COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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TUCSON, ARIZONA
JANUARY 9-10, 1997

McCabe

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 9-10, 1997

1. Opening Remarks of the Chair.

2. Approval of the Minutes.

3. Report of the Chair. (Oral report)

   A. Actions taken by the Judicial Conference at its September 1996 session.

   B. Executive session.

4. Report of the Administrative Office.

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

6. Report of the Advisory Committee on Criminal Rules.

   A. **ACTION** — Proposed amendments to Rule 58 for approval and transmission to the Judicial Conference without public comment.

   B. Minutes and other informational items.

7. Report of the Advisory Committee on Evidence Rules.

   A. **ACTION** — Proposed report to Congress on the need for new evidence rules to govern the confidentiality of communications between a therapist or a counselor and a sexual assault victim.

   B. Minutes and other informational items.

8. Status Report on Study of Rules Governing Attorney Conduct.

9. Report of the Advisory Committee on Appellate Rules.

- Status report on the proposed comprehensive revision of the Federal Rules of Appellate Procedure for style.

10. Report of the Advisory Committee on Civil Rules.

    A. **ACTION** — Proposed amendments to Rule 73 and abrogation of Rules 74, 75, and 76, and proposed amendments to Forms 33 and 34 for approval and transmission to the Judicial Conference without public comment.

    B. Preliminary draft report of the Committee on Court Administration and Case Management to Congress on the Civil Justice Reform Act. (Executive session)

    C. Minutes and other informational items.

11. Report of the Advisory Committee on Bankruptcy Rules.

- Minutes and other informational items.

12. Status Report on Uniform Numbering of Local Rules. (Oral report)

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

14. Long-Range Planning.

- Materials from the liaison of the Judicial Conference Executive Committee.

15. Status Report of the Subcommittee on Technology. (Oral report)

16. Update of Bibliography of Rules-Related Materials.

17. Next Meetings — Summer Meeting on June 18-20, 1997, in Washington, D.C. and Winter Meeting on January 7-9, 1998. (Oral report)

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

(Standing Committee)

Chair:

Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, California 92701

Area Code 714
836-2055

FAX-714-836-2062

Members:

Honorable Frank H. Easterbrook
United States Circuit Judge
219 South Dearborn Street
Chicago, Illinois 60604

Area Code 312
435-5808

FAX-312-435-7543

Honorable Phyllis A. Kravitch
United States Circuit Judge
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Area Code 404
331-6836

FAX-404-331-5884

Honorable William R. Wilson, Jr.
United States District Judge
600 West Capitol Avenue, Room 149
Little Rock, Arkansas 72201

Area Code 501
324-6863

FAX-501-324-6869

Honorable James A. Parker
United States District Judge
P.O. Box 566
Albuquerque, New Mexico 87103

Area Code 505
248-8136

FAX-505-248-8139

Honorable Frank W. Bullock, Jr.
Chief Judge, United States District Court
Post Office Box 3223
Greensboro, North Carolina 27402

Area Code 910
332-6070

FAX-910-332-6075

Honorable Morey L. Sear
Chief Judge, United States District Court
United States Courthouse
500 Camp Street, C-256
New Orleans, Louisiana 70130

Area Code 504
589-7500

FAX-504-589-2057

December 10, 1996
Doc. No. 1651

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Honorable E. Norman Veasey Chief Justice Supreme Court of Delaware Carvel State Office Building 820 North French Street, 11th Floor Wilmington, Delaware 19801	Area Code 302 577-3700 FAX-302-577-3702
Professor Geoffrey C. Hazard, Jr. Director, The American Law Institute (Trustee Professor of Law University of Pennsylvania Law School) 4025 Chestnut Street Philadelphia, Pennsylvania 19104-3099	Area Code 215 243-1684 (215-898-7494) FAX-215-243-1470
Alan W. Perry, Esquire Formam, Perry, Watkins & Krutz 188 East Capitol Street, Suite 1200 P.O. Box 22608 Jackson, Mississippi 39225-2608	Area Code 601 960-8600 FAX-601-960-8613
Honorable Alan C. Sundberg Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. 5th Floor, First Florida Bank Bldg. P.O. Drawer 190 Tallahassee, Florida 32302	Area Code 904 224-1585 FAX-904-222-0398
Sol Schreiber, Esquire Milberg, Weiss, Bershad, Hynes & Lerach One Pennsylvania Plaza, 49th Floor New York, New York 10119-0165	Area Code 212 594-5300 FAX-212-868-1229
Gene W. Lafitte, Esquire Liskow & Lewis 50th Floor, One Shell Square 701 Poydras Street New Orleans, Louisiana 70139	Area Code 504 581-7979 FAX-504-556-4108

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Deputy Attorney General (ex officio)
Honorable Jamie S. Gorelick
4111 U.S. Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
ATTN: David W. Ogden, Associate
Deputy Attorney General
or
Ian H. Gershengorn, Esquire, Special
Assistant to the Deputy Attorney General

Area Code 202
514-2101

FAX-202-514-0467

Tel-202-514-6909
FAX-202-514-6897

Tel-202-514-6915
FAX-202-514-9077

Reporter:

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

Area Code 617
552-8650
-4393 (secy.)
FAX-617-576-1933

Consultants:

Joseph F. Spaniol, Jr., Esquire
5602 Ontario Circle
Bethesda, Maryland 20816-2461

Area Code 301
229-2176
FAX-202-273-1826

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

Area Code 617
552-8851

FAX-617-552-2615

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

Area Code 214
691-8588

FAX-214-691-9294
(Home) -358-5380

Secretary:

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

Area Code 202
273-1820

FAX-202-273-1826

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Subcommittee and Liaison Assignments
December 1996

Liaisons:

Appellate:	Judge Frank H. Easterbrook
Bankruptcy:	(OPEN)
Civil:	Sol Schreiber, Esquire
	Judge Adrian G. Duplantier (from Bankruptcy)
Criminal:	Judge William R. Wilson, Jr.
Evidence:	Judge David S. Doty (from Civil)
	Judge David D. Dowd (from Criminal)

Subcommittee on Style

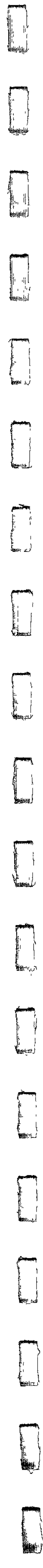
Chair: (OPEN)
Judge William R. Wilson, Jr.
Professor Geoffrey C. Hazard, Jr.

Bryan A. Garner, Esquire, Consultant
Joseph F. Spaniol, Jr., Esquire, Consultant

Subcommittee on Technology

Chair: Judge Frank H. Easterbrook
Judge Alex Kozinski (Appellate)
Judge A. Jay Cristol (Bankruptcy)
Magistrate Judge John L. Carroll (Civil)
Judge D. Brooks Smith (Criminal)
Judge James T. Turner (Evidence)

Richard G. Heltzel, Clerk (consultive role)
Committee Reporters (consultive role)



JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

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

Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66061
Area Code 913-782-9293
FAX 913-782-9855

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

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

Honorable D. Lowell Jensen
United States District Judge
United States Courthouse
1301 Clay Street, 4th Floor
Oakland, California 94612
Area Code 510-637-3550
FAX 510-637-3555

Reporters

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

Professor Carol Ann Mooney
Vice President and
Associate Provost
University of Notre Dame
202 Main Building
Notre Dame, Indiana 46556
Area Code 219-631-4590
FAX-219-631-6897

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

Professor Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215
Area Code 313-764-4347
FAX 313-763-9375

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

December 10, 1996
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CHAIRS AND REPORTERS (CONTD.)

Chairs

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

Reporters

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

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Draft Minutes of the Meeting of June 19-20, 1996
Washington, D.C.

The midyear meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Wednesday and Thursday, June 19-20, 1996. All committee members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Deputy Attorney General Jamie Gorelick was unable to be present. Ian H. Gershengorn, Special Assistant to the Deputy Attorney General, participated in the meeting as the voting representative of the Department of Justice.

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, Mark D. Shapiro, senior attorney in the rules office, and Patricia S. Channon, senior attorney in the Bankruptcy Judges Division.

Representing the advisory committees at the meeting were:

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

Advisory Committee on Criminal Rules -
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules -
Judge Ralph K. Winter, Chair
Professor Margaret A. Berger, Reporter

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

INTRODUCTORY REMARKS

Judge Stotler reported that the Chief Justice had accepted the request of Sixth Circuit Court of Appeals Judge Leroy J. Contie, Jr. to be relieved of service as a committee member for health reasons.

The chair stated that the Judicial Conference, at its March 1996 meeting, had approved the committee's proposed uniform numbering system for local rules, although some members had expressed opposition to the concept of uniform numbering. Following the Conference's action, the Administrative Office distributed a package of materials to the courts explaining how the system was expected to work and providing explanatory materials prepared by the local rules project and the advisory committees.

Judge Stotler reported that the Conference had decided that the courts of appeals should be authorized to decide for themselves whether to allow cameras in appellate court proceedings. It also had requested that the circuits take appropriate steps to prohibit cameras in district court proceedings. The members of the committee then shared information on what actions had been taken in their own circuits to implement these Conference decisions.

Judge Stotler pointed out that the Conference's Committee on Automation and Technology had just launched several initiatives designed to foster the use of automation in the courts, including the filing and service of court papers by electronic means and the application of technology to facilitate courtroom proceedings. She suggested that the committee might wish to establish a special subcommittee to consider these initiatives and asked for volunteers to serve on the subcommittee. Names submitted included the following: Seventh Circuit Judge Frank H. Easterbrook; Professor Thomas D. Rowe, Jr.; Chief Justice E. Norman Veasey; Bankruptcy Judge James J. Barta, Eastern District of Missouri; and Bankruptcy Clerk Richard G. Heltzel, Eastern District of California. Judge Stotler also pointed out that the Advisory Committee on Bankruptcy Rules had established an automation subcommittee several years ago which had provided effective leadership to the rulemaking process in the areas of electronic noticing and filing.

Judge Stotler and the committee expressed their appreciation to Judge Higginbotham and Judge Mannes for their significant contributions to the rulemaking process during their terms as chairs of the Advisory Committee on Civil Rules and the Advisory Committee on Bankruptcy Rules, respectively.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve as written the minutes of the last meeting, held on January 12-13, 1996.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej presented the report of the Administrative Office (AO), as set out in his memoranda of May 13, 1996. (Agenda Item 3) He stated that his office and the AO's Office of Congressional, External, and Public Affairs had been following closely several pieces of legislation in the 104th Congress that would have an impact on the federal rules.

He reported that section 235 of the newly-enacted Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132) contained a provision requiring that closed-circuit television coverage be provided to victims of a crime whenever the venue of a trial is moved out-of-state and more than 350 miles from the place where the prosecution would have taken place originally. He stated that the judiciary had been successful in narrowing the scope of the provision and that, as enacted, it would apply to about 10 cases a year. He pointed out that section 235 sunsets when the Judicial Conference "promulgates and issues rules, or amends existing rules [under the rulemaking process], to effectuate the policy addressed by this section." He noted that the provision has been placed on the agenda of the next meeting of the Advisory Committee on Criminal Rules.

Mr. Rabiej said that the judiciary had not been successful in persuading the Congress to reconcile two internally inconsistent provisions of the new Act. Section 103 amended Rule 22 of the Federal Rules of Appellate Procedure, permitting a district judge or a circuit judge to issue a certificate of appealability in a habeas corpus proceeding. Section 102 of the Act, though, amended the underlying statutory provision to permit only a circuit justice or judge to issue the certificate. Although the Congress had been alerted to the discrepancy on several occasions, including through correspondence from the chair of the Advisory Committee on Appellate Rules, it had failed to correct the problem.

Judge Logan stated that the conflicting provisions could create a statutory interpretation problem in almost every habeas corpus case and every section 2255 proceeding. In addition, he pointed out that the Act added proceedings under 28 U.S.C. § 2255 to the list of those requiring a certificate of appealability. Moreover, the caption to FED.R.APP.P. 22, as amended by the Act, refers to "section 2255 proceedings." Yet, the text of the rule enacted by the statute contained no reference to section 2255 proceedings. Judge Logan stated that the Federal-State Jurisdiction Committee of the Judicial Conference had been alerted to these defects in the statute and that he was in regular contact with the chairman of that committee.

One of the members suggested that the committee might solve these problems eventually by amending Rule 22 through the Rules Enabling Act process. He observed, too, that the Act might eventually require rule making because it requires the district courts to make findings regarding the grounds for dismissal of prisoner suits.

He added that there was another issue raised by the new legislation. The Act provided that an appeal in a habeas corpus proceeding is permitted only if there is a violation of the Constitution. The former law, however, also had permitted appeal when there was a violation of a statute or treaty of the United States. Thus, it appeared that claims that a prisoner's custody violates the laws and treaties of the United States would no longer be appealable. He questioned whether such a result had been intended.

Mr. Rabiej reported that the Administrative Office had advised Congress of the discrepancy between FED.R.CIV.P. 4(m), which requires service of process within 120 days, and 46 U.S.C § 742, the Suits in Admiralty Act, which requires that a party "forthwith serve" process on the United States in admiralty cases. He added that the Supreme Court had resolved the issue recently in *Henderson v. United States*, but that efforts were continuing to resolve the matter by legislation in order to eliminate any future confusion.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Eldridge stated that the report of the Federal Judicial Center—providing an update on the Center's publications, educational programs, and research projects—was informational in nature. (Agenda Item 4) He noted that the Center had just been asked to conduct certain empirical research for the committee concerning attorney discipline in the district courts.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum and attachments of June 20, 1996. (Agenda Item 7)

Amendments for Judicial Conference Approval

Judge Logan reported that the advisory committee was recommending that the standing committee approve amendments to four rules that had been published for public comment. But the advisory committee further recommended that the standing committee defer forwarding these rules to the Judicial Conference until after completion of the public comment process regarding the entire package of restyled appellate rules. He noted that it was possible that additional comments might be received on the four rules during the comment period.

FED.R.APP.P. 26.1

Judge Logan stated at the outset that the word "shall" in the caption of Rule 26.1(a) should be changed to "must."

He explained that the proposed amendment would eliminate the requirement that corporate subsidiaries and affiliates be listed in the corporate disclosure statement. Instead, the advisory committee would require that a corporate party disclose all its parent corporations and any publicly-held company owning 10 percent or more of its stock. He added that the proposed amendment had been sent to the Judicial Conference Committee on Codes of Conduct, which had expressed no objection to it.

FED.R.APP.P. 29

Judge Logan noted that the subject of amicus curiae briefs had attracted substantial interest. He noted that, as a result of the public comments, the advisory committee had decided to retain the limitation that an amicus brief be no more than half the length of a party's principal brief, but it had also decided to amend the proposal to allow the court to make exceptions. In response to objections to the requirement that the amicus brief be filed at the same time as the brief of the party being supported, the committee decided to give the amicus seven days to file its brief following the filing of the principal brief of the party being supported.

Judge Logan noted that the committee had added the District of Columbia to the list of states and other entities authorized to file an amicus brief without court permission. It had also deleted the requirement that the amicus obtain the written consent of all the parties and file these consents with the brief. Instead, the committee substituted a simple requirement that the amicus state in the brief that all parties have consented.

The advisory committee also amended subdivision (c) to require that the cover of the brief both identify the party being supported and indicate whether the brief supports affirmance or reversal. Subdivision (f) would be clarified to provide that an amicus may request leave to file a reply. Finally, in subdivision (g) the advisory committee would delete the provision that an amicus be granted permission to participate in oral argument "only for extraordinary reasons."

FED.R.APP.P. 35

Judge Logan stated that the amendments to Rule 35, governing en banc consideration, had attracted several comments. He explained that the advisory committee had accepted a recommendation from the Solicitor General that the rule provide explicitly that a split among the circuits may be a question of "exceptional importance" warranting a rehearing en banc. He noted that while it had been the intent of the advisory committee to list a split in the circuits as one example of a matter rising to the level of exceptional importance, some commentators had read the amendment as specifying that it was the only grounds for en banc consideration. Accordingly, following the public comment period, the advisory committee amended the rule to make it clear that this was just one example of a situation that raised a question of exceptional importance.

Mr. Gershengorn reported that the Solicitor General had been involved personally in the proposal and was satisfied with the revised language of the proposed amendment.

Judge Logan added that some commentators had interpreted the draft as requiring the court to consider certain matters en banc. In response, the committee revised the amendment and committee note to make it clear that nothing requires a court to rehear any matter en banc.

Judge Logan pointed out that the committee had received two comments opposing the proposed change in terminology from "in banc" to "en banc." He advised that an electronic word search of more than 900 Supreme Court decisions and 40,000 court of appeals decisions had revealed an overwhelming preference for "en banc."

Finally, Judge Logan mentioned that local rules in some circuits require separate petitions for a panel rehearing and a rehearing en banc. The advisory committee, thus, provided that a party is not limited to a total of 15 pages for both documents if a local rule requires separate documents.

FED.R.APP.P. 41

Judge Logan stated that proposed amendments to Rule 41 (mandate of the court) would among other things, make it clear that the party who files a petition for certiorari in the Supreme Court—rather than the clerk of the Supreme Court—must notify the court of appeals of the filing. He noted that the changes made by the advisory committee following publication were stylistic, except for one, and they had attracted very little public comment.

Judge Stotler stated that the discussion of the proposed amendments to the appellate rules had been very informative, but the committee could defer final approval of the proposed amendments until the entire package of restyled appellate rules is presented to the committee.

She then asked for a straw vote on whether any member of the committee would vote against any of the proposed rules. No member voiced an objection.

Amendments for Publication

Judge Logan stated that the advisory committee had decided to defer consideration of any proposed new rule amendments until after completion of the project to restyle the entire body of appellate rules. Nevertheless, recent events—including new prisoner legislation, a proposal to amend FED.R.CIV.P. 23, and a request from the clerk of the Supreme Court—had caused the committee to recommend for publication a proposed merger of Rules 5 and 5.1 and the complete revision of Form 4.

FED.R.APP.P. 5 and 5.1

Judge Logan stated that the proposed changes had been initiated as a response to a proposal of the Advisory Committee on Civil Rules to amend FED.R.CIV.P. 23 by authorizing an interlocutory appeal from an order granting or denying class certification. The proposed amendment to the civil rule would require a conforming amendment to the appellate rules. In drafting the amendment, the committee was struck by the substantial overlap between Rule 5 (dealing with appeal by permission under 28 U.S.C. § 1292(b)) and Rule 5.1 (dealing with appeal by permission under 28 U.S.C. § 636(c)(5)). It saw an opportunity to combine the two rules and write a new, broader rule that would govern all discretionary appeals, including any additional discretionary appeals that might be authorized in the future.

The advisory committee, thus, decided to revise Rule 5 and eliminate Rule 5.1, regardless of what action might be taken on the proposed amendments to FED.R.CIV.P. 23. In combining the two rules, the committee decided to adopt the provision in Rule 5 that gives a party seven days after service to respond to a petition for leave to appeal, rather than the 14-day period specified in Rule 5.1. Professor Mooney added that the amendment would also make some provisions in Rule 5 broader and less specific than those in the current rule.

Judge Logan accepted some stylistic refinements suggested by Chief Justice Veasey, Judge Parker, Mr. Garner, and Mr. Spaniol. Accordingly, subparagraph (b)(1)(E) would read: "an attached copy of (i) the order, decree, or judgment complained of and any related opinion or memorandum; and (ii) any order stating the district court's permission to appeal or finding that any necessary conditions to appeal are met." Judge Logan observed that additional style suggestions could be considered following the public comment period.

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

Chief Justice Veasey pointed out that the committee note tied the justification for the amendments to the proposed changes in FED.R.CIV.P. 23. In response, Judge Logan recommended that the committee note be revised to delete any reference to Rule 23.

