COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Los Angeles, California
January 10-12, 1996

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 10-12, 1996

1. Opening Remarks of the Chair.

2. Approval of Minutes.

3. Report of the Chair. (Oral report.)

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

      i. Approval of and submission of proposed rules amendments to the Supreme Court, with the exception of proposed amendments to Criminal Rule 16.
      ii. No action taken on committee's publication of proposed amendment to Civil Rule 47, regarding voir dire.

   B. Meeting with the Committee on Court Administration and Case Management regarding the implementation of the Civil Justice Reform Act.

   C. Meeting with the Chief Justice on rules-related issues.

4. Report of the Administrative Office.

5. Report of the Federal Judicial Center on Ongoing Rules-related Studies.

6. Report of the Style Subcommittee. (Oral report.)

   A. Composition of subcommittee.

   B. Publication of Bryan Garner's Style Guidelines.

7. Report of the Advisory Committee on Appellate Rules.

   A. **ACTION** — Revised Federal Rules of Appellate Procedure Under Uniform Drafting Standards recommended for public comment.

   B. Minutes and informational items.

8. Report of the Advisory Committee on Bankruptcy Rules.

   A. **ACTION** — Uniform Numbering System for Local Bankruptcy Rules.

   B. **ACTION** — Resolution approving future adjustments to the Official Forms to conform to dollar adjustments required under the Bankruptcy Code.

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(Standing Committee)

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Agenda Item 1-3

OPENING REMARKS OF THE CHAIR

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Draft Minutes of the Meeting of July 6-7, 1995
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, July 6-7, 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
Jamie S. Gorelick, Esquire
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

Judge Wilson attended only the Friday portion of the meeting. In addition to Deputy Attorney General Gorelick, the Department of Justice was represented by Geoffrey M. Klineberg, Special Assistant to the Deputy Attorney General. Roger A. Pauley of the Department attended the meeting on Friday.

Supporting the committee were Professor Daniel R. Coquillette, Reporter to the committee, Peter G. McCabe, Secretary to the committee, John K. Rabiej, Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, and Mark D. Shapiro, senior attorney in the rules 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 C. Roger Vinson, Member
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules -
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules -
Judge Ralph K. Winter, Jr., 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, Judith A. McKenna of the Research Division of the Federal Judicial Center. Additional committee support was provided by Paul A. Zingg, Patricia A. Channon, attorneys in the Office of Judges Programs of the Administrative Office, and Judith W. Krivit and Anne P. Rustin of the Rules Committee Support Office.

INTRODUCTORY REMARKS

Judge Stotler reported that most state bar associations had designated attorneys to serve as their point of contact with the rules committees. She suggested that members of the committee could be helpful in persuading the remaining state bar groups to name points of contact.

Judge Stotler reported on action taken by the Judicial Conference at its March 1995 session with respect to the federal rules, including: (1) the Conference's approval of revised official bankruptcy forms, (2) its recommitment to the committee of proposed amendments to FED. R. CIV. P. 26(c), (3) its approval of a legislative repeal of the service provisions of the Suits in Admiralty Act, and (4) its return without action of the issue of cameras in the courtroom to the Court Administration and Case Management Committee for further consideration. She also reported that the Conference had transmitted to the Congress its recommendations that: (1) the Congress should reconsider FED. R. EVID. 413-415 as a matter of policy, and (2) alternatively, it should enact the committee's substitute amendments. She added, however, that the Judiciary had not succeeded in convincing the Congress to act favorably on the recommendations.

Judge Stotler noted that an adjustment had been made in Recommendation 30(c) of the *Proposed Long Range Plan for the Federal Courts* accommodating the suggestion of the state chief justices that the plan refer specifically to the need for input by the state bench into the federal rules process.

The chair reported that the Supreme Court had adopted generally the proposed rules amendments approved by the Judicial Conference at its September 1994 session. The Court had, however, changed the word "must" to "shall" throughout the amendments. She added that the Chief Justice had stated in correspondence to the chairman of the Executive Committee of the Conference that: "In the revisions of the Supreme Court Rules now in progress, [the Court is] giving consideration to the appropriate use of 'shall.'" The court, moreover, thinks "it sound that terminology changes in the Federal Rules be implemented in thoroughgoing, rather than a piecemeal, way." The Court had also restored the word "made" in FED. R. CIV. P. 83(a)(1) to make it consistent with FED. R. CRIM. P. 57(c).

Judge Stotler stated that she and the Reporter, Professor Coquillette, planned to attend the December 1995 meeting of the Court Administration and Case Management Committee. She emphasized the need to work with that committee to fulfill the Judicial Conference's obligations under the Civil Justice Reform Act. The Act, among other things, requires the Conference to study the results of the procedural experiments in the district courts and to initiate proposals for possible changes in the federal rules.

The Chair issued a statement of policy regarding the participation of visitors at the public meetings and their right to observe and meet with members of the Committee at recess as may be appropriate. The Chair clarified that the Standing Committee meeting is not a meeting where visitors are entitled to speak, because it is a business meeting rather than a public hearing. But, on invitation of the Chair, visitors may be heard.

NINTH CIRCUIT LOCAL RULE 22

Professor Coquillette reported that he had filed a report at the last committee meeting expressing the view that Local Rule 22 of the United States Court of Appeals for the Ninth Circuit, dealing with procedures in death penalty cases, was inconsistent with federal law in two respects. (See January 1995 Committee Minutes, pages 14-15.) The committee concurred in the report and transmitted it to the Ninth Circuit, inviting the court to consider the views of the committee and take whatever steps, if any, it deemed appropriate.

Professor Coquillette reported that in response to the concerns of the committee, the Ninth Circuit had issued a new, interim rule to address the problems cited by the committee. The court had followed suggestions made by the committee: (1) to change the manner of voting for en banc consideration, and (2) to reinstate the requirement of individual consideration of certificates of probable cause. The court was in the process of seeking public comment on the proposed new rule, including comments from the attorneys general who had petitioned the Judicial Conference to abrogate Rule 22.

Judge Stotler stated that the Ninth Circuit was scheduled to address the rule again before the end of the summer. Accordingly, the committee should defer further consideration of the matter until its January 1996 meeting.

CONFERENCE ON ATTORNEY CONDUCT

The committee adopted without objection Professor Coquillette's suggestion that the committee convene a one-day conference to explore attorney conduct issues. The conference would be held in conjunction with the committee's January 1996 meeting. The chair asked Professor Coquillette to work with the Administrative Office in making arrangements for the conference and preparing a proposed list of about 25 knowledgeable and representative invitees.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee approved unanimously the minutes of its January 11-13, 1995 meeting.

LEGISLATIVE REPORT

Mr. Rabiej summarized actions initiated in the new Congress that would have an impact on the federal rules, including proposals to amend FED. R. CIV. P. 11 (sanctions) and 68 (offer of judgment). He stated that Judge Higginbotham, Judge Scirica, and Professor Cooper met with Congressional staff and advised them of concerns with several rules-related provisions in pending legislation governing securities litigation.

Mr. Rabiej reported that on February 8, 1995, the Administrative Office had transmitted to the Congress the Judicial Conference's report on FED. R. EVID. 413-415, requesting that the Congress reconsider these rules. By operation of law, the new rules would take effect on July 9, 1995. He stated that a great deal of effort had been undertaken by Judge Winter and others to meet with members of the Congress and their staff and to urge enactment of the Conference's substitute language.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Professor Mooney presented the report of the advisory committee, as set forth in Judge Logan's memorandum of June 5, 1995. (Agenda Item 5)

She noted at the outset that the committee had to make a policy decision regarding the appropriate terminology to use in light of the Supreme Court's recent action in changing "must" to "shall" in several proposed rules amendments. She reported that the advisory committee, in drafting amendments for Judicial Conference approval, had followed the convention of using "shall" when there is an active voice sentence and "must" when there is a passive voice sentence.

Mr. Garner stated that the golden rule of drafting is that a word should have one single meaning and should be used consistently. He stated that the word "shall" has as many as eight different meanings. Accordingly, he argued that it was not appropriate simply to change every "must" to "shall."

Several members stated that it was important to proceed with style improvements and substitute "must" for "shall" wherever appropriate. They emphasized the need to explain clearly to the Supreme Court why the committees were making the changes in terminology.

Judge Logan accepted a suggestion that the proposed amendments submitted for Judicial Conference approval be revised to use "shall" throughout, in light of the Supreme Court's recent action. He added, though, that his advisory committee would proceed expeditiously to restyle the entire body of appellate rules and use "must" as the consistent term to describe a duty to act.

Judge Logan pointed out that the advisory committee had incorporated all the other conventions of the style subcommittee in the proposed amendments, such as the use of shorter sentences and more breakouts of text. He also reported that the advisory committee had voted 7-1 to change the term "in banc" to "en banc," recognizing majority contemporary usage. Judge Pratt noted that he had dissented on this point in the style subcommittee because the governing statute uses the term "in banc."

1. Amendments for Judicial Conference Approval

Professor Mooney stated that the advisory committee was seeking Judicial Conference approval of amendments to four rules - FED. R. APP. P. 21, 25, 26, and 27.

FED. R. APP. P. 21

Professor Mooney explained that Rule 21, dealing with mandamus, had been published for public comment a second time. The major revision in the proposed amendment would eliminate the requirement that the trial judge be named and served as a respondent in a mandamus proceeding. As amended, the rule would reflect the reality that mandamus is, normally, an adversary proceeding between the parties.

Professor Mooney stated that the only controversial issue raised during consideration of the proposed amendments was whether the trial judge should be accorded an explicit right to appear before the court of appeals. She pointed out that the amended rule would require that a copy of the final disposition of the application for the writ be sent only to the clerk of the trial court, who would be expected to give it to the judge. The rule would also be amended to allow the court of appeals to "invite" the trial judge to participate.

Professor Mooney explained that the version of the rule first published by the advisory committee had given the trial judge a right to appear in the mandamus proceedings before the court of appeals. There was strong opposition in the public responses to having the trial judge participate actively in an appellate proceeding. Commentators pointed out that the judge, after having argued against one or more parties in the court of appeals, would have to resume hearing the case between the same parties. Some members of the committee agreed that it was unseemly to put the trial judge in the middle of the controversy, thereby raising concerns as to the judge's neutrality and objectivity. By analogy, they argued that on a "straight appeal" a trial judge would not be allowed to file a brief defending his or her evidentiary rulings or other judicial acts.

Judge Bertelsman stated that he strongly favored the earlier published version of the amended rule, which would have given the trial judge an express right to appear before the court of appeals. He argued that there are cases in which none of the parties is interested in supporting the trial judge's actions. This occurs most often when the trial judge imposes procedural requirements that the parties find burdensome or objectionable. Accordingly, he objected to the amendment to the extent that it would eliminate the trial judge's right to appear.

Judge Logan added that the commentators who had opposed trial judges' participation were particularly concerned about two matters: (1) that the trial judge might ask one of the parties to write the brief supporting the judge's actions, and (2) that participation was counterproductive and inefficient in cases when prisoners file an application for a writ of mandamus to force the trial judge to act quickly on their papers. These applications are numerous and generally are handled without the need for adversary proceedings or an appearance by the trial judge.

Judge Parker stated that sending notice of the mandamus application to the trial clerk alone would not guarantee that the trial judge would actually receive it. Accordingly, he suggested: (1) adding to line 16 the words "and give a copy to the trial judge," and (2) revising the second sentence of subdivision (b)(4) to read: "The trial court judge may request permission to respond, but may not respond unless invited or ordered to do so by the court of appeals."

The committee took separate straw votes on three concepts embodied in the proposed amendments. First, it voted with one objection to require that the trial judge be given a copy of the mandamus petition and the final disposition. Second, it voted 10-4 to amend subdivision (b)(4) to provide that the trial judge may request permission to participate in the appellate proceedings. Third, it voted with one objection against giving the trial judge a right to appear.

On Thursday afternoon Judge Logan distributed a retyped draft of the proposed amendments to Rule 21. Justice Veasey moved approval of the draft. **The committee voted 10-1, over Judge Bertelsman's objection, to approve the proposed amendments and send them to the Judicial Conference.**

FED. R. APP. P. 25

a. Filing and Service by Commercial Carrier

Professor Mooney reported that Rule 25, dealing with filing and service, had been published originally with a provision stating that a party wishing to file a brief or appendix using the "mailbox rule" must file the document by first class mail. In response, several comments from the bar suggested that the use of commercial carriers should also be authorized. Accordingly, the advisory committee amended and republished the rule to allow filing by "reliable commercial carrier." The second round of public comments, however, produced several warnings that litigation would arise over the meaning of the word "reliable."

Thus, the advisory committee's current draft would allow the use of commercial carriers, but omits the term "reliable." It would allow a party to use the mailbox rule if it gives the paper to a commercial carrier who will deliver it within three days. It would also allow service on another party by commercial carrier.

The public comments also pointed out that it would be difficult as a practical matter for recipients of documents to distinguish between personal service and delivery by commercial carrier. Thus, the rule had been further amended to provide that service may be made 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. Rule 26(c) was also amended to provide the 3-day extension regardless of the method of service, unless the document is delivered to the party on the date of service.

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

b. Electronic Filing

Professor Coquillette stated that the reporters had convened twice to draft common language governing electronic filing of documents with a court. Their common language would be included in proposed amendments to FED. R. APP. P. 25(a)(2)(D), FED. R. BANK. P. 5005(a), and FED. R. CIV. P. 5(e). He pointed out, though, that two technical changes in language had to be made to accommodate the bankruptcy rules. First, the proposed bankruptcy version of the rule refers to the filing of "documents," rather than "papers" to clarify that public access requirements under the Bankruptcy Code will apply to electronically filed data that may never be in tangible paper form. Second, the bankruptcy version contains additional references to the Federal Rules of Bankruptcy Procedure themselves, to those Federal Rules of Civil Procedure incorporated by reference into the Bankruptcy Rules, and to § 107 of the Bankruptcy Code.

The committee voted without objection to approve the proposed, common amendments to the appellate, bankruptcy, civil, and criminal rules, dealing with electronic filing, and send them to the Judicial Conference.

FED. R. APP. P. 26

Professor Mooney reported that the proposed changes in Rule 26 were companion amendments to those of Rule 25. They would provide a 3-day extension if a party is served by commercial carrier, unless the party has received the paper on the date of service. The intent was to allow an extra 3 days if delivery is by commercial carrier, but not if the papers have actually been delivered on the date of service.

Some members pointed out a problem with the draft language in that it would seem to include the possibility of a paper being served "before" the date of service. Judge Logan suggested improving the language by closing the proposed amendment with the words: "unless the paper is delivered on the date of service." He also suggested eliminating from the caption the words, "by Mail or Commercial Carrier." Judge Pratt moved to eliminate the words "or acknowledgement" on lines 7-8. **These changes were approved by the committee without objection.**

The committee then voted to approve the revised rule and send it to the Judicial Conference.

FED. R. APP. P. 27

Professor Mooney stated that Rule 27, governing motions, had been entirely rewritten by the advisory committee. The amended rule would require that all arguments be made in the motion itself. Separate briefs would not be allowed. The rule also would provide a right to reply to a response and would impose page limits on

motions and responses. The advisory committee had moved the requirements regarding the form of motions from Rule 32 to Rule 27.

Professor Mooney stated that, upon the advice of Mr. Garner, the words "with the following exceptions" should be removed from lines 86-87 and the two indented paragraphs following should be integrated into the text as additional sentences.

She also pointed out that Judge Stotler had noticed a difference between the language in Rule 27 and the language of the proposed amendments to Rule 32. Professor Mooney stated that the advisory committee would want the language of the two rules to be identical and would change Rule 27 to incorporate the language of proposed Rule 32.

Mr. Perry noted, however, that the proposed amendments to Rule 32 had not yet been published. He suggested that the amendments to Rule 27 be deferred until the public comments had been received on Rule 32. Both rules could then be considered together. Other members suggested that additional drafting changes were needed in Rule 27.

Mr. Perry moved to table approval of Rule 27 until after public comment had been received on Rule 32. The motion was approved without objection.

2. **Amendments for Publication**

FED. R. APP. P. 26.1

Professor Mooney reported that Rule 26.1, dealing with corporate disclosure statements, had been reorganized by the advisory committee to make it easier to understand. The principal substantive change would simplify what a corporate party must disclose. The amendment would eliminate the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. It would require disclosure only of a parent corporation and of any stockholders that are publicly held companies owning 10% or more of the party's stock.

Ms. Gorelick suggested that the rule be matched up with the canons of judicial ethics since there is a high level of public concern on the issue of a judge's financial interests. Judge Easterbrook recommended, and Judge Logan agreed, that the views of the Committee on Codes of Conduct should be solicited expressly during the public comment period.

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

FED. R. APP. P. 28

Professor Mooney pointed out that the changes to Rule 28 were merely conforming amendments to the proposed changes in Rule 32, plus some stylistic improvements and cross-reference changes.

The committee voted without objection to approve the proposed amendments for publication. On request of Judge Logan, however, the committee later decided to withdraw Rule 28 from publication.

FED. R. APP. P. 29

Professor Mooney stated that Rule 29, governing amicus curiae briefs, had been rewritten entirely. The major change would require that the proposed brief be filed with the motion for leave to file the brief. The motion would have to show the relevance of the matters asserted by the amicus, and the brief would have to comply with all the requirements for a brief specified in Rule 32. It would fix a limit on the length of an amicus brief at half the length of the principal brief. It would also make clear that an amicus may not file a reply brief and would not have the right to participate in oral argument.

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

FED. R. APP. P. 32

Professor Mooney reported that the principal changes made in Rule 32 following publication were as follows:

1. The rule, as published, had provided that briefs could be printed on both sides of a page. In response to a great many negative comments, the advisory committee decided to change the rule and allow printing only on one side.

2. In light of criticism from the public that the requirement of 300 dots per inch was too technical for the text of the rule, the matter was moved from the text to the committee note.

3. All references to carbon copies were deleted.

4. The preference for proportional typeface was deleted in light of many comments from judges expressing a preference for monospaced typeface.

5. In response to a large number of comments from appellate judges that the proposed rule had not mandated a large enough typeface, the advisory committee changed the rule to specify a minimum of 14 points.

6. The requirement for monospace typeface was increased to a maximum of 10-1/2 characters per inch since some computers have more than 10 monospaced characters per inch.

7. The provisions for pamphlet briefs were eliminated because these briefs are very rare. Moreover, elimination of the provisions would result in a simpler rule.

8. The maximum length of a brief was fixed at 14,000 words, with an average of not more than 280 words per page.

9. The "safe harbor" provision was eliminated for proportional spacing, but retained for monospaced briefs. As published, the amendment would have required an attorney to certify compliance with the word count. As amended, the certification would be more detailed and would apply to both proportionally spaced briefs and monospaced briefs.

10. As amended, a brief would have to lie "reasonably flat" when open.

11. The restriction on the use of sans serif type was eliminated.

Judge Easterbrook reported that many appellate judges had stated that they would like to receive copies of the disks on which briefs are prepared for the judges' use in writing their opinions. Accordingly, he suggested that Rule 32 might be further amended to require that when lawyers prepare their brief by computer they should provide a disk to the court. Such a provision would not require them to prepare their briefs on a computer, but it would require them to give a disk to the court if they did in fact use a computer.

A straw vote was taken on the concept of requiring that a disk be filed with the court, if one is available. The concept was approved without objection, and Judge Easterbrook was requested to prepare appropriate draft language to be included in the package of amendments to Rule 32.

Judge Logan suggested that it might be better to send the proposal on filing disks back to the advisory committee since it had not considered the issue. Judge Stotler added that it was unusual for the Standing Committee to draft and publish a rule directly. Professor Hazard emphasized that it was essential for the rules committees to take their time and draft proposed amendments in a careful and thorough manner. It

was particularly important to resolve all drafting problems with Rule 32 before distribution for public comment because it had already been published twice before.

The committee voted 8-5 to defer publication of the proposed amendments to Rule 32 pending resolution of all outstanding drafting issues.

Several members stated that they had additional suggestions to improve the language of the rule. In response, Judge Logan proposed having the advisory committee consider all the suggestions and report back to the Standing Committee at its January 1996 meeting with a revised version of Rule 32. **Accordingly, the committee agreed without objection to defer further action on Rule 32.**

Judge Logan stated that the proposed amendments to Rule 28 were dependent on Rule 32. Accordingly, he recommended that Rule 28 also be deferred for further action.

The committee voted without objection to defer taking action on Rule 28.

Judge Logan reported that he was sympathetic with the complaints by the bar that there had been too many changes in the rules. He explained, however, that the Advisory Committee on Appellate Rules had taken the local rules project very seriously and had proposed a substantial number of amendments to the national rules in order to eliminate local court rules and thereby achieve greater national uniformity. He suggested that the effort could result in eliminating as many as half the local appellate rules.

Judge Logan stated that he expected to present a restyled package of the entire body of the Federal Rules of Appellate Procedure for consideration by the Standing Committee at its January 1996 meeting. He suggested that it was very important to document the style improvements and to emphasize that no changes in substance are intended unless clearly identified as such. He suggested that the public comment period should be longer than normal and that the restyling project should be explained carefully to bench and bar.

FED. R. APP. P. 35

Professor Mooney reported that the principal proposed change proposed by the advisory committee was to eliminate a trap in the rule. When a party files a motion for a panel rehearing, the filing tolls the time for filing a petition for certiorari in the Supreme Court. On the other hand, when a party files a suggestion for a hearing en banc, it does not toll the time for filing a petition for certiorari.

The advisory committee decided to eliminate the trap by treating a suggestion for hearing en banc the same as a petition for a panel rehearing. The committee also would change the term "suggestion" for a hearing en banc to a "petition" to further clarify the

rule. Corresponding changes would also be made in Rule 41. Professor Mooney reported that the Supreme Court had been made aware by correspondence of the advisory committee's proposed action and had not voiced any objection to the committee's approach.

Judge Logan added that the pertinent Supreme Court rule provided that if a local circuit rule treated a suggestion for a hearing en banc the same as a petition for a panel rehearing, it would toll the time for filing a petition for certiorari. Thus, the proposed amendments to Rule 35 would supersede local rule variations with a national norm.

Professor Mooney stated that the advisory committee, at the request of the Solicitor General, would also amend the rule to specify that inter-circuit conflicts are a matter of "exceptional importance" that may justify a rehearing en banc. The committee also added a new 15-page limit on the length of petitions.

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

FED. R. APP. P. 41

Professor Mooney pointed out that some of the amendments were designed to coordinate with the proposed amendments to Rule 35. They also contain a new provision, added at the request of the Department of Justice, stating that the mandate is effective when issued. In addition, they would increase the presumptive period for a stay of mandate from 30 days to 90 days. A court, though, is authorized to issue a stay for a period shorter than 90 days.

Judge Easterbrook expressed concern that the language of the proposed amendment could be read as giving a party an automatic 7 days' delay simply by filing a motion to stay the mandate. Moreover, there appeared to be no limit to the number of stay motions that a party could file. Judge Easterbrook suggested, however, that the rule be published in its current form and that the difficulty be addressed after the close of the comment period.

The committee voted with one objection to approve the proposed amendments for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of May 23, 1995. (Agenda Item 6)

1. Amendments for Judicial Conference Approval

Judge Jensen reported that the advisory committee had published proposed amendments to FED. R. CRIM. P. 16 and 32 and had held public hearings on them. The advisory committee had considered the public comments, made several changes in the proposed amendments, and voted to recommend their approval by the Judicial Conference.

FED. R. CRIM. P. 16

a. *Disclosure of Expert Witnesses*

The proposed amendments to Rule 16(a)(1)(E) and Rule 16(b)(1)(C) had been requested by the Department of Justice. They would require the defendant, on request, to provide pretrial disclosure of information concerning its expert witnesses on the defendant's mental condition. The government would be required to make reciprocal disclosure.

The committee voted without objection to approve the proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C).

b. *Pretrial Disclosure of Witness Names and Statements*

The proposed amendments to Rule 16(a)(1)(F) and Rule 16(b)(1)(D) would require the government to disclose 7 days before trial the names and statements of witnesses that it intends to call during its case-in-chief. Disclosure would not be required, however, if the attorney for the government: (1) believes in good faith that pretrial disclosure of this information would threaten the safety of any person or lead to an obstruction of justice, and (2) files under seal an ex parte, unreviewable written statement to that effect. The amendments would apply reciprocal discovery requirements on the defense.

Judge Jensen reported that at the suggestion of magistrate judges, the advisory committee had restricted application of the rule to felony cases. It had also clarified the rule to provide explicitly that the attorney for the government may decline to disclose either the witness' name or statement, or both.

Judge Jensen asserted that reasonable pretrial disclosure was sound public policy and that the rule would further good trial management. Among other things, it would eliminate the need for a court to stop a case in the middle of a trial. He recognized that the rule presented a potential conflict with the Jencks Act, but argued that it was appropriate to proceed, using the Rules Enabling Act process to bring these important policy matters to the attention of the Congress.

Ms. Gorelick stated that the Department of Justice was strongly opposed to the proposed amendments. She argued that their disclosure requirements were different from, and more extensive than, those required in the Jencks Act. She added that the Department had worked hard to avoid problems of delay and disruption of trial management. It had also engaged in extensive training of prosecutors and cooperation with judges to resolve discovery problems. She stated that the Department instructed its prosecutors to provide the names and statements of witnesses wherever possible, when there is no danger to witnesses.

She emphasized that the requirement in the proposed rule that the United States attorney certify that a witness is endangered was both excessively burdensome and impractical. If a prosecutor were insufficiently sure of a potential threat, he or she might not in good faith be able to file an affidavit. The Department simply did not have the resources to investigate every case before filing a certification. The proposal, in her opinion, would increase the threat of danger to witnesses and would result in less witness cooperation.

She stated that she and the Attorney General had been following the proposal closely and did not believe that there was a systemic problem with disclosure of pretrial information. The Department had received few complaints from judges about pretrial disclosure. She added that when a court ordered pretrial discovery, the Department complied with the order.

Ms. Gorelick concluded that if the proposed rule were approved, the Department would fight it in the Congress because of its concern over the safety of witnesses, especially in violent crime cases. She also stated that victim groups would oppose the proposal.

Professor Schlueter stated that the advisory committee had heard and considered all these concerns in the past and had delayed publishing the draft on several occasions as a courtesy to the Department of Justice. The committee had made several concessions in the draft, including giving the United States attorney the right to avoid pretrial disclosure simply by filing a confidential, unreviewable certification with the court.

Professor Schlueter pointed out that several amendments had already been enacted to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence that require the government to disclose the names and statements of witnesses before trial. He also stated that most state courts and the military courts routinely provide defendants with the names, addresses, and statements of witnesses before trial.

He concluded that the public comments on the proposed rule were overwhelmingly favorable. Ms. Gorelick responded, however, that the United States

attorneys were strongly opposed to the amendments, but they had not chosen to submit comments.

Judge Bertelsman suggested and Judge Ellis moved that the court be given discretion in the rule to set a time for disclosure shorter than 7 days before trial. **The committee approved the motion with one objection (Ms. Gorelick).**

Judge Easterbrook stated that the committee note was not very clear in stating that the proposed amendment was in conflict with the Jencks Act. He stated that he did not believe a good enough case had been made to take the unusual step of relying on the supersession mechanism in the Rules Enabling Act.

After a number of drafting improvements had been accepted, the committee voted 7-6 to approve the rule and send it to the Judicial Conference.

Judge Stotler stated that a minority report should be drafted, and Ms. Gorelick agreed to prepare the report.

Judge Bertelsman then asked to change his vote and have the committee reconsider the rule. He stated that, even though he believed that the amendments were beneficial on the merits, they had no chance of succeeding unless they enjoyed near-unanimous support on the committee.

The committee voted 11-2 to reconsider its vote approving the amendments. It then voted 9-5 against sending the proposal to the Judicial Conference.

Mr. Schreiber moved to avoid a possible conflict with the Jencks Act by revising the proposed amendments to limit pretrial disclosure to the names of witnesses. All references to statements of witnesses would be eliminated. Judge Jensen responded that the advisory committee would probably this proposed revision, although it would be less than the committee had proposed.

Several members suggested that the proposed revision would eliminate any conflict with the Jencks Act. Ms. Gorelick replied that even if the statutory conflict were removed, the Department's policy concerns with the amendment remained.

The committee voted 12-2 to redraft the proposed amendment and limit pretrial disclosure to the names of witnesses. Ms. Gorelick and Professor Hazard were in opposition.

The committee then considered a clean draft of the amendment prepared by Professor Schlueter and Mr. Garner, reflecting the vote of the committee to limit pretrial disclosure to the names of witnesses. The revised draft committee note would

eliminate any reference to the Jencks Act. Mr. Pauley stated that the proposed redraft was defective, in that it appeared to allow the courts and defense counsel to challenge the good faith of the United States attorney. He suggested that the courts could expect routine challenges and satellite litigation. He and several members of the committee suggested substitute language for the text of the rule and the committee note.

Judge Wilson moved to adopt substitute language drafted by Judge Easterbrook. The committee approved the language with one objection.

The committee then voted 9-2 to approve the proposed amendments to the rule and send them to the Judicial Conference. (Mr. Klineberg and Professor Hazard dissented.)

FED. R. CRIM. P. 32

The amendment to Rule 32(d) had been proposed by the Department of Justice. The present rule has been interpreted as not authorizing a court to enter an order of forfeiture before sentencing. The amendment would permit a court to enter a preliminary forfeiture order at any time before sentencing.

No unfavorable comments had been received on the rule during the public comment period. The advisory committee, however, made a number of minor improvements in the rule as a result of the comments.

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

2. Amendments for Publication

Judge Stotler suggested that the committee address as part of a single discussion the proposed amendments that would require attorney participation in voir dire in both criminal and civil cases. (FED. R. CRIM. P. 24 and FED. R. CIV. P. 47).

FED. R. CRIM. P. 24

Judge Jensen reported that the proposed change to Rule 24 would give attorneys a right to engage in voir dire after there has been a preliminary voir dire by the judge. He stated that the advisory committee was of the view that voir dire is better when the attorneys participate in it. Moreover, he said, attorney participation helps the court in dealing with challenges to jurors, and it promotes the goal of a fair jury. He reported that the proposed amendments had been approved by the advisory committee on a 9-2 vote.

He pointed out that the text of the rule drafted by the advisory committee differed in some respects from that prepared by the Advisory Committee on Civil Rules. Under the language of the proposed criminal version, the court would conduct the "preliminary voir dire," the attorneys would conduct "a supplemental examination" of prospective jurors, and the court could place reasonable limits on—and terminate—the supplemental examination by the attorneys.

The committee engaged in a lengthy discussion of the merits of the proposal. Strong differences of opinion were expressed. Those in favor argued that the bar should be given an opportunity to comment on the proposal. They stated that only judges had made their views known to date, and the committee should publish the proposal in order to benefit from the comments of practicing lawyers.

Those opposed to the proposal emphasized that the current rules permit attorney voir dire, and most judges in fact allow some form of participation by lawyers. They objected to forcing all judges to require attorney voir dire in all cases, regardless of the type of case and the local legal culture. They also argued that there was no empirical basis for mandating a change in current procedure and requiring a single national rule. In summary, they argued that the committee should respect local legal culture and should not attempt to fix something that is not broken.

Some members expressed concern that the proposed rule would create a new right and provide new grounds for an appeal. Professor Cooper pointed out that the civil advisory committee was very sensitive to the issue of appellate review. As a result, the text of the committee's draft attempted to limit appellate review by providing explicitly for "reasonable limits set by the court in its discretion." The committee's proposed note, moreover, referred to the "broad discretion" of the district court, specifying that only a clear abuse by a trial judge would justify a reversal by the court of appeals. Professor Schlueter agreed, stating that it was also the intent of the criminal advisory committee to give maximum discretion to the trial judge.

Members suggested that the language of the rule was uncertain and that there were differences between the respective proposals of the civil and criminal advisory committees. It was unclear, for example, whether the amendments gave an attorney the right in all cases to ask questions orally, as opposed to the right to submit written questions to the court. Professor Hazard recommended clarification of the text of the rule or the committee note.

Mr. Schreiber moved to eliminate the word "preliminary" from line 3 of the criminal version of the amendments. **The committee approved the motion with one objection.** Mr. Schreiber also moved to add the word "however" on line 4 and the word "oral" on line 6. **The committee approved the motion with one objection. It further voted to make these changes in both FED. R. CRIM. P. 24 and FED. R. CIV. P. 47.**

Professor Schlueter stated that both the civil and criminal advisory committees favored publishing simultaneously both versions of the proposed amendments. Ms. Gorelick, however, responded that only one version should be submitted for public comment, covering both civil and criminal cases.

The committee first voted 8-7, with the chair breaking the tie, to table the proposed rules. It later voted 7-6 to untable the matter, to have Professor Cooper and Professor Schlueter work out differences in language between the civil and criminal versions of the rule, and to have the committee consider the matter further.

Judge Vinson, Professor Schlueter, and Professor Cooper subsequently presented a redrafted, common version of the proposed amendments.

Professor Hazard stated that greater time and care should be spent in drafting the proposed amendments. He suggested that, after preliminary consideration by the Standing Committee, they should be referred back to the respective advisory committees for additional attention. The chair added that it had been the consensus of the Standing Committee in the past that drafting issues generally should be resolved before the meetings, rather than at the meetings.

Other members recommended that the amendments, as revised during the course of the meeting, should be distributed for public comment immediately. Judge Vinson added that he was confident that the civil advisory committee would be satisfied with the revisions made by the Standing Committee.

The committee then approved several drafting changes in the proposed amendment suggested by the members.

The committee voted 8-3 to authorize publication of the revised amendments to FED. R. CIV. P. 47 and FED. R. CRIM. P. 24.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Mannes reported that the advisory committee had prepared for publication several amendments to the bankruptcy rules necessary to implement the provisions of the Bankruptcy Reform Act of 1994. He also noted that the Act had amended FED. R. BANK. P. 7004(h)—over the opposition of the Judicial Conference—to require that service on insured depository institutions in adversary proceedings be made by certified mail, rather than first class mail.

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of June 1, 1995. (Agenda Item 10)

1. Amendments for Judicial Conference Approval

Professor Resnick reported that public comment on the proposed amendments had been very light. Only 11 letters had been received, including two from bar associations voicing general approval of the amendments. None of the recommendations was viewed as controversial. The committee canceled the scheduled public hearing for lack of witnesses.

FED. R. BANK. P. 1006

The rule would be amended to provided that the new administrative fee set by the Judicial Conference—and any other fee fixed by the Conference and payable at the commencement of a case—may be paid in installments with court approval.

FED. R. BANK. P. 1007

The rule would be amended to provide that new schedules and statements need not be filed when a case is converted to another chapter of the Bankruptcy Code, regardless of the chapter under which the case was proceeding before conversion. The existing rule applies only to conversions of cases from Chapter 7.

FED. R. BANK. P. 1019

Paragraph 7 of the rule would be abrogated, consistent with the proposed abrogation of Rule 3002(c)(6), *infra*.

FED. R. BANK. P. 2002

Professor Resnick stated that Rule 2002, governing notices, would be amended in several respects. Of particular note was a change that would result in cost savings in administering Chapter 7 cases. Toward the conclusion of a Chapter 7 case, the trustee is required to file a final report and a final account. Under the current rule, both the report and the account must be mailed to all creditors. The advisory committee believed that it would be sufficient to send all creditors just the report, and not the account.

The advisory committee also clarified and significantly restyled subdivision (h), which authorizes the court to send notices only to those creditors who have filed a proof of claim.

FED. R. BANK. P. 2015

Rule 2015(b) and (c) would be amended to clarify that in a Chapter 12 case or a Chapter 13 case involving a debtor engaged in business the debtor or trustee does not have to file an inventory of the debtor's property, unless the court orders otherwise.

FED. R. BANK. P. 3002

Professor Resnick reported that under the current Rule 3002 an unsecured creditor or equity security holder must file a timely proof of claim or interest in order for the claim or interest to be allowed. He stated that several courts had held the rule invalid on the grounds that it was inconsistent with § 726 of the Bankruptcy Code, which recognizes that in a Chapter 7 case a creditor holding a claim that has been tardily filed may be entitled to receive a distribution. Other courts, however, had upheld the rule. The advisory committee expended a great deal of effort trying to improve Rule 3002 and make it consistent with the Code. It found a way to do so by abrogating subdivision (c)(6) and adding a proposed new subdivision (d) to the rule. These proposed changes had been distributed for public comment on September 1, 1994.

Later in 1994, however, Congress added § 502(b)(9) to the Bankruptcy Code to clarify the rights of creditors who tardily file a proof of claim. As a result, the committee's proposed amendments were no longer necessary and were deleted following the public comment period. The advisory committee, instead, changed the rule to simply conform to the 1994 legislation on filing proofs of claim.

Rule 3002 would also be amended to eliminate any distinction between domestic and foreign governmental units.

FED. R. BANK. P. 3016

Professor Resnick stated that the advisory committee proposed abrogating Rule 3016(a), because it is probably inconsistent with § 1121 of the Bankruptcy Code. The rule could be applied in such a way as to extend the debtor's statutorily prescribed exclusive period for filing a Chapter 11 plan without a finding of cause by the court.

FED. R. BANK. P. 4004

The current rule, among other things, provides that a debtor in a Chapter 7 case must be granted a discharge unless one of four conditions is present. The advisory committee would add two additional grounds for delaying or not granting a discharge, i.e., (1) when a motion is pending to extend the time for filing a complaint objecting to the discharge, and (2) when the debtor has not paid the filing fee in full.

FED. R. BANK. P. 5005

The amendments to Rule 5005(a), authorizing electronic filing of documents with the court, were approved by the committee earlier in the meeting in connection with the approval of FED. R. APP. P. 25, *supra*.

FED. R. BANK. P. 7004

Professor Resnick stated that the current Rule 7004 makes many of the provisions of FED. R. CIV. P. 4 applicable in adversary proceedings. The cross-references in Rule 7004 to Civil Rule 4, however, are to Rule 4 as it existed in December 1990. That rule was later amended in 1993. The advisory committee would amend Bankruptcy Rule 7004 to conform to the 1993 amendments to FED. R. CIV. P. 4.

Professor Resnick also pointed out that the Congress, as part of the Bankruptcy Reform Act of 1994, had added a new subdivision (h), governing service of process on an insured depository institution. In bankruptcy, service is normally made by first class mail. But under this Congressionally enacted rule, certified mail is required for service on an insured depository institution.

FED. R. BANK. P. 8008

Rule 8008 governs the filing of papers in an appeal to the district court or bankruptcy appellate panel. The advisory committee would incorporate into the rule the proposed electronic filing provisions of Rule 5005.

FED. R. BANK. P. 9006

The rule would be amended to conform to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8) as Rule 2002(a)(7).

The committee voted unanimously to approve the proposed amendments to the bankruptcy rules and send them to the Judicial Conference.

2. Amendments for Publication

Professor Resnick stated that most of the proposed amendments to be published for comment had been designed to implement the provisions of the Bankruptcy Reform Act of 1994, which amended approximately 60 sections of the Bankruptcy Code.

FED. R. BANK. P. 1019

Professor Resnick stated that the current rule, dealing with conversion of cases to Chapter 7 refers to the "superseded case" and the "original petition." It therefore leaves the erroneous impression that conversion of a case to another chapter results in a new case or a new petition for relief. Subdivisions (3) and (5) would be amended to delete these phrases. The advisory committee also reorganized and restyled subdivision (5) to make it easier to read.

FED. R. BANK. P. 1020

The new rule would implement the provision of the Bankruptcy Reform Act of 1994 that permits an eligible debtor to elect to be considered a small business in a Chapter 11 case. The proposed rule would specify the procedures and time limit for making the election.

FED. R. BANK. P. 2002

The advisory committee would amend Rule 2002(a)(1) to add a reference to § 1104(b) of the Code. The effect would be to require that 20 days' notice be given of the meeting of creditors to elect a trustee in a Chapter 11 case.

The Bankruptcy Reform Act of 1994 amended § 342(c) of the Code to provide that certain additional information be included in the caption of every notice required to be given by a debtor to a creditor. The proposed amendment to Rule 2002(n) would incorporate the new statutory requirements into the rule.

FED. R. BANK. P. 2007.1

The amendments to the rule would provide procedures for electing a trustee in a Chapter 11 case in accordance with § 1104(b) of the Code, as amended by the Bankruptcy Reform Act of 1994.

FED. R. BANK. P. 3014

The current rule provides that a secured creditor who elects application of § 1111(b)(2) of the Code must do so by the time of the hearing on the disclosure statement, or such later time as the court may fix. Professor Resnick stated that Rule 3014 had to be amended to take account of the provisions of the Bankruptcy Reform Act of 1994 governing small businesses under Chapter 11. In a small business case there may never be a hearing on the disclosure statement. Therefore, the advisory committee would amend the rule to provide a time limit 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.

FED. R. BANK. P. 3017

The rule governs the procedure by which a disclosure statement is approved before it is distributed to creditors. The advisory committee would amend subdivision (a) to carve out an exception for new Rule 3017.1, which covers small business cases.

The rule also currently specifies that record holders of securities, as of the date that the order approving the disclosure statement is entered, are the ones who will receive the solicitation documents. The advisory committee would amend the rule to give the court flexibility to fix the record date for determining the holders of securities who are entitled to receive the disclosure statement and other solicitation materials.

FED. R. BANK. P. 3017.1

The new rule would implement the concept, introduced in the Bankruptcy Reform Act of 1994, of conditional approval of a disclosure statement in a small business case. The amendment would provide that the disclosure statement may be distributed following conditional approval by the court. The court could then combine the disclosure statement hearing with the hearing on confirmation. If no timely objection were made to the disclosure statement, it would not be necessary for the court to hold a hearing on final approval of the statement.

FED. R. BANK. P. 3018

The rule would be amended to give the court flexibility to fix the record date for the purpose of determining which holders of securities may vote on a plan.

Judge Pratt pointed out an inconsistency in terminology between the proposed amendments to Rule 3018 and Rule 3017, even though the advisory committee apparently had intended the same substance in the two rules. The amendment to Rule 3017 reads: "or another date as the court may, after notice and a hearing, for cause fix." The amendment to Rule 3018 specifies: "or on another date fixed by the court, for cause, after notice and a hearing." He recommended using the language of Rule 3018 in both instances. Professor Resnick agreed to conform the language of the two provisions to whichever version the style committee and the advisory committee found superior.

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Los Angeles, California
January 10-12, 1996

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 10-12, 1996

1. Opening Remarks of the Chair.

2. Approval of Minutes.

3. Report of the Chair. (Oral report.)

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

      i. Approval of and submission of proposed rules amendments to the Supreme Court, with the exception of proposed amendments to Criminal Rule 16.
      ii. No action taken on committee's publication of proposed amendment to Civil Rule 47, regarding voir dire.

   B. Meeting with the Committee on Court Administration and Case Management regarding the implementation of the Civil Justice Reform Act.

   C. Meeting with the Chief Justice on rules-related issues.

4. Report of the Administrative Office.

5. Report of the Federal Judicial Center on Ongoing Rules-related Studies.

6. Report of the Style Subcommittee. (Oral report.)

   A. Composition of subcommittee.

   B. Publication of Bryan Garner's Style Guidelines.

7. Report of the Advisory Committee on Appellate Rules.

   A. **ACTION** — Revised Federal Rules of Appellate Procedure Under Uniform Drafting Standards recommended for public comment.

   B. Minutes and informational items.

8. Report of the Advisory Committee on Bankruptcy Rules.

   A. **ACTION** — Uniform Numbering System for Local Bankruptcy Rules.

   B. **ACTION** — Resolution approving future adjustments to the Official Forms to conform to dollar adjustments required under the Bankruptcy Code.

C. Minutes and informational item on the review of Official Forms.

9. **ACTION** — Recommendation that Judicial Conference Prescribe Uniform Numbering Systems for Local Rules Governing Appellate, Bankruptcy, Civil, and Criminal Procedure.

10. Report of the Advisory Committee on Civil Rules.

    A. Preliminary draft proposed amendments to Rule 23 regarding class action suits presented for the committee's consideration.

    B. Minutes and other informational items.

11. Report of the Advisory Committee on Criminal Rules.

    A. Status report on revised Federal Rules of Criminal Procedure Under Uniform Drafting Standards.

    B. Study of local rules for possible adoption as a Federal Rule of Criminal Procedure.

12. Report of the Advisory Committee on Evidence Rules. (Oral report.)

13. Long Range Plan for the Federal Courts — United States Judicial Conference.

14. Review of the Special Study Conference on Federal Rules Governing Attorney Conduct. (Oral report.)

15. Review of Self-study: Discuss plans to finalize self-study's recommendations, including adoption and publication of final self-study.

16. Update of Bibliography of Rules-related Materials.

17. Next Meetings. (Oral report.)

    A. Summer meeting scheduled for June 19-22, 1996, and a suggested Winter meeting scheduled for January 8-10, 1997.

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(Standing Committee)

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Agenda Item 1-3

OPENING REMARKS OF THE CHAIR

MEMORANDUM

December 8, 1995

To: Judge Stotler

From: Jean Ann Quinn

Re: Update: Ninth Circuit Local Rule 22

We recently received the following update on Ninth Circuit Draft Rule 22. According to the Circuit Clerk, the Court's Advisory Rules Committee has recommended some additional changes which will be reviewed by the Death Penalty Rules Committee next week. They will then be transmitted to the full Court for review and approval. Following this internal review procedure, draft rules will be circulated for public comment. The Circuit Clerk estimates that this will take place in March, 1996.

In the meantime, the current interim rules will remain in effect. There have been slight modifications to the version we received in May. The changes do not bear directly on the issues discussed by the Committee. Note, however, that under the new version of Rule 22-5(e)(2), on a subsequent petition or motion, any active or senior judge may request that the en banc court review the collateral death penalty panel's order granting or denying a certificate of probable cause or stay of execution. (Under the previous version, this was limited to active judges.) The favorable vote of a majority of active judges is still required for en banc review to result.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Draft Minutes of the Meeting of July 6-7, 1995
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, July 6-7, 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
Jamie S. Gorelick, Esquire
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

Judge Wilson attended only the Friday portion of the meeting. In addition to Deputy Attorney General Gorelick, the Department of Justice was represented by Geoffrey M. Klineberg, Special Assistant to the Deputy Attorney General. Roger A. Pauley of the Department attended the meeting on Friday.

Supporting the committee were Professor Daniel R. Coquillette, Reporter to the committee, Peter G. McCabe, Secretary to the committee, John K. Rabiej, Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, and Mark D. Shapiro, senior attorney in the rules 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 C. Roger Vinson, Member
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules -
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules -
Judge Ralph K. Winter, Jr., Chair
Professor Margaret A. Berger, Reporter

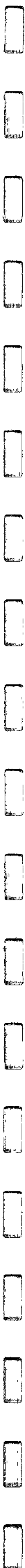
Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan R. Garner, consultants to the committee, Mary P. Squiers, project director of the local rules project, Judith A. McKenna of the Research Division of the Federal Judicial Center. Additional committee support was provided by Paul A. Zingg, Patricia A. Channon, attorneys in the Office of Judges Programs of the Administrative Office, and Judith W. Krivit and Anne P. Rustin of the Rules Committee Support Office.

INTRODUCTORY REMARKS

Judge Stotler reported that most state bar associations had designated attorneys to serve as their point of contact with the rules committees. She suggested that members of the committee could be helpful in persuading the remaining state bar groups to name points of contact.

Judge Stotler reported on action taken by the Judicial Conference at its March 1995 session with respect to the federal rules, including: (1) the Conference's approval of revised official bankruptcy forms, (2) its recommitment to the committee of proposed amendments to FED. R. CIV. P. 26(c), (3) its approval of a legislative repeal of the service provisions of the Suits in Admiralty Act, and (4) its return without action of the issue of cameras in the courtroom to the Court Administration and Case Management Committee for further consideration. She also reported that the Conference had transmitted to the Congress its recommendations that: (1) the Congress should reconsider FED. R. EVID. 413-415 as a matter of policy, and (2) alternatively, it should enact the committee's substitute amendments. She added, however, that the Judiciary had not succeeded in convincing the Congress to act favorably on the recommendations.

Judge Stotler noted that an adjustment had been made in Recommendation 30(c) of the *Proposed Long Range Plan for the Federal Courts* accommodating the suggestion of the state chief justices that the plan refer specifically to the need for input by the state bench into the federal rules process.



The chair reported that the Supreme Court had adopted generally the proposed rules amendments approved by the Judicial Conference at its September 1994 session. The Court had, however, changed the word "must" to "shall" throughout the amendments. She added that the Chief Justice had stated in correspondence to the chairman of the Executive Committee of the Conference that: "In the revisions of the Supreme Court Rules now in progress, [the Court is] giving consideration to the appropriate use of 'shall.'" The court, moreover, thinks "it sound that terminology changes in the Federal Rules be implemented in thoroughgoing, rather than a piecemeal, way." The Court had also restored the word "made" in FED. R. CIV. P. 83(a)(1) to make it consistent with FED. R. CRIM. P. 57(c).

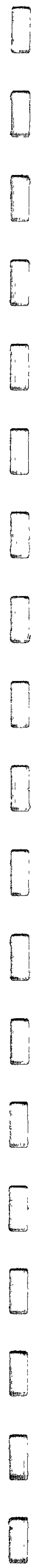
Judge Stotler stated that she and the Reporter, Professor Coquillette, planned to attend the December 1995 meeting of the Court Administration and Case Management Committee. She emphasized the need to work with that committee to fulfill the Judicial Conference's obligations under the Civil Justice Reform Act. The Act, among other things, requires the Conference to study the results of the procedural experiments in the district courts and to initiate proposals for possible changes in the federal rules.

The Chair issued a statement of policy regarding the participation of visitors at the public meetings and their right to observe and meet with members of the Committee at recess as may be appropriate. The Chair clarified that the Standing Committee meeting is not a meeting where visitors are entitled to speak, because it is a business meeting rather than a public hearing. But, on invitation of the Chair, visitors may be heard.

NINTH CIRCUIT LOCAL RULE 22

Professor Coquillette reported that he had filed a report at the last committee meeting expressing the view that Local Rule 22 of the United States Court of Appeals for the Ninth Circuit, dealing with procedures in death penalty cases, was inconsistent with federal law in two respects. (See January 1995 Committee Minutes, pages 14-15.) The committee concurred in the report and transmitted it to the Ninth Circuit, inviting the court to consider the views of the committee and take whatever steps, if any, it deemed appropriate.

Professor Coquillette reported that in response to the concerns of the committee, the Ninth Circuit had issued a new, interim rule to address the problems cited by the committee. The court had followed suggestions made by the committee: (1) to change the manner of voting for en banc consideration, and (2) to reinstate the requirement of individual consideration of certificates of probable cause. The court was in the process of seeking public comment on the proposed new rule, including comments from the attorneys general who had petitioned the Judicial Conference to abrogate Rule 22.



Judge Stotler stated that the Ninth Circuit was scheduled to address the rule again before the end of the summer. Accordingly, the committee should defer further consideration of the matter until its January 1996 meeting.

CONFERENCE ON ATTORNEY CONDUCT

The committee adopted without objection Professor Coquillette's suggestion that the committee convene a one-day conference to explore attorney conduct issues. The conference would be held in conjunction with the committee's January 1996 meeting. The chair asked Professor Coquillette to work with the Administrative Office in making arrangements for the conference and preparing a proposed list of about 25 knowledgeable and representative invitees.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee approved unanimously the minutes of its January 11-13, 1995 meeting.

LEGISLATIVE REPORT

Mr. Rabiej summarized actions initiated in the new Congress that would have an impact on the federal rules, including proposals to amend FED. R. CIV. P. 11 (sanctions) and 68 (offer of judgment). He stated that Judge Higginbotham, Judge Scirica, and Professor Cooper met with Congressional staff and advised them of concerns with several rules-related provisions in pending legislation governing securities litigation.

Mr. Rabiej reported that on February 8, 1995, the Administrative Office had transmitted to the Congress the Judicial Conference's report on FED. R. EVID. 413-415, requesting that the Congress reconsider these rules. By operation of law, the new rules would take effect on July 9, 1995. He stated that a great deal of effort had been undertaken by Judge Winter and others to meet with members of the Congress and their staff and to urge enactment of the Conference's substitute language.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Professor Mooney presented the report of the advisory committee, as set forth in Judge Logan's memorandum of June 5, 1995. (Agenda Item 5)

She noted at the outset that the committee had to make a policy decision regarding the appropriate terminology to use in light of the Supreme Court's recent action in changing "must" to "shall" in several proposed rules amendments. She reported that the advisory committee, in drafting amendments for Judicial Conference approval, had followed the convention of using "shall" when there is an active voice sentence and "must" when there is a passive voice sentence.

Mr. Garner stated that the golden rule of drafting is that a word should have one single meaning and should be used consistently. He stated that the word "shall" has as many as eight different meanings. Accordingly, he argued that it was not appropriate simply to change every "must" to "shall."

Several members stated that it was important to proceed with style improvements and substitute "must" for "shall" wherever appropriate. They emphasized the need to explain clearly to the Supreme Court why the committees were making the changes in terminology.

Judge Logan accepted a suggestion that the proposed amendments submitted for Judicial Conference approval be revised to use "shall" throughout, in light of the Supreme Court's recent action. He added, though, that his advisory committee would proceed expeditiously to restyle the entire body of appellate rules and use "must" as the consistent term to describe a duty to act.

Judge Logan pointed out that the advisory committee had incorporated all the other conventions of the style subcommittee in the proposed amendments, such as the use of shorter sentences and more breakouts of text. He also reported that the advisory committee had voted 7-1 to change the term "in banc" to "en banc," recognizing majority contemporary usage. Judge Pratt noted that he had dissented on this point in the style subcommittee because the governing statute uses the term "in banc."

1. Amendments for Judicial Conference Approval

Professor Mooney stated that the advisory committee was seeking Judicial Conference approval of amendments to four rules - FED. R. APP. P. 21, 25, 26, and 27.

FED. R. APP. P. 21

Professor Mooney explained that Rule 21, dealing with mandamus, had been published for public comment a second time. The major revision in the proposed amendment would eliminate the requirement that the trial judge be named and served as a respondent in a mandamus proceeding. As amended, the rule would reflect the reality that mandamus is, normally, an adversary proceeding between the parties.

Professor Mooney stated that the only controversial issue raised during consideration of the proposed amendments was whether the trial judge should be accorded an explicit right to appear before the court of appeals. She pointed out that the amended rule would require that a copy of the final disposition of the application for the writ be sent only to the clerk of the trial court, who would be expected to give it to the judge. The rule would also be amended to allow the court of appeals to "invite" the trial judge to participate.

Professor Mooney explained that the version of the rule first published by the advisory committee had given the trial judge a right to appear in the mandamus proceedings before the court of appeals. There was strong opposition in the public responses to having the trial judge participate actively in an appellate proceeding. Commentators pointed out that the judge, after having argued against one or more parties in the court of appeals, would have to resume hearing the case between the same parties. Some members of the committee agreed that it was unseemly to put the trial judge in the middle of the controversy, thereby raising concerns as to the judge's neutrality and objectivity. By analogy, they argued that on a "straight appeal" a trial judge would not be allowed to file a brief defending his or her evidentiary rulings or other judicial acts.

Judge Bertelsman stated that he strongly favored the earlier published version of the amended rule, which would have given the trial judge an express right to appear before the court of appeals. He argued that there are cases in which none of the parties is interested in supporting the trial judge's actions. This occurs most often when the trial judge imposes procedural requirements that the parties find burdensome or objectionable. Accordingly, he objected to the amendment to the extent that it would eliminate the trial judge's right to appear.

Judge Logan added that the commentators who had opposed trial judges' participation were particularly concerned about two matters: (1) that the trial judge might ask one of the parties to write the brief supporting the judge's actions, and (2) that participation was counterproductive and inefficient in cases when prisoners file an application for a writ of mandamus to force the trial judge to act quickly on their papers. These applications are numerous and generally are handled without the need for adversary proceedings or an appearance by the trial judge.

Judge Parker stated that sending notice of the mandamus application to the trial clerk alone would not guarantee that the trial judge would actually receive it. Accordingly, he suggested: (1) adding to line 16 the words "and give a copy to the trial judge," and (2) revising the second sentence of subdivision (b)(4) to read: "The trial court judge may request permission to respond, but may not respond unless invited or ordered to do so by the court of appeals."

The committee took separate straw votes on three concepts embodied in the proposed amendments. First, it voted with one objection to require that the trial judge be given a copy of the mandamus petition and the final disposition. Second, it voted 10-4 to amend subdivision (b)(4) to provide that the trial judge may request permission to participate in the appellate proceedings. Third, it voted with one objection against giving the trial judge a right to appear.

On Thursday afternoon Judge Logan distributed a retyped draft of the proposed amendments to Rule 21. Justice Veasey moved approval of the draft. **The committee voted 10-1, over Judge Bertelsman's objection, to approve the proposed amendments and send them to the Judicial Conference.**

FED. R. APP. P. 25

a. Filing and Service by Commercial Carrier

Professor Mooney reported that Rule 25, dealing with filing and service, had been published originally with a provision stating that a party wishing to file a brief or appendix using the "mailbox rule" must file the document by first class mail. In response, several comments from the bar suggested that the use of commercial carriers should also be authorized. Accordingly, the advisory committee amended and republished the rule to allow filing by "reliable commercial carrier." The second round of public comments, however, produced several warnings that litigation would arise over the meaning of the word "reliable."

Thus, the advisory committee's current draft would allow the use of commercial carriers, but omits the term "reliable." It would allow a party to use the mailbox rule if it gives the paper to a commercial carrier who will deliver it within three days. It would also allow service on another party by commercial carrier.

The public comments also pointed out that it would be difficult as a practical matter for recipients of documents to distinguish between personal service and delivery by commercial carrier. Thus, the rule had been further amended to provide that service may be made 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. Rule 26(c) was also amended to provide the 3-day extension regardless of the method of service, unless the document is delivered to the party on the date of service.

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

b. Electronic Filing

Professor Coquillette stated that the reporters had convened twice to draft common language governing electronic filing of documents with a court. Their common language would be included in proposed amendments to FED. R. APP. P. 25(a)(2)(D), FED. R. BANK. P. 5005(a), and FED. R. CIV. P. 5(e). He pointed out, though, that two technical changes in language had to be made to accommodate the bankruptcy rules. First, the proposed bankruptcy version of the rule refers to the filing of "documents," rather than "papers" to clarify that public access requirements under the Bankruptcy Code will apply to electronically filed data that may never be in tangible paper form. Second, the bankruptcy version contains additional references to the Federal Rules of Bankruptcy Procedure themselves, to those Federal Rules of Civil Procedure incorporated by reference into the Bankruptcy Rules, and to § 107 of the Bankruptcy Code.

The committee voted without objection to approve the proposed, common amendments to the appellate, bankruptcy, civil, and criminal rules, dealing with electronic filing, and send them to the Judicial Conference.

FED. R. APP. P. 26

Professor Mooney reported that the proposed changes in Rule 26 were companion amendments to those of Rule 25. They would provide a 3-day extension if a party is served by commercial carrier, unless the party has received the paper on the date of service. The intent was to allow an extra 3 days if delivery is by commercial carrier, but not if the papers have actually been delivered on the date of service.

Some members pointed out a problem with the draft language in that it would seem to include the possibility of a paper being served "before" the date of service. Judge Logan suggested improving the language by closing the proposed amendment with the words: "unless the paper is delivered on the date of service." He also suggested eliminating from the caption the words, "by Mail or Commercial Carrier." Judge Pratt moved to eliminate the words "or acknowledgement" on lines 7-8. **These changes were approved by the committee without objection.**

The committee then voted to approve the revised rule and send it to the Judicial Conference.

FED. R. APP. P. 27

Professor Mooney stated that Rule 27, governing motions, had been entirely rewritten by the advisory committee. The amended rule would require that all arguments be made in the motion itself. Separate briefs would not be allowed. The rule also would provide a right to reply to a response and would impose page limits on

motions and responses. The advisory committee had moved the requirements regarding the form of motions from Rule 32 to Rule 27.

Professor Mooney stated that, upon the advice of Mr. Garner, the words "with the following exceptions" should be removed from lines 86-87 and the two indented paragraphs following should be integrated into the text as additional sentences.

She also pointed out that Judge Stotler had noticed a difference between the language in Rule 27 and the language of the proposed amendments to Rule 32. Professor Mooney stated that the advisory committee would want the language of the two rules to be identical and would change Rule 27 to incorporate the language of proposed Rule 32.

Mr. Perry noted, however, that the proposed amendments to Rule 32 had not yet been published. He suggested that the amendments to Rule 27 be deferred until the public comments had been received on Rule 32. Both rules could then be considered together. Other members suggested that additional drafting changes were needed in Rule 27.

Mr. Perry moved to table approval of Rule 27 until after public comment had been received on Rule 32. The motion was approved without objection.

2. **Amendments for Publication**

FED. R. APP. P. 26.1

Professor Mooney reported that Rule 26.1, dealing with corporate disclosure statements, had been reorganized by the advisory committee to make it easier to understand. The principal substantive change would simplify what a corporate party must disclose. The amendment would eliminate the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. It would require disclosure only of a parent corporation and of any stockholders that are publicly held companies owning 10% or more of the party's stock.

Ms. Gorelick suggested that the rule be matched up with the canons of judicial ethics since there is a high level of public concern on the issue of a judge's financial interests. Judge Easterbrook recommended, and Judge Logan agreed, that the views of the Committee on Codes of Conduct should be solicited expressly during the public comment period.

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

FED. R. APP. P. 28

Professor Mooney pointed out that the changes to Rule 28 were merely conforming amendments to the proposed changes in Rule 32, plus some stylistic improvements and cross-reference changes.

The committee voted without objection to approve the proposed amendments for publication. On request of Judge Logan, however, the committee later decided to withdraw Rule 28 from publication.

FED. R. APP. P. 29

Professor Mooney stated that Rule 29, governing amicus curiae briefs, had been rewritten entirely. The major change would require that the proposed brief be filed with the motion for leave to file the brief. The motion would have to show the relevance of the matters asserted by the amicus, and the brief would have to comply with all the requirements for a brief specified in Rule 32. It would fix a limit on the length of an amicus brief at half the length of the principal brief. It would also make clear that an amicus may not file a reply brief and would not have the right to participate in oral argument.

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

FED. R. APP. P. 32

Professor Mooney reported that the principal changes made in Rule 32 following publication were as follows:

1. The rule, as published, had provided that briefs could be printed on both sides of a page. In response to a great many negative comments, the advisory committee decided to change the rule and allow printing only on one side.

2. In light of criticism from the public that the requirement of 300 dots per inch was too technical for the text of the rule, the matter was moved from the text to the committee note.

3. All references to carbon copies were deleted.

4. The preference for proportional typeface was deleted in light of many comments from judges expressing a preference for monospaced typeface.

5. In response to a large number of comments from appellate judges that the proposed rule had not mandated a large enough typeface, the advisory committee changed the rule to specify a minimum of 14 points.

6. The requirement for monospace typeface was increased to a maximum of 10-1/2 characters per inch since some computers have more than 10 monospaced characters per inch.

7. The provisions for pamphlet briefs were eliminated because these briefs are very rare. Moreover, elimination of the provisions would result in a simpler rule.

8. The maximum length of a brief was fixed at 14,000 words, with an average of not more than 280 words per page.

9. The "safe harbor" provision was eliminated for proportional spacing, but retained for monospaced briefs. As published, the amendment would have required an attorney to certify compliance with the word count. As amended, the certification would be more detailed and would apply to both proportionally spaced briefs and monospaced briefs.

10. As amended, a brief would have to lie "reasonably flat" when open.

11. The restriction on the use of sans serif type was eliminated.

Judge Easterbrook reported that many appellate judges had stated that they would like to receive copies of the disks on which briefs are prepared for the judges' use in writing their opinions. Accordingly, he suggested that Rule 32 might be further amended to require that when lawyers prepare their brief by computer they should provide a disk to the court. Such a provision would not require them to prepare their briefs on a computer, but it would require them to give a disk to the court if they did in fact use a computer.

A straw vote was taken on the concept of requiring that a disk be filed with the court, if one is available. The concept was approved without objection, and Judge Easterbrook was requested to prepare appropriate draft language to be included in the package of amendments to Rule 32.

Judge Logan suggested that it might be better to send the proposal on filing disks back to the advisory committee since it had not considered the issue. Judge Stotler added that it was unusual for the Standing Committee to draft and publish a rule directly. Professor Hazard emphasized that it was essential for the rules committees to take their time and draft proposed amendments in a careful and thorough manner. It

was particularly important to resolve all drafting problems with Rule 32 before distribution for public comment because it had already been published twice before.

The committee voted 8-5 to defer publication of the proposed amendments to Rule 32 pending resolution of all outstanding drafting issues.

Several members stated that they had additional suggestions to improve the language of the rule. In response, Judge Logan proposed having the advisory committee consider all the suggestions and report back to the Standing Committee at its January 1996 meeting with a revised version of Rule 32. **Accordingly, the committee agreed without objection to defer further action on Rule 32.**

Judge Logan stated that the proposed amendments to Rule 28 were dependent on Rule 32. Accordingly, he recommended that Rule 28 also be deferred for further action.

The committee voted without objection to defer taking action on Rule 28.

Judge Logan reported that he was sympathetic with the complaints by the bar that there had been too many changes in the rules. He explained, however, that the Advisory Committee on Appellate Rules had taken the local rules project very seriously and had proposed a substantial number of amendments to the national rules in order to eliminate local court rules and thereby achieve greater national uniformity. He suggested that the effort could result in eliminating as many as half the local appellate rules.

Judge Logan stated that he expected to present a restyled package of the entire body of the Federal Rules of Appellate Procedure for consideration by the Standing Committee at its January 1996 meeting. He suggested that it was very important to document the style improvements and to emphasize that no changes in substance are intended unless clearly identified as such. He suggested that the public comment period should be longer than normal and that the restyling project should be explained carefully to bench and bar.

FED. R. APP. P. 35

Professor Mooney reported that the principal proposed change proposed by the advisory committee was to eliminate a trap in the rule. When a party files a motion for a panel rehearing, the filing tolls the time for filing a petition for certiorari in the Supreme Court. On the other hand, when a party files a suggestion for a hearing en banc, it does not toll the time for filing a petition for certiorari.

The advisory committee decided to eliminate the trap by treating a suggestion for hearing en banc the same as a petition for a panel rehearing. The committee also would change the term "suggestion" for a hearing en banc to a "petition" to further clarify the

rule. Corresponding changes would also be made in Rule 41. Professor Mooney reported that the Supreme Court had been made aware by correspondence of the advisory committee's proposed action and had not voiced any objection to the committee's approach.

Judge Logan added that the pertinent Supreme Court rule provided that if a local circuit rule treated a suggestion for a hearing en banc the same as a petition for a panel rehearing, it would toll the time for filing a petition for certiorari. Thus, the proposed amendments to Rule 35 would supersede local rule variations with a national norm.

Professor Mooney stated that the advisory committee, at the request of the Solicitor General, would also amend the rule to specify that inter-circuit conflicts are a matter of "exceptional importance" that may justify a rehearing en banc. The committee also added a new 15-page limit on the length of petitions.

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

FED. R. APP. P. 41

Professor Mooney pointed out that some of the amendments were designed to coordinate with the proposed amendments to Rule 35. They also contain a new provision, added at the request of the Department of Justice, stating that the mandate is effective when issued. In addition, they would increase the presumptive period for a stay of mandate from 30 days to 90 days. A court, though, is authorized to issue a stay for a period shorter than 90 days.

Judge Easterbrook expressed concern that the language of the proposed amendment could be read as giving a party an automatic 7 days' delay simply by filing a motion to stay the mandate. Moreover, there appeared to be no limit to the number of stay motions that a party could file. Judge Easterbrook suggested, however, that the rule be published in its current form and that the difficulty be addressed after the close of the comment period.

The committee voted with one objection to approve the proposed amendments for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of May 23, 1995. (Agenda Item 6)

1. Amendments for Judicial Conference Approval

Judge Jensen reported that the advisory committee had published proposed amendments to FED. R. CRIM. P. 16 and 32 and had held public hearings on them. The advisory committee had considered the public comments, made several changes in the proposed amendments, and voted to recommend their approval by the Judicial Conference.

FED. R. CRIM. P. 16

a. *Disclosure of Expert Witnesses*

The proposed amendments to Rule 16(a)(1)(E) and Rule 16(b)(1)(C) had been requested by the Department of Justice. They would require the defendant, on request, to provide pretrial disclosure of information concerning its expert witnesses on the defendant's mental condition. The government would be required to make reciprocal disclosure.

The committee voted without objection to approve the proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C).

b. *Pretrial Disclosure of Witness Names and Statements*

The proposed amendments to Rule 16(a)(1)(F) and Rule 16(b)(1)(D) would require the government to disclose 7 days before trial the names and statements of witnesses that it intends to call during its case-in-chief. Disclosure would not be required, however, if the attorney for the government: (1) believes in good faith that pretrial disclosure of this information would threaten the safety of any person or lead to an obstruction of justice, and (2) files under seal an ex parte, unreviewable written statement to that effect. The amendments would apply reciprocal discovery requirements on the defense.

Judge Jensen reported that at the suggestion of magistrate judges, the advisory committee had restricted application of the rule to felony cases. It had also clarified the rule to provide explicitly that the attorney for the government may decline to disclose either the witness' name or statement, or both.

Judge Jensen asserted that reasonable pretrial disclosure was sound public policy and that the rule would further good trial management. Among other things, it would eliminate the need for a court to stop a case in the middle of a trial. He recognized that the rule presented a potential conflict with the Jencks Act, but argued that it was appropriate to proceed, using the Rules Enabling Act process to bring these important policy matters to the attention of the Congress.

Ms. Gorelick stated that the Department of Justice was strongly opposed to the proposed amendments. She argued that their disclosure requirements were different from, and more extensive than, those required in the Jencks Act. She added that the Department had worked hard to avoid problems of delay and disruption of trial management. It had also engaged in extensive training of prosecutors and cooperation with judges to resolve discovery problems. She stated that the Department instructed its prosecutors to provide the names and statements of witnesses wherever possible, when there is no danger to witnesses.

