York, requested that the Advisory Committee study Rule 2014(a) and consider appropriate amendments to clarify the duty to disclose. The Reporter stated that, in response to a resolution adopted by the House of Delegates of the American Bar Association (ABA), the Advisory Committee considered Rule 2014 at its meeting in March 1992 and decided not to amend the rule. The Chairman said he put the matter on the agenda for the purpose of deciding whether to revisit it. The Reporter said he believes there are two issues: 1) Whether the rule can be clarified by being more specific and detailed in setting forth the facts that must be disclosed and 2) The application of the rule to large cases in which strict compliance is difficult or impossible.

Mr. Smith stated that he was responsible for the ABA resolution and that it was not intended to reduce disclosure. He

said the rule should give bankruptcy attorneys who practice around the country guidance as to what types of connections they should disclose. Mr. Rosen stated that the rule does not address supplementation, which causes problems in large cases in which the parties change as the result of claims trading.

Judge Meyers agreed with the comments but expressed concern that it would appear that the Advisory Committee is intervening to give an attorney solace. Mr. Rosen said that the decision in In re Leslie Fay, No. 93-B-41724(TLB), slip op. (Bankr. SDNY December 15, 1994), which prompted Mr. Miller's letter, has been settled and there are no pending appeals. Judge Batchelder expressed concern that claims trading could be used as a means of disqualifying competent counsel and said the letter heightened existing concerns about the rule. **The Advisory Committee unanimously approved a motion to revisit the matter. The Chairman appointed Mr. Smith to head a Rule 2014 subcommittee. Mr. Smith may select the other members of the subcommittee.**

SUBCOMMITTEES

Local Rules. Ms. Channon distributed her memorandum on the 12 letters commenting on the proposed uniform numbering system for local rules. She said the Advisory Committee also received one oral comment from a former committee member. Ms. Channon said the comments were generally either favorable or favorable with qualifications or suggestions for modification. Two persons were opposed to both the proposed system and the entire idea of uniform numbering.

Ms. Channon said the Local Rules Subcommittee had decided that the subdivisions of the national rules should not be carried over into the uniform numbers, that the use of the prescribed titles should be mandated for the uniform numbers, and that the

uniform numbers should not have the exact same titles as the national rules.

Professor Tabb suggesting putting all miscellaneous matters in the 9000 series numbers unless there is an exact match with a national rule. Mr. Sommer said it is more logical to assign these rules to related national rules. Mr. Klee said there appears to be little impetus for completely restructuring the national rules and, therefore, the Advisory Committee should go forward with uniform numbers based on the current national rules.

Judge Leavy suggested that a list be published of the uniform numbers for all local rules, rather than requiring the districts to reorganize their rules according to the national numbers. Mr. Rosen said the problem in implementing the uniform numbers is that one local rule may relate to several national rules. Mr. Heltzel said that it would require a tremendous amount of work for each district to revise its local rules. He suggested compiling a database of local rules and making it available in a scannable format.

Judge Batchelder said the issue is no longer whether to require uniform local rule numbers but what is the best uniform number system. She said the question is what is the most expeditious, most efficient, and least objectionable system. Judge Meyers suggested that the districts be authorized either to use the uniform numbers or to add references to the uniform numbers to their existing rules. Professor Tabb moved to adopt the proposed uniform numbers set out in the attachment to Director Mecham's memorandum of November 22, 1994, except that references to subdivisions of the national rules are to be deleted and cross-references are to be included. **The motion carried with one dissenting vote.**

Long Range Planning. Judge Stotler led a discussion of the

report prepared by the Long Range Planning Subcommittee of the Standing Committee. The committee members agreed that a five-year term for the chair of an Advisory Committee is desirable in order to oversee the lengthy rule-making process and preserve an institutional memory. There was no agreement on whether committee members should be eligible for appointment to a third term or whether the terms should be for two, three or four years.

At the request of the Advisory Committee, the Federal Judicial Center conducted a survey concerning the scope, format, and organization of the bankruptcy rules. A memorandum setting out the survey questions and a tabulation of the initial responses was distributed at the meeting.

Mr. Klee said the survey has not been completed but that some trends are apparent. He said that, although there is no ground swell of sentiment for a complete overhaul of the rules, there is support for improving the rules related to motion practice and the interaction between the 7000 series rules and the 9000 series. Ms. Wiggins stated that the survey indicated there is room for improving a number of rules. Mr. Klee said interest was expressed for developing ethical standards for practicing before the bankruptcy courts. The Reporter stated that the Standing Committee's reporter is tackling the issue as it relates to all federal courts.

Technology. **The Chairman assigned Mr. Heltzel, Mr. Klee, and Mr. Sommer to the Technology Subcommittee and designated Mr. Heltzel as chairman.** The Chairman stated that he will ask Judge James Barta, a former member of the Advisory Committee and the former chairman of the subcommittee, to serve as a consultant. Professor Tabb stated that the American Bankruptcy Journal will publish a symposium issue on the bankruptcy rules, including a section on automation.

Civil Rules Liaison. Judge Restani stated that the Advisory Committee on Civil Rules met in Philadelphia with a number of experts to consider the need for revising Fed. R. Civ. P. 23, Class Actions. She stated that, although the rule does not work well in mass tort cases, there was little sentiment among the experts for a major overhaul of the rule. She said the Civil Committee will continue its exploration of the rule at a seminar at New York University in April.

Alternative Dispute Resolution. With the help of Ralph Mabey, a former member of the Advisory Committee, the subcommittee has conducted a national survey on local Alternative Dispute Resolution (ADR) programs in the bankruptcy courts. Professor Tabb promised to distribute copies of an article on the survey to committee members.

He stated that the ADR Subcommittee will meet at 3 p.m. on May 24, 1995, to consider drafting an ADR proposal for the September meeting. The meeting will be held at a hotel in the vicinity of O'Hare International Airport. Professor Tabb asked that any committee member interested in ADR contact him or another subcommittee member before the May meeting. Several committee members expressed their opposition to mandatory arbitration or mandatory mediation.

Forms. Mr. Sommer said the Forms Subcommittee has almost completed its revision of a number of forms and hopes to present the new, revamped forms at the September meeting. He said the Forms Subcommittee will meet at 10 a.m. on May 25, 1995, at a hotel in the vicinity of O'Hare International Airport.

UPCOMING MEETINGS

The Chairman announced that the next meeting will be in Portland, Oregon, on September 7 - 8, 1995. He suggested that

the winter - spring meeting for 1996 be held in the eastern part of the country. The Reporter suggested March 21 - 22 or March 28 - 29, 1996, as possible meeting dates. The committee members agreed to inform Ms. Channon of their schedule conflicts for those dates within one week.

Respectfully submitted,

James H. Wannamaker, III