Professor Mooney then proceeded to make the recommended changes and later distributed a revised draft of the committee note. Following discussion, she and Judge Logan agreed to accept additional language improvements suggested by Professor Cooper, Mr. Perry, and Mr. Garner.

Chief Justice Veasey moved to approve the committee note as revised.

The committee voted without objection to approve the note for publication.

FORM 4

Judge Logan stated that the clerk of the Supreme Court had asked the committee to devise a new, more comprehensive form for the affidavit in support of an application to proceed in forma pauperis that could be used by both the Supreme Court and the appellate courts. In addition, the recently-enacted Prison Litigation Reform Act of 1996 prescribed new requirements governing in forma pauperis proceedings by prisoners. Among other things, the statute requires a prisoner to submit an affidavit to the court that includes a statement of all assets the prisoner possesses.

Judge Logan said that the advisory committee had used the bankruptcy in forma pauperis schedules as a model for the revised affidavit form. The applicant would be required to provide the court with a great deal more information than that specified in the current Form 4.

Mr. Garner stated that the language and format of the form could be improved substantially, but it would take time to make the revisions and test them. Several members pointed out that the law had taken effect in April and that prompt action on approving a new form was necessary to bring the courts into compliance with the new statutory requirements.

Mr. Garner suggested that the committee might wish to approve the substance of the form and allow him, Judge Logan, and others to work on improvements in the language and format. Judge Logan noted that another alternative would be for the committee to approve the revised form for publication with only a few essential changes and leave all further improvements for consideration by the advisory committee at its next meeting.

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

After conferring with Mr. Garner, Judge Logan advised the committee that necessary improvements in the form could be drafted in about a month, in time for them to be incorporated into the publication sent to bench and bar. The revised draft would contain the same information, but it would be made easier to read and easier for prisoners to complete. He suggested that he, Professor Mooney, and Mr. Garner work on a revised draft form, submit it for approval first to the advisory committee, and then to the standing committee for final approval before publication.

The committee voted without objection to authorize the advisory committee to make additional changes in the form and submit the changes to the committee by mail or fax for final approval.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum and attachments of May 13, 1996. (Agenda Item 8)

Amendments for Judicial Conference Approval

Professor Resnick explained that the primary purpose of the proposed package of amendments was to implement, or conform to, the provisions of the Bankruptcy Reform Act of 1994. He noted that the advisory committee had received only five public comments on the package and had canceled the scheduled public hearings for lack of witnesses.

FED.R.BANKR.P. 1010

Professor Resnick stated that the proposed amendments to Rule 1010 were purely technical in nature and had not been published for public comment. The amendments would merely correct cross-references in the rule to conform to recent changes made in FED.R.CIV.P. 4 and pending changes in FED.R.BANKR.P. 7004.

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

FED.R.BANKR.P. 1019

Professor Resnick reported that the proposed changes to Rule 1019 were stylistic in nature. He emphasized that the advisory committee recommended deleting from the rule the phrase "superseded case" because it created the erroneous impression that a new case is commenced when a case is converted from one chapter of the Code to another.

FED.R.BANKR.P. 1020

Professor Resnick stated that Rule 1020 was a new rule implementing the provisions of the 1994 Act authorizing a qualified debtor in a chapter 11 case to elect to be considered a small business. The rule would provide the procedure and time limit for the debtor's election.

FED.R.BANKR.P. 2002

Professor Resnick pointed out that Rule 2002(a)(1) would be amended to add a reference to newly-enacted section 1104(b) of the Code, which for the first time would permit creditors in a chapter 11 case to elect a trustee. The amendment would add a reference to section 1104(b) in the general notice provisions of the rules, thereby requiring that creditors be given notice of the meeting convened to elect a trustee.

In addition, language would be added to Rule 2002(n) requiring that the caption of every notice given by the debtor to a creditor include the information required by newly-enacted section 342(c) of the Code, i.e., the name, address, and taxpayer identification number of the debtor.

FED.R.BANKR.P. 2007.1

Professor Resnick stated that the proposed amendments to Rule 2007.1 would establish the procedures to be followed for the election of a chapter 11 trustee. He added that the language of the amendment had been modified by the advisory committee following the public comment period to take account of concerns expressed by the Executive Office for United States Trustees. He pointed out that the Executive Office was now in agreement with the language of the proposal.

FED.R.BANKR.P. 3014

Professor Resnick explained that the proposed amendment was technical. It would provide the deadline for secured creditors to elect application of section 1111(b)(2) of the Code. Under the current rule, the election must be made by creditors before the conclusion of the hearing on the disclosure statement. Under the 1994 Act, however, a hearing on the disclosure statement is not always required if the debtor is a small business. The amendment would provide a different deadline for making the election in those cases.

FED.R.BANKR.P. 3017

Professor Resnick stated that the proposed amendments to the rule were mostly stylistic. The rule would also be amended to give the court some flexibility to determine the record date for distributing vote solicitation materials in a chapter 11 case. The current rule requires that these materials, such as ballots, be sent to record holders on the date the court enters its order

approving the disclosure statement. The amendment would give the courts discretion to set another date, if circumstances warrant.

FED.R.BANKR.P. 3017.1

Professor Resnick noted that Rule 3017.1 was a new rule to implement section 1125(f) of the Code, enacted by the 1994 Act. The new statute authorizes the court to approve a disclosure statement in a small business case conditionally, subject to final approval after notice and a hearing. The court may combine the hearing on the disclosure statement with the hearing on confirmation of the plan. If the court approves the disclosure statement conditionally, and no timely objection to it is filed, there is no need for the court to hold a hearing on final approval.

FED.R.BANKR.P. 3018

Professor Resnick stated that the proposed amendment to Rule 3018, dealing with voting in chapter 11 cases, was similar to the proposed change in Rule 3017. It would allow the court some flexibility to set the record date for determining which holders of securities are entitled to vote on the plan.

FED.R.BANKR.P. 3021

Professor Resnick explained that the proposed change in Rule 3021 was similar to the proposed amendments to Rules 3017 and 3018. It would give the court some flexibility to set the record date for determining which holders of securities are entitled to share in distributions.

FED.R.BANKR.P. 8001

Professor Resnick stated that Rule 8001, dealing with appeals to the district court or the bankruptcy appellate panel, had two proposed changes. The first, in subdivision (a), would implement the 1994 statutory provision authorizing an appeal as of right from an interlocutory order of a bankruptcy judge increasing or reducing the exclusive time periods under 11 U.S.C. § 1121.

The second proposed amendment, to subdivision (e), would make the rule conform to the 1994 amendment to § 158(c)(1) of the Code, providing that appeals from a bankruptcy judge be heard by a bankruptcy appellate panel (if one is available) unless a party elects to have the appeal heard by the district court.

FED.R.BANKR.P. 8002

Professor Resnick said that Rule 8002(c) would be changed in three ways. First, it would require that a request for an extension of time to file a notice of appeal be *filed*, rather than *made*,

within the applicable time period. Second, it would give the court discretion to allow a party to file a notice of appeal more than 20 days after expiration of the time to appeal, but only if: (1) the motion to extend the time were timely filed, and (2) the notice of appeal were filed within 10 days after entry of the court's order extending the time. Third, the amendment would prohibit the court from granting an extension of time to file a notice of appeal from certain designated categories of orders.

FED.R.BANKR.P. 8020

Professor Resnick stated that proposed Rule 8020 was a new rule, adapted from FED.R.APP.P. 38. It would make it clear that a district court, when sitting as an appellate court, or a bankruptcy appellate panel may award damages and costs for a frivolous appeal. There had been some uncertainty in case law as to whether a bankruptcy appellate panel had that authority.

FED.R.BANKR.P. 9011

Professor Resnick stated that Rule 9011 would be amended to conform to recent amendments to FED.R.CIV.P. 11. He pointed out, though, that the 21-day "safe harbor" provisions of Rule 11 would not apply if the improper paper complained of were the bankruptcy petition commencing a case.

FED.R.BANKR.P. 9015

Professor Resnick said that proposed new Rule 9015 would implement the newly-enacted provision of the 1994 Act authorizing bankruptcy judges conduct jury trials. It would make certain Federal Rules of Civil Procedure applicable, and it would provide the procedure for obtaining the consent of the parties to have a jury trial tried before a bankruptcy judge.

FED.R.BANKR.P. 9035

Professor Resnick explained that the proposed amendment to Rule 9035 was a technical change dealing only with the six judicial districts in North Carolina and Alabama, where there are no United States trustees. The amendment would provide that the bankruptcy rules apply generally in those states, unless they are inconsistent with "any federal statute." This is a broader term than that used in the existing rule, which refers only to titles 11 and 28 of the United States Code. The 1994 legislation had enacted certain provisions not codified in either title 11 or title 28 that relate to bankruptcy administration matters in these districts.

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

Official Forms - Amendments for Publication

Professor Resnick stated that the advisory committee recommended several changes in the Official Forms, as set forth in Agenda Item 8-B. He added that the advisory committee, acting on a recently-received request from the Committee on the Administration of the Bankruptcy System, also recommended one further, minor change. The proposal would add another box to the statistical information section of the petition form to provide better statistical information on estimated assets of debtors in very large cases.

The committee voted without objection to approve the proposed amendments to the forms 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 and attachments of May 7, 1996. (Agenda Item 5)

Amendments for Judicial Conference Approval

FED.R.CRIM.P. 16

Judge Jensen reported that the Judicial Conference at its March 1996 session had rejected generally the proposed amendments to Rule 16. He added, however, that the opposition voiced at the Conference had been directed exclusively to the proposed amendments to Rule 16(a)(1)(F), which would have required the government to disclose the names of its witnesses before trial.

Following the Conference's action, the advisory committee considered anew the other proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C), requiring reciprocal disclosure of information on expert witnesses when the defense gives notice under Rule 12.2 that it intends to present expert testimony on the defendant's mental condition. The advisory committee decided to approve these amendments once again, without further publication, and forward them for approval by the Judicial Conference.

Some members pointed out that there appeared to be a stylistic inconsistency between the language in lines 17-21 ("The summary provided under this subdivision") and that in lines 53-56 ("This summary"). They pointed out that different language had been used to express the identical meaning. **Judge Parker moved to change the language in lines 17-21 to make it consistent with that in lines 53-56. The motion died for lack of a second.**

Concern was also expressed as to whether references in the amendments to the Federal Rules of Evidence were accurate. **Mr. Schreiber moved to change line 16 to state "under Article VII of the Federal Rules of Evidence," rather than "under Rules 702, 703, or 705 of the Federal Rules of Evidence." The motion died for lack of a second.**

Judge Easterbrook moved to change the word "and" to "or" in lines 16 and 43 and to send the amendments to the Conference otherwise as written. The motion carried, and the committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

Amendments for Publication

FED.R.CRIM.P. 5.1 and 26.2

Judge Jensen stated that the proposed changes to Rules 5.1 and 26.2 would require production of a witness' statement after the witness has testified at a preliminary examination hearing. The amendments were parallel to similar changes made in 1993, requiring the production of witness statements at various other evidentiary hearings, including hearings on suppression of evidence, sentencing, detention, revocation or modification of supervised release, and section 2255 motions. He pointed out that, technically, these amendments, like the 1993 amendments, raised a Jencks Act question because the witnesses' statements would be required before trial.

Rule 26.2 would be amended to add a cross-reference to Rule 5.1. It would also be amended to correct a cross-reference to Rule 32, which had been amended recently.

One of the members suggested that the words "may not," appearing on line 8, were ambiguous. Mr. Garner explained that the style committee's convention was to use the words "must not," or "shall not," when describing a prohibition against specified action. The members agreed generally that the latter terminology would improve the rule, but Professor Schlueter advised against changing the language because the wording "may not" appeared in several other parallel rules.

Judge Easterbrook moved that the proposed amendments to Rules 5.1 and 26.2 be published for public comment as written. He added that the advisory committee could resolve the language issues after completion of the public comment period. **The motion was approved without objection.**

FED.R.CRIM.P. 31

Judge Jensen stated that the current rule did not provide a particular method for polling a jury, thereby permitting a jury to be polled collectively. The proposed amendment would require that jurors be polled individually.

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

FED.R.CRIM.P. 33

Judge Jensen stated that the proposed amendment would change the triggering date for newly-discovered evidence to be used as the basis for a new trial. The deadline for filing a motion for a new trial under the current rule is two years from the "final judgment." Case law has interpreted the rule to provide a deadline of two years from the final judgment of the court of appeals or from the issuance of the appellate court's mandate. The advisory committee recommended that the rule be amended to provide that the two-year period run from "the verdict or finding of guilty" in the district court.

Mr. Garner suggested that the language of the rule could be improved in a number of ways. It was the consensus of the committee that his proposed improvements should be taken into account by the advisory committee after the public comment period.

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

FED.R.CRIM.P. 35(b)

Judge Jensen explained that if a defendant provides substantial assistance to the government before sentencing, the court may—upon motion by the government—make a downward departure in imposing sentence. If the defendant provides substantial assistance after sentencing, the court may reduce the sentence under authority of Rule 35(b). The proposed amendment would authorize a reduction of sentence: (1) if the defendant provides some assistance before sentencing and some assistance after sentencing, and (2) each stage of the assistance, considered separately, may not be substantial, but in the aggregate they are substantial.

He pointed out that the advisory committee had considered the potential problem of a defendant "double-dipping" by obtaining a reduction for assistance at the time of sentencing and then seeking additional credit for the same assistance on a motion for reduction of sentence. He explained that the government can take care of the problem by not making the motion for reduction.

Judge Jensen agreed to a suggestion that the words "to the Government" be deleted from the third line of the committee note. The deletion would avoid taking a stand on the substantive issue of whether substantial assistance warranting a reduction of sentence includes assistance rendered by the defendant to state and local authorities, as well as to the federal government.

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

FED.R.CRIM.P. 43

Judge Jensen stated that the proposed amendment would specify with greater clarity the resentencing proceedings that require the presence of the defendant. The rule would require the defendant's presence at a Rule 35(a) resentencing, i.e., when there has been a reversal by the court of appeals and a remand to the district court for resentencing. On the other hand, the defendant would not have to be present for resentencing under: (1) Rule 35(b), when the government moves to reduce the sentence in return for the defendant's subsequent assistance, (2) Rule 35(c), when the court must correct the sentence for clear error, or (3) 18 U.S.C. § 3582(c), when the court may reduce the sentence after the Sentencing Commission lowers the applicable sentencing range or where the Bureau of Prisons moves to reduce the sentence for extraordinary and compelling reasons.

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

Information Item

FED.R.CRIM.P. 24

Judge Jensen reported that following the public comment period on proposed amendments to FED.R.CRIM.P. 24(a), dealing with attorney participation in voir dire, the advisory committee decided not to proceed with seeking Judicial Conference approval of the amendments. In this respect, the committee's action paralleled that of the Advisory Committee on Civil Rules, which decided not to proceed with companion amendments to FED.R.CIV.P. 47(a).

Judge Jensen stated that the Rules Enabling Act process had worked very well. The proposed amendments had attracted a large body of thoughtful and informative comments, including responses from many federal judges and from every major attorney association in the country. The advisory committees decided that proceeding with the proposed amendments was not the most effective way to proceed. Rather, the best way to improve the voir dire process was to initiate new programs to educate judges in the most effective ways of conducting voir dire. Judge Jensen added that both he and Judge Higginbotham had spoken to Judge Rya Zobel, Director of the Federal Judicial Center, about presenting voir dire programs both at orientation sessions for newly-appointed judges and at workshops for experienced judges.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Higginbotham presented the report of the advisory committee, as set forth in his memorandum and attachments of May 17, 1996. (Agenda Item 10)

Amendments for Judicial Conference Approval

FED.R.CIV.P. 9(h)

Judge Higginbotham reported that the proposed amendment would resolve an ambiguity in the rule by authorizing an interlocutory appeal in an admiralty case regardless of whether the order appealed from disposes of an admiralty claim or a nonadmiralty claim.

The committee voted without objection to approve the proposed amendment and send it to the Judicial Conference.

FED.R.CIV.P. 48

Judge Higginbotham reported that the proposed amendments to the rule would restore the 12-person jury in civil cases, albeit without alternate jurors. He stated that a number of judges had voiced opposition to the proposal during the public comment period.

He noted that concern had been expressed about the cost of implementing the amendment, especially at a time when appropriated funds for the Judiciary were limited. He explained that the advisory committee had attempted to quantify the costs of the proposal, but in the final analysis costs were not a major consideration when weighed against the value of returning to 12-person juries.

He pointed out that one of the most compelling reasons in favor of the proposal was the greater inclusion of minorities on juries. He emphasized that it was important public policy to have a cross-section of the community participating in the jury process. He added that the reduction in jury size from twelve persons to six had severely limited the representation of minorities on federal juries.

He noted that the advisory committee had considered the issue of courtroom availability and had found that virtually all courtrooms used by district judges had jury boxes large enough to accommodate at least 12 jurors. On the other hand, a number of magistrate judges did not have their own 12-person jury courtrooms. Nevertheless, they could, when necessary, obtain access to larger courtrooms in their courthouse.

He stated that all empirical studies had shown that the dynamics of the 12-person jury were different from those of smaller juries. Twelve-person juries were less inclined to be dominated by one or two strong-willed persons, and they were less likely to render inappropriate verdicts.

Finally, Judge Higginbotham emphasized that the proposed amendment represented a strong statement in support of the role of the civil jury itself. He added that juries were a fundamental component of the American form of government, and the civil jury was enshrined in the Constitution. The proposed amendment would return the federal courts to centuries of tradition.

One of the members stated that he found the argument regarding diversity to be persuasive, but not the arguments concerning history and custom. He added that a compelling case had not been made that 12-person juries render better decisions than 6-person juries. Moreover, the proposed amendment would in fact allow a verdict to be rendered by as few as six jurors. Another member added that the amendment was an interesting sociological proposal, but that it was opposed by most trial judges and by the Court Administration and Case Management Committee of the Judicial Conference.

Another member countered that his experience in the federal and state courts clearly demonstrated—and the universal opinion of practitioners in his state confirmed—that 12-person juries rendered more rational decisions than 6-person juries.

Several members stated that the *Batson* decision was simply not effective in practice and that the proposed amendment was the best assurance of obtaining representative juries in the federal courts.

Mr. Gershengorn reported that the Department of Justice was strongly of the view that the benefits of 12-person juries—better representativeness and better verdicts—were worth the additional costs.

One of the members stated that he would have preferred an amendment that would have relaxed the requirement of a unanimous verdict among the 12 jurors. Judge Higginbotham responded that the advisory committee had decided at the outset that unanimity would be retained. He added that the unanimity requirement was not the cause of hung juries, and that a very small percentage of juries are hung.

The committee voted by 9-2 with one abstention to approve the proposed amendments and send them to the Judicial Conference.

Amendments for Publication

FED.R.CIV.P. 23

1. Committee Process

Judge Stotler pointed out that the Advisory Committee on Civil Rules had been studying class actions for several years, and it had invited many interested parties to participate in its deliberations. In an effort to gather as much information as possible before drafting specific amendments to Rule 23, the committee had convened large meetings tantamount to public hearings to discuss class action issues with interested attorneys, judges, and academics. She complimented the committee on seeking out the best information possible from knowledgeable persons on complicated and controversial issues.

She stated that the advisory committee had only recently decided upon the final language of its draft proposal. She suggested that recent correspondence objecting to publication of the proposal was probably attributable to the recent nature of the advisory committee's action, coupled with the very public nature of its deliberations. She noted that copies of all recent correspondence had been distributed to each member of the standing committee, and she urged the members to take their time and work through the advisory committee's proposal carefully and thoroughly.