She emphasized that the requirement in the proposed rule that the United States attorney certify that a witness is endangered was both excessively burdensome and impractical. If a prosecutor were insufficiently sure of a potential threat, he or she might not in good faith be able to file an affidavit. The Department simply did not have the resources to investigate every case before filing a certification. The proposal, in her opinion, would increase the threat of danger to witnesses and would result in less witness cooperation.

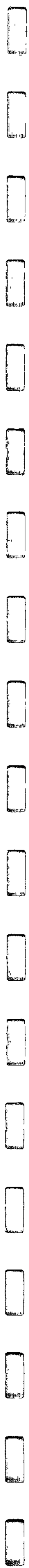
She stated that she and the Attorney General had been following the proposal closely and did not believe that there was a systemic problem with disclosure of pretrial information. The Department had received few complaints from judges about pretrial disclosure. She added that when a court ordered pretrial discovery, the Department complied with the order.

Ms. Gorelick concluded that if the proposed rule were approved, the Department would fight it in the Congress because of its concern over the safety of witnesses, especially in violent crime cases. She also stated that victim groups would oppose the proposal.

Professor Schlueter stated that the advisory committee had heard and considered all these concerns in the past and had delayed publishing the draft on several occasions as a courtesy to the Department of Justice. The committee had made several concessions in the draft, including giving the United States attorney the right to avoid pretrial disclosure simply by filing a confidential, unreviewable certification with the court.

Professor Schlueter pointed out that several amendments had already been enacted to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence that require the government to disclose the names and statements of witnesses before trial. He also stated that most state courts and the military courts routinely provide defendants with the names, addresses, and statements of witnesses before trial.

He concluded that the public comments on the proposed rule were overwhelmingly favorable. Ms. Gorelick responded, however, that the United States



attorneys were strongly opposed to the amendments, but they had not chosen to submit comments.

Judge Bertelsman suggested and Judge Ellis moved that the court be given discretion in the rule to set a time for disclosure shorter than 7 days before trial. **The committee approved the motion with one objection (Ms. Gorelick).**

Judge Easterbrook stated that the committee note was not very clear in stating that the proposed amendment was in conflict with the Jencks Act. He stated that he did not believe a good enough case had been made to take the unusual step of relying on the supersession mechanism in the Rules Enabling Act.

After a number of drafting improvements had been accepted, the committee voted 7-6 to approve the rule and send it to the Judicial Conference.

Judge Stotler stated that a minority report should be drafted, and Ms. Gorelick agreed to prepare the report.

Judge Bertelsman then asked to change his vote and have the committee reconsider the rule. He stated that, even though he believed that the amendments were beneficial on the merits, they had no chance of succeeding unless they enjoyed near-unanimous support on the committee.

The committee voted 11-2 to reconsider its vote approving the amendments. It then voted 9-5 against sending the proposal to the Judicial Conference.

Mr. Schreiber moved to avoid a possible conflict with the Jencks Act by revising the proposed amendments to limit pretrial disclosure to the names of witnesses. All references to statements of witnesses would be eliminated. Judge Jensen responded that the advisory committee would probably this proposed revision, although it would be less than the committee had proposed.

Several members suggested that the proposed revision would eliminate any conflict with the Jencks Act. Ms. Gorelick replied that even if the statutory conflict were removed, the Department's policy concerns with the amendment remained.

The committee voted 12-2 to redraft the proposed amendment and limit pretrial disclosure to the names of witnesses. Ms. Gorelick and Professor Hazard were in opposition.

The committee then considered a clean draft of the amendment prepared by Professor Schlueter and Mr. Garner, reflecting the vote of the committee to limit pretrial disclosure to the names of witnesses. The revised draft committee note would

eliminate any reference to the Jencks Act. Mr. Pauley stated that the proposed redraft was defective, in that it appeared to allow the courts and defense counsel to challenge the good faith of the United States attorney. He suggested that the courts could expect routine challenges and satellite litigation. He and several members of the committee suggested substitute language for the text of the rule and the committee note.

Judge Wilson moved to adopt substitute language drafted by Judge Easterbrook. The committee approved the language with one objection.

The committee then voted 9-2 to approve the proposed amendments to the rule and send them to the Judicial Conference. (Mr. Klineberg and Professor Hazard dissented.)

FED. R. CRIM. P. 32

The amendment to Rule 32(d) had been proposed by the Department of Justice. The present rule has been interpreted as not authorizing a court to enter an order of forfeiture before sentencing. The amendment would permit a court to enter a preliminary forfeiture order at any time before sentencing.

No unfavorable comments had been received on the rule during the public comment period. The advisory committee, however, made a number of minor improvements in the rule as a result of the comments.

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

2. Amendments for Publication

Judge Stotler suggested that the committee address as part of a single discussion the proposed amendments that would require attorney participation in voir dire in both criminal and civil cases. (FED. R. CRIM. P. 24 and FED. R. CIV. P. 47).

FED. R. CRIM. P. 24

Judge Jensen reported that the proposed change to Rule 24 would give attorneys a right to engage in voir dire after there has been a preliminary voir dire by the judge. He stated that the advisory committee was of the view that voir dire is better when the attorneys participate in it. Moreover, he said, attorney participation helps the court in dealing with challenges to jurors, and it promotes the goal of a fair jury. He reported that the proposed amendments had been approved by the advisory committee on a 9-2 vote.

He pointed out that the text of the rule drafted by the advisory committee differed in some respects from that prepared by the Advisory Committee on Civil Rules. Under the language of the proposed criminal version, the court would conduct the "preliminary voir dire," the attorneys would conduct "a supplemental examination" of prospective jurors, and the court could place reasonable limits on—and terminate—the supplemental examination by the attorneys.

The committee engaged in a lengthy discussion of the merits of the proposal. Strong differences of opinion were expressed. Those in favor argued that the bar should be given an opportunity to comment on the proposal. They stated that only judges had made their views known to date, and the committee should publish the proposal in order to benefit from the comments of practicing lawyers.

Those opposed to the proposal emphasized that the current rules permit attorney voir dire, and most judges in fact allow some form of participation by lawyers. They objected to forcing all judges to require attorney voir dire in all cases, regardless of the type of case and the local legal culture. They also argued that there was no empirical basis for mandating a change in current procedure and requiring a single national rule. In summary, they argued that the committee should respect local legal culture and should not attempt to fix something that is not broken.

Some members expressed concern that the proposed rule would create a new right and provide new grounds for an appeal. Professor Cooper pointed out that the civil advisory committee was very sensitive to the issue of appellate review. As a result, the text of the committee's draft attempted to limit appellate review by providing explicitly for "reasonable limits set by the court in its discretion." The committee's proposed note, moreover, referred to the "broad discretion" of the district court, specifying that only a clear abuse by a trial judge would justify a reversal by the court of appeals. Professor Schlueter agreed, stating that it was also the intent of the criminal advisory committee to give maximum discretion to the trial judge.

Members suggested that the language of the rule was uncertain and that there were differences between the respective proposals of the civil and criminal advisory committees. It was unclear, for example, whether the amendments gave an attorney the right in all cases to ask questions orally, as opposed to the right to submit written questions to the court. Professor Hazard recommended clarification of the text of the rule or the committee note.

Mr. Schreiber moved to eliminate the word "preliminary" from line 3 of the criminal version of the amendments. **The committee approved the motion with one objection.** Mr. Schreiber also moved to add the word "however" on line 4 and the word "oral" on line 6. **The committee approved the motion with one objection. It further voted to make these changes in both FED. R. CRIM. P. 24 and FED. R. CIV. P. 47.**

Professor Schlueter stated that both the civil and criminal advisory committees favored publishing simultaneously both versions of the proposed amendments. Ms. Gorelick, however, responded that only one version should be submitted for public comment, covering both civil and criminal cases.

The committee first voted 8-7, with the chair breaking the tie, to table the proposed rules. It later voted 7-6 to untable the matter, to have Professor Cooper and Professor Schlueter work out differences in language between the civil and criminal versions of the rule, and to have the committee consider the matter further.

Judge Vinson, Professor Schlueter, and Professor Cooper subsequently presented a redrafted, common version of the proposed amendments.

Professor Hazard stated that greater time and care should be spent in drafting the proposed amendments. He suggested that, after preliminary consideration by the Standing Committee, they should be referred back to the respective advisory committees for additional attention. The chair added that it had been the consensus of the Standing Committee in the past that drafting issues generally should be resolved before the meetings, rather than at the meetings.

Other members recommended that the amendments, as revised during the course of the meeting, should be distributed for public comment immediately. Judge Vinson added that he was confident that the civil advisory committee would be satisfied with the revisions made by the Standing Committee.

The committee then approved several drafting changes in the proposed amendment suggested by the members.

The committee voted 8-3 to authorize publication of the revised amendments to FED. R. CIV. P. 47 and FED. R. CRIM. P. 24.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Mannes reported that the advisory committee had prepared for publication several amendments to the bankruptcy rules necessary to implement the provisions of the Bankruptcy Reform Act of 1994. He also noted that the Act had amended FED. R. BANK. P. 7004(h)—over the opposition of the Judicial Conference—to require that service on insured depository institutions in adversary proceedings be made by certified mail, rather than first class mail.

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of June 1, 1995. (Agenda Item 10)

1. Amendments for Judicial Conference Approval

Professor Resnick reported that public comment on the proposed amendments had been very light. Only 11 letters had been received, including two from bar associations voicing general approval of the amendments. None of the recommendations was viewed as controversial. The committee canceled the scheduled public hearing for lack of witnesses.

FED. R. BANK. P. 1006

The rule would be amended to provided that the new administrative fee set by the Judicial Conference—and any other fee fixed by the Conference and payable at the commencement of a case—may be paid in installments with court approval.

FED. R. BANK. P. 1007

The rule would be amended to provide that new schedules and statements need not be filed when a case is converted to another chapter of the Bankruptcy Code, regardless of the chapter under which the case was proceeding before conversion. The existing rule applies only to conversions of cases from Chapter 7.

FED. R. BANK. P. 1019

Paragraph 7 of the rule would be abrogated, consistent with the proposed abrogation of Rule 3002(c)(6), *infra.*

FED. R. BANK. P. 2002

Professor Resnick stated that Rule 2002, governing notices, would be amended in several respects. Of particular note was a change that would result in cost savings in administering Chapter 7 cases. Toward the conclusion of a Chapter 7 case, the trustee is required to file a final report and a final account. Under the current rule, both the report and the account must be mailed to all creditors. The advisory committee believed that it would be sufficient to send all creditors just the report, and not the account.

The advisory committee also clarified and significantly restyled subdivision (h), which authorizes the court to send notices only to those creditors who have filed a proof of claim.

FED. R. BANK. P. 2015

Rule 2015(b) and (c) would be amended to clarify that in a Chapter 12 case or a Chapter 13 case involving a debtor engaged in business the debtor or trustee does not have to file an inventory of the debtor's property, unless the court orders otherwise.

FED. R. BANK. P. 3002

Professor Resnick reported that under the current Rule 3002 an unsecured creditor or equity security holder must file a timely proof of claim or interest in order for the claim or interest to be allowed. He stated that several courts had held the rule invalid on the grounds that it was inconsistent with § 726 of the Bankruptcy Code, which recognizes that in a Chapter 7 case a creditor holding a claim that has been tardily filed may be entitled to receive a distribution. Other courts, however, had upheld the rule. The advisory committee expended a great deal of effort trying to improve Rule 3002 and make it consistent with the Code. It found a way to do so by abrogating subdivision (c)(6) and adding a proposed new subdivision (d) to the rule. These proposed changes had been distributed for public comment on September 1, 1994.

Later in 1994, however, Congress added § 502(b)(9) to the Bankruptcy Code to clarify the rights of creditors who tardily file a proof of claim. As a result, the committee's proposed amendments were no longer necessary and were deleted following the public comment period. The advisory committee, instead, changed the rule to simply conform to the 1994 legislation on filing proofs of claim.

Rule 3002 would also be amended to eliminate any distinction between domestic and foreign governmental units.

FED. R. BANK. P. 3016

Professor Resnick stated that the advisory committee proposed abrogating Rule 3016(a), because it is probably inconsistent with § 1121 of the Bankruptcy Code. The rule could be applied in such a way as to extend the debtor's statutorily prescribed exclusive period for filing a Chapter 11 plan without a finding of cause by the court.

FED. R. BANK. P. 4004

The current rule, among other things, provides that a debtor in a Chapter 7 case must be granted a discharge unless one of four conditions is present. The advisory committee would add two additional grounds for delaying or not granting a discharge, i.e., (1) when a motion is pending to extend the time for filing a complaint objecting to the discharge, and (2) when the debtor has not paid the filing fee in full.

FED. R. BANK. P. 5005

The amendments to Rule 5005(a), authorizing electronic filing of documents with the court, were approved by the committee earlier in the meeting in connection with the approval of FED. R. APP. P. 25, *supra*.

FED. R. BANK. P. 7004

Professor Resnick stated that the current Rule 7004 makes many of the provisions of FED. R. CIV. P. 4 applicable in adversary proceedings. The cross-references in Rule 7004 to Civil Rule 4, however, are to Rule 4 as it existed in December 1990. That rule was later amended in 1993. The advisory committee would amend Bankruptcy Rule 7004 to conform to the 1993 amendments to FED. R. CIV. P. 4.

Professor Resnick also pointed out that the Congress, as part of the Bankruptcy Reform Act of 1994, had added a new subdivision (h), governing service of process on an insured depository institution. In bankruptcy, service is normally made by first class mail. But under this Congressionally enacted rule, certified mail is required for service on an insured depository institution.

FED. R. BANK. P. 8008

Rule 8008 governs the filing of papers in an appeal to the district court or bankruptcy appellate panel. The advisory committee would incorporate into the rule the proposed electronic filing provisions of Rule 5005.

FED. R. BANK. P. 9006

The rule would be amended to conform to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8) as Rule 2002(a)(7).

The committee voted unanimously to approve the proposed amendments to the bankruptcy rules and send them to the Judicial Conference.

2. Amendments for Publication

Professor Resnick stated that most of the proposed amendments to be published for comment had been designed to implement the provisions of the Bankruptcy Reform Act of 1994, which amended approximately 60 sections of the Bankruptcy Code.

FED. R. BANK. P. 1019

Professor Resnick stated that the current rule, dealing with conversion of cases to Chapter 7 refers to the "superseded case" and the "original petition." It therefore leaves the erroneous impression that conversion of a case to another chapter results in a new case or a new petition for relief. Subdivisions (3) and (5) would be amended to delete these phrases. The advisory committee also reorganized and restyled subdivision (5) to make it easier to read.

FED. R. BANK. P. 1020

The new rule would implement the provision of the Bankruptcy Reform Act of 1994 that permits an eligible debtor to elect to be considered a small business in a Chapter 11 case. The proposed rule would specify the procedures and time limit for making the election.

FED. R. BANK. P. 2002

The advisory committee would amend Rule 2002(a)(1) to add a reference to § 1104(b) of the Code. The effect would be to require that 20 days' notice be given of the meeting of creditors to elect a trustee in a Chapter 11 case.

The Bankruptcy Reform Act of 1994 amended § 342(c) of the Code to provide that certain additional information be included in the caption of every notice required to be given by a debtor to a creditor. The proposed amendment to Rule 2002(n) would incorporate the new statutory requirements into the rule.

FED. R. BANK. P. 2007.1

The amendments to the rule would provide procedures for electing a trustee in a Chapter 11 case in accordance with § 1104(b) of the Code, as amended by the Bankruptcy Reform Act of 1994.

FED. R. BANK. P. 3014

The current rule provides that a secured creditor who elects application of § 1111(b)(2) of the Code must do so by the time of the hearing on the disclosure statement, or such later time as the court may fix. Professor Resnick stated that Rule 3014 had to be amended to take account of the provisions of the Bankruptcy Reform Act of 1994 governing small businesses under Chapter 11. In a small business case there may never be a hearing on the disclosure statement. Therefore, the advisory committee would amend the rule to provide a time limit 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.

FED. R. BANK. P. 3017

The rule governs the procedure by which a disclosure statement is approved before it is distributed to creditors. The advisory committee would amend subdivision (a) to carve out an exception for new Rule 3017.1, which covers small business cases.

The rule also currently specifies that record holders of securities, as of the date that the order approving the disclosure statement is entered, are the ones who will receive the solicitation documents. The advisory committee would amend the rule to give the court flexibility to fix the record date for determining the holders of securities who are entitled to receive the disclosure statement and other solicitation materials.

FED. R. BANK. P. 3017.1

The new rule would implement the concept, introduced in the Bankruptcy Reform Act of 1994, of conditional approval of a disclosure statement in a small business case. The amendment would provide that the disclosure statement may be distributed following conditional approval by the court. The court could then combine the disclosure statement hearing with the hearing on confirmation. If no timely objection were made to the disclosure statement, it would not be necessary for the court to hold a hearing on final approval of the statement.

FED. R. BANK. P. 3018

The rule would be amended to give the court flexibility to fix the record date for the purpose of determining which holders of securities may vote on a plan.

Judge Pratt pointed out an inconsistency in terminology between the proposed amendments to Rule 3018 and Rule 3017, even though the advisory committee apparently had intended the same substance in the two rules. The amendment to Rule 3017 reads: "or another date as the court may, after notice and a hearing, for cause fix." The amendment to Rule 3018 specifies: "or on another date fixed by the court, for cause, after notice and a hearing." He recommended using the language of Rule 3018 in both instances. Professor Resnick agreed to conform the language of the two provisions to whichever version the style committee and the advisory committee found superior.

FED. R. BANK. P. 3021

The proposed amendments to Rule 3021 would provide the court with flexibility to fix the record date for the purpose of determining which security holders are entitled to distribution under a confirmed plan.

Professor Resnick stated that in drafting the amendment, the advisory committee had also noticed an inconsistency in the current rule. Accordingly, it would amend the rule to treat holders of bonds, debentures, notes, and other debt securities the same as any other creditors by specifying that they will receive a distribution only if their claims have been allowed.

FED. R. BANK. P. 8001

The rule would be changed in two ways to conform to the Bankruptcy Reform Act of 1994. The 1994 Act changed the law to provide a right to an immediate appeal from an order extending or reducing the debtor's exclusive period for filing a Chapter 11 plan. The advisory committee would amend subdivision (a) to implement the statutory change.

The 1994 Act provided that when a bankruptcy appellate panel service is available, an appeal will lie automatically to the panel, unless the parties elect to have it heard by the district court. The advisory committee would amend subdivision (e) to provide the procedure for electing a district court appeal. The proposed amendment makes reference to § 158(c)(1) of the Code, which specifies the pertinent time limits.

FED. R. BANK. P. 8002

Professor Resnick explained that in the bankruptcy rules the time for filing an appeal is only 10 days, rather than the 30 days specified in FED. R. APP. P. 4. The time period for filing a bankruptcy appeal may be extended in two ways: (1) If a motion to extend the time is filed within the 10-day period, it may be granted by the court, but only for an additional 20 days; (2) If the 10-day period for filing a motion to extend is missed, a party may still file a motion to extend the time for "excusable neglect," except with regard to certain specified categories of time-sensitive matters.

Professor Resnick pointed out that in a recent case a judge granted a motion for leave to file a notice of appeal after the 20-day time period had expired, even though the party had filed the motion within the time limit. The court of appeals held that the time for filing the notice of appeal could not be extended beyond 20 days, even though the delay resulted from the judge not having ruled on the motion. Professor Resnick stated that this result was inconsistent with the pertinent provisions of the Federal Rules of Appellate Procedure, which protect an appellant as long as the motion is filed on time.

The advisory committee would amend Rule 8002 to: (1) provide that a party must file a request for an extension of time within the applicable time limit, (2) provide that the court will have discretion, more than 20 days after the expiration of the time to file a notice of appeal, to allow a party to file a notice of appeal if the party's motion for an extension was timely and if the notice of appeal is filed not later than 10 days after entry of the order extending the time, and (3) prohibit any extension of time to file a notice of appeal if the appeal is from certain specified types of orders. The list of specific orders would be moved up to the front of the rule.

Judge Easterbrook pointed out that lines 40-41 of the proposed amendments to Rule 8002 had been modeled on FED. R. APP. P. 4(a)(5). He questioned why the advisory committee would choose subdivision 4(a)(5) as the model, rather than subdivision 4(b), since the latter provides a definite cut-off date and prevents delay. Professor Resnick responded that it had been the strong view of the members that the parties should not be penalized when delay is caused by a judge or clerk.

Professor Resnick agreed to bring to the attention of the advisory committee a suggestion by Professor Hazard that a statement be added to the committee note specifying that a party who files a motion to extend the time, which is later denied, would have no recourse unless the notice itself were filed within the 10-day period.

FED. R. BANK. P. 8020

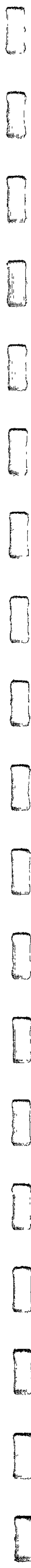
Proposed new Rule 8020, which is related to FED. R. APP. P. 38, would give the district court or bankruptcy appellate panel hearing an appeal express authority to impose damages and costs for frivolous appeals.

FED. R. BANK. P. 9011

Rule 9011 is analogous to FED. R. CIV. P. 11. The advisory committee would amend Rule 9011 to conform to the 1993 amendments to Rule 11. The "safe harbor" provision in the proposed bankruptcy rule, however, would not apply to the filing of a petition.

FED. R. BANK. P. 9015

Rule 9015, dealing with jury trials, had been abrogated following enactment of the Bankruptcy Reform Act of 1984. The Bankruptcy Reform Act of 1994 provides that bankruptcy judges may conduct jury trials if: (1) they are specially designated by the district court to do so, and (2) the parties expressly consent. The proposed new Rule 9015 would provide procedures relating to the conduct of jury trials in bankruptcy cases and proceedings, including procedures for the parties to consent to have a jury trial conducted by a bankruptcy judge. The proposed new national rule is based on the



provisions of the interim bankruptcy rule which had been approved by the Standing Committee in January 1995.

FED. R. BANK. P. 9035

The rule contains a minor change necessary to deal with the six districts in Alabama and North Carolina that do not have a United States trustee. The present rule provides that the Bankruptcy Rules apply in these districts to the extent they are not inconsistent with the provisions of titles 11 and 28. Some statutes relating to bankruptcy administrators, however, are not codified in title 11 or title 28. Therefore, the rule would be amended to apply to all federal statutes.

The committee unanimously approved the proposed amendments in the bankruptcy rules for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Vinson presented the report of the advisory committee, as set forth in Judge Higginbotham's memorandum of June 2, 1995. (Agenda Item 8)

1. Amendments for Judicial Conference Approval

The amendments to Rule 5(e), authorizing electronic filing of documents with the court, were approved by the committee in connection with the approval of FED. R. APP. P. 25, *supra*.

2. Amendments for Publication

FED. R. CIV. P. 9

Judge Vinson reported that the proposed amendment to Rule 9(h) would treat a case that includes an admiralty or maritime claim as an admiralty case under 28 U.S.C. § 1291(a)(3) for the purpose of taking an interlocutory appeal.

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

FED. R. CIV. P. 26

Judge Vinson reported that the proposed amendments to Rule 26(c), dealing with protective orders, had been submitted to the Judicial Conference for approval at its March 1995 session. Members of the Conference, however, had expressed concern

about the amendments. As a result, the Conference voted to eliminate the proposal that would authorize a court expressly to issue a protective order on stipulation of the parties, and it returned the amendments to the committee for further consideration.

Judge Vinson stated that the advisory committee at its April 1995 meeting had considered four alternative courses of action with regard to Rule 26(c): (1) to eliminate any reference in the proposed amendments to stipulations made by the parties, (2) to retain the reference to stipulations, but redraft the amendments to make it explicit that, even with a stipulation, there is still a requirement of "good cause" for issuance of a protective order, (3) to do nothing further with regard to Rule 26(c), and (4) to adhere to the committee's prior draft, as submitted to the Judicial Conference, and to republish it for public comment. The committee chose the fourth alternative.

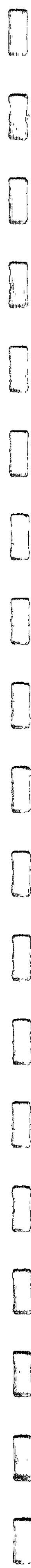
Judge Vinson emphasized that protective orders are an essential part of civil litigation and are used in a wide variety of categories of civil cases. He stated that the current federal practice of dealing with protective orders was appropriate and effective. The advisory committee, therefore, considered the third alternative—of doing nothing—to be very attractive. The fourth alternative, though, was more attractive because it would facilitate further public input regarding protective orders.

Judge Vinson stated that the fears of "secrecy" voiced by those opposed to the amendments were unfounded. He asserted that the amendments would not increase secrecy in any way. One member added that the proposed rule, in fact, would provide explicitly for greater public access to records.

Judge Vinson emphasized that there were major differences between protective orders and sealing orders. The proposed amendment was carefully crafted and did not deal at all with sealing orders or access to records.

Judge Vinson stated that the advisory committee believed that there was no need to specify a requirement for good cause when there is a stipulation by the parties. The rule deals only with discovery conducted between the parties. Stipulation practice, as it now exists, gives a trial judge full discretion to accept or reject a stipulation. On the other hand, if the reference to stipulations were not included in the amendment, there might be a need for an evidentiary hearing and a good cause determination in every case.

Justice Veasey moved to authorize publication of the proposed amendments with the addition of a clarifying statement in the committee note to the effect that Rule 26 deals with discovery protective orders, and not with sealing orders. **The committee approved the motion without objection.**



FED. R. CIV. P. 47

The committee approved for publication proposed amendments to Rule 47, dealing with attorney participation in voir dire, in connection with the proposed amendments to FED. R. CRIM. P. 24, *supra*.

FED. R. CIV. P. 48

Proposed amendments to Rule 48 that would require the seating of 12 jurors were approved for publication by the Standing Committee at its January 1995 meeting. (See January 1995 Committee Minutes, pages 8-9.)

REPORT OF THE ADVISORY COMMITTEE ON THE EVIDENCE RULES

Judge Winter presented the report of the advisory committee, as set forth in his memorandum of June 7, 1995. (Agenda Item 9)

1. Amendments for Judicial Conference Approval

The advisory committee had no proposed amendments before the committee for Judicial Conference approval.

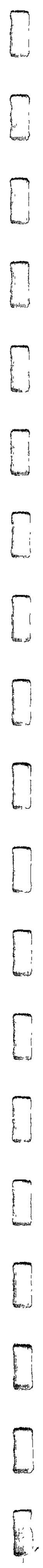
2. Amendments for Publication

Judge Winter reported that the advisory committee was seeking authority to publish: (1) proposed amendments to FED. R. EVID. 801, 803, 804, and 806, and a new rule 807; and (2) the committee's tentative decision *not* to amend 24 rules of evidence.

FED. R. EVID. 801

Judge Winter reported that the advisory committee proposed amending Rule 801(d)(2) in light of the Supreme Court's decision in *Bourjaily v. United States*, 483 U.S. 171 (1987). A majority of the committee voted to codify *Bourjaily* and provide expressly that the contents of a conspirator's statement may be considered by the court in determining the existence of a conspiracy and the participation of the declarant and the party against whom the statement is offered.

Judge Winter stated that the proposed amendment applied: (1) to subparagraph (C), dealing with the declarant's authority, (2) to subparagraph (D), dealing with the agency or employment relationship and its scope, and (3) to proving the existence of the conspiracy and the declarant's participation in it. He added, however, that the



amendment to the rule provided that the declarant's statement could not be used by itself to establish these facts.

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

FED. R. EVID. 803, 804, AND 807

Judge Winter reported that the advisory committee proposed combining Rules 803(24) and 804(b)(5) and moving them into a new Rule 807. Both subdivisions refer to the "foregoing" exceptions. Accordingly, if any new exception were to be added, the subdivisions would have to be renumbered, thereby causing confusion in computer-aided research. When reprinted, Rules 804(b)(5) and 803(24) would simply say "Abrogated."

The committee voted without objection to authorize publication of the proposed amendments to Rules 803 and 804 and the proposed new Rule 807.

The advisory committee recommended adding as Rule 804(b)(6) a new hearsay exception dealing with waiver by misconduct. It would provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party engaged or acquiesced in wrongdoing that procured the unavailability of the declarant as a witness.

The committee voted without objection to authorize publication of the proposed new Rule 804(b)(6).

Judge Winter stated that the advisory committee proposed a purely technical amendment to Rule 806 that would remove an improper comma. He also agreed to accept two additional style changes in the rule proposed by the members.

The committee voted without objection to authorize publication of the proposed amendments to Rule 806.

RULES OF EVIDENCE THAT SHOULD NOT BE AMENDED

The committee voted without objection to authorize for publication the proposal of the advisory committee *not* to amend the following rules of evidence: Rules 103, 104, 408, 411, 801(a),(b),(c),(d)(1), 802, 803(1-23), 804(a),(b)(1-4), 805, 806, 901, 902, 903, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1101, 1102, and 1103.

UNIFORM LOCAL RULES NUMBERING SYSTEM

Amendments to the rules due to take effect on December 1, 1995, would require courts to make their local rules "conform to any uniform numbering system prescribed by the Judicial Conference." (FED. R. APP. P. 47, FED. R. BANK. P. 9029, FED. R. CIV. P. 83, AND FED. R. CRIM. P. 57).

Professor Coquillette pointed out that the committee had distributed a model numbering system for local civil rules to the district courts in 1989 and that many courts had followed the model in revising their rules. He added that the district courts would have to revisit their local rules again as a result of the conclusion of the Civil Justice Reform Act experiments. He suggested that they might be asked to renumber their rules at the same time. The committee might be able to distribute a package of materials to assist the courts in this matter following the January 1996 committee meeting.

Ms. Squiers gave a brief presentation on her study and proposed uniform numbering system for local district court criminal rules. **The committee voted unanimously to authorize Ms. Squiers to distribute her study and proposed uniform numbering system to the district courts.**

SELF-STUDY OF THE RULES PROCESS

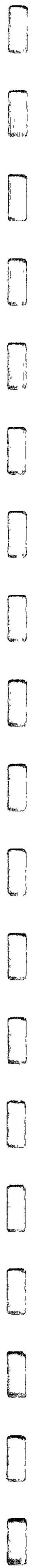
Professor Baker and Judge Easterbrook recommended that the report of the committee's self-study of the rules process be sent to all the individuals and institutions that had contributed comments on the draft. Members suggested that some of the recipients were likely to provide further comments that could be helpful in preparing the report for final action by the committee in January 1996.

On a straw vote, the committee voted without objection to eliminate the long range planning subcommittee after its final report has been accepted.

Judge Pratt noted that the subcommittee on integration of the rules had decided that the substantial effort required to integrate all the federal rules into one body would not be justified.

RECOGNITION OF MEMBERS WHOSE TERMS HAVE EXPIRED

Judge Stotler reported that the terms of Judge Bertelsman, Judge Pratt, and Professor Baker were due to expire on October 1, 1995. She thanked them for outstanding service to the committee, pointing, among other things, to Judge



Bertelsman's strong defense of judicial independence, Judge Pratt's assistance on the style subcommittee and as a parliamentarian, and Professor Baker's lead role in the committee's recent self-study.

RECOGNITION OF JOHN K. RABIEJ

The chairs of the advisory committees and the Standing Committee presented a plaque to John K. Rabiej, Chief of the Rules Committee Support Office of the Administrative Office, to recognize his outstanding service to the committees. The chairs expressed their gratitude for his "continuous and tireless contributions to the success of the rulemaking process."

FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the next meeting of the committee would be held on January 10-11, 1996. The conference to consider attorney conduct issues would be held on January 9, 1996, immediately before the committee meeting. The site of the meeting would be determined later, with Tucson as the favored location if reasonably-priced accommodations could be found.

[After the meeting it was decided to hold the meeting in Los Angeles.]

The committee determined to hold its Summer 1996 meeting on June 19-22, 1996, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

Agenda Item 4

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

December 13, 1995

MEMORANDUM TO STANDING COMMITTEE

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

The following report briefly outlines some major initiatives undertaken by the office to improve its support service to the rules committees.

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 have been catalogued and will be boxed for shipment to a government record center shortly. We will box and catalogue the documents for 1992 over the next six months. 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.

Automation Project

The office is continuing its efforts to develop better methods and procedures in monitoring and retrieving rules-related records and materials. We have purchased hardware (e.g., upgraded PC's, scanners, etc.) and software (off-the-shelf) recommended by the private-sector consultant hired to assess our needs and recommend an automated tracking and

retrieval system. We are working with another private-sector consultant to customize the software to our specifications. The manual system will be maintained while the automated system is being developed and tested.

When implemented the system offers a high-speed scanner (2-3 seconds per page) and should provide a searchable database with comprehensive indexing and cross referencing capabilities that will allow easy retrieval of information. Full implementation of the project is scheduled for January 1997. We are exploring the feasibility of providing access to the document database to committee chairs and reporters, and possibly to other committee members and the public at some point in the future.

Manual Tracking

Meanwhile we have improved our ability to acknowledge and follow-up each public comment or suggested rule change. Our manual system of tracking comments continues to work well. Last year the office received, acknowledged, and forwarded 261 comments and many suggestions to the appropriate committees. We numbered each comment consecutively, which enabled committee members to determine instantly whether they have received all of them. We sent a follow-up letter to each individual and organization that submitted a comment explaining the action taken by the pertinent advisory committee on a proposed rule change.

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 *Request for Comment*, which contains proposed amendments to the rules, highlights the comment-seeking purpose of the publication and indicates which rules are being amended. We again prepared a foldout brochure that summarizes the proposed rules amendments. We have received many requests for it. We will continue to monitor response to the *Request for Comment* and take steps as necessary to improve our circulation of rules-related materials. For example, the names of several legal publishers have been added to the list of those who receive rules-related documents, bringing the total to 51 publishers.

State Bar Points-of-Contact

In August 1994, Judge Stotler sent a letter to the president of each state bar requesting that a point-of-contact be designated for the rules committee to solicit and coordinate that state bar's comments on the proposed amendments. She sent a follow-up letter in November

1994 to those who failed to respond to the original request. The Standing Committee outreach to the organized bar has resulted in 43 state bars designating a point-of-contact. (See attached list.) The names and affiliations of the points-of-contact were included in the September 1995 *Request for Comment* publication. We received comments on the proposed rules amendments published in September 1994 from 12 points-of-contact, several of whom commented on more than one set of rules.

Mailing List

The names of approximately 200 law school deans and 51 state Supreme Court Justices have been added 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, they will remove from the list and replace the name. The Administrative Office is exploring either purchasing or developing a new automated mailing list system. This should substantially reduce the time involved in maintaining and expanding the mailing list.

Internet

The Request for Comment is now available on the Internet (http://www.uscourts.gov). Internet access supplements, rather than replaces, our current system of targeted mailing. During the first month that the proposed amendments were available online, there were 551 "visits" to them on Internet. We are exploring the possibility of making other rules-related documents available on the Internet and other electronic bulletin boards. We are not currently receiving comments on the proposed rules amendments on the Internet.

Tracking Rule Amendments

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

Miscellaneous

In October 1995, we delivered the proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure approved by the Judicial Conference at its September 1995 session to the Supreme Court.

In December 1995, we advised the courts that the amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure approved by the Supreme Court on April 27, 1995, took effect.

The office has forwarded the minutes of the Fall 1994 committee meetings to several legal publishers. The minutes from those meetings should be available on-line in early January 1996.

John K. Rabiej

Attachment

State Bar Points-of-Contact

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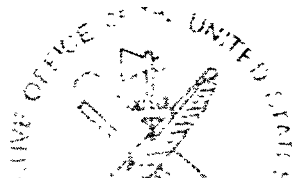
Montpelier, Vermont 05601



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

December 12, 1995

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: *Legislative Activity Report*

Composition of Rules Committees

On August 21, 1995, Judge Stotler wrote to Congressman Henry Hyde, chair of the House Judiciary Committee, to oppose provisions in three separate bills that would regulate the membership-composition of the rules committees. (Copy is attached.)

Two of the bills involve comprehensive crime control legislation, which will not be addressed until the next session of Congress. The third bill, S. 370, is a stand-alone that was introduced by Senator Howell Heflin on February 8, 1995. No hearing has been held on it. But during the hearing on the *Federal Courts Improvements Act of 1995*, which was held before the Senate Subcommittee on Administrative Oversight and the Courts on October 24, 1995, Senator Heflin returned to this issue and questioned the judiciary's representative on the composition of the rules committees. (The *Courts Improvements Act* contains provisions endorsed by the Judicial Conference that address administrative, financial, and personnel needs of the Judicial Branch.) It is uncertain whether Senator Heflin will try to attach his stand-alone bill to the Court Improvements bill.

Jury Verdicts

On November 27, 1995, Senator Strom Thurmond introduced S. 1426. The bill would amend Rule 31(a) of the Federal Rules of Criminal Procedure and Rule 48 of the Federal Rules of Civil Procedure, eliminating the requirement of a unanimous verdict. It would require a vote of five-sixths of a jury.

Suits in Admiralty Act

On August 8, 1995, Judge Stotler forwarded to Senator Trent Lott, chair of the Senate Subcommittee on Surface Transportation and Merchant Marine, a recommendation that the service of process provisions contained in the *Suits in Admiralty Act*, 46 U.S.C. § 742, be deleted to conform with the service provisions in Civil Rule 4. (Copy is attached.) The Judicial Conference approved the recommendation at its March 1995 session at the request of this committee.

Private Securities Litigation Reform Act

The Senate and the House of Representatives passed the conference report on the *Private Securities Litigation Reform Act of 1995* (H.R. 1058) on December 5 and 6, 1995, respectively. The President received the bill on December 7, and he has until December 19 to sign it. The bill's substantive provisions are controversial. The bill also contains procedure-related provisions.

Judge Patrick Higginbotham appointed a subcommittee, chaired by Judge Anthony Scirica, to review the bill's rules-related implications. The subcommittee, Professor Cooper, and Judge Higginbotham met with officials of the Securities and Exchange Commission and staffers of key members of Congress. The meetings were productive, and several of the rules-related provisions were revised, including a sanction procedure that was inconsistent with Rule 11.

The conference bill rejected the House provision, which would have authorized attorney-fee shifting as a sanction for frivolous law suits, and accepted the Senate provision, which requires a "court (to) include in the record specific findings regarding compliance by each party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion." The underscored was added partly in response to our concerns that it was otherwise over broad.

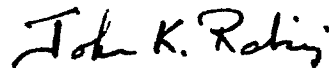
During the Senate consideration of the bill, Senator Arlen Specter attempted to insert an alternative sanction provision suggested by Judge Higginbotham. The proposed substitute would have retained the discretion of the court in reviewing and sanctioning the filing of abusive litigation, consistent with Rule 11. Consideration of Senator Specter's amendment was tabled by a vote of 57 - 38.

Product Liability Act

Conferees from the Senate and the House of Representatives were designated on November 28, 1995, on the product liability reform bills. The House passed the *Common Sense Product Liability and Legal Reform Act of 1995* (H.R. 956) on March 7, 1995. The bill would limit punitive damages in all types of civil cases to the greater of $250,000 or three times the amount of economic damages. The Senate passed a separate *Product Liability Fairness Act of 1995* — as an amended H.R. 956. The bill caps punitive damages at the greater of $250,00 or two times compensatory damages, and it applies only to product liability suits. The Senate earlier had defeated an amendment that would have extended the limits on punitive damages to all civil actions.

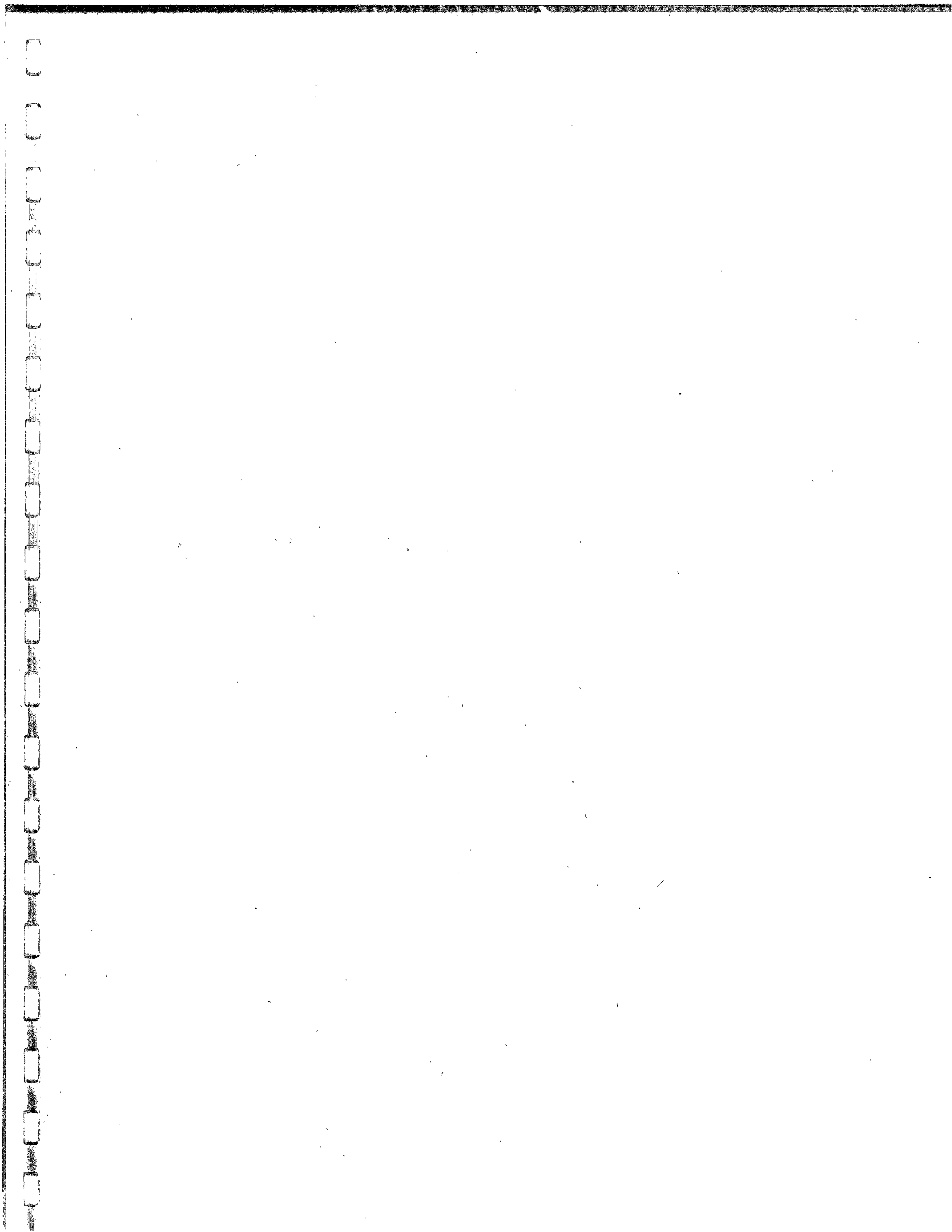
Attorney Accountability

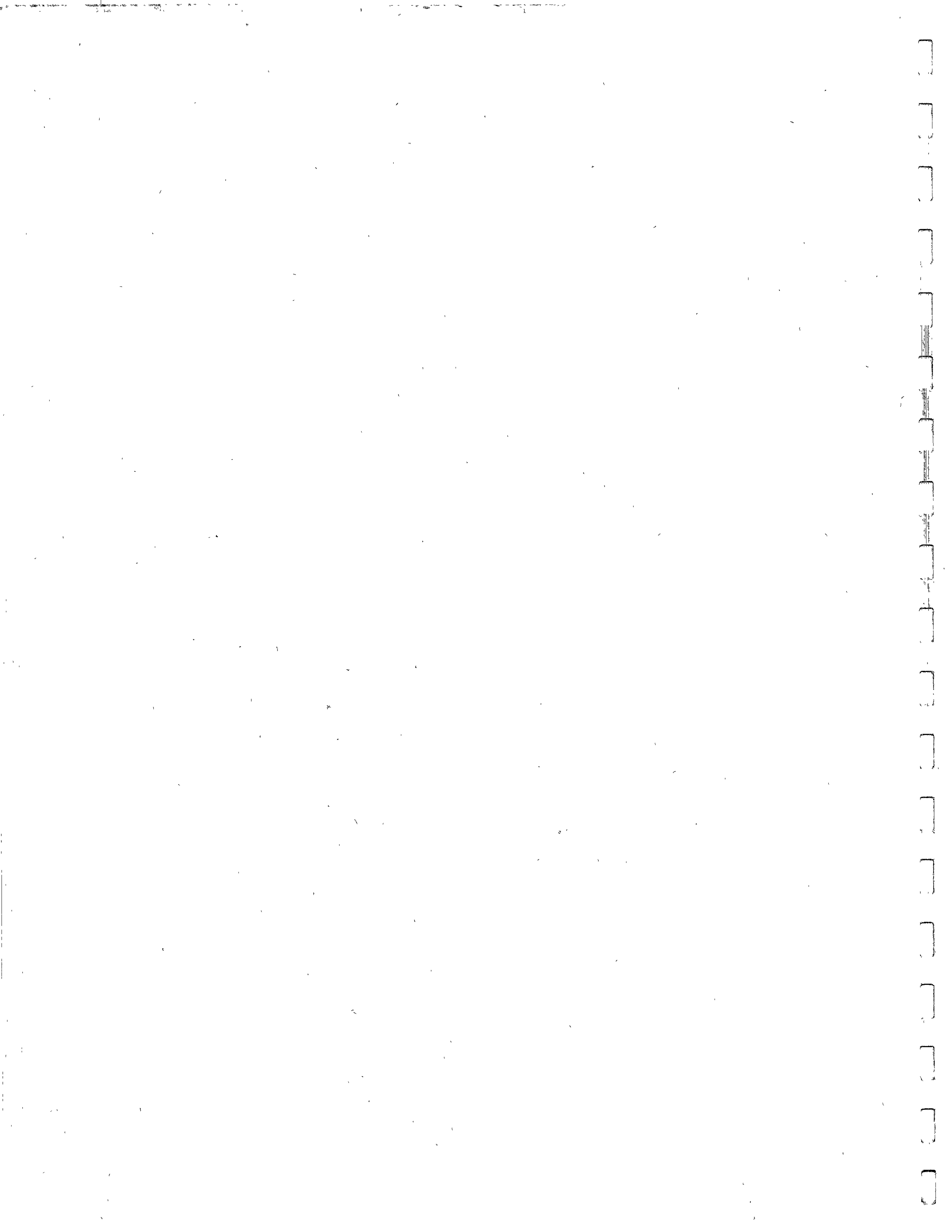
On March 7, 1995, the House of Representatives passed the *Attorney Accountability Act of 1995* (H.R. 988). The bill would undo much of the 1993 amendments to Civil Rule 11 and would establish a modified "loser-pays" mechanism in diversity actions. Senator Orrin Hatch introduced the *Civil Justice Fairness Act of 1995* (S. 672) on April 4, 1995. It contains "loser-pays" provisions similar to ones in the House-passed bill. No hearing has been held specifically on the bill.



John K. Rabiej

Attachments





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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

PAUL MANNES
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CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

August 21, 1995

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

Dear Chairman Hyde:

At its March 1995 session, the Judicial Conference of the United States approved the recommendation of the Committee on the Rules of Practice and Procedure (Standing Committee) to oppose legislation regulating the composition of committees constituted to advise the Conference and the Chief Justice on the rules governing practice and procedure in the federal courts. Chief Justice Rehnquist had earlier noted in his 1994 year-end report, that "this system (rulemaking) has worked well, and ... Congress should not seek to regulate the composition of rules committees any more than it already has."

Section 504 of the *Violent Crime Control and Law Enforcement Improvement Act of 1995* (S. 3) and § 604 of the *Local Law Enforcement Act of 1995* (S. 816) would require that the number of representatives from the Department of Justice on the Appellate, Criminal, Evidence, and Standing Committees be equal to the number of committee members who represent defendants. Under S. 370, a majority of each of the five advisory rules committees and the Standing Committee would be required to be members of the practicing bar.

The Judicial Conference opposes the provisions in each of the three bills mandating the composition of the rules committees. The bills raise important concerns relating to the Chief Justice's prerogative to appoint members to committees expressly established to provide advice to the Judicial Conference. They also raise serious policy considerations implicating the integrity of the rulemaking process.

The rules committees serve in an advisory capacity under the *Rules Enabling Act*, 28 U.S.C. §§ 2071-77. All proposed rules changes must be approved by the Judicial Conference and then prescribed by the Supreme Court, before being presented to the Congress. Members of the rules committees are appointed by the Chief Justice and include federal judges, practicing attorneys, law professors, state chief justices, and representatives from the Department of Justice. Each committee has a reporter, a prominent law professor, who is responsible for coordinating the committee's agenda and drafting appropriate amendments to the rules and explanatory committee notes.

The tradition of rulemaking has been based on a disinterested expertise, as opposed to decisionmaking controlled by interest-groups. The recommendations of the rules committees have been given great respect and weight among the bench, bar, and academia. No small part of this deference is due to the neutral character of the committees, which is enhanced by a membership that represents a wide cross-section of the bench and bar and reflects the leadership of federal judges.

Although rendering fair decisions is certainly not the exclusive province of federal judges, they do have the knowledge to act in the best interest of the public those courts serve. Judges are of course lawyers too, with substantial experience on both sides of the bench. The ability to draw upon these two experiences makes judges especially appropriate rulemakers.

Recognizing the unique role of judges in rulemaking does not disparage the role of private attorneys. Indeed, federal judges now make up less than a majority of the rules committees. The practicing bar and the Department of Justice are given full opportunity to express and press their views in the committees. These views are recorded and reported to the Judicial Conference for its consideration. In addition, before the rules committees make any recommendations to the Conference, proposed rules changes are circulated for public comment and public hearings are scheduled. The committees have embarked on an outreach effort to facilitate greater involvement of the bench, bar, and public in this comment process. A point-of-contact has been established with nearly every state bar association. And the committees' mailing lists have been significantly enlarged and now exceed 11,000 judges, lawyers, bar associations, federal and state government officials, law schools, and other agencies.

Placing a premium on the notion of representativeness, i.e., that there ought to be a "seat" on the rules committees for each identifiable faction of the bar, would undermine the integrity of the rulemaking process. Committees would be perceived as promoting self-interested goals rather than the interests of justice. For the same reasons, requiring more representatives from the Justice Department could magnify their respective partisan roles and compromise the committees' neutrality.

For all these reasons, I urge you to oppose provisions mandating the composition of rules committees. I look forward to continuing this dialogue with you on this important matter. Thank you for your consideration.

Sincerely yours,

Alicemarie H. Stotler
United States District Judge

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

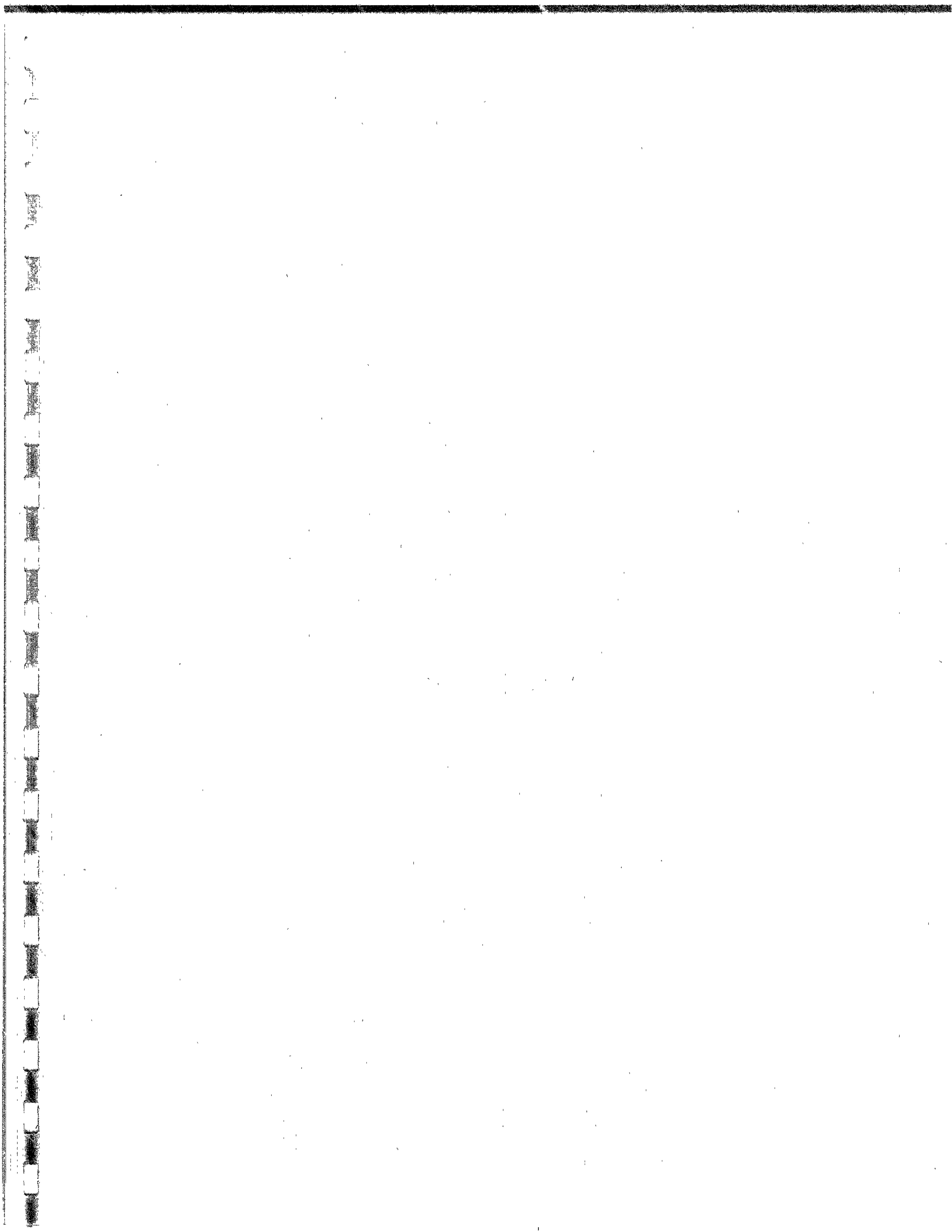
For all these reasons, I urge you to oppose provisions mandating the composition of rules committees. I look forward to continuing this dialogue with you on this important matter. Thank you for your consideration.

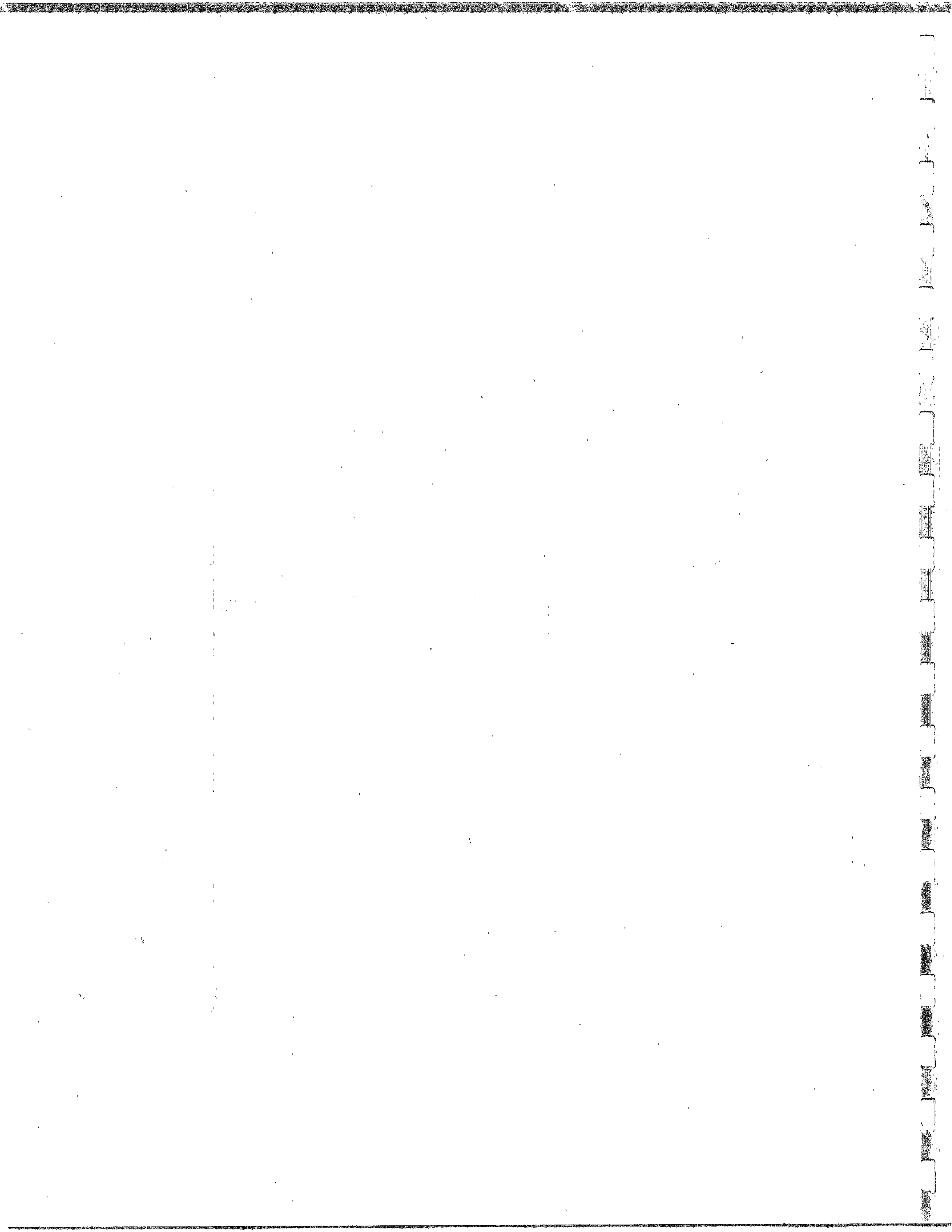
Sincerely yours,

Alicemarie H. Stotler
United States District Judge

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

bc: Alan Coffey
Jonathan Yarowsky
Thomas Mooney
Betty Wheeler





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CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

August 8, 1995

Honorable Trent Lott
Chair, Senate Subcommittee
on Surface Transportation
and Merchant Marine
427 Hart Senate Office Building
Washington, D.C. 20515

Dear Chairman Lott:

At its March 14, 1995 session the Judicial Conference of the United States on the request of the Committee on Rules of Practice and Procedure (Standing Committee) approved a resolution to recommend to Congress that the service of process provisions contained in the *Suits in Admiralty Act, 46 U.S.C. § 742*, which are different from the service provisions in Rule 4 of the Federal Rules of Civil Procedure, be deleted. Under the proposed amendments, the general service of process procedures in Civil Rule 4 would apply to all civil cases, including admiralty and non-admiralty cases.

Section 742 requires that a party "forthwith serve" process on the United States in admiralty cases. "Forthwith" has been interpreted by some courts to require service within a period much shorter than the 120-day period provided for effecting service under Rule 4(m) of the Federal Rules of Civil Procedure. Some courts have further ruled that Rule 4(m) does not supersede § 742 because the service requirement is a condition on the United States' waiver of sovereign immunity. Under these circumstances, the inconsistent time periods for service of process have posed traps for counsel inexperienced in admiralty cases and caused loss of rights for their clients.

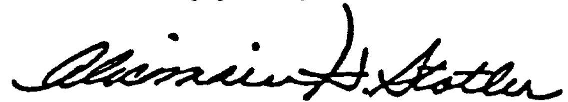
Section 742 was enacted before the Federal Rules of Civil Procedure were adopted, and there is no apparent remaining reason to treat suits in admiralty

differently than other civil actions. Rule 4(i) of the Federal Rules of Civil Procedure currently governs service upon the United States in all other civil cases.

The proposed amendment is purely procedural and is non-controversial. It addresses a historical anomaly that has adversely affected blameless parties. The Advisory Committee on Civil Rules and the Standing Committee unanimously approved the recommendation to amend § 742 prior to consideration by the Judicial Conference. The representatives from the Department of Justice on both the Advisory Committee and the Standing Committee concurred with the proposal. The Maritime Law Association has recommended this amendment for years.

I have enclosed a copy of the proposed amendment to § 742. If you have any questions on the proposal please contact me or Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure at (202) 273-1820.

Sincerely yours,



Alicemarie H. Stotler
United States District Judge

Enclosure

cc: Honorable Larry Pressler
Honorable Ernest F. Hollings
Honorable Daniel K. Inouye

§ 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. ~~The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation.~~ In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

Agenda Item 5

Committee on Rules of Practice and Procedure
January 1995
Information Item

FEDERAL JUDICIAL CENTER REPORT

This is an update of selected Federal Judicial Center projects and activities that may be of interest to this Committee.

I. Publications, Manuals, and Videos

1. ***Manual for Complex Litigation.*** The Center has distributed the third edition of its *Manual for Complex Litigation* to all federal judges. Several private publishers are making the manual available for sale, and the Center has also made it publicly available on the FJC homepage on the Internet.

2. ***Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure.*** In November the Center published a report of its survey of lawyers and judges. The study, undertaken at the request of the Advisory Committee on Civil Rules, examined judges' and attorneys' experiences under the 1983 and 1993 versions of Rule 11 and their views of the effects each version has had. A majority of both prefer the 1993 amendments, with one exception: Most believe the purpose of Rule 11 sanctions should include compensation of the party injured by violation of the rule and should not be limited to deterrence of future violations.

3. ***Likely Consequences of Amendments to Rule 68, Federal Rules of Civil Procedure.*** In September the Center published this report of its survey of trial counsels' views about proposals to amend Rule 68. The survey, undertaken at the request of the Advisory Committee on Civil Rules, found that the proposed revisions would be well received by most attorneys and would likely influence litigation in about 50% of civil cases, resulting in more and earlier settlements at reduced expense and with limited effects—both positive and negative—for litigants of modest means.

4. ***The Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook.*** The Center published this reference book in September. It contains seventeen tables summarizing the civil case management procedures contained in the Civil Justice Reform Act (CJRA) plans adopted by the U.S. district courts. An earlier version of the sourcebook, which was undertaken with the assistance of the Committee's AO staff, was submitted to Congress as part of the Judicial Conference's 1994 report on CJRA implementation.

5. ***Stalking the Increase in the Rate of Federal Civil Appeals.*** This report, published in July, examines whether there has been an increase in the rate of appeal and what the sources of the increase may be. It concludes that much of the increase has resulted from the higher volume of litigation in the district courts, with an additional portion of the increase attributable to increasing rates of appeal in prisoner actions and, to a lesser extent, civil rights cases. No evidence of an across-the-board increase in the likelihood of appeal was detected. A copy of this report has been sent to each Committee member.

6. ***Manual on Recurring Problems in Criminal Trials.*** A third edition of this manual, originally prepared by the late Judge Donald S. Voorhees (W.D. Wash.), is planned for publication early in 1996. The second edition was published in 1990.

7. ***Bench Book for U.S. District Court Judges.*** The Center is planning to publish a new edition of its *Bench Book* in 1996. The Center's *Bench Book* Committee is reviewing the current text and recommending updates and other revisions. Information from the Center's ongoing study of procedures for handling capital case litigation will be used to update the *Bench Book* chapter on death penalty cases.

8. ***Chambers to Chambers* on death penalty cases.** The Center has prepared the first two in a series of *Chambers to Chambers* papers on legal and practical issues unique to federal death penalty cases. The first paper addresses appointment of counsel and jury selection; the second concerns compensation of counsel, investigators, and expert witnesses. Forthcoming *Chambers to Chambers* will deal with pretrial motions and other pretrial matters, trial management, and the punishment phase of a capital trial. These articles are based largely on the experiences of several judges who have tried federal death penalty cases and specifically address judges' needs for information about how to manage such cases. The Center distributes *Chambers to Chambers* to all federal judges.

9. **Guideline sentencing publications.** In October, the Center distributed a new edition of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* to judges and probation and pretrial services offices. The Center continues to publish the newsletter *Guideline Sentencing Update* at least monthly and more frequently as case law warrants.

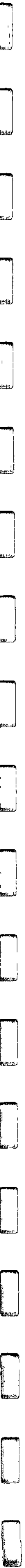
10. ***Directions* Issue on Mass Torts.** In July the Center published an issue of its serial magazine, *Directions*, which included articles on the National Mass Tort Conference co-sponsored by the Center and the Judicial Conference (among others). Topics covered by the issue include the conference participants' suggestions for pretrial and trial management of mass tort cases and the role of ADR and other settlement techniques. The Center has distributed this publication to all federal judges.

11. ***ADR and Settlement Procedures in the Federal District Courts. A Sourcebook for Judges and Attorneys.*** Later this year the Center will publish a sourcebook describing the alternative dispute resolution and settlement procedures used in the district courts. The sourcebook provides district-by-district descriptions of current ADR programs. Its purpose is to assist the Committee and the courts in developing policy and programs regarding ADR and to give guidance to attorneys who practice in federal court.

12. **District judge orientation videos.** In June, the Center released an updated version of its video program, *Sentencing and Other Criminal Post-Trial Matters*. The program, originally produced in 1993, is part of the Center's video orientation series for new district judges. The Center consulted with Sentencing Commission staff in updating the video, and Judge Conaboy appears in the program speaking on behalf of the Commission. Judge Anna Diggs Taylor (E.D. Mich.) also appears in the video. In November, the Center taped a new version of *The Role of the Magistrate Judge*, for use in the video orientation series.

13. **Juror orientation video.** In November, the Center completed its new video for petit jurors, entitled *Called To Serve*. The program will be distributed to all courts for use at their option in orienting jurors.

14. **Magistrate judge orientation video on Central Violations Bureau.** As part of its video orientation series for new magistrate judges, the Center is producing *The Central Violations Bureau: How It Helps Magistrate Judges Process Petty Offenses*, a program that describes the work of the Central Violations Bureau and standardized CVB procedures that assist magistrate judges in processing petty offense cases efficiently.



15. **Orientation videos for new court employees.** The Center has completed and distributed to the courts its five-part video orientation series for new clerk's office personnel and other new employees. The programs in the series, titled *Introducing the Federal Courts*, depict hypothetical cases that help court employees better understand their jobs and the important role they play in the effective administration of justice. The series includes an introductory video (also available in an interactive CD-ROM version) and videos on the civil, criminal, bankruptcy, and appellate processes. Accompanying written materials include an outline, a glossary, and appendices containing forms and other documents.

16. **Security awareness in the federal courts.** At the request of the Committee on Security, Space, and Facilities, the Center is producing a video on workplace security for federal court employees. Completion is expected in early 1996.

II. Education and Training Seminars and Workshops

The following Center seminars and workshops involving matters of particular interest to the Committee are a small portion of the Center's total educational offerings for judges and staff. In the last fiscal year, the Center offered sixty-seven seminars and workshops for judges, reaching over 2,700 participants; seventy programs for supporting personnel, reaching almost 2,500 participants; and five programs for federal public defenders, reaching over 800 participants. In addition, the Center sponsored over 900 programs that were offered in courts across the country, reaching over 18,000 participants.

1. **Seminar for Circuits Adopting Bankruptcy Appellate Panels.** The Center will conduct a seminar for circuits adopting bankruptcy appellate panels March 18-20, 1996, in Pasadena, California. The seminar will address issues surrounding each phase of the progress of the BAP in operation, including sessions on how to establish a BAP and how to run and organize a BAP. Circuits establishing BAPS have been invited to send up to six representatives to participate in the program.

2. **Workshop on Scientific Evidence.** One day at each of the three recent national workshops for district court judges was devoted to topics on scientific evidence. Information from these educational programs is being used to design a three-day workshop that will provide more in-depth training on handling statistical evidence. This special focus workshop, which will be held in January 1996, will be limited to approximately thirty judges.

3. **Annual Workshops for District and Appellate Judges.** In FY96 the Center will, as it does each year, hold workshops for all judges of the appellate and district courts. The FY96 workshops will be circuit-based. At each of these programs the Center contemplates sessions on death penalty habeas issues and improving jury trials.

4. **Executive Team Development Programs.** The Center will conduct two *Executive Team Development Workshops* in 1996. Teams from the U.S. bankruptcy courts will participate in a March program; teams from U.S. district courts will attend a program in April. The workshops teach management skills to teams of new chief judges and their clerks. Each workshop will precede Center national judges' programs.

5. **Federal Court Manager Leadership Training Program.** Court managers who want to prepare for positions of increasing leadership responsibility may apply to participate in the multi-phased *Federal Court Manager Leadership Program*. During their two- to three-year participation in this self-directed developmental program, court managers analyze recurring

court management problems, enhance their leadership skills, and focus on areas for further professional growth. Applicants for the program must serve in a position of JSP level 12 and above and have a minimum of four years' experience in the federal courts.

6. **Programs for Court Training Specialists.** In 1977, the Center established a network of court personnel to coordinate delivery of training programs in their court units and serve as resources to both the courts and the Center. There are currently 364 "court training specialists" in the federal judiciary. The Center provides orientation programs for the newly appointed specialists, continuing education for those who are experienced, a training newsletter, and an electronic bulletin board that is accessible to all specialists 365 days a year.

7. **Training Through Technology.** As part of its efforts to broaden educational programs that do not require participant travel, the Center has developed a number of automated training programs. Among them are:

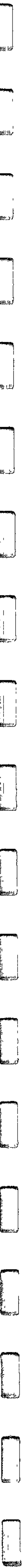
- **Computer-Assisted Instruction.** Training delivered through personal computers offers unique advantages to the learner: the training can proceed at a pace and time that meets the user's schedule and the instruction can be revisited as often as desired.

  - In October 1994, the Center distributed to all courts a CD-ROM containing a program on the Federal Rules of Civil Procedure. In February 1996, a program on the Federal Rules of Bankruptcy Procedure will be released. A program on appellate procedure is in development. The programs are designed for use by deputy clerks and contain the rules themselves, information about the rules, and quizzes and scenarios that help court staff identify the appropriate rule for a given situation.

  - *Supervising in the Courts: Tips for Success* is a computer-assisted guide that will be pilot-tested in 1996. The guide is a rapid reference for federal court staff who direct the work of others and provides suggestions on personal, interpersonal, and leadership skills, as well as on other topics critical to supervising court staff. The guide also recommends resources that are available through the Center and locally.