Judge Higginbotham noted that correspondence opposing the proposed changes had been received from many members of the academic community. He stated that the views expressed had been made with the best of intentions and should be regarded as very positive because they demonstrated the importance of the proposed amendments and the public attention they would receive. He added that it was vital that the committee hear from the users of the system. He pointed out, however, that there is a prescribed public comment period, and the commentators could appear at the hearings, present their views in person, and respond to questions.

Judge Higginbotham stated that the advisory committee had begun its review of class actions six years earlier at the direction of the Judicial Conference to study mass tort and asbestos cases. During the first round of consideration, under Judge Pointer's leadership, the committee had approved a set of proposed revisions to Rule 23 based in large part on a proposal by the American Bar Association. The committee, however, had not sought approval of the revisions because of the press of other matters on its agenda.

Judge Higginbotham explained that after he had become chairman, the advisory committee returned to Rule 23 and decided that it needed to reach out widely and learn as much as it could about class actions. This required not just seeking reactions to a particular proposal for amending the rule, but also a broad effort to deal with basic concepts and to explore the practical operation of all aspects of class actions.

Judge Higginbotham pointed out that the advisory committee had invited prominent class action lawyers to attend its meetings and discuss class action issues. It had also convened symposia and meetings on class actions with practitioners and scholars at university settings in Philadelphia, Dallas, New York, and Tuscaloosa. Many people had participated in these gatherings, and they had been encouraged to speak freely and share their differing viewpoints. Judge Higginbotham stated that the lawyers and academics had been generous with their time, and he thanked them for their contributions to the work of the advisory committee.

2. Substantive Issues

Judge Higginbotham pointed out that Rule 23 does not lend itself to neat analysis. It is peculiarly dependent on experience and practice. He emphasized that there are many different categories of class actions, ranging from securities cases, to product liability cases, to tort cases, to civil rights cases. The practical problems of class action litigation and the interests and viewpoints of the participants vary substantially from one category of litigation to another.

He also stressed at the outset that there is a critical difference between (b)(1) and (b)(2) classes, on the one hand, and (b)(3) classes on the other. In a (b)(1) or (b)(2) class, claimants have no right to opt out of the class. On the other hand, the right to opt out is key to the operation of a (b)(3) class. He stated that in the case of a (b)(3) settlement class, plaintiffs have the choice of either accepting the proposed settlement offer or refusing it and assuming the risk of prosecuting their cases individually. Accordingly, from a plaintiff's viewpoint, a claimant in a (b)(3) settlement action has greater rights than a claimant in a case that is first certified and then proceeds later to settlement.

Judge Higginbotham stated that the advisory committee had considered a number of proposals to revise Rule 23. In the end, the members took a very cautious approach and decided to adopt a "minimalist" draft. As an example, the committee had considered a proposal to require the court to look at the merits of the case and the strength of the proponent's claim as an element in determining whether to certify the class. After examination, though, the committee decided that the price of that inquiry was simply too great, for, among other things, it would require a minitrial.

Judge Higginbotham then described in turn each of the eight proposed changes that the advisory committee would make in Rule 23. He emphasized that the eight changes were stated distinctly, but they were interrelated and reinforced each other.

1. The list of factors pertinent to the court's findings of predominance and superiority would be expanded. A new subparagraph (b)(1)(A) would require the court to consider the practical ability of individual class members to pursue their claim without class certification.

2. Subparagraph (b)(3)(B) would be revised to make it clear that the court must look at alternatives to a class action. The amendment would emphasize the autonomy of individual claimants to determine their own destiny.

3. The word "maturity" would be added to subparagraph (b)(3)(C), thus requiring the court to look not only at the ability of plaintiffs to prosecute their claims, but also at the extent to which there has been development or maturity of the claims.

4. A new subparagraph (b)(3)(F) would be added, requiring the court to weigh the probable relief to individual class members against the costs and burdens of the class litigation.

5. New paragraph (4) would explicitly authorize settlement classes.

6. In subdivision (c) the requirement that the court certify a class "as soon as practicable" after commencement of the action would be changed to "when practicable" after commencement of the action. Read in conjunction with other proposed changes above, requiring the court to look at the maturity of claims and to consider other alternatives to a class action, the amendment would remove the incentive in the present rule for a judge to certify a class quickly.

7. Subdivision (e) would be amended to require that the court hold a hearing on settlements in class actions. Even though courts routinely hold hearings on settlements, the rule would now explicitly require it.

8. New subdivision (f) would authorize interlocutory appeals of district court orders granting or denying certification of a class.

Finally, Judge Higginbotham pointed out that the advisory committee had decided not to address "futures" classes, which are the subject of ongoing case law development. He also emphasized that the proposed amendments did not deal with (b)(1) or (b)(2) class actions, but only with (b)(3) class actions. The committee had insisted on retention of the right of a claimant to opt out of a settlement class. Moreover, the amendments did not dispense with the Rule 23(a) prerequisites or the notice requirements of (b)(3).

3. Views of the Members

The chair asked the members first for any general comments they had regarding the proposed amendments to Rule 23.

Chief Justice Veasey suggested that it would be helpful if the committee note were expanded to include some of the introduction and background just enunciated by Judge Higginbotham. The note would also benefit by: (1) updating the case law to include the *Georgine* case, and (2) addressing some of the concerns expressed in recent correspondence to the committee. Judge Higginbotham responded that the note could be expanded to discuss *Georgine,* but interested parties were very much aware already of the issues and the case law, and they would submit knowledgeable and helpful comments during the public comment period.

Mr. Perry stated that it was clear from the committee note that the opt-out provision applied to settlement classes. Yet, he asked whether the rule itself should be amended to provide explicitly that a settlement class under (b)(4) is governed by all the provisions applicable to (b)(3) classes, including a right of opt-out.

Judge Higginbotham responded that the text might be expanded, but the advisory committee had concluded that the language of the amendment provided clearly that a settlement class is a (b)(3) class. He added that it could not reasonably be interpreted as dispensing with the opt-out provision and other requirements associated with a (b)(3) class. He suggested that confusion on this point had been introduced because some people who had read the text had not read the committee note. He recommended that the language of the rule be published without change and that drafting improvements be considered as part of the public comment process.

Mr. Schreiber stated that he had spent 30 years in class action work, as a plaintiff's lawyer, a defense lawyer, a judge, a teacher, and a special master. He argued that the proposed amendments were defendant-oriented and would cripple class actions. The central premise of the advisory committee, he said, had been that something had to be done to address mass tort problems. But by attempting to solve those problems by amending Rule 23, the committee would set up an entirely new class action structure that would spawn many new problems. He added that the proposed amendments would prevent consumer class actions and cause great disturbance in securities and antitrust class actions, unless the advisory note were expanded to identify explicitly what a judge may and may not do under the rule.

Judge Stotler then took up each of the eight suggested amendments to the rule in order, soliciting comments from the members on each.

Mr. Schreiber stated that the advisory note accompanying subparagraphs (b)(3)(A) and (b)(3)(B) had to be expanded to specify that the judge must take into account the tremendous cost of class litigation. For example, an individual plaintiff might have a large claim for $200,000, but the potential relief could well be dwarfed by the cost of maintaining the class action and obtaining discovery, which might may run into millions of dollars.

Mr. Schreiber expressed reservations about subparagraph (C), dealing with the maturity of related litigation involving class members. He alluded to a Seventh Circuit case in which, he said, the trial judge had decertified a class action on the grounds that a handful of the plaintiffs had tried and lost their individual cases and the defendants apparently would have refused to settle the cases under any circumstances. He argued that as a result of the court's decertification of the class and the plaintiffs' inability to pursue a class action, they had to settle for 30-40 percent of what similarly-situated claimants later received in Japan. He strongly recommended that a decision to decertify a class should not be based on only a few cases. He said that he was not opposed in general to the concept that the maturity of related litigation should be a pertinent factor in the court's certification decision, but it should be explained more fully in the advisory committee note.

Judge Easterbrook responded that in the Seventh Circuit case described, there had been 13 trials at the time of the class decertification decision. The defendants had prevailed in twelve cases, and the plaintiff had prevailed in one case, winning about a million dollars. The case ended up being settled for the actuarial value of plaintiff verdicts in the set of 13 litigated cases. He stated that the key issue was that the trial judge must determine in each case the appropriate number of cases that constitute maturity of related litigation.

Mr. Sundberg pointed out that he had been involved in the case personally and believed that the issue of maturity of litigation had not been dispositive of the case. There were many other important factors that had a major influence on the outcome of the case.

Mr. Schreiber stated that if the amendment and committee note were published without change, a huge number of people would testify at the hearings to express their concerns and objections. As a result, the advisory committee would have to reexamine the amendments, correct them, and republish them. Judge Higginbotham responded that the public comment period was a vital part of the rules process. If the public comments demonstrated that changes in the amendments or note were needed, the advisory committee would make the changes and republish the proposal, if necessary..

Mr. Schreiber argued that proposed new subparagraph (b)(3)(F) was the most troublesome provision of all because it appeared to weigh the claims of individual litigants against the total cost of the class litigation. He proposed that the committee note state clearly that the totality of all the claims, rather than each individual claim, be compared to the costs of the litigation. In its present form, he stated, the amendment could literally end all consumer cases. He added that, alternatively, the problems could be resolved by revising the language of the rule itself.

Judge Ellis said that the language of the rule was not clear on the point and might have to be revised. He added, though, that sending the proposal back to the advisory committee would serve no useful purpose since the committee had studied the matter long and hard. Rather, the time had come to solicit the advice of the public and make any needed changes later.

Judge Ellis continued that there was a question as to whether the amendments fell within the bounds of the Rules Enabling Act because it could be argued that they affected substantive rights. He suggested that there was a fundamental ideological fight between people who believe that class actions should be used for certain purposes and people who believe that they ought not to be used for those purposes. He concluded that publication of the amendments would generate a very important debate and lead to helpful suggestions for improvements.

Judge Easterbrook suggested that a court should not compare the probable relief to individual class members against the total costs of class litigation. Rather, it could compare either: (1) individual claims against the pro-rata cost per class member, or (2) the aggregate benefits to all class members against the aggregate costs of the litigation. He added that he believed that the proposed amendment was perfectly clear in this respect, but if the public comments were to show that it was not clear, the language could be adjusted.

Mr. Sundberg said that the language could perhaps stand some clarification, but it should be published in its present form. The bench and bar would understand the issues, provide helpful insights, and suggest language improvements.

Professor Coquillette noted that, as a technical matter, it would aid electronic research if subparagraphs (b)(3)(C) and (b)(3)(D) were not renumbered.

Judge Easterbrook suggested that the text of paragraph (c)(2), referring to paragraph (b)(3), should be amended to include a specific reference to (b)(4). Professor Cooper responded that the advisory committee had decided not to adopt that approach. It had drafted (b)(4) to provide that a settlement class is a class certified under (b)(3). If (c)(2) were amended to include a reference to (b)(4), it would carry the implication that a (b)(4) class is not a (b)(3) class. He added that another way to clarify the matter would be to replace the words "under subdivision (b)(3)," as they appear in (b)(4), with the words "request certification of a subdivision (b)(3) class." Judge Easterbrook concluded that any language changes should be deferred to the public comment period.

Judge Higginbotham added that the advisory committee had decided as a matter of policy not to dispense with the (b)(3) requirements in a settlement class action. Stylistic refinements to reinforce that point could be made after the comment period without requiring publication of the amendments.

Mr. Schreiber stated that he supported the addition of paragraph (b)(4) to the rule. But he recommended that the committee note be expanded: (1) to specify the factors that a judge must consider in determining whether to certify a settlement class, and (2) to address the issue of future claimants. He added that the *Georgine* opinion had discussed these matters well, and they needed to be included in the committee note.

Judge Stotler explained that the *Georgine* opinion had been issued after the advisory committee had settled on the language of the amendment and committee note. She suggested that *Georgine* should be addressed, and it might be advisable to refer to the case in the publication sent to bench and bar.

Judge Higginbotham said that he found the *Georgine* decision to be troubling, and it was in conflict with the holdings of five other circuits. In *Georgine*, the court of appeals would require the trial judge, in considering whether to certify a class, to engage in the hypothetical exercise of determining whether or not the case could be tried. He added that the *Georgine* opinion, applied literally, would bar certification of the breast implant cases and a great many securities cases.

Mr. Schreiber stated that the basis of the *Georgine* holding was that the court had found no typicality on the part of the representative party, who was a present claimant attempting to represent future claimants. He added that he believed that Judge Becker would find settlement classes appropriate in certain cases.

Chief Justice Veasey stated that the public comment period would be better informed if the committee note were enhanced to discuss: (1) the important cases, including *Georgine*, and (2) the factors relevant to determining whether the probable relief to class members justifies the costs and burdens of class litigation. Judge Higginbotham responded that the committee note could easily be expanded to include a citation to *Georgine*.

Professor Hazard stated that he strongly supported publishing the amendments and agreed with the observations of Judge Easterbrook, Chief Justice Veasey, and Mr. Schreiber regarding revisions to the rule and note. He added, though, that the changes should be made following the public comment period.

He said that he had reached the conclusion that settlement classes were necessary. They appeared to be what most class actions were about. He explained that under (b)(4), the lawyers may negotiate a deal before they file the case and seek certification of the class. The proposed settlement they reach requires court approval to constitute a contract, because if the court does not certify the class, a condition essential to the settlement fails to materialize, and the deal is effectively canceled. In essence, the issue is not one of judicial approval, for the court ultimately must approve every settlement. Rather, the key question is whether the lawyers should be able to bargain without superintendence of the judge or be compelled to bargain under what could be the court's close superintendence.

In other words, it boiled down to the question of whether the rules should legitimate the pre-filing settlement contracting process. He concluded that he was satisfied that there were good reasons for permitting that process. The trial judge still must make a gestalt decision—based on all the facts in each particular case—as to whether the particular class suit, as configured by the lawyers, is on balance a good thing. He emphasized that the subject was multidimensional and involved many variables. Accordingly, it just did not lend itself to an easy, definitive resolution in a rule of procedure.

Professor Hazard added that some of the academics who had written to the committee had misunderstood the rule and the significance of the (b)(3) requirements, which the advisory committee had intended to be applicable in settlement class actions. They had also been unrealistic in addressing what the real social alternatives would be to a settlement class in large, continuing tort situations. He said that he was satisfied that the asbestos cases, for example, had reached the point where settlement was the only sensible way to deal with them.

He argued that the *key* question in *Georgine* should have been whether the proposed settlement was on balance a good thing. He regretted that the opinion had not been more explicit in acknowledging that issue.

Mr. Schreiber said that he approved of the proposed change in subdivision (c). It would replace the current requirement that the court make a decision as to whether the class action should be maintained "as soon as practicable" with a requirement that the court make the decision "when practicable." He pointed out that the change would reflect current reality, since most cases are not certified within 60 or 90 days.

Judge Easterbrook said that the proposed change in subdivision (e), requiring a hearing on dismissal or compromise of a class action, was fine in principle. He questioned, though, whether a hearing is necessary when there is no opposition to the dismissal or compromise. He suggested that the advisory committee might want to consider substituting the words "opportunity for a hearing." Judge Higginbotham responded that the suggestion would be taken into account by the advisory committee.

Mr. Schreiber asked why class certification decisions warranted an interlocutory appeal when: (1) other types of equally important matters cannot be appealed, and (2) the courts of appeals were overburdened. He doubted whether a special exception was needed for class actions. Judge Higginbotham responded that the advisory committee was of the view that class actions as a matter of policy did in fact warrant a special path, at least to the extent that a party could request leave to appeal a certification decision. He concluded that the courts of appeals would have little difficulty in distinguishing between those matters that warrant an interlocutory appeal and those that do not.

Judge Higginbotham pointed out that class action certification issues had come before the appellate courts only in mandamus cases. The proposed new Rule 23(f) would recognize reality and authorize a discretionary, interlocutory appeal, rather than force the appellate courts to continue relying on the extraordinary writ.

Mr. Sundberg strongly supported the interlocutory appeal provision. He said that experience in the Florida state courts—where there is an interlocutory appeal as of right from a certification decision—had demonstrated that these appeals had not created caseload burdens for the appellate courts. Moreover, the proposed interlocutory appeal would be purely discretionary, and it was clearly preferable to having the appellate courts stretch to use the mandamus remedy.

Judge Higginbotham added that the advisory committee had not addressed a number of other issues in the proposed amendments because it had concluded that they should continue to be developed through decisional law. Professor Hazard added that the advisory committee had been wise in deciding not to address the issue of future claims in the proposal.

Judge Stotler called for the vote on sending the proposed amendments to Rule 23 out for public comment, with a citation or two added to the committee note. **The committee voted without objection to approve the proposed amendments for publication.**

Mr. Schreiber requested that the members of the advisory committee be given a report of the standing committee's discussions regarding the Rule 23 proposal. He said that the members had raised serious concerns that needed careful examination. Judge Stotler asked Mr. McCabe to provide a detailed record of these concerns for consideration by the advisory committee. In response, he incorporated a detailed summary of the discussions in the minutes of the meeting.

Informational Items

FED.R.CIV.P. 26

The advisory committee had decided not to seek Judicial Conference approval of proposed amendments to Rule 26(c), governing protective orders. Rather, it had concluded that Rule 26(c) should be held for further consideration as part of a new project to study the general scope of discovery authorized by Rule 26(b)(1) and the scope of document discovery under Rules 34 and 45.

Judge Higginbotham pointed out that at one time the standards for document discovery had been more stringent than those for oral discovery, in that they required a showing of good cause. He stated that members of the bar had expressed strong sentiments to the advisory committee that the linkage of the two kinds of discovery had caused problems and should be reconsidered. He added that the issue would be considered at the next meeting of the advisory committee.

Judge Higginbotham reported that the March 1997 meeting of the advisory committee would be held in conjunction with a national conference of lawyers, judges, and professors to discuss the final study and report required under the Civil Justice Reform Act of 1990. He noted that the conference would be sponsored by RAND and the American Bar Association, and it should prove to be very useful for the rules process.

He also reported that the American College of Trial Lawyers and the Litigation Section of the American Bar Association, among others, had appointed liaisons who attend the meetings of the advisory committee and provide constructive comments on rules issues.

FED.R.CIV.P. 47

As noted in the report of the Advisory Committee on Criminal Rules, both the criminal and civil advisory committees had concluded that consideration of the proposed amendments to FED.R.CIV.P. 47(a) and FED.R.CRIM.P. 24(a), requiring attorney participation in voir dire, should be postponed in favor of efforts to encourage mutual education between bench and bar on the values of lawyer participation in the voir dire examination of prospective jurors.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Winter presented the report of the advisory committee, as set forth in his memorandum and attachments of May 15, 1996. (Agenda Item 9)

Amendments for Judicial Conference Approval

F.R.EVID. 407

Professor Berger explained that the proposed amendment would make two changes in the rule, both of which would reflect the decisional law in effect in most circuits. First, the advisory committee would extend the subsequent remedial measures rule explicitly to cover product liability cases. Second, the committee would make it clear that the rule applied only to remedial measures taken after occurrence of the event producing the injury or harm. The committee had not accepted a recommendation made by several commentators that the rule also apply to remedial measures taken after manufacture of the product, but before occurrence of the event.

Judge Winter stated that the proposed amendments had been more controversial than anticipated. Professor Berger added that the objections raised to the proposal during the public comment period had been directed only to the timing of the remedial measures. No objections had been voiced to extending the rule explicitly to products liability cases.

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

F.R.EVID. 801

Judge Winter stated that the proposed amendment to Rule 801(d)(2) restated the Supreme Court's ruling in *Bourjaily v. United States* that a court must consider the contents of a coconspirator's statement in determining the existence of the conspiracy and the participation of the person against whom the statement is used. The amendment would also provide that the statement of the coconspirator alone would not be sufficient to establish the existence of the conspiracy. The court would have to consider other evidence and the circumstances surrounding the statement. Judge Winter stated that this result was implied in *Bourjaily*, but the advisory committee had thought it wise to address the matter explicitly in the rule. He added that the amendment would also extend the reasoning to cover statements offered under subparagraphs (C) and (D) of the rule.

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

F.R.EVID. 803, 804, and 807

Judge Winter stated that Rule 803(24) and Rule 804(b)(5) would be transferred to proposed new Rule 807. Relocation of the residual exceptions to the hearsay rule would facilitate possible future additions to Rules 803 and 804.

Mr. Garner suggested that a comma should be inserted after the reference to Rules 803 and 804 on line 3 of the proposed amendment to Rule 807. The suggestion was accepted by Judge Winter.

Judge Winter stated that most of the objections to the amendments during the public comment period had come from commentators seeking changes in the residual exception rule itself. Professor Berger added that, in light of the comments, the advisory committee had agreed to examine how the residual exception is being applied in practice.

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

F.R.EVID. 804(b)(6)

Judge Winter pointed out that the proposed new paragraph (b)(6), labeled "forfeiture by wrongdoing," would address the problem of witness tampering. It would provide that a party who has engaged in, or acquiesced in, wrongdoing intended to procure the unavailability of a

witness forfeits the right to object on hearsay grounds to admission of the prior statements of the witness. He explained that the advisory committee deliberately had chosen the broad terms "acquiesce" and "wrongdoing" to avoid both over inclusion and under inclusion and to leave room for common sense interpretation by the courts. He added that Rule 403 is applicable, and it allows a judge to exclude any evidence that is unreliable or prejudicial.

Professor Berger stated that some commentators had interpreted the proposed amendment too broadly and had suggested that it might make admissible any prior statements made by the victim in a murder case. She and Judge Winter emphasized that the rule dealt only with witness-tampering, for it referred explicitly to conduct intended to "procure the unavailability of the declarant as a witness."

Judge Ellis suggested that the committee note be amended to make this point clearer, and Judge Winter agreed to the suggestion.

The committee voted with one objection to approve the proposed amendments and send them to the Judicial Conference.

F.R.EVID. 806

Judge Winter stated that the proposed amendment would correct a typographical error in the rule by eliminating a comma.

The committee voted without objection to approve the proposed amendment and sent it to the Judicial Conference.

Informational Item

F.R.EVID. 103

Judge Winter stated that the advisory committee, following the public comment period, had decided not to pursue the proposed amendments to Rule 103. It had published a proposed default rule requiring that a pretrial objection to, or proffer of, evidence be renewed at trial unless the court had stated on the record that its ruling was final or if "the context clearly demonstrates" that the ruling is final.

The proposal had generated several public comments. Differences of opinion had been voiced as to which way the default rule should operate, i.e., whether a pretrial evidentiary ruling should or should not have to be renewed at trial. The same differences existed among the members of the advisory committee itself. Moreover, people on both sides of the issue were uncertain as to what exactly was meant by the language "the context clearly demonstrates." Judge Winter concluded that a default rule would not be appropriate unless it were clear on its face.

Judge Winter noted that three members of the advisory committee had voted to send the proposed amendment to the Judicial Conference as published. Another three members wanted to approve a default rule with the opposite result, i.e., that a pretrial ruling would not have to be renewed at trial. Four members wanted to defer the entire matter and consider whether a new approach might be attempted. The final vote of the advisory committee had been 7-2 to defer action on the proposed amendments to Rule 103 and to seek the advice of the civil and criminal advisory committees.

SPECIAL STUDY CONFERENCE ON ATTORNEY CONDUCT

The committee sponsored a second special study conference to discuss attorney conduct issues, held on Tuesday afternoon, June 18 and Wednesday morning, June 19, 1996. Approximately 25 guests had participated, including a cross-section of interested and knowledgeable attorneys, professors, representatives of professional organizations, and members of other Judicial Conference committees. A similar study conference had been held in conjunction with the committee's January 1996 meeting.

The study conference had been convened as a way to begin a candid dialogue among all interested parties on a series of perceived problems regarding attorney discipline rules in the federal courts. Among the problem areas considered by the conferees were: (1) the "balkanization" of local federal court rules on attorney conduct, (2) the absence of any attorney conduct rules in some federal courts, (3) uncertainty as to what standards of conduct exist in certain districts, (4) choice of law difficulties, particularly in complex cases, and (5) differences between the Department of Justice and the states over the power to regulate the conduct of government attorneys in certain matters.

Professor Coquillette reported that he had presented seven options for addressing attorney conduct in the federal courts, including:

1. *Promulgate a uniform federal rule or rules, through the Rules Enabling Act process, that would establish a single code governing professional conduct in every federal district court.*

   Professor Coquillette reported that this option had attracted no support.

2. *Do nothing at all.*

   Professor Coquillette stated that this option had received almost no support. Rather, there was a sense among the participants that some action should be taken with regard to attorney conduct rules. Ms. Gorelick added, however, that the Department of Justice would prefer to have no action taken rather than have rules promulgated that would adversely impact government lawyers.

3. *Promulgate a uniform federal rule, through the Rules Enabling Act process, that would adopt as the standard for attorney conduct in a federal district court the standards adopted by the highest court of the state in which the federal district is located.*

   Professor Coquillette stated that three participants in an informal straw vote had favored this option, with the understanding that a federal district court could not opt out of a specific state rule of attorney conduct. On the other hand, four participants had supported this option as long as it explicitly authorized the district court to opt out of specific state rules.

   Professor Coquillette emphasized that all participants favored "dynamic conformity" with state law, that is, the federal court would conform to state law as it is amended from time to time.

4. *Prepare a model rule on attorney conduct that would be adopted by the individual district courts on a voluntary district-by-district basis.*

   Professor Coquillette reported that five participants had favored this option. He noted that they had found the alternative attractive in large part because it could be accomplished relatively quickly and would not involve either the Rules Enabling Act process or the Congress.

5. *Promulgate uniform federal rules addressing a limited number of important matters that arise frequently and involve the heart of the litigation process, such as conflicts of interest or lawyers serving as witnesses. By default, all other conduct matters would be governed by state law.*

   Professor Coquillette reported that this option had been endorsed by five participants.

6. *Promulgate only a uniform federal rule on choice of law.*

   Professor Coquillette reported that this option had received no support.

7. *Promulgate a uniform federal default rule providing that if a district court did not adopt a local rule on attorney conduct, state rules of conduct would apply.*

   Professor Coquillette reported that this option had been supported by one participant.

Professor Coquillette reported that he had asked the special study conference for guidance as to what course of action they might want to recommend to the rules committee. In response, the participants, by an 11-5 straw vote, recommended that he draft a model local rule on attorney conduct for the district courts. The rule might be generally similar to one approved in 1978 by the Court Administration Committee of the Judicial Conference, specifying that attorney conduct in each federal district should be governed by the rules of the state in which the district is located, except to the extent that the district court chooses to promulgate a different local rule.

He stated that even those participants who favored a uniform federal rule on attorney conduct saw no harm in starting with a model local rule. He further stated that a majority of the special study conference was of the view that no action should be taken to draft uniform rules under the Rules Enabling Act, especially while delicate negotiations were continuing between the Department of Justice and the Conference of Chief Justices.

Professor Coquillette added that the members of the special study conference had asked that he examine reported cases on attorney discipline in the courts of appeals under FED.R.APP.P. 46. He stated that he would also try to distinguish the bankruptcy cases in his decisional law search. The Federal Judicial Center had been asked to gather empirical data on: (1) experience in districts that had adopted the 1978 model rule, (2) the frequency with which federal courts have handled discipline matters directly, instead of referring them to state disciplinary authorities. The committee asked that the results be available for its June 1997 meeting.

Chief Justice Veasey suggested that another option would be defer taking any action at all, at least as long as the negotiations between the Department of Justice and the state chief justices were continuing. Several other committee members agreed, and Judge Stotler suggested that the reporter proceed with the suggested research and with the drafting of a model rule, and plan to discuss this work further at the next meeting, without making recommendations to the committee.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker stated that the restyling efforts of the subcommittee would be confined to the Federal Rules of Appellate Procedure until completion of the comprehensive project to restyle those rules. He offered the continuing services of the style subcommittee and Mr. Garner to the advisory committees and their reporters to assist in drafting and editing proposed amendments to the rules. He also advised that copies of the *Guidelines for Drafting and Editing Court Rules* had been sent by the Administrative Office to every federal judge, court executive, and member of Congress.

At several points during the meeting, members expressed concern over a tendency by the committee to spend substantial time during its meetings in redrafting the language of proposed amendments and committee notes, including amendments and notes that had not yet been

published. Some members expressed the view that it was appropriate for the standing committee to resolve drafting problems, style defects, and inconsistencies in terminology before rules are published for comment. Others, though, voiced the contrary opinion that drafting issues should be deferred for consideration by the advisory committee following the public comment process.

The members reached a consensus that drafting problems ideally should be resolved by the advisory committee before a rule amendment or committee note is submitted to the standing committee for authority to publish. They agreed that: (1) any member who has a concern with particular language in a proposed amendment or note should raise the concern immediately with the chair or reporter of the appropriate advisory committee in time for it to be resolved in advance of the standing committee meeting, and (2) whenever possible, the advisory committees should seek the advice of the style subcommittee and its consultant before submitting proposed amendments to the standing committee.

LONG RANGE PLANNING

Professor Coquillette reported that the Long Range Planning Subcommittee's *Self-Study of Federal Judicial Rulemaking* had been extremely valuable and was being implemented in many different ways. He said that several of the recommendations in the study had been brought to the attention of the Chief Justice at a meeting in December 1995, and several others lay within the special authority of the chair of the committee. All in all, 13 of the study's 16 recommendations had been implemented already or required no further action.

Two of the remaining three recommendations addressed the issue of creating local options in the national rules. The final recommendation called for a change to a two-year cycle as the norm for the rulemaking process. These recommendations would be taken into account by the standing committee and the advisory committees on an ongoing basis.

Judge Stotler noted that the Long Range Planning Subcommittee had been discharged, and she stated that the committee had officially received the subcommittee's report and would publish it. She then thanked the subcommittee for its efforts and accomplishments. She advised that she would write to personally thank Professor Thomas Baker, who was the primary author of the study.

FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the next meeting of the committee would be held on Wednesday through Friday, January 8-10, 1997, in Tucson, Arizona.

She further reported that the summer 1997 meeting will be held on Wednesday through Friday, June 18-20, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe
Secretary

Agenda Item 3A

Agenda F-18 (Summary)
Rules
September 1996

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Conference:

1. Approve proposed amendments to Bankruptcy Rules 1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035, and proposed new Rules 1020, 3017.1, 8020, and 9015 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ....pp. 4-9

2. Approve proposed amendments to Civil Rules 9 and 48 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 10-13

3. Approve proposed amendments to Criminal Rule 16 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp.16-17

4. Approve proposed amendments to Evidence Rules 407, 801, 803(24), 804(b)(5), 806, and proposed new Rules 804(b)(6) and 807 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp.19-21

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

- Rules governing attorney conduct ....p. 22
- Report to the Chief Justice on proposed select new rules and rules amendments generating controversy ....p. 23
- Status of proposed and pending rules amendments ....p. 23

Agenda F-18
Rules
September 1996

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Your Committee on Rules of Practice and Procedure met on June 19-20, 1996. All the members attended the meeting, with Ian H. Gershengorn attending on behalf of Deputy Attorney General Jamie S. Gorelick, who was unable to be present.

Representing the advisory committees were: Judge James K. Logan, chair, and Professor Carol Ann Mooney, reporter, of the Advisory Committee on Appellate Rules; Judge Paul Mannes, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Patrick E. Higginbotham, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Ralph K. Winter, Jr., chair, and Professor Margaret A. Berger, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and

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Mark D. Shapiro, attorney, of the Administrative Office's Rules Committee Support Office; Patricia S. Channon of the Bankruptcy Judges Division; William B. Eldridge of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Tentative Approval Subject to Later Reconsideration

The Advisory Committee on Appellate Rules submitted for approval amendments to Appellate **Rules 26.1, 29, 35**, and **41**, together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in September 1995. A public hearing was scheduled, but later canceled. The advisory committee requested that transmission of the amendments to the Judicial Conference be deferred, however, until the completion of the style revision project.

The style revision of the Appellate Rules is part of a comprehensive effort to clarify and simplify the language of the procedural rules. The style changes are designed to be nonsubstantive. The comprehensive style revision was published for public comment in April 1996, and the comment period expires on December 31, 1996. Instead of approving and transmitting the substantive amendments to **Rules 26.1, 29, 35,** and **41** separately, the advisory committee recommended that their transmittal be deferred until next year, when they could be considered along with the stylized revision of the Appellate Rules.

Your committee approved the proposed amendments provisionally, subject to reconsideration in light of any comments that may be received on the same rules during consideration of the stylized revision of the rules. A full explanation of the proposed amendments will be submitted next year when they are transmitted to the Judicial Conference for approval.

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments that would combine Appellate **Rules 5 and 5.1** into a **new Appellate Rule 5** with the recommendation that it be published for public comment.

Rule 5 (*Appeal by Permission Under 28 U.S.C. § 1292(b)*) and **Rule 5.1** (*Appeal by Permission Under 28 U.S.C. § 636(c)(5)*) would be amended to combine both rules into a **new Rule 5** that would govern all discretionary appeals from district court orders, judgments, and decrees. Although Rule 5 deals with interlocutory appeals and Rule 5.1 deals with judgments originally entered on direction of a magistrate judge, both rules involve discretionary appeals, and much of Rule 5.1 is repetitive of Rule 5. Most of the changes are intended to broaden the language so that the new Rule 5 would apply to all discretionary appeals.

In addition to economizing the rules, the proposed rules' consolidation would govern any future discretionary appeals authorized under 28 U.S.C. § 1292(e). The statutory provision was amended in 1992 authorizing the Supreme Court to prescribe rules that "provide for an appeal of an interlocutory decision to the courts of appeals that

is not otherwise provided for" in § 1292. The Court has not yet exercised its authority under § 1292(e), but a proposed amendment to Civil Rule 23 is being published for comment that would permit a discretionary interlocutory appeal from a district court order granting or denying class action certification. Instead of prescribing separate rules for each newly authorized interlocutory appeal, the proposed single rule would govern present and future discretionary appeals.

Appellate **Form 4** (*Affidavit to Accompany Motion for Permission to Appeal in Forma Pauperis*) would be substantially revised to request more detailed information, which is needed to evaluate a party's eligibility to proceed in forma pauperis.

The committee voted to circulate the proposed amendment of Appellate Rules 5 and 5.1 and the revised Appellate Form 4 to the bench and bar for comment.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Federal Rules of Bankruptcy Procedure **1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011,** and **9035** and proposed **new Rules 1020, 3017.1, 8020,** and **9015**, together with Committee Notes explaining their purpose and intent. Many of the changes conform to, or implement, the Bankruptcy Reform Act of 1994. The Act contains provisions on procedures governing, among other matters, small businesses, appointment of trustees, and jury trials. The proposed amendments — with the exception of Rule 1010 — and new rules had been circulated to the bench and bar for comment in

September 1995. A public hearing was scheduled, but later canceled because no request to appear was received by the committee.

The proposed amendments to **Rule 1010** (*Service of Involuntary Petition and Summons; Petition Commencing Ancillary Case*) would conform certain references to subdivisions in Civil Rule 4 and Bankruptcy Rule 7004 that were changed in 1993, and 1996, respectively. The amendments are technical and not intended to make any substantive change.

After approving amendments to Rule 1010, your committee agreed with the request of the advisory committee not to publish them for comment because they were purely conforming and technical involving changes in certain cross-references and their publication for comment was not appropriate or necessary. Under section 4(d) of the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*, "(t)he Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary."

Rule 1019 (*Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case*) would be amended to clarify the effect of a conversion of a case to a different chapter of the Bankruptcy Code and make stylistic improvements.

New Rule 1020 (*Election to be Considered a Small Business in a Chapter 11 Reorganization Case*) provides procedures and time limits for a small business to elect to

be considered a small business in a chapter 11 case. The new rule implements certain provisions added to the Bankruptcy Code by the Bankruptcy Reform Act of 1994 that authorize a qualified debtor in a chapter 11 reorganization case to elect to be considered a small business.

Rule 2002 (*Notices to Creditors, Equity Security Holders, United States, and United States Trustee*) is amended to provide notice of a meeting called for the purpose of electing a chapter 11 trustee. In addition, the caption of every notice required to be given by the debtor to a creditor must include information mandated under § 342(c) of the Bankruptcy Code as amended by the Bankruptcy Reform Act of 1994.

Rule 2007.1 (*Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case*) is amended to provide procedures for the election of a chapter 11 trustee implementing § 1104(b) of the Bankruptcy Code as amended by the Bankruptcy Reform Act of 1994.

The proposed amendments to **Rule 3014** (*Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case*) would set a deadline for secured creditors to elect the application of § 1111(b)(2) of the Bankruptcy Code in a small business case when a conditionally-approved disclosure statement is approved finally without a hearing.

Rule 3017 (*Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases*) is amended to give the court flexibility in fixing the record date for determining the holders of securities who are

entitled to receive a disclosure statement, ballot, and other materials in connection with the solicitation of votes on a plan.

New Rule 3017.1 (*Court Consideration of Disclosure Statement in a Small Business Case*) would implement § 1125(f), added by the Bankruptcy Reform Act of 1994, by providing procedures for the conditional and final approval of a disclosure statement in a small business chapter 11 case.

Rule 3018 (*Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case*) would be amended to provide a court with flexibility in fixing the record date for determining the holders of securities who may vote on a plan.

Rule 3021 (*Distribution Under Plan*) would be amended to provide flexibility in fixing the record date for determining the holders of securities who are entitled to receive distributions under a confirmed plan; to treat the holders of debt securities the same as other creditors by requiring that their claims be allowed to receive distribution; and to clarify that all interest holders whose interests have not been disallowed may receive a distribution under a confirmed plan.

Rule 8001 (*Manner of Taking Appeal; Voluntary Dismissal*) would be amended to conform to the 1994 Bankruptcy Reform Act's provisions that amended 28 U.S.C. § 158 to permit an appeal as of right from an order extending or reducing the exclusivity period for filing a chapter 11 plan under § 1121 of the Code. Subdivision (e) would be specifically amended to provide a procedure for electing to have an appeal heard by the

district court rather than by a bankruptcy appellate panel, under 28 U.S.C. § 158(c)(1), as amended by the Act.

The proposed amendments to **Rule 8002** (*Time for Filing Notice of Appeal*) would allow a court, based on excusable neglect, to enter an order — more than 20 days after the expiration of the time to file a notice of appeal — permitting a party to file a notice of appeal if the motion for an extension was timely and the notice of appeal is filed not later than ten days after the entry of the order extending the time; and to prohibit any extension of time to file a notice of appeal if the appeal is from certain types of orders.

New Rule 8020 (*Damages and Costs for Frivolous Appeal*) would be added to clarify the authority of a district court or a bankruptcy appellate panel hearing an appeal to award damages and costs for a frivolous appeal.

Rule 9011 (*Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers*) would be amended to conform to the 1993 amendments to Civil Rule 11, except that the Rule 11 "safe harbor" provision — which prohibits the filing of a motion for sanctions unless the challenged paper is not withdrawn or corrected within a prescribed time after service of the motion — does not apply if the challenged paper is a bankruptcy petition.

New Rule 9015 (*Jury Trials*) would provide procedures relating to jury trials in bankruptcy cases and proceedings, including procedures for consenting to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e), as added by the Bankruptcy Reform Act of 1994.

Rule 9035 (*Applicability of Rules in Judicial Districts in Alabama and North Carolina*) would be amended to clarify that the Bankruptcy Rules do not apply to the extent that they are inconsistent with any federal statutory provision relating to bankruptcy administrators in the districts of North Carolina and Alabama.