- **On-Line Conferences**. These conferences feature several benefits that live presentations do not: participants use computers to connect to the meeting "site," attend at a time that is convenient for them, and can read, review, and respond to faculty instruction and participants' comments with greater deliberation. Among the on-line conferences scheduled for FY96 is *Ensuring Effective Case-Flow Management.* This three-month conference is a follow-up to a March 1995 workshop for district courts in the Fifth and Eleventh Circuits. The conference offers continued technical assistance to the participants to help them implement the case management plans they developed at the workshop.

- **Teleconferences.** Like on-line conferences, teleconferences provide instruction to geographically separated court employees. Next fall the Center will telecast a conference on *Appellate Case Management: Case Closing Procedures* from the Center's studio in the Thurgood Marshall Federal Judiciary Building to case administrators at circuit sites. The program topics will include improving the effectiveness and efficiency of case closings and customer service.



8. **National Conference for Federal Appellate Judges.** The Center held a National Workshop for Judges of the U.S. Courts of Appeals this past June in San Diego. As well as offering sessions on substantive law, the Center responded to the request of judges at the 1993 workshop for more information and interchange about how the courts of appeals handle their workload. The program included sessions in which judges learned of the practices of other courts in screening appeals, diverting appeals to preargument settlement or mediation programs, and using nonjudicial staff. Judges also had the opportunity to comment on the likely utility of these and other case management alternatives in dealing with projected caseload increases.

9. **Workshop for Appellate Conferencing Attorneys.** The Center conducted a workshop for appellate court conferencing attorneys in September in Washington, D.C. The program concentrated on methods for enhancing the conferencing attorneys' mediation skills and provided a forum for exchange of information about their settlement programs. Every circuit with a conferencing program was represented.

10. **ADR Training for Judges.** At each of the Center's three FY 95 national workshops for district judges, participants were given the option to stay an additional day to attend a program on ADR. Sessions included: The ADR Landscape/Why Use ADR; Administration of Court-Connected ADR Programs; ADR Program Design: Planning for Your Court; and Issues in Ethics and Case Management. These programs prompted the Court of Claims to ask for an ADR add-on day at its Judicial Conference; the program was held in Williamsburg, Virginia in November 1995.

11. Evaluation **Workshop for District Courts**. The Center conducted two seminars in FY95 on research methods courts can use to evaluate the effectiveness of court programs and procedures. The workshops, which focused on the fundamental principals and procedures of conducting sound evaluations, will help court staff determine whether a new program, such as ADR, or a new policy, such as a compressed work schedule, provides the anticipated benefits. The workshops also provided information to help the courts conduct the annual assessments required by the CJRA.

12. **National Chief Probation and Pretrial Services Officers' Conference.** All chiefs have been invited to attend the January 8-11, 1996 **National Conference of Chief Probation and Pretrial Services Officers.** The theme of the Center-sponsored conference will be "Leading Probation and Pretrial Services into the Twenty-First Century."

13. **Federal Criminal Procedure Seminar**. Presented annually in August for the past four years, this popular seminar instructs 25-30 Article III judges on the current problem areas of federal criminal procedure in a hands-on intensive program. Topics include environmental crimes, civil and criminal asset forfeiture, habeas corpus, money laundering, and various evidentiary issues including the admissibility of uncharged misconduct both during trial and sentencing and the admissibility problems inherent in major conspiracy cases. This seminar was last held August 1-4, 1995 in Portland, Oregon.

III. Research and Planning Projects

1. **Class Actions.** The Center sent a draft of its final report on class action activity to the Advisory Committee on Civil Rules for the committee's November 9-11 discussion of revisions to Fed. R. Civ. P. 23. Among other findings, the study found that a substantial number of "routine" class actions, particularly securities cases, have standard modes of litigation and adjudication. Most of these and many other cases resulted in awards for individual class members that appeared to be too small to support individual litigation. Most certified class actions settled, but usually not before the merits were litigated via a motion to dismiss or motion for summary judgment. Trials occurred infrequently, and plaintiffs were rarely successful at trial or on appeal. Appeals were frequent, but seldom touched on certification issues. The study was based on cases filed as class actions in E.D. Pa, S.D. Fla., N.D. Ill., and N.D, Cal.

2. **Special Verdicts and Interrogatories.** Fed. R. Civ. P. 49 provides two alternatives to the general verdict—a special verdict and a general verdict with interrogatories. Because the rule provide judges with little guidance regarding the use of special verdicts and general verdicts with interrogatories, the Center is examining the use of these two types of verdicts, with the goal of aiding the Advisory Committee on Civil Rules in developing guidelines for their use. The questions under study include: 1) How frequently and under what circumstances do judges use special verdicts and general verdicts with interrogatories? 2) What procedural challenges do judges face when using these verdicts? and 3) What consequences does the use of these verdicts have on court resources and on jury deliberations and decision-making? A report will be published upon completion of the study.

3. **Juror Privacy in Voir Dire.** Proposals to expand voir dire under draft amendments to Federal Rule of Civil Procedure 47(a) have raised concerns about juror privacy and the proper limits of expanded inquiries. Because the amendments anticipate greater use of juror questionnaires, the Center is collecting examples of recent questionnaires, noting issues that are likely to raise concerns about juror privacy, and offering suggestions for minimizing intrusions into juror privacy in the voir dire process.

4. **Trends in Summary Judgment.** The Center is gathering data on current summary judgment practice in six federal district courts, which will be compared with previous levels of summary judgment activity. The study is looking for broad trends and shifts in the likelihood that summary judgment motions will be filed, changes in the outcome of such motions, and the likelihood that such motions will be appealed.

5. **Evaluation of Changes in Rule 26.** The Center is considering how and when to initiate a study of recent amendments to Rule 26. The nature and timing of the study will depend, in part, on whether there has been sufficient experience under the new rule to produce a valid study.

6. **Evaluation of AAAS/ABA Demonstration Project.** The Center is assisting in the development of two demonstration projects that will provide judges the names of prominent scientists, doctors, and engineers who will serve as court-appointed experts. The National Conference of Lawyers and Scientists (a joint committee of the ABA and the American Association for the Advancement of Science) is preparing a demonstration project that will link judges' requests for help in identifying potential court-appointed experts with scientists and engineers nominated by professional societies. The Center will serve as evaluator of the demonstration program if it goes forward. The Center has also recently agreed to help the Private Adjudication Center at Duke University School of Law prepare a proposal to

establish a standing list of "certified" experts who will agree to serve as court-appointed experts.

7. **Court Connection Project.** The Center continues to work with the District Court for the District of Columbia to develop kiosk technology for use by a wide range of court users, including pro se litigants. The project will allow the court and the Center to assess the utility of using kiosks to provide public information about case filing procedures, directions for prospective jurors, job announcements and vacancies, courtroom locations, office phone numbers, and in-court activities.

8. **Criminal Videoconferencing.** The Center has been asked to conduct a study of video conferencing of federal criminal pretrial hearings in connection with a pilot being conducted by the U.S. Marshals Service and the Federal Bureau of Prisons. One of the two pilot districts, Puerto Rico, has dropped out of the study, with only the Eastern District of Pennsylvania now using the video system on a limited basis. It is anticipated that one or two additional courts may be added as pilot sites. We will continue to monitor developments.

9. **Study of Judges' and Attorneys' Views of Rule 11.** See above under Publications, Manuals, and Videos.

10. **Study of Attorneys' Views of Proposed Amendments to Rule 68.** See above under Publications, Manuals, and Videos.

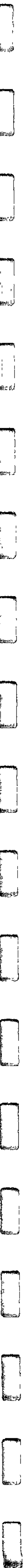
Pro Se Litigation Work Group

The Center has continued its efforts to assist the courts in addressing the challenges posed by pro se litigation. The Pro Se Work Group's efforts are coordinated with other relevant activities within the judicial branch, including Conference committees, the Administrative Office, and circuit councils. The following are some of the projects coordinated by the group:

1. **Manual on Managing Prisoner Civil Rights Litigation.** This work-in-progress will become a manual for managing prisoner civil rights litigation. Completion of the manual awaits action in Congress on legislation that would substantially affect prisoner litigation. Comments have been widely sought from judges and others, through, for example, presentations at the Center's three FY95 magistrate judge regional programs and in breakout discussions at the three FY95 district judge national workshops. The manual is slated to be published in early 1996.

2. **Case Study of the District of Nevada's Early Evaluation Procedures in Prisoner Civil Rights Cases.** A number of districts, including the District of Nevada, are using innovative approaches to manage and resolve prisoner civil rights complaints. This case study describes and examines the court's procedures and case management practices for prisoner civil rights cases, including the district's detailed plan for the imposition of partial filing fees and the use of early case evaluation hearings to essentially "clean up" a prisoner pro se civil rights complaint before service is effected and the case proceeds further. The Center's report on these procedures will be published in a special 1996 edition of *Directions* focusing on pro se issues of interest to the courts.

3. **Non-Prisoner Pro Se Data Base.** Using ICMS data, the Center has constructed a data base of 57,000 non-prisoner pro se cases filed and terminated in ten of the largest districts during the past four years. This data base provides a rich source of information on the nature and extent of non-prisoner pro se litigation in these districts.



4. **Technical Assistance to the Ninth Circuit's Task Force on Prisoner Discipline Procedures.** Over the past several months, staff of the Center have assisted the Task Force with its efforts to examine prisoner discipline procedures in institutions that are located in the Ninth Circuit. The Task Force produced a report in August, 1995, and is now working on a plan to implement its recommendations.

5. **Court Connection Project.** See above under Research and Planning Projects.

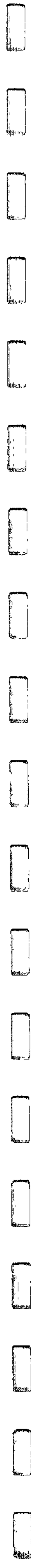
Death Penalty Work Group

As the number of crimes eligible for the federal death penalty has increased, the few federal judges who have had such cases have expressed concern about the relatively limited information available to inform judges about the substantive and procedural issues relevant to conducting a federal capital trial. The Center has established a work group to address this need and other questions raised by death penalty cases. From the outset, the Center has consulted with the chairs of relevant Conference committees. Below are descriptions of the individual projects being coordinated by the work group.

1. **Clearinghouse for Information on Managing Death Penalty Cases**. The Center's Information Services Office (ISO) serves as a clearinghouse for information on techniques that federal judges are using to manage death penalty cases. The Center has asked all federal judges who have handled such cases to send to ISO materials such as jury questionnaires, orders, jury instructions, and verdict forms; these materials are provided to other federal judges on request.

2. **Study of Procedures for Handling Death Penalty Cases.** Center researchers have collected materials from federal judges who have handled death penalty cases and have interviewed federal judges who have presided over death penalty cases. Researchers will also interview attorneys experienced in prosecuting and defending death penalty cases. One product of the study, planned for completion by Spring 1996, will be a *Bench Book* chapter annotated with sample forms and instructions. The study will also produce a longer report (also slated for completion in Spring 1996) describing in more detail the case management procedures used by judges in death penalty cases and their observations about how these cases differ from more routine criminal actions.

3. **Death Penalty Tracking Study**. This is a long-term Center project to build a comprehensive database on all federal offenders who are or could have been subject to federal capital prosecution. The Center is currently working with the Department of Justice and other groups to develop the data elements for inclusion in the database. Data collection should start in the near future. The project is slated for completion in approximately 2002.



Agenda Item 6-7

TO: Honorable Alicemarie H. 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: December 12, 1995

INTRODUCTION

The Advisory Committee on Appellate Rules met October 19, 20, and 21, 1995, in Washington, D.C. Most of the three-day meeting was devoted to completing work on the "restylized" version of the appellate rules.

At its July meeting, the Standing Committee remanded Rule 32 to the Advisory Committee for further consideration. Some members of the Standing Committee objected to the level of detail in the rule, others thought the detail necessary but not quite right. As a result, the Standing Committee concluded that Rule 32 was not ready for republication. Rules 27 and 28 were also remanded to the Advisory Committee principally so that the provisions of those rules could be coordinated with the proposed amendments to Rule 32. The Advisory Committee made further amendments to all three rules. Those rules are included in the packet of "restylized" rules. It is the Advisory Committee's recommendation that they be published as part of that packet because separate, but at least partially simultaneous, publication would be confusing.

I. ACTION ITEM

The Advisory Committee requests that the Standing Committee approve for publication revised Federal Rules of Appellate Procedure 1-48 as redrafted using uniform drafting standards.

As you know this project has been in process for sometime. The draft submitted for publication is at a minimum a fourth draft. Mr. Bryan Garner, a consultant to the Standing Committee, completed the first redraft of the full set of Appellate Rules in early summer 1994. The Style Subcommittee of the Standing Committee thoroughly reviewed Mr. Garner's draft and completed the first Style Subcommittee redraft of Rules 1-23 by mid-September 1994.

Two subcommittees of the Advisory Committee on Appellate Rules were assigned portions of Rules 1-23 for study and redraft in preparation for the Advisory Committee's fall 1994 meeting. The Advisory Commit ee met on October 25, 26, and 27, 1994, in Washington, D.C. and spent much of that meeting working on Rules 1-23.

The Standing Committee's Style Subcommittee completed its first redraft of Rules 24-48 in December 1994. Once again, two subcommittees of the Advisory Committee on Appellate Rules were assigned responsibility for reviewing and revising that draft prior to the Advisory Committee's fall 1995 meeting. At the fall 1995 meeting, the Advisory Committee revisited some questions that had arisen in the redrafting of Rules 1-23 and thoroughly reviewed Rules 24-48.

In order to facilitate your review and examination of the revised rules, the current rule is reproduced on the left-hand side of the page, and the revised rule is on the right-hand side of the page.

Our goal is to make the rules concise, clear, and consistent — and thereby help the bench and bar. We use simpler language and generally use active rather than passive voice. Long text is divided into subdivisions and "reader cues," such as captions and headings are inserted. We have attempted, in general, to leave the substance of the rules unchanged. Some substantive changes are, however, recommended.

While striving to improve the language of the rules, existing ambiguities were unmasked. In order to complete a new draft, we ordinarily had to resolve an ambiguity by choosing one of the competing interpretations. Most of the changes that are identified as substantive are of this nature. The choices are identified and discussed in the Committee Notes.

Close review of the rules also gave rise to questions about the meaning and operation of certain rules as well as ideas for improving them. A few such changes were incorporated when, in the committee's opinion, they were simple amendments. All such changes are discussed in the Committee Notes. Any complex or controversial suggestions for change were added to the committee's table of agenda items for later consideration.

Rules 32, 27, and 28 — those that were remanded to the Advisory Committee by the Standing Committee last July — contain major substantive changes. The Committee Note accompanying each of those rules states that the Advisory Committee had been working on substantive amendments to those rules just prior to completion of the larger redrafting project. Extensive Committee Notes accompany each of those rules; the notes identify and discuss the substantive amendments.

There may appear to be more substantive changes in Rules 21, 25, 26, 26.1, 29, 35, and 41 than there are. Amendments to each of those rules are currently in the pipeline. Those amendments are not reflected in the "current" rule in the left-hand column. For purposes of preparing the Committee Note accompanying the "restyled" version, however, the committee assumed that those amendments would be approved and become effective independent of this project. Amendments to Rules 21, 25, and 26 were approved by the Judicial Conference at its fall meeting and have been forwarded to the Supreme Court for its review. If they continue on schedule, those amendments will become effective on December 1, 1996. Amendments to Rules 26.1, 29, 35, and 41 are currently published for public comment. The comments will be reviewed by the Advisory Committee at its spring meeting; assuming that the amendments continue to have Advisory Committee support they will be presented to the Standing Committee in July with a request that they be forwarded to the Judicial Conference.

A. Synopsis of Proposed Amendments to Rule 27

The rule is entirely rewritten.

1. The amendments require that any legal argument necessary to support the motion must be contained in the motion; no separate brief is permitted.

2. The time for responding to a motion is expanded from 7 days to 10 days.

3. 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.

4. A motion or a response to a motion must not exceed 20 pages and a reply to a response must not exceed 10 pages.

5. The form requirements are moved from Rule 32(b) to subdivision (d) of this rule.

6. Subdivision (e) makes it clear that a motion will be decided without oral argument unless the court orders otherwise.

B. Synopsis of Proposed Amendments to Rule 28

The proposed amendments to Rule 28 are necessary to conform it to proposed amendments to Rule 32. The page limitations for a brief are deleted from 28(g). Rule 28 is amended to require a brief to include a certificate of compliance with the length limitations established in Rule 32.

C. Synopsis of Proposed Amendments to Rule 32

Rule 32 is amended in several significant ways.

1. A brief may be on "light" paper, not just "white" paper. Cream and buff colored paper, including recycled paper, are acceptable.

2. The provision for pamphlet-sized briefs have been deleted.

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

4. The amended rule permits a brief to be produced using either a monospaced typeface or a proportionately-spaced typeface.

5. The rule establishes new length limitations for briefs. If page counting is used to measure the length of a brief, a principal brief may not exceed 30 pages, and a reply brief may not exceed 15 pages. Other counting methods that approximate the current 50 page limit are, however, permitted.
   - A brief may have a total of 14,000 words as long as the average number of words per page does not exceed 280.
   - Alternatively, a brief may have a total of 90,000 characters as long as the average number of characters per page does not exceed 1,800.
   - A brief using monospaced typeface may have 1,300 lines of text.

   Those persons who prepare a brief using a typewriter can easily use the line counting method, and almost as easily the character counting method. (With 6½ inch lines and 10 characters per inch, there is a maximum of 65 characters per line.)

6. The rule requires a certificate of compliance with the length limitations.

7. The treatment of an appendix is in its own subdivision.

8. A brief that complies with the national rule is acceptable in every court. Local rules may not impose requirements that are not in the national rule. Local rules may, however, move in the other direction; they can authorize non-compliance with certain of the national norms.

II. INFORMATION ITEMS

A. Uniform Numbering of Local Rules

Amendments to Fed. R. App. P. 47 took effect on December 1, 1995. The amendments state that all local circuit rules "must conform to any uniform numbering system prescribed by the Judicial Conference." Similar amendments took effect in the bankruptcy, civil, and criminal rules. The Standing Committee asked each Advisory Committee to submit a recommendation concerning uniform numbering. With regard to local rules adopted by the courts of appeals this appears to be a relatively easy task. All but one circuit has followed the recommendation of the Local Rules Project and renumbered the circuit rules to correspond to the Fed. R. App. P. numbering system.

The Advisory Committee unanimously recommends that circuit rules be required to have a number that corresponds with the related national rule. The committee further recommends that the use of a prefix (used to identify the rule as a local appellate rule) as well as the use of decimal points, dashes, etc. (used after the FRAP number and before the number identifying which of the several related local rules is involved; for example the first local rule relating to FRAP 28 might be cited as 28.1, the second would then be 28.2) should be left to local option.

B. Committee Notes

The Advisory Committee was asked to discuss the problem that arises when a Committee Note, drafted by the Advisory Committee to explain its proposed amendment, no longer "fits" the rule because the Standing Committee makes substantial changes in the rule. This particular question is really a subpart of the larger question — whose note is it?

The consensus of the Advisory Committee is that the note should be treated as an Advisory Committee Note and should, to the extent possible, be the responsibility of the Advisory Committee. A motion was made to delegate to the

chair and the reporter authority to make whatever amendments to a Committee Note are made necessary by Standing Committee changes to the proposed rule. The motion passed unanimously with the understanding that if controversial changes are made, the chair and reporter would attempt to consult with the Advisory Committee.

C. Committee Agenda

Attached to this report is a copy of the Advisory Committee's Table of Agenda Items which indicates the status of proposed amendments under consideration by the committee.

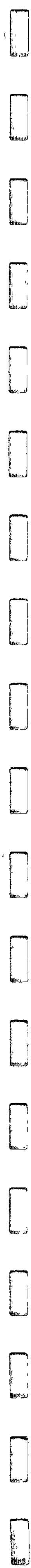
III. Minutes

Also attached to this report are draft minutes o. the Advisory Committee Meeting held October 19, 20, and 21 in Washington, D.C. The minutes have not yet been approved by the Advisory Committee.

Revised
Federal Rules of Appellate Procedure
Under
Uniform Drafting Standards

Revised by
The Advisory Committee on Appellate Rules
Judicial Conference of the United States

OCTOBER 1995



Rule 1. Scope of Rules and Title	Rule 1. Scope of Rules; Title
(a) Scope of rules. — These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.	**(a) Scope of Rules.** (1) These rules govern procedure in the United States courts of appeals. (2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.
(b) Rules not to affect jurisdiction. — These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.	**(b) Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.
(c) Title. — These rules may be known and cited as the Federal Rules of Appellate Procedure.	**(c) Title.** These rules are to be known as the Federal Rules of Appellate Procedure.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The Advisory Committee recommends deleting the language in subdivision (a) that describes the different types of proceedings that may be brought in a court of appeals. The Advisory Committee believes that the language is unnecessary and that its omission does not work any substantive change.

Rule 2. Suspension of Rules	Rule 2. Suspension of Rules
In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.	On its own or a party's motion, a court of appeals may — to expedite its decision or for other good cause — suspend the provisions of any of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 3. Appeal as of Right — How Taken	Rule 3. Appeal as of Right — How Taken
(a) Filing the Notice of Appeal. — An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.	**(a) Filing the Notice of Appeal.** (1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). (2) An appellant's failure 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 the court of appeals to act as it considers appropriate, including dismissing the appeal. (3) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6 respectively.

(b) Joint or consolidated appeals. — If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.	**(b) Joint or Consolidated Appeals.** (1) When two or more persons are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant. (2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated if the court of appeals so orders on its own or a party's motion.

(c) Content of the Notice of Appeal. — A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.	**(c) Contents of the Notice of Appeal.** (1) The notice of appeal must: (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X"; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken. (2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise. (3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class. (4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. (5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal. - The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record (apart from the appellant's), or, if a party is not represented by counsel, to the party's last known address. The clerk of the district court shall forthwith send a copy of the notice and of the docket entries to the clerk of the court of appeals named in the notice. The clerk of the district court shall likewise send a copy of any later docket entry in the case to the clerk of the court of appeals. When a defendant appeals in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date when the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date when the clerk received the notice of appeal. The clerk's failure to serve notice does not affect the validity of the appeal. Service is sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.	**(d) Serving the Notice of Appeal.** (1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record — excluding the appellant's — or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries — and any later docket entries — to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed. (2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the clerk must also note the date when the clerk docketed the notice. (3) The clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient notwithstanding the death of a party or the party's counsel.
(e) Payment of fees. — Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.	**(e) Payment of Fees.** Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and

terminology consistent throughout the appellate rules. These changes are generally intended to be stylistic only; in this rule, however, substantive changes are recommended in subdivisions (b) and (d).

Subdivision (b). A joint appeal is authorized only when two or more persons may appeal from a single judgment or order. A joint appeal is treated as a single appeal and the joint appellants file a single brief. Under existing Rule 3(b) parties decide whether to join their appeals. They may do so by filing a joint notice of appeal or by joining their appeals after filing separate notices of appeal.

In consolidated appeals the separate appeals do not merge into one. Separate judgments are entered. The parties do not proceed as a single appellant and the appellants are not "parties" of each others' cases. See *United States v. Tippett*, 975 F.2d 713 (10th Cir. 1992). Under existing Rule 3(b) it is unclear whether appeals may be consolidated without court order if the parties stipulate to consolidation. The proposed language resolves that ambiguity by requiring a court order for consolidation. The order may be entered upon motion of a party or by the court on its own motion.

The proposed language also requires a court order to join appeals after separate notices of appeal have been filed. The order will make it clear that the appeals are joined.

Subdivision (d). Paragraph (d)(2) has been amended to require that when an inmate files a notice of appeal by depositing the notice in the institution's internal mail system, the clerk must note the docketing date -- rather than the receipt date -- on the notice of appeal before serving copies of it. This change conforms to a recommended change in Rule 4(c). Rule 4(c) is amended to provide that when an inmate files the first notice of appeal in a civil case by depositing the notice in an institution's internal mail system, the time for filing a cross-appeal runs from the date the district court dockets the inmate's notice of appeal. Existing Rule 4(c) says that in such a case the time for filing a cross-appeal runs from the date the district court receives the inmate's notice of appeal. A court may "receive" a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. "Docketing" is an easily identified event. The change is made to eliminate the uncertainty.

Rule 3.1. Appeal from a Judgment Entered by a Magistrate Judge in a Civil Case	Rule 3.1 Appeal from a Judgment of a Magistrate Judge in a Civil Case
When the parties consent to a trial before a magistrate judge under 28 U.S.C. § 636(c)(1), any appeal from the judgment must be heard by the court of appeals in accordance with 28 U.S.C. § 636(c)(3), unless the parties consent to an appeal on the record to a district judge and thereafter, by petition only, to the court of appeals, in accordance with 28 U.S.C. § 636(c)(4). An appeal under 28 U.S.C. § 636(c)(3) must be taken in identical fashion as an appeal from any other judgment of the district court.	(a) **To the District Court.** When the parties have consented to a trial before a magistrate judge under 28 U.S.C. § 636(c)(1), an appeal from the judgment is heard by the court of appeals in accordance with § 636(c)(3), unless the parties have consented — at the time of reference to a magistrate judge — to an appeal on the record to a district judge and then, by petition only, to the court of appeals under § 636(c)(4). (b) **To the Court of Appeals.** An appeal under § 636(c)(3) must be taken in the same way as an appeal from any other district-court judgment.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 4. Appeal as of Right — When Taken	**Rule 4. Appeal as of Right — When Taken**
(a) Appeal in a civil case. — (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.	**(a) Appeal in a Civil Case.** (1) **Time for Filing a Notice of Appeal.** (A) In a civil case, except as provided in Rule 4(a)(4) and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the date when the judgment or order appealed from is entered. (B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after entry.
(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.	(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.
(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.	(3) **Notice of Cross-Appeal.** If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if a district court extends the time for appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.	(B)(i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered. (ii) To challenge such an order, or a judgment altered or amended upon such a motion, a party must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion. (iii) No additional fee is required to file an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.	(5) **Motion for Extension of Time.** (A) The district court may extend the time to file a notice of appeal if: (i) a party so moves within 30 days after the time prescribed by this Rule 4(a) expires; and (ii) that party shows excusable neglect or good cause. (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules. (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.	(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) the motion is filed within 180 days after the entry of the judgment or order or within 7 days after the moving party receives notice of such entry, whichever is earlier; (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and (C) the court finds that no party would be prejudiced.
(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.	(7) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

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<td>(b) Appeal in a Criminal Case.- In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order — but before entry of the judgment or order — is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:
(1) for judgment of acquittal;
(2) for arrest of judgment;
(3) for a new trial on any ground other than newly discovered evidence; or
(4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment.</td>
<td>(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed, or

(ii) the filing of the Government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of the last defendant's notice of appeal.</td>
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	(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision, sentence, or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry. (3) **Effect of a Motion on a Notice of Appeal.** (A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such motion remaining, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion: (i) for judgment of acquittal under Rule 29; (ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or (iii) for arrest of judgment under Rule 34.

A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal must be filed in the district court within 30 days after (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant. A judgment or order is entered within the meaning of this subdivision when it is entered on the criminal docket. Upon a showing of excusable neglect, the district court may — before or after the time has expired, with or without motion and notice — extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.	(B) A notice of appeal filed after the court announces a decision, sentence, or order — but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) — becomes effective upon the later of the following: (i) the entry of the order disposing of the last such remaining motion; or (ii) the entry of the judgment of conviction. (C) Despite Rule 3(c), a valid notice of appeal is effective — without amendment — to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A). (4) **Motion for Extension of Time.** Upon a finding of excusable neglect or good cause, the district court may — before or after the time has expired, with or without motion and notice — extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).
The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.	(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. (6) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.- If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c), the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; in this rule, however, substantive changes are recommended in paragraphs (a)(6) and (b)(4), and in subdivision (c).

Subdivision (a), paragraph (1). Although the Advisory Committee does not intend to make any substantive changes in this paragraph, a cross-reference to Rule 4(c) has been added to subparagraph (a)(1)(A).

Subdivision (a), paragraph (4). Item (vi) in subparagraph (A) of Rule 4(a)(4) provides that filing a motion for relief under Fed. R. Civ. P. 60 will extend the time for filing a notice of appeal if the Rule 60 motion is filed no later than 10 days after judgment is entered. Again, the Advisory Committee does not intend to make any substantive change in this paragraph. But because Fed. R. Civ. P. 6(a) and Fed. R. App. P. 26(a) have different methods for computing time, one might be uncertain whether the 10 day period referred to in Rule 4(a)(4) is computed using Civil Rule 6(a) or Appellate Rule 26(a). Because the Rule 60 motion is filed in the district court, and because Fed. R. App. P. 1(a)(2) says that when the appellate rules provide for filing a motion in the district court, "the procedure must comply with the practice of the district court," the Advisory Committee believes that the 10 day period is computed using Fed. R. Civ. P. 6(a).

Subdivision (a), paragraph (6). Paragraph (6) permits a district court to reopen the time for appeal if a party has not received notice of the entry of judgment and no party would be prejudiced by the reopening. Before reopening the time for appeal, the existing rule requires the district court to find that the moving party was entitled to notice of the entry of judgment and did not receive it "from the clerk or any party within 21 days of its entry." The Advisory Committee recommends a substantive change. The Advisory Committee recommends that the finding must be that the movant did not receive notice "from the district court or any party within 21 days after entry." This change broadens the type of notice that can preclude reopening the time for appeal. The existing rule provides that only notice from a party or from the clerk bars reopening. Under the new language such notice would continue to bar reopening, but the Advisory Committee believes that if a district judge announces the judgment in open court in the presence of the parties that announcement should also be sufficient notice to preclude later reopening of the time for appeal. The new language precludes reopening if the movant has received notice from "the court."

Subdivision (b). Existing Rule 4(b) provides that when the government is entitled to appeal in a criminal case, the government's notice of appeal must be filed within 30 days after entry of judgment or "the filing of a notice of appeal by any defendant." Use of the term "any defendant" creates an ambiguity. It may mean that when there are multiple defendants in a case, the government may file its notice of appeal as to all defendants as late as 30 days after the last notice of appeal is filed by any defendant. Conversely, it may mean that the government must file its notice within 30 days after the first defendant files a notice of appeal; failure to do so would then preclude the government from cross-appealing as to any subsequently filed notices of appeal in the case. The Advisory Committee recommends amending the rule to state that the government may appeal within 30 days after the later of entry of judgment or the filing of "the last defendant's" notice of appeal. This will remove the existing ambiguity.

Two substantive changes are proposed in what will be paragraph (b)(4). The current rule permits an extension of time to file a notice of appeal if there is a "showing of excusable neglect." First, the rule is amended to permit a court to extend the time for "good cause" as well as for excusable neglect. Rule 4(a) permits extensions for both reasons in civil cases and the Advisory Committee believes that "good cause" should be sufficient in criminal cases

as well. The proposed amendment does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired. The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do so provided that the extended period does not exceed 30 days after the expiration of the time otherwise prescribed by Rule 4(b). Second, paragraph (b)(4) is amended to require only a "finding" of excusable neglect or good cause and not a "showing" of them. Because the rule authorizes the court to provide an extension without a motion, a "showing" is obviously not required; a "finding" is sufficient.

Subdivision (c). Substantive amendments are recommended in this subdivision. The current rule provides that if an inmate confined in an institution files a notice of appeal by depositing it in the institution's internal mail system, the notice is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee recommends amending the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision.

When an inmate uses the filing method authorized by subdivision (c), the current rule provides that the time for other parties to appeal begins to run from the date the district court "receives" the inmate's notice of appeal. The rule is amended so that the time for other parties begins to run when the district court "dockets" the inmate's appeal. A court may "receive" a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. "Docketing" is an easily identified event. The change is recommended to eliminate uncertainty. Paragraph (c)(3) is further amended to make it clear that the time for the government to file its appeal runs from the later of the entry of the judgment or order appealed from or the district court's docketing of a defendant's notice filed under this paragraph (c).

Rule 5. Appeal by Permission under 28 U.S.C. § 1292(b)	Rule 5. Appeal by Permission under 28 U.S.C. § 1292(b)
(a) Petition for permission to appeal. — An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.	**(a) Petition for Permission to Appeal.** To seek an appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b), a party must — within 10 days after the entry of the district court's order — file with the circuit clerk a petition for permission to appeal. The petition must include proof of service on all other parties to the district-court action. A district-court order may at any time be amended to include the prescribed statement, and permission to appeal may be sought within 10 days after entry of the amended order.
(b) Content of petition; answer. — The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition, an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.	**(b) Contents of Petition; Answer.** (1) The petition must include the following: (A) the facts necessary to understand the controlling question of law that was determined by the district court's order; (B) the question itself; (C) the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially shorten the litigation; and (D) an attached copy of the order being appealed and any findings of fact, conclusions of law, and related opinion. (2) An adverse party may file an answer within 7 days after the petition is served. (3) The petition and answer will be submitted without oral argument unless the court orders otherwise.

(c) 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.	**(c) Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). Three copies must be filed with the original, unless the court requires a different number by local rule or by order in a particular case.
(d) Grant of permission; cost bond; filing of record. — Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of appeal need not be filed.	**(d) Grant of Permission; Fees; Cost Bond; Filing the Record.** (1) Within 10 days after the entry of the order granting permission to appeal, the appellant must: (A) pay the district clerk all required fees; and (B) file a cost bond if required under Rule 7. (2) A notice of appeal need not be filed. (3) The district clerk must notify the circuit clerk once the appellant has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(b).

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 5.1. Appeal by Permission Under 28 U.S.C. § 636(c)(5)	Rule 5.1 Appeal by Leave under 28 U.S.C. § 636(c)(5)
(a) Petition for Leave to Appeal; Answer or Cross Petition. — An appeal from a district court judgment, entered after an appeal under 28 U.S.C. § 636(c)(4) to a district judge from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.	**(a) Petition for Leave to Appeal.** (1) A party may seek an appeal from a district-court judgment entered after an appeal before the district court under 28 U.S.C. § 636(c)(4) — that is, an appeal to a court of appeals from the order of a district judge on appeal from a judgment entered upon direction of a magistrate judge in a civil case — by filing a petition for leave to appeal. Such an appeal to a court of appeals is a matter not of right but of sound judicial discretion. (2) The petition must be filed with the circuit clerk within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the district-court action.

(b) Content of petition; answer. — The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.	**(b) Contents of Petition; Answer or Cross-Petition.** (1) The petition must include the following: (A) the facts necessary to understand the questions to be presented; (B) the questions themselves; (C) the relief sought; (D) the reasons why, in the opinion of the petitioner, the appeal should be allowed; and (E) an attached copy of the order, decree, or judgment complained of and any related opinion or memorandum. (2) Within 14 days after the petition is served, a party may file an answer in opposition or a cross-petition. (3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.
(c) 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.	**(c) Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). Three copies must be filed with the original, unless the court requires a different number by local rule or by order in a particular case.

(d) Allowance of the appeal; fees; cost bond; filing of record. — Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).	**(d) Allowance of the Appeal; Fees; Cost Bond; Filing of Record.** (1) Within 10 days after entry of the order granting leave to appeal, the appellant must: (A) pay the district clerk all required fees; and (B) file a cost bond if required under Rule 7. (2) A notice of appeal need not be filed. (3) The district clerk must notify the circuit clerk once the appellant has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(b).

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The caption to this rule is changed from “Appeal by Permission under 28 U.S.C. § 636(c)(5)” to “Appeal by Leave under 28 U.S.C. § 636(c)(5).” The word "leave" is preferable because § 636(c)(5) and subdivision (a) of this rule both use the term “leave to appeal.”

Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or of a Bankruptcy Appellate Panel	**Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel**
(a) Appeal from a judgment, order or decree of a district court exercising original jurisdiction in a bankruptcy case. — An appeal to a court of appeals from a final judgment, order or decree of a district court exercising jurisdiction pursuant to 28 U.S.C. § 1334 shall be taken in identical fashion as appeals from other judgments, orders or decrees of district courts in civil actions.	**(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case.** An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.
(b) Appeal from a judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case. — (1) Applicability of other rules. All provisions of these rules are applicable to an appeal to a court of appeals pursuant to 28 U.S.C. § 158(d) from a final judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a) or (b), except that: (i) Rules 3.1, 4(a)(4), 4(b), 5.1, 9, 10, 11, 12(b), 13-20, 22-23, and 24(b) are not applicable; (ii) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" shall be read as a reference to Form 5; and (iii) when the appeal is from a bankruptcy appellate panel, the term "district court" as used in any applicable rule, means "appellate panel".	**(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.** (1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are three exceptions: (A) Rules 3.1, 4(a)(4), 4(b), 5.1, 9, 10, 11, 12(b), 13–20, 22–23, and 24(b) do not apply; (B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; and (C) when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel."

(2) Additional rules. In addition to the rules made applicable by subsection (b)(1) of this rule, the following rules shall apply to an appeal to a court of appeals pursuant to 28 U.S.C. § 158(d) from a final judgment, order or decree of a district court or of a bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a) or (b):	(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:
(i) Effect of a Motion for Rehearing on the Time for Appeal. If any party files a timely motion for rehearing under Bankruptcy Rule 8015 in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.	(A) **Motion for Rehearing.** (i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree — but before disposition of the motion for rehearing — becomes effective when the order disposing of the motion for rehearing is entered. (ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 — excluding 4(a)(4) and 4(b) — measured from the entry of the order disposing of the motion. (iii) No additional fee is required to file an amended notice.

(ii) The record on appeal. Within 10 days after filing the notice of appeal, the appellant shall file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee, a statement of the issues to be presented on appeal and a designation of the record to be certified and transmitted to the clerk of the court of appeals. If the appellee deems other parts of the record necessary, the appellee shall, within 10 days after service of the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. The record, redesignated as provided above, plus the proceedings in the district court or bankruptcy appellate panel and a certified copy of the docket entries prepared by the clerk pursuant to Rule 3(d) shall constitute the record on appeal.	(B) **The Record on Appeal.** (i) Within 10 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk. (ii) An appellee who believes that other parts of the record are necessary must, within 10 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. (iii) The record on appeal consists of: • the redesignated record as provided above; • the proceedings in the district court or bankruptcy appellate panel; and • a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(iii) Transmission of the record. When the record is complete for purpose of the appeal, the clerk of the district court or the appellate panel, shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court or of the appellate panel shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerk for the transportation and receipt of exhibits of unusual bulk or weight.	(C) **Forwarding the Record.** (i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk must not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.
All parties shall take any other action necessary to enable the clerk to assemble and transmit the record. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the redesignated record, subject to the right of any party to request at any time during the pendency of the appeal that the redesignated record be transmitted.	(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.
(iv) Filing of the record. Upon receipt of the record, the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed. Upon receipt of a certified copy of the docket entries transmitted in lieu of the redesignated record pursuant to rule or order, the clerk of the court of appeals shall file it, and shall immediately give notice to all parties of the date on which it was filed.	(D) **Filing of the Record.** Upon receiving the record — or a certified copy of the docket entries sent in place of the redesignated record — the circuit clerk must file it and immediately notify all parties of the filing date.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivision (b). Language is added to Rule 6(b)(2)(A)(ii) to conform with the corresponding provision in Rule 4(a)(4). The new language is clarifying rather than substantive. The existing rule states that a party intending to challenge an alteration or amendment of a judgment must file an amended notice of appeal. Of course if a party has not previously filed a notice of appeal, the party would simply file a notice of appeal not an amended one. The proposed language states that the party must file "a notice of appeal or amended notice of appeal."

Rule 7. Bond for Costs on Appeal in Civil Cases	Rule 7. Bond for Costs on Appeal in a Civil Case
The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.	In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 8. Stay or Injunction Pending Appeal	Rule 8. Stay or Injunction Pending Appeal
(a) Stay must ordinarily be sought in the first instance in district court; motion for stay in court of appeals. — Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court.	**(a) Motion for Stay.** (1) **Initial Motion in the District Court.** A pary must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of a district court pending appeal; (B) approval of a supersedeas bond; or (C) an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal.

A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.	(2) **Motion in the Court of Appeals.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges. (A) The motion must: (i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action. (B) The motion must also include: (i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record.
	(C) The moving party must give reasonable notice of the motion to all parties. (D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(b) Stay may be conditioned upon giving of bond; proceedings against sureties. — Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. A surety's liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribed may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.	**(b) Stay May Be Conditioned Upon Filing a Bond; Proceedings Against Sureties.** Relief by the court of appeals under this rule may be conditioned upon a party's filing a bond or other appropriate security in the district court. If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.
(c) Stays in a Criminal Case. — A stay in a criminal case shall be had in accordance with the provisions of Rule 38 of the Federal Rules of Criminal Procedure.	**(c) Stay in a Criminal Case.** Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 9. Release in a Criminal Case	Rule 9. Release in a Criminal Case
(a) Appeal from an Order Regarding Release Before Judgment of Conviction. -The district court must state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, must file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order must file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.	**(a) Release Before Judgment of Conviction.** (1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district-court order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or explain why a transcript was not obtained. (2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed. (3) The court of appeals or a circuit judge may order the defendant's release pending the disposition of the appeal.
(b) Review of an Order Regarding Release After Judgment of Conviction. — A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). In addition, the papers filed by the applicant for review must include a copy of the judgment of conviction.	**(b) Release After Judgment of Conviction.** A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

(c) Criteria for Release. The decision regarding release must be made in accordance with applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).	**(c) Criteria for Release.** The court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 10. The Record on Appeal	**Rule 10. The Record on Appeal**
(a) Composition of the Record on Appeal. — The record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court.	**(a) Composition of the Record on Appeal.** The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.
(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered. —	**(b) The Transcript of Proceedings.**

(1) Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 4(a)(4), whichever is later, the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.	(1) **Appellant's Duty to Order.** Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following: (A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications: (i) the order must be in writing; (ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and (iii) the appellant must, within the same period, file a copy of the order with the district clerk; or (B) if no transcript is ordered, file a certificate to that effect.
(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.	(2) **Unsupported Finding or Conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to any such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10-day time provided in paragraph (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal, and shall serve on the appellee a copy of the order or certificate and of the statement. An appellee who believes that a transcript of other parts of the proceedings is necessary shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of the designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.	(3) **Partial Transcript.** Unless the entire transcript is ordered: (A) the appellant must — within the 10 days provided in Rule 10(b)(1) — file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement; (B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 10 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and (C) unless within 10 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.
(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.	(4) **Payment.** At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable. — If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.	(c) **Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.
(d) Agreed statement as the record on appeal. — In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.	(d) **Agreed Statement as the Record on Appeal.** In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it — together with any additions that the district court may consider necessary to a full presentation of the issues on appeal — must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) Correction or modification of the record. — If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.	**(e) Correction or Modification of the Record.** (1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly. (2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded: (A) on stipulation of the parties; (B) by the district court before or after the record has been forwarded; or (C) by the court of appeals. (3) All other questions as to the form and contents of the record must be presented to the court of appeals.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 11. Transmission of the Record	Rule 11. Forwarding the Record
(a) Duty of appellant. -- After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.	**(a) Appellant's Duty.** An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, the clerk must forward a single record.
(b) Duty of reporter to prepare and file transcript; notice to court of appeals; duty of clerk to transmit the record. — Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the circuit clerk and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.	**(b) Duties of Reporter and District Clerk.** (1) **Reporter's Duty to Prepare and File a Transcript.** The reporter must prepare and file a transcript as follows: (A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk. (B) If the transcript cannot be completed within 30 days of the reporter's receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The clerk must note on the docket the action taken and notify the parties. (C) When a transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the filing. (D) If the reporter fails to file the transcript on time, the circuit clerk must notify the district judge and do whatever else the court of appeals directs.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.	(2) **District Clerk's Duty to Forward.** When the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk must not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.
(c) Temporary retention of record in district court for use in preparing appellate papers. — Notwithstanding the provisions of (a) and (b) of this Rule 11, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event the clerk of the district court shall certify to the clerk of the court of appeals that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.	(c) **Retaining the Record Temporarily in the District Court for Use in Preparing the Appeal.** The parties may stipulate, or the district court on motion may order, the district clerk to retain the record temporarily for the parties to use in preparing the papers on appeal. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to forward the record.
(d) [Extension of time for transmission of the record; reduction of time] [Abrogated]	**(d) [Abrogated.]**

(e) Retention of the record in the district court by order of court. — The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted. If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.	**(e) Retaining the Record by Court Order.** (1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded. (2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the court of appeals. (3) If part or all of the record is ordered retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.
(f) Stipulation of parties that parts of the record be retained in the district court. — The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.	**(f) Retaining Parts of the Record in the District Court by Stipulation of the Parties.** The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) Record for preliminary hearing in the court of appeals. — If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.	**(g) Record for Preliminary Hearing in the Court of Appeals.** If, before the record is forwarded, a party makes any of the following motions: • for dismissal; • for release; • for a stay pending appeal; • for additional security on the bond on appeal or on a supersedeas bond; or • for any other intermediate order; the district clerk must send the court of appeals any parts of the record designated by any party.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record	Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record
(a) Docketing the appeal. — Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.	(a) **Docketing the Appeal.** Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant, adding the appellant's name if necessary.
(b) Filing a Representation Statement. — Within 10 days after filing a notice of appeal, unless another time is designated by the court of appeals, the attorney who filed the notice of appeal shall file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney.	(b) **Filing a Representation Statement.** Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 10 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.
(c) Filing the Record, Partial Record, or Certificate. — Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.	(c) **Filing the Record, Partial Record, or Certificate.** Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 13. Review of a Decision of the Tax Court	Rule 13. Review of a Decision of the Tax Court
(a) How Obtained; Time for Filing Notice of Appeal. — Review of a decision of the United States Tax Court must be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after entry of the Tax Court's decision. At the time of filing the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after entry of the Tax Court's decision. The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision whichever is later.	**(a) How Obtained; Time for Filing Notice of Appeal.** (1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered. (2) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.
(b) Notice of appeal — How filed. — The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of § 7502 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto.	**(b) Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.
(c) Content of the notice of appeal; service of the notice; effect of filing and service of the notice. — The content of the notice of appeal, the manner of its service, and the effect of the filing of the notice and of its service shall be as prescribed by Rule 3. Form 2 in the Appendix of Forms is a suggested form of the notice of appeal.	**(c) Contents of the Notice of Appeal; Service; Effect of Filing and Service.** Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) The record on appeal; transmission of the record; filing of the record. — The provisions of Rules 10, 11 and 12 respecting the record and the time and manner of its transmission and filing and the docketing of the appeal in the court of appeals in cases on appeal from the district courts shall govern in cases on appeal from the Tax Court. Each reference in those rules and in Rule 3 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court respectively. If appeals are taken from a decision of the Tax Court to more than one court of appeals, the original record shall be transmitted to the court of appeals named in the first notice of appeal filed. Provision for the record in any other appeal shall be made upon appropriate application by the appellant to the court of appeals to which such other appeal is taken.	**(d) The Record on Appeal; Forwarding; Filing.** (1) An appeal from the Tax Court is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk. (2) If an appeal from a Tax Court decision is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 14. Applicability of Other Rules to the Review of a Tax Court Decision	**Rule 14. Applicability of Other Rules to the Review of a Tax Court Decision**
All provisions of these rules are applicable to review of a decision of the Tax Court, except that Rules 4-9, Rules 15-20, and Rules 22 and 23 are not applicable.	All provisions of these rules, except Rules 4–9, 15–20, and 22–23, apply to the review of a Tax Court decision.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention	**Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention**
(a) Petition for Review of Order; Joint Petition. - Review of an order of an administrative agency, board, commission, or officer (hereinafter, the term "agency" will include agency, board, commission, or officer) must be obtained by filing with the clerk of a court of appeals that is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" will include a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal).	**(a) Petition for Review; Joint Petition.** (1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.
The petition must name each party seeking review either in the caption or in the body of the petition. Use of such terms as "et al.," or "petitioners," or "respondents" is not effective to name the parties. The petition also must designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency must be named respondent. The United States will also be a respondent if required by statute, even though not designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.	(2) The petition must: (A) name each party seeking review either in the caption or the body of the petition; using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties; (B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and (C) specify the order or part thereof to be reviewed. (3) Form 3 in the Appendix of Forms is a suggested form of a petition for review. (4) In this rule "agency" includes an agency, board, commission or officer, and "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

(b) Application for enforcement of order; answer; default; cross-application for enforcement. — An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.	**(b) Application or Cross-Application to Enforce an Order; Answer; Default.** (1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, the respondent may file a cross-application for enforcement. (2) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested. (3) Within 20 days thereafter the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.
(c) Service of petition or application — A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.	**(c) Service of Petition or Application.** The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must: (1) have served a copy on all parties admitted to participate in the agency proceedings, except for the respondents; (2) file with the clerk a list of those so served; and (3) give the clerk enough copies of the petition or application to serve each respondent.

(d) Intervention. — Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.	**(d) Intervention.** Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion — or other notice of intervention authorized by statute — must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.
(e) Payment of Fees. - When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the clerk of the court of appeals the fees established by statute, and also the docket fee prescribed by the Judicial Conference of the United States.	**(e) Payment of Fees.** When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 15.1. Briefs and Oral Argument in National Labor Relations Board Proceedings	**Rule 15.1. Briefs and Oral Argument in a National Labor Relations Board Proceeding**
Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.	In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 16. The record on Review or Enforcement.	Rule 16. The Record on Review or Enforcement
(a) Composition of the record. — The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of any agency.	**(a) Composition of the Record.** The record on review or enforcement of an agency order consists of: (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency.
(b) Omissions from or misstatements in the record. — If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.	**(b) Omissions From or Misstatements in the Record.** The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 17. Filing of the Record	Rule 17. Filing the Record
(a) Agency to file; time for filing; notice of filing. — The agency shall file the record with the clerk of the court of appeals within 40 days after service upon it of the petition for review unless a different time is provided by the statute authorizing review. In enforcement proceedings the agency shall file the record within 40 days after filing an application for enforcement, but the record need not be filed unless the respondent has filed an answer contesting enforcement of the order, or unless the court otherwise orders. The court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.	**(a) Agency to File; Time for Filing; Notice of Filing.** The agency must file the record with the circuit clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.
(b) Filing — What Constitutes. — The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.	**(b) Filing — What Constitutes.** (1) The agency must file: (A) the original or a certified copy of the entire record or parts designated by the parties, or (B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties. (2) The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed. (3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive changes is recommended, however, in subdivision (b).

Subdivision (b). The current rule provides that when a court of appeals is asked to review or enforce an agency order, the agency must file either "the entire record or such parts thereof as the parties may designate by stipulation filed with the agency" or a certified list describing the documents, transcripts, exhibits, and other material constituting the record. If the agency is not filing a certified list, the current rule requires the agency to file the entire record unless the parties file a "stipulation" designating only parts of the record. Such a "stipulation" presumably requires agreement of the parties as to the parts to be filed. The amended language in subparagraph (b)(1)(A) permits the agency to file the entire record or "parts designated by the parties." The new language permits the filing of less than the entire record even when the parties do not agree as to which parts should be filed. Each party can designate the parts that it wants filed; the agency can then forward the parts designated by each party. In contrast, paragraph (b)(2) continues to require stipulation, that is agreement of the parties, that the agency need not file either the record or a certified list.

Rule 18. Stay Pending Review	Rule 18. Stay Pending Review
Application for a stay of a decision or order of any agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the application had requested. The motion shall also show the reasons for the relief requested and the facts relied upon and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the court of appeals. The court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.	**(a) Motion for a Stay.** (1) **Initial Motion before the Agency.** A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order. (2) **Motion in the Court of Appeals.** A motion for a stay may be made to the court of appeals or one of its judges. (A) The motion must: (i) show that moving first before the agency would be impracticable; or (ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its actions. (B) The motion must also include: (i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record.

	(C) The moving party must give reasonable notice of the motion to all parties. (D) A motion under Rule 18 (a)(1) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge. (b) **Bond.** The court may condition relief on the filing of a bond or other appropriate security.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 19. Settlement of Judgments Enforcing Orders	Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part
When an opinion of the court is filed directing the entry of a judgment enforcing in part the order of any agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, the respondent shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which the respondent deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.	When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 7 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 20. Applicability of Other Rules To Review or Enforcement of Agency Orders	Rule 20. Applicability of Rules to the Review or Enforcement of an Agency Order
All provisions of these rules are applicable to review or enforcement of orders of agencies, except that Rules 3-14 and Rules 22 and 23 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.	All provisions of these rules, except Rules 3-14 and 22-23, apply to the review or enforcement of an agency order. In these rules, "appellant" includes a petitioner or applicant, and "appellee" includes a respondent.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs	Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs
(a) Mandamus or prohibition to a judge or judges; petition for writ; service and filing. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The 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 copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.	**(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.** (1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes. (2)(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 a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition. (3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.

(b) Denial; order directing answer. If the court is of the opinion that the writ should not be granted, it shall 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. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.	**(b) Denial; Order Directing Answer; Briefs; Precedence.** (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 request permission to respond but may not respond unless invited or ordered to do so by the court of appeals. (5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial court judge or amicus curiae. (6) The proceeding must be given preference over ordinary civil cases. (7) The circuit clerk must send a copy of the final disposition to the trial court judge.
(c) **Other Extraordinary Writs.** Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.	(c) **Other Extraordinary Writs.** Application for an extraordinary writ other than one of those provided for in subdivisions (a) and (b) of this rule must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on such application 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.	**(d) Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). 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

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 22. Habeas Corpus Proceedings.	Rule 22. Habeas Corpus Proceeding
(a) Application for the original writ. — An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.	**(a) Application for the Writ.** An application for a writ of habeas corpus ought to be made to the appropriate district court. If made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not favored; the proper remedy is to appeal to the court of appeals from the district court's order denying the writ.

(b) Necessity of certificate of probable cause for appeal. — In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.	**(b) Necessity of Certificate of Probable Cause.** (1) If the detention complained of in a habeas corpus proceeding arises from process issued by a state court, the applicant cannot take an appeal unless a district or circuit judge issues a certificate of probable cause. If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of probable cause or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate. (2) 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. (3) A certificate of probable cause is not required when a state or its representative appeals.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings	**Rule 23. Custody or Release of a Prisoner in a Habeas Corpus Proceeding**
(a) Transfer of custody pending review. — Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.	**(a) Transfer of Custody Pending Review.** Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.
(b) Detention or release of prisoner pending review of decision failing to release. — Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.	**(b) Detention or Release Pending Review of Decision Not to Release.** While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be: (1) detained in the custody from which release is sought; (2) detained in other appropriate custody; or (3) released on personal recognizance, with or without surety.

(c) Release of prisoner pending review of decision ordering release. — Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.	**(c) Release Pending Review of Decision Ordering Release.** While a decision ordering the release of a prisoner is under review, the prisoner must — unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise — be released on personal recognizance, with or without surety.
(d) Modification of initial order respecting custody. — An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.	**(d) Modification of the Initial Order on Custody.** An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only

Subdivision (d). The current rule states that the initial order governing custody or release "shall govern review" in the court of appeals. The amended language says that the initial order generally "continues in effect" pending review.

When Rule 23 was adopted it used the same language as Supreme Court Rule 49, which then governed custody of prisoners in habeas corpus proceedings. The "shall govern review" language was drawn from the Supreme Court Rule. The Supreme Court has since amended it rule, now Rule 36, to say that the initial order "shall continue in effect" unless for reasons shown it is modified or a new order is entered. The Advisory Committee recommends that Rule 23 be amended to similarly state that the initial order "continues in effect." The new language is clearer. It removes the possible implication that the initial order created law of the case, a strange notion to attach to an order regarding custody or release.

Rule 24. Proceedings in Forma Pauperis	**Rule 24. Proceedings in Forma Pauperis**
(a) Leave to proceed on appeal in forma pauperis from district court to court of appeals. — A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial. Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.	**(a) Leave to Proceed in Forma Pauperis.** (1) **Motion in the District Court.** Except as stated in (3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that: (A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs; (B) claims an entitlement to redress; and (C) states the issues that the party intends to present on appeal. (2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs. If the district court denies the motion, it must state its reasons in writing. (3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. In that event, the district court must state in writing its reasons for the certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.	(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following: (A) denies a motion to proceed on appeal in forma pauperis; (B) certifies that the appeal is not taken in good faith; or (C) finds that the party is not otherwise entitled to proceed in forma pauperis. (5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice described in Rule 24(a)(3). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed in Rule 24(a)(1).
(b) Leave to proceed on appeal or review in forma pauperis in administrative agency proceedings. — A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the United States Tax Court) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of (a) of this Rule 24.	**(b) Leave to Proceed in Forma Pauperis on Appeal or Review of an Administrative-Agency Proceeding.** When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24 (a)(1).

(c) Form of briefs, appendices and other papers. — Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.	(c) **Leave to Use Original Record.** A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The Advisory Committee recommends deleting the language in subdivision (c) authorizing a party proceeding in forma pauperis to file papers in typewritten form because the authorization is unnecessary. The rules permit all parties to file typewritten documents.

Rule 25. Filing and Service (Filing, Proof of Filing, Service, and Proof of Service)	Rule 25. Filing and Service
(a) Filing.- Papers required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used.	**(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. (B) **A brief or appendix.** 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.

Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing 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.	(C) **Inmate filing.** A paper filed by an inmate confined in an institution is timely filed if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid. (D) **Electronic Filing.** A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. (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; the judge must note the filing date on the motion and give it to the clerk. (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.

(b) Service of all papers required. — Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.	**(b) Service of All Papers Required.** Unless a rule requires service by the clerk, a party must, at or before the time of filing, have copies of any filed paper served on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.
(c) Manner of service. — Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.	**(c) Manner of Service.** Service may be personal, by mail, or by third-party commercial carrier. 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 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. — 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, of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed.	**(d) Proof of Service.** (1) A paper presented for filing must contain either of the following: (A) an acknowledgment of service by the person served; or (B) proof of service consisting of a statement by the person who made service certifying: (i) the date and manner of service; (ii) the names of the persons served; and (iii) their mailing addresses or the addresses of the places of delivery. (2) 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. (3) Proof of service may appear on or be affixed to the papers filed.
(e) Number of Copies. — Whenever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.	**(e) Number of Copies.** When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive amendment is recommended, however, in subdivision (a).

Subdivision (a). The substantive amendment recommended in this subdivision is a companion to a recommended amendment in Rule 4(c). Currently Rule 25(a)(2)(C) provides that if an inmate confined in an institution files a document by depositing it in the institution's internal mail system, the document is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee recommends amending the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subparagraph.

Rule 26. Computation and Extension of Time	**Rule 26. Computing and Extending Time**
(a) Computation of time. — In computing any period of time prescribed or allowed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.	**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute: (1) Exclude the day of the act, event, or default that begins the period. (2) When the period is less than 7 days, exclude intermediate Saturdays, Sundays, and legal holidays. (3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which the weather or other conditions make the clerk's office inaccessible.
As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.	(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Enlargement of time. — The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.	**(b) Extending Time.** For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4), a petition for permission, or a petition for leave to appeal; or (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.
(c)Additional time after service by mail. — 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 days shall be added to the prescribed period.	**(c) Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service in the proof of service.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is recommended, however, in subdivision (a).

Subdivision (a). The amendment makes the computation method prescribed in this rule applicable to any time period imposed by a local rule. This means that if a local rule establishing a time limit is permitted, the national rule will govern the computation of that period.

Rule 26.1. Corporate Disclosure Statement	Rule 26.1. Corporate Disclosure Statement
Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.	(a) **Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying its parent corporation and listing any publicly held company that owns 10% or more of the party's stock. (b) **Time for Filing.** A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. (c) **Number of Copies.** If the statement is filed before the principal brief, the party must file an original and three copies, unless the court requires a different number by local rule or by order in a particular case.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 27. Motions	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 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 ground 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.	**(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. A motion must be in writing unless the court permits otherwise. (2) **Contents of a Motion.** (A) **Grounds and relief sought.** A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it. (B) **Accompanying documents.** (i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion. (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 separate exhibit.

	(C) **Documents barred or 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.
Any party may file a response in opposition to a motion other than one for 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.	(3) **Response.** (A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. But a motion may be decided before a response is filed if it is a motion for a procedural order governed by Rule 27(b) or a motion authorized by Rule 8, 9, 18, or 41 and reasonable notice has been given. (B) **Request for Affirmative Relief.** A response may include a motion for affirmative relief. The time to respond to the new motion, and to 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 reply to a response no later than 5 days after service of the response, unless the court shortens or extends the time. A reply must not present matters that do not relate to the response.

(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	**(b) Disposition of a Motion for a Procedural Order.** The court may act on a procedural order — including a motion under Rule 26(b) — at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to dispose of specified types of procedural motions. A party adversely affected by the court's, or the clerk's, disposition may file a motion to reconsider, vacate, or modify that action. Timely opposition 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 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.	**(c) Power of a Single Judge to Entertain a Motion.** A circuit judge may act alone 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; 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.

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

(1) **Format.**

(A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque, unglazed paper. Only one side of the paper may be used.

(B) **Cover.** 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.

(C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) **Paper Size, Line Spacing, and Margins.** The document must be on 8½ 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. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

	(2) **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. (3) **Number of Copies.** An original and three copies must be filed unless the court requires a different number by local rule or by order in a particular case. (e) **Oral Argument.** A motion will be decided without oral argument unless the court orders otherwise.

Committee Note

In addition to amending Rule 27 to conform to uniform drafting standards, several substantive amendments are recommended. The Advisory Committee had been working on substantive amendments to Rule 27 just prior to completion of this larger project. Rather than publish the Rule 27 amendments separately, they have been made a part of this packet.

Subdivision (a). Paragraph (1) retains the language of the existing 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 (1) also states that a motion must be in writing unless the court permits otherwise. The writing requirement has been implicit in the rule; the Advisory 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 Advisory Committee decided that it is better to leave the determination of the propriety of an oral motion to the court's discretion. The provision does 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.

Paragraph (2) outlines the contents of a motion. It begins with the general requirement from the current 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) retains the provisions of the current 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 Advisory 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 should not reargue propositions presented in the motion or present matters that do not relate 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 relate to the response.

Subdivision (b). The material in 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 this subdivision are stylistic only. No substantives changes are intended.

Subdivision (d). This subdivision has been substantially revised.

The format requirements have been moved from Rule 32(b) to paragraph (1) of this subdivision. 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 (2) 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. This 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.

The changes in paragraph (4) are stylistic only. No substantive changes are intended.

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.

Rule 28. Briefs	**Rule 28. Briefs**
(a) Appellant's Brief. — The brief of the appellant must contain, under appropriate headings and in the order here indicated: (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.	(a) **Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated: (1) a corporate disclosure statement if required by Rule 26.1; (2) a table of contents, with page references; (3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;
(2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; (ii) a statement of the basis for jurisdiction in the court of appeals, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; the statement shall include relevant filing dates establishing the timeliness of the appeal or petition for review and (a) shall state that the appeal is from a final order or a final judgment that disposes of all claims with respect to all parties or, if not, (b) shall include information establishing that the court of appeals has jurisdiction on some other basis. (3) A statement of the issues presented for review.	(4) a jurisdictional statement, including: (A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction; (B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction; (C) the filing dates establishing the timeliness of the appeal or petition for review; and (D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis; (5) a statement of the issues presented for review;

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).	(6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;
	(7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));
(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.	(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;
(6) An argument. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.	(9) the argument, which must contain: (A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);
(7) A short conclusion stating the precise relief sought.	(10) a short conclusion stating the precise relief sought; and
	(11) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. — The brief of the appellee must conform to the requirements of paragraphs (a)(1)-(6) , except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant: (1) the jurisdictional statement; (2) the statement of the issues; (3) the statement of the case; (4) the statement of the standard of review.	**(b) Appellee's Brief.** The appellee's brief must conform to the requirements of Rule 28(a)(1)–(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement: (1) the jurisdictional statement; (2) the statement of the issues; (3) the statement of the case; (4) the statement of the facts; and (5) the statement of the standard of review.
(c) Reply brief. — The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain 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 reply brief where they are cited.	**(c) Reply Brief.** Appellant may file a brief in reply to appellee's brief. If appellee has cross-appealed, appellee may file a brief in reply to appellant's response to the issues presented by the cross-appeal. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.
(d) References in briefs to parties. — Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.	**(d) References to Parties.** In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used below, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) References in briefs to the record. — References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment, p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.	(e) **References to the Record.** References to the parts of the record contained in the appendix filed with appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example: • Answer p. 7; • Motion for Judgment p. 2; • Transcript p. 231. Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.
(f) Reproduction of statutes, rules, regulations, etc. — If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.	(f) **Reproduction of Statutes, Rules, Regulations, etc.** If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.
(g) 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.	(g) **[Reserved]**

(h) Briefs in cases involving cross appeals. — If a cross appeal is filed, the party who first files a notice of appeal, or in the event that the notices are filed on the same day, the plaintiff in the proceeding below shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall conform to the requirements of subdivision (a)(1)-(6) of this rule with respect to the appellee's cross appeal as well as respond to the brief of the appellant except that a statement of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.	**(h) Briefs in a Case Involving a Cross-Appeal.** If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)–(11). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.
(i) Briefs in cases involving multiple appellants or appellees. — In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.	**(i) Briefs in a Case Involving Multiple Appellants or Appellees.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.
(j) Citation of supplemental authorities. — When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.	**(j) Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the clerk of the court by letter, with a copy to all counsel, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are recommended in this rule, however. Most of them are necessary to conform Rule 28 with changes recommended in Rule 32.

Subdivision (a). The current rule requires a brief to include a statement of the case which includes a description of the nature of the case, the course of proceedings, the disposition of the case — all of which might be described as the procedural history — as well as a statement of the facts. The amendments separate this into two statements: one procedural, called the statement of the case; and one factual, called the statement of the facts. The Advisory Committee believes that the separation will be helpful to the judges. The table of contents and table of authorities have also been separated into two distinct items.

An additional amendment of subdivision (a) is recommended to conform it with an amendment being made to Rule 32. Rule 32(a)(7) generally requires a brief to include a certificate of compliance with type-volume limitations contained in that rule. (No certificate is required if a brief does not exceed 30 pages, or 15 pages for a reply brief.) Rule 28(a) is amended to include that certificate in the list of items that must be included in a brief whenever it is required by Rule 32.

Subdivision (g). The amendments delete 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 (11) with regard to a cross-appeal. The addition of separate paragraphs requiring a corporate disclosure statement, table of authorities, statement of facts, and certificate of compliance increased the relevant paragraphs of subdivision (a) from (7) to (11). The other changes are stylistic; no substantive changes are intended.

Rule 29. Brief of an Amicus Curiae	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 a 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 it is accompanied by written consent of all parties or by leave of court. (b) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and 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, 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. An amicus brief need not comply with Rule 28, but must include the following: (1) a table of contents, with page references; (2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited; (3) a concise statement of the identity of the amicus curiae and its interest in the case; (4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and (5) a certificate of compliance, if required by Rule 32(a)(5).

	(d) **Length.** An amicus brief may be no more than one-half the maximum length of a party's principal brief. (e) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, within the time allowed to the party being supported. An amicus curiae who does not support either party must 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

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 30. Appendix to the Briefs	Rule 30. Appendix to the Briefs
(a) Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies. — The appellant must prepare and file an appendix to the briefs which must contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts. Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant must serve and file the appendix with the brief. Ten copies of the appendix must be filed with the clerk, and one copy must be served on counsel for each party separately represented, unless the court requires the filing or service of a different number by local rule or by order in a particular case.	**(a) Appellant's Responsibility.** (1) **Contents of the Appendix.** The appellant must prepare and file an appendix to the briefs, containing: (A) the relevant docket entries in the proceeding below; (B) the relevant portions of the pleadings, charge, findings, or opinion; (C) the judgment, order, or decision in question; and (D) other parts of the record to which the parties wish to direct the court's attention. (2) **Excluded Material.** Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied upon by the court or the parties even though not included in the appendix. (3) **Time to File; Number of Copies.** Unless filing is deferred under Rule 30(c), the appellant must file ten copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) Determination of contents of appendix; cost of producing. — The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which the appellant intends to include in the appendix and a statement of the issues which the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated with respect to the appeal and any cross appeal. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation. The provisions of this paragraph shall apply to cross appellants and cross appellees.	**(b) All Parties' Responsibilities.** (1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 10 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 10 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.
Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.	(2) **Costs of Appendix.** Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when alternative method is used. — If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time each brief is served, and a statement of the issues presented shall be unnecessary.	(c) **Deferred Appendix.** (1) **Deferral Until After Briefs Are Filed.** The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where the page begins. Or if a party desires to refer in a brief directly to pages of the appendix, that party may serve and file typewritten or page proof copies of the brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.	(2) **References to the Record.** (A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear. (B) A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) Arrangement of the appendix. — At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.	(d) **Format of the Appendix.** The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.
(e) Reproduction of exhibits. — Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.	(e) **Reproduction of Exhibits.** Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.
(f) Hearing of appeals on the original record without the necessity of an appendix. — A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record or relevant parts thereof, as the court may require.	(f) **Appeal on the Original Record Without an Appendix.** The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivision (c). When a deferred appendix is used, a brief must make reference to the original record rather than to the appendix because it does not exist when the briefs are prepared. Unless a party later files an amended brief with direct references to the pages of the appendix (as provided in subparagraph (c)(2)(B)), the material in the appendix must indicate the pages of the original record from which it was drawn so that a reader of the brief can make meaningful use of the appendix. The instructions in the current rule for cross- referencing the appendix materials to the original record are unclear. The language in paragraph (c)(2) has been amended to try to clarify the procedure.

Subdivision (d). In recognition of the fact that use of a typeset appendix is exceedingly rare in the courts of appeals, the last sentence — permitting a question and answer (as from a transcript) to be in a single paragraph — has been omitted.

Rule 31. Filing and Service of a Brief	**Rule 31. Serving and Filing Briefs**
(a) Time for serving and filing briefs. — The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases or by order for specific cases.	**(a) Time to Serve and File a Brief.** (1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least three days before argument, unless the court, finding good cause, allows a later filing. (2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(b) Number of Copies to Be Filed and Served. — Twenty-five copies of each brief must be filed with the clerk, and two copies must be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies must be filed with the clerk, and one copy must be served on counsel for each party separately represented.	**(b) Number of Copies.** Twenty-five copies of each brief must be filed with the clerk and two copies must be served on counsel for each separately represented party, unless the court requires a different number by local rule or by order in a particular case. An unrepresented party proceeding in forma pauperis may file an original and three legible copies with the clerk and one copy must be served on counsel for each separately represented party.
(c) Consequence of failure to file briefs. — If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.	**(c) Consequence of Failure to File.** If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is recommended, however, in subdivision (b).