The proposed amendments to the Federal Rules of Bankruptcy Procedure, as recommended by your committee, appear in Appendix A together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve proposed amendments to Bankruptcy Rules 1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035, and proposed new Rules 1020, 3017.1, 8020, and 9015 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Official Bankruptcy Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed revisions of **Official Bankruptcy Forms 1, 3, 6, 8, 9, 10, 14, 17,** and **18,** and **new Forms 20A** and **20B** and recommended that they be published for public comment.

Most of the proposed changes to the Official Forms are technical or intended to clarify or simplify existing forms. Some of the more frequently used forms were redesigned by a graphics expert, and instructions in forms often used by petitioners in bankruptcy or creditors were rewritten using plain English.

Your committee voted to circulate the proposed amendments to Official Forms 1, 3, 6, 8, 9, 10, 14, 17, and 18, and new Forms 20A and 20B to the bench and bar for comment.

AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted to your committee proposed amendments to Civil **Rules 9** and **48** together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in September 1995. Public hearings were held in Oakland, California; New Orleans, Louisiana; and Atlanta, Georgia.

Rule 9(h) (*Pleading Special Matters*) would be amended to resolve the ambiguity that arises from interlocutory appeals in cases that involve both admiralty and nonadmiralty claims by clarifying that "a case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3)."

The proposed amendments to **Rule 48** (*Number of Jurors — Participation in Verdict*) would require the initial empaneling of a jury of twelve persons in all civil cases, in the absence of stipulation by counsel to a lesser number. The jury may be reduced to fewer members if some are excused under Rule 47(c). A jury may be reduced to fewer than six members, however, only if the parties stipulate to a lower number before the verdict is returned. The proposed amendments would not alter the requirement of unanimity, nor require alternate jurors.

The advisory committee found the following considerations persuasive:

- It reviewed the considerable body of literature on jury size, particularly empirical studies, which overwhelmingly favored a return to twelve-person juries. (A survey

of the relevant articles is contained in an October 12, 1994 memorandum from the advisory committee's chairman. It is set out in Appendix B.)

- A twelve-person jury would significantly increase the statistical probability of having a more diverse cross-section of the community and would include more persons from different occupational and economic backgrounds than a smaller jury. In particular, a twelve-person jury would likely include more racial, religious, and ethnic minority representation. For example, the statistical probability of including in a twelve-person jury at least one member of a minority that constitutes 10% of the population is one and one-half times greater than in a six-person jury. An empirical study substantiating the statistical probabilities has shown that minorities constituting 10% of the population were represented on twelve-person juries 82% of the time and on six-person juries only 32% of the time.

- A twelve-person jury has a greater capacity for recalling all facts and arguments presented at trial.

- A larger jury would be less likely to be dominated by a single aggressive juror and less likely to reach an aberrant decision.

- Recent studies have challenged the data relied on by the courts when they originally decided to reduce jury size in the early 1970's.

- Few magistrate judges lack access to twelve-person jury courtrooms within reasonable proximity to their chambers.

- Although the added costs are not insignificant — roughly $10 million per year — the increase would be less than 13% of the funds allocated to pay for jurors' expenses and only one-third of one percent of the judiciary's overall $3 billion budget. The advisory committee was sensitive to and appreciated the concerns of the Economy Subcommittee "that the fiscal implications of (this) policy (change) be carefully considered as part of (the) deliberations before these amendments are placed before the Judicial Conference." (The Economy Subcommittee expressed no policy position on the proposed amendments.)

Objections to the proposal were voiced during the public comment period. First, opponents argue that the present flexibility in the rule, which allows, but does not require, a judge to seat a jury of less than twelve persons, has been working well, and the

proposed change is unnecessary. Second, they also assert that incurring added costs to pay the expenses of additional veniremembers and some structural renovation to jury boxes in magistrate judge courtrooms would be unwise, especially in these times of financial restraints. An argument was also made that more hung juries would result.

The advisory committee concluded that the possibility of an increase in the number of "hung juries" caused by the proposed amendments was not supported by data. The committee found telling the statistical comparison of hung juries in civil and criminal jury trials. Recent data showed that in 1995, only 122 of 4,248 jury trials in criminal cases (2.9 percent) and 26 of 4,236 jury trials in civil cases (six tenths of one percent) resulted in hung juries. The difference in the overall number of hung juries between the two can be discounted further when considering the more demanding "beyond a reasonable doubt" level of certainty mandated in criminal twelve-person jury trials. The advisory committee also recognized that some districts would experience difficulties in securing a larger juror pool. But it concluded that the benefits outweighed the difficulties.

The advisory committee unanimously voted to recommend that the proposed amendments to **Rule 48** be submitted for approval. The advisory committee found particularly helpful the article written by Chief Judge Richard S. Arnold, which reviews the long history and extols the virtues of a twelve-person jury. *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1 (1993) — contained in Appendix C. Professors Wright and Miller also found the article to be "a persuasive argument that smaller juries are inferior to twelve person juries." 9A Charles

A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2491, n. 35 (1995). In the end, the advisory committee believed that juries lie at the core of the Article III function and that it is important to regain the strength of twelve-person juries, restoring the longstanding tradition of the court system that had been followed for over 600 years.

The Standing Committee noted the substantial public comment on the proposed amendments, much of it adverse from the bench, while positive from practitioners, including national bar associations. A committee member expressed concern over the opposition expressed by a number of judges who commented on the proposed amendments. In addition, the Committee on Court Administration and Case Management opposes the proposed amendments for reasons set out in Judge Ann C. Williams' December 21, 1994 and March 20, 1996 letters contained in Appendix D. The Department of Justice stated its strong view, however, favoring the proposed amendments because the gains — better representation and better verdicts — were worth the additional costs. After carefully considering the various points of views, your committee voted 9 to 2 with one abstention to recommend approval of the proposed amendments.

The proposed amendments to the Federal Rules of Civil Procedure, as recommended by your committee, are in Appendix E together with an excerpt from the advisory committee report.

> **RECOMMENDATION:** That the Judicial Conference approve the proposed amendments to Civil Rules 9 and 48 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to **Rule 26(c)** (*General Provisions Governing Discovery; Duty of Disclosure*) dealing with protective orders were originally published for comment in October 1993, but were later revised and republished in September 1995 after being returned to the rules committees by the Judicial Conference. The advisory committee decided not to proceed with the amendments at this time, but to defer further consideration to coincide with future study of the American College of Trial Lawyers' request to narrow the general scope of discovery.

The proposed amendments to **Rule 47** (*Selection of Jurors*) would have given the parties a right to supplement the court's examination and orally question prospective jurors under reasonable limits on time, manner, and subject matter determined by the trial court in its discretion. The proposed amendments were circulated to the bench and bar for comment in September 1995. The advisory committee decided not to go forward with the proposal. Instead, the advisory committee urged the Federal Judicial Center to include presentations of experienced practitioners and judges on voir dire at future judicial programs and orientations.

Amendment of Rule 23 Approved for Publication and Comment

At the request of the Ad Hoc Committee on Asbestos Litigation, the Judicial Conference in March 1991 directed your committee to ask the Advisory Committee on Civil Rules to study whether **Rule 23** should be amended to accommodate the demands of mass tort litigation.

The advisory committee began its work with a review of a draft rule proposed in 1986 by the American Bar Association, which would have collapsed the three subdivisions of Rule 23(b); created an opt-in class provision; authorized a court to permit or deny opting out of any class action; specifically governed notice requirements for (b)(1) and (b)(2) classes; and made many other changes, many of them independently significant. In 1993, the advisory committee recommended publication of a modified version of the ABA proposal, but then withdrew it for further consideration.

The advisory committee requested that the Federal Judicial Center study all class actions terminated in a two-year period in four metropolitan districts. Meanwhile, the advisory committee continued to study the rule. It invited experienced class action practitioners to meet with the advisory committee, held a conference at the University of Pennsylvania Law School, attended a symposium at Southern Methodist University Law School, and participated in a symposium at the New York University Law School. In addition, many lawyers and representatives of bar groups attended and spoke at the Fall 1995 and Spring 1996 advisory committee meetings.

The advisory committee faced a host of competing proposals that would substantially amend **Rule 23.** At several meetings, it painstakingly drafted and debated various options. In the end, the advisory committee requested publication of proposed amendments that were significant, but much less sweeping and comprehensive than many other proposals promoted by serious class action participants. Among other things, the advisory committee's preliminary draft would provide more discretion to the district court

in certifying class actions, explicitly permit certification of settlement classes, and establish a discretionary interlocutory appeal of the certification decision.

Class actions involve difficult and divisive issues. The advisory committee's proposal has drawn immediate criticism from some persons and professional groups that have closely followed the rulemaking process. Although there was some disagreement on some of the substantive provisions, your committee agreed that the public airing of the proposal would provide all interested persons an opportunity to express their views as contemplated under the Rules Enabling Act. Further views and comments from academics, experienced practitioners, and judges on the proposal would be especially helpful in the committees' future deliberations.

Your committee voted to circulate the proposed amendments to the bench and bar for comment.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted to your committee proposed amendments to Criminal **Rule 16** together with Committee Notes explaining their purpose and intent.

Rule 16 (*Discovery and Inspection*) would be amended to require pretrial reciprocal disclosure by the parties of expert testimony offered on the issue of the defendant's mental condition. The reciprocal disclosure provisions, parallel to similar provisions adopted in 1993, would be triggered when the government requests disclosure

concerning expert witness' information regarding the defendant's mental condition after the defendant has given notice under Rule 12.2(b).

The proposed amendments to **Rule 16** were circulated to the bench and bar for comment in September 1994, together with controversial changes that would have required the government to disclose the names of witnesses to be called at trial seven days before the trial. Although there was no controversy or discussion of the specific amendments providing reciprocal rights for the disclosure of expert witness' information, the specific proposal was subsumed by the action of the Judicial Conference at its September 1995 session rejecting the amendments to Rule 16 — which was aimed at the provision requiring government pretrial disclosure of the names of witnesses. JCUS-SEP 95, p. 96.

The advisory committee concluded that separate republication of the same proposal on disclosure of expert witness' information on the defendant's mental condition was unnecessary. It submitted the proposed amendments for approval.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your committee, are in Appendix F with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rule 16 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The Advisory Committee on Criminal Rules decided not to proceed with proposed amendments to **Rule 24** (*Trial Jurors*) that would have provided parties with a right to

participate in the oral questioning of prospective jurors by supplementing the court's examination under reasonable limits on time, manner, and subject matter determined by the court in its discretion. The proposed amendments were circulated to the bench and bar for comment in September 1995. The advisory committee joined with the Advisory Committee on Civil Rules in urging the Federal Judicial Center to use its training and educational programs to provide more information on effective voir dire from experienced lawyers and judges.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted to your committee proposed amendments to Criminal Rules **5.1, 26.2, 31, 33, 35,** and **43** and recommended that they be published for public comment.

The proposed amendments to **Rule 5.1** (*Preliminary Examination*) would require the production of witness' statements after the witness had testified at a preliminary hearing. **Rule 26.2** (*Production of Witness Statements*) would be amended to include a cross-reference to the proposed amendment of Rule 5.1. The amendments are similar to changes made in 1993 requiring production of witness statements in other proceedings governed by Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings Under § 2255.

The proposed amendments to **Rule 31** (*Verdict*) would require that jurors be polled individually whenever any polling occurs after the verdict, either at a party's request or on the court's motion.

Rule 33 (*New Trial*) would be amended to clarify the time within which to file a motion for a new trial on the ground of newly discovered evidence. Under the proposed amendment, the two-year time limit would commence on the date of the verdict or finding of guilty instead of on the date of the final judgment — which has been interpreted to mean either the appellate court's judgment or the issuance of its mandate.

Rule 35 (*Correction or Reduction of Sentence*) would be amended to allow a court to aggregate a defendant's assistance rendered before and after sentencing in determining whether a defendant's subsequent assistance is "substantial" as required under Rule 35(b).

The proposed amendments to **Rule 43** *(Presence of the Defendant)* would add proceedings involving the reduction of sentence under Rule 35(b) and (c) and resentencing hearings under 18 U.S.C. § 3582(c) to those at which the defendant's presence is not required. A defendant's presence is not now required in similar proceedings involving the correction of sentence.

The committee voted to circulate the proposed amendments to the bench and bar for comment.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted to your committee proposed amendments to Federal Rules of Evidence **407, 801(d)(2), 803(24), 804(b)(5), 806,** and **807,** and **new Rule 804(b)(6)** together with Committee Notes explaining their

purpose and intent. The proposed amendments were circulated to the bench and bar for comment in September 1995. A public hearing was held in New York, New York in January 1996.

Rule 407 (*Subsequent Remedial Measures*) would be amended to extend the exclusionary principle expressly to product liability actions and to clarify that the rule applies only to remedial measures made after the occurrence that produced the damages giving rise to the action.

Rule 801 (*Definitions*) would be amended to address the issues raised by the Supreme Court in Bourjaily v. United States, 483 U.S. 171 (1987). It would codify the holding in Bourjaily by stating expressly that a court must consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." The amendment also provides that the content of the declarant's statement does not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The amendments also treat analogously preliminary questions relating to the declarant's authority and the agency or employment relationship.

The contents of **Rule 803(24)** (*Other Hearsay Exceptions; Availability of Declarant Immaterial*) and Rule **804(b)(5)** (*Other Hearsay Exceptions; Declarant Unavailable*) would be combined and transferred to a **new Rule 807** (*Residual Exception*) under the proposed amendments. The changes would facilitate future additions to Rules 803 and 804. No change in meaning was intended.

New Rule 804(b)(6) (*Hearsay Exceptions; Declarant Unavailable*) 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's deliberate wrongdoing or acquiescence therein was intended to procure the unavailability of the declarant as a witness. The rule would apply in civil as well as criminal cases and would apply to any party, including the government. The amendment would apply only to actions taken after the event to prevent a witness from testifying at trial.

The proposed amendment of **Rule 806** (*Attacking and Supporting Credibility of Declarant*) corrects a misplaced comma in a citation.

Proposed new **Rule 807** (*Residual Exception*) consists of old Rules 803(24) and 804(b)(5).

The proposed amendments to the Federal Rules of Evidence, as recommended by your committee, are in Appendix G together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 407, 801, 803(24), 804(b)(5), 806, and proposed new Rules 804(b)(6) and 807 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to **Rule 103** (*Rulings on Evidence*) would have clarified the different practices among the courts regarding the finality of rulings on pretrial motions concerning the admissibility of evidence. Unless the court ruling had been stated on the record or the context clearly demonstrated that the ruling was final, the

proposed amendments would have explicitly established a default rule requiring counsel to renew at trial any pretrial objection or proffer that was earlier denied by the court to preserve the objection for appeal purposes.

The proposed amendments to **Rule 103** were circulated to the bench and bar for comment in September 1995. Neither the rule published for comment nor an alternative default rule commanded a majority in the comments or in the advisory committee. The advisory committee decided not to go forward with the proposed amendments.

RULES GOVERNING ATTORNEY CONDUCT

Your committee sponsored a second special study conference on federal rules governing attorney conduct to follow up on a conference held in January 1996. Inclement weather experienced on the East Coast in January prevented several key participants from attending the initial conference. The conferees completed their work, unanimously agreeing that problems caused by the present "balkanization" of applicable local rules in the districts need to be addressed and corrected. Several recommendations were submitted for the committee's consideration, including obtaining more data on the 17 courts that adopted a previously approved Conference model local rule and the attorney disciplinary procedures employed by the districts. The committee agreed to request the Federal Judicial Center to study these two matters. It deferred any formal action until the conclusion of ongoing negotiations between the Department of Justice and the Conference of Chief Justices on contacting represented parties.

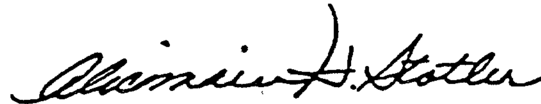
REPORT TO THE CHIEF JUSTICE ON PROPOSED SELECT NEW RULES OR RULES AMENDMENTS GENERATING CONTROVERSY

In accordance with the standing request of the Chief Justice, a summary of issues concerning the proposed amendments generating controversy is set forth in Appendix H.

STATUS OF PROPOSED AMENDMENTS

A chart prepared by the Administrative Office (reduced print) is attached as Appendix I, which shows the status of the proposed amendments to the rules.

Respectfully submitted,



Alicemarie H. Stotler

Frank H. Easterbrook
Thomas S. Ellis, III
Jamie S. Gorelick
Geoffrey C. Hazard, Jr.
Phyllis A. Kravitch
Gene W. Lafitte
James A. Parker
Alan W. Perry
Sol Schreiber
Alan C. Sundberg
E. Norman Veasey
William R. Wilson, Jr.

APPENDICES

Appendix A —	Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix B —	Survey of Literature on the Size of Juries
Appendix C —	Chief Judge Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1 (1993)
Appendix D —	Correspondence from Judge Ann C. Williams
Appendix E —	Proposed Amendments to the Federal Rules of Civil Procedure
Appendix F —	Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix G —	Proposed Amendments to the Federal Rules of Evidence
Appendix H —	Report to the Chief Justice on Proposed Select New Rules or Rules Amendments Generating Controversy
Appendix I —	Chart Summarizing Status of Rules Amendments

PROPOSED SELECT NEW RULES OR RULES AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Committee as to certain new rules or controversial rules amendments. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is forwarded together with this report.

Federal Rules of Civil Procedure

I. Rule 48 (*Court must initially empanel jury of 12*)

A. Brief Description of Changes

The proposed amendments would require the initial empaneling of a jury of twelve persons in all civil cases, in the absence of stipulation by counsel to a lower number. The jury may be reduced to fewer members if some are excused under Rule 47(c). The proposed amendments would not alter the requirement of unanimity, nor require alternate jurors. Under the present rule, the court has the discretion to seat a jury of not less than six and not more than twelve.

B. Arguments in Favor

1. More diverse juries: A twelve-person jury would significantly increase the statistical probability of having a more diverse cross-section of the community and would include more persons from different occupational and economic backgrounds than a smaller jury. In particular, a twelve-person jury would likely include more racial, religious, and ethnic minority representation.

2. Greater recall of facts and arguments.

3. Domination by a single aggressive juror less likely; jury less likely to reach an aberrant decision.

4. Data relied on by the courts in the early 1970's when jury size was originally reduced has been challenged by more recent studies.

C. <u>Objections</u>

1. Change is unnecessary: The present flexibility in the rule, which allows, but does not require, a judge to seat a jury of less than twelve persons, has been working well.

2. Cost: Incurring added costs to pay the expenses of additional venire members and some structural renovation to jury boxes in magistrate judge courtrooms would be unwise, especially in these times of financial restraints.

3. The possibility of an increase in the number of "hung juries."

D. <u>Advisory Committee Consideration</u>

The advisory committee unanimously voted to recommend that the proposed amendments to Rule 48 be submitted for approval. The advisory committee reviewed the considerable body of literature on jury size, particularly empirical studies, which overwhelmingly favored a return to twelve-person juries. (A survey of the relevant articles is contained in an October 12, 1994 memorandum from the advisory committee's chairman. It is set out as *Appendix B* to the Conference materials on rules.)

The advisory committee found that the expected cost increase, although not insignificant — roughly $10 million per year — would be less than 13% of the funds allocated to pay for jurors' expenses and only one-third of one percent of the judiciary's overall $3 billion budget.

Further, the advisory committee concluded that the possibility of a rise in the number of "hung juries" caused by the proposed amendments was not supported by data. The advisory committee recognized that some districts would experience difficulties in securing a larger juror pool. But it concluded that the benefits outweighed the difficulties.

In the end, the advisory committee believed that juries lie at the core of the Article III function and that it is important to regain the strength of twelve-person juries, restoring the longstanding tradition of the court system that had been followed for over 600 years.