Subdivision (a)(2). Paragraph (a)(2) explicitly authorizes a court of appeals to shorten a briefing schedule if the court routinely considers cases on the merits promptly after the briefs are filed. Extensions of the briefing schedule, by order, are permitted under the general provisions of Rule 26(b).

Subdivision (b). The current rule says that a party who is permitted to file "typewritten ribbon and carbon copies of the brief" need only file an original and three copies of the brief. The quoted language, in conjunction with current rule 24(c), means that a party allowed to proceed in forma pauperis need not file 25 copies of the brief. Two changes are suggested in this subdivision. First, it is anachronistic to refer to a party who is allowed to file a typewritten brief as if that would distinguish the party from all other parties; any party is permitted to file a typewritten brief. The amended rule states directly that it applies to a party permitted to proceed in forma pauperis. Second, the amended rule does not generally permit parties who are represented by counsel to file the lesser number of briefs. Inexpensive methods of copying are generally available. Unless it would impose hardship, in which case a motion to file a lesser number should be filed, a represented party should file the usual number of briefs.

Rule 32. Form of Briefs, the Appendix and Other Papers	Rule 32. Form of a Brief, an Appendix, and Other Papers
(a) Form of briefs and the appendix. — Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. 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 1/8 inches. Those produced by any other process shall be bound in volumes having pages not exceeding 8 ½ by 11 inches and type matter not exceeding 6 ½ by 9 ½ 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. 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.	**(a) Form of a Brief.** **(1) Reproduction.** (A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used. (B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer. (C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) 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) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.	(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; and any reply brief, gray. The front cover of a brief must contain: (A) the number of the case centered at the top; (B) the name of the court; (C) the title of the case (see Rule 12(a)); (D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below; (E) the title of the document, identifying the party or parties for whom the document is filed; and (F) the name, office addresses, and telephone number of counsel representing the party for whom the document is filed.

(3) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(4) **Paper Size, Line Spacing, and Margins.** The document must be on 8 ½ 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. Margins must be at least 1 inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) **Typeface.** Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger, but 12-point type may be used in footnotes.

(B) A monospaced face may not contain more than 10 ½ characters per inch.

(6) **Type Styles.** A brief must be set in a plain, roman style, although italics may be used for emphasis. Case names must be italicized or underlined. A brief may use boldface only for case captions, section names, and argument headings. A brief may use all capitals only for case captions and section names. Nevertheless, quoted passages may use the original type style and capitalization.

(7) **Length.**

(A) **Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) **Type-Volume Limitation.**

(i) A principal brief is acceptable if it contains no more than 14,000 words or 90,000 characters and does not average more than 280 words or 1,800 characters per page. A brief using a monospaced face also is acceptable if it does not contain more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word, character, and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, and any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

	(C) **Certificate of Compliance.** A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or character count of the word-processing system used to prepare the brief. The certificate must state either: (i) the number of words or characters in the brief and the average number per page; or (ii) the number of lines of monospaced type in the brief.
	(b) Form of an Appendix. An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions: (1) The cover of a separately bound appendix must be white. (2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision. (3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8 ½ by 11 inches, and need not lie reasonably flat when opened.

(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 ½ by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached to 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.	**(c) Form of Other Papers.** (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 reproduced in the manner prescribed by Rule 32(a), with the following exceptions: (A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2); and (B) Rule 32(a)(7) does not apply. **(d) Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Committee Note

In addition to amending Rule 32 to conform to uniform drafting standards, several substantive amendments are recommended. The Advisory Committee had been working on substantive amendments to Rule 32 for some time prior to completion of this larger project. In fact, earlier versions of proposed amendments to Rule 32 have been previously published. Rather than publish the Rule 32 proposed amendments separately, they have been made a part of this packet.

Subdivision (a). Form of a Brief.

Paragraph (a)(1). Reproduction.
The rule permits the use of "light" paper, not just "white" paper. Cream and buff colored paper, including recycled paper, are acceptable. 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 the text be reproduced with a clarity that equals or exceeds the output of a laser printer. That means that the method used must have a print resolution of 300 dots per inch (dpi) or more. This will ensure the legibility of the brief. A brief produced by a typewriter or a daisy wheel printer, as well as one produced by a laser printer, has a print resolution of 300 dpi or more. But a brief produced by a dot-matrix printer, fax machine, or portable printer that uses heat or dye transfer methods does not. Some ink jet printers are 300 dpi or more, but some are 216 dpi and would not be sufficient.

Photographs, illustrations, and tables may be reproduced by any method that results in a good copy.

Paragraph (a)(2). Cover.
The rule requires that the number of the case be centered at the top of the front cover of a brief. This will aid in identification of the document and 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, the information is necessary to the court. If, however, the document is filed on behalf of all appellants or 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.

Paragraph (a)(3). Binding.
The rule requires a brief 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. One circuit already has such a requirement and another states 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 a brief at the upper left-hand corner also satisfies this requirement as long as it is sufficiently secure.

Paragraph (a)(4). Paper Size, Line Spacing, and Margins.
The provisions for pamphlet-size briefs are deleted because their use is so rare. If a circuit wishes to authorize their use, it has authority to do so under subdivision (d) of this rule.

Paragraph (a)(5). Typeface.

This paragraph and the next one, governing type style, are new. The existing rule simply states that a brief 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.

With regard to typeface there are two options: proportionally-spaced typeface or monospaced typeface.

A proportionally-spaced typeface gives a different amount of horizontal space to characters depending upon the width of the character. A capital "M" is given more horizontal space than a lower case "i." The rule requires that a proportionally-spaced typeface have serifs. A serif is a smaller line used to finish off a main stroke of a letter, for example at the top and bottom of a capital "M." Long blocks of text are easier to read in serif type. Books and newspapers as well as all professionally printed briefs are printed in proportionally-spaced, serif type. The rule requires a minimum type size of 14 points so that the type is easily legible. But a 12-point type may be used in footnotes.

A monospaced typeface is 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 10½ 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 10½ 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.

Paragraph (a)(6). Type Styles.
The rule requires use of plain roman, that is not italic or script, type. Italics may be used only for emphasis and in case names. The use of boldface is also restricted; it may be used only for case captions, section names (section names refers to the headings for the items required in Rule 28(a), e.g., jurisdictional statement, statement of facts), and argument headings. Except that a quoted passage may use the original type style and capitalization, all-capitals may be used only for case captions and section names. These rules also aid legibility.

Paragraph (a)(7). Type-Volume Limitation.
Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospaced typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a

typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this, and more, have made the 50 page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing "tricks" available with most personal computers to file a brief far longer than the "old" 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30 page limit is imposed.

The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a person without a personal computer. The aim of these provisions is to create a level playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.

The length can be determined either by counting words, characters, or lines. That is, the length of a brief is determined not by the number of pages but by the number of words, characters, or lines in the brief. 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 word or character counting methods can be used with any typeface. One can choose to count either words or characters. A character count (count of each letter, number, punctuation mark, etc.) is highly consistent across word-processing programs but is not required by the rule because it is not easily done with some programs. A person using a typewriter, however, can easily determine the maximum number of characters per line and certify that the number of characters per page and in the brief does not exceed the maximum. (For example, a typewriter with pica type produces no more than 10 characters per inch. One line of text, therefore, has not more than 65 characters per line.) Different word-processing programs do not produce as consistent a word count, but the rule permits use of word counts because the variations from program to program are small and some programs do not count characters. The rule imposes not only an overall word/character limit (the number of words or characters in the brief) but also limits the average number of words or characters per page. This latter provision ensures legibility; it does not permit a person to squeeze too many words on a page.

A monospaced brief can meet the volume limitation by using the word or character count, or a line count. If the line counting method is used, the number of lines may not exceed 1,300 — 26 lines per page in a 50 page brief. The number of lines is easily counted manually. Line counting is not sufficient if a proportionally spaced typeface is used, because the amount of material per line can vary widely.

A brief using the type-volume limitations in subparagraph (B) must include a certificate by the attorney, or party proceeding pro se, that the brief complies with the limitation. The rule permits the person preparing the certification to rely upon the word or character count of the word-processing system used to prepare the brief.

Currently, Rule 28(g) governs the length of a brief. Rule 28(g) begins with the words "[e]xcept by permission of the court," signalling that a party may file a motion to exceed the limits established in the rule. The absence of similar language in Rule 32 does not mean that the Advisory Committee intends to prohibit motions to deviate from the requirements of the rule. The Advisory Committee does not believe that any such language is needed to authorize such a motion.

Subdivision (b). Form of an Appendix.
The provisions governing the form of a brief generally apply to an appendix. The rule recognizes, however, that an appendix is usually produced by photocopying existing documents. The rule requires that the photocopies be legible.

The rule permits inclusion not only of documents from the record but also copies of a printed judicial or agency decision. If a decision that is part of the record in the case has been published, it is helpful to provide a copy of the published decision in place of a copy of the decision from the record.

Subdivision (c). Form of Other Papers.
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)(7) do not apply to those documents and a cover is not required if all the information needed by the court to properly identify the document and the parties is included in the caption or signature page.

Existing subdivision (b) states that other papers may be produced in like manner, or "they may be typewritten upon opaque, unglazed paper 8½ by 11 inches in size." The quoted language is deleted but that method of preparing documents is not eliminated because (a)(5)(B) permits use of standard pica type. The only change is that the new rule now specifies margins for typewritten documents.

Subdivision (d). Local Variation.
A brief that complies with the national rule should be acceptable in every court. Local rules may move in one direction only; they may authorize non-compliance with certain of the national norms. For example, a court that wishes to do so may authorize printing of briefs on both sides of the paper, or the use of smaller type size or sans-serif proportional type. A local rule may not, however, impose requirements that are not in the national rule.

Rule 33. Appeal Conferences	Rule 33. Appeal Conferences
The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement.	The court may direct the attorneys — and, when appropriate, the parties — to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 34. Oral Argument	**Rule 34. Oral Argument**
(a) In general; local rule. — Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard: Oral argument will be allowed unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.	**(a) In General.** Any party may file a statement explaining why oral argument should be permitted. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons: (1) the appeal is frivolous; (2) the dispositive issue or issues have been authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.
(b) Notice of argument; postponement. — The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.	**(b) Notice of Argument; Postponement.** The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.
(c) Order and Content of Argument.- The appellant is entitled to open and conclude the argument. Counsel may not read at length from briefs, records, or authorities.	**(c) Order and Contents of Argument.** The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) Cross and separate appeals. — A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross appeal, the party who first files a notice of appeal, or in the event that the notices are filed on the same day the plaintiff in the proceeding below, shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.	**(d) Cross-Appeals and Separate Appeals.** If there is a cross-appeal, Rule 28(h) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.
(e) Non-appearance of parties. — If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.	**(e) Nonappearance of a Party.** If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.
(f) Submission on briefs. — By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.	**(f) Submission on Briefs.** The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.
(g) Use of physical exhibits at argument; removal. — If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.	**(g) Use of Physical Exhibits at Argument; Removal.** Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom before the court convenes on the day of the argument. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology

consistent throughout the appellate rules. These changes are intended to be stylistic only. Substantive changes are recommended in subdivision (a).

Subdivision (a). Currently subdivision (a) says that oral argument must be permitted unless, applying a local rule, a panel of three judges unanimously agrees that oral argument is not necessary. Rule 34 then outlines the criteria to be used to determine whether oral argument is needed and requires any local rule to "conform substantially" to the "minimum standard[s]" established in the national rule. The amendments omit the local rule requirement and make the criteria applicable by force of the national rule. The local rule is an unnecessary instrument.

Paragraph (a)(2) states that one reason for deciding that oral argument is unnecessary is that the dispositive issue has been authoritatively decided. The amended language no longer states that the issue must have been "recently" decided. The Advisory Committee does not intend any substantive change, but thinks that the use of "recently" may be misleading.

Subdivision (d). A cross-reference to Rule 28(h) has been substituted for a reiteration of the provisions of Rule 28(h).

Rule 35. Determination of Causes by the Court in Banc	**Rule 35. En Banc Determination**
(a) When hearing or rehearing in banc will 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 banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.	**(a) When Hearing or Rehearing En Banc 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 en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered 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 for hearing or rehearing in banc. — A party may suggest the appropriateness of a hearing or rehearing in banc. 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.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing 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 an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

(3) Except by the court's permission, if a petition for a 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.

(c) Time for suggestion of a party for hearing or rehearing in banc; suggestion does not stay mandate. — If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such a 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.	**(c) Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.
(d) Number of Copies. — The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.	**(d) Number of Copies.** The number of copies to be filed must 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 an 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

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 36. Entry of Judgment	Rule 36. Entry of Judgment
The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.	**(a) Entry.** A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment: (1) after receiving the court's opinion, but if settlement of the judgment's form is required, after final settlement; or (2) if a judgment is rendered without an opinion, as the court instructs. **(b) Notice.** On the date when judgment is entered, the clerk must mail to all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 37. Interest on Judgments	Rule 37. Interest on Judgment
Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.	(a) **When the Court Affirms.** Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered. (b) **When the Court Reverses.** If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 38. Damages and Costs for Frivolous Appeals	Rule 38. Frivolous Appeal — Damages and Costs
If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.	If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Committee Note

Only the caption of this rule has been amended. The changes are intended to be stylistic only.

Rule 39. Costs	Rule 39. Costs
(a) To whom allowed. — Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.	**(a) Against Whom Assessed.** The following rules apply unless the law provides or the court orders otherwise: (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise; (2) if a judgment is affirmed, costs are taxed against the appellant; (3) if a judgment is reversed, costs are taxed against the appellee; (4) if a judgment is affirmed in part, reversed in part, or vacated, costs are taxed only as the court orders.

(b) Costs for and against the United States. — In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.	**(b) Costs For and Against the United States.** Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.
(c) Costs of briefs, appendices, and copies of records. — By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.	**(c) Costs of Copies.** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief, appendix, or record authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.
(d) Bill of costs; objections; costs to be inserted in mandate or added later. — A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.	**(d) Bill of Costs: Objections; Insertion in Mandate.** (1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs. (2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time. (3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must — upon the circuit clerk's request — add the statement of costs, or any amendment of it, to the mandate.

(e) Costs on appeal taxable in the district courts. — Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.	(e) **Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule: (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. All references to the cost of "printing" have been deleted from subdivision (c) because commercial printing is so rarely used for preparation of documents filed with a court of appeals.

Rule 40. Petition for Rehearing	Rule 40. Petition for Rehearing
(a) Time for Filing; Content; Answer; Action by Court if Granted. — A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted.	**(a) Time to File; Contents; Answer; Action by the Court if Granted.** (1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time. (2) **Contents.** The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.
No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.	(3) **Answer.** Unless the court requests, no answer to a petition for rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request. (4) **Action by Court.** If a petition for rehearing is granted, the court may do any of the following: (A) make a final disposition of the case without reargument; (B) restore the case to the calendar for reargument or resubmission; or (C) issue any other appropriate order.

(b) Form of petition; length. — The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.	**(b) Form of Petition; Length.** The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for rehearing must not exceed 15 pages.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 41. Issuance of Mandate; Stay of Mandate	Rule 41. Mandate: Contents; Issuance and Effective Date; Stay
(a) Date of Issuance. — The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.	**(a) Contents.** 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. **(b) When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time. **(c) Effective Date.** 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 must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay cannot exceed 30 days unless the period is extended for cause shown or unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ, in which case the stay will continue until final disposition by the Supreme Court. 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 as a condition to the grant or continuance of a stay of the mandate.	**(d) Staying the Mandate.** (1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise. (2) **Pending Petition for Certiorari.** (A) 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 the certiorari petition would present a substantial question and that there is good cause for a stay. (B) The stay must not exceed 90 days, unless the period is extended for good cause or a notice from the Supreme Court clerk is filed during the stay indicating that the party who obtained the stay has filed a petition for the writ. In that case, the stay continues until the Supreme Court's final disposition. (C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate. (D) 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.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 42. Voluntary Dismissal	Rule 42. Voluntary Dismissal
(a) Dismissal in the district court. — If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.	**(a) Dismissal in the District Court.** Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal upon the filing of a stipulation signed by all parties or upon the appellant's motion with notice to all parties.
(b) Dismissal in the court of appeals. — If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.	**(b) Dismissal in the Court of Appeals.** The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 43. Substitution of Parties	Rule 43. Substitution of Parties
(a) Death of a party. — If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.	**(a) Death of a Party.** (1) **After Notice of Appeal Filed.** If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings. (2) **Before Notice of Appeal Filed — Potential Appellant.** If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative — or, if there is no personal representative, the decedent's attorney of record — may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).
If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.	(3) **Before Notice of Appeal Filed — Potential Appellee.** If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(b) Substitution for other causes. — If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).	**(b) Substitution for a Reason Other Than Death.** If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.
(c) Public officers; death or separation from office. — (1) When a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. (2) When a public officer is a party to an appeal or other proceeding in an official capacity that public officer may be described as a party by the public officer's official title rather than by name; but the court may require the public officer's name to be added.	**(c) Public Officer: Identification; Substitution.** (1) **Identification of Party.** A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added. (2) **Automatic Substitution of Office-Holder.** When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 44. Cases Involving Constitutional Questions Where United States Is Not a Party	Rule 44. Case Involving a Constitutional Question When the United States Is Not a Party
It shall be the duty of a party who draws in question the constitutionality of any Act of Congress in any proceeding in a court of appeals to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.	If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 45. Duties of Clerk	Rule 45. Clerk's Duties
(a) General provisions. — The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.	**(a) General Provisions.** (1) **Qualifications.** The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office. (2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(b) The docket; calendar; other records required. — The clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders and judgments. An index of cases contained in the docket shall be maintained as prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law. The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.	**(b) Records.** (1) **The Docket.** The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments. (2) **Calendar.** Under the direction of the court, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law. (3) **Other Records.** The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.
(c) Notice of orders or judgments. — Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.	**(c) Notice of an Order or Judgment.** Upon the entry of an order or judgment, the circuit clerk must immediately serve by mail a notice of entry on each party to the proceeding, with a copy of any opinion, and must note the mailing on the docket. Service on a party represented by counsel must be made on counsel.

(d) Custody of records and papers. — The clerk shall have custody of the records and papers of the court. The clerk shall not permit any original record or paper to be taken from the clerk's custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed papers filed.	**(d) Custody of Records and Papers.** The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 46. Attorneys	Rule 46. Attorneys
(a) Admission to the bar of a court of appeals; eligibility; procedure for admission. — An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals. An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation. I, ______________, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States. Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.	**(a) Admission to the Bar.** (1) **Eligibility.** An attorney is eligible to admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) **Application.** An applicant must file an application for admission, on a form approved by the court and furnished by the clerk, that contains the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant must take and subscribe to the following oath or affirmation:

> "I, ______, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) **Admission Procedures.** The court will act on the application upon written or oral motion of a member of the bar of the court. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or disbarment. — When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

(b) Suspension or Disbarment. If a member of a court's bar has been suspended or disbarred from practice in any other court of record — or is guilty of conduct unbecoming a member of the bar of the court — the member is subject to suspension or disbarment by the court. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) Disciplinary power of the court over attorneys. — A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.	(c) **Disciplinary Power Over Attorneys.** A court of appeals may take any appropriate disciplinary action against an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

Committee Note

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Rule 47. Rules of a Courts of Appeals	Rule 47. Local Rules by Courts of Appeals
(a) Local Rules.	**(a) Local Rules.**
(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to a party or a lawyer regarding practice before a court shall be in a local rules rather than an internal operating procedure or standing order. A local rule shall be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.	(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to a party or a lawyer regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.
(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.	(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.
(b) Procedure When There Is No Controlling Law. A court of appeals may regulate practice in a particular case in any manner consistent with federal law. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	**(b) Procedure When There Is No Controlling Law.** A court of appeals may regulate practice in a particular case in any manner consistent with federal law. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

<table>
<tr><th>Rule 48. Masters.</th><th>Rule 48. Masters</th></tr>
<tr><td>A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.</td><td>(a) Appointment; Powers. A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations about factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following:

(1) regulating all aspects of a hearing;

(2) taking all appropriate actions for the efficient performance of the master's duties under the order;

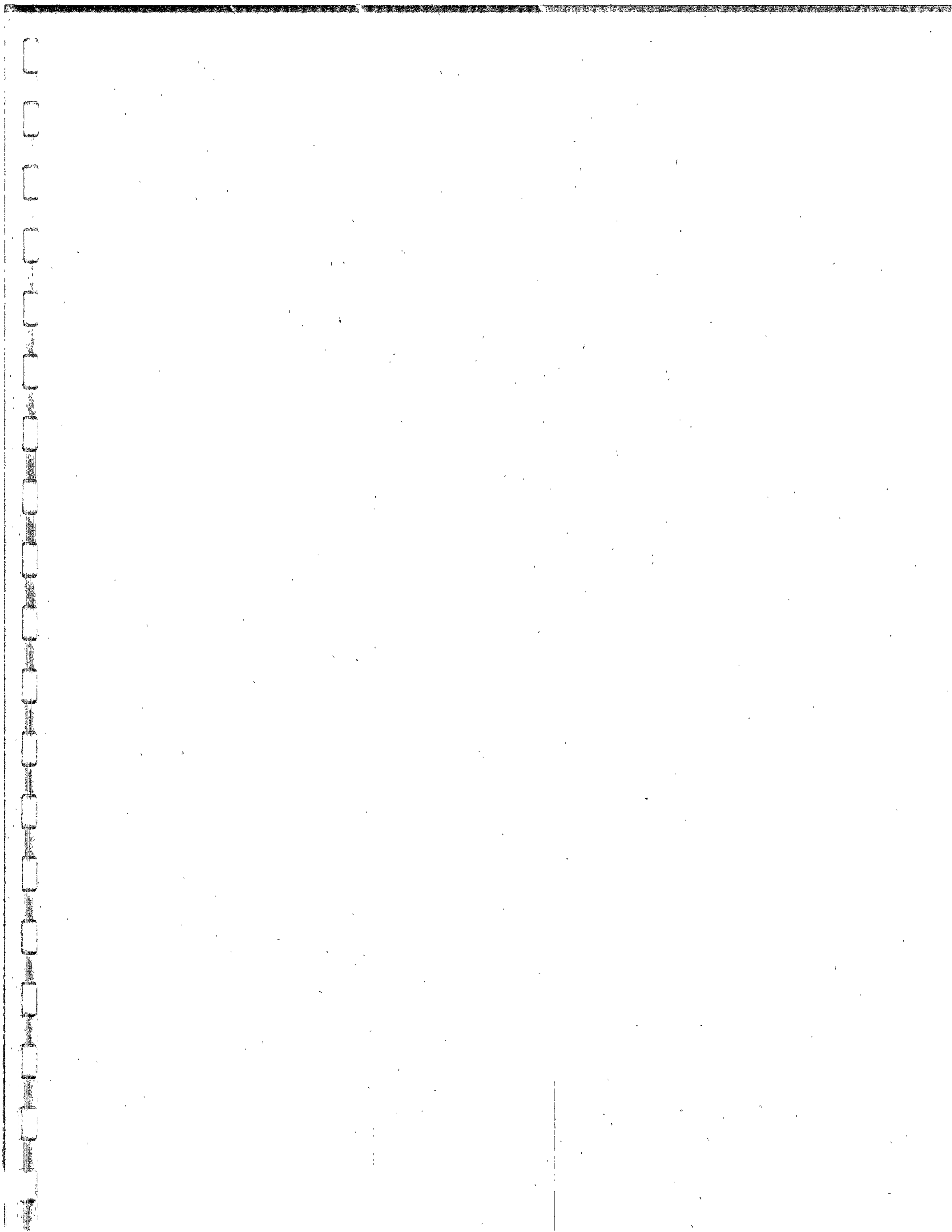
(3) requiring the production of evidence on all matters embraced in the reference; and

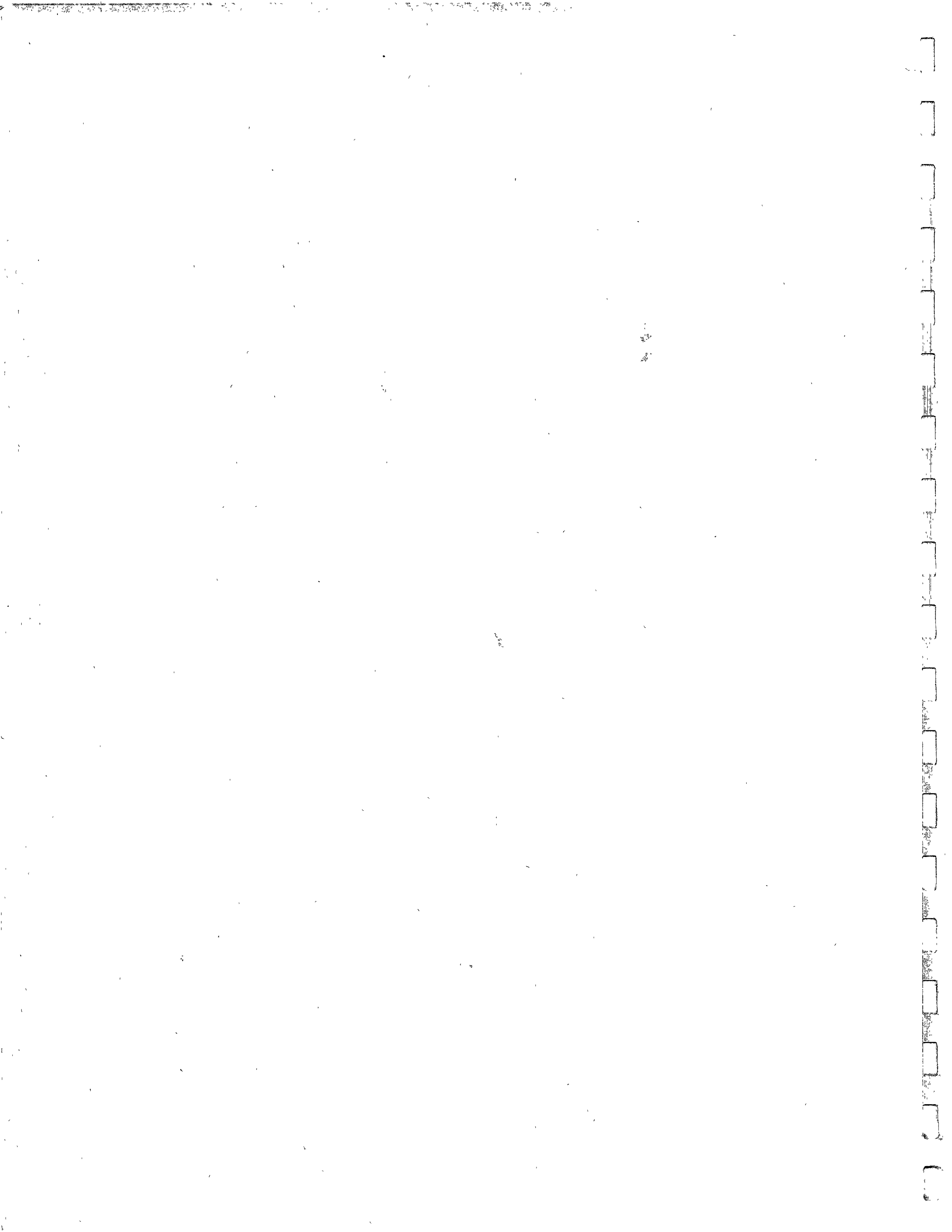
(4) administering oaths and examining witnesses and parties.

(b) Compensation. If the master is not a judge or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.</td></tr>
</table>

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.





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MINUTES OF THE MEETING
OF THE ADVISORY COMMITTEE ON APPELLATE RULES
OCTOBER 19, 20, & 21, 1995

Judge James K. Logan called the meeting to order on October 19, 1995, at 8:30 a.m. in the Judicial Conference Center of the Thurgood Marshall Federal Judiciary Building in Washington, D.C. In addition to Judge Logan, the Advisory Committee Chair, the following committee members were present: 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, and Judge Frank Easterbrook, the liaison member from the Standing Committee, were both present. Mr. Patrick Fisher, the Clerk for the Tenth Circuit attended on behalf of the clerks. Mr. George Pratt, a member of the Standing Committee's subcommittee on style, and Mr. Bryan Garner and Mr. Joseph Spaniol, consultants to the Standing Committee were in attendance. Mr. John Rabiej and Mr. Mark Shapiro, both of the Rules Committee Support Office, were present. Chief Justice Pascal Calogero, a member of the Advisory Committee; Ms. Judith McKenna, of the Federal Judicial Center; and Professor Dan Coquillette, the Reporter for the Standing Committee, joined the meeting later.

Judge Logan began by introducing Judge Frank Easterbrook and Judge George Pratt. Judge Easterbrook is a United States Circuit Judge for the Seventh Circuit and the liaison from the Standing Committee to the Advisory Committee. Judge Pratt recently resigned as a United States Circuit Judge for the Second Circuit. He was a member of the Standing Committee and of its subcommittee on style. Because he had been an integral member of the team that initially worked on the restyling of the appellate rules, he attended the meeting to aid in discussion of the rules under consideration. Judge Logan welcomed Judge Easterbrook and Judge Pratt.

The minutes of the April 1995 meeting were approved as submitted.

Judge Logan announced that discussion of the self-study prepared by the Long Range Planning Subcommittee of the Standing Committee would be discussed the next morning. Judge Stotler distributed a questionnaire about the self-study to the members of the Advisory Committee. She requested that the members complete the questionnaire by the next day so that it might serve as the basis for the discussion.

I. Liaisons from the Advisory Committee to the Circuits

Judge Logan noted that the 1987 Judicial Conference Committee Procedures require that each judicial conference committee appoint a liaison for each circuit so that there is someone to whom concerns can be addressed. Chief Judge Gilbert Merritt, Chair of the Executive Committee of the Judicial Conference of the United States, had recently written to the chair of each judicial conference committee requesting that the liaison members be designated. Judge Logan assigned the following members of the Advisory Committee to act as liaisons to the circuits:

Judge Garwood - 3rd, 5th, and 6th circuits;
Judge Kozinski - 7th, 8th, and 9th circuits;
Judge Logan - 1st, 2nd, 10th, and 11th circuits; and
Judge Williams - 4th, District of Columbia, and Federal circuits.

II. Style Project

The committee discussion turned next to the restyled rules. Most of the discussion for the remainder of the following two and a half days focused upon specific word changes in the entire set of rules. Whenever the committee believed that a word choice had substantive consequences, it requested that the choice be discussed in the Committee Notes that will accompany the rules. These minutes will not reiterate the discussions that have been incorporated in the Committee Notes or attempt to recount the detailed grammar and word-choice discussions that occupied most of the meeting time.

In attempting to improve the language of the rules, existing ambiguities were unmasked and questions about the meaning of rules arose. In order to complete a new draft, the Advisory Committee ordinarily had to resolve an ambiguity by choosing one of the competing interpretations. Those choices are discussed in the Committee Notes. Some of the questions about the operation of the rules were sufficiently complex that the Advisory Committee decided that it was unnecessary to resolve them as part of this project, but requested that the questions be added to the committee's table of agenda items for future consideration. In addition, review of the rules gave rise to new ideas for substantively improving them. These ideas were also deferred for future consideration.

The committee asked that the following items be added to the agenda for future consideration:

A. Rule 3(d) requires the district clerk to serve a copy of a notice of appeal on all other parties. Similarly, Rule 15(c) generally requires the circuit

clerk to serve a copy of a petition for review of an agency decision on each respondent. The Advisory Committee will discuss amending both rules to require that the appellant, or petitioner serve the copies rather than the clerk.

B. Rule 4(a)(5) permits a court to extend the time to file a notice of appeal if a party files a motion for an extension within 30 days after expiration of the time prescribed for filing by Rule 4(a). The rule requires the party to show excusable neglect or good cause. Some courts have taken the position that a "good cause" extension is not available after expiration of the original appeal period. A member of the committee wants to discuss whether a showing of "good cause" should be sufficient when the motion for extension is filed after expiration of the original time to file a notice of appeal.

C. Rule 4(a)(7) says that a judgment or order is entered when it is entered in compliance with Rules 58 and 79(a) of the civil rules.

- Rule 58 requires that "[e]very judgment shall be set forth on a separate document" and is "effective only when so set forth. . . ."
- Rule 79(a) requires the district clerk to keep a docket. All "orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action . . . These entries shall be brief but shall show the . . . substance of each order or judgment . . . . The entry of an order or judgment shall show the date the entry is made. . . ."

Can Rule 4(a)(7), in conjunction with Civil Rules 58 and 79(a), be read to repeal the collateral order doctrine?

D. The time for preparing a transcript and the record on appeal derive from the date of filing the notice of appeal. Under Rule 5 (dealing with interlocutory appeals under § 1292(b)) and Rule 5.1 (dealing with discretionary appeals after an appeal as of right to a district court from a decision entered upon direction of a magistrate judge) no notice of appeal is filed. Should Rules 5 and 5.1 be amended to provide that the time for ordering the transcript, etc., runs from the date of entry of the order granting permission to appeal?

E. Rule 4(a)(4) has been amended to preserve an appeal that is filed before disposition of one of the posttrial tolling motions. In contrast a petition for review of an agency action that is filed before the agency disposes of a petition for reconsideration, rehearing, or reopening is still treated, in some circuits, as premature and null. The committee will consider whether Rule 15 should be amended to provide that a petition for judicial review of agency action should be held in abeyance until resolution of the

administrative motion, at which time the petition would ripen into a valid petition.

After adjourning Thursday evening at 5:45, the meeting reconvened Friday morning, October 20, at 8:30 a.m.

III. Self-Study

Judge Logan turned the floor over to Judge Stotler for discussion of the self-study. She explained that the questionnaire she had distributed the preceding day contained the 18 recommendations made in the report of the self-study subcommittee. She noted that several of the members had already returned their questionnaires to her and many of them contained annotations.

She said that recommendation five was generally received as noncontroversial to the extent that it urges use of electronic means of communication to disseminate committee proposals. There has been objection, however, to the second part of the proposal - that comments on the proposals could be submitted to the committee electronically. She invited comments on this item and whether submission of comments via e-mail would create problems with the committee's obligation to respond to all comments.

Judge Stotler said that she did not need to elicit comments on any particular part of the self-study but was willing to hear general comments or simply work with the written responses to the questionnaire.

A very brief discussion followed at the conclusion of which Judge Stotler requested that those who have not already done so, submit their completed questionnaires to her.

IV. Marketing the Restyled Rules

Judge Stotler also led discussion concerning the "marketing" of the redrafted rules. She explained that the memorandum she prepared last spring was intended simply to capture a number of ideas that had surfaced about paving the way for introduction of the style project. The one question that she wanted to raise with the Advisory Committee concerned the possibility of previewing the redrafted rules with the Judicial Conference at its March 1996 meeting. If the entire set of appellate rules is ready and presented to the Standing Committee in January and approved by it for publication, Judge Stotler asked whether the Advisory Committee would object to an informal presentation of the packet to the Judicial Conference prior to publication. Although proposed amendments

ordinarily are not submitted to the Judicial Conference prior to publication, it was suggested that given the nature of this undertaking it might be better to consult the chief judges prior to publication and have their blessing on the project, however tentative that might be.

V. Committee Notes

Judge Stotler also asked the Advisory Committee to discuss the problem that arises when a Committee Note, drafted by the Advisory Committee to explain its proposed amendments, no longer "fits" the rule because the Standing Committee makes substantial changes in it. This particular question is really a subpart of the larger question — whose note is it? Judge Stotler expressed her personal preference that the note be, to the extent possible, the principal responsibility of the Advisory Committee.

After brief discussion, the consensus of the Advisory Committee was that the note should be treated as an Advisory Committee Note. A motion was made to delegate to the chair and the reporter authority to make whatever amendments to a Committee Note are made necessary by Standing Committee changes to the proposed rule. The understanding was that if controversial changes were made the chair and reporter would attempt to consult with the Advisory Committee. The motion passed unanimously.

VI. Uniform Numbering of Local Rules

Amendments to FRAP 47 took effect on December 1, 1995. The amendments state that all local circuit rules "must conform to any uniform numbering system prescribed by the Judicial Conference." Similar amendments took effect in the Bankruptcy, Civil, and Criminal Rules. The Standing Committee asked each Advisory Committee to submit a recommendation concerning uniform numbering. With regard to the local rules adopted by the courts of appeals this appears to be a relatively easy task. All but one circuit has followed the recommendation of the Local Rules Project and renumbered the circuit rules to correspond to the FRAP numbering system.

The Local Rules Project recommended that a local circuit rule be preceded by L.A.R. (standing for local appellate rule), that the rule be numbered to correspond with FRAP, and that it be followed by a decimal after which each local rule having to do with the same national rule be consecutively numbered. For example the first local rule relating to FRAP 28 would be L.A.R. 28.1, the second would be L.A.R. 28.2. The Advisory Committee disagreed with both the L.A.R. and decimal recommendations. Several circuits identify the local rules

with the number of the circuit and "Cir. R.", e.g. 7th Cir. R., or 10th Cir. R. The committee believes that such designations are appropriate. The decimal system will pose difficulties because some of the FRAP rules themselves have a decimal, e.g. Fed. R. App. P. 26.1.

A motion was made to recommend only that the local rules have a number that corresponds with the national rule, and that prefixes, decimal points, dashes, etc. should be left to local option. The motion passed unanimously.

VII. Sanctions

After the April 1995 meeting, Judge Logan asked Judge Kozinski and Mr. Munford to report on developments under Rule 38. Mr. Munford's subcommittee report summarized the committee's recent treatment of the issue. Over the past 10 years, the committee has considered a number of Rule 38 issues. The questions raised have included, among other things, whether Rule 38 should be revised to include a specific notice requirement, whether it should be revised to conform to Fed. R. Civ. P. 11, and whether attorneys should be specifically listed as persons potentially liable for Rule 38 sanctions.

At the Advisory Committee's December 1991 meeting, the committee voted to revise Rule 38, but to limit the revision to a change that would require notice and opportunity to respond before a court imposes Rule 38 sanctions. By reports dated April 19, 1993, and May 11, 1994, a subcommittee headed by Judge Danny J. Boggs endorsed the notice and comment revision, but concluded that while other new language in the rule might have benefits, "it was not clear that there would be a net benefit to going to a new set of words and abandoning the ones [with] which the participants had become familiar." The notice and comment requirement was added to the rule and became effective on December 1, 1994.

Mr. Munford reported that Mr. Alan B. Morrison, of the Public Citizen Litigation Group, had written the committee short letters on July 17, 1992, and October 13, 1994, urging that Rule 38 be revised to establish more specific standards and to make it more difficult for an appellate court to award sanctions. Mr. Morrison was advised that the committee would continue to monitor Rule 38 developments in light of the adoption of the notice and comment provision and would discuss the matter at its fall 1995 meeting.

A survey of cases dealing with Rule 38 since December 1, 1994, indicates that the courts appear to be applying the procedural requirements faithfully and the recited standards for imposing sanctions are those traditionally reflected in the case law. Mr. Munford's subcommittee report suggested that "[g]iven the

committee's extended prior discussion of Rule 38, the recency of the amendment, and the seeming lack of controversy in its current application," Rule 38 be removed from the committee's agenda. A motion to that effect was made and seconded. It passed unanimously.

The meeting adjourned at noon on Saturday, October 21, 1995.

Respectfully submitted,

Carol Ann Mooney
Reporter

Advisory Committee on the Federal Appellate Rules
Table of Agenda Items -- Revised December 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 subcommittee 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 No further action deemed appropriate 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 Published 9/95
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 interlocutory 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 Standing Committee referred back to Advisory Committee 6/96 New draft approved by Advisory Committee 10/95
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 Standing Committee referred back to Advisory Committee 6/95 New draft approved by Advisory Committee 10/95

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 Standing Committee approved forwarding to Judicial Conference 6/95 Approved by Judicial Conference 9/95
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 Published 9/95

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 Published 9/95
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 Standing Committee referred back to Advisory Committee 6/95 New draft approved by Advisory Committee 10/95

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 Effective 12/1/95
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 Published 9/95

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 Standing Committee approved forwarding to Judicial Conference 6/95 Approved by Judicial Conference 9/95
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 No further action deemed appropriate 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 Effective 12/1/95

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 Effective 12/1/95
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 Effective 12/1/95
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 Published 9/95

FRAP Item	Proposal	Source	Current Status
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 Published 9/95
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 Published 9/95
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 Published 9/95
95-1	Amend Civil Rule 23 so class members do not need to intervene to appeal.	Mr. Alan Morrison	Awaiting initial discussion
95-2	Amend Rules 3 and 24 re: denial of in forma pauperis status.	Mr. Wm. Johnson, Sr. & Mr. Kenneth Bonds	Awaiting initial discussion
95-3	Amend Rule 15(f) to conform to recent amendments to 4(a)(4).	Hon. Stephen Williams (CA-DC)	Awaiting initial discussion
95-4	Amend computation of time to conform to Civil Rules method.	Mr. James B. Doyle	Awaiting initial discussion
95-5	Amend Rule 31 to require submission of digitally readable copy of brief, when available.	Hon. Frank Easterbrook (CA-7)	Awaiting initial discussion
95-6	Amend Rule 3(d) & 15(5) to require appellant/petitioner to serve copies of notice of appeal.	Advisory Committee	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
95-7	Amend Rule 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Advisory Committee	Awaiting initial discussion
95-8	Does Rule 4(a)(7) repeal collateral order doctrine?	Advisory Committee	Awaiting initial discussion
95-9	Amend Rules 5 & 5.1 so that time for ordering transcript runs from entry of order granting permission to appeal.	Advisory Committee	Awaiting initial discussion

Agenda Item 8

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

FROM: Paul Mannes, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 5, 1995

RE: Report of the Advisory Committee on Bankruptcy Rules

Introduction

The Advisory Committee on Bankruptcy Rules met on September 7-8, 1995, in Portland, Oregon. A draft of the minutes is attached to this report as Appendix C. At the meeting, the Advisory Committee approved for presentation to the Standing Committee a uniform numbering system for local bankruptcy rules (discussed below under "Action Items"). The Committee also discussed the Self-Study Report of the Long-Range Planning Committee (discussed below under "Information Items"). Other matters considered by the Committee at the September meeting, including several suggestions for amendments to the Rules and the Official Bankruptcy Forms, will not require any action by the Standing Committee at its January 1996 meeting.

Another matter that will be presented to the Standing Committee as an "Action item" at the January meeting is the Advisory Committee's suggestion (made at its December 1994 meeting and discussed at the January 1995 Standing Committee meeting) that the Standing Committee recommend to the Judicial Conference that it adopt a resolution providing for the automatic amendment to the Official Bankruptcy Forms for the purpose of conforming to mandated adjustments of certain dollar amounts in the Bankruptcy Code made every three years beginning April 1, 1998.

I. Action Items

A. Uniform Numbering System for Local Bankruptcy Rules

Bankruptcy Rules 9029 and 8018 have been amended, effective December 1, 1995, to require that local rules conform to any uniform numbering system prescribed by the Judicial Conference of the United States. At the Standing Committee's request, the Advisory Committee has developed a uniform numbering system for local bankruptcy rules that coordinates with the numbering system of the Federal Rules of Bankruptcy Procedure. A copy of the numbering system is attached to this report as Appendix A. The Advisory Committee presents this numbering system to the Standing Committee and recommends that it be approved.

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 uniform numbering system is the product of the extensive efforts of the Bankruptcy Judge's Division of the Administrative Office and the Advisory Committee's Subcommittee on Local Rules. Patricia S. Channon, staff attorney of the Bankruptcy Judges Division, was especially helpful in developing an initial draft of a numbering system that, with alterations made by the Subcommittee on Local Rules, was approved by the Advisory Committee for publication in 1994. The draft 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, several improvements were made to the preliminary draft at the Advisory Committee's meetings in March and September. The Advisory Committee also approved a citation form (for example, "E.D. Va. LBR 1007-1"), and added cross-references and an alphabetical list of topics to make the system easier to use. In addition, the Advisory Committee approved a memorandum to all federal judges to accompany the uniform local rule numbering system. The memorandum briefly explains the history and method used to develop the system, informs judges of the deadline for courts to implement the system, and offers the assistance of the Bankruptcy Judges Division to provide technical and logistical support to courts in their efforts to convert to the new system. A copy of the memorandum is included at the beginning of Appendix A of this report.

B. Recommendation for Judicial Conference Resolution Approving Future Amendments to the Official Forms to Conform to Dollar Adjustments Under Section 104 of the Code

The Bankruptcy Reform Act of 1994 has doubled certain specified dollar amounts in the Bankruptcy Code. For example, the priority for wage claims under § 507(a)(3) was increased from $2,000 to $4,000, and the priority for consumer deposit claims under § 507(a)(6) was increased from $ 900 to $1,800. In addition, § 108(e) of the Bankruptcy Reform Act of 1994 added a new § 104(b) to the Bankruptcy Code to provide that every three years, beginning on April 1, 1998, certain dollar amounts in the Code (including, among others, the monetary limitations on priorities under § 507 of the Code) shall be adjusted to reflect the change in the Consumer Price Index for All Urban Consumers published by the Department of Labor. These dollar adjustments will be automatic and will not require any action to become effective. Not later than March 1 of the year in which dollar adjustments are made, the Judicial Conference is required by § 104(b)(2) to publish the adjusted amounts in the Federal Register.

Specifically, § 104(b) provides as follows:

> "(b)(1) On April 1, 1998, and at each 3-year interval ending on April 1 thereafter, each dollar amount in effect under sections 109(e), 303(b), 507(a), 522(d), and 523(a)(2)(C) immediately before such April 1 shall be adjusted --
>
> > (A) to reflect the change in the Consumer Price Index for All Urban Consumers, published by the Department of Labor, for the most recent 3-year period ending immediately before January 1 preceding such April 1, and
> >
> > (B) to round to the nearest $25 the dollar amount that represents such change.
>
> (2) Not later than March 1, 1998, and at each 3-year interval ending on March 1 thereafter, the Judicial Conference of the United States shall publish in the Federal Register the dollar amounts that will become effective on such April 1 under sections 109(e), 303(b), 507(a), 522(d), and 523(a)(2)(C) of this title.
>
> (3) Adjustments made in accordance with paragraph (1) shall not apply with respect to cases commenced before the date of such adjustments."

The determination of the precise dollar amounts and the publication by the Judicial Conference of future dollar adjustments every three years as mandated by § 104(b) will be accomplished through a mechanism being developed by the Bankruptcy Administration Committee of the Judicial Conference and the Bankruptcy Judges Division of the Administrative Office. The Advisory Committee on Bankruptcy Rules has no role in that process. The Bankruptcy Administration Committee will meet on January 4-5, 1996, one week before the Standing Committee meeting, and will consider such a mechanism. The Bankruptcy Administration Committee is expected to approve and forward to the Judicial Conference a proposal on the subject drafted for that Committee by the Bankruptcy Judges Division. I will give an oral report to the Standing Committee on the action of the Bankruptcy Administration Committee.

Dollar adjustments made in April 1998 and every three years thereafter under § 104(b) will necessitate future amendments to the Official Bankruptcy Forms to conform to new dollar amounts. Two of the current Official Forms include references to specific dollar amounts relating to priorities under § 507(a) that will be adjusted every three years under § 104(b): Official Forms No. 6, Schedule E ("Creditors Holding Unsecured Priority Claims") and No. 10 ("Proof of Claim"). Copies of these forms are attached to this report as Appendix B.

In response to the doubling of dollar amounts by the 1994 Reform Act, the Advisory Committee in January 1995 proposed conforming amendments to these two Official Forms. The amendments were approved by the Standing Committee in January 1995 and promulgated by the Judicial Conference in March 1995. Under Bankruptcy Rule 9009, amendments to the Official Forms do not have to be approved by the Supreme Court.

In view of new § 104(b) providing for the automatic adjustment of certain dollar amounts on April 1, 1998, and at each 3-year interval thereafter, current Official Forms No. 6 (Schedule E) and No. 10 (as amended in 1995) contain a statement indicating that certain specified amounts "are subject to adjustment on April 1, 1998 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment." This notice was added to warn practitioners and parties who, after 1998, may still have old forms. The language relating to future dollar adjustments is highlighted on the copies of Official Forms No. 6 (Schedule E) and No. 10 that are attached as Appendix B.

Notwithstanding the warning now contained in these forms, any delay in conforming the Official Forms to future dollar adjustments under § 104(b) could mislead practitioners and could adversely affect the rights of parties. In order to avoid any such delay -- and to avoid the necessity of obtaining Advisory Committee, Standing Committee, and Judicial Conference approval of future amendments to the Official Forms conforming to adjusted dollar amounts every three years -- the Advisory Committee suggests that the Standing Committee adopt the following recommendation to the Judicial Conference:

RECOMMENDATION: That the Judicial Conference adopt a resolution providing that on April 1, 1998, and at each 3-year interval ending on April 1 thereafter, the Official Bankruptcy Forms shall be amended, automatically and without further action by the Judicial Conference, to conform to any adjustment of dollar amounts made under section 104(b) of the Bankruptcy Code.

This recommendation was developed in consultation with Peter G. McCabe (Assistant Director of the Administrative Office) and the Bankruptcy Judges Division of the Administrative Office.

The recommended resolution is deliberately broad so that any Official Forms that contain a dollar amount adjusted under § 104(b) will be amended automatically, rather than limiting the resolution to only the two Official Forms that contain such dollar amounts at this time. The reason for the broad language of the recommendation is so that it would cover other Official Forms that might be amended in the future to include a reference to dollar amounts that are adjusted under § 104(b). This flexibility is especially appropriate in view of the Advisory Committee's ongoing project of revising most of the Official Forms.

It is anticipated that, upon any dollar adjustments under § 104(b), the Administrative Office will engage in its usual practice of notifying courts and publishers of the conforming amendments to the Official Forms, and that the Administrative Office will consult with the Advisory Committee to assure that all conforming amendments to the forms have been made accurately. However, if the recommended resolution is adopted by the Judicial Conference, no additional action by the Standing Committee or the Judicial Conference will be required to effectuate the conforming amendments to the forms.

II. Information Items

A. Self-Study Report of the Long-Range Planning Committee.

At the request of the Standing Committee, the Advisory Committee discussed the Self-Study Report of the Long-Range Planning Committee. Copies of the Report were circulated prior to the September 1995 meeting as part of the agenda materials. At the meeting, an issues summary questionnaire was distributed and was used by Committee members to evaluate the recommendations of the Report. Highlights of the discussion include the following:

(1) Several members expressed reservations about any recommendation that, for the purpose of supporting diversity in committee membership, the Chief Justice be advised on how appointments should be made. The Chief Justice already appears to be appointing people of diverse characteristics and backgrounds, and the consensus was that the recommendation is both unnecessary and inappropriate.

(2) The circulation of materials by the Reporter and the Rules Committee Support Office using electronic mail was discussed. The ability to receive suggestions and comments from the bench and bar via email also was discussed. The likelihood that technological developments will make it much easier for the bench and bar to communicate with Advisory Committees in the future, and would thereby increase the volume of suggestions and comments, may necessitate procedures for screening or prioritizing matters that are considered at Advisory Committee meetings. The use of electronic communications among Committee members between meetings as a way to deal with an increased volume of matters brought to the Committee's attention also was discussed, as was the use of subcommittees.

B. Status of Matters Under Consideration: Official Bankruptcy Forms

The Subcommittee on Forms is continuing its work reviewing the Official Bankruptcy Forms with a view toward simplifying language and making them more understandable to the general public. At its September 1995 meeting, the Advisory Committee reviewed numerous changes suggested by the

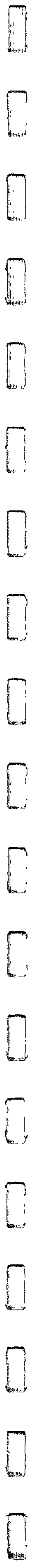
Subcommittee. It is anticipated that the Advisory Committee will consider further proposals to improve the Official Forms at its March 1996 meeting and will present a package of proposed forms amendments to the Standing Committee in June 1996 with a request for publication for comment.

Attachments:

1. Appendix A -- Uniform Numbering System for Local Bankruptcy Rules

2. Appendix B -- Official Bankruptcy Forms No. 6 ("Schedule E -- Creditors Holding Unsecured Priority Claims") and No. 10 ("Proof of Claim").

3. Draft of minutes of Advisory Committee meeting of September 7-8, 1995.



APPENDIX A

UNIFORM NUMBERING SYSTEM FOR LOCAL BANKRUPTCY RULES

[AO Letterhead] **DRAFT**

(Date)

MEMORANDUM TO: JUDGES, UNITED STATES COURTS OF APPEAL
JUDGES, UNITED STATES DISTRICT COURTS
JUDGES, UNITED STATES BANKRUPTCY COURTS
CIRCUIT EXECUTIVES

SUBJECT: Uniform Numbering System for Local Bankruptcy Rules (ACTION REQUIRED)

ACTION DUE DATE: ____________(March 1, 1997 or other date)

Federal Rule of Bankruptcy Procedure 9029 as amended December 1, 1995, requires that local bankruptcy rules conform to a uniform numbering system prescribed by the Judicial Conference of the United States. The Judicial Conference prescribed the attached uniform numbering system for local bankruptcy rules on March __, 1996.

Uniform numbering based on the numbers used in the Federal Rules of Bankruptcy Procedure is intended to make it easier for attorneys or parties to search for relevant local rules. An alphabetical listing is included also, for the convenience of attorneys and as an aid to those charged with converting their districts' local rules to the new numbering system. The cross-references listed in the column labeled "See Also LBR" are intended to assist in locating other topics or local rules related to the rule that is the starting point. Local courts may wish to add other cross-references.

History and Method of Development

A proposed numbering system was developed by the Bankruptcy Judges Division of the Administrative Office and the Advisory Committee on Bankruptcy Rules and published in November 1994 for public comment. After consideration of the public comment, the original proposal was substantially revised. For example, as a result of the comments received, no subdivisions of the national rules are used, leaving lettered subdivisions available as a tool for districts having lengthy or multiple rules on a particular topic.

Starting with a list of local rules topics prepared by the Bankruptcy Judges Division of the Administrative Office of the United States Courts, the Advisory Committee identified those topics which relate to a national rule and assigned them uniform numbers consisting of the four-digit national rule number, a dash, and a fifth digit, starting with 1. For instance, local

rules relating to chapter 13 trustees are assigned the uniform number 2015-5 and local rules relating to United States trustees are assigned the uniform number 2020-1.

Local rule topics for which there is no related national rule have been assigned to the part of the national rules to which each topic is most closely related. These topics are assigned available, unused numbers within the part, starting with 1070, 2070, etc. For example, rules related to attorney admission and discipline are assigned to uniform numbers 2090-1 and 2090-2.

Converting to Uniform Numbering

The existence of a uniform local rule number should not be interpreted as a recommendation that any district needs a local rule on the topic. The numbering system was derived from a review of existing local rules and represents the subjects on which one or more bankruptcy courts actually have local rules. Some courts have few rules; others many. No court has a rule on every topic for which a uniform number has been assigned.

Likewise, many national rules address matters about which there is no apparent need for local rules. Accordingly, users may perceive "gaps" in the numbering system, where there is no uniform local rule number assigned to a national rule. This exclusion of various national rules from the uniform local rule numbering system is deliberate; only subjects that actually appear in local rules are included.

If a district does have a local rule on a subject, then the district should use both the assigned uniform local rule number and the topic name. This procedure will make local rules searchable both by uniform local rule number and by topic name.

There may be a situation (hopefully rare) in which no existing uniform number seems to fit a particular local rule. In that event, I would encourage a member of the court's local rules committee to contact the Bankruptcy Judges Division, at the telephone number given below, for suggestions on assigning a uniform number.

A deadline of <u>(date)</u> has been set for local courts to implement the new system. The Bankruptcy Judges Division of the Administrative Office is available to provide technical and logistical support to the districts as they convert to the new numbering system. The telephone number of the Bankruptcy Judges Division is (202) 273-1900.

L. Ralph Mecham
Director

Attachments

cc: Clerks, United States Courts of Appeal
Clerks, United States District Courts
Clerks, United States Bankruptcy Courts
Bankruptcy Administrators

UNIFORM NUMBERING SYSTEM FOR LOCAL BANKRUPTCY RULES

Cite as "__________LBR _____ - __." Example: "E.D. Va. LBR 1007-1."
(District) (Number)

If a rule is prescribed by a circuit council for a Bankruptcy Appellate Panel Service, cite as ____Cir. BAP LBR _____ - __." Example: "9th Cir. BAP LBR 8009-1."

The topic names are part of this uniform numbering system and should be used in addition to the rule numbers.

PART I

Uniform Local Rule Number	Topic	See Also LBR
1002-1	PETITION - GENERAL	1004-1, 1005-1 1010-1, 5005-2
1004-1	PETITION - PARTNERSHIP	
1005-1	PETITION - CAPTION	9004-2
1006-1	FEES - INSTALLMENT PAYMENTS	5080-1, 5081-1
1007-1	LISTS, SCHEDULES, & STATEMENTS	5005-2
1007-2	MAILING - LIST OR MATRIX	
1007-3	STATEMENT OF INTENTION	
1009-1	AMENDMENTS TO LISTS & SCHEDULES	
1010-1	PETITION-INVOLUNTARY	
1014-1	TRANSFER OF CASES	
1014-2	VENUE - CHANGE OF	
1015-1	JOINT ADMINISTRATION/ CONSOLIDATION	
1015-2	RELATED CASES	
1017-1	CONVERSION - REQUEST FOR/ NOTICE OF	
1017-2	DISMISSAL OR SUSPENSION - CASE OR PROCEEDINGS	
1019-1	CONVERSION - PROCEDURE FOLLOWING	
1020-1	CHAPTER 11 SMALL BUSINESS CASES - GENERAL	
1070-1	JURISDICTION	
1071-1	DIVISIONS - BANKRUPTCY COURT	
1072-1	PLACES OF HOLDING COURT	

PART I, Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
1073-1	ASSIGNMENT OF CASES	
1074-1	CORPORATIONS	

PART II

Uniform Local Rule Number	Topic	See Also LBR
2002-1	NOTICE TO CREDITORS & OTHER INTERESTED PARTIES	
2002-2	NOTICE TO UNITED STATES OR FEDERAL AGENCY	
2002-3	UNITED STATES AS CREDITOR OR PARTY	
2003-1	MEETING OF CREDITORS & EQUITY SECURITY HOLDERS	
2004-1	DEPOSITIONS & EXAMINATIONS	7027-1, 9016-1
2007.1-1	TRUSTEES & EXAMINERS (Ch. 11)	
2010-1	TRUSTEES - BONDS/SURETY	
2014-1	EMPLOYMENT OF PROFESSIONALS	6005-1
2015-1	TRUSTEES - GENERAL	
2015-2	DEBTOR-IN-POSSESSION DUTIES	
2015-3	TRUSTEES - REPORTS & DISPOSITION OF RECORDS	
2015-4	TRUSTEES - CHAPTER 12	
2015-5	TRUSTEES - CHAPTER 13	
2016-1	COMPENSATION OF PROFESSIONALS	6005-1
2019-1	REPRESENTATION OF MULTIPLE PARTIES	
2020-1	UNITED STATES TRUSTEES	
2070-1	ESTATE ADMINISTRATION	
2071-1	COMMITTEES	
2072-1	NOTICE TO OTHER COURTS	
2080-1	CHAPTER 9	
2081-1	CHAPTER 11 - GENERAL	

PART II, Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
2082-1	CHAPTER 12 - GENERAL	
2083-1	CHAPTER 13 - GENERAL	
2090-1	ATTORNEYS - ADMISSION TO PRACTICE	9010-1
2090-2	ATTORNEYS - DISCIPLINE & DISBARMENT	9011-3
2091-1	ATTORNEYS - WITHDRAWALS	

PART III

Uniform Local Rule Number	Topic	See Also LBR
3001-1	CLAIMS AND EQUITY SECURITY INTERESTS - GENERAL	5003-3
3006-1	CLAIMS - WITHDRAWAL	
3007-1	CLAIMS - OBJECTIONS	
3008-1	CLAIMS - RECONSIDERATION	
3009-1	DIVIDENDS - CHAPTER 7	
3010-1	DIVIDENDS - SMALL	
3011-1	UNCLAIMED FUNDS	
3012-1	VALUATION OF COLLATERAL	
3015-1	CHAPTER 13 - PLAN	
3015-2	CHAPTER 13 - AMENDMENTS TO PLANS	
3015-3	CHAPTER 13 - CONFIRMATION	
3016-1	CHAPTER 11 - PLAN	
3016-2	DISCLOSURE STATEMENT - GENERAL	
3017-1	DISCLOSURE STATEMENT - APPROVAL	
3017-2	DISCLOSURE STATEMENT - SMALL BUSINESS CASES	
3018-1	BALLOTS - VOTING ON PLANS	
3018-2	ACCEPTANCE/REJECTION OF PLANS	
3019-1	CHAPTER 11 - AMENDMENTS TO PLANS	
3020-1	CHAPTER 11 - CONFIRMATION	
3021-1	DIVIDENDS - UNDER PLAN (Ch. 11)	
3022-1	FINAL REPORT/DECREE	
3070-1	CHAPTER 13 - PAYMENTS	

PART IV

Uniform Local Rule Number	Topic	See Also LBR
4001-1	AUTOMATIC STAY - RELIEF FROM	
4001-2	CASH COLLATERAL	
4001-3	OBTAINING CREDIT	
4002-1	DEBTOR - DUTIES	
4002-2	ADDRESS OF DEBTOR	
4003-1	EXEMPTIONS	
4003-2	LIEN AVOIDANCE	
4004-1	DISCHARGE HEARINGS	
4004-2	OBJECTIONS TO DISCHARGE	
4007-1	DISCHARGEABILITY COMPLAINTS	
4008-1	REAFFIRMATION	
4070-1	INSURANCE	
4071-1	AUTOMATIC STAY - VIOLATION OF	

PART V

Uniform Local Rule Number	Topic	See Also LBR
5001-1	COURT ADMINISTRATION	
5001-2	CLERK - OFFICE LOCATION/HOURS	
5003-1	CLERK - GENERAL/AUTHORITY	
5003-2	COURT PAPERS - REMOVAL OF	
5003-3	CLAIMS - REGISTER	
5005-1	FILING PAPERS - REQUIREMENTS	1002-1, 1007-1, 9004-1, 9004-2
5005-2	FILING PAPERS - NUMBER OF COPIES	
5005-3	FILING PAPERS - SIZE OF PAPERS	9004-1
5005-4	ELECTRONIC FILING	
5009-1	FINAL REPORT/DECREE	
5010-1	REOPENING CASES	
5011-1	WITHDRAWAL OF REFERENCE	

PART V, Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
5011-2	ABSTENTION	
5070-1	CALENDARS & SCHEDULING	9073-1, 9074-1
5071-1	CONTINUANCE	
5072-1	COURTROOM DECORUM	
5073-1	PHOTOGRAPHY, RECORDING DEVICES & BROADCASTING	
5075-1	CLERK - DELEGATED FUNCTIONS OF	
5076-1	COURT REPORTING	
5077-1	TRANSCRIPTS	
5078-1	COPIES - HOW TO ORDER	
5080-1	FEES - GENERAL	1006-1
5081-1	FEES - FORM OF PAYMENT	1006-1
5090-1	JUDGES - VISITING & RECALLED	
5091-1	SIGNATURES - JUDGES	
5092-1	SEAL OF COURT	
5095-1	INVESTMENT OF ESTATE FUNDS	

PART VI

Uniform Local Rule Number	Topic	See Also LBR
6004-1	SALE OF ESTATE PROPERTY	
6005-1	APPRAISERS & AUCTIONEERS	2014-1, 2016-1
6006-1	EXECUTORY CONTRACTS	
6007-1	ABANDONMENT	
6008-1	REDEMPTION	
6070-1	TAX RETURNS & TAX REFUNDS	

PART VII

Uniform Local Rule Number	Topic	See Also LBR
7001-1	ADVERSARY PROCEEDINGS - GENERAL	
7003-1	COVER SHEET	
7004-1	SERVICE OF PROCESS	
7004-2	SUMMONS	
7005-1	CERTIFICATE OF SERVICE (APs)	9013-3
7005-2	FILING OF DISCOVERY MATERIALS	
7007-1	MOTION PRACTICE (in APs)	9013-1
7008-1	CORE/NON-CORE DESIGNATION (Complaint)	
7012-1	CORE/NON-CORE DESIGNATION (Responsive Pleading)	
7016-1	PRE-TRIAL PROCEDURES	
7023-1	CLASS ACTION	
7024-1	INTERVENTION	
7024-2	UNCONSTITUTIONALITY, CLAIM OF	
7026-1	DISCOVERY - GENERAL	
7027-1	DEPOSITIONS & EXAMINATIONS (APs)	2004-1
7040-1	ASSIGNMENT OF ADVERSARY PROCEEDINGS	1073-1
7052-1	FINDINGS & CONCLUSIONS	
7054-1	COSTS - TAXATION/PAYMENT	
7055-1	DEFAULT - FAILURE TO PROSECUTE	
7056-1	SUMMARY JUDGMENT	
7065-1	INJUNCTIONS	
7067-1	REGISTRY FUND	
7069-1	JUDGMENT - PAYMENT OF	

PART VIII

Uniform Local Rule Number	Topic
8001-1 ff.	APPEALS For District Court/Bankruptcy Appellate Panel uniform local rule numbers, see "Appendix of Uniform Local Rule Numbers for Bankruptcy Appeals."

PART IX

Uniform Local Rule Number	Topic	See Also LBR
9001-1	DEFINITIONS	
9003-1	EX PARTE CONTACT	
9004-1	PAPERS - REQUIREMENTS OF FORM	5005-1, 5005-3
9004-2	CAPTION - PAPERS, GENERAL	1005-1, 5005-1
9006-1	TIME PERIODS	
9009-1	FORMS	
9010-1	ATTORNEYS - NOTICE OF APPEARANCE	2090-1, 9011-1
9010-2	POWER OF ATTORNEY	
9011-1	ATTORNEYS - DUTIES	
9011-2	PRO SE PARTIES	
9011-3	SANCTIONS	2090-2
9011-4	SIGNATURES	
9013-1	MOTION PRACTICE	7007-1
9013-2	BRIEFS & MEMORANDA OF LAW	
9013-3	CERTIFICATE OF SERVICE - MOTIONS	7005-1
9015-1	JURY TRIAL	
9016-1	SUBPOENAS	
9016-2	WITNESSES	2004-1
9019-1	SETTLEMENTS & AGREED ORDERS	
9019-2	ALTERNATIVE DISPUTE RESOLUTION (ADR)	
9020-1	CONTEMPT	
9021-1	JUDGMENTS & ORDERS - ENTRY OF	
9021-2	ORDERS - EFFECTIVE DATE	

PART IX, Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
9022-1	JUDGMENTS & ORDERS - NOTICE OF	
9027-1	REMOVAL/REMAND	
9029-1	LOCAL RULES - GENERAL	
9029-2	LOCAL RULES - GENERAL ORDERS	
9029-3	LOCAL RULES - DISTRICT COURT	
9035-1	BANKRUPTCY ADMINISTRATORS	
9036-1	NOTICE BY ELECTRONIC TRANSMISSION	
9070-1	EXHIBITS	
9071-1	STIPULATIONS	
9072-1	ORDERS - PROPOSED	
9073-1	HEARINGS	5070-1
9074-1	TELEPHONE CONFERENCES	5070-1
9075-1	EMERGENCY ORDERS	

APPENDIX OF UNIFORM LOCAL RULE NUMBERS FOR BANKRUPTCY APPEALS

PART VIII

Uniform Local Rule Number	Topic
8001-1	NOTICE OF APPEAL
8001-2	DISMISSAL OF APPEAL (VOLUNTARY)
8001-3	ELECTION FOR DISTRICT COURT DETERMINATION OF APPEAL
8002-1	TIME FOR FILING APPEAL
8003-1	MOTION FOR LEAVE TO APPEAL
8004-1	SERVICE OF NOTICE OF APPEAL
8005-1	STAY PENDING APPEAL
8006-1	DESIGNATION OF RECORD - APPEAL
8007-1	COMPLETION OF RECORD - APPEAL
8007-2	TRANSMISSION OF RECORD - APPEAL
8007-3	DOCKETING OF APPEAL
8007-4	RECORD FOR PRELIMINARY HEARING - APPEAL
8008-1	FILING PAPERS - APPEAL
8008-2	SERVICE OF ALL PAPERS REQUIRED - APPEAL
8008-3	MANNER OF SERVING PAPERS - APPEAL
8008-4	PROOF OF SERVICE OF FILED PAPERS - APPEAL
8009-1	TIME FOR FILING BRIEFS - APPEAL
8009-2	TIME FOR FILING APPENDIX TO BRIEF - APPEAL
8010-1	FORMS OF BRIEFS - APPEAL
8010-2	REPRODUCTION OF STATUTES, ETC. - APPEAL
8010-3	LENGTH OF BRIEFS - APPEAL
8011-1	MOTION, RESPONSE, REPLY - APPEAL
8011-2	DETERMINATION OF PROCEDURAL MOTION - APPEAL
8011-3	DETERMINATION OF MOTION - APPEAL
8011-4	EMERGENCY MOTION - APPEAL

PART VIII, Cont'd.

Uniform Local Rule Number	Topic
8011-5	POWER OF SINGLE JUDGE TO ENTERTAIN MOTIONS
8012-1	ORAL ARGUMENT - APPEAL
8013-1	DISPOSITION OF APPEAL
8014-1	COSTS - APPEAL
8015-1	MOTION FOR REHEARING
8016-1	ENTRY OF JUDGMENT BY CLERK OF DISTRICT COURT OR BAP
8016-2	NOTICE OF ORDER OR JUDGMENT - APPEAL
8016-3	RETURN OF RECORD ON APPEAL
8017-1	STAY PENDING APPEAL TO COURT OF APPEALS
8018-1	LOCAL RULES OF CIRCUIT JUDICIAL COUNCIL OR DISTRICT COURT
8019-1	SUSPENSION OF PART VIII, FED.R.BANKR.P.
8020-1	DAMAGES AND COSTS FOR FRIVOLOUS APPEAL
8070-1	DISMISSAL OF APPEAL BY COURT FOR NON-PROSECUTION

ALPHABETICAL LIST OF LOCAL RULE TOPICS AND UNIFORM LOCAL RULE NUMBERS

Local Rule Topic	Uniform Local Rule Number
ABANDONMENT	6007-1
ABSTENTION	5011-2
ACCEPTANCE/REJECTION OF PLANS	3018-2
ADDRESS OF DEBTOR	4002-2
ADVERSARY PROCEEDINGS - GENERAL	7001-1
ALTERNATIVE DISPUTE RESOLUTION (ADR)	9019-2
AMENDMENTS TO LISTS & SCHEDULES	1009-1
AMENDMENTS TO PLANS (See "Ch. 11 - ____," "Ch. 13 - ___.")	
APPEALS	8001-1 ff. (See Appendix)
APPRAISERS & AUCTIONEERS	6005-1
ASSIGNMENT OF ADVERSARY PROCEEDINGS	7040-1
ASSIGNMENT OF CASES	1073-1
ATTORNEYS - ADMISSION TO PRACTICE	2090-1
ATTORNEYS - DISCIPLINE & DISBARMENT	2090-2
ATTORNEYS - DUTIES	9011-1
ATTORNEYS - NOTICE OF APPEARANCE	9010-1
ATTORNEYS - WITHDRAWALS	2091-1
AUTOMATIC STAY - RELIEF FROM	4001-1
AUTOMATIC STAY - VIOLATION OF	4071-1
BALLOTS - VOTING ON PLANS	3018-1
BANKRUPTCY ADMINISTRATORS	9035-1
BRIEFS & MEMORANDA OF LAW	9013-2
CALENDARS & SCHEDULING	5070-1
CAPTION - PAPERS, GENERAL (See also "Petition-Caption")	9004-2
CASH COLLATERAL	4001-2
CERTIFICATE OF SERVICE - APs	7005-1
CERTIFICATE OF SERVICE - MOTIONS	9013-3
CHAPTER 11 - AMENDMENTS TO PLANS	3019-1

Local Rule Topic	Uniform Local Rule Number
CHAPTER 11 - CONFIRMATION	3020-1
CHAPTER 11 - GENERAL	2081-1
CHAPTER 11 - PLAN	3016-1
CHAPTER 11 - SMALL BUSINESS CASES, GENERAL	1020-1
CHAPTER 12 - GENERAL	2082-1
CHAPTER 13 - AMENDMENTS TO PLANS	3015-2
CHAPTER 13 - CONFIRMATION	3015-3
CHAPTER 13 - GENERAL	2083-1
CHAPTER 13 - PAYMENTS	3070-1
CHAPTER 13 - PLAN	3015-1
CHAPTER 9	2080-1
CLAIMS & EQUITY SECURITY INTERESTS - GENERAL	3001-1
CLAIMS - OBJECTIONS	3007-1
CLAIMS - RECONSIDERATION	3008-1
CLAIMS - WITHDRAWAL	3006-1
CLASS ACTION	7023-1
CLERK - DELEGATED FUNCTIONS OF	5075-1
CLERK - GENERAL/AUTHORITY	5003-1
CLERK - OFFICE LOCATION/HOURS	5001-2
COMMITTEES	2071-1
COMPENSATION OF PROFESSIONALS	2016-1
CONTEMPT	9020-1
CONTINUANCE	5071-1
CONVERSION - REQUEST FOR/NOTICE OF	1017-1
CONVERSION - PROCEDURE FOLLOWING	1019-1
COPIES, HOW TO ORDER	5078-1
CORE/NON-CORE DESIGNATION (Complaint)	7008-1

Local Rule Topic	Uniform Local Rule Number
CORE/NON-CORE DESIGNATION (Responsive Pleading)	7012-1
CORPORATIONS	1074-1
COSTS - TAXATION/PAYMENT	7054-1
COURT ADMINISTRATION	5001-1
COURT PAPERS - REMOVAL OF	5003-2
COURT REPORTING	5076-1
COURTROOM DECORUM	5072-1
COVER SHEET	7003-1
DEBTOR - DUTIES	4002-1
DEBTOR-IN-POSSESSION-DUTIES	2015-2
DEFAULT - FAILURE TO PROSECUTE	7055-1
DEFINITIONS	9001-1
DEPOSITIONS & EXAMINATIONS	2004-1
DEPOSITIONS & EXAMINATIONS - APs	7027-1
DISCHARGE HEARINGS	4004-1
DISCHARGEABILITY COMPLAINTS	4007-1
DISCLOSURE STATEMENT - APPROVAL	3017-1
DISCLOSURE STATEMENT - GENERAL	3016-2
DISCOVERY - GENERAL	7026-1
DISMISSAL OR SUSPENSION - CASE OR PROCEEDINGS	1017-2
DIVIDENDS - CHAPTER 7	3009-1
DIVIDENDS - SMALL	3010-1
DIVIDENDS UNDER PLAN (Ch. 11)	3021-1
DIVISIONS - BANKRUPTCY COURT	1071-1
ELECTRONIC FILING	5005-2
EMERGENCY ORDERS	9077-1
EMPLOYMENT OF PROFESSIONALS	2014-1
ESTATE ADMINISTRATION	2070-1

Local Rule Topic	Uniform Local Rule Number
EX PARTE CONTACT	9003-1
EXECUTORY CONTRACTS	6006-1
EXEMPTIONS	4003-1
EXHIBITS	9072-1
FEES - FORM OF PAYMENT	5081-1
FEES - GENERAL	5080-1
FEES - INSTALLMENT PAYMENTS	1006-1
FILING OF DISCOVERY MATERIALS	7005-2
FILING PAPERS - NUMBER OF COPIES	5005-2
FILING PAPERS - REQUIREMENTS	5005-1
FILING PAPERS - SIZE OF PAPERS	5005-3
FINAL REPORT/DECREE	5009-1
FINAL REPORT/DECREE (Ch. 11)	3022-1
FINDINGS & CONCLUSIONS	7052-1
FORMS	9009-1
HEARINGS	9075-1
INJUNCTIONS	7065-1
INSURANCE	4070-1
INTERVENTION	7024-1
INVESTMENT OF ESTATE FUNDS	5095-1
JOINT ADMINISTRATION/CONSOLIDATION	1015-1
JUDGES - VISITING & RECALLED	5090-1
JUDGMENTS - PAYMENT OF	7069-1
JUDGMENTS & ORDERS - ENTRY OF	9021-1
JUDGMENTS & ORDERS - NOTICE OF	9022-1
JURY TRIAL	9015-1
JURISDICTION	1070-1
LIEN AVOIDANCE	4003-2

Local Rule Topic	Uniform Local Rule Number
LISTS, SCHEDULES, & STATEMENTS	1007-3
LOCAL RULES - DISTRICT COURT	9029-3
LOCAL RULES - GENERAL	9029-1
LOCAL RULES - GENERAL ORDERS	9029-2
MAILING - LIST OR MATRIX	1007-2
MEETING OF CREDITORS & EQUITY SECURITY HOLDERS	2003-1
MOTION PRACTICE	9013-1
MOTION PRACTICE (in APs)	7007-1
NOTICE TO CREDITORS & OTHER INTERESTED PARTIES	2002-1
NOTICE TO OTHER COURTS	2072-1
NOTICE TO UNITED STATES OR FEDERAL AGENCY	2002-2
OBJECTIONS - TO DISCHARGE	4004-2
OBTAINING CREDIT	4001-3
ORDERS - EFFECTIVE DATE	9021-2
ORDERS - PROPOSED	9074-1
PETITION - CAPTION	1005-1
PETITION - INVOLUNTARY	1010-1
PETITION - PARTNERSHIP	1004-1
PHOTOGRAPHY, RECORDING DEVICES & BROADCASTING	5073-1
PLACES OF HOLDING COURT	1072-1
POWER OF ATTORNEY	9010-2
PRE-TRIAL PROCEDURES	7016-1
PRO SE PARTIES	9011-2
REAFFIRMATION	4008-1
REDEMPTION	6008-1
REGISTRY FUND	7067-1
RELATED CASES	1015-2

Local Rule Topic	Uniform Local Rule Number
REMOVAL/REMAND	9027-1
REOPENING CASES	5010-1
SALE OF ESTATE PROPERTY	6004-1
SANCTIONS	9011-3
SEAL OF COURT	5092-1
SERVICE OF PROCESS	7004-1
SETTLEMENTS & AGREED ORDERS	9019-1
SIGNATURES	9011-4
SIGNATURES - JUDGES	5091-1
STATEMENT OF INTENTION	1007-3
STIPULATIONS	9073-1
SUBPOENAS	9016-1
SUMMARY JUDGMENT	7056-1
SUMMONS	7004-2
TAX RETURNS & TAX REFUNDS	6070-1
TELEPHONE CONFERENCES	9076-1
TIME PERIODS	9006-1
TRANSCRIPTS	5077-1
TRANSFER OF CASES	1014-1
TRUSTEES - BONDS/SURETY	2010-1
TRUSTEES - CHAPTER 12	2015-4
TRUSTEES - CHAPTER 13	2015-5
TRUSTEES - GENERAL	2015-1
TRUSTEES - REPORTS & DISPOSITION OF RECORDS	2015-3
TRUSTEES & EXAMINERS (Ch. 11)	2007.1-1
UNCLAIMED FUNDS	3011-1
UNCONSTITUTIONALITY, CLAIM OF	7024-2
UNITED STATES AS A CREDITOR OR PARTY	2002-3

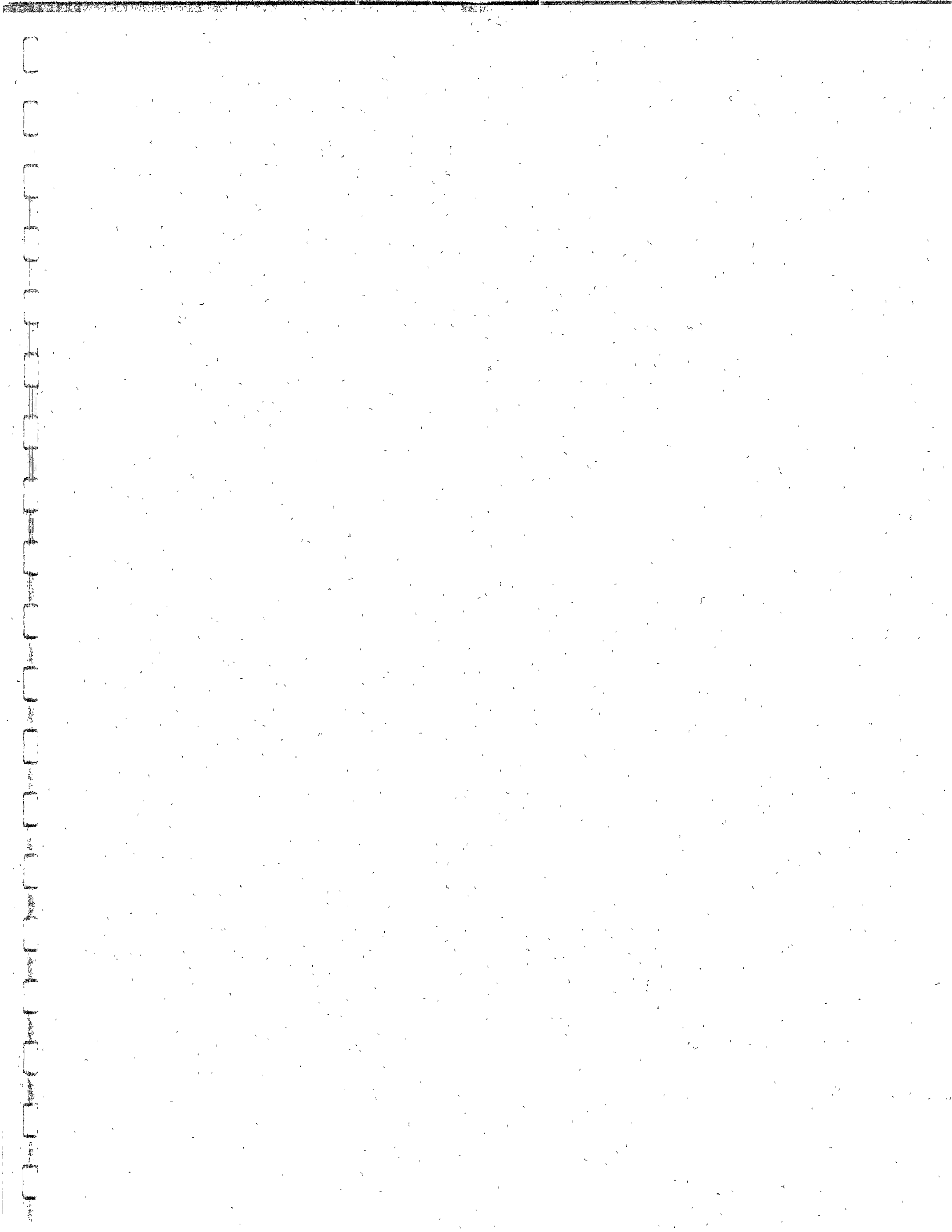
Local Rule Topic	Uniform Local Rule Number
UNITED STATES TRUSTEE	2020-1
VALUATION OF COLLATERAL	3012-1
VENUE - CHANGE OF	1014-2
WITHDRAWAL OF REFERENCE	5011-1
WITNESSES	9016-2

APPENDIX OF UNIFORM LOCAL RULE NUMBERS FOR BANKRUPTCY APPEALS

Topic	Uniform Local Rule Number
COMPLETION OF RECORD - APPEAL	8007-1
COSTS - APPEAL	8014-1
DAMAGES AND COSTS FOR FRIVOLOUS APPEAL	8020-1
DDESIGNATION OF RECORD - APPEAL	8006-1
DDETERMINATION OF MOTION - APPEAL	8011-3
DETERMINATION OF PROCEDURAL MOTION - APPEAL	8011-2
DISMISSAL OF APPEAL BY COURT FOR NON-PROSECUTION	8071-1
DISMISSAL OF APPEAL (Voluntary)	8001-2
DISPOSITION OF APPEAL	8013-1
DOCKETING OF APPEAL	8007-3
ELECTION FOR DISTRICT COURT DETERMINATION OF APPEAL	8001-3
EMERGENCY MOTION - APPEAL	8011-4
ENTRY OF JUDGMENT BY CLERK OF DISTRICT COURT OR BAP	8016-1
FILING PAPERS - APPEAL	8008-1
FORM OF BRIEFS - APPEAL	8010-1
LENGTH OF BRIEFS - APPEAL	8010-3
LOCAL RULES OF CIRCUIT JUDICIAL COUNCIL OR DISTRICT COURT	8018-1
MANNER OF SERVING PAPERS - APPEAL	8008-3
MOTION FOR LEAVE TO APPEAL	8003-1
MOTION FOR REHEARING - APPEAL	8015-1
MOTION, RESPONSE, REPLY - APPEAL	8011-1
NOTICE OF APPEAL	8001-1
NOTICE OF ORDER OR JUDGMENT - APPEAL	8016-2

PART VIII, Cont'd.

Topic	Uniform Local Rule Number
ORAL ARGUMENT - APPEAL	8012-1
POWER OF A SINGLE JUDGE TO ENTERTAIN MOTIONS	8011-5
PROOF OF SERVICE OF FILED PAPERS - APPEAL	8008-4
RECORD FOR PRELIMINARY HEARING - APPEAL	8007-4
REPRODUCTION OF STATUTES, ETC. - APPEAL	8010-2
RETURN OF RECORD ON APPEAL	8016-3
SERVICE OF ALL PAPERS REQUIRED - APPEAL	8008-2
SERVICE OF NOTICE OF APPEAL	8004-1
STAY PENDING APPEAL	8005-1
STAY PENDING APPEAL TO COURT OF APPEALS	8017-1
SUSPENSION OF PART VIII, FED.R.BANKR.P.	8019-1
TIME FOR FILING APPEAL	8002-1
TIME FOR FILING APPENDIX TO BRIEF - APPEAL	8009-2
TIME FOR FILING BRIEFS - APPEAL	8009-1
TRANSMISSION OF RECORD - APPEAL	8007-2



APPENDIX B

OFFICIAL BANKRUPTCY FORMS

No. 6 ("Schedule E -- Creditors Holding Unsecured Priority Claims") and No. 10 ("Proof of Claim").

B6E
(Rev. 12/94)

Form No. 6

In Re ______________________________.
Debtor

Case No.______________________
(if known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name and mailing address, including zip code, and account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditor, and complete Schedule H-Codebtors. If a joint petition is filed, state whether husband, wife, both of them or the marital community may be liable on each claim by placing an "H,""W","J", or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotal" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Repeat this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ **Extensions of credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(2).

☐ **Wages, salaries, and commissions**

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to $4000* per person earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(3).

☐ **Contributions to employee benefit plans**

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ **Certain farmers and fishermen**

Claims of certain farmers and fishermen, up to $4000* per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(5).

☐ **Deposits by individuals**

Claims of individuals up to $1,800* for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(6).

Form No. 6, continued

In Re ________________________________. Case No.____________________

Debtor (if known)

☐ **Alimony, Maintenance, or Support**

Claims of a spouse, former spouse, or child of the debtor for alimony, maintenance, or support, to the extent provided in 11 U.S.C. § 507(a)(7).

☐ **Taxes and Certain Other Debts Owed to Governmental Units**

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(8).

☐ **Commitments to Maintain the Capital of an Insured Depository Institution**

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507 (a)(9).

* Amounts are subject to adjustment on April 1, 1998, and every three years thereafter with respect to cases commenced on or after the date of adjustment.

____ continuation sheets attached

B10 (Official Form 10)
(Rev. 12/94)

United States Bankruptcy Court
________________ District of ________________

PROOF OF CLAIM

In re (Name of Debtor)

Case Number

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor
(The person or other entity to whom the debtor owes money or property)

Name and Address Where Notices Should be Sent

Telephone No.

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:

Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated:__________

1. BASIS FOR CLAIM
- ☐ Goods sold
- ☐ Services perfomed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other (Describe briefly)
- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (Fill out below)

Your social security number__________
Unpaid compensation for services performed
from__________ (date) to __________ (date)

2. DATE DEBT WAS INCURRED

3. IF COURT, JUDGMENT, DATE OBTAINED:

4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following: (1) Unsecured nonpriority, (2) Unsecured Priority, (3) Secured. It is possible for part of a claim to be in one category and part in another.
CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM AT TIME CASE FILED.

☐ SECURED CLAIM $ __________
Attach evidence of perfection of security interest
Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle ☐ Other (Describe briefly)

Amount of arrearage and other charges at time case filed included in secured claim above, if any $ __________

☐ UNSECURED NONPRIORITY CLAIM $ __________
A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

☐ UNSECURED PRIORITY CLAIM $ __________
Specify the priority of the claim.

☐ Wages, salaries, or commissions (up to $4000),* earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier—11 U.S.C. § 507(a)(3)

☐ Contributions to an employee benefit plan—11 U.S.C. § 507(a)(4)

☐ Up to $1,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use—11 U.S.C. § 507(a)(6)

☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child—11 U.S.C. § 507(a)(7)

☐ Taxes or penalties of governmental units—11 U.S.C. § 507(a)(8)

☐ ~~Other—Specify applicable paragraph of 11 U.S.C. § 507(a)~~

*Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

5. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED: $ __________ (Unsecured) $ __________ (Secured) $ __________ (Priority) $ __________ (Total)

☐ Check this box if claim includes charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

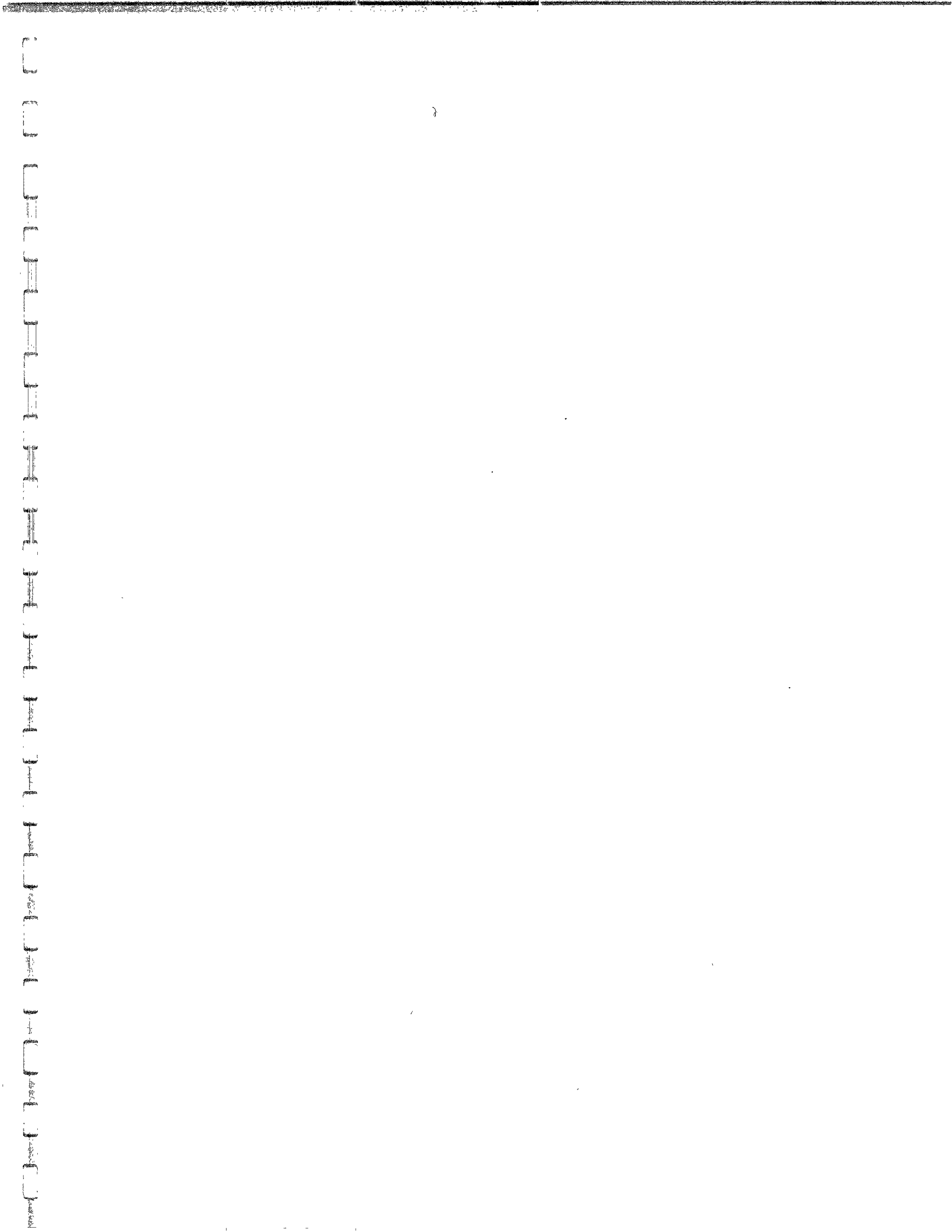
6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.
7. SUPPORTING DOCUMENTS: *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running acocunts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.
8. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

THIS SPACE IS FOR COURT USE ONLY

Date

Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.



APPENDIX C

DRAFT MINUTES OF SEPTEMBER 1995 MEETING

ADVISORY COMMITTEE ON BANKRUPTCY RULES

DRAFT

Meeting of September 7-8, 1995

Portland, Oregon

DRAFT

Minutes

The Advisory Committee met at the Portland Marriott Hotel. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman
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
Professor Charles J. Tabb
R. Neal Batson, Esquire
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 Alan N. Resnick, Reporter

Circuit Judge Alice M. Batchelder was unable to attend. District Judge Thomas S. Ellis, III, liaison to the Committee from the Committee on Rules of Practice and Procedure, also was unable to attend.

District Judge Alicemarie H. Stotler, chair of the Committee on Rules of Practice and Procedure ("Standing Committee"), attended the meeting. Peter G. McCabe, Assistant Director of the Administrative Office of the United States Courts ("Administrative Office") and Secretary to the Standing Committee, also attended.

The following additional persons attended all or part of the meeting: District Judge Paul A. Magnuson, Chair, Committee on the Administration of the Bankruptcy System; Kevyn Orr, Deputy Director, Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Channon, 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 are 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 Items

The Committee approved the minutes of the March 1995 meeting subject correction on page 24 of the title of the periodical mentioned there to "American Bankruptcy Law Journal."

The Chairman and the Reporter briefed the Committee on actions taken at the July 1995 meeting of the Standing Committee. Both the preliminary drafts and the final drafts of proposed amendments to the bankruptcy rules were approved. With respect to the amendments to Rule 5005 concerning electronic filing, the Standing Committee approved use of the word "document" in the bankruptcy rule, as requested by the Committee, even though the other advisory committees are using the word "paper." The Committee preferred the broader "document" in recognition that some material filed electronically may never exist in paper form and to clarify that such material will be available for public access under § 107 of the Bankruptcy Code.

Another matter discussed at the Standing Committee meeting was the appropriate title for Committee Notes. A question had arisen concerning whether these should be titled Advisory Committee Notes, or whether they should be considered Standing Committee Notes, because the Advisory Committees report to the Standing Committee, which can approve or not approve any Committee Note. The Reporter stated that these notes presesntly are titled Committee Notes, but some publishers re-title them as Advisory Committee Notes. Professor Resnick also said that the

Supreme Court orders prescribing rules do not include the Committee Notes. Judge Stotler said that she is not very concerned about nomenclature, but believes that if the Standing Committee changes a rule, the Committee Note should go back to the Advisory Committee for any rewriting. Professor Resnick, however, raised the point that there may not be sufficient time to do that if the Standing Committee changes the rule after the public comment period. Rather, the rule must be forwarded almost immediately to the Judicial Conference. Judge Stotler said she would like to establish as a standard procedure: 1) rewrite of the Committee Note by the Chairman and Reporter of the Advisory Committee, 2) fax of revised Committee Note to the Advisory Committee members for their approval, and 3) fax of approved rewrite to the Standing Committee. There was no objection to the proposed procedure.

In connection with the Standing Committee's recent Self-Study, Judge Stotler distributed to the Committee copies of an issues summary questionnaire and invited the members to use it to evaluate the recommendations. The Committee also discussed several of the recommendations.

Several members expressed reservations about any recommendation that, in the name of supporting diversity in committee membership, would seem to be advising the Chief Justice on how appointments should be made. Several members noted that the Chief Justice already appears to be appointing people of diverse characteristics and backgrounds, and the consensus was that the recommendation is both unnecessary and inappropriate.

The Committee discussed at length the circulation of materials among the members by the Reporter and by the Rules Committee Support Office. Mr. McCabe mentioned that the rules office soon may have the capacity to receive suggestions from the public by e-mail. The Reporter stated that, if suggestions were

to be accepted in this form and a large volume of messages are received, reporters may need to be authorized to exercise some discretion concerning them. A reporter currently has to address every letter received, he said, and to require a reporter to draft a full memorandum and response to every suggestion received by e-mail might be unduly burdensome, depending on the number of messages received.

Several methods of screening and prioritizing suggestions were discussed, with a view toward enabling a committee to better control the use of its reporter's energies and the limited time for meetings. These included circulating suggestions tentatively, with two or three "for" votes needed to bring a suggestion to the agenda for a meeting, having a "miscellaneous day" every other year, and increased telephone and facsimile communication among the members between meetings, so that meeting time can be spent on matters of strategy and substance.

Judge Stotler said she thought the current procedural rules of the rules committees would permit the Committee to adopt any of these strategies. Mr. Klee cautioned that the Committee needs to be careful, in any procedure it adopts, not to violate any applicable open meeting rule. The Reporter observed that the use of subcommittees has worked very well for the Committee, enabling it to use its meeting time well. In closing, he stressed that sometimes a suggestion that is non-meritorious in itself can lead the Committee to a needy area.

<u>Rules</u>

<u>Uniform Local Rule Numbering, Rule 9029.</u> At the March 1995 meeting, the Committee approved a uniform local rule numbering system subject to certain modifications to be implemented, including the addition of cross-references. Ms. Channon and Professor Resnick explained that the Committee's intentions regarding the modifications had been unclear. That was the

reason for returning the proposed numbering system, with all modifications in place, to the Committee for further approval. The proposal as resubmitted also contained further improvements suggested by the subcommittee on local rules. The Committee discussed what the policy should be when a district promulgates a new rule or cannot fit one of its existing rules into the prescribed numbering system. Ms. Channon stated that such problems likely would be rare because the system was derived from analysis of all existing local rules. If the situation were to arise, the attorneys in the Bankruptcy Judges Division of the Administrative Office, all of whom are familiar with the numbering system, would be available to assist a district in assigning a uniform number. Professor Tabb suggested adding a "catchall" number such as 9999-1 for those few rules that do not fit any existing topic. The Committee requested that the subcommittee add to the draft of the memorandum that will accompany the numbering system explicit instructions to the districts concerning rules that do not seem to fit and stating that a district is welcome to add any further cross-references it deems helpful within the numbering system. **A motion to approve the uniform local rule numbering system, to include in it the material (bracketed in the draft) directing use of the topic names as well as the numbers, to recommend that the alphabetical list of topics accompany the numbering system, to recommend that districts be given at least one year to convert their rules to the system, to designate the Bankruptcy Judges Division to provide technical support and advice during the conversion process, and to authorize the subcommittee to make minor changes to the system as may be necessary carried by a vote of 11 - 2.**

Rule 7062. The Reporter recited the background, including the potential for undesirable unintended consequences if the amendments approved in March 1995 were to become the rule, and the problems that Rule 7062 presents with respect to contested matters and confirmation orders. Some members noted that Rule

62, Fed.R.Civ.P., stays only execution and proceedings to enforce a judgment and suggested that application of Rule 7062 to contested matters was largely harmless, because "execution" rarely would occur in a contested matter. As an alternative to the amendments originally proposed, Judge Kressel had suggested limiting Rule 7062 to adversary proceedings by amending Rule 9014 to delete mention of Rule 7062. Mr. Klee, however, said he still was troubled by the fact that Rule 7001 requires an adversary proceeding for obtaining "equitable relief," even though confirmation orders often grant equitable relief without an adversary proceeding. Mr. Batson said the growing list of exceptions in Rule 7062 and proposals to add more arise from the perceived need to move things along in a bankruptcy case and the difficulty of obtaining a stay. Chairman Mannes said he thought there was a consensus that Rule 7062 ought to be pared down, although the specifics of how to accomplish that and address both the issue of the effective date of orders and the preservation of appellate rights were not clear. He stated his intention to appoint a subcommittee to work out proposals for the Committee's consideration. Judge Restani asked whether there was consensus on shifting the burden to create a 10-day stay of the effectiveness of all orders. Judge Robreno asked whether imposing such a stay would take away discretion which a judge now has: an order is effective upon docketing, although not enforceable for ten days, but a judge can always provide for a stay of effect. Staying the effectiveness of all orders would affect injunctions also, he added. A non-binding vote disclosed three members in favor of orders being effective immediately (as a default) and seven in favor of delayed effect (as a default). **Judge Mannes appointed Judge Kressel to serve as chair of a subcommittee to work on these issues with Mr. Batson, Mr. Smith, Mr. Kohn, Mr. Sommer, and Mr. Klee to serve as members.**

Rule 3010. The Reporter said his memorandum on the suggestion to amend this rule needed correcting in one respect.

The memorandum states that unclaimed money in a bankruptcy case escheats to the government after five years. In fact, although the money is paid into the United States Treasury, it never escheats because it remains subject to claim by the owner. The legislative history to section 347 of the Code, however, erroneously states that escheat occurs.

Mr. Klee stated that he previously had suggested providing for a minimum amount of a distribution check in a chapter 11 case, as the present rule covers only cases under chapters 7 and 13. At that time, the Committee had requested him to reserve his suggestion until other amendments to the rule were being considered. He asked that, if any of the suggested changes were approved, his proposal concerning chapter 11 cases also be considered.

The suggestion to raise from $5 to $30 the minimum amount for which a chapter 7 trustee must write a distribution check to a creditor was made by the Bankruptcy Judges Advisory Committee, but there was no documentation concerning the assertions that it costs more than $5 to issue the check and that creditors do not want to receive such small amounts. Mr. Orr said the cost of issuing a check varies greatly and depends on the efficiency of the individual trustee. Mr. Heltzel stated that while raising the amount might lessen the work of a trustee, it would create more work for the clerk, who would spend much more time than at present processing requests from creditors who want their money. **A motion not to amend the rule carried, 11 - 0.**

A similar suggestion to raise the minimum amount of a check to be issued by a standing chapter 13 trustee from $15 to $45 failed for want of a motion. Some members noted that a chapter 13 trustee issues monthly checks, and that the rule provides for amounts due a creditor to accrue until the minimum is satisfied.

Rule 3015(f). The Bankruptcy Judges Advisory Committee also suggested that Rule 3015(f) establish a deadline of two days prior to the hearing on confirmation of a chapter 13 plan for filing an objection to confirmation. Presently, the rule simply requires that an objection be filed "before confirmation," and the Reporter stated that it is intended to afford the greatest flexibility to the districts. Some districts hold confirmation hearings on the same day as a chapter 13 debtor's § 341 meeting, and the two days recommended by the judges would -- in those districts --deprive creditors of the opportunity to examine the debtor prior to the deadline for filing an objection. Professor Resnick said nothing in the rule prevents a court from setting a reasonable deadline. **A motion to take no action carried by a vote of 11-0.**

Rule 9014. The Bankruptcy Judges Advisory Committee suggested that Rule 9014 should be amended to make Rule 7005 applicable in adversary proceedings. The purpose would be to permit service of pleadings filed subsequent to the motion to be served on the party's attorney rather than on the party. **The Committee referred this suggestion to its subcommittee on long range planning, which is working on a comprehensive proposal for rules governing motion practice in bankruptcy.**

Rule 3017(d). Mr. Klee had suggested that the rule be amended to authorize the court, in its discretion, to order that ballots and copies of the plan and disclosure statement not be mailed to an impaired class of creditors. Mr. Klee had stated that this would allow a plan proponent who intended to "go straight to cramdown" to save expenses. Mr. Klee had noted further that certain creditors which the plan proponent formerly could have treated as unimpaired --- and thereby avoided providing them with voting materials --- no longer are considered unimpaired since enactment of the 1994 amendments to the Code. The Reporter stated the background of the proposal and said there

appeared to be a question whether the proposal would conflict with a creditor's right under section 1126(a) of the Code to "accept or reject a plan." After discussion, **a motion to take no action carried by a vote of 7 - 3.**

Rule 3002. Mr. Sommer had suggested that the rule be amended to require a creditor filing a late claim to serve copies on the debtor and the trustee. The suggestion was discussed at the March 1995 meeting but not resolved. Subsequently, two attorneys had written separately to suggest that a creditor be required to serve a copy of any claim on the debtor and debtor's attorney, regardless of whether the claim were timely or tardily filed, and further suggesting that failure to make service be grounds for disallowance. The Reporter stated that, although there should be some consequence for failing of meet a requirement of a rule, establishing disallowance as a penalty probably would violate the Rules Enabling Act by altering a substantive right created by the Bankruptcy Code. **A motion to take no action carried 9 - 2.**

Rules 1019(1)(B), 2003(d), 4004(b), 4007(c), and 4007(d). These rules currently provide that a party may obtain relief by a motion "made" before the specified deadline. Professor Tabb had suggested that the word "made" should be changed to "filed" throughout the rules. After analyzing the rules in question, the Reporter said he had drafted amendments making the suggested change in four rules in which it appeared that the motion typically would be made in writing and concerning which the rules specify a deadline. In Rule 1019(1)(B), however, where the subject matter suggested that the motion often might be made orally, the Reporter had drafted an amendment providing for either an oral motion or a written motion filed before the deadline. Although there are other rules in which the word "made" is used in connection with a motion, no amendments were proposed because the provision in which "made" is used does not

relate to a time limit. The Reporter's draft also included stylistic changes and conformed Rule 2003(d) to proposed amendments to Rule 2007.1 on election of a chapter 11 trustee. **A motion to adopt the Reporter's drafts carried by a vote of 11 - 2.** A member inquired why the draft of proposed amendments to Rule 2003(d) used the phrase "the presiding officer" on line 12, rather than the "United States trustee" consistently throughout. The Reporter said that "United States trustee" should be used for consistency and the consensus of the Committee was to substitute "United States trustee" for "presiding officer" in line 12.

Rule 3008. Professor Lawrence P. King had suggested amending the rule to state explicitly that the court may deny a motion to reconsider the allowance or disallowance of a claim without notice and a hearing. Professor King had said an amendment would clarify the original intent that notice and a hearing are required only if the motion to reconsider is granted and the judge plans to consider the merits of the allowance or disallowance. **A motion to take no action carried 7 - 3.**

Rule 1003. Bankruptcy Judge S. Martin Teel, Jr., had suggested amendments to the rule to address the situation when three creditors have filed the petition, but the debtor avers that the claim of one or more of them is disputed or contingent. Judge Teel also suggested that a debtor averring the existence of 12 or more creditors be required to state on the list of creditors whether any of their claims are contingent or disputed. **A motion to take no action carried by a vote of 8 - 2.**

Rule 2004(c). Bankruptcy Judge Charles E. Matheson had suggested that Rule 2004 be amended, because he thinks it is not clear in the current rule whether a court can order the examination of a nondebtor to be held outside the judicial district of the court issuing the order (or more than 100 miles from where the court sits). The Reporter said he did not agree

that the rule is unclear on that point, but had discovered a mismatch between Rule 2004(c) and Federal Rule of Civil Procedure 45 concerning the issuance of a subpoena for the examination. (Fed. R. Civ. P. 45 is applicable through Rule 9016, which governs issuance of a subpoena in a bankruptcy proceeding.) Professor Resnick had drafted proposed amendments covering both matters. After discussion, the Committee altered the final sentence of the proposed draft to more closely track Fed. R. Civ. P. 45(a) concerning who can issue a subpoena and to make it clear that an attorney who is admitted either in the district in which the examaination is to take place or in the district where the case is pending can issue the subpoena in the name of the court for the district in which the examination is to take place. **A motion to accept the Reporter's draft amendments to Rule 2004(c) as altered by the Committee carried, 7 - 4.** The Committee then discussed also adding to Rule 2004(a) language stating that an order for an examination may be issued "after notice and a hearing." A poll of the judges on the Committee disclosed that some judges routinely handle motions for Rule 2004 examinations ex parte while others do not. Some members said examination should be available upon notice issued in the same manner as a subpoena with no prior court order. **A motion to table and refer Rule 2004(a) to the Reporter for further study, drafting of alternative proposals, and reconsideration at the next meeting, carried by a vote of 11 - 2.**

Rules 2002(a) and (f). The Reporter stated that an attorney had requested amendments to the rules that would add to the information required in the combined notice of the commencement of the case and the meeting of creditors. Specifically, the notice would have to inform the creditor of the amount the debtor alleges is owed to the creditor, the account number by which the debtor is known to the creditor, whether the debtor asserts that the debt is contingent, disputed, or unliquidated, and the presence of any codebtor, guarantor, etc. Mr. Heltzel said it is

impossible for the clerk, who prepares the notice for printing and mailing, to customize it separately for each creditor in each case. The Reporter noted that Congress recently had considered a statutory amendment that resembled the suggestion concerning account numbers. Ultimately, because of the practical inability of clerks' offices to comply, Congress enacted a provision requiring the account number only on notices actually sent by the debtor and providing expressly that failure to include the information does not invalidate any notice. **A motion to take no action carried 12 - 1.** After the vote, Mr. Smith stated that the technology exists to provide this information when the noticing function has been delegated to the debtor, as often occurs in large chapter 11 cases. The debtor, who creates the schedules, can transfer the data to the materials to be mailed, he said. The clerk, however, does not have the same capability. The consensus was that the Committee supports the goal of providing each creditor with the best and most complete notice possible, will continue to monitor advances in technology, and will continue to propose amendments to maximize the benefits offered by these advances when it considers such action to be appropriate.

Preliminary Discussion Items

Bankruptcy Judge Steven W. Rhodes had written a letter recommending to the Committee his court's local rule on motion procedure, his article on statutory (and rules-related) causes of delay and expense in bankruptcy cases, and suggesting that his court's local rule imposing a 90-day deadline for filing proofs of claim in chapter 11 cases be adopted as a national rule. **The Committee rejected the suggestion for a deadline for filing a proof of claim in a chapter 11 case and referred the materials on motion practice and Judge Rhodes' article to the newly-appointed subcommittee on litigation.** (See, Subcommittee Reports, Long Range Planning, _infra._)

District Judge Paul Magnuson, chairman of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee), had referred to the Committee three suggestions that arose from the Bankruptcy Committee's long range planning project. **The Committee rejected the suggestion that there be authorization to appoint a special master in a bankruptcy proceeding.** The consensus was that a special master is too reminiscent of the former bankruptcy referee and that adequate alternatives exist in the authority to appoint a trustee and an examiner.

The second suggestion, that there be a separate procedure for handling "small claims" in a bankruptcy case, was very similar to one contained in a letter from Peter H. Arkison, Esquire. The consensus was that existing creditor rights might be adversely affected by a streamlined "small claims" procedure. As the bankruptcy rules cannot modify substantive rights of the parties, the Committee determined that legislative amendments would be required. Accordingly, **the Committee rejected this suggestion also.**

The third suggestion was that bankruptcy judges "be encouraged" to appoint experts to review applications for compensation filed by professionals. The consensus was that use of experts for this purpose is a good idea, and that authority to implement it already exists in Rule 706 of the Federal Rules of Evidence. Accordingly, **the Committee rejected the suggestion to amend the bankruptcy rules.**

Two suggestions had been referred to the Committee as part of the judiciary's efforts to cut the cost of operating the court system. One suggestion was that Rule 2013 be abrogated. Ms. Channon stated, however, that the reporting and compilation of professional fees awarded by the court now is an automated

operation. Accordingly, the cost of compliance with the rule is small; whereas the benefit to the court's integrity is great. **The Committee rejected the suggestion that Rule 2013 be abrogated.**

The second suggestion was that Rule 2002 be amended to require the United States trustee either to provide notice to all creditors of the (motion and) hearing on dismissal for failure to file schedules and statements or to pay the clerk for providing notice. Ms. Channon suggested instead that the Committee consider amending Rule 1017 to limit to the debtor and the trustee the notice of a motion and hearing to dismiss on this ground. Rule 1017 already provides for limited notice of a motion to dismiss for failure to pay filing fees or for substantial abuse. The amendment could provide for the United States trustee to request that notice be sent to all creditors if the circumstances warrant, and creditors would continue to receive notice in the event the case actually were dismissed. **It was the sense of the Committee that such an amendment would be appropriate, and it directed the Reporter to prepare a draft for the next meeting.**

Subcommittee Reports

Long Range Planning. Mr. Klee gave a summary of the results of the Federal Judicial Center's survey to determine perceived problem areas in the rules. He requested that subcommittees be appointed to study and make specific recommendations in the two areas identified in the survey as creating problems --- litigation and attorney admissions and ethics. Ms. Wiggins suggested that the Committee might need a third subcommittee to evaluate the large number of specific and technical recommendations made by survey respondents.

Judge Mannes said that attorney admissions are a separate subject from the problem of ethics in a multilateral situation

and that the district court already is guarding the admissions gate. **He said that the ethics issues should be studied by the existing subcommittee on attorney disclosure and Rule 2014, which is chaired by Mr. Smith.**

Professor Resnick said that the Reporter for the Standing Committee is organizing a symposium on ethics and admission issues to be held in conjunction with the January 1996 meeting of the Standing Committee. One of the issues to be examined, he said, is should the national rules deal with ethics? Judge Stotler said that the Standing Committee would do the first, seminal work, which might help the Committee steer its projects.

Mr. Smith said that his subcommittee already had reached a preliminary decision that drafting a code of ethics might be beyond the scope of its assignment and that such a project should at least be postponed because of the work being done in the area by others. He said he does see a need for national standards because bankruptcy practice is national. A further area for study, he said, is attempting to define "conflict," an issue the American Law Institute is working on in connection with a Restatement of the Law Governing Lawyers, which the ALI recently has published in a "final draft." This draft contains almost nothing on the bankruptcy aspects of this issue, an oversight he intends to call to the drafters' attention. Other projects that the subcommittee is undertaking relate directly to Rule 2014, he said. These are 1) studying the Reporter's 1992 memorandum concerning the American Bar Association's resolutions, 2) improving the language of both Rule 2014 and Rule 2016, particularly the word "connections," 3) developing guidance on disclosures and a form to serve as a model for making them, and 4) proposing a better procedure for appointing counsel in a case.

Judge Mannes directed the subcommittee to go forward and, at the same time, stay in touch with the related work of the

Standing Committee and other groups. He appointed Judge Batchelder, Judge Cordova, Judge Kressel, and Mr. Rosen to join Mr. Klee as members of the subcommittee.

Judge Mannes also appointed Mr. Klee to chair a new litigation subcommittee to propose solutions to the litigation problems identified in the Federal Judicial Center survey. He appointed Judge Restani, Judge Kressel, Mr. Batson, Mr. Smith, and Mr. Sommer to serve as members.

Technology. Mr. Heltzel reported that the court system in Prince George's County, Maryland, is experimenting with a product developed by Arthur Anderson & Co. for electronic receipt, filing, and service of documents. The parties pay a transmission fee directly to Arthur Anderson.

Liaison with the Advisory Committee on Civil Rules. Judge Restani reported that the civil rules committee is continuing to work on Rule 23 and class actions. She said that there no longer seems to be the same interest in collapsing the categories of classes as appeared at the committee's April 1995 meeting. Interest now seams to focus on interlocutory appeal as of right on the issue of certification and a "probable success" test, she said. The committee members also seem to be questioning how useful class action is in a mass tort situation, whether class actions should be "reined in," and whether to permit settlement classes.

Alternative Dispute Resolution. Professor Tabb reported that the subcommittee had met in May 1995 to discuss whether to recommend any of the proposals circulated in draft at the March 1995 committee meeting. The subcommittee had decided not to propose any amendments at this time, he said, in part because numerous ADR experiments are going on and extensive work on a model local rule is underway by a task force made up of representatives from

many interested organizations. The subcommittee will continue to monitor activity and to consider whether any amendments to the national rules would be appropriate.

Style. Judge Duplantier reported that the subcommittee had gone over all the drafts that were submitted to the Standing Committee.

Official Bankruptcy Forms

Form 1. The Committee questioned whether the box labeled "Type of Debtor" on page 1 should mention "municipality" expressly, rather than leaving such an entity to identify itself in the "other" category, and whether the category labeled "Individual(s)" should be changed to "Individual/Joint." **The Committee requested Ms. Channon to check on the number of filings by municipalities and on the statistical treatment of joint debtors' cases.** On page 2, a member questioned the statement which an individual debtor is required to sign under penalty of perjury, because it lists chapter choices most debtors probably are not eligible to proceed under but says "I understand I may proceed under chapters 7, 11, 12, and 13 . . . ." The member suggested changing "may" to "might." The Reporter stated that the language on the form was enacted directly by Congress, and the question of changing it should be brought to the Bankruptcy Review Commission and thence to Congress. He also said Rule 9009 possibly could be construed to permit a departure from the statutorily prescribed wording if required for the context. Another member said the use of "or" in the sentence indicates that the list is disjunctive and provides a context that gives a meaning of "might," or conditionality, to the word "may." **A motion to approve the form for publication without changing the debtor's statement carried by a vote of 8 - 5.** In addition, the Committee **approved suggestions by Mr. Klee to change the wording of the request for relief by a corporation or partnership from "I**

request" to "The debtor requests" and to change the word "person" to "entity" in numbered paragraph 6 of Exhibit A to the petition.

Form 3. **The Committee approved the proposed Application and Order to Pay Filing Fees in Installments with the substitution of "may" for "will" in numbered paragraph 5 of the application and the substitution of "may" for "shall" in the first sentence of the order.**

Form 6. **The Committee approved the proposed Schedule F with the further amendment of "non priority" to "nonpriority" in the label on the checkbox to be used if the debtor has no creditors holding such claims.**

Form 8. **The Committee approved the proposed Individual Debtor's Statement of Intention subject to deletion of the words "the debtor" in numbered paragraph 1, the substitution of "I intend to do the following" for "My intention" in numbered paragraph 3, and the deletion of numbered paragraph 3 of the draft.**

Form 9. The subcommittee's draft contained a notice to persons with disabilities, directing such persons to telephone the clerk's office for "reasonable accommodations." Mr. Heltzel requested guidance on compliance with this notice. Several members stated that inclusion of the notice would be premature, because the judiciary is not covered by the Americans with Disabilities Act, the issue is an institutional one for the entire federal judiciary, and is now under study by another committee of the Judicial Conference. Another factor, said Mr. McCabe, is the recently enacted Congressional Accountability Act, which brings Congress under many laws including the ADA. The Act gives the judiciary two years to comment on what similar requirements should apply to the judiciary, and the Administrative Office's general counsel is preparing a report for the Congress. **A motion to delete the disability notice from the**

proposed form carried, 6 - 4. The chairman of the forms subcommittee, Mr. Sommer, suggested that the Committee could include in its publication of the forms a notice that the Committee is considering including such a notice on this and other forms and requesting comment, both on the content of the notice and on which forms should contain it. **A motion to include such a "notice of intent" in the publication of the forms carried, 6 - 5. A motion to include the notice but direct the public to contact the office of the United States trustee concerning any accommodations needed at a § 341 meeting failed by a vote of 4 - 8.** The Committee discussed whether the directive: "Do not file a proof of claim unless you receive a court notice to do so," which appears on the current notice in no asset cases, is appropriately worded. The directive was requested by the bankruptcy clerks who do not want to have to process claim forms that never will be used. **A motion to add the word "please" at the beginning of the directive carried, 6 - 4. There was consensus further that consistent terminology should be used throughout the eleven versions of the form, particularly with respect to "bankruptcy clerk" and "bankruptcy clerk's office." The Committee approved the form with the changes as voted.**

Form 10. **The Committee approved a number of changes to the proof of claim for publication and comment.** These included deleting "In re" and the parentheses around "Name of Debtor," deleting the direction to attach evidence of perfection of security interest from the checkbox labeled "SECURED CLAIM," and, in numbered paragraph 7 ("SUPPORTING DOCUMENTS"), substituting for "or evidence of security interests," the words "mortgages, security agreements, and evidence of perfection of lien." The Committee approved making it clearer that the specific priorities listed are subcategories of an unsecured priority claim by inserting a direction to specify the priority of the claim and attempting to improve the format of this part of the form. The Committee also approved clarifying that the tax priority is for taxes and

penalties "owed to" a governmental unit. In numbered paragraph 5, the Committee rewrote the checkbox to read as follows: "Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges." In numbered paragraph 6, the Committee deleted the references to setoffs. Instead, the new instruction sheet will add the following sentence to the definition of secured claim: " In addition, to the extent a creditor owes money to the debtor, the creditor's claim is a secured claim." The Committee directed the forms subcommittee to make conforming changes throughout the instruction sheet. The Committee also changed "company" to "corporation" and revised other language to make the instruction sheet more general.

There was not enough time to complete work on the forms. Mr. Sommer suggested that Committee members send written comments to the subcommittee as soon as possible. He said the subcommittee would consider these and circulate a revised forms package.

Recognition of Judge Meyers

The chairman noted that this meeting marked the end of Judge Meyers' term as a member of the Committee and thanked him for his six years of conscientious service.

Next Meeting

The Committee selected September 26-27, 1996, as the dates for its next autumn meeting. (The Committee will meet March 21-22, 1996, in Charleston, South Carolina.)

Respectfully submitted,
Patricia S. Channon

Agenda Item 9

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

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December 15, 1995

Memorandum

TO: Honorable Alicemarie H. Stotler, Chairwoman, and Members of the Committee on Rules of Practice and Procedure

FROM: Mary P. Squiers, Consultant

RE: *Renumbering of the Local Rules relating to Civil, Criminal, and Appellate Procedure*

Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure took effect on December 1, 1995, requiring that all local rules of court "must conform to any uniform numbering system prescribed by the Judicial Conference." See Appellate Rule 47, Bankruptcy Rules 8018 and 9029, Civil Rule 83, and Criminal Rule 57. Although courts have been encouraged to adopt renumbering systems for their local rules based on the Federal Rules of Procedure, the Judicial Conference has not formally "prescribed" a uniform numbering system. The Committee is requested to recommend that the Conference prescribe a uniform numbering system to implement the December 1, 1995 amendments.

Background

The Judicial Conference authorized the Committee on Rules of Practice and Procedure to undertake a study of local rules of the district courts at its September 1984 meeting. As a result, the Local Rules Project was formed. During its initial activity, the Committee on Rules of Practice and Procedure noted that there was no uniform numbering system for federal district court local rules relating to civil practice. Since there are many advantages of such a system, *e.g.,* to help the bar in locating rules applicable to a particular subject and to ease the incoproration of local rules into indexing services and computer services, the Conference in September 1988 approved and urged district courts to adopt a uniform numbering system for their local rules addressing civil practice, patterned upon the Federal Rules of Civil Procedure. Report of the Judicial Conference, 103 (Sept. 1988).

Civil rules. In 1989, a suggested uniform numbering system governing local rules in district courts based on the Federal Rules of Civil Procedure was circulated to all chief district

judges. (See Attachment A). Some district courts, however, have not yet renumbered their local rules of civil practice in conformance with the 1988 suggestion of the Judicial Conference.

Appellate rules. The Committee on Rules of Practice and Procedure then authorized a study by the Local Rules Project of the local rules of appellate practice. In 1991, a suggested uniform numbering system governing local rules of courts of appeals based on the Federal Rules of Appellate Procedure was circulated to circuit chief judges. (See Attachment B).

Many courts have already revised their local rules governing appellate and civil proceedings using the federal models.

Current activities

The work of the Local Rules Project has continued since that time. It has resulted in the completion and distribution of research documents discussing, individually, the local rules that relate to civil, criminal, and appellate procedure. In addition, the Advisory Committee on Bankruptcy Rules has completed its uniform numbering project for local bankruptcy rules.

Bankruptcy rules. At the Standing Committee's request, the Bankruptcy Rules Committee has developed a uniform numbering system for local bankruptcy rules that coordinates with the numbering system of the Federal Rules of Bankruptcy Procedure. The advisory committee's numbering system is presented to the Standing Committee for approval as part of the advisory committee's report. (See Item 8.A).

Criminal rules. The Standing Committee authorized a review of the local rules of criminal practice at its June 1994 meeting. The report was presented to the Standing Committee for review in June 1995, which requested further consideration by the Criminal Rules Committee at its October 1995 meeting. The report, including a model uniform numbering system that tracks the Federal Rules of Criminal Procedure, was reviewed by the advisory committee without objection. (See Attachment C).

Recommendations

In order to implement the December 1, 1995 amendments to the Federal Rules of Practice and Procedure regarding the numbering of local rules, it is recommended:

(1) that the Judicial Conference prescribe a uniform numbering system for local rules of court governing appellate, civil, and criminal procedure that are based on and track the respective Federal Rules of Practice and Procedure, and:

(2) that the effective date of compliance with the uniform numbering system be delayed until April 1997, so that courts will have sufficient time to make necessary changes to their local rules.

Uniform Numbering System for Local Rules

Currently, there is no uniform numbering system for federal district court local rules. Some of the jurisdictions have local rules which are simply numbered sequentially beginning at "1". *E.g.*, Southern District of Alabama; Northern District of Illinois. Other jurisdictions have local rules which are arranged by topic, designated with a "100," "200," or "300," followed by a hyphen and the actual rule number. *E.g.*, District of Hawaii; Southern District of California. Still other jurisdictions have local rules which are arranged by topic, designated "1," "2," or "3," followed by a decimal point and the actual rule number. *E.g.*, Central District of California; Middle District of Florida.

The Judicial Conference recommends that a uniform numbering system be adopted which would standardize the numbering of all local rules. Such a uniform system would have many advantages. It would be helpful to the bar in locating rules applicable to a particular subject. This is especially important for those attorneys with multi-district practices. It is also significant for any attorney needing to locate a particular rule or to learn whether a local rule on a specific topic exists in the first instance. At present, it is often difficult to find any case law relating to a particular local rule, in part because there is no uniform numbering. The uniform system will also ease the incorporation of local rules into the various indexing services such as West Publishing Company and the Lexis computer services.

The system, as proposed, focuses on the numbering system already used for the Federal Rules of Civil Procedure. This system is already familiar to the bar. What follows, therefore, is a numbering system for local rules proposed by the Local Rules Project which tracks the Federal Rules of Civil Procedure. Each local rule number corresponds to the number of the related

Federal Rule of Civil Procedure. For example, the designation "LR15.1" refers to the local rule entitled: "Form of a Motion to Amend and Its Supporting Documentation." The designation "LR" indicates it is a local rule; the number "15" indicates that the local rule is related to Rule 15 of the Federal Rules of Civil Procedure; and, the number "1" indicates that it is the first local rule concerning Rule 15 of the Federal Rules of Civil Procedure. The same system applies with respect to those Federal Rules of Civil Procedure with a "1" or a "2" after the initial rule number, such as Rule 65.1 entitled "Security; Proceedings Against Sureties." Thus, for example, the first local rule concerning Federal Rule 65 "Injunctions" is designated "LR65.1," while the first local rule concerning Federal Rule 65.1 "Security; Proceedings Against Sureties" is designated "LR65.1.1."

Uniform Numbering System

I. Scope of Rules - One Form of Action.

LR1.1. Scope of Rules.

LR1.2 Availability of the Local Rules.

LR1.3 Sanctions.

II. Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

LR3.1 Civil Cover Sheet.

LR3.2 Venue.

LR3.3 Notification of Complex and Multidistrict Litigation.

LR4.1 Service of Process.

LR4.2 Payment of Fees by In Forma Pauperis Litigants.

LR4.3 Form Affidavits to Establish In Forma Pauperis Status.

LR4.4 Prepayment of Fees.

LR4.5 Schedule of Fees.

LR5.1 General Format of Papers Presented for Filing.

LR5.2 Proof of Service when Service is Required by Rule 5, Fed.R.Civ.P.

LR5.3 Copies Required for a Three-Judge Court.

LR5.4 Copies of Orders.

III. Pleadings and Motions.

LR7.1 Motion Practice.

LR7.2 Preparation and Filing of Orders.

LR7.3 Orders.

LR7.4 Stipulations.

LR9.1 Social Security Number in Social Security Cases.

LR9.2 Request for Three-Judge Court.

LR9.3 Standard Forms for Habeas Corpus Petitions and Motions.

LR14.1 Impleader.

LR15.1 Form of a Motion to Amend and Its Supporting Documentation.

LR16.1 Pre-Trial Procedures.

LR16.2 Scheduling Orders Required by Rule 16, Fed.R.Civ.P.

IV. Parties.

LR17.1 Infants and Incompetent Persons.

LR17.2 Deportation and Exclusion Proceedings.

LR22.1 Interpleader.

LR23.1 Designation of "Class Action" in the Caption.

LR24.1 Procedure for Notification of Any Claim of Unconstitutionality.

V. Depositions and Discovery.

LR26.1 Form of Certain Discovery Documents.

LR29.1 Discovery Stipulations.

LR30.1 Depositions.

LR33 Interrogatories.

LR34.1 Production of Documents and Things.

LR35.1 Physical and Mental Examination of Persons.

LR36.1 Requests for Admission.

LR37.1 Informal Conference to Settle Discovery Disputes.

LR37.2 Form of Discovery Motions.

VI. Trials.

LR38.1 Notation of "Jury Demand" in the Pleading.

LR39.1 Opening Statements and Closing Arguments.

LR39.2 Trial Briefs.

LR39.3 Use of Exhibits at Trial.

LR40.1 Assignment of Cases.

LR40.2 Priorities of Cases.

LR40.3 Calendar of Cases.

LR41.1 Dismissal of Actions

LR42.1 Bifurcation.

LR43.1 Examination of Witnesses.

LR45.1 Subpoenas.

LR47.1 Voir Dire of Jurors.

LR47.2 Attorney Communication with Jurors.

LR48.1 Six-Member Juries.

LR51.1 Instructions to Jury.

LR52.1 Proposed Findings.

LR53.1 Masters.

LR53.2 Arbitration/Alternative Dispute Resolution.

VII. Judgment.

LR54.1 Taxation of Costs.

LR54.2 Jury Cost Assessment.

LR54.3 Award of Attorney's Fees.

LR55.1 Defaults.

LR56.1 Summary Judgment Procedure.

LR58.1 Entry of Judgment.

LR58.2 Satisfaction of Judgment.

LR62.1 Stays of Proceedings.

LR62.2 Supersedeas Bonds.

VIII. Provisional and Final Remedies and Special Proceedings.

LR65.1 Injunctions.

LR65.2 Temporary Restraining Orders.

LR65.1.1 Security; Proceedings Against Sureties.

LR66.1 Receiverships.

LR67.1 Bonds and Other Sureties.

LR67.2 Deposits.

LR67.3 Withdrawal of a Deposit Pursuant to Rule 67, Fed.R.Civ.P.

LR68.1 Settlement Conferences.

LR68.2 Settlement Procedures.

LR69.1 Execution.

LR71A.1 Condemnation Cases.

LR72.1 Magistrates.

X. District Courts and Clerks.

LR77.1 Hours of the Court.

LR77.2 Orders and Judgments Grantable by the Clerk.

LR77.3 Form of Orders.

LR77.4 Sessions of the Court.

LR77.5 Naturalization Petitions.

LR77.6 Court Library.

LR77.7 Ex Parte Communication with Judges.

LR79.1 Custody of Files and Exhibits.

LR79.2 Books and Records of the Clerk.

LR80.1 Court Reporting Fees.

XI. General provisions.

LR81.1 Removal Bonds.

LR81.2 Copies of State Court Proceedings in Removed Actions.

LR83.1 Local Rulemaking.

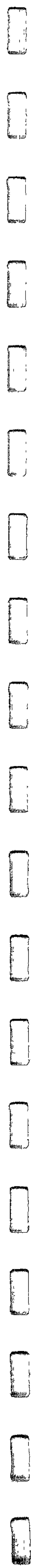
LR83.2 Free Press - Fair Trial Provisions.

LR83.3 Courtroom and Courthouse Decorum.

LR83.4 Security in the Courthouse.

LR83.5 Bar Admission.

LR83.6 Attorney Discipline.



Summary of Statutes Bearing on Oversight of Local Rules of District Courts
March 1992

Section 2071(a) of Title 28 declares that "all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business," on conditions stated in 2071(b). Section 2071(b) declares that a rule of a district court is subject to modification or abrogation "by the judicial council of the relevant circuit."

Section 2072 declares that the Supreme Court

> shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts ....

Section 332(a) creates a judicial council for each circuit, and 332(d)(4) declares that the judicial council of each circuit

> shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such a review.

The Act of 1990, codified in 28 U.S.C. §§471-482, includes a section on "Review of district court action," the text of which is as follows:

> (a)(1) The chief judges of each district court in a circuit and the chief judge of the court of appeals for such circuit shall, as a committee --
>
> (A) Review each plan and report submitted pursuant to section 472(d) of this title; and
>
> (B) make such suggestions for additional actions or modified actions of that district court as the committee considers appropriate for reducing cost and delay in civil litigation in the district court.
>
> (2) The chief judge of a court of appeals and the chief judge of a district court may designate another judge of such

court to perform the chief judge's responsibilities under paragraph (1) of this subsection.

(b) The Judicial Conference of the United States --

(1) shall review each plan and report submitted by a district court pursuant to section 472(d) of this title; and

(2) may request the district court to take additional action if the Judicial Conference determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group.

28 U.S.C. §474.

Judicial Conference Resolution of September 1988

LOCAL RULES

The Judicial Conference authorized the Committee on Rules of Practice and Procedure to undertake a study of local rules of the district courts. That study is under way. The Committee noted, however, that there is no uniform numbering system for federal district court local rules. Since there are many advantages of such a system, e.g., to help the bar in locating rules applicable to a particular subject, and to ease the incorporation of local rules into indexing services and the Westlaw and LEXIS computer services, 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.

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EDWARD LEAVY
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

[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)

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)
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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)

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LR7.1 Motions; Opposition and Reply. (215-3)
LR7.1 Motions; Briefs and Memoranda. (215-4)
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LR9.1 Social Security Cases. (200-7)

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LR11.1 Identification of Counsel. (200-1)

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LR16.1 Pretrial Status Conference Order. (235-2)
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LR16.1 Pretrial Conference Statement. (235-4)
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LR16.2CJ DCM; Definitions. (205-2)
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LR16.2CJ DCM; Track Assignment and Case Management Conference. (205-7)
LR16.2CJ DCM; Status Hearing and Final Pretrial Conference. (205-8)
LR16.2CJ DCM; Alternative Dispute Resolution. (205.9)

LR16.3CJ Trial Date; Presumptive. (206-1)
LR16.3CJ Trial Date; Firm for Track "A" Cases. (206-2)
LR16.3CJ Trial Date; Firm for Track "B" and "C". (206-3)
LR16.3CJ Trial Date ; Continuances After Date is Set. (206-4)
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LR16.4 Settlement Conference. (240-1)

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LR16.6CJ Alternative Dispute Resolution (ADR) General Provisions. (400-1)

LR16.7CJ Arbitration; Actions Subject to Mandatory Arbitration. (405-1)
LR16.7CJ Arbitration; Procedure for Referral to Mandatory Arbitration. (405-2)
LR16.7CJ Arbitration; Selection and Compensation of Arbitrators. (405-3)
LR16.7CJ Arbitration; Award and Judgment. (405-4)
LR16.7CJ Arbitration; Trial De Novo. (405-5)

LR16.8CJ Arbitration; General Provisions for Voluntary Arbitration. (410-1)

LR16.9CJ Early Neutral Evaluation; General Provisions. (415-1)

LR16.10CJ Mediation; General Provisions. (420-1)

LR16.11CJ Summary Jury Trial; General Provisions. (425-1)

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LR26.2CJ Discovery; Preliminary. (230-9)

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- B. Videotape Depositions.

LR33.1 Interrogatories. (230-2)

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LR35.1	Physical and Mental Examination. (230-6)
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LR37.1	Conference to Settle Discovery Disputes. (230-8)
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LR51.1	Jury Instructions; Proposed. (245-3)
LR51.1	Jury Instructions; Objections. (245-4)
LR54.1	Taxation of Costs; Procedure. (270-1)
LR54.2	Jury Costs. (245-5)
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LR65.1.1	Bonds and Sureties; When Required. (290-1)
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Delete	Bonds and Sureties; Removal Bond. (290-3)
LR65.1.1	Bonds and Sureties; Examination of Sureties. (290-4)
LR65.2	Temporary Restraining Orders. (215-8)
LR66.1	Receivers. (220-1)
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LR72.1	Magistrate Judges' Duties. (300-1)

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LR72.1 Magistrate Judges; Selection of Chief Magistrate Judge. (330-1)
LR72.1 Magistrate Judges; Duties of Chief Magistrate Judge. (330-2)
LR72.1 Magistrate Judges; Responsibilities. (350-1)

LR73.1 Magistrate Judges; Procedure for Obtaining Consent to Trial. (340-1)
LR73.1 Magistrate Judges; Effect of Magistrate Judge's Result. (340-2)

LR74.1 Magistrate Judges; Procedure for Review. (320-1)

LR77.1 Clerk's Office; Location and Hours. (132-1)

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LR77.4 Sessions of the Court. (101-1)

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LR83.3 Courtroom Decorum. (260-1)

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LR83.5 Attorneys; Standards of Professional Conduct. (110-2)
LR83.5 Attorneys; Student Practice. (110-3)
LR83.5 Attorneys; Appearance, Substitution, and Withdrawal. (110-4)

LR83.6 Attorney Discipline. (110-5)

LR83.7CJ 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.] (440)

Part 3. Alphabetical List of Local Rule Topics

LR16. Alternative Dispute Resolution (ADR); General Provisions.
LR16. ADR; Other Procedures.
LR16. Arbitration; Actions Subject to Mandatory Arbitration.
LR16. Arbitration; Award and Judgment.
LR16. Arbitration; General Provisions for Voluntary Arbitration.
LR16. Arbitration; Procedure for Referral to Mandatory Arbitration.
LR16. Arbitration; Selection and Compensation of Arbitrators.
LR16. Arbitration; Trial De Novo.
LR83. Attorney Discipline.
LR83. Attorneys; Admission to the Bar.

LR83. Attorneys; Appearance, Substitution, and Withdrawal.
LR83. Attorneys; Standards of Professional Conduct.
LR83. Attorneys; Student Practice.
LR54. Attorneys' Fees.

LR65.1. Bonds and Sureties; Examination of Sureties.
LR65.1. Bonds and Sureties; Qualifications of Surety.
Delete Bonds and Sureties; Removal Bond.
LR65.1. Bonds and Sureties; When Required.

LR83. 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.]
LR24. Claim of Unconstitutionality.
LR23. Class Actions.
A. Complaint.
B. Class Certification.
C Restrictions Regarding Communications with Actual or Potential Class Members.
LR77. Clerk's Office; Location and Hours.
LR37. Conference to Settle Discovery Disputes.
LR1. Conflicts of DCM with Other Rules.
LR16. Continuance of Trial Date.
LR80. Court Reporters; Fee Schedule.
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LR1. Definitions.
LR30. Depositions.
A. Who May Attend Depositions.
B. Videotape Depositions.
LR16. Differentiated Case Management (DCM); Alternative Dispute Resolution.
LR1. DCM; Application; Dates.
LR16. DCM; Case Information Statement.
LR16. DCM; Definitions.
LR16. DCM; Purpose and Authority.
LR16. DCM; Status Hearing and Final Pretrial Conference.
LR16. DCM; Track Assignment and Case Management Conference.
LR16. DCM; Tracks and Evaluation of Cases.
LR26. Discovery Documents; Form.
LR5. Discovery; Filing.
LR26. Discovery; Preliminary.
LR5. Discovery; Service.
LR37. Discovery Motions; Form.
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LR3. Divisions; Number.