E. Standing Committee Consideration

The Standing Committee noted the substantial public comment on the proposed amendments, much of it adverse from the bench, while positive from practitioners, including national bar associations. A committee member expressed concern over the opposition expressed by the Committee on Court Administration and Case Management and a number of judges who commented. The Department of Justice stated its strong view, however, favoring the proposed amendments because the gains — better representation and better verdicts — were worth the additional costs. After carefully discussing and considering the various points of views, the Standing Committee voted 9 to 2 with one abstention to recommend approval of the proposed amendments.

Federal Rules of Evidence

I. Rule 801 (*Statement of coconspirator, person authorized, or agent or servant must be considered*)

A. Brief Description of Changes

The amendments would require a court to consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." The amendments also provide that the content of the declarant's statement does not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The amendments treat analogously preliminary questions relating to the declarant's authority and the agency or employment relationship.

B. Advisory Committee Consideration

The proposed amendments would codify the holding by the Supreme Court in Bourjaily v. United States, 483 U.S. 171 (1987), and resolve an issue left open in Bourjaily by providing that the content of the statement is not alone sufficient to establish conspiracy. The advisory committee found that this was in accord with existing practice — the eight courts of appeals that have faced this issue have required some evidence in addition to the contents of the statement. Public comment on the proposed changes was generally favorable, although a number of commentators debated the wisdom of omitting the requirement that *evidence aliunde* must be received to establish the alleged conspiracy.

C. Standing Committee Consideration

The Standing Committee approved the proposed amendments to Rule 801 without objection.

II. Rule 804(b)(6) (*Admissibility not precluded when declarant's unavailability caused by party's wrongdoing*)

A. Brief Description of Changes

The amendments would add a new provision providing that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein was intended to procure the unavailability of the declarant as a witness. The rule would apply in civil as well as criminal cases and to all parties, including the government. The amendment would apply only to actions taken after the event to prevent a witness from testifying.

B. Advisory Committee Consideration

Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although one of those circuits applies the "clear and convincing" standard and the four other circuits apply the "preponderance of the evidence" standard for determining whether there is a forfeiture. The amendment

adopts the preponderance of the evidence standard. There was some discussion regarding the precise meaning of a party's "wrongdoing" and "acquiescence." The advisory committee believed that further refinement of what was intended by the terms would be counterproductive and would lead to risks of being under (or over) inclusive. They concluded that future judicial interpretation of the terms' meanings in individual cases would be more appropriate.

C. Standing Committee Consideration

The Standing Committee approved the proposed amendments to Rule 804 with one member objecting.

CHAPTER I. CODE OF CONDUCT FOR UNITED STATES JUDGES[1]

Introduction

This Code applies to United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. In addition, the Tax Court, Court of Veterans Appeals, and Court of Military Appeals have adopted this Code. Persons to whom the Code applies must arrange their affairs as soon as reasonably possible to comply with the Code and should do so in any event within one year of appointment.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions[2] concerning this Code and its applicability should be addressed to the Chairman of the Committee on Codes of Conduct as follows:

Chairman, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the
United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

(202) 273-1100

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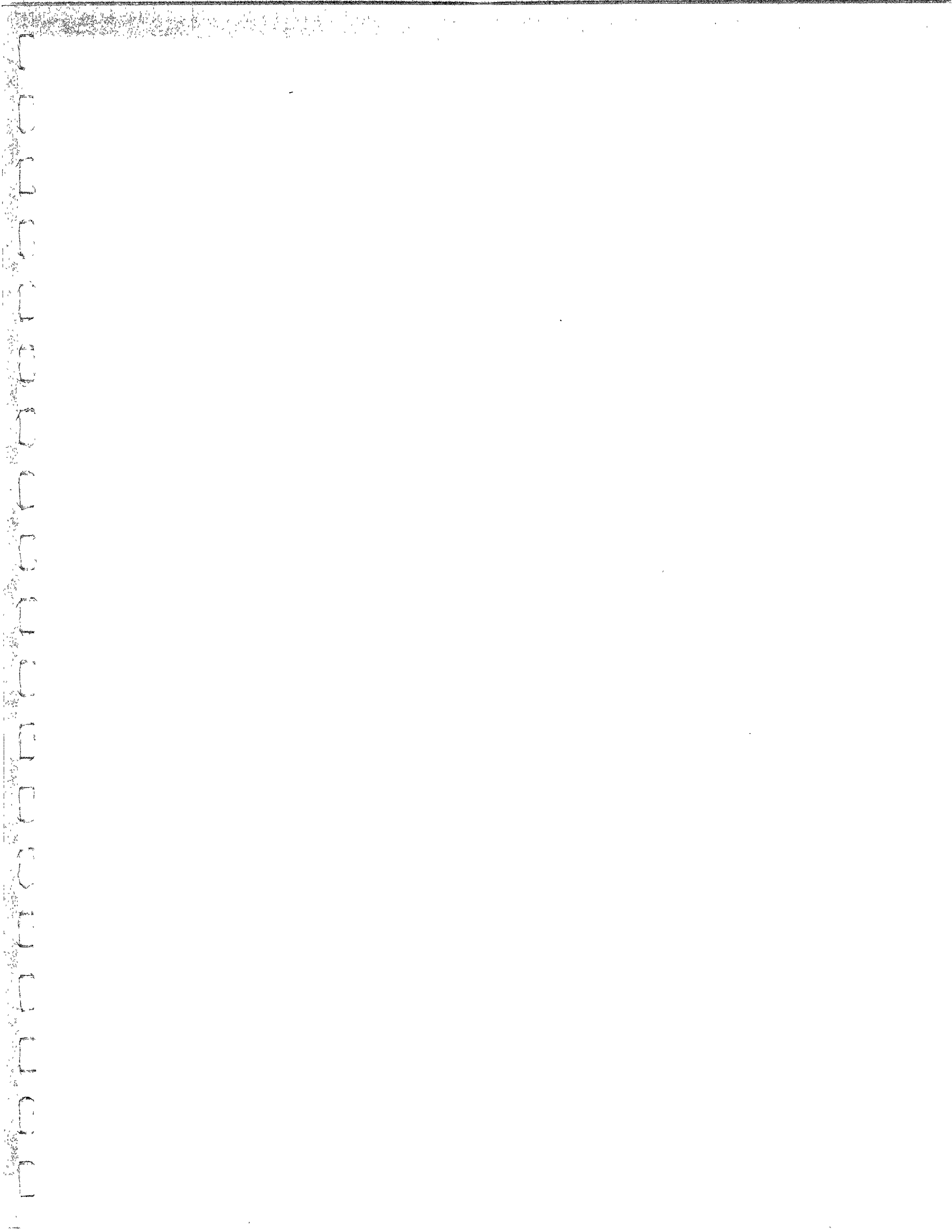
[1] The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Codes of Judicial Conduct for United States Judges." At its March 1987 session, the Judicial Conference deleted the word "Judicial" from the name of the Code. Substantial revisions to the Code were adopted by the Judicial Conference at its September 1992 session. Section C. of the Compliance section, following the code, was revised at the March 1996 Judicial Conference. Canons 3C(3)(a) and 5C(4) were revised at the September 1997 Judicial Conference.

[2] Procedural questions may be addressed to: Office of the General Counsel, Administrative Office of the United States Courts, Thurgood Marshall Federal Judiciary Building, Washington, D.C., 20544, (202-273-1100).

CANON 4

A JUDGE MAY ENGAGE IN EXTRA-JUDICIAL ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

A judge, subject to the proper performance of judicial duties, may engage in the following law-related activities, if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge:



A. Code of Conduct for Judicial Employees.

Introduction

This Code of Conduct applies to all employees of the Judicial Branch except Justices; judges; and employees of the United States Supreme Court, the Administrative Office of the United States Courts, the Federal Judicial Center, the Sentencing Commission, and Federal Public Defender offices.[1] As used in this code in canons 3F(2)(b), 3F(5), 4B(2), 4C(1), and 5A, a member of a judge's personal staff means a judge's secretary, a judge's law clerk, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff.[2]

Contractors and other nonemployees who serve the Judiciary are not covered by this code, but appointing authorities may impose these or similar ethical standards on such nonemployees, as appropriate.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this code. Employees should consult with their supervisor and/or appointing authority for guidance on questions concerning this code and its applicability before a request for an advisory opinion is made to the Committee on Codes of Conduct. In assessing the propriety of one's proposed conduct, a judicial employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations[3] (e.g., receipt of a gift may implicate canon 2 as well as canon 4C(2) and the Ethics Reform Act gift regulations). Should a question remain after this consultation, the affected judicial employee, or the chief judge, supervisor, or appointing authority of such employee, may request an advisory opinion from the Committee. Requests

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[1] Justices and employees of the Supreme Court are subject to standards established by the Justices of that Court. Judges are subject to the Code of Conduct for United States Judges. Employees of the AO and the FJC are subject to their respective agency codes. Employees of the Sentencing Commission are subject to standards established by the Commission. Federal public defender employees are subject to the Code of Conduct for Federal Public Defender Employees. When Actually Employed (WAE) employees are subject to canons 1, 2, and 3 and such other provisions of this code as may be determined by the appointing authority.

[2] Employees who occupy positions with functions and responsibilities similar to those for a particular position identified in this code should be guided by the standards applicable to that position, even if the position title differs. When in doubt, employees may seek an advisory opinion as to the applicability of specific code provisions.

[3] See Guide to Judiciary Policies and Procedures, Volume II, Chapter VI, Statutory and Regulatory Provisions Relating to the Conduct of Judges and Judicial Employees.

for advisory opinions may be addressed to the Chairman of the Committee on Codes of Conduct in care of the General Counsel, Administrative Office of the United States Courts, One Columbus Circle, N.E., Washington, D.C. 20544.

Adopted September 19, 1995 by the
Judicial Conference of the United States
Effective January 1, 1996

CANON 4: **IN ENGAGING IN OUTSIDE ACTIVITIES, A JUDICIAL EMPLOYEE SHOULD AVOID THE RISK OF CONFLICT WITH OFFICIAL DUTIES, SHOULD AVOID THE APPEARANCE OF IMPROPRIETY, AND SHOULD COMPLY WITH DISCLOSURE REQUIREMENTS**

A. Outside Activities. A judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves. Subject to the foregoing standards and the other provisions of this code, a judicial employee may engage in such activities as civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, and recreational activities, and may speak, write, lecture, and teach. If such outside activities concern the law, the legal system, or the administration of justice, the judicial employee should

first consult with the appointing authority to determine whether the proposed activities are consistent with the foregoing standards and the other provisions of this code.

B. Solicitation of Funds. A judicial employee may solicit funds in connection with outside activities, subject to the following limitations:

(1) A judicial employee should not use or permit the use of the prestige of the office in the solicitation of funds.

(2) A judicial employee should not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign. A member of a judge's personal staff should not solicit any court personnel to contribute funds to any such activity under circumstances where the staff member's close relationship to the judge could reasonably be construed to give undue weight to the solicitation.

(3) A judicial employee should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, except as an incident to a general fund-raising activity.

C. Financial Activities.

(1) A judicial employee should refrain from outside financial and business dealings that tend to detract from the dignity of the court, interfere with the proper performance of official duties, exploit the position, or associate the judicial employee in a substantial financial manner with lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, provided, however, that court reporters are not prohibited from providing reporting services for compensation to the extent permitted by statute and by the court. A member of a judge's personal staff should consult with the appointing judge concerning any financial and business activities that might reasonably be interpreted as violating this code and should refrain from any activities that fail to conform to the foregoing standards or that the judge concludes may otherwise give rise to an appearance of impropriety.

(2) A judicial employee should not solicit or accept a gift from anyone seeking official action from or doing business with the court or other entity served by the judicial employee, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties; except that a judicial employee may accept a gift as permitted by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder. A judicial employee should endeavor to prevent a member of a judicial employee's family residing in the

household from soliciting or accepting any such gift except to the extent that a judicial employee would be permitted to do so by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder.

Note: See 5 U.S.C. § 7353 (gifts to federal employees). See also 5 U.S.C. § 7342 (foreign gifts); 5 U.S.C. § 7351 (gifts to superiors).

(3) A judicial employee should report the value of gifts to the extent a report is required by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Note: See 5 U.S.C. app. 6, §§ 101 to 111 (Ethics Reform Act financial disclosure provisions).

(4) During judicial employment, a law clerk or staff attorney may seek and obtain employment to commence after the completion of the judicial employment. However, the law clerk or staff attorney should first consult with the appointing authority and observe any restrictions imposed by the appointing authority. If any law firm, lawyer, or entity with whom a law clerk or staff attorney has been employed or is seeking or has obtained future employment appears in any matter pending before the appointing authority, the law clerk or staff attorney should promptly bring this fact to the attention of the appointing authority.

D. Practice of Law. A judicial employee should not engage in the practice of law except that a judicial employee may act pro se, may perform routine legal work incident to the management of the personal affairs of the judicial employee or a member of the judicial employee's family, and may provide pro bono legal services in civil matters, so long as such pro se, family, or pro bono legal work does not present an appearance of impropriety, does not take place while on duty or in the judicial employee's workplace, and does not interfere with the judicial employee's primary responsibility to the office in which the judicial employee serves, and further provided that:

(1) in the case of pro se legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings);

(2) in the case of family legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings) and does not involve the entry of an appearance in a federal court;

(3) in the case of pro bono legal services, such work (a) is done without compensation; (b) does not involve the entry of an appearance in any federal, state, or local court or administrative agency; (c) does not involve a matter of public controversy, an issue likely to come before the judicial employee's court,

or litigation against federal, state or local government; and (d) is reviewed in advance with the appointing authority to determine whether the proposed services are consistent with the foregoing standards and the other provisions of this code.

Judicial employees may also serve as uncompensated mediators or arbitrators for nonprofit organizations, subject to the standards applicable to pro bono practice of law, as set forth above, and the other provisions of this code.

A judicial employee should ascertain any limitations imposed by the appointing judge or the court on which the appointing judge serves concerning the practice of law by a former judicial employee before the judge or the court and should observe such limitations after leaving such employment.

Note: See also 18 U.S.C. § 203 (representation in matters involving the United States); 18 U.S.C. § 205 (claims against the United States); 28 U.S.C. § 955 (restriction on clerks of court practicing law).

E. Compensation and Reimbursement. A judicial employee may receive compensation and reimbursement of expenses for outside activities provided that receipt of such compensation and reimbursement is not prohibited or restricted by this code, the Ethics Reform Act, and other applicable law, and provided that the source or amount of such payments does not influence or give the appearance of influencing the judicial employee in the performance of official duties or otherwise give the appearance of impropriety. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by a judicial employee and, where appropriate to the occasion, by the judicial employee's spouse or relative. Any payment in excess of such an amount is compensation.

A judicial employee should make and file reports of compensation and reimbursement for outside activities to the extent prescribed by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Notwithstanding the above, a judicial employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States, provided, however, that court reporters are not prohibited from receiving compensation for reporting services to the extent permitted by statute and by the court.

Note: See 5 U.S.C. app. 6, §§ 101 to 111 (Ethics Reform Act financial disclosure provisions); 28 U.S.C. § 753 (court reporter compensation). See also 5 U.S.C. app. 7, §§ 501 to 505 (outside earned income and employment).

ADVISORY COMMITTEE ON CODES OF CONDUCT
ADVISORY OPINION NO. 67

Attendance at Educational Seminars.

Advice has been requested on whether judges may with propriety attend seminars and similar educational activities organized by non-governmental entities and may have the expenses of their attendance paid by such entities.

Payment of tuition and expenses involved in attendance at non-government sponsored seminars constitutes a gift. Canon 5C(4) permits a judge to accept a gift so long as certain tests are met. Canon 5C(4)(b) provides that one gift a judge may accept is a fellowship or scholarship "awarded on the same terms applied to other applicants". See Advisory Opinion No. 6, in which the Interim Advisory Committee on Judicial Activities approved acceptance of reimbursement for expenses of attending the Appellate Judges Seminar of the New York University Law School.

A gift may also be accepted under Canon 5C(4)(c), so long as the donor is not a party in litigation before, and its interests are not likely to come before, the invited judge.

The education of judges in various academic disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to weigh them.

It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of such litigation. If there is a reasonable question concerning the propriety of participation, the judge should take such measures as may be necessary to satisfy himself or herself that there is no impropriety. To the extent that this involves obtaining further information from the sponsors of the seminar, the judge should make clear an intent to make the information public if any question should arise concerning the propriety of the judge's attendance.

Advisory Opinion No. 67

Judges who accept invitations to participate in such seminars, having been satisfied that no impropriety or appearance thereof is present, must report the reimbursement of expenses and the value of the gift on their financial disclosure reports.

August 25, 1980

COMMITTEE ON CODES OF CONDUCT
ADVISORY OPINION NO. 87

Participation in Continuing Legal Education Programs.

The Committee has received several inquiries concerning various forms of participation by judges in continuing legal education programs, and the impact of the Ethics in Government Act of 1978, as amended, and accompanying regulations on such participation. This Advisory Opinion summarizes, for the benefit of the judiciary in general, the Committee's views concerning the ethical implications of judicial participation in such programs.

I. Introduction

Judges are permitted to teach and write, and to receive compensation for doing so. Judges are not, however, permitted to accept honoraria, defined as including payment for a personal appearance, speech, or article.

The applicable regulations make clear that "participation in continuing legal education programs for which credit is given by licensing authorities or programs which are sponsored by recognized providers of continuing legal education" constitutes teaching activity for which compensation may properly be accepted.

It is, of course, necessary for the judge to obtain advance approval from the chief judge of the circuit, before engaging in such teaching activity. And the normal restrictions on extra-judicial compensation apply: the compensation must be reasonable in amount, no greater than a similarly situated non-judge would receive for the same services; the 15% cap on outside earned income is applicable; and the payments must be included in the judge's annual financial report.

It is permissible for a judge to receive separate or additional compensation for preparing written instructional materials for use in such continuing legal education programs. Ordinarily, such payments constitute compensation for teaching activities, rather than a sale of intellectual property or receipt of a royalty, and therefore fall within the 15% limitation. There may, however, be situations which do involve a sale of intellectual property; exception 5 of § 3 of the regulations permits judges to receive "royalties, fees, and their functional equivalent from use or sale of copyright ... received from established users or purchasers of those rights".

ADVISORY OPINION NO. 87

II. Avoiding Improper Exploitation of Judicial Office

Canon 5C(1) provides in part:

> "A judge should refrain from financial and business dealings that tend to ... exploit the judicial position.

On the other hand, Canon 4A provides:

> "A judge may speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice.

And the Commentary to that rule states:

> "As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice ...
>
> "to the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law."

Construing these provisions together, the Committee is of the view that a judge who, in writing or teaching, utilizes the special insights derived from his or her judicial experience, is not thereby engaging in improper exploitation of the judicial office, when the subject of the teaching or writing is not principally concerned with the specific court on which the judge sits.

A judge who writes on a legal topic or teaches in the field of law inevitably draws to some degree upon his or her experience as a judge. This is unavoidable if judges are to write and teach as the Canons encourage them to do. And, as noted above, the Canons expressly approve the receipt of reasonable compensation for encouraged scholarly activity. But the Committee believes there is a distinction between a judge's writing or teaching for compensation when the subject matter is how to practice before the judge's own court, as distinguished from a judge's writing or teaching for compensation on other legal topics with respect to which the judge does not occupy a unique position by virtue of his or her own particular judgeship. The "unique position" mentioned in the commentary to Canon 4 means the judicial position in general, rather than the particular judgeship of that particular judge.

ADVISORY OPINION NO. 87

For a judge to derive financial benefit, over and above the judicial salary, from the publication and sale of a book about his or her own court, or from participation in a seminar on the same topic, would constitute exploiting the judicial position for financial gain. It could also permit others -- the publisher of the book, the sponsor of the seminar -- to benefit from the judge's exploitation of his or her judicial position. Moreover, when the subject matter is so limited, there is the likelihood that a lawyer practicing in that court could reasonably believe that purchase of the publication, or attendance at the seminar, is expected by the judiciary.