LR16. Early Neutral Evaluation; General Provisions.
LR1. Effective Date; Transitional Provisions.
LR43. Examination of Witnesses.
LR58. Execution.
LR79. Exhibits; Custody and Disposition.

LR79. Files; Custody and Withdrawal.

Deleted Filing by Clerk; Nonconforming Documents Rejected.
LR5. Filing with the Court.
LR5. Form; Legibility of Pleadings and Other Papers.

LR11. Identification of Counsel.
LR33. Interrogatories.

LR58. Judgment; Form.
LR47. Jury; Communication with Jurors.
LR54. Jury Costs.
LR38. Jury Demand.
LR51. Jury Instructions; Objections.
LR51. Jury Instructions; Proposed.
LR47. Jury; Voir Dire.

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.
LR16. Mediation; General Provisions.
LR7. Motions; Affidavits.
LR7. Motions; Briefs and Memoranda.
A. When Required.
B. Form of Briefs, Memoranda, and Appendices.
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LR7. Motions; Continuances and Withdrawal.
LR7. Motions; Extensions, Enlargements, or Shortening of Time.
LR7. Motions; Filing.
Deleted Motions; Nonconforming Papers Rejected.
LR7. Motions; Notice and Supporting Papers.
LR7. Motions; Opposition and Reply.
LR7. Motions; to Whom Made.

LR7. Orders; Submission of Orders to a Judge.
LR77. Orders Grantable by Clerk.

LR83. Photography and Broadcasting.
LR35. Physical and Mental Examination.
LR10. Pleadings; Caption and Title.
LR65. Preliminary Injunctions.
LR16. Pretrial Conference.
LR16. Pretrial Conference Statement.
LR16. Pretrial Objections to Proposed Testimony and Exhibits.
LR16. Pretrial Order.
LR16. Pretrial Status Conference.
LR16. Pretrial Status Conference Order.

LR5. Proof of Service.

LR66. Receivers.
LR67. Registry Funds; Disbursement.
LR67. Registry Funds; Investment.
LR67. Registry Funds; Receipt and Deposit.
LR36. Requests for Admission.
LR34. Requests for Production.

LR1. Sanctions and Penalties for Noncompliance.
LR1. Scope of Local Rules.
LR4. Service by Mail.
LR77. Sessions of the Court.
LR16. Settlement Conference.
Delete Six-Person Juries.
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.
LR65. Temporary Restraining Orders.
LR9. Three-Judge Court.
LR6. Time; Computation of Time Periods.
LR6. Time; Extensions of Time by Clerk.
LR1. Title.
LR3. Transfer of Civil Actions Among Divisions.
LR16. Trial Date; Continuances After Date is Set.
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

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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.

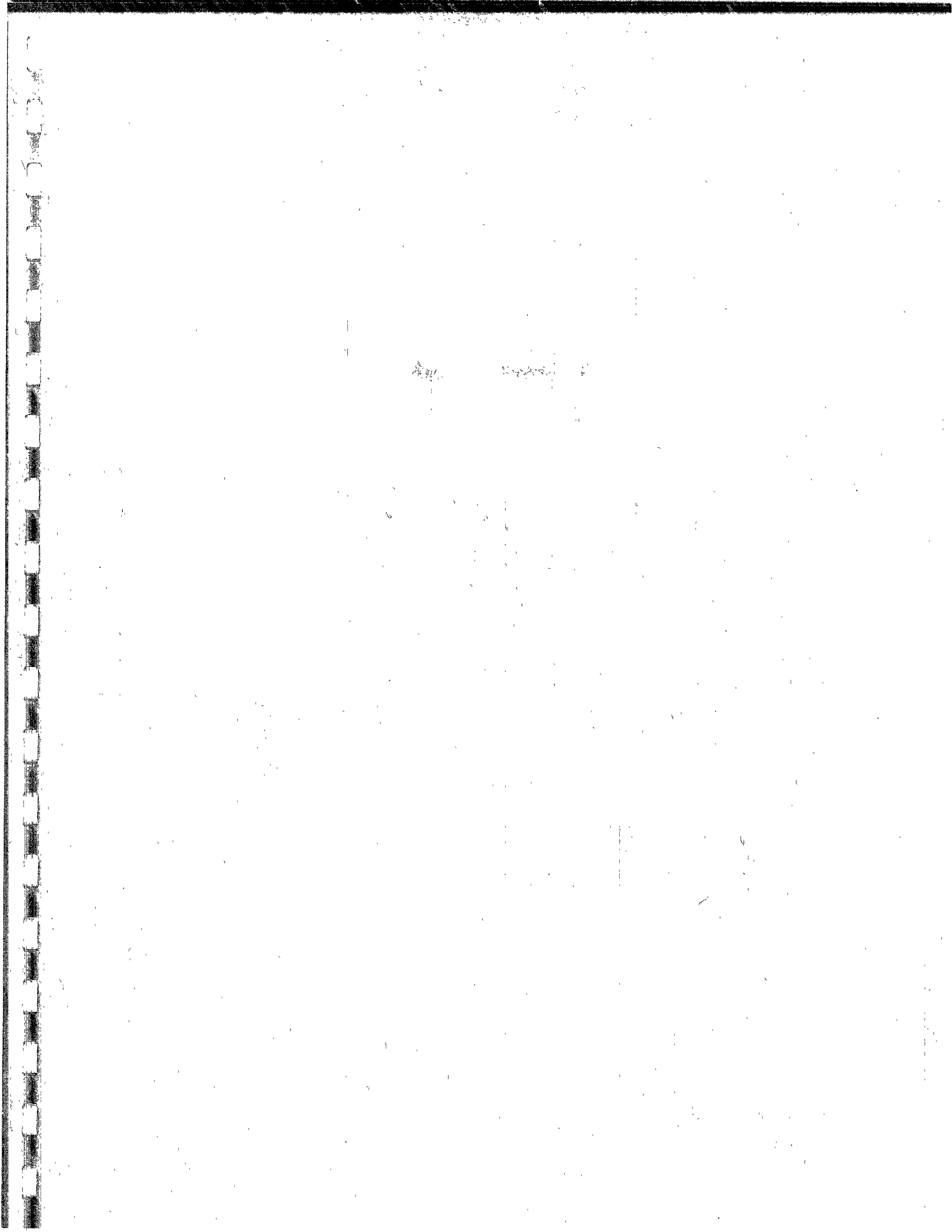
The Judicial Conference assigned to the Standing Committee on Rules of Practice and Procedure a responsibility for overseeing the Local Rules Project and its work in aid of implementation of the Uniform Numbering System.

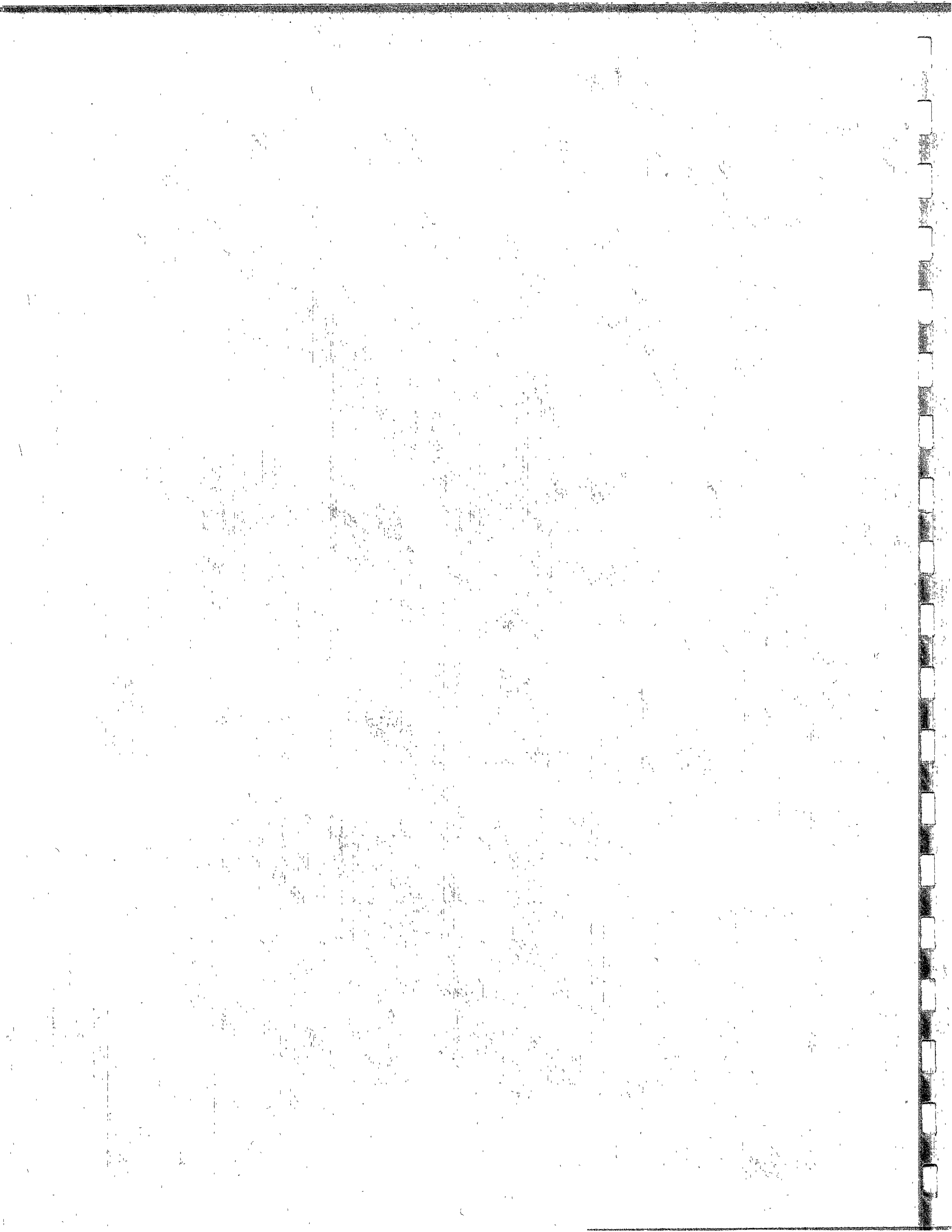
Although the Committee on Rules of Practice and Procedure has an ongoing responsibility regarding recommendations to the Judicial Conference, we are sensitive to the fact that we do not have authority with respect to implementation of the Judicial Conference Resolution or with respect to oversight of 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





Uniform Numbering System for Local Appellate Rules

All of the courts of appeals have local appellate rules. Eleven of these courts have other directives which also regulate practice. The Local Rules Project has termed these directives "Internal Operating Procedures" (IOPs). Currently, there is no uniform numbering system for these local rules and IOPs. Five of the courts have appellate rules and IOPs which correspond with the numbering of the existing Federal Rules of Appellate Procedure. Court of Appeals for the Fourth Circuit, Court of Appeals for the Fifth Circuit, Court of Appeals for the Ninth Circuit (no IOPs exist), Court of Appeals for the Eleventh Circuit, Court of Appeals for the Federal Circuit (no IOPs exist). Four other courts have rules and IOPs that appear to correlate in some instances to the Federal Rules of Appellate Procedure and at other times to be numbered quite differently. Court of Appeals for the First Circuit (rules generally correlate but not IOPs), Court of Appeals for the Second Circuit (rules generally correlate but not IOPs), Court of Appeals for the Seventh Circuit (rules generally correlate but not IOPs), Court of Appeals for the Tenth Circuit (rules generally correlate but not IOPs). The remaining four courts have rules and IOPs that are arranged according to a numbering system which does not resemble that of the Federal Rules of Appellate Procedure. Court of Appeals for the Third Circuit, Court of Appeals for the Sixth Circuit, Court of Appeals for the Eighth Circuit, Court of Appeals for the District of Columbia Circuit.

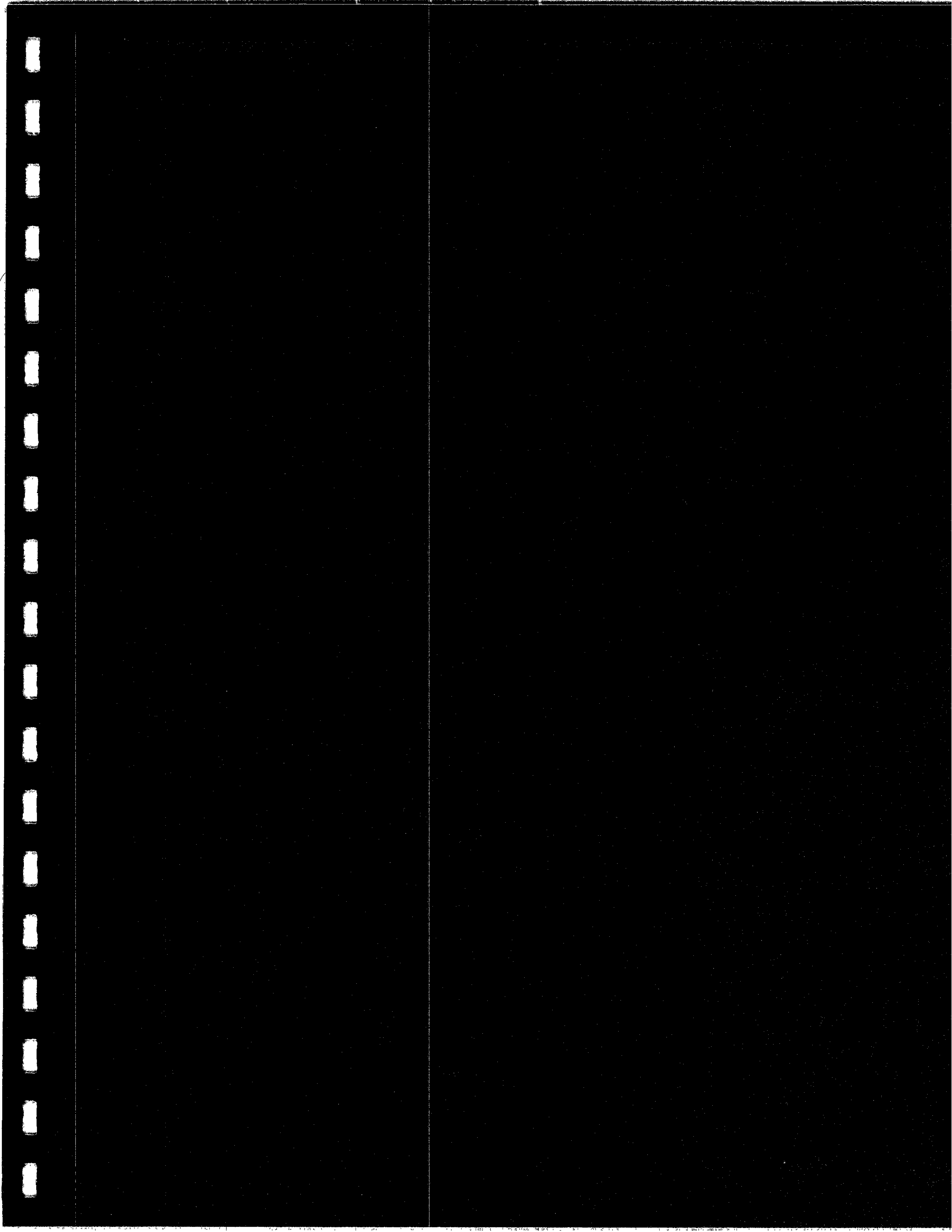
The Judicial Conference has recommended that a uniform numbering system be adopted which would standardize the numbering of the local rules on civil practice in the district courts. *See* Report of the Judicial Conference (September, 1988) 103. A uniform system has many advantages. It will be helpful to the bar in locating rules applicable to a particular subject.

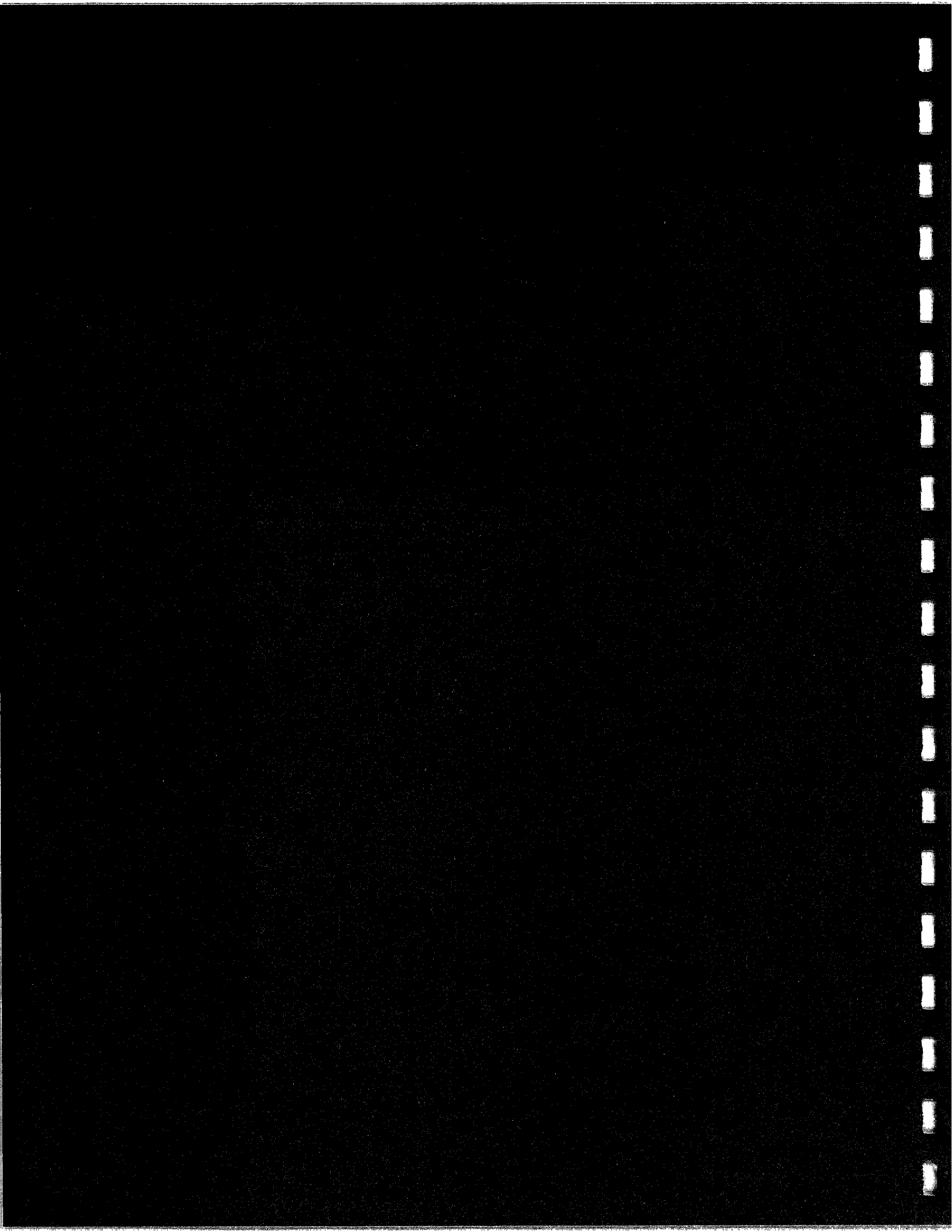
This is especially important for those attorneys with multi-district or multi-circuit practices. It is also significant for any attorney needing to locate a particular rule or to learn whether a local rule on a specific topic exists in the first instance. In the past, it has been difficult to find any case law relating to a particular local rule, in part because there is no uniform numbering. The uniform system will also ease the incorporation of local rules into the various indexing services such as West Publishing Company and the Lexis computer services.

The Report of the Local Rules Project examining the local rules on civil practice which was sent to the chief judges of the district courts in the spring of 1989 suggested a uniform numbering system based on the numbering system used for the Federal Rules of Civil Procedure. This system is already familiar to the bar. The Local Rules Project also suggested that the numbering system for the admiralty rules correlate with the Supplemental Rules. Consistent with these proposals, the Local Rules Project now suggests that the courts of appeals adopt a numbering system for their respective local rules which tracks the Federal Rules of Appellate Procedure.

Under this system, each local rule corresponds to the number of the related Appellate Rule. For example, the designation "LAR3.1" refers to the local rule entitled: "Appeal as of Right—How Taken." The designation "LAR" indicates it is a local rule of appellate practice; the number "3" indicates that the local rule is related to Appellate Rule 3; and, the number "1" after the period indicates that it is the first local rule concerning Appellate Rule 3.1. The same system also applies with respect to those Federal Rules of Appellate Procedure with a "1" or a "2" after the initial rule number, such as Rule 3.1 entitled "Appeals from Judgments Entered by Magistrates in Civil Cases." Thus, for example, the first local rule concerning Appellate Rule 5 "Appeals by

Permission under 28 U.S.C. §1292(b)" is designated "LAR5.1," while the first local rule concerning Appellate Rule 5.1 "Appeals by Permission under 28 U.S.C. §636(c)(5)"" is designated "LAR5.1.1."





Uniform Numbering System for Local Criminal Rules

Currently, there is no uniform numbering system for federal district court local rules on criminal practice. Some of the jurisdictions have local rules which are simply numbered sequentially beginning at "1". *E. g.*, Central District of California, District of Connecticut. Other jurisdictions have rules which are arranged by topic, designed with a "100," "200," or "300," followed by a hyphen and the actual rule number. *E.g.*, Northern District of California, District of the Northern Mariana Islands. Still other jurisdictions have local rules which are arranged by topic, designed "1," "2," or "3," followed by a decimal point or colon and the actual rule number. *E.g.*, Northern District of Ohio.

The Judicial Conference recommended that a uniform numbering system be adopted for local rules on civil practice which would standardize the numbering of all local rules. *See* Report of the Judicial Conference (September, 1988) 103. It is now recommended that a similar uniform numbering system for the local rules on criminal practice be adopted.

Such a uniform system has many advantages. It would be helpful to the bar in locating rules applicable to a particular subject. This is especially important for those attorneys with multi-district practices. It is also significant for any attorney needing to locate a particular rule or to learn whether a local rule on a specific topic exists in the first instance. At present, it is sometimes difficult to find any case law relating to a particular local rule, in part because there is no uniform numbering. The uniform system will also ease the incorporation of local rules into the various indexing services such as West Publishing Company and the Lexis computer services.

The system, as proposed, focuses on the numbering system already used for the Federal Rules of Criminal Procedure. This system is already familiar to the bar. What follows, therefore, is a numbering system for local rules which tracks the Federal Rules of Criminal Procedure. Each local rule number corresponds to the number of the related Federal Rule of Criminal Procedure. For example, the designation "LCrR4.1" refers to the local criminal rule relating to the arrest warrant or summons upon the complaint. The designation "LCrR" indicates it is a local criminal rule; the number "4" indicates that the rule is related to Rule 4 of the Federal Rules of Criminal Procedure; and, the number "1" indicates that it is the first local rule concerning Rule 4 of the Federal Rules of Criminal Procedure. The same system applies with respect to those Federal Rules of Criminal Procedure with a "1" or a "2" after the initial rule number, such as Rule 12.1 entitled "Pleadings and Motions before Trial; Defenses and Objections. Thus, for example, the first local rule concerning Federal Rule 32 "Sentence and Judgment" is designated "LCrR32.1," while the first local rule concerning Federal Rule 32.1 "Revocation or Modification of Probation or Supervised Release" is designated "LCrR32.1.1."

I. Scope, Purpose, and Construction

LCrR1.1 Scope

LCrR2.1 Purpose and Construction

II. Preliminary Proceedings

LCrR3.1 The Complaint

LCrR4.1 Arrest Warrant or Summons Upon Complaint

LCrR5.1 Initial Appearance Before the Magistrate Judge

III. Indictment and Information

LCrR6.1 The Grand Jury

LCrR7.1 The Indictment and the Information

LCrR8.1 Joinder of Offenses and of Defendants

LCrR9.1 Warrant or Summons Upon Indictment or Information

IV. Arraignment, and Preparation for Trial

LCrR10.1 Arraignment

LCrR11.1 Pleas

LCrR12.1 Pleadings and Motions before Trial; Defenses and Objections

LCrR12.1.1 Notice of Alibi

LCrR12.2.1 Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition

LCrR12.3.1 Notice of Defense Based Upon Public Authority

LCrR13.1 Trial Together of Indictments or Informations

LCrR14.1 Relief from Prejudicial Joinder

LCrR15.1 Depositions

LCrR16.1 Discovery and Inspection

LCrR17.1 Subpoena

LCrR17.1.1 Pretrial Conference

V. Venue

LCrR18.1 Place of Prosecution and Trial

LCrR19.1 Transfer Within the District (Rescinded)

LCrR20.1 Transfer From the District for Plea and Sentence

LCrR21.1 Transfer From the District for Trial

LCrR22.1 Time of Motion to Transfer

VI. Trial

LCrR3.1 Trial by Jury or by the Court

LCrR24.1 Trial Jurors

LCrR25.1 Judge; Disability

LCrR26.1 Taking of Testimony

LCrR26.1.1 Determination of Foreign Law

LCrR26.2.1 Production of Witness Statements

LCrR26.3.1 Mistrial

LCrR27.1 Proof of Official Record

LCrR28.1 Interpreters

LCrR29.1 Motion for Judgment of Acquittal

LCrR29.1.1 Closing Argument

LCrR30.1 Instructions

LCrR31.1 Verdict

VII. Judgment

LCrR32.1 Sentence and Judgment

LCrR32.1.1 Revocation or Modification of Probation or Supervised Release

LCrR33.1 New Trial

LCrR34.1 Arrest of Judgment

LCrR35.1 Correction or Reduction of Sentence

LCrR36.1 Clerical Mistakes

VIII. Appeal (Abrogated)

LCrR37.1 Taking Appeal; and Petition for Writ of Certiorari (Abrogated).

LCrR38.1 Stay of Execution

LCrR39.1 Supervision of Appeal (Abrogated)

IX. Supplementary and Special Proceedings

LCrR40.1 Commitment to Another District

LCrR41.1 Search and Seizure

LCrR42 1 Criminal Contempt

X. General Provisions

LCrR43.1 Presence of the Defendant

LCrR44.1 Right to and Assignment of Counsel

LCrR45.1 Time

LCrR46.1 Release from Custody

LCrR47.1 Motions

LCrR48.1 Dismissal

LCrR49.1 Service and Filing of Papers

LCrR50.1 Calendars; Plans for Prompt Disposition

LCrR51.1 Exceptions Unnecessary

LCrR52.1 Harmless Error and Plain Error

LCrR53.1 Regulation of Conduct in the Court Room

LCrR54.1 Application and Exception

LCrR55.1 Records

LCrR56.1 Courts and Clerks

LCrR57.1 Rules by District Courts (Including Duties of Magistrates)

LCrR58.1	Procedure for Misdemeanors and Other Petty Offenses
LCrR59.1	Effective Date
LCrR60.1	Title

Agenda Item 10

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

December 13, 1995

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CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: Members of the Standing
Committee on Rules

Dear Colleagues:

The Advisory Committee on Civil Rules has no items requiring action by the Standing Committee. A detailed account of our past meeting is set out in the Minutes. As you know, the Advisory Committee has spent a great deal of time struggling with class actions and Rule 23. Approximately four years ago, a proposal to collapse the (b)(1), (2), and (3) classes into one was sent forward by the Advisory Committee. With the new large settlement classes coming on the horizon, and the expanding use of Rule 23(b)(3) in mass tort disasters, the committee decided that it was unwise to continue with that proposal. We then began a process which has taken the past two and a half years. That process included a request to the Federal Judicial Center to conduct an empirical study of class actions in operation in the district courts across the country. We spent considerable time working with the research group of the Federal Judicial Center in developing the required protocol. Unfortunately, the project suffered mightily from an extraordinarily weak data base. The good work of the Judicial Center quickly spotted serious gaps in the furnished data, which, in combination with reporting errors, cast doubt on the accuracy of much of the data that was available. That study was then refocused. The new study was more modest, reflecting the actual available data. The Judicial Center will furnish a copy of the study on request.

Our process also included extensive discussion with academics and practitioners. These discussions continued in 1994 with an in-house tutorial conducted by Herb Wachtell of the New York Bar, Professor Francis McGovern of the University of Alabama School of Law, and John Frank of the Phoenix Bar. Wachtell and McGovern have considerable experience in the current use of class actions in large cases, including the creation of complex alternative dispute systems to administer disbursements of billions of dollars. John Frank was a member of the committee when (b)(3) was added to the rule in 1966.

On February 16 & 17, 1995, the committee met at the University of Pennsylvania School of Law in a meeting hosted by Professors Steve Burbank and Geoff Hazard. Approximately 16 academics and practitioners joined the committee. I attach a copy of that agenda. On March 29-30, the committee participated in a conference in Dallas, Texas, convened by The Southwestern Legal Foundation and Southern Methodist University. Arthur Miller was the discussion leader for the conference, and Geoff Hazard was its reporter. The first day of the conference was confined to discussions by leading academics across the country. Approximately 100 lawyers joined the 20 academics on the second day in a plenary session. The conference included free-ranging discussions as well as scholarly presentations from Professors David Shapiro, Paul Carrington, Steve Burbank, Ed Cooper, Deborah Hensler (RAND), and others. Much of the discussion focused on group litigation. The committee next met on April 20 at New York University School of Law. There, we participated in a 2-day national symposium on class actions.

By this point, the committee had listened to hundreds of ideas. We began a winnowing process. On May 8, Professor Cooper and I submitted a questionnaire to members of the committee. The questionnaire disclosed a sense of the committee's views and assisted in organizing our thinking. Each committee member responded to the questionnaire over the summer, with a copy to all other members. By August of 1995, several avenues of reform had become clear. I categorized the possible changes into two groups. Professor Cooper translated groups of ideas into rule language. These were the proposals before the committee when it met on November 9-11 at the University of Alabama School of Law. The material you have before you comes from that meeting. The committee elected not to proceed with any of the second group of possible changes which consisted largely of "clean-up." The four questions of the first group were: (1) Interlocutory appeal, draft 23(f); (2) Changing the 23(b)(3) requirement that a class action be superior to a requirement that it be "necessary for the fair and efficient disposition of the controversy"; (3) Limiting Rule 23(b)(3) by requiring consideration of the probability and importance of success on the merits--item (ii) in the first paragraph of (3), and subparagraphs (E) and (F); (4) Recognition of "settlement classes" in (b)(3), but not elsewhere.

As noted in the Minutes, the meeting at the University of Alabama was also attended by representatives of the American College of Trial Lawyers, the Litigation Section of the American Bar Association and several distinguished practitioners. All participated in the discussion.

It is not my purpose to explain here the actions taken by the committee. Professor Cooper and I will do that in person. The actions taken by the Advisory Committee are reflected in the attached draft rules and notes. My purpose is, rather, to outline for you the work devoted to this issue by the Advisory Committee. The large amount of time the Committee has spent has caused me to puzzle over how the Advisory Committee can best profit from the expertise of the Standing Committee and how to make this a meaningful collegial discussion. In reflecting on how to proceed, I was persuaded that we should put the matter on the January agenda of the Standing Committee as an information item without the pressure of decisionmaking. This will give the Standing Committee opportunity to explore these difficult issues and share its views. The Advisory Committee at its April meeting will then be able to benefit from the discussions at the January meeting of the Standing Committee. Our plan is to then bring the class issues to the summer meeting of the Standing Committee with a request for publication. This way you will not be greeting a stranger at the summer meeting. Ed and I look forward to being with you in January.

Sincerely yours,

Patrick E. Higginbotham

PRELIMINARY AGENDA
Advisory Committee on Civil Rules
University of Pennsylvania Law School
February 16-17, 1995

I. First Session - Thursday, February 16, 1995, 1:30 - 5:15 p.m.

A. Welcome - Dean Colin Diver

B. Plan for the Meetings - Professor Stephen Burbank

C. New Congress Update (2 - 3 p.m.) - Judge Patrick Higginbotham

D. Break (3 - 3:15 p.m.)

E. Presentation of Preliminary Results of FJC Empirical Study (3:15 - 4:15 p.m.) - Thomas Willging

F. Securities Class Actions (4:15 - 5:15 p.m.) - Judge Anthony Scirica

II. Reception at the Law School (5:30-6:30 p.m.)

III. Dinner, The Garden, 1617 Spruce Street (7:00 p.m.)

IV. Second Session - Friday, February 17, 1995, 9 a.m. - 12 noon

A. The 1992/93 Proposed Amendments (9 - 10:15 a.m.) - Professors Thomas Rowe & Edward Cooper

B. Break (10:15 - 10:30 a.m.)

C. Settlement Classes, Mandatory Classes and "Futures" Classes (10:30 - 12:30 p.m.) - Judge Edward Becker, Judge William Schwarzer, and Judge Lowell Reed

V. Lunch (12:30 - 1:30 p.m.)

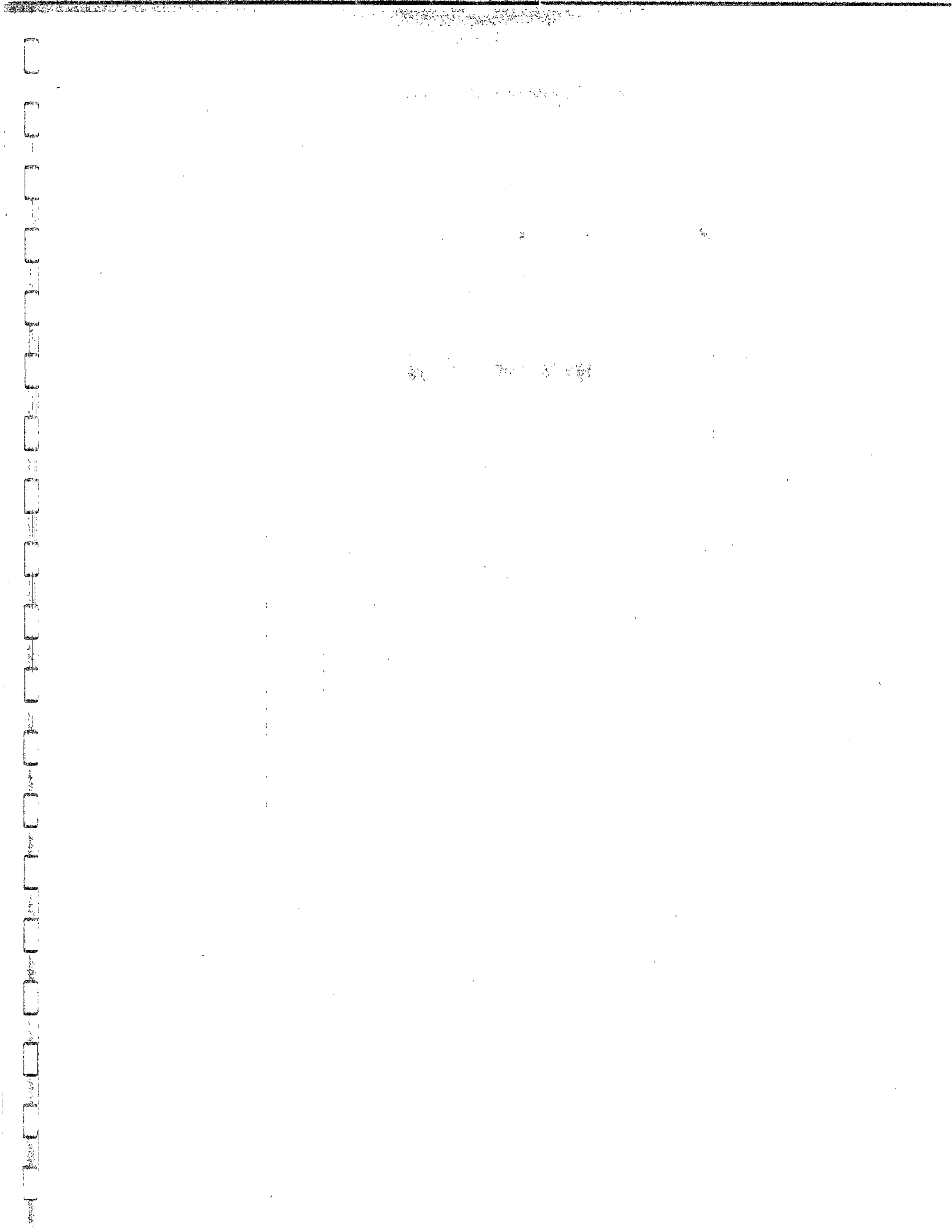
VI. Third Session - 1:30 - 4 p.m.

A. Alternatives to the Class Action (1:30 - 2:45 p.m.) - Judge Patrick Higginbotham [illegible] & due process

B. Break (2:45 - 3:00 p.m.)

C. The Path Ahead (3:00 - 4 p.m.) - Professor Stephen Burbank

D. Adjournment (4 p.m.)



DRAFT CIVIL RULE 23

NOVEMBER 1995 EXCERPTS

The Civil Rules Advisory Committee discussed four major aspects of a draft class action rule at its meeting on November 9 and 10, 1995. It did not discuss any other aspect of the full draft of Civil Rule 23 that was before it. The attached materials are set out in a sequence designed to ease the way into the discussion.

The first attached page sets out all of the draft subdivision (b)(3) and subdivision (f). Several portions of (b)(3) reflect the matters discussed at the November meeting. (1) Item (ii) in the first paragraph is set out in two alternative versions at lines 8 through 13. This item embodies a preliminary review of the merits as part of the (b)(3) certification decision. The first alternative simply sets a "not insubstantial" threshold. The second alternative adopts a more complicated balancing test that weighs the prospect of success against the burdens of class litigation. Either alternative is supplemented by new factor (E), lines 33 to 34. The Committee has not chosen between these two alternatives. (2) Item (iii) retains the familiar requirement that a (b)(3) class be superior, but adds the new requirement that it also be "necessary" for the fair and efficient disposition of the controversy, see line 14. This requirement underscores the distinction between settings in which individual litigation is possible — perhaps with consolidation by some means other than Rule 23 — and settings in which the underlying claims will not support individual litigation. (3) Factor (F), lines 35 through 37, would allow a court to refuse certification, even though the class claim seems strong on the merits, on the ground that the public and private values served by class relief are outweighed by the burdens of class litigation. (4) Factor (G), lines 38 through 41, reflects a modest approach to certification of settlement classes; it is supplemented by the change from "adjudication" to "disposition" in lines 14 and 16 of the introductory paragraph. The Committee discussed settlement classes at length but reached no resolution.

Subdivision (f), lines 43 through 48, provides for permissive interlocutory appeals from certification decisions. It has not been controversial within the Committee.

The next attachment is a draft Committee Note dealing with the provisions noted above. It has not been reviewed by the Committee, but reflects the November discussion.

The final items are a full Rule 23 draft, and draft minutes of the November meeting. Except for the items noted above, the full draft has not been reviewed by the Committee. One of the major questions that remains for Committee consideration is whether it is wise to attempt at one time as many changes as this draft reflects.

RULE 23. CLASS ACTIONS

* * * * *

(b) ~~Class actions Maintanable~~ When Class Actions may be Certified. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(3) the court finds (i) that the questions of law or fact common to the certified Class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, (ii) that {the class claims, issues, or defenses are not insubstantial on the merits,} [alternative:] {the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification}, and (iii) that a class action is superior to other available methods and necessary for the fair and efficient ~~adjudication~~ disposition of the controversy. The matters pertinent to ~~the~~ these findings include:

(A) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(B) the extent and nature of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(C) the desirability ~~or undesirability~~ of concentrating the litigation ~~of the claims~~ in the particular forum;

(D) the likely difficulties ~~likely to be encountered in the management of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;

(E) the probable success on the merits of the class claims, issues, or defenses;

(F) whether the public interest in — and the private benefits of - the probable relief to individual class members justify the burdens of the litigation; and

38 (G) the opportunity to settle on a class basis claims that
39 could not be litigated on a class basis or could not
40 be litigated by [or against?] a class as comprehensive
41 as the settlement class; or

42 * * * * *

43 (f) Appeals. A court of appeals may in its discretion permit an
44 appeal from an order of a district court granting or denying a
45 request for class action certification under this rule if
46 application is made to it within ten days after entry of the
47 order. An appeal does not stay proceedings in the district court
48 unless the district judge or the court of appeals so orders.

PARTIAL DRAFT ADVISORY COMMITTEE NOTE

December 12, 1995

Subdivision (b). Subdivision (b) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking. When Rule 23 was substantially revised in 1966, the Advisory Committee Note stated: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liabilitiy and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits seprately tried." Although it is clear that developing experience has superseded that suggestion, the lessons of experience are not yet so clear as to support detailed mass tort provisions either in Rule 23 or a new but related rule.

The probability that a claim would support individual litigation depends both on the probability of any recovery and the probable size of such recovery as might be won. One of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median recovery figures reported by the Federal Judicial Center study all were far below the level that would be required to support individual litigation, unless perhaps in a small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases frequently sweep into a class many members whose individual claims would easily support individual litigation, controlled by the class member. Individual class members may be seriously harmed by the loss of control. Class certification may be desired by defendants more than most plaintiff class members in such cases, and denial of certification or careful definition of the class may be essential to protect many plaintiffs. As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims.

In another direction, class certification may be sought as to individual claims that would not support individual litigation because of a dim prospect of prevailing on the merits.

Certification in such a case may impose undue pressure on the defendant to settle. Settlement pressure arises in part from the expense of defending class litigation. More important, settlement pressure reflects the fact that often there is at least a small risk of losing against a very weak claim. A claim that might prevail in one of every ten or twenty individual actions gathers compelling force — a substantial settlement value — when the small probability of defeat is multiplied by the amount of liability to the entire class.

Individual litigation may play quite a different role with respect to class certification. Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual actions. The need to wait until a class of claims has become "mature" seems to apply peculiarly to claims that at least involve highly uncertain facts that may come to be better understood over time. New and developing law may make the fact uncertainty even more daunting. A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed. Pre-maturity class certification runs the risk of mistaken decision, whether for or against the class. This risk may be translated into settlement terms that reflect the uncertainty by exacting far too much from the defendant or according far too little to the plaintiffs.

Item (ii) has been added to the findings required for class certification, and is supplemented by the addition of new factor (E) to the list of factors considered in making the findings required for certification. It addresses the concern that class certification may create an artificial and coercive settlement value by aggregating weak claims. It also recognizes the prospect that certification is likely to increase the stakes substantially, and thereby increase the costs of the litigation.

{**Version 1**} Taken to its full extent, this concern might lead to a requirement that the court balance the probable outcome on the merits against the cost and burdens of class litigation, including the prospect that settlement may be forced by the small risk of a large class recovery. A balancing test was rejected, however, because of its ancillary consequences. It would be difficult to resist demands for discovery to assist in demonstrating the probable outcome. The certification hearing and determination, already events of major significance, could easily become overpowering events in the course of the litigation. Findings as to probable outcome would affect settlement terms, and could easily affect the strategic posture of the case for purposes of summary judgment and even trial. Probable success findings could have collateral effects as well, affecting a party's standing in the financial community or inflicting other harms. And a probable

success balancing approach must inevitably add considerable delay to the certification process.

The "first look" approach adopted by item (ii) is calculated to avoid the costs associated with balancing the probable outcome and costs of class litigation. The court is required only to find that the class claims, issues, or defenses "are not insubstantial on the merits." This phrase is chosen in the belief that there is a wide — although curious — gap between the higher possible requirement that the claims be substantial and the chosen requirement that they be not insubstantial. The finding is addressed to the strength of the claims "on the merits," not to the dollar amount that may be involved. The purpose is to weed out claims that can be shown to be weak by a curtailed procedure that does not require lengthy discovery or other prolonged proceedings. Often this determination will be supported by precertification motions to dismiss or for summary judgment. Even when it is not possible to resolve the class claims, issues, or defenses on motion, it may be possible to conclude that the claims, issues, or defenses are too weak to justify the costs of certification.

{**Version 2**} These risks can be justified only by a preliminary finding that the prospect of class success is sufficient to justify them. The prospect of success need not be a probability greater than 0.50. What is required is that the probability be sufficient in relation to the predictable costs and burdens, including settlement pressures, entailed by certification. The finding is not an actual determination of the merits, and pains must be taken to control the procedures used to support the finding. Some measure of controlled discovery may be permitted, but the procedure should be as expeditious and inexpensive as possible. At times it may be wise to integrate the certification procedure with proceedings on precertification motions to dismiss or for summary judgment. A realistic view must be taken of the burdens of certification — bloated abstract assertions about the crippling costs of class litigation or the coercive settlement effects of certification deserve little weight. At the end of the process, a balance must be struck between the apparent strength of the class position on the merits and the adverse consequences of class certification. This balance will always be case-specific, and must depend in large measure on the discretion of the district judge.

The prospect-of-success finding is readily made if certification is sought only for purposes of pursuing settlement, not litigation. If certification of a settlement class is appropriate under the standards discussed [with factor (G) and subdivision (e)] below, the prospect of success relates to the likelihood of reaching a settlement that will be approved by the court, and the burdens of certification are merely the burdens of negotiations that all parties are willing to pursue.

Care must be taken to ensure that subsequent proceedings are

not distorted by the preliminary finding on the prospect of success. If a sufficient prospect is found to justify certification, subsequent pretrial and trial proceedings should be resolved without reference to the initial finding. The same caution must be observed in subsequent proceedings on individual claims if certification is denied.

One court's refusal to certify for want of a sufficient prospect of class success is not binding by way of res judicata if another would-be representative appears to seek class certification in the same court or some other court. The refusal to recognize a class defeats preclusion through the theories that bind class members. Even participation of the same lawyers ordinarily is not sufficient to extend preclusion to a new party. The first determination is nonetheless entitled to substantial respect, and a significantly stronger showing may properly be required to escape the precedential effect of the initial refusal to certify.

Item (iii) in the findings required for class certification has been amended by adding the requirement that a (b)(3) class be necessary for the fair and efficient [adjudication] of the controversy. The requirement that a class be superior to other available methods is retained, and the superiority finding — made under the familiar factors developed by current law, as well as the new factors (E), (F), and (G) — will be the first step in making the finding that a class action is necessary. It is no longer sufficient, however, to find that a class action is in some sense superior to other methods of [adjudicating] "the controversy." It also must be found that class certification is necessary. Necessity is meant to be a practical concept. In adding the necessity requirement, it also is intended to encourage careful reconsideration of the superiority finding without running the drafting risks entailed in finding some new word to substitute for "superior." Both necessity and superiority are together intended to force careful reappraisal of the fairness of class adjudication as well as efficiency concerns. Certification ordinarily should not be used to force into a single class action plaintiffs who would be better served by pursuing individual actions. A class action is not necessary for them, even if it would be superior in the sense that it consumes fewer litigating resources and more fair in the sense that it achieves more uniform treatment of all claimants. Nor should certification be granted when a weak claim on the merits has practical value, despite individually significant damages claims, only because certification generates great pressure to settle. In such circumstances, certification may be "necessary" if there is to be any [adjudication] of the claims, but it is neither superior nor necessary to the fair and efficient [adjudication] of the claims. Class certification, on the other hand, is both superior and necessary for the fair and efficient [adjudication] of numerous individual claims that are strong on the merits but small in amount.

Superiority and necessity take on still another dimension when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. Even though many individual plaintiffs would be better served by racing to secure and enforce the earlier judgments that exhaust the available assets, fairness may require aggregation in a way that marshals the assets for equitable distribution. Bankruptcy proceedings may prove a superior alternative, but the certification decision must make a conscious choice about the best method of addressing the apparent problem.

Yet another problem, presented by some recent class-action settlements, arises from efforts to resolve future claims that have not yet matured to the point that would permit present individual enforcement. A toxic agent, for example, may have touched a broad universe of persons. Some have developed present injuries, most never will develop any injury, and many will develop injuries at some indefinite time in the future. Class action settlements, much more than adjudications, can be structured in ways that provide for processing individual claims as actual injuries develop in the future. Class disposition may be the only possible means of resolving these "futures" claims. Although "necessary" in this sense, class certification — if it is ever appropriate — must be carefully guarded to protect the rights of class members who do not even have a realistic way to determine whether they may some day experience actual injury. The needs to effect meaningful notice and to protect the opportunity to opt out of the class require that any class be limited to terms that permit an individual claimant to opt out of the class and pursue individual litigation within a reasonable time after knowing both of the individual injury and the existence of the class litigation.

Factor (E) has been added to subdivision (b)(3) to complement the addition of new item (ii) and the addition of the necessity element to item (iii). The role of the probable success of the class claims, issues, or defenses is discussed with those items.

Factor (F) has been added to subdivision (b)(3) to effect a modest retrenchment in the use of class actions to aggregate trivial individual claims. It bears on the item (iii) requirement that a class action be superior to other available methods and necessary for the fair and efficient [adjudication] of the controversy. It permits the court to deny class certification if the public interest in — and the private benefits of — probable class relief do not justify the burdens of class litigation. This factor is distinct from the evaluation of the probable outcome on the merits called for by item (ii) and factor (E). At the extreme, it would permit denial of certification even on the assumption that the class position would certainly prevail on the merits.

Administration of factor (F) requires great sensitivity.

Subdivision (b)(3) class actions have become an important private means for supplementing public enforcement of the law. Legislation often provides explicit incentives for enforcement by private attorneys-general, including qui tam provisions, attorney-fee recovery, minimum statutory penalties, and treble damages. Class actions that aggregate many small individual claims and award "common-fund" attorney fees serve the same function. Class recoveries serve the important functions of depriving wrongdoers of the fruits of their wrongs and deterring other potential wrongdoers. There is little reason to believe that the Committee that proposed the 1966 amendments anticipated anything like the enforcement role that Rule 23 has assumed, but there is equally little reason to be concerned about that belief. What counts is the value of the enforcement device that courts, aided by active class-action lawyers, have forged out of Rule 23(b)(3). In most settings, the value of this device is clear.

The value of class-action enforcement of public values, however, is not always clear. It cannot be forgotten that Rule 23 does not authorize actions to enforce the public interest on behalf of the public interest. Rule 23 depends on identification of a class of real persons or legal entities, some of whom must appear as actual representative parties. Rule 23 does not explicitly authorize substituted relief that flows to the public at large, or to court- or party-selected champions of the public interest. Adoption of a provision for "fluid" or "cy pres" class recovery would severely test the limits of the Rules Enabling Act, particularly if used to enforce statutory rights that do not provide for such relief. The persisting justification of a class action is the controversy between class members and their adversaries, and the final judgment is entered for or against the class. It is class members who reap the benefits of victory, and are bound by the res judicata effects of victory or defeat. If there is no prospect of meaningful class relief, an action nominally framed as a class action becomes in fact a naked action for public enforcement maintained by the class attorneys without statutory authorization and with no support in the original purpose of class litigation. Courts pay the price of administering these class actions. And the burden on the courts is displaced onto other litigants who present individually important claims that also enforce important public policies. Class adversaries also pay the price of class enforcement efforts. The cost of defending class litigation through to victory on the merits can be enormous. This cost, coupled with even a small risk of losing on the merits, can generate great pressure to settle on terms that do little or nothing to vindicate whatever public interest may underlie the substantive principles invoked by the class.

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that

otherwise satisfy Rule 23 requirements. If probable individual relief is so slight as to be essentially trivial or meaningless, however, the core justification of class enforcement fails. Only public values can justify class certification. Public values do not always provide sufficient justification. An assessment of public values can properly include reconsideration of the probable outcome on the merits made for purposes of item (ii) and factor (E). If the prospect of success on the merits is slight and the value of any individual recovery is insignificant, certification can be denied with little difficulty. But even a strong prospect of success on the merits may not be sufficient to justify certification. It is no disrespect to the vital social policies embodied in much modern regulatory legislation to recognize that the effort to control highly complex private behavior can outlaw much behavior that involves merely trivial or technical violations. Some "wrongdoing" represents nothing worse than a wrong guess about the uncertain requirements of ambiguous law, yielding "gains" that could have been won by slightly different conduct of no greater social value. Disgorgement and deterrence in such circumstances may be unfair, and indeed may thwart important public interests by discouraging desirable behavior in areas of legal indeterminacy.

Factor (G) is added to resolve some, but by no means all, of the questions that have grown up around the use of "settlement classes." Factor (G) bears only on (b)(3) classes. Among the many questions that it does not touch is the question whether it is appropriate to rely on subdivision (b)(1) to certify a mandatory non-opt-out class when present and prospective tort claims are likely to exceed the "limited fund" of a defendant's assets and insurance coverage. This possible use of subdivision (b)(1) presents difficult issues that cannot yet be resolved by a new rule provision. Subdivisions (c)(1)(A)(2) and (e) also bear on settlement classes.

A settlement class may be described as any class that is certified only for purposes of settling the claims of class members on a class-wide basis, not for litigation of their claims. The certification may be made before settlement efforts have even begun, as settlement efforts proceed, or after a proposed settlement has been reached.

Factor (G) makes it clear that a class may be certified for purposes of settlement even though the court would not certify the same class, or might not certify any class, for litigation. At the same time, a (b)(3) settlement class continues to be controlled by the prerequisites of subdivision (a) and all of the requirements of subdivision (b)(3). The only difference from certification for litigation purposes is that application of these Rule 23 requirements is affected by the differences between settlement and litigation. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be

reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important and even vitally important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully-informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, particularly if the action appears to have been shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Subdivision (c)(1)(A)(ii) requires that if the class was certified only for settlement, class members be allowed to opt out of any settlement after the terms of the settlement are approved by the court. Parties who fear the impact of such opt-outs on a settlement intended to achieve total peace may respond by refusing to settle, or by crafting the settlement so that one or more parties may withdraw from the settlement after the opt-out period. The opportunity to opt out of the settlement creates special problems when the class includes "futures" claimants who do not yet know of the injuries that will one day bring them into the class. As to such claimants, the right to opt out created by subdivision (c)(1)(A)(ii) must be held open until the injury has matured and for a reasonable period after actual notice of the class settlement.

The right to opt out of a settlement class is meaningless unless there is actual notice. Actual notice in turn means more than exposure to some official pronouncement, even if it is directly addressed to an individual class member by name. The notice must be actually received and also must be cast in a form that conveys meaningful information to a person of ordinary understanding. A class member is bound by the judgment in a settlement-class action only after receiving actual notice and a reasonable opportunity to opt out of the judgment.

Although notice and the right to opt out provide the central

means of protecting settlement class members, the court must take particular care in applying some of Rule 23's requirements. Definition of the class must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are no disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

When a settlement class seems premature, the same goals may be served in part by forming an opt-in class under subdivision (b)(4). An opt-in class will bind only those whose actual participation guarantees actual notice and voluntary choice. The major difference, indeed, is that the opt-in class provides clear assurance of the same goals sought by requiring actual notice and a right to opt out of a settlement-class judgment. Other virtues of opt-in classes are discussed separately with subdivision (b)(4).

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. The procedures that apply to the request for court of appeals permission to appeal under § 1292(b) should apply to a request for permsision to appeal under Rule 23(f). At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Only a modest expansion of the opportunity for permissive interlocutory appeal is intended. Permission to appeal should be granted with great restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify some expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is

by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. [The prior draft added that if a plaintiff class is certified after judgment for the representative plaintiffs, the result may be "one-way" intervention. That does not seem much of a concern to me - if indeed there is a valid claim on the merits, why should we be concerned that the late-certified class members have not had to take a sporting chance on losing their valid claims?] An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is indeed modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law. Such questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Rule 23. Class Actions (November, 1995 draft)

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if – with respect to the claims, defenses, or issues certified for class action treatment –

(1) the ~~class is~~ members are so numerous that joinder of all members is impracticable~~,~~;

(2) there are questions of law or fact common to the class~~,~~;

(3) ~~the claims or defenses of the representative parties are typical of the claims or defenses~~ the representative parties' positions typify those of the class~~,~~; and

(4) the representative parties and their attorneys will fairly and adequately discharge the fiduciary duty to protect the interests of ~~the~~ all persons while members of the class until relieved by the court from that fiduciary duty.

(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class ~~which~~ that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class ~~which~~ that would as a practical matter be dispositive of the interests of the other members

30 not parties to the adjudications or substantially
31 impair or impede their ability to protect their
32 interests; or

33 (2) ~~the party opposing the class has acted or refused to act~~
34 ~~on grounds generally applicable to the class, thereby~~
35 ~~making appropriate~~ final injunctive or declaratory relief
36 ~~or corresponding declaratory relief~~ may be appropriate
37 with respect to the class as a whole; or

38 (3) the court finds (i) that the questions of law or fact
39 common to the certified class ~~members of the class~~
40 predominate over ~~any~~ individual questions ~~affecting only~~
41 ~~individual members~~ included in the class action, (ii)
42 that {the class claims, issues, or defenses are not
43 insubstantial on the merits,} [alternative:] {the
44 prospect of success on the merits of the class claims,
45 issues, or defenses is sufficient to justify the costs
46 and burdens imposed by certification}, and (iii) that a
47 class action is superior to other available methods and
48 necessary for the fair and efficient ~~adjudication~~
49 disposition of the controversy. The matters pertinent to
50 ~~the~~ these findings include:

51 (A) the ~~interest of members of the class in individually~~
52 ~~controlling the prosecution or defense of~~
53 practical ability of individual class members to
54 pursue their claims without class certification and
55 their interests in maintaining or defending
56 separate actions;

57 (B) the extent and nature of any related litigation
58 ~~concerning the controversy already commenced by or~~
59 ~~against~~ involving class members ~~of the class~~;

60 (C) the desirability ~~or undesirability~~ of concentrating
61 the litigation ~~of the claims~~ in the particular

62 forum;

63 (D) the likely difficulties ~~likely to be encountered in~~
64 ~~the management of~~ in managing a class action that
65 will be avoided or significantly reduced if the
66 controversy is adjudicated by other available
67 means;

68 (E) the probable success on the merits of the class
69 claims, issues, or defenses;

70 (F) whether the public interest in — and the private
71 benefits of — the probable relief to individual
72 class members justify the burdens of the
73 litigation; and

74 (G) the opportunity to settle on a class basis claims
75 that could not be litigated on a class basis or
76 could not be litigated by [or against?] a class as
77 comprehensive as the settlement class; or

78 (4) the court finds that permissive joinder should be
79 accomplished by allowing putative members to elect to be
80 included in a class. The matters pertinent to this
81 finding will ordinarily include:

82 (A) the nature of the controversy and the relief sought;

83 (B) the extent and nature of the members' injuries or
84 liability;

85 (C) potential conflicts of interest among members;

86 (D) the interest of the party opposing the class in
87 securing a final and consistent resolution of the
88 matters in controversy; and

89 (E) the inefficiency or impracticality of separate
90 actions to resolve the controversy; or

91 (5) the court finds that a class certified under subdivision
92 (b)(2) should be joined with claims for individual
93 damages that are certified as a class action under
94 subdivision (b)(3) or (b)(4).

95 **(c) Determination by Order Whether Class Action to Be ~~Maintained~~**
96 **Certified; Notice and Membership in Class; Judgment; ~~Actions~~**
97 **~~Conducted Partially as Class Actions~~ Multiple Classes and**
98 **Subclasses.**

99 **(1)** ~~As soon as practicable after the commencement of an action~~
100 ~~brought as a class action, the court shall determine by~~
101 ~~order whether it is to be so maintained. An order under~~
102 ~~this subdivision may be conditional, and may be altered~~
103 ~~or amended before the decision on the merits.~~ When
104 persons sue or are sued as representatives of a class,
105 the court shall determine by order whether and with
106 respect to what claims, defenses, or issues the action
107 should be certified as a class action.

108 (A) An order certifying a class action must describe the
109 class. When a class is certified under subdivision
110 (b)(3), the order must state when and how putative
111 members (i) may elect to be excluded from the
112 class, and (ii) if the class is certified only for
113 settlement, may elect to be excluded from any
114 settlement approved by the court under subdivision
115 (e). When a class is certified under subdivision
116 (b)(4), the order must state when, how, and under
117 what conditions putative members may elect to be
118 included in the class; the conditions of inclusion
119 may include a requirement that class members bear a
120 fair share of litigation expenses incurred by the
121 representative parties.

122 (B) An order under this subdivision may be [is]

123 conditional, and may be altered or amended before
124 ~~the decision on the merits~~ final judgment.

125 (2) (A) When ordering that an action be certified as a class
126 action under this rule, the court shall direct that
127 appropriate notice be given to the class. The
128 notice must concisely and clearly describe the
129 nature of the action, the claims, issues, or
130 defenses with respect to which the class has been
131 certified, the right to elect to be excluded from a
132 class certified under subdivision (b)(3), the right
133 to elect to be included in a class certified under
134 subdivision (b)(4), and the potential consequences
135 of class membership. [A defendant may be ordered
136 to advance the expense of notifying a plaintiff
137 class if, under subdivision (b)(3)(E), the court
138 finds a strong probability that the plaintiff class
139 will win on the merits.]

140 (i) In any class action certified under subdivision
141 (b)(1) or (2), the court shall direct a means
142 of notice calculated to reach a sufficient
143 number of class members to provide effective
144 opportunity for challenges to the class
145 certification or representation and for
146 supervision of class representatives and class
147 counsel by other class members.

148 (ii) In any class action ~~maintained~~ certified under
149 subdivision (b)(3), the court shall direct to
150 ~~the~~ members of the class the best notice
151 practicable under the circumstances, including
152 individual notice to all members who can be
153 identified through reasonable effort[, but
154 individual notice may be limited to a sampling
155 of class members if the cost of individual

156 notice is excessive in relation to the
157 generally small value of individual members'
158 claims.] The notice shall advise each member
159 that ~~(A) the court will exclude the member~~
160 ~~from the class if the member so requests by a~~
161 ~~specified date; (B) the judgment, whether~~
162 ~~favorable or not, will include all members who~~
163 ~~do not request exclusion; and (C)~~ any member
164 who does not request exclusion may, if the
165 member desires, enter an appearance through
166 counsel.

167 (iii) In any class action certified under
168 subdivision (b)(4), the court shall direct a
169 means of notice calculated to accomplish the
170 purposes of certification.

171 (3) Whether or not favorable to the class,

172 (A) The judgment in an action ~~maintained~~ certified as a
173 class action under subdivision (b)(1) or ~~(b)~~ (2)~~,~~
174 ~~whether or not favorable to the class,~~ shall
175 include and describe those whom the court finds to
176 be members of the class~~.~~;

177 (B) The judgment in an action ~~maintained~~ certified as a
178 class action under subdivision (b)(3)~~, whether or~~
179 ~~not favorable to the class,~~ shall include and
180 specify or describe those to whom the notice
181 provided in subdivision (c)(2)(A)(ii) was directed,
182 and who have not requested exclusion, and whom the
183 court finds to be members of the class~~.~~; and

184 (C) The judgment in an action certified as a class
185 action under subdivision (b)(4) shall include all
186 those who elected to be included in the class and
187 who were not earlier dismissed from the class.

(4) ~~When appropriate (A)~~ An action may be ~~brought or maintained~~ certified as a class action —

(A) with respect to particular claims, defenses, or issues; or

(B) ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly~~ by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

(d) Orders in Conduct of Class Actions. ~~In the conduct of actions to which this rule applies, the court may make appropriate orders:~~

(1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

(2) As a class action progresses, the court may make orders that:

(A) ~~(1)~~ determine~~ing~~ the course of proceedings or prescribe~~ing~~ measures to prevent undue repetition or complication in ~~the~~ presenting~~ation of~~ evidence or argument;

(B) ~~(2)~~ require~~ing~~, ~~for the protection of~~ to protect the members of the class or otherwise for the fair conduct of the action, ~~that~~ notice ~~be directed~~ to some or all ~~of the~~ members of:

(i) refusal to certify a class;

217 (ii) any step in the action; ~~, or of~~

218 (iii) the proposed extent of the judgment; ~~,~~ or ~~of~~

219 (iv) the members' opportunity ~~of the members~~ to
220 signify whether they consider the
221 representation fair and adequate, to intervene
222 and present claims or defenses, ~~or~~ to
223 otherwise come into the action, or to be
224 excluded from or included in the class;

225 (C) ~~(3)~~ impose~~ing~~ conditions on the representative
226 parties, class members, or ~~on~~ intervenors;

227 (D) ~~(4)~~ require~~ing~~ that the pleadings be amended to
228 eliminate ~~therefrom~~ allegations ~~as to~~ about
229 representation of absent persons, and that the
230 action proceed accordingly;

231 (E) ~~(5)~~ deal~~ing~~ with similar procedural matters.

232 (3) ~~The orders~~ An order under subdivision (d)(2) may be
233 combined with an order under Rule 16~~,~~ and may be altered
234 or amended ~~as may be desirable from time to time~~.

235 **(e) Dismissal ~~or~~ and Compromise.**

236 (1) Before a certification determination is made under
237 subdivision (c)(1) in an action in which persons sue [or
238 are sued] as representatives of a class, court approval
239 is required for any dismissal, compromise, or amendment
240 to delete class issues.

241 (2) An ~~class~~ action certified as a class action shall not be
242 dismissed or compromised without the approval of the
243 court, and notice of ~~the~~ a proposed dismissal or
244 compromise shall be given to all members of the class in
245 such manner as the court directs.

246 (3) A proposal to dismiss or compromise an action certified as
247 a class action may be referred to a magistrate judge or
248 a person specially appointed for an independent
249 investigation and report to the court on the fairness of
250 the proposed dismissal or compromise. The expenses of
251 the investigation and report and the fees of a person
252 specially appointed shall be paid by the parties as
253 directed by the court.

254 (f) **Appeals.** A court of appeals may in its discretion permit an
255 appeal from an order of a district court granting or denying
256 a request for class action certification under this rule if
257 application is made to it within ten days after entry of the
258 order. An appeal does not stay proceedings in the district
259 court unless the district judge or the court of appeals so
260 orders.

DRAFT MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

NOVEMBER 9 and 10, 1995

NOTE: THIS DRAFT HAS NOT BEEN REVIEWED BY THE COMMITTEE

The Advisory Committee on Civil Rules met on November 9 and 10, 1995, at The University of Alabama School of Law. The meeting was attended by all members of the Committee: Judge Patrick E. Higginbotham, Chair, and Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Carol J. Hansen Posegate, Esq., Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Former Committee Chair Chief Judge Sam C. Pointer Jr., and former member John P. Frank, Esq., also attended. Judge Alicemarie H. Stotler attended as Chair of the Standing Committee on Rules of Practice and Procedure; Professor Daniel R. Coquillette attended as Reporter, and Sol Schreiber, Esq. attended as liaison member, of that Committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej, along with Karen Kremer, represented the Administrative Office of the United States Courts. Thomas E. Willging and Robert J. Niemic represented the Federal Judicial Center. Professor Francis E. McGovern attended as an invited speaker on experience with state-court class actions. Observers included Frank Bainbridge, Esq., Sheila Birnbaum Esq., Robert S. Campbell, Jr. (liaison, American College of Trial Lawyers), Esq., Alfred W. Cortese, Jr., Esq., Robert Heim, Esq., Professor Deborah R. Hensler, Robert Klein, Esq., Barry McNeil, Esq. (Chair-elect, ABA Litigation Section), Professor Linda S. Mullenix, Fred Nisko, Esq., Professor Carol M. Rice, Evan Schwab, Esq., Fred S. Souk, Esq., Melvin Spaeth, Esq., and H. Thomas Wells Jr., Esq. (liaison, ABA Litigation Section).

Judge Higginbotham opened the meeting by welcoming the Committee and observers to Tuscaloosa and the Law School.

The Minutes of the April 20, 1995 meeting were approved.

Judge Higginbotham reported on the September meeting of the Judicial Conference of the United States. Shortly before the meeting, the proposals to publish for comment revised jury voir dire provisions in Criminal Rule 24(a) and Civil Rule 47(a) were moved to the discussion calendar. It was proposed that the Judicial Conference direct the Standing Committee that the revisions not be published for comment. This proposal raised concerns on at least two scores. The first concern is that it would be a new and unfortunate precedent to bring the Judicial Conference into the rulemaking process before the ordinary consideration of proposals that have worked through the full

processes of the Advisory Committees and Standing Committee. The second concern is that such interference could make it more difficult to persuade Congress that the Enabling Act process should be respected because it provides an orderly and designedly deliberate process for considering rules changes. After spirited discussion, the Judicial Conference decided not to interfere with the proposed publications. This action seems to reflect a judgment about the need to respect the regular Enabling Act process, not final approval of the merits of the Criminal Rule 24(a) and Civil Rule 47(a) proposals. There seems to have been a strong sense that allowing public comment is particularly important with respect to attorney participation in jury voir dire. The matter is of great importance to the bar, and the bar should know that it has had full opportunity to make its views known.

Brief further discussion was given to the Civil Rule 47(a) proposal. It was noted that the public comment period may propose alternatives that will improve the initial proposal. Jury questionnaires are often suggested, but must be controlled both to protect juror privacy and also to reduce the opportunities for manipulation of psychological profiles or other jury selection devices. New York, which has followed the practice of selecting civil juries outside the presence of a judge, is moving toward a system of greater judicial involvement that nonetheless is likely to leave room for lawyer participation. And thoughtful attention must be directed to the fact that many judges who permit substantial lawyer participation under present Rule 47(a) oppose amendment of the rule to require this practice. If possible, some means must be found to address the underlying concern that judges are better able to control improper uses of voir dire if they have an unconditional right to deny any participation.

The report on pending legislation pointed out that it was decided that the "Contract With America" bills were moving so fast in the House of Representatives that it would not be fruitful to attempt to voice Rules Committee concerns in the House. The Subcommittee chaired by Judge Scirica, including members Doty, Rowe, Vinson, and Wittmann, has met with some success in working with members of the Senate staff. Congress is working toward a conference report on securities legislation, although as of the time of this meeting the Senate had not yet appointed conferees. Some difficulties continue to divide the House and Senate. The chair of the SEC has stated profound reservations about the legislation. It is still too early to guess the prospects for eventual passage. There are important substantive provisions in the bill, and the subcommittee has been at pains to state repeatedly that substantive matters are outside the area of proper Committee concern. When substance and procedure are tied together in the bill, as often happens, this approach has necessarily constrained the subcommittee's freedom to make suggestions. And

there are many procedural provisions, dealing with pleading, discovery, Civil Rule 11 sanctions, jury interrogatories, class actions, and other matters. Some of the troubling procedural provisions have been dropped, such as the proposals for steering committees or guardians ad litem in class actions. Other class action innovations — and there are many — are limited to securities actions, but seem to have reached a stage that is beyond further modification. Pleading requirements have been moved to a relatively "low stakes" table; the most recent version incorporates Second Circuit standards for pleading with particularity. The Rule 11 provisions continue to be a challenge. The current version requires the court to review the complaint, responsive pleadings, and dispositive motions, and make findings whether there has been any violation of Rule 11. Any Rule 11 violation in the complaint that is not de minimis presumptively requires an award of the full attorney fees incurred by the defendant, no matter how small a portion of the fees was incurred by reason of the violation rather than entirely proper portions of the complaint. These Rule 11 provisions have become a surrogate for a more general fee-shifting proposal, and the compromise seems untouchable during this session. If the bill does not pass this session, however, there may be an opportunity for further consideration and improvement of these provisions.