In short, it is the Committee's view that it is inappropriate for a judge to sell his or her expertise on the idiosyncracies of practice before that particular court. This does not mean that a judge cannot lecture or write on that subject, only that the judge may not properly do so for compensation. Nor does this mean that a judge who is lecturing or writing for profit about some aspect of legal practice or procedure is foreclosed from giving illustrations from his or her own experience on the court, only that a judge may not charge for giving a lecture or writing a book where the principal focus is on how to practice before the judge's court and where, as a necessary result, a substantial part of the value and appeal to the audience arises from the fact that the lecturer or author is an "insider".

III. Limitations on Uncompensated Teaching or Writing

As stated above, when a judge's teaching or writing focuses upon the ins-and-outs of practice before that judge's court, his or her particular judicial position is being exploited, to some extent. It is therefore improper for the judge to receive compensation for such activities, because to do so would be to exploit the judicial office for his or her own private gain. By the same token, when the sponsoring entity of the seminar or course is a private individual or a for-profit entity, the judge could be said to be exploiting the judicial position for the private benefit of the sponsor, irrespective of whether the judge is being compensated. Where the sponsoring organization is a law-related non-profit entity, however, these restrictions do not apply: Canon 4 permits judges to assist in the activities of law-related entities, including their fund-raising activities, so long as the judge does not personally participate in fund-raising activities. Hence, there is no ethical impediment to a judge teaching or writing about the practices of his or her own court, if the sponsor is a law-related non-profit entity, provided the judge does not accept compensation for doing so.

ADVISORY OPINION NO. 87

IV. Summary

It is permissible for judges to engage in teaching and writing, including participation in continuing legal education seminars, and to accept compensation for doing so, unless the subject matter primarily relates to practice before the judge's own particular court. When the subject matter is thus focused, a judge may participate only if no compensation is accepted, and only if the sponsoring organization is a not-for-profit entity.

It is the continuing obligation of the participating judge to monitor any promotional activities associated with his or her participation, to insure that no improper exploitation of judicial office occurs.

June 30, 1992

COMMITTEE ON CODES OF CONDUCT
ADVISORY OPINION NO. 88

Receipt of Mementos or Other Tokens Under the Prohibition Against the Receipt of Honoraria for Any Appearance, Speech, or Article.

A judge has asked the Committee whether a decorative table clock, made by a well-known manufacturer, presented to the judge in connection with a speech at a program sponsored by a nonprofit institute falls within the definition of "Honorarium" as defined in the Judicial Conference's Regulations promulgated under Title VI of the Ethics Reform Act of 1989, 5 U.S.C. app. 7, §§ 501, 505. The Committee has also been asked whether it is permissible to be reimbursed for travel expenses in connection with the speech.

Section 4(a) of the Judicial Conference Regulations on outside earned income, honoraria, and outside employment provides that no judicial officer or employee shall receive an honorarium and Section 4(b) defines "honorarium" to mean:

> a payment of money or anything of value (excluding or reduced by travel expenses as provided in 5 U.S.C. app. 7, §§ 505(3) and (4)) for an appearance, speech or article by a judicial officer or employee, provided that the following shall not constitute an honorarium:
>
> . . . .
>
> (2) Compensation received for teaching activity approved pursuant to Section 5 hereof.
>
> . . . .
>
> (4) A suitable memento or other token in connection with an occasion or article, provided that it is neither money nor of commercial value.

Guide to Judicial Policies and Procedures, Vol. II, Chap. V.I.

The Committee notes at the outset that a presentation to a nonprofit institute may constitute a teaching activity that is exempt from the definition of "honorarium." The Commentary to the Regulations states that "teaching may also include participation in programs sponsored by bar associations or professional associations or other established providers of continuing legal

education programs for practicing lawyers." If the institute is an established provider of continuing legal education programs for practicing lawyers, a presentation sponsored by it would appear to be a teaching activity. If so, the receipt of a memento or other token would not constitute an honorarium for purposes of the Ethics Reform Act.

Moreover, assuming that the presentation was a teaching activity and the judge had no knowledge that he or she would receive anything other than expenses prior to giving the presentation, the receipt of a memento or other token at or following a presentation would not, in the Committee's view, convert the presentation into "compensated teaching" that required prior approval. Under these circumstances, the ethical propriety of accepting the gift is to be determined under the gift provisions of Canon 5C(4) and Canon 2's prohibition of conduct giving the appearance of impropriety. If the institute is a bona fide regular provider of continuing legal education programs, the Committee believes that receipt of a memento or other token would be a permissible gift under Canon 5C(4)(h) and would not violate Canon 2.

Assuming that the presentation was not a teaching activity, the determinative issue is whether the gift would constitute an "honorarium" or a "suitable memento or other token." In order to be a suitable memento or token, the item received must be (1) something other than money and (2) without "commercial value." The prohibition on receiving anything of "commercial value" is intended to foreclose compensation in kind for a speech or appearance as a substitute for the payment of cash. A judge could not properly receive, for example, securities or other resalable property as compensation for a speech. The Regulations must be construed with this overall purpose in mind.

In this context, without "commercial value" does not refer to the absence of any commercial value in the hands of the manufacturer of the article given or in the hands of the sponsor of the presentation. Any article, including the letter opener referred to in the Commentary to the Regulations as an example of a suitable memento, will have some commercial value in the hands of the manufacturer or sponsor, and such an interpretation would render the "suitable memento or other token" exception meaningless. Rather, the appropriate question, is whether the gift would have commercial value in the hands of the judge if accepted. Accordingly, where the circumstances are such that the judge could not, consistent with the intent of the donor, transfer the tendered article to another, the article has no commercial value within the meaning of the Regulations.

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This does not mean that a judge is free to accept any gift in connection with a presentation, no matter what its commercial value in the hands of the manufacturer or the sponsor. The article tendered must be "suitable" as a reminder of the occasion and must be in the nature of a "token." This means that a judge may accept a gift in connection with an appearance, speech, or article if its value to the judge is solely as a reminder of the occasion, and that a judge may not accept such a gift if it confers any other benefit upon him or her. While the "suitability" of a memento has no necessary relationship to the commercial value of the gift in the hands of the manufacturer or sponsor, if that value is in the neighborhood of $250 or less, it will be unlikely to have either a utilitarian or a prestige value to the judge beyond its value as a reminder of the occasion.

Assuming that the gift is a "suitable memento" and not an "honorarium," there remains the issue of whether it is a permissible gift under Canon 5C(4). Assuming that the gift is properly viewed under all the circumstances as a gift from the institute as an entity and not as a gift on behalf of identifiable lawyers, the receipt of the gift would be permissible under Canon 5C(4)(h) which authorizes the receipt of a gift so long as:

> (i) the donor has not sought and is not seeking to do business with the court or other entity served by the judge; or
>
> (ii) the donor is not a party or other person who has come or is likely to come before the judge or whose interests may be substantially affected by the performance or non-performance of [the judge's] official duties.

We now turn to the propriety of accepting reimbursement of travel expenses in connection with a presentation of this kind. Under the provisions of 5 U.S.C. app. 7, § 505 cited in Regulation § 4(b) <u>supra</u>, which excludes travel expenses from the definition of "Honorarium," the term "travel expenses" means "necessary travel expenses incurred by such individual (and one relative)" and includes "the cost of transportation, and the cost of lodging and meals while away from his or her residence or principal place of employment." Thus, acceptance of reimbursement for the costs of transportation, lodging, and meals is clearly appropriate.

June 30, 1992

COMMITTEE ON CODES OF CONDUCT
ADVISORY OPINION NO. 89

Judges' Acceptance of Honors Funded Through Voluntary Contributions.

The Committee has often been asked to advise on the propriety of a judge's consenting to or participating in a project to raise funds for scholarships and similar beneficial enterprises to be named in honor of the judge. In the past similar projects to honor judges involved endowment of professorships or research chairs, or construction of practice courtrooms, libraries and their like.

In Advisory Opinion No. 21 we said a judge may permit a university law school to name its library reading room after the judge, but we added that it would be improper for the university "to utilize the fact of the . . . reading room being named for the judge as part of the activities of the [university] in soliciting funds for the room itself" or the books acquired for it. We addressed the matter as one of using a judicial name to raise money for a charitable institution and we applied Canon 25 of the former Canons of Judicial Ethics of the American Bar Association (1923) to reach our opinion.[1]

Judicial Canon 25 is no longer the governing rule. In its place are Canons 4 and 5 of the Code of Conduct, both of which speak to the judge's role in enterprises that raise or spend funds for good causes.

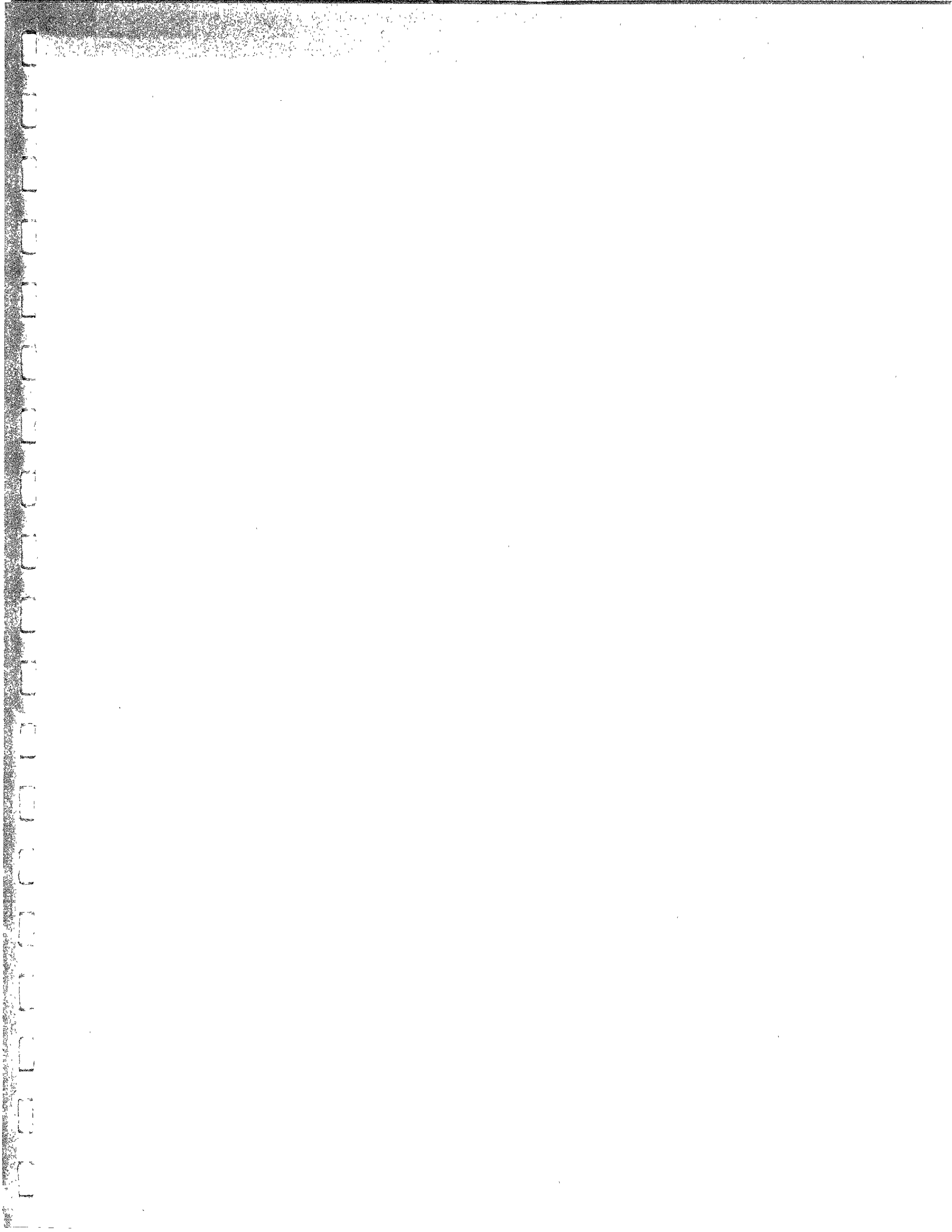
Canon 4C says:

> A judge may serve as a member, officer, or

---

[1] Judicial Canon 25 provides as follows:

> BUSINESS PROMOTIONS AND SOLICITATIONS FOR CHARITY
> A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.



THE AMERICAN UNIVERSITY
LAW REVIEW

RENEWAL OF THE FEDERAL RULEMAKING PROCESS

PETER G. MCCABE

Reprinted from
THE AMERICAN UNIVERSITY LAW REVIEW
Volume 44, June 1995, Number 5
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VOLUME 44 JUNE 1995 NUMBER 5

RENEWAL OF THE FEDERAL RULEMAKING PROCESS

PETER G. MCCABE*

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* J.D., Harvard Law School; A.B., Columbia University. Assistant Director for Judges Programs, Administrative Office of the United States Courts and Secretary to the Judicial Conference Standing Committee on Rules of Practice and Procedure. The views expressed in this Article are the author's own.

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INTRODUCTION

The federal rules of practice and procedure regulate litigation in the federal courts and are designed "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[1] The Federal Rules of Civil Procedure, in particular, have been described as "among the most significant accomplishments of American jurisprudence,"[2] setting the standard "against which all other systems of procedure must be judged."[3] The success of the civil rules led to the establishment of federal rules for criminal, appellate, and bankruptcy procedure, as well as federal rules of evidence.

The process by which the federal rules[4] are promulgated, although subject to periodic criticism, has been praised as "perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules."[5] The essence of the federal rulemaking process has remained constant for the past sixty years. Its basic features include: (1) the drafting of new rules and rule amendments by prestigious advisory committees composed of judges, lawyers, and law professors; (2) circulation of the committees' drafts to the bench, bar, and public for comment; (3) fresh consideration

1. 28 U.S.C. § 331 (1988).

2. *Rules Enabling Act: Hearings on H.R. 4144 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. 12 (1983 & 1984) [hereinafter *1983-84 Hearings*] (statement of Judge Edward Thaxter Gignoux, Judicial Conference of the United States). The success of the Federal Rules of Civil Procedure has been described as "quite phenomenal." CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 62, at 429 (5th ed. 1994); *see also* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989) (describing Rules as "a major triumph of law reform"); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1905-07 (1989) (describing Rules as a "great success" and cautioning against utilizing Rules to erect barriers to courts).

3. CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1005 (2d ed. 1987). *See, e.g.*, H.R. REP. NO. 889, 100th Cong., 2d Sess. 27 (1988); Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579, 579 (1975).

4. The term "federal rules" is used to collectively describe the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Evidence, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code.

5. COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS recommendation 30, at 54 (2d prtg. 1995) [hereinafter 1995 PROPOSED LONG RANGE PLAN]; *see also infra* note 7.

of the proposed changes by the advisory committees, after taking into account the comments of the bench, bar, and public; (4) careful review of the advisory committees' proposals; (5) promulgation of the proposals by the Supreme Court; and (6) "enactment" of the proposals into law following the expiration of a statutory period in which Congress is given an opportunity to reject, modify, or defer them.

At various points over the last sixty years both Congress and the judiciary have acted to reaffirm and renew the rulemaking process, with the objective of making it more effective and more open. Significant organizational and procedural improvements have been made as a result both of self-evaluation efforts by the judiciary and criticisms from the bar and Congress. One recommendation in the *Proposed Long Range Plan for the Federal Courts*,[6] which was recently approved by the Judicial Conference of the United States,[7] reaffirms the judiciary's commitment to periodic, comprehensive reexaminations of the rulemaking process.[8] The Plan recommends that:

- rules of practice, procedure, and evidence should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act;
- the national rules should strive for greater uniformity of practice and procedure in the federal courts, but individual courts should have some limited rulemaking authority to account for differing local circumstances and to experiment with innovative procedures; and
- the Judicial Conference and the courts should seek significant participation in rulemaking by the interested public and representatives of the bar, including federal and state judges.[9]

Part I of this Article provides a brief history of the federal rulemaking process. Part II describes the current rulemaking procedures, focusing on how they have been changed to address past criticisms. Part III discusses future initiatives in the rulemaking process.

6. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 54; *see also infra* note 7.

7. 60 Fed. Reg. 30,317 (1995). The Judicial Conference's Long Range Planning Committee prepared the Plan following consultation with the other Conference committees, wide distribution within and outside the judiciary, and public comments and hearings.

8. *See, e.g.*, WINIFRED R. BROWN, FEDERAL JUDICIAL CTR., FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES (1981); Warren E. Burger, *The State of the Federal Judiciary, 1979*, 65 A.B.A. J. 358, 360 (1979); *Symposium: The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117 (1957) [hereinafter *Symposium*].

9. *See* 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 54.

I. HISTORICAL BACKGROUND

Although there has been debate among scholars over the authority of the federal judiciary, vis-á-vis Congress, to promulgate procedural rules for the federal courts,[10] the matter was resolved by the Rules Enabling Act of 1934.[11] By virtue of the Act, Congress delegated almost all rulemaking authority to the judiciary, reserving to itself the post facto right to reject, enact, amend, or defer any of the rules. The legislation delegated to the Supreme Court the explicit power to prescribe rules for the district courts governing practice and procedure in civil actions.[12]

In 1935, the Supreme Court appointed a blue ribbon advisory committee to draft the first Federal Rules of Civil Procedure.[13] Over the next two years, the advisory committee widely circulated proposed drafts to the bench and bar for comment, and it made numerous changes to the drafts thanks to extensive assistance from the legal profession.[14] After the Supreme Court adopted the rules and

10. *See, e.g.*, WRIGHT & MILLER, *supra* note 3, § 1001; *see generally* Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285 (1994); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 291 (1958); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992) [hereinafter Mullenix, *Counter-Reformation*]; Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993); Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926); John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

The Supreme Court recognizes the ultimate power of Congress to regulate the practice and procedure of federal courts and has declared that Congress may exercise that power by delegating it to the judiciary to make rules not inconsistent with the Constitution or federal statutes. *See* Hanna v. Plumer, 380 U.S. 460, 472-74 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941).

Judge Weinstein points out that rulemaking falls within an area where activities of the legislative and judicial branches merge and that historically there has been a "practical accommodation" between the two branches. Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 916, 922 (1976). Judge Weinstein's law review article is an abbreviated version of his book. *See* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977).

11. Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 331, 2071-77 (1988 & Supp. V 1993)); *see also Hanna*, 380 U.S. at 472-74.

12. 28 U.S.C. § 331 (1988 & Supp. V 1993). While the 1934 Act applied explicitly only to civil actions at law, the Court had long-standing rulemaking authority over equity and admiralty practice. *See, e.g.*, Act of May 8, 1792, ch. XXXVI, 1 Stat. 275.

13. Order of June 3, 1935, Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774-75 (1935) (ordering committee "to prepare and submit to the Court a draft of a unified system of rules").