Rule 23

Civil Rule 23 formed the central focus of the meeting. The materials with the discussion draft suggested that four major proposals should be discussed first: (1) The new Rule 23(f) provision for permissive interlocutory appeals; (2) that Rule 23(b)(3) be modified to require that a class action be "necessary" for the fair and efficient adjudication of the controversy; (3) that Rule 23(b)(3) require consideration of the probable success of the class claim on the merits, and of the significance of even probable success; and (4) that Rule 23 be modified — most likely with respect to (b)(3) classes only — to make clear the appropriateness of "settlement" classes. The meeting provided opportunity for full discussion of each of these four proposals, and tentative decisions were reached as to the first three. No time was available to discuss the more detailed changes that also were proposed in the discussion draft. The discussion draft posed two separate issues with respect to these changes. The first issue is whether it is wise to propose a number of significant changes in tandem with a set of major changes. The choices to be made will not be easy. If the Committee finds several aspects of Rule 23 that bear useful improvements, it seems undesirable to defer these matters for a period that is likely to extend several years into the future. On the other hand, consideration of even two or three fundamental changes will continue to require careful attention and much hard work. If the Standing Committee, members of the bench

and bar, Judicial Conference, Supreme Court, and Congress are asked to consider fundamental changes, there may be a risk that other significant changes will not receive the attention required to ensure the best possible revisions. The second issue really is all the other changes. None can be advanced without careful Committee review. If it is decided that they should be considered on the merits with an eye to determining which merit a recommendation for publication, the Committee must review them to support appropriate determinations.

Rule 23(f): Permissive Interlocutory Appeals

Draft Rule 23(f) would provide for permissive interlocutory appeal from a district court order granting or denying class certification. The draft is closely modeled on the language of 28 U.S.C. § 1292(b), in an effort to invoke familiar concepts that will ease application of a new rule. It departs from § 1292(b), however, in important respects. First, it does not require permission to appeal from the district court, nor even an initial request to the district court for permission. Second, it does not incorporate any of the limiting § 1292(b) requirements that have limited use of § 1292(b) in the class certification context – that there be "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Although § 1292(b) has provided a useful opportunity for appeal with respect to various Rule 23 rulings, the draft is intended to make appeals more readily available. The opportunity for more frequent review may be particularly important if other substantial changes are made in Rule 23. Particularly during the early years of any new Rule 23 provisions, the opportunity for appellate guidance by interlocutory appeal can be invaluable.

The limits built into the draft were noted repeatedly throughout the discussion. Application for permission to appeal must be made within 10 days of the order granting or denying certification. District court proceedings are stayed only if a stay is ordered by the district judge or the court of appeals – the stay provision is modeled on § 1292(b) to ensure there is no confusion of meaning. The district-court-first analogy to Appellate Rule 8(a) also was noted repeatedly. The Advisory Committee Note to this provision should observe that ordinarily an application to stay district court proceedings should be made first to the district court. The question was raised whether the rule should provide a presumptive stay of discovery when a court of appeals grants permission to appeal. It was agreed that it is better to adhere to the general provisions of the § 1292(b) model; such problems seem to be worked out well in practice under § 1292(b), and creation of a presumption might distort the stay

decision.

The first question addressed to the nature of the permissive appeal was whether there should be an opportunity to appeal as of right, even broader than the former "death-knell" theory that was used by some courts to permit appeal when a denial of class certification seemed to threaten the practical termination of litigation that could not be pursued to vindicate individual claims alone. The discretionary opportunity provided by the draft was thought to be illusory. It was observed that at least in some circuits, certification for appeal under § 1292(b) frequently fails because the court of appeals denies permission to appeal; eliminating the need for district-court certification does not ensure that the court of appeals will grant permission.

The response to the fear that a discretionary system of interlocutory appeal would prove illusory was the fear that a right to appeal would lead to abuse. The Federal Judicial Center study confirms the belief that there are many "routine" class certification decisions. Appeals in such cases are likely to do little more than increase delay and expense. Yet there will be strong temptations to appeal certification decisions; defendants will be particularly tempted to appeal orders that grant certification. Perhaps worse, the right to appeal certification decisions might lead a party to contest a certification that otherwise would be accepted by stipulation. It is anticipated — and the Advisory Committee Note would make clear — that permission to appeal, although discretionary in the court of appeals, will rarely be given.

It was further urged that the draft provides significantly greater protection against improvident certification decisions than § 1292(b) now provides. Removing the power of the district court to defeat any opportunity to appeal is a significant change. A grant or denial of certification can "make or break" the litigation, and the need for review at times will be greatest in situations that are least likely to lead to district-court certification. And the danger of delay is reduced not only by the draft requirement that permission to appeal be sought within 10 days, but also by the prospect that the courts of appeals generally will act quickly, likely within 30 days or so, in deciding whether to grant permission.

An argument was advanced for restoring the requirement of district court permission to appeal, drawing from the observation that a class certification decision may be provisional. When a judge has reached a reasonably firm decision as to certification, appellate review often will be welcome, particularly in cases that present uncertain questions of law. There is little reason to fear that necessary appeals will be thwarted by district court

intransigence. And if the district judge has no voice in the appeal decision, there will be a tendency to defer certification rulings. These arguments were later renewed, with the added suggestion that district-court discretion is particularly important in cases that have generated lengthy records on the certification question. The district court's familiarity with the record will support a better evaluation of the value of appeal. The response was renewed also, this time with the added observations that certification for appeal might be inappropriately denied by a judge bent on pursuing settlement following a grant of class certification designed to encourage settlement, or that certification for appeal might be inappropriately denied by a judge who has denied class certification because of distaste for the underlying claim.

Discussion returned to the fear that the draft rule would encourage too many efforts to appeal; it was suggested that appeals would be attempted in the overwhelming majority of cases. It was rejoined, however, that this prediction rested on experience with the most complex and contentious of class actions. More routine actions are not likely to involve such persistent efforts. The explicit invocation of court of appeals discretion, moreover, is a significant safeguard against feckless attempts to appeal. Although adding "in its discretion" to an openly permissive appeal provision may seem redundant, it is valuable as an explicit reaffirmation of the sweep of appellate discretion. The phrase is lifted bodily from § 1292(b); the Committee Note should state that the scope of appellate discretion is as broad under proposed Rule 23(f) as it is under § 1292(b). Invoking this familiar concept should allay concerns about the risks of improvident and disruptive appeal attempts. It is expected, moreover, that most certification decisions will depend heavily on specific case circumstances. There will be little reason to grant appeal in such cases; the major impetus for appeal will come in cases presenting unsettled questions of law.

Further discussion led to the conclusion that the Committee Note should discuss the possible importance of district court contributions to the decision whether to permit interlocutory appeal. District courts should be encouraged to offer advice on the desirability of appeal at the time of making certification decisions. The advice would not be a condition of appeal, but would be more or less persuasive according to the reasons offered by the district court and the extent to which certification turns on case-specific facts developed at length in the district court. District courts can be quite helplful in "separating the wheat from the chaff" of intended appeals. District court advice may help the parties as well as the court of appeals; a cogent statement of reasons for refusing appeal may often discourage a party who otherwise would attempt an appeal.

It also was asked whether an appeal provision could reasonably be discussed before deciding whether to propose any other changes in Rule 23. Until the Committee has concluded its deliberations on Rule 23, it will not be possible to know what the Rule will be. The scope of appeal, the nature of the issues that may be advanced, and the frequency or infrequency of "routine" certification decisions, all depend on the nature of the rule itself. It was responded that the Committee may decide to urge only the appeal amendment. But it was further agreed that a decision to propose an appeal provision may appropriately be revisited, at the behest of any Committee member, at the conclusion of the Rule 23 deliberations.

A motion to approve proposed Rule 23(f) passed, 11 for and 1 opposed as to particular (unspecified) features of the draft.

CERTIFICATION "NECESSARY"

The discussion draft proposed that to certify a Rule 23(b)(3) class, a district court must find that certification is "necessary" for the fair and efficient adjudication of the controversy, not merely superior to other available methods:

> (3) the court finds * * * that a class action is ~~superior to other available methods~~ necessary for the fair and efficient adjudication of the controversy. * * *

The background of this proposal was described as the great level of interest and concern that have come to surround use of Rule 23 to address mass torts, and particularly dispersed mass torts. The Committee has heard many views on this set of problems through its activities focused on Rule 23. There has been a strong sense that much of the difficulty has been due to the substantive law, a difficulty beyond the reach of this Committee. There also has been much concern that certification of a class can give artifical strength to claims that individually lack any significant merit. The greatest concern focuses on claims that, if valid, would generate substantial individual damage awards. Although many of the claims may be brought as individual actions, the defendants would defeat most. If all are aggregated in a single action, however, even a relatively small risk of losing on the merits must be weighed by the defendants against the crushing liability that would be imposed by a loss on the merits. This calculation may be further affected by a fear that the sheer weight of the responsibility of denying any recovery to all members of a class may increase the prospect that the class will win on an aggregate claim that would be lost far more often if pursued in individual litigation. The result is a great pressure to settle. The pressure to settle also may be enhanced by the transaction costs of

litigating individual claims — if a defendant can purchase "global peace" by settlement, much of the settlement cost may be offset by saving the expense of individual litigations.

On the other side of the equation is the familiar phenomenon of class litigation to enforce claims that are strong on the merits but that would not bear the expense of individual litigation. Consolidation of actions in the same court under Civil Rule 42, and aggregation of actions in different courts under 28 U.S.C. §§ 1404, 1406, and 1407 is not a particularly effective means of addressing this problem, even recognizing that the efficiencies of consolidated proceedings may make it possible to pursue claims that would not bear the risks and expenses of separate adjudication. Class actions in such circumstances do far more than merely achieve efficiency. The proposal is not designed to deter consolidations, but only to limit class certification to settings in which individual litigation is not a realistic alternative.

Changing this criterion of Rule 23(b)(3) certification from superiority to necessity could emphasize the role of class actions in addressing claims that do not bear the costs of individual litigation. For such claims, class certification is necessary. Certification is not necessary for claims that could reasonably be pursued in individual actions. It may be that a single event or set of events will give rise to claims of both types because some victims suffer substantial injury, while many other victims suffer only relatively minor injuries.

Such is the purpose of the proposal. It is limited to (b)(3) classes. The questions the Committee addressed began with the central issues: is the change desirable? What might it mean in practice — is there force to the concern that "necessary" might mean a lower threshold, not a higher threshold? Should the change be broadened to include (b)(1) or (b)(2) classes?

The first response was that the proposal was a mere cosmetic change that is not adequate to address any of the real problems of Rule 23.

The next response was that indeed the change seemed to lower the standard, making it easier to achieve certification. The annotations to the proposal say that the test of necessity is a practical test, not an absolute one; is this something that can safely be left to the Committee Note, or should it somehow be worked into the language of the Rule? Another view of this question was that there is no meaningful difference between superiority and necessity; unless we can find and express a difference, we should not amend the language of the present rule. In any event, the concept of necessity is ambiguous.

And then the proposal was championed as a good thing. The only way to effect change is to modify the language of the rule. The problems indeed are clustered around (b)(3) and the "freeway" effect it has in generating claims that, but for class certification, would not ever develop into litigation. If it were possible to find the equivalent in formal drafting language, the rule should caution against "willy-nilly" certification. The Note should say this. A clear and convincing preponderance of the factors conducing to certification should be required.

The opposing view conceded that necessity implies a higher standard than superiority, and argued that a higher standard is undesirable. To find that a class action is superior is to find that it is a better means of proceeding. To change the standard is to require that a court deny certification even though a class action would be better than — superior to — the realistically available alternative methods of proceeding. The change may seem to be loading the rule too much in favor of defendants. The perceived problems would be better addressed through the proposed factors that look to the probability and social benefits of success on the merits of the class claim.

Another concern about the necessity standard was expressed in relation to employment discrimination claims. The statutory amendments that have added damages remedies now bring these cases into the ambit of (b)(3) classes. Class certification may be necessary to ensure that all affected individuals recover damages; a rule that emphasizes necessity may lead to certification of a class that will generate many practical problems, and that would not be "superior" to other available methods that often would not be invoked. This result may be a good thing, but we need to think about the problem before deciding on a language change.

The concern about the ambiguous relationship between the superiority and necessity standards led to the suggestion that the rule retain the superiority requirement and add necessity as an additional requirement. This should make it clear that the standard is being ratcheted up. This proposal was in fact adopted after much further discussion.

Attention then moved to the element of this requirement that focuses on the "fair and efficient adjudication of the controversy." It was observed that the meaning of this phrase depends on the "controversy" that it refers to. If the controversy includes claims that grow out of a common fact setting but that would not give rise to individual litigation, the concepts of fairness and efficiency may diverge. A class action may be superior and indeed necessary precisely because there is no viable alternative means of adjudication. It is more fair if the claim deserves to be enforced. At the same time, class proceedings may

be "efficient" only in the sense that the alternatives are so inefficient as to be unavailable. For that matter, certification also may not be "fair" in light of the prospect that an aggregation of worthless small claims may gain leverage that forces settlement to avoid the costs of class litigation and the risk of a mistaken judgment on the merits. This discussion did not lead to any proposal for amending any of the three terms involved.

Another suggestion was that as a matter of drafting, factor (C) should be reframed. "Desirability" somehow duplicates the inquiry into superiority or necessity; it would be better to refer to the consequences of concentrating the litigation in the particular forum. This suggestion was met, however, with the concern that the longstanding language of Rule 23 should be changed only when a change of meaning is intended. Any substitute for desirability must be explained in the Note as a styling change, not a change of meaning, and even then there would be a risk that the Note would be overlooked and some change of meaning read into the change of language.

These concerns provoked the observation that before addressing matters of language, it is most important to determine what policy should be embodied in the rule. Should we maintain present policy, or is it desirable to suggest some change?

One broad policy issue was found in the question whether adoption of a higher standard for (b)(3) class certification would be, or would be perceived to be, a pro-defendant choice. The response was that the change cannot meaningfully be seen in that light. The purpose of this change is not to address the classes that aggregate numerous small claims; if anything is do be done about such classes, it will be through other proposals. Instead, it addresses the classes that include plaintiffs who have substantial individual claims and who could pursue individual litigation. In the last few years, defendants have often sought certification of such classes. The interests of the defendants, often spurred by liability insurers, are to achieve a global settlement that avoids the costs and uncertainties of individual litigation. Making certification more difficult in these cases could at least as easily be seen as a pro-plaintiff change. As an additional complication, the interests of the defendants may overlap with the interests of some members of the plaintiff class because a class adjudication can effect a more orderly and uniform distribution of the assets available to satisfy the claims of all plaintiffs. A carefully structured class disposition can ensure that all persons injured by a common course of conduct share in the judgment, not simply those who got the earlier judgments. The purpose is not so much to favor plaintiffs or defendants as to find a procedure that most effectively recognizes the interests of all.

The Committee then was admonished that this proposal reflects rulemaking at its worst. The Rules were, in the beginning, relatively simple. People could understand them. They have become complex. The cognoscenti understand them still. But there are 800,000 lawyers who may need to understand them, and it is counterproductive to continue along a course of trivial changes that generate confusion far out of proportion to any incremental benefit that might be achieved.

The policy issues were brought back into the discussion with an illustration of a "single event" mass tort. An airplane crash might generate 150 claims. Each claim could be tried separately. A joint class proceeding may be more efficient, but is not necessary. This is a real situation that causes real difficulty. Individual actions in the federal courts can be consolidated without difficulty, given the array of consolidation devices. The Note should comment on this alternative to certification. This change is important. This argument was met by the contrary view that class certification is suitable for the single-event mass disaster. And in return it was accepted that perhaps in some single-event settings a class action is necessary because consolidation will not accomplish all the appropriate results. Class certification, for example, might help address settings in which individual state-court actions cannot be consolidated with a mass of federal actions.

A different perspective was opened by the observation that the proposed necessity standard seems calculated to underscore a preference for individual litigation where individual litigation is possible. It was answered that this is indeed the purpose, that many lawyers believe there is too much emphasis on moving cases, getting rid of them, even though individual actions would be better. This is the policy that should be addressed before language is chosen.

This policy was then underscored by referring to the decision in Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995). It was suggested that the result in the Rhone-Poulenc case is right, and that Rule 23(b)(3) should be amended to make it easier to support similar results in future cases. We need to find a way to make it easier to refuse certification. This view was echoed in the statement that the issue is whether Rule 23(b)(3) should be amended to discourage class certification.

The earlier suggestion was renewed by a motion that the superiority language should be retained, and supplemented by adding a requirement of necessity. There would be no change in the "fair and efficient language," which refers to matters that depend heavily on the context of specific cases. This change may indeed encourage certification of small-claims classes; whether there may

be offsetting changes that may discourage certification depends on the additional proposals still to be discussed.

The virtues of this proposal were urged to be twofold. The existing body of doctrine that elaborates the superiority requirement will be retained, providing a familiar first step of analysis. The additional necessity requirement need be addressed only if superiority is found. Necessity then will provide an additional and higher requirement that will require further evaluation of the same factors that bore on the superiority determination.

The objection was made that it seems undesirable to require this two-step process. The proposal seems to be that necessity is a higher standard that always embraces superiority, and always requires something more. The finding of superiority will be necessary in all cases, but never sufficient for certification. Why not focus on necessity alone, explaining it as well as can be, without retaining both requirements?

The motion to retain the superiority requirement and add a necessity requirement passed by vote of 8 to 4. This portion of Rule (b)(3) would read:

> (3) the court finds * * * that a class action is superior to other available methods <u>and necessary</u> for the fair and efficient adjudication of the controversy. * * *

State Class Actions

Professor Frances McGovern then addressed the Committee on current experience with class actions in state courts. He spoke from extensive experience with state-court class actions, including experience as a special master charged with facilitating coordination between state courts and the federal court supervising the consolidated federal cases arising out of claims concerning silicone gel breast implants. He has worked extensively with the MTLC committee established by the Conference of Chief Justices.

There has been an explosion in state class actions. Many of them involve claims that are framed as "fraud" claims arising out of the terms of various kinds of insurance and loan transactions. The volume is remarkable. The procedures also are remarkable; state judges achieve much greater uniformity of procedure than federal judges, largely by adhering closely to the recommendations made in the Manual for Complex Litigation. There are some major problems.

Polybutelene pipe cases illustrate one type of state actions.

Chlorine attacks the pipe joints, causing them to leak. State law governs, and individual claims ordinarily are too small to meet the amount-in-controversy requirement for diversity jurisdiction. Some individual claims have been tried to judgment. The defendants want to settle. A Texas state judge refused to certify a nationwide class for a $750,000,000 settlement. A federal judge denied jurisdiction of an attempted class action. The result was that class actions were filed in three states. A California judge took on the task of persuading judges from the other state to go to California to work out a settlement. When that did not work, he conducted a settlement conference that came very close to a settlement. The lawyers have been "sent back" to the other state courts to attempt to conclude the settlement of all actions in all states. It may work.

For some time, class actions have provided the "end game" after a number of individual actions have been tried to judgment, establishing a framework of information that facilitates just and reasonable settlement on a class basis. But recently some lawyers are attempting to bypass this process, putting the class action "up front" before there have been many individual adjudications.

State judges increasingly are turning down "sweetheart" settlements that establish res judicata for the defendants in return for deals that benefit the class lawyers more than the class.

State class actions have become very important. And federal Rule 23 is very important to what the state courts do. Most states follow Rule 23, although there are variations in the extent of its adoption.

Deborah Hensler then stated that Rand is trying to put together a project to get a good view on the frequency and diversity of class actions. The methodology would be different than that used by the Federal Judicial Center study, aiming at generating complementary information. A survey of potential plaintiffs would be an important element in the study. A series of case studies, based on data collection from sources outside court files, would be attempted as the basis for a systematic measure of the costs and benefits of class actions for plaintiffs and defendants. This is a very ambitious proposal, which will require substantial independent funding. It may not be possible to mount as ambitious a project as would be desirable. Although it takes a while to make sure that the cases studied are fairly representative, not "eccentric," results could be available in time to inform this Committee's ongoing consideration of Rule 23.

PROBABILITY OF SUCCESS

Over the course of the past year, it has been urged that Rule 23 should incorporate a test, akin to preliminary injunction analysis, that balances the probable outcome on the merits against the burdens imposed by class certification. The discussion draft included this feature in two — perhaps redundant — ways, dealing only with (b)(3) classes:

> **(3)** the court finds * * * that the probability of success on the merits of the claim [by or against members of the class] warrants the burdens of certification, and that a class action is superior * * *. The matters pertinent to the findings include: * * * (E) the probable success on the merits of the class claims, issues, or defenses.

Discussion began by framing the general issues: should any consideration of the merits be required? If so, what should be the means of calibrating the strength of the claims to the certification decision? Should the preliminary injunction analogy be used, or does it suggest an unnecessarily elevated standard of success? How would this approach affect the relationship between the certification decision and other proceedings — would it require substantially increased opportunity for discovery on the merits, delay the certification decision, create difficulty for certification of settlement classes, increase the occasions for interlocutory appeal? Although the provision may seem a boon for defendants, may it generate offsetting problems by elevating the stakes at an early stage of the litigation for fear that a preliminary finding of probable success may increase settlement pressure and even affect a defendant's standing with the financial community? So, in the end, is this an approach that may help plaintiffs in cases that lead to a favorable preliminary appraisal of the merits, and may harm plaintiffs when the preliminary appraisal is unfavorable?

It was suggested that perhaps it would be more appropriate to rely on analogy to temporary restraining order practice rather than preliminary injunction practice. The difficulty with preliminary injunction procedure was thought to be that it may be akin to trying the case before certification. Civil Rule 65, indeed, authorizes the court to combine the preliminary injunction hearing with trial on the merits. A temporary restraining order often issues only after a hearing, but the hearing is expedited and there is little or no discovery. The key is to find an abbreviated procedure, a matter that invokes the procedural distinctions between temporary restraining orders and preliminary injunctions, not any supposed difference in the standards for preliminary relief.

It was observed that with preliminary consideration of the

merits, lawyers inevitably will demand an opportunity for discovery to support well-informed presentations on the merits. And, once discovery is opened up, it will be difficult to limit its scope. It will be difficult to resist this pressure, and it will be difficult to keep the focus of discovery narrow. If the purpose is to separate out claims that gain settlement power by certification despite scant prospect of success at trial on the merits, an abbreviated procedure will not do the job. During the delay, it may happen that some individual claims are tried; that is not necessarily an undesirable thing.

The fear that a probable success requirement would impede certification of classes for the purpose of settlement was stated to be a real problem. It also was noted that defendants often push for certification of a plaintiff class if they believe they have strong cases, and that the probable success requirement could prove adverse to defendants in this way as well.

Concern with the effects on settlement classes was met by the suggestion that a probable success requirement could be viewed from the perspective of settlement. If certification is made to support future efforts to settle, the requirement means only that there is a reasonable prospect that settlement will be achieved, since settlement will count as success on the merits. If certification is made to support a settlement already reached, the measurement of success on the merits becomes one with the proceedings to determine whether to approve the settlement. The defendant wants certification, the plaintiff wants certification, and a probable success element should not be a problem if the rule is properly drafted.

The probable success factor was urged to be a good token of the broader problems of class actions today. Some class actions are very good, as shown by the wide array of opinions gathered by the Committee's efforts to reach out to the bench and bar for advice. Other class actions are simply means by which complaisant plaintiffs' lawyers offer res judicata for sale at bargain rates to intimidated defendants. The Federal Judicial Center study shows that individual recoveries are small in most class actions. Account should be taken both of the prospects of meaningful recovery for anyone, and whether there is enough real good in any recovery to justify the burden of class proceedings. Although the Rhone-Poulenc decision in the Seventh Circuit does not say so expressly, it turns in part on an estimate of the probable merits of the class claim, and also on the costs to the system even if the class claim succeeds. The history of plaintiff failures at trial generated a particular fear that a single class proceeding might reach a wrong result. Even if a right result should be achieved, great difficulties would be encountered in further proceedings to translate the class judgment into individual judgments. Other

cases involving minuscule individual recoveries, administered and distributed at great cost, impose quite different burdens. "Fluid" class recovery in such cases involves elements of social policy that should be beyond the reach of the Rules Enabling Act process.

It was asked whether success on the merits should be measured by the representative parties' claims or by the class claim. The response was that it is the class claim that is important, but that the plaintiffs' individual claims may be strong evidence of the strength of the class claim. The question is how many class members have claims sufficiently similar to the individual representatives' claims to warrant certification.

This discussion led to more pointed suggestions as to the nature of the showing that might be required. Rather than a thorough appraisal of the merits, it was suggested that a "first look" might be sufficient, or that the effort should be only to ensure that the claims are not "bogus."

The first look approach was resisted on the ground that the certification decision is very important. If the merits are to be considered, it should not be done on the basis of half-a-dozen affidavits. If there is to be discretionary consideration of the merits at the certification stage, it should not be so open-ended.

The "bogus" claim approach met the response that few cases involve bogus claims. Most contemporary criticism of Rule 23 arises from dispersed mass-tort cases, and these cases do not involve bogus claims.

These observations returned the discussion to the opening point. The class device should facilitate prosecution of strong claims, but should not be misused to add strength to weak claims. Many experienced lawyers say that, despite the difficulties of making a rigorous empirical demonstration, a significant share of class actions involve coercive use of the class device to force settlement of claims that have little chance of success on the merits but that promise overwhelming liability should the slender prospect of success on the merits mature into reality.

The quest for alternative formulations led to additional suggestions looking to a "significant probability of success," or "sufficient merit to warrant certification." These and other formulas led to the suggestion that before further drafting efforts were made, the Committee should determine the general question whether any consideration of the merits might be appropriate.

A motion to add to the (b)(3) certification some consideration of the probable merits passed by 11 to 1.

Robert Heim, an observer, then told the Committee that although he had been an early proponent of the preliminary injunction probability-of-success analogy, the Committee discussions had persuaded him that this approach might impose an undue burden on plaintiffs. The burden would be particularly troubling if appraisal of the probable outcome were to be made early in the litigation. Defendants too may have cause to fear this approach, particularly as the preliminary appraisal might come to influence such subsequent matters as settlement negotiations, summary judgment, or even attitudes at trial. It would be better simply to adopt a low threshold that gives the court discretion to look at the merits without embarking on an extended inquiry. This result could be accomplished by adopting a new element in the Rule 23(b)(3) calculus, requiring the court to find that the issues presented by the facts and the law are not insubstantial [and have been sufficiently well developed through prior judicial experience].

Immediate response to this suggestion was that perhaps this inquiry should be reduced from an element of the certification decision to a mere place in the list of factors that bear on the elements of certification – the most obvious fit would be with the determination that certification is superior and necessary for the fair and efficient adjudication of the controversy. The question is one of weeding out weak cases, and a simple role as one factor in the certification process will accomplish that task. It was suggested that if this look at the merits should become only a factor, a balancing element should be incorporated, so that a greater prospect of success on the merits would be required when the burdens of certification are greater. Treating the inquiry as a mere factor in the certification determinations was urged to reduce the risk of untoward consequences. Indeed, it was urged that as a mere factor, this inquiry could actually help plaintiffs win certification of classes on strong small claims, reducing the concern that preliminary consideration of the merits may seem an unfairly pro-defendant provision. (And it was responded that perhaps the bilateral impact of this approach is enhanced if it is made an element of certification, not a mere factor.)

Another response was that it is dangerous to require prior judicial experience with the underlying claims. This element seems to reflect concern with dispersed mass torts. There is no reason to insist on earlier litigation with respect to many class claims that arise out of a single transaction – securities fraud actions offer a common example. It was responded that the concern really goes to the newness of the kind of claim. Securities litigation often presents issues of a kind made familiar by much earlier litigation that arises out of distinct events but invokes common principles. So of other kinds of class actions. But some class actions present issues that are new and unfamiliar; it takes time

for the claims to mature through individual adjudication before courts can safely consider class litigation. Premature class certification can create many claims that otherwise "would not be."

The balancing approach reappeared, with the suggestion that a "not insubstantial" test standing alone would not have much effect. Insubstantial claims should be dismissed without regard to attempted class certification. It also was urged that "not insubstantial" has a double-negative ring that is not well-suited to rule drafting. The effort to sort out claims that can proceed as individual claims but not as class claims also seems to intrinsically involve balancing. What is sought is a sufficient prospect of success by the members of the class to justify the incremental costs, delays, risks, and settlement pressures that flow from certification. Why not say this openly, recognizing that the adverse consequences of certification vary from case to case, and allowing only relatively strong claims to support a certification that imposes relatively onerous burdens?

The difficulty of making a cogent appraisal of the likely outcome returned to the discussion. A "determination" of probable merits should not be required, but only a preliminary assessment. But there is a danger that in many cases the assessment will not in fact be preliminary. Any requirement in this dimension will put real pressure on the judge. Findings will be made. Discovery will be had. The determination may be tied to, or sequenced with, summary judgment.

A separate question was raised about the risk that an adverse ruling on the probable success factor might spur a plaintiff to mount a second action. The same representative plaintiff might allow the first action to meander along without certification, but seek certification of the same class in another court with another opportunity to persuade a different judge on the probable success issue. It would be a nice question whether the first determination should preclude relitigation by the same plaintiff, particularly if there is no final judgment in the first action. And the problems would become much more tangled if the same lawyers simply found a different representative plaintiff to maintain a second action. Certification and defeat of the class claim brings some measure of finality. Denial of certification is less likely to do so. These questions were met with the response that if there is a need to make certification more difficult, the need should not be put aside because of the prospect that a plaintiff who once fails to make the required showing may try a second time to make the same required showing.

Comparisons with present practice also were noted. One comparison is the finding in the Federal Judicial Center study that in a majority of the class actions studied, motions to dismiss or

for summary judgment were made before a ruling on certification. Another was that evidentiary hearings now are required on only a small fraction of class certifications, and that the hearings that are had typically run from two hours to perhaps a single day.

Discussion of the probability-of-success factor resumed after an overnight break. It was suggested at the beginning of the morning session that it would be difficult to be achieve a final formula, with confidence, at this meeting. There will be many opportunities for review, aided by comment, before the present discussion draft can be transformed into a new rule. The Committee should seek to do the best it can for the moment, recognizing that the time has not yet come to take a proposal to the Standing Committee with a recommendation for publication and comment. Instead, the draft that emerges from this meeting can be reported to the Standing Committee as an information item at its January meeting, seeking their views as support for further consideration at the April meeting of this Committee. If a proposal for publication can be reached at the April meeting, and is approved by the Standing Committee in early summer, it would go out for public comment at the same time as a proposal presented to the Standing Committee in January.

Turning to the actual approach to be taken, it was observed that the "not insubstantial" claim approach involves a double negative in one sense, but it reflects a common recognition that goes beyond the surface logic of words. Lawyers understand that however precise a line we might imagine between "substantial" and "insubstantial," there is a big difference between requiring that a claim be substantial and requiring that a claim be not insubstantial. Earlier discussion has shown many difficulties with a balancing test. It seems more attractive to adopt a test that allows a first look at the merits, but that often can be met without a need for extensive discovery or formal hearings. The test would be designed to screen out claims so weak on the merits as to gain potential strength only by class certification. Even at that, the certification decision will be a major event, just as it often is now. If the rule requires only a finding that the claims are not insubstantial, it will be far different from requiring that a means be found to weigh different measures of probable success on the merits against different levels of certification-induced burdens, risks, and pressures to settle. There even is a virtue in the negative reference to "not insubstantial," moving away from the dangers of early factfinding.

Initial discussion settled on a draft that incorporates the "not insubstantial" requirement among the findings required for certification of a (b)(3) class, and that adds "on the merits" to make it clear that insubstantiality does not refer to the dollar amount of individual or aggregate claims. The draft would add this

element to (b)(3):

> (3) the court finds * * * that the class claims, issues, or defenses are not insubstantial on the merits, * * *. The matters pertinent to ~~the~~ these findings include * * * (E) the probable success on the merits of the class claims, issues, or defenses * * *.

This approach was contrasted with the balancing approach that dominated much of the earlier discussion. The balancing approach continued to find support, particularly if the rule were to identify explicitly the continuing concern that certification of a class can impose not only great expense but also a coercive pressure to settle in face of a very small probability that a weak claim may result in liability for large damages. This alternative was offered as a proper matter for further discussion at future meetings. Indeed, the Committee may wish to provide an alternative discussion draft in its informational report to the Standing Committee.

This point of uncertainty was the occasion for one of the frequent observations anticipating the later discussion whether the burdens of class proceedings may be so important as to justify refusal to certify claims that are likely to succeed on the merits. It was suggested that although this question is conceptually distinct from the probability-of-success question, it affords an alternative approach to the concern that class proceedings may at times be much ado about too little.

These uncertainties also provoked one of several discussions of the frustration that inheres in a process of surveying many possible changes, large and small, before finally determining what path to take. The Committee has not finally determined whether to propose any changes at all — the only commitment is to make thorough use of the information that has been gathered. If changes are to be proposed, there is no determination whether there will be only a few small changes, a major overhaul of the rule, or a substantial set that includes some important changes and a number of smaller improvements. The frustration, however, is a necessary price to be paid for carefully reviewing each of many possibilities, suspending judgment until all have been considered.

Returning to the probable-success issue, it was moved that the Committee present two alternatives to the Standing Committee for information and advice. One alternative would be the "not insubstantial on the merits" version set out at pages 19 to 20. The second alternative would not for the moment refer expressly to the effect of certification in creating pressure to settle, but would include an explicit balancing requirement and raise a higher

threshold than the "not insubstantial on the merits" version. This alternative would read:

> (3) the court finds * * * that the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification * * *. The matters pertinent to ~~the~~ these findings include: * * * (E) the probable success on the merits of the class claims, issues, or defenses * * * .

Retaining both versions for purposes of further discussion will provide the opportunity for further consideration. They are intended to be quite distinct.

The motion to present both alternatives passed 11 to 1.

Benefits and Costs of Class Victory

The next topic was a proposal, drawn from various state law models, that a court have discretion to refuse certification of a (b)(3) class if the benefits gained by success on the merits would not be sufficient to justify the costs of administering the class action and distributing individual recoveries. This proposal is distinct from the probability-of-success question because it can be applied by assuming that the class will prevail on the merits. In pure form, it would be administered by assuming that the class will prevail and asking whether the victory will justify the costs entailed in reaching the merits and implementing the judgment.

The discussion draft shaped this issue by adding a new item to the list of factors to be considered in determining whether a class action is superior and necessary to the fair and efficient adjudication of the controversy:

> (F) the significance of the public and private values of the probable relief to individual class members in relation to the complexities of the issues and the burdens of the litigation;

The first observation was that it is logically difficult to fit this drafting form into the list of findings required in the initial paragraph of (b)(3). It clearly does not bear on predominance of common issues, or probable success. It fits, if at all, only with the determination whether a class action is superior to other available methods and necessary for the fair and efficient adjudication of the controversy. This factor is likely to be relevant only when individual claims are too small to justify the cost of nonclass adjudication, so that a class action is necessary if the controversy is to be adjudicated, and so that it is

difficult to deny that a class action is superior to alternatives that will not lead to any adjudication of the controversy. There may be a better drafting solution if this factor is to be adopted.

In support of some such approach, it was urged that this issue is a major matter. Although the Federal Judicial Center study shows median individual recoveries in class actions across a range from $300 to $500, there are many illustrations of far smaller recoveries. The "two dollar" individual recovery is trivial, and is responsible more than anything else for the "bad name" of class actions. The courts are asked to shoulder a considerable burden, to conscientiously administer cases that mean little or nothing to individual class members but enrich class counsel.

Of course the contrary argument will be made that what is important is not the perhaps trivial individual recovery but enforcement of the social policies embodied in the legal rules that support the recovery. The malefactors must not be allowed to retain their ill-gotten gains because they have managed to profit from small wrongs inflicted on many people, and because public enforcement resources are not adequate to the task assumed by the class-action bar. But courts must pay the price of administering this form of justice, and the price is paid at the expense of litigants who present individually important claims that also rest on important social policies. The question whether to devise means to punish all wrongdoers is a question of political and social policy that should be left to other agencies of government. They should find the means to reach a proper level of enforcement, not civil rules adopted through the Rules Enabling Act process.

The median individual recovery figures of the Federal Judicial Center study were again advanced to show that although the typical figures are far below the level needed to support individual litigation, the figures are not trivial. Across the four districts in the study, median individual recoveries ranged from $315 to $528.

It was proposed that all of these concerns might better be addressed by a more thorough revision of factors (D), (E), and (F) in the Rule 23(b) calculus:

(D) the likely difficulties, expenses, and burdens if the controversy is resolved by class adjudication rather than by separate individual actions;

(E) the likely benefits to individual class members if the controversy is resolved by class adjudication rather than by separate individual actions; and

(F) the public interest, if any, in having the

controversy resolved by class adjudication rather than by separate individual actions

(F) {alternative} whether the predominant motivation for class certification is counsel's interest in fees rather than the benefits sought for class members

It was agreed that if there is to be a factor F, and if it is to have the force suggested, its structure and placement are important. Various committee members had attempted to combine factors (E) and (F) of the draft version, and encountered difficulty. These efforts commonly wound up in the direction of asking whether the probable relief to individual class members is sufficient to justify the costs and burdens of class litigation, or more simply whether the probable relief is worth the effort. One difficulty arises from the meaning of the relatively neutral but open-ended reference in the draft to the "significance" of the public and private values of class relief. Identification of public and private values, and particularly of "public values," involves a wide-open element of discretion that may be too broad.

Turning to the cost and effort dimension, the Committee asked for a review of the attorney fee awards found in the Federal Judicial Center study. The response was that median gross monetary recoveries ranged in the four different courts from $2,000,000 to $5,000,000; attorney fees ranged from 20% to 40% of class recoveries, and the higher percentages ordinarily were associated with smaller gross recoveries.

Attention then focused on the issue that many believed to lie at the core of the F factor issue. There are significant problems in administering class actions that yield only trivial individual recoveries — the "$2 recovery" became the symbol of this phenomenon. But there is a deterrence value in enforcing existing social policy as captured in current law. The F factor seeks to incorporate this value by focusing on the public value of the probable relief, but may not capture the importance of deterrence and forcing disgorgement of ill-gotten gains. The very elasticity of the public value concept, indeed, virtually ensures that very good judges will reach different results in cases that seem indistinguishable. A focus solely on the insignificance of private relief, however, leaves out the deterrence function.

The need to pursue deterrence through privately instituted class litigation was challenged. Congress can, if it wishes, create a bounty system to encourage private enforcement of public values. Qui tam actions embody precisely such a system. The question is whether Rule 23 should continue to play a comparable role. This function has been absorbed by Rule 23(b)(3) over many years in which it was adapted to functions that never were

anticipated by its authors. There was no imperative command that the rule be adopted. There was none that it be adapted as it has been. It should be possible to reexamine the question whether it must continue to function as an incentive to lawyers who at best can pursue the public interest only by means of the inefficient, costly, and pressure-ridden device of artificially aggregating vast numbers of individually trivial claims. Why not cut back on this outgrowth, leaving it to Congress to devise better means of enforcement in the public interest where better means really are desirable? Even the class action represents litigation with parties. It began life simply as a procedural device to facilitate effective determination of individual claims. It becomes quite a different procedural device — and perhaps more a substantive tool than a procedural device — when it is abused by fee-inspired lawyers in the name of social policy. It is brought on behalf of the constituent members of the class, and it is they who are bound by the judgment. It cannot be brought without defining a class of real people or legal entities. Why not focus solely on the benefits to the class members, as parties? If there is meaningful individual relief, class litigation makes sense. Lawyers who bring such class actions will be rewarded, and the public interest is served. But there are actions in which individual benefits are trivial or nonexistent. Why should class actions be the means of enforcing public values in such settings?

Quite apart from the direct costs of achieving public enforcement by aggregating trivial individual claims, it was observed that this device has contributed to a public sense of cynicism about courts, lawyers, and the law.

A first rejoinder was that the image of the $2 recovery is misleading. There are few such cases. What of a case with 20,000 claimants with $25 individual recoveries: is $500,000 too trivial to ignore? How will a judge decide wither $25, or $200, is important enough — whether the calculation also includes public values, or is limited to private values?

A second part of the response was that whatever may have been intended when the 1966 amendments were adopted, the social-enforcement function has become part of Rule 23. It is, in a real sense, woven into the fabric of social justice. The idea is to deter the conduct, in a manner somewhat analogous to punitive damages. If the costs of administering individual remedies are untoward, the answer may lie in substituted relief in the models often characterized as "fluid" or "cy pres" recovery.

Sheila Birnbaum was then asked to address the committee. She began by noting that many practitioners are exposed to class actions across the full national scene. They are proliferating. One new field of growing activity involves state-law attacks on the

drafting failures of insurance policies, loan forms, and the like, framed as fraud claims but in fact involving highly technical matters. There are no statistics, but actions like this are common. And they enforce no meaningful social policies at all. Anticipating the later discussion, she also addressed the use of settlement classes. They often are proper; disagreement with the result in one or another prominent case should not disguise the importance of settlement as a means of resolving problems that otherwise may be intractable. Choice-of-law problems provide one illustration of the reasons that may support use of a settlement class where a litigation class would not be possible. It is not clear that the Rule 23 draft does enough to support settlement classes.

Further doubts were expressed about allowing courts to turn a certification decision on assessment of the public values to be served by a class victory. Rule 23 is what it has become. It is troubling. But the fact is that public enforcement agencies simply do not have the resources to achieve comprehensive enforcement of all our public laws against all significant violations. Rule 23 enforcement has become a major feature of the enforcement system, and only political judgments can justify substantial alteration. In addressing securities class actions, for example, pending legislation seeks simply to address specific perceived abuses, not to retrench the central role of class actions in vindicating individually small claims for violations that, in the aggregate, have inflicted sufficient total injury to repay the private costs of class-action enforcement. These problems are too much political to be addressed through the Enabling Act process. Congress is the agency to correct them.

These doubts were repeated in a different voice. Discretion needs anchors, it needs guidelines. Members of the Committee have expressed quite different views as to the proper interpretation of the draft (F) factor. It will be very difficult for district judges to administer, and the difficulty will generate costly uncertainty. This approach almost invites the troubling response that class actions are being trimmed to the "just-the-right-size" formula: if the problems are too small, or too large, Rule 23 assistance will be denied. When suit is filed, the parties and lawyers do not agree that it is a "$2" case. If attorney fees are the problem, the Committee should address that problem directly.

Another problem was seen in the feature of the draft that limits consideration of the burdens of certification to (b)(3) classes. Various illustrations offered in the Committee discussion have included (b)(2) classes in which injunctive or declaratory relief seemed to offer trivial benefits to individual class members. And in any event, it does not seem practicable to separate consideration of the probability of success from the

importance of success. As with the approach sketched on page 22, it would be better to restructure factors (D), (E), and (F) together. It also might be better to incorporate a direct reference to cases in which attorney fees seem to be the motivating factor behind the litigation.

The suggested direct focus on attorney-fee motivation spurred the observation that the private attorney general aspect of class actions is not of itself untoward. It is accepted in actions that yield significant benefits to individual class members. The question is whether it should be accepted in actions that do not yield significant individual benefits. Private enforcement can be wise; the question is whether it is desirable absent significant individual benefits. The antitrust laws, for example, encourage private enforcement by treble damages and attorney-fee awards, but provide these encouragements only to people who can prove antitrust injury.

So, it was suggested, the draft F factor may be too general. How might it be narrowed, reducing concerns about open-ended discretion and avoiding even the appearance of trespass on areas of social-political policy? Would it help to seek something simpler than a factor that bears on the also discretionary (b)(3) determination whether a class action is superior and necessary? The questions are first, what is the proper role of the committee in reconsidering the ways in which Rule 23(b)(3) has evolved over three decades of judicial interpretation? Second, what direction should be taken? And, third, what language will best effect the intended changes?

One approach would be to attempt to distinguish between the deterrence that arises from a meaningfully compensatory remedy and the deterrence that arises from the in terrorem function of aggregating trivial claims. Not all deterrence is desirable, particularly if it arises from the disproportionate burdens and risks of pursuing judgment on the merits. Focus on the public interest may legitimately recognize that there may be no public interest in a particular proposed means of enforcement — the rule even could be drafted to focus on "the public interest, if any * * *." This leaves substantive concerns to substantive law, not the mode of relief. This approach, however, does not directly address the difficulty of understanding just what public values are involved in any particular proposed class action. It must be remembered that all of this discussion addresses a situation in which there is a strong claim on the merits but small individual damages. What is the public interest then?

The difficulty of the values concept was finally addressed by a proposal that the factor be redrafted in terms of public interest and private benefit. On motion, the Committee cast 11 votes, with

no dissent, to adopt the following language as a working draft:

> <u>(F) whether the public interest in – and the private benefits of – the probable relief to individual class members justify the burdens of the litigation;</u>

The Committee Note to this factor would explain that the burdens of litigation include not only the costs of class litigation and the complexity of the issues, but also the in terrorem effect of certification.

Settlement Classes

Discussion of settlement classes began with the reminder that this topic has come in for renewed attention in conjunction with dispersed mass tort actions. In re General Motors Corp. Pick-up Truck Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995) has surveyed the terrain. Two asbestos cases are approaching appellate arguments in the Third and Fifth Circuit. The issues are open for debate and the law is in flux. The first question is whether the Committee should attempt to deal with these issues while the litigation cauldron is boiling. This question does not imply that the Committee should not consider the problem; to the contrary, the Committee already has begun the process, and should make a deliberate decision whether anything useful can yet be done. But it may be the course of wisdom to decide that the time for action is not ripe. The risks of defendant-created plaintiff classes are not new. But the risks are much affected by the way in which the class is structured. An opt-out class is less threatening; consent is very important. An opportunity to opt-out knowing the actual terms of a proposed settlement can be particularly useful to ensure individual fairness. Other questions include the basic question whether it makes sense to certify a class for settlement purposes when the same class would not – and often could not – be certified for litigation, and whether it is proper to permit a class that is first proposed for certification at the same time as a proposed settlement is presented for approval. Settlements that seek to include "futures" claimants who do not yet have enforceable claims present quite different issues. Great savings in transaction costs can be achieved by means of settlement classes. And they may facilitate claims administration structures that achieve a measure of equality in the treatment of different claimants that could not be achieved by any other means.

The questions are large. The drafting chore may not be difficult once the questions are answered. But finding the answers remains difficult. The Committee has elected not to press forward with the draft that would have collapsed the categorical distinctions between (b)(1), (b)(2), and (b)(3) classes,

recognizing the special origins and legitimacy of (b)(1) and (b)(2) classes and the risk of losing this history. Is the tie to litigation equally important to the legitimacy of class certification, or can the real-world importance of settlement be recognized in the text of the Rule? Notice and adequate representation will remain crucial. The opportunity to opt out, perhaps at the time of settlement as well as at the time of certification, may remain equally important.

The gravity of these questions led to the suggestion that perhaps settlement classes should not be treated simply as a factor subsumed in the (b)(3) certification process, but should become a new and separate Rule 23.3. The rejoinder was that any new rule would have to duplicate many provisions of Rule 23; there should be a way to make settlement classes a separate part of Rule 23.

It was urged that the decision whether to act now should not turn on anticipation of the guidance to be provided by pending cases. These cases will be controlled by the current language and structure of Rule 23, and by the specific settlement events in those cases. The first issue is whether the rule should address settlement classes as a separate phenomenon; the mechanics should be deferred until that decision is made. The question is whether it is proper to view the requirements for certification differently when certification is sought solely for purposes of settlement, not for litigation. The Rule or the Note can emphasize the distinctive importance of notice and adequacy of representation in settlement classes.

One ground for resisting settlement classes is the danger of sloppy thinking about the class definition. Another danger is presented by cases in which the settlement is worked out before the request for certification. Two parties negotiate a prepackaged complaint, certification, and settlement, and then present it for approval by a process that lacks any of the safeguards provided by a true adversary proceeding. It is not really clear whether there is an Article III case or controversy in this setting. There is some force to the view that the court is simply being asked to peddle res judicata through the group of plaintiffs' lawyers who made the lowest and most attractive bid to the defendants. How can a court ensure that there was genuine adversariness in negotiating the settlement? And how can it ensure that there was no disqualifying conflict of interests among different people who are lumped together in a single supposed class? There is a great practical value in settlement classes, but also a great strain on the system. How can adequate representation of class members be ensured, and by whom? Perhaps the impending Third and Fifth Circuit decisions will provide helpful guidance.

From a somewhat different perspective, it was urged that there

should not be any need to amend Rule 23 to support settlement class certifications. All of the requirements for certification must be met. But the question whether the requirements have been met can be addressed from the perspective of settlement, not the problems of adjudication. The Third Circuit General Motors Pickup decision can be read to reject this view, and to insist that certification is permissible only if the Rule 23 requirements would be met for purposes of litigation. If the opinion is read that way and is followed, then Rule 23 should be amended to restore the meaning that should be found in its present text. The purpose of certifying a settlement class is to provide benefits for class members — present claimants — and to reduce the transaction costs for all parties. The court has an important role to play by administering settlement through Rule 23; without this judicial supervision, defendants in the dispersed mass tort cases may attempt to establish nonjudicial claims-administration procedures that settle individual claims by means that do not inform claimants as well, and that do not protect individual interests as well. Most settlements in these cases occur after there have been individual judgments in individual actions; the terms of settlement are informed by the results of actual adjudications, and the exercise of judicial review is similarly informed.

This defense of settlement classes focused attention on Rule 23(e). It was observed that it is difficult enough to provide effective judicial review of settlements reached in actions certified for class adjudication, in substantial part because the parties cease to be adversaries when they join in seeking approval of a settlement, and suggested that these problems may be exacerbated with settlement classes. The fairness hearing, urged by some as adequate protection, does not do the job. The best lawyers and best judges can work together to fashion a fair settlement, present the alternatives effectively, and accomplish an effective review. But not all can get it right. Once a settlement is proposed, moreover, other class-action lawyers can undertake a campaign to encourage opt-outs, promising to get a better deal.

The case-or-controversy theme returned to the discussion, with the statement that it is essential that there be a bona fide dispute between real parties. There is no authority in the Enabling Act or Constitution to provide for settings that do not involve a valid dispute presented for actual decision. A settlement class divorced from a litigation class is illegitimate. Courts may be doing it, but it should be off-limits.

This view of the "real dispute" issue was met by the observation that many cases come to court this way. At the very least, there are nonclass individual actions pending, ordinarily many of them. Some of the individual actions may be consolidated by nonclass means. A settlement class is sought because everyone

involved wants a global resolution, and for good reason. The proposed settlement reflects many antecedent real disputes. It should be enough that the settlement class meets Rule 23 requirements as applied to settlement, not litigation. And there are objectors — there is always someone who comes forward to challenge the settlement. Some settlement classes involve large claims, some involve small claims. Settlement classes will continue to occur unless the Committee acts to prohibit the use of Rule 23 in dispersed mass torts. The settlement terminates claims that were real cases or controversies; it simply moves them into a class context.

The case-or-controversy discussion led to the question whether a settlement class can be used to expand jurisdiction, reaching people who could not be forced into an adjudicated class. It was suggested that "force" is not proper, nor even an opt-out approach, but that an opt-in class should be proper.

The praises of settlement classes were then sung by reference to the silicone gel breast implant cases. They could not be tried as a class. Choice-of-law problems would be insurmountable. In addition, differences in the facts relevant to different defendants would defeat a single action against all defendants. The critical thing is to get understandable notice to plaintiffs who demonstrate understanding by making informed choices. There are now thousands of individual actions outside the class, and thousands more are being filed every month. Asbestos litigation may provide even more persuasive justifications. There are large numbers of plaintiffs with clearly "real" claims. Manageability is very different for settlement than for litigation. If individuals consent, the settlement class should be appropriate.

Robert Heim observed that it is easy to be distracted by the common concern for the settlement class action that first comes to court as a prepackaged complaint, certification-by-consent, and settlement. The fear of collusion is genuine, and it is fair to worry whether courts can provide effective protection in the process of reviewing the settlement. But defendants who face massive litigation want to resolve the many problems that arise from dispersed actions. It should not be controlling whether the negotiations occur before or after the comprehensive class action is filed. The court can gain help in reviewing the settlement by making sure that effective notice is provided to class members. In addition, there is a whole new group of class-action lawyers who represent objectors, providing the adversary elements that otherwise would be missing. In addition, it would be desirable to appoint a guardian ad litem to provide independent representation for the class; if it is congenial to achieve this function by relying on the "master" label, that should be helpful.

The view was repeated that even prepackaged settlements come to court as the fruit of much earlier litigation.

It also was suggested that more thought should be given to adding to Rule 23(e) more detailed guidance on the process for reviewing and approving proposed settlements. The Manual for Complex Litigation provides guidance now. But perhaps Rule 23(e) should be elaborated along the lines recently developed by Judge Schwarzer.

The focus of the settlement discussion on dispersed mass torts led to the question whether Rule 23 should be used to make it easier to resolve these problems. The easier it is to resolve claims, the more claims there will be, and the more mass-tort class actions.

The prospect that ready access to settlement-class litigation may increase the volume of litigation was discounted by the observation that at least in asbestos litigation, the focus on the detailed manageability of class litigation blinks the reality that the alternative is no more individual than a class action. There are lawyers with hundreds or even thousands of clients, whose relationship with their clients is no more real than the relationship between class lawyers and nonrepresentative class members. And they too are said to be settling cases in batches, by group settlements that focus on a total sum that, as a practical matter, is allocated among clients by the lawyer who represents them.

The settlement-class topic was left unresolved. The Committee is anxious to hear specific proposals that go beyond the tentative beginnings in the discussion draft. The topic will remain on the agenda for the April, 1996 meeting.

Federal Judicial Center Study

The Federal Judicial Center study of class actions was referred to throughout the class-action discussion. Committee members had the nearly-final version of the report that was prepared for this meeting. A brief summary of the report was provided by Thomas Willging, and as to the appeal portion by Robert Niemic. The study, conducted in four districts, examined all actions that involved a class allegation and that were terminated between July 1, 1992 and June 30, 1994. The districts, chosen for believed high levels of class action activity and geographic dispersion, were the Northern District of California, the Northern District of Illinois, the Eastern District of Pennsylvania, and the Southern District of Florida. The total number of cases with class allegations was 418. The data are representative only for those courts over the study period.

The first summary observation was that the study shows that class actions are commonly necessary means of enforcing the claims that they involve. Among the four districts in the study, the highest individual recovery figure was $5,331, an amount too small to support individual litigation. (By way of contrast, a study of litigation in the 75 largest counties by the National Center for State Courts showed average recoveries of $52,000 in personal injury actions, and $57,000 in fraud actions.)

The next observation was that despite the modest amount of individual recoveries, the aggregate recoveries showed that class litigation is an effective deterrent instrument. After deducting attorney fees, the median net settlements in certified Rule 23(b)(3) class actions ranged from $800,000 to $2,800,000 in the four courts; the median class sizes ranged from 3,000 to 15,000.

The entire study included 13 certified classes with no net monetary distribution. Five of them sought primarily injunctive relief. Some had nonmonetary distributions such as rebate coupons that could not be valued by the study. It seems likely that if the court had been able to foresee the results in the cases that did not involve significant injunctive relief, the classes would not have been certified.

It is not possible to use the study to predict what effects would follow from a requirement that the certification decision consider the probable outcome on the merits. The present system strongly discourages any consideration of the merits. But the study does show that through motions to dismiss or for summary judgment, judges commonly do look at the merits before certification. A majority of the cases in all districts had a ruling on dismissal before or at the same time as the certification ruling, and many had summary judgment rulings.

The study found 28 cases, 18% of the total certified classes, that involved simultaneous certification and settlement. A substantial share of the classes were certified for settlement only.

The class actions endured far longer than average litigation in the same courts.

Turning to appeals, 15% to 33% of the study cases had at least one appeal. There were more appeals in the cases that were not certified as class actions than in the certified cases. There was a dramatically increased rate of appeal in the cases that went to trial — appeals were taken in 12 of these 18 cases, a very high rate for civil actions. The appeals led to affirmance in about 50% of the cases, to reversal and remand in about 15%, and to dismissal of the appeals in the remainder.

Few appeals dealt with class certification issues. The study cases involved one § 1292(a)(1) appeal; no attempt for mandamus review was observed.

DISCOVERY

Robert Campbell, representing the Federal Rules Committee of the American College of Trial Lawyers, reported on the Committee's informal review of the scope of discovery under Civil Rule 26(b)(1). The Committee studied alternative possibilities in detail. The rule now permits discovery of "any matter * * * relevant to the subject matter involved in the pending action." It also permits discovery of information "reasonably calculated to lead to the discovery of admissible evidence." The committee includes a wide variety of plaintiff- and defendant-lawyers, and they achieved a strong consensus that the expense, time, and difficulties parties encounter in litigation are caught up in Rule 26(b)(1). A distinguished federal judge has estimated that 95% of all discovery is irrelevant and never used. That figure may be a bit high, but it is in the right neighborhood. This is the core of the discovery problem. They urge the Committee to consider both of these sweeping elements of discovery. Their committee was unanimous in making this recommendation, an unusual event.

The Committee agreed to include this topic on the agenda for the April meeting. Deep concerns with discovery were voiced at the Southwestern Legal Foundation conference on procedure attended by many Committee members in March, 1995, and it is appropriate for the Committee to review these problems as part of the continuing duty to study the rules. The Committee should not simply put the topic aside because the same concerns have been expressed for many years without leading to any direct response. Many efforts have been made to cabin the occasional excesses of discovery. If they have not done the job, it must be considered whether the time has come to reconsider the central issues. The purpose of the suggestion is large. The inquiry must not be undertaken lightly.

Standing Committee Self-Study Draft

Professor Coquillette, as Reporter of the Standing Committee, addressed the Committee on the draft self-study report prepared for the Standing Committee. The draft is tentative; it has not yet been approved and does not reflect considered Standing Committee views. The Standing Committee is anxious to have the draft reviewed by members of all of the Advisory Committees. Some of the recommendations are very important to the future of the rulemaking process.

Discussion began with the composition of the Advisory Committees and the Standing Committee. The Standing Committee is

important not only to coordinate the several advisory committees, but also to provide deliberate review of their recommendations. The history of the relationships has been one that expands the role of the advisory committee chairs. Some earlier chairs of the Standing Committee did not ask the advisory committee chairs to attend the full Standing Committee meeting. Now it is routine to have the advisory committee chairs attend the full meeting. They have become valuable participants. Their role would be enhanced by making them voting members of the Standing Committee. As a practical matter, the advisory committee chairs now do most of the work that would be entailed by full membership on the Standing Committee, participating actively in discussion of recommendations made by all of the advisory committees. This change can be effected without significant dislocation; the Standing Committee can simply be enlarged to include the advisory committee chairs. There is no need for legislation.

The Committee unanimously adopted a resolution supporting Standing Committee membership for advisory committee chairs.

Other Rules

Admiralty Rule B had been on the agenda for this meeting. The need to integrate Rule B with the 1993 amendments of Rule 4, however, presents challenging questions. Discussion of the necessary changes was put off to the next meeting to allow more thorough preparation.

A proposal that the rules require use of recycled paper and double-sided copying for all papers filed in district courts was held for continuing study.

Two proposals that had been made to the Committee were put aside as outside the Committee's role. One was creation of a privilege against discovery of police internal investigation reports. This proposal was found better suited to the Evidence Rules Advisory Committee. The other proposal was adoption of a requirement that successful defendants recover attorney fees in actions under 42 U.S.C. § 1983 or the Americans with Disabilities Act; if the unsuccessful plaintiff is unable to pay the award, payment by the plaintiff's lawyer should be ordered. This proposal was found to involve matters of substantive law suitable to Congress, not the Rules Enabling Act process.

Several other significant proposals were deferred for future consideration. Although many of them involve potentially useful improvements of the Civil Rules, the Committee does not have sufficient time to devote appropriate attention to every such proposal when the proposal is first advanced. Perhaps more important than Committee time constraints are the limits on the

capacity of the full Enabling Act process. It is not only this Committee, but also the Standing Committee, members of the bench and bar, the Judicial Conference of the United States, the Supreme Court, and Congress that must lavish searching scrutiny on proposed rules. The Committee has proposed a continuing series of important rules changes, and must husband the resources of the process to ensure full evaluation of the most important proposals.

The Copyright Rules present a special problem because it seems that few lawyers have the experience needed to help the Committee determine what (if anything) should be done beyond amending Copyright Rule 1 to reflect that the 1909 Copyright Act has been superseded by the 1976 Copyright Act. Advice is being sought.

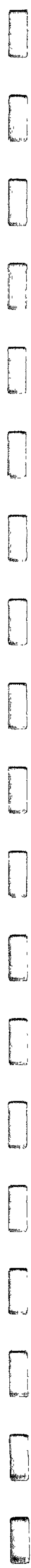
Next Meeting

It was tentatively decided that the next Committee meeting would be held on April 18 and 19, 1996.

With thanks to the several observers who participated helpfully in the meeting, and to the Administrative Office staff for its unfailing strong support, the meeting adjourned at 4:40 p.m. on November 10.

Respectfully submitted,

Edward H. Cooper, Reporter



Agenda Item 11

RECEIVED 12/7/95

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO:	**Hon. Alicemarie H. Stotler, Chair Standing Committee on Rules of Practice and Procedure**
FROM:	**Hon. D. Lowell Jensen, Chair Advisory Committee on Federal Rules of Criminal Procedure**
SUBJECT	**Report on Proposed and Pending Rules of Criminal Procedure**
DATE:	**December 4, 1995**

I. INTRODUCTION.

At its meeting October 16-77, 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 are attached.

There are no items affecting the Rules of Criminal Procedure which require action by the Standing Committee at its January 1996 meeting.

II. RULE OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT: RULE 24(a).

A proposed amendment to Rule 24(a) is currently pending public comment. The amendment would provide for attorney-conducted voir dire of prospective jurors and parallels a similar amendment to Rule 47, Federal Rules of Civil Procedure. Two dates

have been set for hearings on the proposal: December 15, 1995 in Oakland, California and February 9, 1996 in New Orleans, La. It appears that a number of witnesses will appear at the scheduled hearings.

III. RULES PENDING BEFORE THE ADVISORY COMMITTEE

The Committee has considered proposed amendments to Rule 11 (participation by court in plea discussions), Rule 26.2 (definition of statement), Rule 31 (individual polling of jurors), Rule 33 (timing for motion for new trial), and Rule 35 (reduction of sentence).

Although the Criminal Rules Committee has no proposed amendments to present to the Standing Committee at this time, the Committee decided to consider specific language to amend Rules 11, 31, 33, and 35(c) at its April 1996 meeting.

IV. RESTYLING PROJECT

At its October 1995 meeting, the Committee considered its upcoming role in restyling the Rules of Criminal Procedure. Two subcommittees were apppointed to review and monitor the drafts prepared by Mr. Garner, and to report on the drafts at the Committee's April 1996 meeting.

V. LOCAL RULES PROJECT

A subcommittee was also appointed to study the local rules identified by Professor Mary Squiers of the Local Rules project as worthy of consideration as amendments to the national rules. That subcommittee is to report on its progress at the Committee's April 1996 meeting.

Attachment: Minutes of Committee Meeting

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 16-17, 1995
Manchester Village, Vermont

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Equinox Hotel in Manchester Village, Vermont on October 16 and 17, 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, October 16, 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
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge Alicemarie H. Stotler; Chair of the Standing Committee on Rules of Practice and Procedure; Judge William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. John Rabiej and Mr. Paul Zing 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 noted that Professor Saltzburg's, whose term on the Committee had expired, had made invaluable contributions to the Committee and would be recognized at the Committee's Spring 1996 meeting.

II. APPROVAL OF MINUTES OF OCTOBER 1994 MEETING

Judge Crow moved that the minutes of the Committee's April 1995 meeting in Washington, D.C., be approved. Following a second by Judge Marovich, the motion 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 will become effective on December 1, 1995, absent any further action by Congress: 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). The Reporter noted that in its consideration of the rules, the Supreme Court had changed the word "must" to "shall" in order to maintain consistency within all of the rules.

IV. RULES CONSIDERED BY THE JUDICIAL CONFERENCE AND FORWARDED TO THE SUPREME COURT

Judge Jensen reported on the disposition of Rules 16 and 32 which had been forwarded by the Committee to the Standing Committee for action.. After considerable discussion at its July 1995 meeting, the Standing Committee had approved a modified version of the Committee's proposed amendments to Rule 16, which would have required the government to produce the names and statements of its witnesses prior to trial. In order to avoid any conflict with the Jencks Act, the Standing Committee deleted any requirement to produce a witness' statement. The Standing Committee had approved, without change, the Committee's proposed amendment to Rule 32 regarding forfeiture procedures.

Although the Judicial Conference approved Rule 32 for transmittal to the Supreme Court, it rejected altogether the proposed amendments to Rule 16 regarding production of witness names and statements. Although it was not clear from the Judicial Conference's action whether they specifically intended to reject the amendment to Rule 16 which addressed disclosure of expert witness testimony, the consensus of the Committee was that that amendment had also been implicitly rejected because the changes to Rule 16 had been treated as single unit by the Conference.

V. RULES APPROVED BY STANDING COMMITTEE FOR PUBLICATION AND COMMENT

The Reporter informed the Committee that at its July 1995, meeting, the Standing Committee had approved for publication an amendment to Rule 24(a) which would provide for attorney-conducted voir dire of jurors. The final language was the result of a compromise with a provision presented by the Civil Rules Committee for amending Civil Rule 47.

Judge Jensen indicated that hearings on the proposed amendment have been set for December 15, 1995 in Oakland and February 9, 1996 in New Orleans. He added that any members of the Committee interested in attending those hearings should contact the Rules Committees Support office.

During the discussion on Rule 24, Judge Jensen raised questions about the appropriate role of the Chair and Reporter at the Standing Committee meetings when proposed amendments are offered to the Committee's proposed versions. He noted that for amendments in which the Advisory Committee has invested a great deal of debate and time, it is not always possible to know just what amendments to agree to at the Standing Committee level. That point was made clear during the discussion at that Committee's meeting regarding the proposed amendments to Rules 16 and 32. In both instances, major changes were made to the rules as the result of negotiation and compromise in an attempt to go forward with some amendment, rather than remanding the issue to the Advisory Committee for further action. During the ensuing discussion, the consensus of the Committee was that the Chair and Reporter should have some reasonable discretion to assess the Standing Committee's proposed actions and agree to changes which they believe are in accordance with the Committee's views. Several members expressed concern that if the Standing Committee makes drastic changes to a rule published for comment, there may changed votes at the Advisory Committee level upon further consideration.

Judge Jensen also raised the related question of the appropriate role of the Committee vis a vis lobbying Congress for or against a particular amendment. Mr. Rabiej indicated that the legislative liaison office coordinates any such efforts with the chairs of the respective committees.

The discussion also raised the issue of the relationship between the Advisory Committees and the Standing Committee. Mr. Pauley noted that rarely does the Standing Committee expand on a Committee's proposed amendment; if any changes are made, they usually result in narrowing the Advisory Committee's proposal. Several members also observed that there is a difference in making changes to a rule which has been forwarded for possible publication and comment. In those instances, the Advisory Committee will have another opportunity to review the rule and may decide not to pursue any amendments to the rule. Judge Stotler noted that survey forms had been provided to the

Advisory Committee to solicit its views on a wide range of issues, including the relationship between the Standing Committee and Advisory Committee.

VI. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 11(e). Provision Barring Court from Participation in Plea Agreement Discussions

The Reporter and Judge Jensen informed the Committee of the practice used in the Southern District of California to expedite plea agreements. A judge, other than a sentencing judge, works with the parties to reach a plea agreement and recommends a particular sentence. The Ninth Circuit apparently became concerned about the procedure and the District now makes the procedure voluntary; the defendant may request that the first judge inform the sentencing judge of the latter's recommendation. The procedure may be in violation of Rule 11(e) which indicates that the "court" may not participate in plea discussions. The question, said Judge Jensen, is what is meant by the term "court?"

Mr. Pauley noted that while the Department of Justice probably would not oppose such a procedure, there would be concern that such would create unanticipated problems. Judge Dowd noted that there would be problems if the defendant was not present during such plea discussions and Judge Crigler observed that the provision in Rule 11 was for protecting the judge; he recognized, however, that need for disposing of high numbers of criminal cases was a high priority in some courts.

Justice Wathen stated that in state practice it is sometimes hard to avoid the situation. Although it is rare that the judge becomes involved, it may arise where the issues are close and the parties ask the judge for assistance in clarifying which way the case will go.

A number of members noted the apparent need for expediency but questioned whether getting a judge involved was proper. Judge Jensen noted that even if there is a consensus that a judge's participation is helpful, the Committee should nonetheless be sensitive to potential constitutional issues. Mr. Pauley observed that changing Rule 11 might raise other problems in that the change would be viewed as a blessing on other innovative procedures.

Several judges questioned whether the criminal case dockets were so heavy as to require such procedures. Judge Dowd noted that the smaller the court, the more frequently the judge sees the defense counsel in the courtroom. The rule, he noted, was designed to keep the judges out of the plea agreement discussions. Judge Marovich observed that plea bargaining is sometimes viewed negatively but that there is nothing

wrong with it and that there should be no problem with some judge, other than the sentencing judge, helping the parties reach an agreement. Mr. Martin expressed mixed feelings about the process used in the Ninth Circuit. He noted that the presence of a judge in the bargaining process can be intimidating and is not excited about opening the door to greater judicial participation at that stage.

Mr. Josefsburg indicated that he did not see any need for a change at this point and Mr. Jackson observed that it was important to first address the underlying policy issue in the rule and determine if there might not be another way to address the problem of moving cases along.

Judge Crow stated that he was disturbed by view that counsel might not be trusted to successfully negotiate plea agreement and noted that there might be a problem if it is the senior judge who is helping the negotiate a settlement. Judge Wilson opined that he could not envision a judge forcing a defendant into a plea agreement. Judge Marovich stated that where the parties do not reach a plea agreement because of a disagreement over the sentencing guidelines, the parties would like to know what the judge is likely to do regarding those guidelines. Justice Wathen noted that there may be cases where there is a legitimate need for judicial intervention. But he was also troubled about judges becoming involved with decisions affecting strategic delay. Mr. Josefsburg stated that there should not be any problem with one judge telling another judge what he or she thinks about the case and that the rule is designed to protect the parties where there is not an agreement.

Judge Dowd moved that the Chair appoint a subcommittee to determine the need for an amendment to Rule 11(e). Judge Davis seconded the motion which carried by a 6 to 5 vote. Judge Jensen subsequently appointed the following members to the subcommittee: Judge Marovich (Chair); Mr. Martin, and Mr. Pauley. Any proposed amendments will be discussed at the Spring 1996 meeting.

B. Rule 12. Proposal to Abolish Rule

The Reporter informed the Committee that a Mr. Paul Sauers had proposed abolishing Rule 12 as being unconstitutional. Following a very brief discussion, the Committee unanimously agreed not to take any action on the proposal.

C. Rule 26.2 Production of Witness Statements

1. Rule 26.2(g). (Scope of Rule)

The Reporter indicated that the Committee had received a suggestion from Mr. Michael R. Levine, an Assistant Public Defender, to make Rule 26.2(g) applicable to preliminary hearings. The Reporter also informed the Committee that he had searched the materials accompanying the most recent amendments to Rule 26.2, which had extended the production of statements requirement to other proceedings, and that he could find no reference to extending that requirement to preliminary hearings. Magistrate Judge Crigler noted that in his experience preliminary examinations are rarely encountered, an observation shared by Judge Jensen. Mr. Pauley noted that if the preliminary hearing includes testimony from a live witness, it would be logical to extend the production requirement to that proceeding. Mr. Martin added that there seems to be an increase in preliminary proceedings in some districts.

Following additional brief discussion, Magistrate Judge Crigler moved to extend Rule 26.2(g) to preliminary hearings under Rule 5.1. Mr. Martin seconded the motion which carried by a unanimous vote. The Reporter informed the Committee that he will draft the appropriate language for consideration at the Committee's next meeting.

2. Rule 26.2(f). (Definition of "Statement")

The Reporter also indicated that at its prior meeting the Committee had indicated an interest in addressing the question of what constitutes a "statement" for purposes of Rule 26.2. During the brief discussion which followed, Judge Stotler observed that the question of whether Rule 26.2 does not seem to raise any real questions; in most cases, the court is simply required to apply the facts to the definition which already exists in the rule. Mr. Pauley observed that the question sometimes arises as to whether an agent's recitation of what a witness has said, in a "302" falls within the definition. He added that the definition of statement in Rule 26.2 follows the definition in the Jencks Act. Judge Jensen observed that there is sometimes an issue as to whether an agent's notes about what a witness said amounts to a statement and Judge Davis noted that in his experience most 302's are excluded from the definition because they are not sufficiently verbatim. Finally, Judge Wilson noted that he believed that the FBI no longer asked witnesses to sign the 302's. No further action was taken on amending Rule 26.2.

D. Rule 31(d). Polling of Jurors

The Reporter noted that Judge Brooks Smith had raised the possibility of amending Rule 31(d) to permit the court to poll jurors individually, a procedure not

specifically provided for in the current rule. Judge Smith noted that the issue had arisen in a recent opinion in the Third Circuit, *United States v. Miller*, ____ F.3d ____ (3d Cir. 1995). Mr. Josefsburg moved that Rule 31(d) be so amended. Following a second by Judge Davis the vote to amend the rule was unanimous. The Reporter indicated that he would draft the appropriate language for the Committee's consideration at its next meeting.

E. Rule 33. Motion for New Trial

At the suggestion of Mr. Pauley, the Committee considered an amendment to Rule 33 to address the issue of what event should start the clock for filing a motion for a new trial and how long a defendant should have for doing so. Mr. Pauley indicated that the Department of Justice was recommending that the rule be amended to reflect that the clock starts with some event in the District Court. He noted that if the time runs from an appellate court's affirmance, the time may vary greatly from case to case because of the time consumed by an appeal. He noted that a two-year time limit would send the message that after guilt has been determined, the courts have two years to consider claims of innocence. Mr. Pauley added that to the best of his knowledge, the Department of Justice has no statistics on how many cases are processed under Rule 33. The purpose of the amendment, he said, would be to promote uniformity.

Mr. Martin expressed concern about the shortening the time for filing a motion for new trial, especially in capital cases where a new lawyer may be appointed to handle the appeal.

Following additional brief discussion about what should trigger the timing of a motion, Mr. Pauley moved that Rule 33 be amended to require that motions for new trials must be filed within two years of some event in the District Court, e.g. judgment. Judge Davis seconded the motion which carried by a 10-1 vote. Mr. Pauley indicated that he would draft language for the Committee's consideration at its next meeting.

Rule 35(b). Reduction of Sentence

At the suggestion of Judge T.S. Ellis (a member of the Standing Committee), the Committee considered a proposal to amend Rule 35(b) regarding reduction of a sentence where the defendant has provided pre-sentencing assistance. In his view, a defendant's cooperation may not separate easily into pre-sentencing and post-sentencing cooperation even though Rule 35(b) permits sentence reduction only for post-sentencing assistance. That rigid line, Judge Ellis indicated, raises problems of fairness.

Judge Wilson observed that a defendant who provides pre-sentencing cooperation would normally receive favorable consideration, if any, under the appropriate sentencing

guideline, USSG § 5K1.1. Post-sentencing cooperation is covered under Rule 35(b). Mr. Pauley indicated that the current rule seems to be working well. He noted that Rule 35(b) had been amended by Congress to include the word "subsequent." Following additional discussion on the history of the rule, Judge Crigler noted the problem of accumulating presentence and post-sentence assistance, where neither, standing alone, would be substantial. Mr. Josefsburg indicated that the word "subsequent" should be removed from the rule; it is difficult to accept, and explain to a defendant, the reason for such a rigid rule. In response to a question from Judge Dowd as to why the Rule includes a one-year provision, Mr. Pauley indicated that the language had been intended to encourage early cooperation and that the provision encouraged certainty and finality.

Following additional discussion about the history of Rule 35, Judge Davis moved that the rule be amended to include the language, "In evaluating whether substantial assistance has been rendered, the court may consider the defendant's presentence assistance." Mr., Josefsburg seconded the motion. The motion carried by a 7-3 vote.

Mr. Pauley raised concerns about a defendant being able to benefit twice from the same assistance; under the sentencing guidelines and also under Rule 35(b). The consensus of the Committee that the Reporter should draft alternative language in an attempt to meet the concerns raised by Mr. Pauley, and shared by others.

G. Local Rules Project; Proposed Amendments

The Reporter indicated that the Local Rules Project had completed its survey of local rules governing criminal cases and that Professor Mary Squires had provided, first, a list of rules which might be worthy of consideration by the Committee as proposed amendments to the national rules and second, a proposed uniform numbering system for local rules. Professor Coquillette provided background information on the project which had begun in 1986. He observed that similar studies and compilations had already been conducted on the civil and appellate rules and that the criminal rules had not presented nearly the number of problems encountered in those two sets of rules. He noted that a uniform numbering system for all of the rules would be especially critical in the age of computerized access by counsel and the courts to both the national and local rules.

Mr. Rabiej informed the Committee that his office had received inquires from district courts as to the effective date of any uniform numbering system and that it appeared that the issue would be presented to the Supreme Court in March 1996, with an effective date one year later.

Following additional brief comments, Judge Dowd moved that a subcommittee be appointed by the chair to study the local rules and report back to the Committee. Judge Marovich seconded the motion, which carried by a unanimous vote. Judge Jensen later

appointed the following persons to that subcommittee: Judge Davis (Chair), Judge Crow, and Judge Crigler.

VII. RULES AND PROJECTS PENDING BEFORE STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Status Report on Crime Bill Amendments Potentially Affecting Criminal Rules

Mr. Rabiej reported that there were no imminent amendments in the pending Crime Bill affecting the Criminal Rules.

B. Status Report on Federal Rules of Evidence 413-415

Mr. Rabiej indicated that the Judicial Conference's proposed changes to Federal Rules of Evidence 413-415 had gone into effect on July 9, 1995, without any changes by Congress. He stated that representatives of the Evidence Committee and the Administrative Office had met with members of Congress in an attempt to convince Congress to accept the Judicial Conference's proposed changes.

VIII. MISCELLANEOUS

A. Appointment of Advisory Committee Members to Other Committees

Judge Jensen noted that Judge Dowd had been appointed as the Committee's liaison to the Evidence Advisory Committee, to replace Professor Saltzburg.

B. Restyling the Rules of Criminal Procedure

The Reporter informed the Committee that it appeared that Mr. Bryan Garner was prepared to draft restyled criminal rules, as part of the Standing Committee's long range plan to modernize and streamline the language of all of the rules of procedure. Judge Jensen noted the potential problem of inadvertently making substantive changes in the rules. Professor Coquillette noted the value of restyling the rules, including catch-up changes or minor changes which may have been deferred. The Reporter observed that for the last several years, a number of rules had already been restyled. i.e., Rule 32 which had been completely reorganized.

Mr. Pauley shared the concern raised by Judge Jensen that restyling changes might result in substantive changes. He queried whether the Supreme Court had been informed

the pending major changes in the rules. Judge Stotler indicated that she would be meeting with Chief Justice Rehnquist and that the issue would be addressed. She noted that Mr. Garner had assisted the Supreme Court in redrafting its own rules.

Judge Jensen and the Reporter indicated a possible method of addressing the proposed changes: Subcommittees could be appointed to review Mr. Garner's drafts and report to the Committee. Judge Jensen subsequently appointed two subcommittees to review those drafts: Subcommittee A (Rules 1-30): Judge Smith (Chair), Mr. Josefsburg, and Mr. Martin. Subcommittee B (Rules 31-60): Judge Dowd (Chair), Mr. Jackson, and Chief Justice Wathen.

C. Comments on Long Range Planning Subcommittee Report.

Judge Stotler requested that the Committee members complete the survey provided by the Standing Committee which would assist that Committee in analyzing potential long-range issues.

The Reporter indicated that the Committee had been asked to address two key issues: the role of the Advisory Committee Notes and the respective roles of the Standing and Advisory Committees. The second issue had been addressed at the beginning of the meeting. With regard to the Committee Notes, the Reporter stated that it did not appear that there would be two sets of notes, one for the Advisory Committee and one for the Standing Committee, which would reflect a sort of legislative history for any particular amendment. Judge Stotler indicated that the Chair and Reporter of the Advisory Committee should have the option of revising the Committee Notes to reflect any later amendments by the Standing Committee of the underlying Rule of Procedure.

D. Report by Justice Department on Proposed Amendments

Mr. Pauley informed the Committee that in the future the Department of Justice would be asking that several items be placed on the agenda: a possible amendment to Rule 6(e) regarding disclosures of grand jury information to state and federal authorities; and a possible amendment to Rule 41 to provide for searches of computers and for "sneek and peek" warrants.

IX. CONCLUDING REMARKS; DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee was reminded that its next meeting would be held at the Administrative Office of the United States Courts in Washington, D.C. on April 29 and

30, 1996. The Committee also decided to hold its Fall 1996 meeting in Portland, Oregon on October 7-8, 1996.

On behalf of the Committee, Judge Jensen expressed deep appreciation to Mr. Rabiej and his staff for making arrangements for the meeting

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Agenda Item 12-16

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

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CHAIR

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CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

MEMORANDUM

TO: Honorable Alicemarie Stotler, Committee on Rules of Practice and Procedure, Chairs and Reporters of Advisory Committees

FROM: Mary P. Squiers

RE: Annotated Bibliography

DATE: December 14, 1995

Attached please find an annotated bibliography of articles and other writings discussing court cost and delay in the federal courts. The document covers material from June 1, 1993 through the summer of 1995. As you may recall, I have provided you with several earlier annotations, the first covering material published through approximately April, 1991, the second covering material published from January, 1991 through June, 1992, and the third covering material from June, 1992 through June, 1993. This document is the result of long work from my research assistant, Howard Brown, who is now a second-year law student at Boston College. Howard's assistance was invaluable.

I will be available at the Standing Committee meeting in January to discuss any particular issues or questions you may have concerning this matter.

An Annotated Bibliography of Writings on Expense and Delay Reduction in the Federal Courts

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1. Introduction:

This document is the third edition of an annotated bibliography of articles and other writings that discuss court cost and delay (and related issues), covering material from June 1, 1993 through the summer of 1995. It contains 82 entries that refer to and annotate 72 different articles, most coming from law reviews and other periodicals, with a special emphasis on empirical studies of cost and delay reduction techniques. The focus was on the federal court system, but particularly informative writings on the state courts were also included. Most news-type articles, opinion pieces, duplicative writings, articles that have been "mooted" by subsequent revisions of law, writings on general topics of civil procedure, and other materials only marginally related to cost and delay reduction have been omitted.

For the sake of keeping this document manageable and currently relevant, only new items have been included. The second edition of this document contained 82 new items and 99 items from the first edition. Also, sections that appeared in the first two editions but which were largely composed of opinion pieces rather then empirical-based studies (such as "News" and "Interviews") were eliminated or consolidated into other sections. One new section, *The Reporting Requirement*, was added under the CJRA heading.

2. Research Methodology:

Citations to most of the writings described herein were obtained by using the WestLaw computer network. Several different queries, the most fruitful of which are listed below, were used within the TP-ALL database and cross-referenced on the LEXIS computer network.

To find articles addressing general topics of cost and delay reduction:

> ((COST TIME RESOURC! DELAY CONGESTION) /5 (SAVE REDUCE DECREAS! MINIMIZ! PREVENT CURTAIL)) /30 ((TRIAL LITIGATION JUSTICE PROCEDURE COURT) /10 (REFORM IMPROVE CHANGE)) & DATE (AFTER JUNE 01, 1993)

To find articles addressing specific topics of cost and delay reduction (for example):

> ("DIFFERENTIATED CASE MANAGEMENT" "DCM") & ("FEDERAL COURTS" "DISTRICT COURTS") & (COST TIME DELAY CONGEST! CASELOAD) /30 (REFORM SAVE SAVING! DECREAS! MINIMIZ!) & DATE (AFTER JUNE 01, 1993)

To find articles by some of the leading writers in the field (for example):

> AU (ROBEL DUNWORTH STIENSTRA SUBRIN) & DATE (AFTER JUNE 01, 1993)

The LegalTrac CD-ROM database was also researched with the keywords CIVIL PROCEDURE, COURT CONGESTION AND DELAY, and REFORM.

Finally, the footnotes of all investigated materials were perused for other significant and current articles and leads.

3. Expense and Delay Reduction in General:

Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833 (1994).

This article comments on the balance between reducing court delays and defining procedural due process. The article notes that "delay reduction" is often aimed for and yet it is rarely defined such that reformers can truly understand for what they are aiming and at what cost to due process. The language of the CJRA, for instance, is too vague and fails to set the perimeters necessary for courts to know when they have gone too far. Also, predetermined standards of reduction may be unrealistic and unresponsive to the needs of procedural due process. Finally, the 1986 and 1988 Harris Foundation surveys as well as the 1986 ICJ study are discussed. The author contends that these studies did not account for due process protections.

Robert J. Kerekes, *The Crisis of Congested Courts: One Potential Solution*, 18 SETON HALL LEGIS. J. 489 (1994).

This opinion piece blames court congestion problems on the increasing number of attorneys admitted to the bar and a smaller increase in the number of judges to hear cases. The author's proposed solutions include time limits for the discovery process enforced by sanctions such as paying costs, dismissals, mandatory arbitration enforced by "% more favorable" sanctions, and mandatory malpractice insurance for lawyers. Such solutions, the author argues, will ease court congestion, increase the professionalism of the bar, and increase the public perception of the judicial system.

Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23(1) JOURNAL LEGAL STUD. 569 (1994).

In this article, Professor Walker argues that civil rule making can be accomplished most efficiently by asking the Advisory Committee on Civil Rules to use existing research and data, such as that provided by law and economics approaches, before acting on the Rules. Using empirical data--that which is based on observation, hypothesis testing, and generalization--will increase predictability as to whether a change in the rules will actually benefit the system.

Robert G. Bone, *The Empirical Turn in Procedural Rule Making: Comment on Walker (1)*, 23(1) JOURNAL LEGAL STUD. 595 (1994).

In this article, Professor Bone argues that Professor Walker has gone too far in demanding that empirical data be used before any changes in the Rules are made. While the Advisory Committee should pay careful attention to empirical research, it should also be able to incorporate all available information relevant to Rule changes. First, empirical research is not the only way to attain predictability. Theoretical economic analysis may provide just as much predictability since it relies on rational choice--something which does not need to be tested. Second, Walker assumes, perhaps incorrectly, that the cost of "surprise" under the current system is so high that it is worthwhile to correct it. Bone suggests that Walker's proposal should be limited to those instances where surprise is such a problem. Also, the use of empirical data may not reduce surprise since, for instance, empirical data does not correct for long-term social and economic changes.

Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993).

Professor Burbank criticizes the rule making process for not incorporating enough empirical evidence in its decisions. He writes that "amended Rule 11 was promulgated in a virtual empirical vacuum" (at 844) and that the 1993 Rule 26 amendments were made with "little relevant empirical evidence" (at 845). The lack of empirical data makes rule maker's decisions more susceptible to Congressional override.

Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721 (1993).

This article questions the wisdom of using local rules to remedy the federal courts' delay and expense dilemmas. First, litigants' transaction costs increase due to having to discover and learn the new rules for their district. Second, because local rules will vary from district to district, federal practice is balkanized, uniformity is compromised, and general confusion is increased. Third, the litigants' forum selection process becomes more difficult. On the other hand, local rules help to "fill in the gaps" of the national rules, they provide local certainty and uniformity, and they allow for experimentation and creativity. The article also discusses the CJRA and the 1993 Amendments in respect to implementation of mandatory disclosure, discovery limitations, differential case management, and alternative dispute resolution.

Kim Dayton, *Judicial Vacancies and Delay in the Federal Courts: An Empirical Evaluation*, 67 ST. JOHN'S L. REV. 757 (1993).

This article, complete with two tables and thirteen graphs, purports that it is the "legal culture" that arises in district courts that is the cause of delay rather then case load, management or slow judicial appointment. In fact, because of a decrease in filings (14.4 per cent decrease between 1986 and 1991) and an increase in the number of judges, the raw filings per judge has generally decreased since 1986. The author argues, using case management statistics which resulted in 540 "observations", that where caseloads are managed by judges rather then lawyers, there is less delay. The study measured the effect of judicial vacancies on three delay-caused variables: filing-to-disposition time, issue-to-trial time, and percentage of three-year old cases. The result was an empirical showing that there is no relationship between judicial vacancies and court delay and that the former cannot predict the latter. More likely causes of the delay problem include increasing criminal caseloads (particularly, drug-war related actions), the complexity of motions and bench trials, non-enforcement of delay-reducing rules, and lawyers who lack the incentive to avoid delay.

A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 900 (1993).

In this article, the author encourages the use of empirical studies in evaluating the success of cost and delay reduction plans. However, he points out that such data may not be conclusive due to the difficulty of assessing causation and the problems involved with the lack of a strict control group by which to conduct comparisons.

3.1. Is There a Litigation Crisis?:

J. Stratton Shartel, *A Judicial System in Crisis? Getting Behind the Numbers*, 8 No. 10 INSIDE LITIG., Nov. 1994, at 1.

The author argues that statistics which seem to show that the civil justice system is not struggling with cost and delay problems do not necessarily reveal the true condition of the system. Case filing statistics as gathered by the AO showed only a 2.6 percent increase in filings between 1989 and 1993. Similarly, Federal Court Management Statistics show that the number of cases closed and cases pending between 1988 and 1993 have actually fallen. Median disposition times have fallen from nine to eight months over the same period. In order to get a true picture of the state of the system, however, one must examine different types of cases and determine what types have grown or decreased, differences between districts, the growth in the federalization of criminal actions, and the substantial growth in appeals. Studies done in these areas show an increase in the complexity of cases and the number of complex cases in given districts such as the Eastern District of New York (where "weighted filings" per judge have grown from 489 to 578 between 1988 and 1993). Further, these studies lead some experts to believe that district-to-district differences in litigant and attorney behavior may have more to do with explaining court delay then other standard measures.

Judge G. Thomas Eisele, *Differing Visions--Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935 at 1938 (1993).

This article, a response to Judge Parker's call for a system of more effective ADR techniques (see annotation below in Alternative Dispute Resolution section) first challenges the assumption that there is a litigation crisis at all. Using figures gathered from AO statistics, Judicial Conference reports, and Rand Corporation studies, Judge Eisele argues that the numbers do not show a crisis in the judiciary. The Rand study, for instance, found that delay in the nation's courts was no greater in 1986 then it was in 1971.

Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 801-02 (1993).

The author reports that there was little empirical evidence to support the concerns that Congress held regarding court delay during the Biden Bill process. In fact, the Rand Corporation study from around the same time showed no significant increase in delay in civil litigation since 1971.

Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 830 (1993).

Judge Weinstein reports that Administrative Office figures show that there has not been overwhelming growth in civil litigation. There were about 18,000 more cases filed in 1992 as there were in 1991; this moderate increase was the first since 1988. Given the size of the country and the litigation system, these numbers, the author argues, are not outrageous.

3.2. The Civil Justice Reform Act of 1990 (CJRA):

Civil Justice Expense and Delay Reduction Plans, as well as Reports of Advisory Groups, may be available in WestLaw's "CJRA" database, through the Federal Judicial Center, in files at Courthouses, and in law journals (e.g., the Advisory Group for the District of North Dakota submitted both documents to the North Dakota Law Journal which published them in 69 N. D. L. REV. 739, 859 (1993)).

The RAND Corporation's study on the effectiveness of the various cost and delay reduction plans incorporated by the districts under the CJRA is scheduled to be completed by December 1995.

3.2.1. Description and Implementation:

***Civil Justice Reform Act Report Submitted to Congress*, 26 THIRD BRANCH, Dec. 1994 at 9.**

This brief but informative piece summarizes the Judicial Conference's report on expense and delay reduction plans submitted to Congress on Dec. 1, 1994. In addition to listing several figures regarding the percentage of courts adopting particular reforms in their plans, the article also lists several advisory group recommendations for congressional action.

Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303 (1994).

Written by two members of the Rand Institute, this excellent article discusses the workings and preliminary observations of Rand's evaluation of the CJRA's pilot districts. The article begins by giving a short history and explanation of the CJRA and of the pilot program it established. It uses statistics and charts to show that the pilot districts and the comparison districts are representative of the federal courts at large. The article then explains how the Institute will evaluate the pilot program for its final report to the Judicial Conference. It will use court statistics gathered from over 10,000 cases and interviews and surveys from over 60,000 judges, lawyers, litigants, and ADR providers. The Institute will be evaluating topics such as case-management, time to disposition, litigant costs, and satisfaction with outcome and procedures. The article then gives a brief summary of the way in which the pilot districts have implemented the plans thus far.

Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879 (1993).

The author conducted a survey of the members of twenty six Advisory Groups; she reports on the results of 194 completed surveys. The information she gathered related to the membership composition of the groups (predominantly non-minority, male, veteran attorneys from law firms active in federal court litigation), the primary benefits that members believed the CJRA produced (increased understanding and communication between the court and the bar), sources of cost and delay problems (under funding of the courts, sentencing guidelines), etc. She also found that the Groups are generally conservative in their recommendations; that is, they tend to want to expand *existing* programs such as ADR. On the other hand, they were less conservative in their approach to mandatory disclosure systems which were recommended by a large number of Groups.

Carl Tobias, *Silver Linings in Federal Civil Justice Reform,* 59 BROOK. L. REV. 857 (1993).

In this excellent article, Professor Tobias briefly comments on various District Court's attempts to experiment with cost and delay reduction plans.

The Eastern District of California Advisory Group surveyed federal court attorneys and found that by pre-scheduling lengthy law and motion matters for the end of the motion calendar, lawyers spent less time waiting at the courthouse to argue motions.

The Western District of Texas' expedited tracking mechanism was found to be effective.

The South Carolina state court system's settlement week was so successful that the South Carolina Advisory Group recommended its adoption for the district courts.

The Montana District Court that has used the opt-out option has been more successful in obtaining litigant's consent to magistrate jurisdiction then those courts that have not used that option. This saves the time and resources of Article III judges.

The Northern District of Ohio has reduced expense and delay through its judicial case management program.

Interviews with practitioners in Arizona, Northern California, Massachusetts and Montana have revealed that the automatic-disclosure system seems to work well in non-complex cases and once attorneys have become accustomed to the system.

The Western District of Missouri's ADR system has increased the number of cases settled and has therefore effectively saved time and money.

3.2.2. Commentary:

Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts,* 46 STAN. L. REV. 1589 (1994).

Professor Tobias criticizes the promulgation of local rules as disruptive to uniformity, simplicity, and trans-substantivity as well as adding to the problems of cost and delay in civil litigation. He reports on the Local Rules Project 1989 findings that there were already over 5,000 local rules in the federal districts. Additionally, the district courts have their own general orders, special orders, scheduling orders and informal procedures. The author contends that local rules which demand that attorneys produce more documents (specialized discovery plans, for instance) and attend more meetings (pre-trial conferences and ADR sessions, for instance) increase cost and delay. The author also reports on a 1990 study by Heydebrand and Seron that questions whether there is a delay problem at all.

3.2.3. Inter-branch Communication:

Carl Tobias, *Silver Linings in Federal Civil Justice Reform,* 59 BROOK. L. REV. 857, 876 (1993).

Professor Tobias reports that civil justice planning and the passing of the CJRA have prompted communication between Congress and the Judiciary, as well as between those branches and offices such as the FJC and the AO. Increased communication has helped to center reform and planning on the true problems and needs of the federal court system.

3.2.4. The Reporting Requirement:

R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687 (1993).

This article reports on Section 476 of Title 28 of the CJRA which calls for the AO to publish a semiannual report that identifies, by judge, all motions and bench trials pending for more then six months. By increasing judicial accountability, the requirement encourages judges to act quickly on pretrial motions--an act which seems to relate directly to median disposition times. A Southern District of New York Advisory Group study of 2,000 cases found that those without motions were closed in 7.3 months while those with motions lasted 16.7 months. Mr. Dessem argues that overall, the reporting procedure seems to have worked. There has been a decrease in numbers of motions pending for six months (declined by 7 per cent), bench trials (declined by 3 per cent), and three-year old cases (declined by 5 per cent) in the one-year period since the first report was made. The Western District of Texas was particularly successful. It first reported 1,498 pending motions. One year later, it reported 595, a decrease of 60 per cent.

Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511 (1993).

The article analyzes the reporting requirement of the CJRA by discussing various causes of delay (broken down into "defensible" and "indefensible" delay), the history and implementation of the requirement, and the results of the requirement. A 1992 Administrative Office report found decreases in the number of motions pending for six months, bench trials, and three-year old cases (see above annotation for exact figures). Also, a survey conducted by Mr. Geyh found that judges are generally pleased with the use of the requirement. Nineteen of twenty chief circuit judges called the requirement "very effective" or "somewhat effective" in reducing delay. Further, as measured against five other delay reduction devices such as disciplinary measures and mandamus, the reporting requirement was considered to be the most effective.

3.3. Legislative Impact on the Judiciary:

Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285 (1994).

In this article, Senator Biden argues that Congress has an important role in helping to reduce expense and delay in the federal courts. The Senator uses quotes from *The Federalist No. 83*, *Sibbach v. Wilson & Co.* (312 U.S. 1, 9 (1941)), *Hanna v. Plumer* (380 U.S. 460, 472-73 (1964)), and the Rules Enabling Act--as well as policy arguments that Congress is in the best position to reform the courts--to support his assertion that Congress has the authority to act in respect to the courts' procedural rules. Also, Congress should maintain a system by which it takes the federal court docket into consideration when it deliberates over legislation that would create new federal causes of action. Federal courts are proper forums, the Senator argues, where state courts are unwilling (gender-based violence cases) or unable (multi-jurisdictional drug trafficking cases) to protect important federal interests.

William H. Rehnquist, *1993 Year-End Report on the Federal Judiciary*, 17:3 AM. J. TRIAL ADVOC. 571 (1994).

This annual year-end "wrap-up" published by the Supreme Court provides, among other things, summaries of the federal courts' workload, the Supreme Court's caseload statistics, and the work of the AO and the FJC. Chief Justice Rehnquist also discusses the legislative developments that have impacted the Third Branch. While commending the President and the Senate for confirming twenty-eight new Article III judges, he reminds the reader that there are still over one hundred judicial vacancies and that judicial vacancy is perhaps the most serious problem facing the judiciary. He also criticizes new crime bill measures that expand the role of the federal courts. Warning Congress to be wary of the balance between federal and state jurisdiction and that the federal courts are not equipped to handle the advent of new federal crimes, the Chief Justice suggests that Congress provide state courts with the assistance they need to handle their traditional jurisdictional responsibilities.

3.4. Magistrates:

R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN'S L. REV. 799 (1993).

Although the Brookings Task Force report (*Justice For All*) envisioned a subordinate, de-emphasized role for magistrates, this author points out that the Task force used no empirical evidence to support its findings. Further, the 1989 Harris survey which was used by the Task Force found that only 4-5 per cent of attorneys and 9 per cent of judges believed that excessive referral of discovery matters to magistrates is a major cause of cost and delay problems. Although there is no consensus among the districts on how to best utilize the magistrates, the author purports that they have not been effectively used. The author seems to believe that magistrate judges can help to ease cost and delay problems if they are used to conduct pretrial conferences, settlement conferences, and even act as "additional judges" where parties consent to magistrate judge jurisdiction. Expanding the role of magistrates will correspondingly increase their perceived judicial authority which will, in turn, allow their role--and the efficiency of the courts--to grow even more.

3.5. State Court Programs:

Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553 (1994).

The author contends that with 98 percent of all civil cases appearing in state courts, the states have a great opportunity to address cost and delay problems in civil litigation. States have broader authority then federal courts to advance a wide range of diverse procedural reforms in areas such as judicial administration, case management, ADR, and settlement incentives. Further, states may refer to the CJRA, reform plans from other states, and ABA proposals for assistance in formulating reform plans.

4. Federal Rules of Civil Procedure:

4.1. Rule 11:

Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study,* 1993 TR. LAW. GUIDE 137.

This article reports on data gathered from the author's study of cases filed in the USDC for the Eastern District of Washington and the Spokane County Superior Court; the study also includes data gathered from surveys of six federal judges, ten state judges, and 506 attorneys. The study found that of 6,841 cases filed in the federal court between 1983 and 1990, there were 110 formal Rule 11 requests made in 1.3 per cent of the cases (89 cases). In only 17 per cent of those instances (19 cases) were sanctions imposed while in 65 per cent of those instances (72 cases) sanctions were denied. The surveys found that federal court attorneys have been greatly effected by Rule 11: 71 per cent of the attorneys reported an increase in pre-filing fact inquiry and 63 per cent reported an increase in pre-filing law inquiry. Unfortunately, only 17 per cent of federal judges and 11 per cent of attorneys believe that Rule 11 has been able to decrease the cost of litigation; and while no federal judges believed that it increased the cost, 27 per cent of attorneys responded that it did exactly that. Also, 50 per cent of federal judges and a mere 5 per cent of attorneys believe that Rule 11 has decreased the time for case resolution; no federal judges believed it increased the time, but 22 per cent of attorneys did.

Herbert M. Kritzer & Frances Kahn Zemans, *Local Legal Culture and Control of Litigation,* 27 LAW & SOC'Y REV. 535 (1993).

This article analyzes the results of a 12-page survey of 2,421 federal court practitioners questioned about their direct experience with different levels of Rule 11 action in eleven districts in three circuits. The authors found substantial variations in the use of Rule 11 among the various districts; based upon a complex statistical analysis using linear regression, the authors credited the differences to structural or legal factors--such as caseloads and number of actors in the system--rather then to a "how we do things here" version of the "local legal culture" concept. That take on the local legal culture idea is more appropriate in the criminal system where groups of actors work together on a regular basis such that they arrive at expectations of how the system should operate.

Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress,* 59 BROOK. L. REV., 761, 797-803 (1993).

The author reports on The Third Circuit Task Force findings that Rule 11 was invoked in only .5 per cent of civil cases in that circuit in a given year after the 1983 amendment; there was a disproportionate number of successful motions aimed at civil rights plaintiffs, though. This, the Task Force credited to the general uncertainty of the law in that field. The FJC, in a study of its own, found that attorneys overwhelmingly support the amendment to Rule 11 but that certain areas of the law were more prone to sanctions (citing Thomas Willging, The Rule 11 Sanctioning Process 9-10 (1988)). Also, the FJC study found that in five districts it surveyed, Rule 11 was raised in 2-3 per cent of cases, rulings were made in 48-79 per cent of those cases, and of those rulings, 58-80 per cent were denials. It found that civil rights cases did not represent a disproportionate number of cases in which there was Rule 11 activity. The author reports that overall, empirical findings support the idea that the Rule 11 amendment has had a positive impact on reducing attorney abuse of the litigation system.

4.2. Rule 16:

Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials,* 35 ARIZ. L. REV. 663 (1993).

The author argues that judge-imposed limits on trial times will reduce the cost and delay present in our federal district courts. At the time of publication, six district courts had incorporated such proposals into their Civil Justice Expense and Delay Reduction Plans (Delaware, S.D. of Ill., Mass., E.D. of Texas, S.D. of Texas, and E.D. of Wisconsin) and other districts had done so within their local rules. To support his argument, the author puts forth statistics that show that the availability of civil trial time is declining. Between 1984 and 1992, for instance, the number of civil trials per judge has declined by 42 per cent despite an increase in cases filed and an increase in the number of judgeships. By mandating time limits, attorneys will be forced to refine their cases and the court's resources will be saved.

- **California State Court:**

Harry N. Scheiber, *Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960-1990,* 66 S. CAL. L. REV. 2050 (1993).

Historical studies have shown that procedural reforms such as changes in discovery rules, mandatory pretrial settlement, judicial assignment techniques and the addition of judgeships have not been entirely successful in curbing the cost and delay problems in California courts. However, since 1991, when the "Fast Track Program" was incorporated into all superior courts, court analysts have found improvements in the area of congestion. The Fast Track Program has allowed for greater judicial management of cases through specific limits for processing times of cases and time frames for each step of the litigation process.

4.3. Rule 26:

William O. Bertelsman, *The 1994 Annual Meeting of the Association of American Law Schools: Changing the Rules of Pretrial Fact Disclosure,* 46 FLA. L. REV. 105 (1994).

This article, written by the Chief Judge for the United States District Court for the Eastern District of Kentucky, discusses the author's experiment with disclosure. The highlight of his experiment seemed to be the early meeting requirement. The Chief Judge felt that it "sets a positive tone and gets things off to a good start." During the experiment with automatic disclosure, the docket saw a significant drop in discovery motions. The author concludes by writing that although automatic disclosure is not a cure-all for the problems of the federal courts, it does expedite cases.

Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery,* 23(1) J. LEGAL STUD. 435 (1994).

Using complex, mathematical formulas within an economic analysis, the authors of this article show that increased, voluntary discovery, in general, will increase the probability of settlement by increasing the pessimism and transaction costs of each party. Equalizing the costs of discovery will abate abuse and misuse, as well as help to avoid inaccuracy in dispute

resolution. This can be accomplished, the authors argue, by making the responding party bear the cost of discovery up to a particular, calculated point appropriate for specific classes of cases; beyond that point, the requesting party should bear all costs.

P.N. Harkins III, *Significant Changes in Practice and Procedure*, 27 CRIEGHTON L. REV. 709 (1994).

This article reports on the proposed changes to the Federal Rules of Civil Procedure. The author briefly describes the ethical dilemmas surrounding automatic disclosure whereby proponents stress the lawyers duty to the court and opponents stress adherence to the traditional attorney/client relationship.

Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994).

This excellent article by Professor Mullenix contends that the motivations behind the procedural reform movement--that America is over litigious and that the system is riddled with discovery abuse--is a media myth unsupported by empirical findings. The author sharply criticizes the 1988 Harris survey (which was used by the Brookings Institute), the Brookings Institute's *Justice for All*, and the legislative history of the CJRA for their lack of sound empiricism. Professor Mullenix instead applauds the case-based empirical methodology and findings of the 1978 FJC study of civil discovery, the 1982 FJC Baltimore discovery case study, and the 1993 National Center for State Courts study of civil discovery. The 1978 study examined discovery activity in over 3000 cases in six districts and found no discovery requests in 52 percent of the cases and more then ten requests in only five percent of the cases. The 1982 study, the results of which were never published, is important because it shows the difficulties of conducting empirical research of discovery. However, it did find that of the eighteen cases it studied, fourteen were free of discovery abuse, three had minor abuse, and only one was characterized as having major abuse. Finally, the 1993 study of 2000 cases found that 42 percent of cases had no recorded discovery activity. Of those cases that did conduct discovery, 37 percent used three or less pieces of discovery and only 14 percent had eleven or more requests.

Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges, Fed. Jud. Center, 1994.

See complete annotation below in the Other Publications and Sources section.

Lauren K. Robel, *Mandatory Disclosure and Local Abrogation In Search of a Theory for Optional Rules*, 14 REV. LITIG. 49 (1994).

This short opinion piece takes issue with that aspect of Rule 26 that allows district courts to opt out of its discovery requirements. Citing Donna Stienstra's work, the author points out that 52 districts have opted out of the mandatory disclosure requirements of Rule 26. The author argues that the opt-out feature of the Rule sacrifices uniformity (and the certainty, decreased costs, and improved court access that uniformity brings) without providing any benefit in merit-based case decisions.

Donna Stienstra, *Implementation of Disclosure in Federal District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26*, (March 1, 1994) (Fed. Jud. Center).

This highly informative document reports on district courts' activity since the implementation of disclosure. It presents tables that describe which courts have opted in and opted out of what parts of the new Rule 26. Of courts that have opted out, the tables describe what forms, if any, of disclosure the courts have introduced through local rules or Civil Justice Reform Act plans. A summary table shows that thirty-two courts have made a "final" decision to give effect to Rule 26(a). On the other hand, six courts have made a "final" decision to not give effect to Rule 26(a). Twenty-one courts have decided to not effectuate Rule 26(a), but have other provisions (such as a CJRA plan) for disclosure.

Carl Tobias, *A Progress Report on Automatic Disclosure in the Federal Districts*, August, 155 F.R.D. 229 (1994).

This brief article by Professor Tobias reports that 21 federal districts have rejected automatic disclosure altogether. He also makes the point that it is very difficult to determine the effectiveness of automatic disclosure since districts vary so much in their discovery mechanisms, local experimentation is relatively new, and very little empirical data on automatic disclosure has been gathered and analyzed. However, evidence gathered from practitioner and expert interviews seems to reveal that automatic disclosure works best when it is of a general, rather then specific, nature, when it is used in simple cases, and once attorneys have become familiar with the system. It does have the disadvantage of adding another layer to the discovery process and some have taken issue with the effect it has on the ethics of the lawyer/client relationship.

Anne Y. Shields, *The Utility of Disclosure as a Reform to the Pretrial Discovery Process*, 67 ST. JOHN'S L. REV. 907 (1993).

This article, written by a Member of the CJRA Advisory Group for the USDC for the Eastern District of New York, discusses different forms of disclosure as well as disclosures' effectiveness. The author begins with statistics taken from the Harris Survey which show that the average time of pretrial discovery is seven months. Importantly, she writes that this number shows that pretrial discovery is not "fraught with delay". However, the Harris Survey also showed that judges and lawyers perceive discovery abuse to be the most important factor contributing to costs and delays. Discovery abuse includes "over-discovery," failure to focus on pertinent issues, and lawyer refusal to produce discoverable information. The author argues that while limited disclosure may encourage early focus on issues, other problems such as over-discovery are better addressed through judicial control, deadlines, and speedy rulings. Further, because traditional discovery will still be necessary in complex cases, disclosure simply adds another layer of cost and delay, its semantic requirements such as "material" and "likely to bear significantly" are vague and will demand greater judicial involvement, and lawyers will still not be provided with the incentive needed to cooperate.

Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 AM. U. L. REV. 1465 (1993).

In addition to arguing that restrictions on discovery and the resultant restrictions on access to information will harm consumer litigants in product liability cases, the authors describe numerous empirical studies to show that the system of discovery is not riddled with abuse and is not a major cause of cost and delay problems. The studies reported on were conducted by various groups and during various periods of time over the course of about eighteen years (from the "Columbia Survey" in 1968 to an Iowa Supreme Court study in 1986).

- **Arizona State Court:**

Hon. Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11 (1993).

This excellent article by Judge Myers outlines Arizona's experiment in reducing cost and delay in the civil justice system. The experiment lasted 18 months and covered 8,200 cases in four divisions. The "Zlaket Rules," as they have become known, included measures to improve arbitration, requirements that complaints be served within 120 days of filing, mandatory pretrial conferences upon request of counsel or court, a limit of one expert per issue per side, and discovery reform. The discovery changes include a requirement (backed by sanctions) for automatic disclosure of all known facts and legal theories upon which parties will be relying. Also, limits have been placed on depositions (four hours each and only to parties, experts, and records holders), interrogatories (40), requests for admissions of fact (25), and requests for production of documents (10). Statistics have shown that cases in the experimental courts (the MAD track) finished 2 months faster then those in other courts. In cases not considered "complex," parties took fewer depositions, made fewer requests for interrogatory answers, admissions of fact, and production of documents. Non-MAD track courts saw three times the number of discovery motions as MAD track courts. Judges stated that less time and expense were used on discovery disputes since there were only one or two per month as opposed to the one or two per week that occurred in non-MAD track courts. Other impressive statistics abound in this article.

- **Louisiana State Court:**

Dennis J. Krystek, *Discovery Versus Delay in Civil District Court: A Cross-Sectional Pilot Study of Civil District Court Reveals No Significant Correlation*, 42 LA. B. J. 255 (1994).

This article reports on a study of how the discovery process impacts case disposition times. The study measured numbers of discovery activities (broken into interrogatories, depositions and motions to produce) against case processing times in 429 Orleans Parish Civil District Court cases. The study found that the majority of cases showed no signs of discovery abuse or relation between discovery and delay. Interestingly, it found that 44 per cent of cases did not involve any discovery at all. The study did, however, find an important distinction between the majority of simple cases (80 per cent of cases) and a minority of extraordinary, complex cases in which the discovery process was the main ingredient to litigation. In this latter type of case, discovery does seem to relate to delay. The author suggests that better judicial management of the discovery process may reduce cost and delay in those types of cases; however, judicial

management will have little effect on the majority of cases. Therefore, the smaller the percentage that the complex cases occupy of the overall docket, the less cost-efficient judicial management becomes.

4.4. Rule 68:

R. Bruce Beckner, *Advance Sheet: How Much is That Lawyer in the Window?*, LITIG., Winter 1994, at 57.

This opinion piece deals with the ability of prevailing parties to receive attorney's fees as part of judgment and the controversy regarding the determination of "reasonable" attorney fees. It discusses discrimination statutes and important federal cases such as *Gusman v. Unisys Corp.*, 986 F.2d 1146 (7th Cir. 1993). The author argues that one solution to economically inefficient litigation and practices by which one party attempts to outspend the other can be found in a reformed version of FRCP 68. As it is used and interpreted now, Rule 68 is limited by the holdings of *Delta Air Lines v. August*, 450 U.S. 346 (1981) and *Marek v. Chesney*, 473 U.S. 1 (1985), as well as by the fact that a Rule 68 offer of judgment is an admission of liability. The author calls for amendments to Rule 68 that would 1) allow all litigation expenses, including attorneys' fees, to fall under the term "costs," 2) erase the *Delta Air Lines* holding that a completely successful defendant cannot receive costs after an offer of judgment, and 3) permit plaintiffs to use Rule 68 by offering to accept a judgment from the defendant.

Gregory E Maggs & Michael D. Weiss, *Progress on Attorney's Fees: Expanding the "Loser Pays" Rule in Texas*, 30 HOUS. L. REV. 1915 (1994).

This article presents arguments for adoption and expansion of the "English Rule," responds to criticisms of the "English Rule," and suggests proposals for making Texas' current "loser pays" rule more comprehensive. Among their suggestions are 1) expanding current two-way fee shifting categories to include a greater number of kinds of actions and 2) the adoption of a "refusal to settle" rule by which either party could make an offer but one who refuses an offer and subsequently loses in judgment is required to pay to the other party fees comparable to his or her own.

John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993).

This article attempts to contradict the notion that using a pure form of the English Rule would help defray the cost and delay problems in American courtrooms by reducing the number of frivolous claims brought. The author highlights two studies and examines Alaska's experience under its schedule-of-fees program. One study was of settlement negotiation behavior in 529 California cases; although not specifically addressed to fee-shifting, the author evaluates the results of the study in light of what is known about behavior under the English Rule. He concludes that the English Rule would encourage the defendants to make greater use of hard bargaining techniques and add to the risk-aversion pressure of injured plaintiffs. The other study was of Florida's experience with the English rule which it used between 1980 and 1985.

4.5. Rule 83:

Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994).

The author argues that the CJRA does not mandate or authorize the district courts to create local procedural rules in conflict with the existing FRCP or other laws. The statutory and legislative history of the CJRA, as well as the text of the Act, show that it never intended to give federal judges the power to make the kind of substantive reforms that some districts have advanced. Professor Robel also argues, however, that the CJRA does not violate the principles of separation of powers and was within Congress' power to enact.

5. Federal Rules of Appellate Procedure:

Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might do to Help Themselves*, 25 ST. MARY'S L.J. 1321 (1994).

This article describes numerous ways by which the courts of appeals should reform their procedures in order to keep up with the burgeoning docket. The author explains how reforms such as the use of technology (such as computer based case management and court management), administrative decentralization, differentiated case management, and increased sanctions for frivolous appeals may help to reduce cost and congestion in the courts. The author is careful to back up each proposal with examples of circuits that have experimented with similar plans. For instance, after suggesting that circuits divide into administrative units, Mr. Baker describes the success of the Fifth Circuit in reducing such factors as judicial travel time.

Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97 (1994).

This article attempts to provide a new methodology for quantifying the magnitude of delay in the courts of appeals. The new methodology primarily consists of replacing the traditional "months-per-appeal" statistics with a long-term comparison of the national aggregate of time intervals through-out the appeals process. Using this type of measurement, the authors show that the courts of appeals of 1990 are far less efficient then those in 1950--despite the advent of procedural reform and the addition of judgeships during that period of time. One of the more stunning statistics is the following: The courts of appeals, in aggregate, took 255 per cent longer to decide an orally argued appeal in 1990 then they did in 1950. The author reminds reformers that any improvements in the system must account for the system as a whole.

Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (1994).

In this article, Professor Yeazell discusses the problem with focusing civil reform on the trial courts and on pretrial procedure, while failing to initiate the same degree of reform in appellate review. Namely, trial courts tend to be subjected to less appellate review then in years past and as a result the balance of power over litigation has moved to the trial courts.

Although statistical analysis tends to show that the courts of appeals are busier then ever, Yeazell argues that those courts do not have as much control over the outcome of as high a proportion of civil trials as they have in the past. Using figures from AO reports, Yeazell argues that trials have been replaced by motion practice, summary judgments, dismissals on the pleadings, settlements, etc. In 1938, for instance, trials accounted for 63 per cent of all adjudication's while in 1990, that number dropped to only 11 per cent. Yeazell suggests that further discussions regarding civil process must account for the entire system's inter-connectedness and to its mutability over time.

6. Federal Rules of Evidence:

Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637 (1993).

This article is a somewhat scathing review of Peter Huber and his book entitled *Galileo's Revenge: Junk Science in the Courtroom.* Mr. Huber's book refers to what he calls the "junk science" which has, he claims, overrun the courtroom under Rule 702 (regarding expert testimony) and caused increases in litigant costs and delays. Mr. Chesebro's main criticism of Huber's work is that it fails to use accurate and comprehensive empirical studies to back up his assertions, that he concealed certain other studies that contradict his assertions, and that he failed to cite opposing authority.

7. Alternative Dispute Resolution:

7.1. In General:

Donna Stienstra & Thomas E. Willging, *Alternatives to Litigation: Do They Have a Place in the Federal Courts?*, Fed. Jud. Center, 1995.

The authors frame the debate regarding alternative dispute resolution devices in federal courts. Regarding ADR's effect on cost and delay reduction, the authors preface their comments by writing that there has been little empirical work done on the subject and that what has been done does not provide for clear conclusions. Also, empirical analysis should not necessarily override considerations such as social values and intuitions. Some statistics that are reported on, however, include the following: a 1987-88 FJC study found that Article III judges spent only .14 per cent of their case-related time on matters connected with ADR, while 2.33 per cent of their time was spent on settlement conferences. Also, alternative dispute resolution programs in the N.D. of California and W.D. of Missouri are discussed. The N.D. of California statistics come from the Rosenberg and Folberg piece annotated below. The W.D. of Missouri incorporated a mediation program which has closed cases over two months faster then non-mediated cases. Further, 216 attorney reported a total of $4,890,750 in net savings resulting from using the mediation program. On the other hand, the authors pose the argument that ADR statistics are skewed because they often measure ADR cases against cases that go to trial--an obviously more expensive and time consuming process. A more accurate statistic would be one that measured ADR cases against traditional pretrial settlement cases.

Debra Cassens Moss, *Reformers Tout ADR Programs: In a cauldron of federal civil justice experiments, some rise to the top.*, A.B.A. J., Aug. 1994, at 28.

This brief article highlights and lauds two ADR programs: the Western District of Missouri's early assessment program and the Northern District of California's ENE program. The W.D. of Missouri's program is unusual because of its emphasis on using ADR in the early pretrial stage (an initial meeting of attorneys, clients, and a program administrator is held within thirty days of filing a responsive pleading). The filing to disposition time for cases required to go through the program was 232 days, while the figure for cases not participating in the program was between 310 and 317 days. In addition, 92 per cent of surveyed attorneys felt that the program should be continued. A December 1992 report on the N.D. of California's ENE program found that 67 per cent of attorneys and 66 per cent of clients surveyed were satisfied with that program.

***Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges*, Fed. Jud. Center, 1994.**

See complete annotation below in the Other Publications and Sources section.

Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (1994).

This article, which is full of statistical information, tables, and graphs, is based on a report to an ADR subcommittee of the Advisory Committee to the USDC for the N.D. of California. Its authors were commissioned to study the district's mandatory "early neutral evaluation" (ENE) program. This program uses a pretrial session managed by a neutral evaluator who listens to the parties, asks questions, assesses the case, predicts a winner, and facilitates settlement or case management. The authors studied four years worth of cases through interviews, observation, docket records, and questionnaires. Generally, they found that net savings produced by ENE were ten times larger then the cost of an ENE session, 42 percent of attorneys believed that ENE shortened their time to disposition, ENE cases closed slightly quicker then non-ENE cases, and two-thirds of participants were satisfied with the ENE program.

Michael L. Seigel, *Pragmatism Applied: Imagining A Solution to the Problem of Court Congestion*, 22 HOFSTRA L. REV. 567 (1994).

This article proceeds from the perspective that statistics show that current methods of reform have not worked. It argues for a pragmatic approach to reform that emphasizes workable solutions rather then "correct" answers. The author suggests the adoption of the "Abbreviated Jury Trial" (AJT) as a means of reducing cost and delay.

Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993).

Associate Professor Bernstein believes that mandatory, non-binding court-annexed arbitration will not improve access to justice and may in fact be detrimental to poorer litigants. Where litigants would not choose to participate in ADR but are mandated to do so, they will

be unable to jointly receive benefits. Also, assertion that ADR produces social benefits (such as avoiding nuisance suits and reducing cost and delay) are inconclusive, ambiguous, and often depend on the structure of particular programs. Private ADR, to which parties consent, may reduce cost and delay in the courts and better serve the needs of attorneys, clients, and society by providing secrecy, informality, delay reduction, and finality.

R. William Ide III, *ADR: A Giant Step Toward The Future*, DISP. RESOL. J., Dec 1993, at 20.

This article, written by the then president of the American Bar Association, is a brief sketch of ADR's role in the justice system. Mr. Ide points out that all 50 states and the District of Columbia have some kind of dispute resolution program. He also draws from a 1990 FJC study which found that ADR programs save time and money, reduce caseload burdens, are perceived by parties as fair, and judges overwhelmingly support expansion of court-annexed ADR. Mr. Ide explains how dispute resolution among communities of people can prevent violence and unrest and how corporate America can benefit by using ADR devices. The article closes by imploring the legal community to adopt a more conciliatory approach to problem solving .

Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two- Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 45 (1993).

In addition to providing an overview and history of ADR , as well as the Constitutional issues which surround the topic, this article uses empirical studies to evaluate the effectiveness of compulsory ADR in reducing court costs and delays. The term "compulsory ADR" is used in reference to court-ordered ADR, ADR mandated by statutes, judicial mediation, settlement conferences, and non-mandatory summary jury trials. Generally, judges and participants have been satisfied with compulsory ADR, particularly in the areas of fairness and the need to be heard. However, the author reports that empirical studies have been unable to show clearly that compulsory ADR results in decreased costs and increased efficiency. The author calls for an increased number of studies into the use and effectiveness of voluntary ADR.

Matthew L. Larrabee & Richard DeNatale, *The Abridged Private Jury Trial*, 20 LITIG. 42 (1993).

The authors, both California attorneys, advocate the use of the Abridged Private Jury Trial to reduce time and cost problems associated with complex cases. The article is based on the authors' actual experience with an APJT. The process, in the authors' words, worked by "limiting almost everything" including live testimony, deviations from pre-agreed to schedules, and even lunch breaks during trial. The key to the APJT's success seemed to be in-depth, judge-free, pre-trial proceedings that established schedules, resolved evidentiary disputes, and eliminated low-value claims.

Joseph T. McLaughlin & Karen M. Crupi, *Alternative Dispute Resolution*, C879 A.L.I.-A.B.A. 49 (1993).

Applauding the use of ADR techniques as a faster and less expensive way to resolve disputes, this article reports on several empirical studies. A 1988 Second Circuit Standing Committee study found that although a vast majority of judges take on activist roles during

parties' settlement negotiations, few initiate creative methods of dispute resolution. For instance, 80.5 per cent of judges will speak to each lawyer separately and 50 per cent use magistrates to resolve disputes, but only 6 per cent have experimented with mini-trials and only 20 per cent have used independent mediators. The piece discusses various forms and techniques of ADR including arbitration, mini-trials, summary jury trials, the use of special masters, as well as the use of ADR in international and corporate dispute resolution.

Judge Robert M. Parker & Leslie J. Hagin, *"ADR" Techniques in the Reformation Model of Civil Dispute Resolution,* 46 SMU L. REV. 1905 (1993).

This article stresses the necessity for adopting effective dispute resolution techniques in order to counter the cost and delay problems facing the judiciary today and in the future. Backed by empirical evidence that shows the problem of burgeoning case loads, the authors stress that current forms of dispute resolution are not effective enough. Their suggestions include a public, rather then a private system, early judicial management, decisions that are made under a presumption of finality, and the use of a traditional jury trial where litigants are able to prove that it is necessary according to a cost/benefit-fairness analysis. The article also discusses the Seventh Amendment issues that surround alternative forms of dispute resolution by noting the pragmatic and evolving nature of Seventh Amendment law as well as the need to use a balancing test of interests.

7.2. Constitutional Issues; Authority Issues; Enforceability Issues:

Shelby R. Grubbs, *A Brief Survey of Court Annexed ADR,* 30 TENN. B.J. 20 (Jan.-Feb. 1994).

This article, written by the chairman of the Tennessee Supreme Court Commission on Dispute Resolution and the E.D. of Tennessee's Advisory Group on Reduction of Cost and Delay, is informative in that it provides a table of most of the district courts' ADR programs as of mid-1993. It lists, by district, the type of program used, the criteria for entering it, and the authority behind it. The author also points out that the CJRA grants the federal courts considerable latitude to experiment with various ADR techniques. Mr. Grubbs' table is based on information received from the FJC.

Judge G. Thomas Eisele, *Differing Visions--Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts,* 46 SMU L. REV. 1935, 1938 (1993).

See complete annotation above in the Is There a Litigation Crisis? section. Judge Eisele also responds to Judge Parker's assertions that a reformed model of ADR would pass Seventh Amendment muster. Instead, he argues that the Seventh Amendment is not open to a balancing test, that Judge Parker's arguments are insupportable, and that it is difficult to predict how the Supreme Court would decide such a case.

Gerald P. Lepp, *Court Annexed Mediation and Early Neutral Evaluation--Eastern District of New York,* C879 A.L.I.-A.B.A. 583 (1993).

This informative piece reports on the Eastern District of New York's Civil Justice Expense and Delay Reduction Plan as it relates to ADR. In addition to describing numerous

aspects of the ADR mechanisms that the district uses, the author points out issues of authority and enforceability of those mechanisms. For instance, court annexed mediation negotiations are non-binding unless a written settlement is made. The mandatory court-annexed arbitration is also non-binding. However, arbitration awards become the final judgment of the court and are not subject to appellate review but are open to a trial de novo request. Early neutral evaluation, which is also non-binding, is conducted by an evaluator who has the authority to use broad discretion in structuring the session but who has no authority to impose a settlement.

Joseph T. McLaughlin & Karen M. Crupi, *Alternative Dispute Resolution,* C879 A.L.I.-A.B.A. 49, 79 (1993).

See complete annotations above in the Alternative Dispute Resolution section and below in the Summary Jury Trial section. This article has a section on the enforceability of an agreement to participate in ADR. The authors make the point that most arbitration agreements are specifically enforceable but that whether mini-trial agreements and mediation agreements are enforceable is still unanswered.

Judge Robert M. Parker & Leslie J. Hagin, *"ADR" Techniques in the Reformation Model of Civil Dispute Resolution,* 46 SMU L. REV. 1905 (1993).

See complete annotation above in the Alternative Dispute Resolution section.

7.3. Summary Jury Trial:

Thomas D. Lambros, *The Summary Jury Trial: An Effective Aid to Settlement*, 77(1) JUDICATURE, July-Aug. 1993, at 6.

Written by the U.S. District Court Judge who invented the summary jury trial, this article applauds its use in reducing cost and delay and making room in the court system for "hardcore, durable controversies." The author argues that judges are authorized to use the SJT by Title 28 U.S.C. §473 (a)(6)(B), FRCP 1, 16, 39(c), and the CJRA. Reporting on a study conducted by a staff attorney for the Northern District of Ohio, the author writes that 82 per cent of SJT cases are resolved faster then comparable non-SJT cases. In fact, SJT seemed to have reduced the time a case is pending by about eleven months.

Joseph T. McLaughlin & Karen M. Crupi, *Alternative Dispute Resolution,* C879 A.L.I.-A.B.A. 49, 65 (1993).

See complete annotations above in the Alternative Dispute Resolution section and Constitutional Issues section. In discussing summary jury trials, the authors highlight Judge Lambros' experience with the device. Over a five year period he summary tried 200 cases; all but seven of those cases settled before trial. The authors credit the success of SJT to the parties exposure to jury perception and to the satisfaction derived from allowing parities to tell "their side of the story to a court." The article also argues for the courts ability to compel participation in SJT.

7.4. Arbitration:

David Rauma & Carol Krafka, *Voluntary Arbitration in Eight Federal District Courts: An Evaluation,* Fed. Jud. Center, 1994.

This booklet, published by the FJC, reports on a study of arbitration programs in the district courts. Its statistical conclusions find that voluntary arbitration programs that use an "opt-in" referral device are used less often then those using "opt-out" devices. Further, the "opt-out" districts have participation rates that are comparable to those districts that have mandatory arbitration programs. The authors conclude that "opt-in" systems are used to such a small extent that they have little or no effect on cost and delay reduction.

7.5. Mediation:

Donna Stienstra & Thomas E. Willging, *Alternatives to Litigation: Do They Have a Place in the Federal Courts?,* Fed. Jud. Center, 1995.

See complete annotation above in the ADR section.

8. Differentiated Case Management:

- **Minnesota, Second Judicial District Court:**

Thomas Mott, *Reducing Delay and Trial Date Continuances,* JUDGES' JOURNAL, Winter 1994, at 6.

This article, written by a judge from the Second Judicial District Court in Minnesota and the Chairman of the District's Case Flow Committee, reports on the DCM program established in that district. Prior to implementation of the civil and criminal DCM program, the Second Judicial District had the slowest civil and criminal case system in the state. Within one year of implementation of the criminal DCM program, the criminal system became the fastest in the state. The civil DCM program is comprised of four tracks. The "expedited track" is reserved for simple, two-party cases; cases are assigned a trial date within six months of filing and discovery is conducted in accordance to time frames. The "standard track" is reserved for cases that might take a bit longer (medical malpractice, large contracts); cases are assigned a joint disposition conference within 245 days, a settlement conference in the next thirty days, and a trial thirty days after that. A modified track for cases that may fall between the simplicity of expedited cases and the complexity of standard cases follows the standard one but is condensed by one or two months. The "Complex track", accounting for 3-8 per cent of the entire caseload, is reserved for cases assigned to it by the Chief Judge; cases are assigned to a particular judge who holds a case management conference and then orders an appropriate schedule of events. Since implementation there has been a 59 per cent reduction in pending civil cases, an increase from 70 per cent to 110 per cent in civil clearance rate, a 60 per cent reduction in civil disposition time, and a decrease to 5 per cent in the trial continuances granted due to judge unavailability. Also, judicial, staff, and attorney satisfaction is high. Finally, $70,000 was saved in one year in juror fees.

- **New Jersey, Superior Court in Camden County:**

  Rudolph J. Rossetti, *Special Civil Tracks,* JUDGES' JOURNAL, Winter 1994, at 34.

This article, written by an assignment judge for the Camden County Superior Court and the director of its civil differentiated case management program, reports on the system used by that court. It uses a Complex, Standard, and Expedited track in addition to specialty tracks such as a declaratory judgment track and an asbestos track. The program was designed with the idea that different types of cases have different needs as to discovery, preparation time, and judicial involvement. Under the plan, after a case is assigned to a track, the lawyers are sent an assignment scheduling notice which, among other things, sets the date for termination of discovery and the expected month in which alternative dispute resolution may be entered into. Attorneys work together with the court to compose the scheduling plan. After discovery is completed, attorneys report to the court as to their readiness for trial. The court then schedules the case for ADR or trial. The author recommends the use of computers and staff teams responsible for guiding and managing particular cases assigned to it. The program works, the author purports, because cases are dealt with when they are ready, communication between lawyers and the court is improved, and cases go to trial when they are called in.

9. Settlement:

Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements,* 46 STAN. L. REV. 1339 (1994).

Using data gathered in the past by people such as Herbert Kritzer, Wayne Brazil and Terence Dunworth, the authors of this article argue that settlement is not good or bad *per se.* Therefore, encouraging increased settlement should not, in itself, be a goal of court reform. Rather, settlements should be regulated so as to encourage quality results in respect to things such as disclosure of relevant facts, fair compensation and sharing of costs and burdens. Importantly, the authors question the notion that judicial supervision and the use of judicial resource to encourage and promote settlement, while generally enjoyed by attorneys, actually reduces cost and delay in the courts. Several earlier studies cited by the authors found no such relationship--one study even found an inverse relationship whereby judges with greater involvement saw fewer cases terminated.

10. Tort Reform:

Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism,* 42 AM. U. L. REV. 1393 (1993).

In this article, the authors argue that while punitive damages should not be without limits, they serve an important function and should therefore not be limited to some set multiple of compensatory damages. Several empirical studies of punitive damages are explicated to show that incidents of awarding punitive damages are neither extreme nor regular. For instance, a study from the early 1980s found that of 23,129 cases seeking money damages, only 4.5 per cent included punitive damages. Another study conducted by William Landes and Richard Posner found that punitive damages were awarded in only 2 per cent of 359 product liability cases. Yet another study of product liability cases found that punitive damages accounted for a mere 0.7 per cent of total payments made.

Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers,* 42 AM. U. L. REV. 1269 (1993).

The authors challenge the notion put forth by, among others, former Vice President Dan Quayle, that the award of punitive damages against product manufacturers in tort cases is harmful to U.S. businesses and should therefore by limited. The authors contend that there is no empirical evidence supporting such an assertion. Rather, punitive damages serve the important functions of prevention, punishment, and providing remedy for harm caused by dominant powers (such as corporations) against ordinary citizens. The article reports on empirical studies which show that punitive damages in product liability cases are neither extreme nor regularly awarded. One study found that punitive damages were awarded in only 34 of 967 such cases. The authors' own study found that punitive damages were awarded in only 355 cases nationwide over a twenty-five year period. Also, the authors cite studies which show that the most extreme and regularly awarded punitive damages occur in business/contract lawsuits rather then in product liability cases.

Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?,* 42 AM. U. L. REV. 1465 (1993).

See complete annotation above in the Discovery section.

11. Criminal Justice:

***Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges,* Fed. Jud. Center, 1994.**

See complete annotation below in the Other Publications and Sources section.

J. William W Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice,* Fed. Jud. Center, 1994.

This booklet is useful in framing the debate on the federalization of the judicial system. It examines Constitutional and policy arguments regarding a limited role for federal courts. Interesting statistical information informs the reader that from 1980 to 1992, criminal case filings per judge increased from fifty-eight to eighty-four per year, including a staggering increase in drug filings from about 3,000 in 1980 to about 13,000 in 1992. Also, an FJC survey found that 91.5 per cent of active district court judges supported the notion of defining federal court jurisdiction narrowly so as to prevent hearing "ordinary street crime" cases in federal courts.

Gary R. Brown, *Reforming Civil Forfeiture Law: The Case for an Automatic Stay Provision,* 67 ST. JOHN'S L. REV. 705 (1993).

This article calls for reform in the field of civil forfeiture actions, which are one of the fastest growing parts of the federal docket. The author makes the case for an automatic stay of forfeiture actions until the related criminal proceeding is resolved. By providing an automatic

stay, time and resource consuming motion practices would be eliminated, the merits of the forfeiture action will be determined in a fairer and more efficient manner, and the discovery process for the criminal action is protected from the expansiveness of civil discovery.

12. Other Publications, Sources, and Articles:

Michael V. Bork, *Federal Judicial Caseload: A Five Year Review 1989-1993*, Administrative Office of the U.S. Courts, (1994).

This publication compiles statistics on caseloads and caseload composition in the U.S. District Courts (civil and criminal), U.S. Courts of Appeals, and U.S. Bankruptcy Courts. There was a 2.6 percent rise in civil cases filed between 1989 and 1993, including a 9 percent increase since 1990. There were 230,597 civil cases in U.S. District Courts in 1993.

Memorandum from John Shapard & Molly Johnson, *Survey Concerning Voir Dire* (Sept. 26, 1994) (Fed. Jud. Center).

This memorandum reports on a survey of 124 district judges that measured their methods of conducting voir dire, the extent of counsels' participation in voir dire, and the effects of *Batson v. Kentucky*, 476 U.S. 79. The survey found, among other things, that most judges conduct the entire examination and only allow counsel to submit questions to the judge that counsel would like to have asked. Also, most judges spent an average of one to two hours questioning prospective jurors; in 1977, however, most judges spent only thirty minutes to an hour.

Memorandum from Elizabeth C. Wiggins & Melissa J. Pecherski, *Protective Order Activity in Three Federal Judicial Districts Interim Report to the Advisory Committee on Civil Rules*, (Oct. 14, 1994) (Fed. Jud. Center).

This piece summarizes work in progress that the FJC is conducting on protective orders as part of a larger piece on protective orders, confidential settlement agreements and other sealed court records. The study covers District of Columbia civil cases filed in 1990-92 and Eastern District of Michigan and Eastern District of Pennsylvania civil cases filed in 1991-92. The interim report presents nine findings that are supported by numerous statistical figures and tables. An earlier memorandum from the authors (dated June 20, 1994) gives a preliminary introduction to the study and to findings made from District of Columbia cases.

Memorandum from Tom Willging et al., *Preliminary Empirical Data on Class Action Activity in the Eastern District of Pennsylvania and the Northern District of California in Cases Closed Between July 1, 1992 and June 30, 1994* (April 13, 1995) (Fed. Jud. Center).

This piece summarizes work in progress that the FJC is conducting on class action cases in two federal judicial districts. In reference to cost and delay issues, the authors found that certified class actions tend to be open longer and result in more activity then non-certified class action cases. In N.D. of Cal., for instance, certified class actions lasted five times as long as non-certified cases. However, certified class actions were far more likely to settle then non-certified class actions. The authors also attached a piece specifically on securities class actions--a category which they found accounted for the greatest number of class action cases.

***Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges,* Fed. Jud. Center, 1994.**

This is a collection of tables of statistics gathered from a 1992 survey of 1,489 judges. It covers a broad range of topics including the nature and severity of the problems in federal courts, structure of the federal courts, jurisdiction issues, resource issues, administration, discovery, the jury, criminal sanctions, deciding appeals, counsel, and dispute resolution methods. Although particularly interesting figures will be noted in this annotation, any summary of the statistics in this publication would be incomplete and it should therefore be perused by the curious reader herself or himself.

The volume of criminal cases was noted as a grave problem in the federal courts by a greater percentage of circuit judges then any other listed problem. District judges felt that the delay in filling judicial vacancies is a grave problem.

Regarding discovery, the suggestion for improvement that received the greatest support among circuit judges was to eliminate local variation in discovery rules. District judges felt strongly that discovery could be improved by requiring automatic, early, and full disclosure to prosecutors in criminal cases.

Regarding criminal sanctions, both circuit judges and district judges were strongly opposed to mandatory sentencing guidelines.

Regarding ADR, a preponderance of circuit and district judges felt that the federal courts should assist those resolving their disputes by whatever means is best suited to the case. However, very few circuit judges felt that there is a need for ADR in her or his court. Considerably more district judges felt such a need.

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