14. FINAL REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, at V (Nov. 4, 1937).

Congress did not act to modify them, the civil rules took effect in September 1938.[15]

In 1940, Congress authorized the Supreme Court to promulgate rules governing criminal cases in the district courts.[16] The Supreme Court followed the same procedure it had used to prepare the civil rules. A distinguished advisory committee prepared and circulated draft rule proposals, received comments from the bench and bar, and submitted the proposed rules to the Court.[17] The Federal Rules of Criminal Procedure took effect, by operation of law, without congressional action in March 1946.[18]

In 1958, Congress enacted legislation transferring the major responsibility for the rulemaking function from the Supreme Court to the Judicial Conference of the United States.[19] The Conference was mandated to "carry on a continuous study of the operation and effect of the [federal] rules" and to recommend appropriate amendments in the rules.[20] The Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference.[21]

Following enactment of the 1958 legislation, the Judicial Conference established a Standing Committee on Rules of Practice and Procedure and five advisory committees, to amend or create the civil, criminal, bankruptcy, appellate, and admiralty rules.[22] The Standing Committee's mission was to supervise the rulemaking process for the Conference and to coordinate and approve the work of the advisory committees.[23]

The Admiralty Rules were merged into the Federal Rules of Civil Procedure in 1966.[24] The Federal Rules of Appellate Procedure took effect in 1968,[25] the federal Bankruptcy Rules became law in

15. FED. R. CIV. P. 86(a).

16. Act of June 29, 1940, ch. 445, 54 Stat. 688. This Act was superseded by the Rules Enabling Act amendments of 1988 and is now incorporated in 28 U.S.C. § 2072(a) (1988). The Court had been given authority in 1933 to prescribe rules for criminal proceedings after verdict. Act of Feb. 24, 1933, ch. 119, 47 Stat. 904.

17. REPORT OF THE ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE (1944).

18. FED. R. CRIM. P. 59.

19. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (1988 & Supp. V 1993)).

20. *Id.* § 331.

21. 28 U.S.C. §§ 2072, 2073.

22. JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6-7 (1958).

23. *Id.*; *see also* Albert B. Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772, 772 (1961).

24. 383 U.S. 1029 (1966).

25. 389 U.S. 1063 (1968).

1973,[26] and the rules governing post-conviction collateral remedies for prisoners took effect in 1977.[27] The separate rules for misdemeanor and petty offense cases before magistrate judges were merged into the Federal Rules of Criminal Procedure in 1990.[28]

New proposed rules and amendments to the rules approved by the Supreme Court were accepted by Congress without change for approximately thirty-five years following promulgation of the Federal Rules of Civil Procedure.[29] The picture changed sharply in the 1970s, however, as a result of controversy surrounding the Federal Rules of Evidence.

Chief Justice Earl Warren appointed an advisory committee to draft rules of evidence in 1965, and the Supreme Court transmitted the rules to Congress in 1972.[30] Immediate concern was expressed that the judiciary had exceeded its statutory authority on the grounds that: (1) the Rules Enabling Act, which authorized the Supreme Court to promulgate rules of "practice and procedure," was not broad enough to govern the promulgation of rules of evidence; and (2) the new rules had impermissibly overstepped the boundary between procedure and substance, particularly in attempting to supersede evidentiary privileges established by state law.[31]

Congress deferred the proposed rules indefinitely and held extensive hearings on them. Eventually, the Federal Rules of Evidence were revised by Congress and enacted into law by affirmative legislation.[32] The principal legislative revision was to eliminate the proposed federal evidentiary privileges, thereby continuing to leave the matter to federal common law and applicable state law.[33] Congress also amended the Rules Enabling Act to give the judiciary explicit authority to amend the Federal Rules of Evidence.[34] It

26. 411 U.S. 989 (1973). Statutory authority to promulgate bankruptcy rules was provided in 1964. Act of Oct. 3, 1964, Pub. L. No. 88-623, § 1, 78 Stat. 1001 (codified as amended at 28 U.S.C. § 2075 (1988)).

27. Act of Sept. 28, 1976, Pub. L. No. 94-426, § 1, 90 Stat. 1334 (codified as amended at 28 U.S.C. § 2254, 2255 (1988 & Supp. V 1993)).

28. FED. R. CRIM. P. 58. This rule was added in 1990 and essentially restated the prior misdemeanor rules.

29. Between 1937 and 1972, the Supreme Court transmitted new rules or rules amendments to Congress on 14 occasions.

30. Order of Nov. 20, 1972, 56 F.R.D. 183, 184 (S. Ct. 1972).

31. *See* H.R. REP. NO. 422, 99th Cong., 1st Sess., 12-14, 20-21 (1985); Dissent of Justice Douglas to submission of the proposed Federal Rules of Evidence, 409 U.S. 1132 (1973); *see also* Charles A. Wright, *Book Review of Jack B. Weinstein, Reform of Court Rule-Making Procedures*, 9 ST. MARY'S L.J. 652, 653-54 (1978) [hereinafter Wright, *Book Review*].

32. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 40 U.S.C. § 472 (1988)).

33. *See* FED. R. EVID. 501.

34. 28 U.S.C. § 2074(b) (1988).

provided, however, that no rule establishing, abolishing, or modifying a privilege has any force unless approved by an act of Congress.[35]

Following enactment of the Federal Rules of Evidence, Congress periodically intervened to delay, reject, or modify proposed federal rules.[36] The controversy over the evidence rules also evoked criticism directed at the procedures under which the new rules had been promulgated. Generally, the complaints were that the process was not sufficiently "open" and had not allowed for adequate public input.[37] Accordingly, one member of the House Judiciary Committee suggested that the time was ripe to reexamine the rulemaking process and possibly amend the Rules Enabling Act.[38]

Chief Justice Warren E. Burger, in his 1979 *The State of the Federal Judiciary* report, took note of the controversy and suggested that it was time to take a "fresh look" at the entire rulemaking process.[39] He requested that the Judicial Conference and the Federal Judicial Center, the judiciary's primary research arm, study the matter in light of the experience under the Rules Enabling Act.[40] In response, the Federal Judicial Center prepared a report to assist the Standing Committee on Rules of Practice and Procedure.[41] The report analyzed the strengths and weaknesses of the process and focused on those aspects of the process that had been singled out for criticisms and change.[42]

The Standing Committee conducted a comprehensive review of rulemaking procedures and instituted a number of changes. The innovations included making the records considered by the rules committees available to the public, documenting all changes made by the committees at the various stages of the process, and conducting public hearings on proposed amendments. The Conference also

35. *Id.*

36. A list of the instances of congressional intervention is set forth in H.R. REP. NO. 422, *supra* note 31, at 8-9. Most recently, in 1994, Congress took the unprecedented step of enacting revised Federal Rule of Evidence 412 that had been approved by the Judicial Conference, enacting portions of the Conference proposal that had been withheld by the Supreme Court. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796, 1918 (codified in scattered sections of 42 U.S.C.).

37. *See* WEINSTEIN, *supra* note 10, at 316-17; Lesnick, *supra* note 3, at 580-81.

38. William L. Hungate, *Changes in the Federal Rules of Criminal Procedure*, 61 A.B.A. J. 1203, 1207 (1975).

39. Burger, *supra* note 8, at 360.

40. *Id.* The functions of the Federal Judicial Center are set forth generally at 28 U.S.C. § 620.

41. *See* BROWN, *supra* note 8.

42. *See* BROWN, *supra* note 8.

committed its procedures to writing and published them for the benefit of the bench and bar.[43]

In 1983, the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice initiated a comprehensive review of the rulemaking process.[44] The House Subcommittee conducted hearings in both the 98th and 99th Congresses, during which it invited comment on the rulemaking process and engaged in a productive dialogue with the Judicial Conference and the Standing Committee chairman.[45]

Following five years of study, hearings, and dialogue, the House subcommittee marked up a bill to codify formally some of the rulemaking procedures already being used by the Judicial Conference and also to require that all meetings of rules committees be open to the public and that minutes of the meetings be prepared.[46] The legislation ratified the Judicial Conference's authority to appoint a standing committee and appropriate advisory committees.[47]

The House version of the legislation specified "that each rules committee consist of 'a balanced cross section of bench and bar, and trial and appellate judges.'"[48] The judiciary endorsed this provision.[49] As eventually enacted, however, the legislation did not contain the requirement of a balanced cross section, merely providing for the committees to consist of trial judges, appellate judges, and members of the bar.[50]

One of the major objectives of the House sponsors of the legislation was to eliminate the "supersession" clause of the 1934 Act, providing that "all laws in conflict with . . . rules [promulgated under the Act] shall be of no further force or effect after such rules have taken effect."[51] It was asserted that the clause was unnecessary because its original purpose (to override various procedural rules scattered

43. *See* Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347 (1983).

44. *See, e.g.*, H.R. REP. NO. 889, 100th Cong., 2d Sess. 27 (1988) (describing subcommittee's review of rulemaking process from 1983 to 1988).

45. *See 1983-84 Hearings*, *supra* note 2; *Rules Enabling Act of 1985: Hearings on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) [hereinafter *1985 Hearings*].

46. *See* H.R. REP. NO. 889, *supra* note 44, at 3-4. Congress eventually enacted the bill. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4649 (1988) (codified as amended at 28 U.S.C. §§ 2071-2075 (1988 & Supp. V 1993)).

47. 28 U.S.C. § 2073(a)(2)(b); *see also* H.R. REP. NO. 889, *supra* note 44, at 3.

48. *See* H.R. REP. NO. 889, *supra* note 44, at 3.

49. *1985 Hearings*, *supra* note 45, at 248 (statement of Judge Edward Thaxter Gignoux).

50. *See* 28 U.S.C. § 2073(a)(2).

51. *Id.* § 2072(b).

throughout the United States Code) had passed.[52] More importantly, it was argued that the provision was of questionable constitutional validity in light of *INS v. Chadha*,[53] because the Rules Enabling Act authorizes the repeal of statutes without conforming to the requirements of Article I.[54] The Senate, however, did not accept the House provision,[55] and the Rules Enabling Act amendments were enacted in 1988 without deleting the supersession clause.[56]

The 1988 amendments also attempted to stem the proliferation of local rules of courts and to provide for more public participation in the adoption of local rules. The House subcommittee expressed particular concern that some local court rules were inconsistent with federal rules and statutes.[57] It noted, however, that the Judicial Conference had taken steps to deal with the problems of local rules by: (1) establishing a Local Rules Project to review all local rules, and (2) amending the national rules[58] to require that local court rules be prescribed only after giving appropriate public notice and an opportunity to comment.[59]

Congress codified these local rule requirements in the Rules Enabling Act.[60] It also required each court, other than the Supreme Court, to appoint an advisory committee to study the court's rules of practice and internal operating procedures and make recommendations concerning them.[61] The legislation gave the judicial councils of the circuits authority to modify or abrogate any district court local rules and the Judicial Conference the authority to modify or abrogate the local rules of any court of appeals or other federal court except the Supreme Court.[62]

52. *See* H.R. REP. NO. 889, *supra* note 44, at 28.

53. 462 U.S. 919 (1983).

54. *See* H.R. REP. NO. 889, *supra* note 44, at 28; *see also* H.R. REP. NO. 422, *supra* note 31, at 16-17. In *Chadha*, the Court held that the one-house veto provision of the Immigration and Naturalization Act, under which either the House or the Senate could by resolution invalidate an executive branch decision to allow a deportable alien to remain in the United States, was unconstitutional because Article I of the Constitution requires all legislation to be passed by both the House and the Senate and either signed by the President or repassed by both the House and the Senate over the President's veto. *See* INS v. Chadha, 462 U.S. 919, 956-59 (1983).

55. *See* H.R. REP. NO. 889, *supra* note 44, at 3.

56. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended at 28 U.S.C. §§ 2071-2075 (1988 & Supp. V 1993)).

57. *See* H.R. REP. NO. 422, *supra* note 31, at 14-15, 17; *see also* Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J. 62, 64-65 (1989); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2018-26 (1989).

58. FED. R. CIV. P. 83; FED. R. CRIM. P. 57.

59. *See* H.R. REP. NO. 889, *supra* note 44, at 28-29.

60. 28 U.S.C. § 2071(b) (1988).

61. *Id.* § 2077(b) (Supp. V 1993).

62. *Id.* §§ 331, 2071(c) (1988).

Ironically, while Congress attempted to promote national uniformity and limit the proliferation of local court rules in 1988, it took an entirely different approach just two years later in enacting the Civil Justice Reform Act of 1990.[63] That legislation requires each district court to implement its own, individualized civil justice expense and delay reduction plan.[64]

II. CURRENT RULEMAKING PROCEDURES

Although many changes have been made in operating procedures, the rulemaking structure today is essentially the same as that established by the Judicial Conference following the 1958 legislation assigning it the central role in drafting and monitoring the federal rules.[65] The Conference's Standing Committee supervises the rulemaking process and recommends to the Conference such changes to the rules as it believes are necessary to maintain consistency and promote the interest of justice.[66]

The Standing Committee is assisted by five advisory committees, each of which is responsible for one set of federal rules, i.e., civil, criminal, appellate, bankruptcy, or evidence.[67] The advisory committees conduct ongoing studies of the operation of their respective rules, prepare appropriate amendments and new rules, draft explanatory committee notes, conduct hearings, and submit proposed changes through the Standing Committee to the Judicial Conference.

A. *Committee Membership*

The committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. Each committee has a Reporter, a law professor with

63. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. V 1993)). The impetus for the Rules Enabling Act amendments of 1988 came from the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. *See supra* notes 44-56 and accompanying text. The driving force behind the Civil Justice Reform Act was the Senate Judiciary Committee and its chairman, Senator Joseph R. Biden, Jr. *See, e.g.*, 136 CONG. REC. S. 407, S. 414 (daily ed. Jan. 25, 1990) (statement of Sen. Biden).

64. 28 U.S.C. §§ 471, 472 (Supp. V 1993); *see* Part III, *infra*; *see also* Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589 (1994) (discussing inconsistencies between 1988 and 1990 statutes).

65. The 1988 amendments to the Rules Enabling Act codified the committee structure established by the Conference in 1958. *See* 28 U.S.C. § 2073(a), (b) (1988).

66. *Id.* § 331.

67. The Advisory Committee on the Rules of Evidence was discharged in 1975 and reestablished in 1993. JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 80 (1992) [hereinafter 1992 JUDICIAL CONFERENCE REPORTS].

demonstrated expertise in the committee's subject area, who is responsible for coordinating the committee's agenda and drafting appropriate amendments to the rules and explanatory committee notes. The Administrative Office of the United States Courts, through the Office of the Secretary and the Rules Committee Support Office, coordinates the operational aspects of the rules process, provides administrative and legal support to the committees, and maintains the committees' records.

During congressional hearings in the 1970s and 1980s, it was argued that the rulemaking committees were not broadly based and did not adequately reflect the diversity of the legal community.[68] In addition, there has been criticism that there are not enough practicing lawyers on the committees.[69] The present composition of the committees is as follows:

	Committees					
	App.	Bankr.	Civil	Crim.	Evid.	Standing
Attorneys and Professors						
Private Practice Att'ys	3	5	4	3	3	3
Government Att'ys	1	1	1	1	1	1
Law Professors	-	1	1	1	2	2
Federal Judges						
Circuit Judges	4	1	3	1	2	3
District Judges	-	2	3	5	2	5
Other Judges	-	5	-	1	1	-
Other						
State Chief Justice	1	-	1	1	1	1
Total	9	15	13	13	12	15

The advisory committee that drafted the original Federal Rules of Civil Procedure was comprised entirely of lawyers and professors. Judges were added to the committees shortly thereafter and eventually

68. *See* H.R. REP. NO. 422, *supra* note 31, at 24; American Bar Association, Policy on the Rules Enabling Act, *reprinted in 1983-84 Hearings*, *supra* note 2, at 46, 51; Lesnick, *supra* note 3, at 581.

69. The American Bar Association, for example, has proposed that "practicing lawyers" comprise a majority of the rules committees. Resolution of the ABA House of Delegates, Aug. 9-10, 1994.

became a large majority on each committee. In the past few years, however, the number of attorneys vis-á-vis judges on the committees has been increasing. Federal judges presently are a minority on three of the six committees, and they constitute about fifty percent of the membership of the committees as a whole.

The committees' membership is geographically balanced and increasingly represents different perspectives within the legal profession, including members of large and small law firms, government attorneys, "public interest" lawyers, teachers, federal defenders, and criminal defense attorneys. Diversity in membership has increased, but the primary criteria for membership remain professional ability and experience.

Commentators suggested that there be greater turnover in the membership of the committees.[70] This objective has been achieved. At present, members of the rules committees, as with almost all Judicial Conference committees, serve for terms of three years.[71] Only one reappointment is allowed.[72] Thus, a member may serve on a committee for a maximum of six years. Chairs of the committees are normally appointed for just one three-year term.[73] The current chair of the Standing Committee is District Judge Alicemarie H. Stotler of the Central District of California, who was appointed by the Chief Justice in 1993.

Several of the committees invite persons with important and specialized knowledge to assist them as a resource at committee meetings. The appellate and bankruptcy committees, for example, have included a clerk of court in their deliberations for many years. The clerks are extremely helpful in identifying the practical impact of the rules on administrative operations and on case management. In addition, the bankruptcy committee invites the director of the U.S. trustee program to participate in committee meetings.

70. *See, e.g.*, *1985 Hearings*, *supra* note 45, at 64 (statement of the American Bar Association).

71. JUDICIAL CONFERENCE OF THE U.S., REPORTS OF PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 60 (1987) [hereinafter 1987 JUDICIAL CONFERENCE REPORTS] (establishing current membership policies). It has been suggested that the terms of office of committee chairs and members, once viewed as too long in the rules context, now might not be long enough. *See* 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, recommendation 46, at 73.

72. *See* 1987 JUDICIAL CONFERENCE REPORTS, *supra* note 71, at 60.

73. *See* 1987 JUDICIAL CONFERENCE REPORTS, *supra* note 71, at 60.

B. *Publication of Procedures*

During the early 1980s, the Judicial Conference was criticized for not having published its rulemaking procedures.[74] In response, in 1983 the Standing Committee developed a written Statement of Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, which incorporated long-standing practices of the rules committees and adopted many suggested procedural improvements.[75] The publication requirement was codified in the 1988 amendments to the Rules Enabling Act.[76]

The rulemaking procedures are now published as an integral part of the public announcement of all proposed rule amendments when they are distributed to the bench and bar. A new easy-to-read pamphlet, *The Federal Rules of Practice and Procedure: A Summary for Bench and Bar*,[77] is also included with all distributions to the public and is made available to bar groups and others as a means of fostering knowledge about the rulemaking process and stimulating comments on the rules.

C. *Soliciting Comments from the Public*

A number of people complained that inadequate advance notice had been provided of proposed amendments to the rules, thereby depriving the public of a meaningful opportunity to shape the rules before promulgation.[78] In addition, it was said that the mailing list for distribution of proposed amendments was too limited.[79] Accordingly, proposals for amendments in the rules did not reach a sufficiently broad cross section of the legal profession.

Today, extensive efforts are made to reach all segments of the bench and bar, as well as organizations and individuals likely to be interested in or affected by proposed changes to the rules. The

74. *See* Lesnick, *supra* note 3, at 580; *see also 1985 Hearings*, *supra* note 45, at 57, 70-71 (statement of Professor Paul F. Rothstein, American Bar Association); *1983-84 Hearings*, *supra* note 2, at 87 (statement of Rep. Kastenmeier); *id.* at 43-44 (statement of James F. Holderman, American Bar Association).

75. *See* Rules of Civil Procedure, Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347 (1983). The statement, however, did not include a requirement of open committee meetings.

76. *See* 28 U.S.C. § 2073(a)(1) (1988).

77. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE FEDERAL RULES OF PRACTICE AND PROCEDURE: A SUMMARY FOR BENCH AND BAR (1993).

78. *See 1983-84 Hearings*, *supra* note 2, at 46 (statement of the American Bar Association's Criminal Justice Section); *id.* at 36 (statement of Alan B. Morrison, Director, Public Citizen, Litigation Group).

79. *See 1985 Hearings*, *supra* note 45, at 47 (statement of Professor Paul F. Rothstein, American Bar Association).

Administrative Office mails all rules proposals to about forty major legal publishing firms, and they are reprinted in advance sheets. They are also mailed to more than 10,000 persons and organizations on its rules mailing list, including—

- federal judges and other federal court officers,
- U.S. Attorneys and other Department of Justice officials,
- other federal government agencies and officials,
- federal defenders,
- state chief justices,
- state attorneys general,
- legal publications,
- law schools,
- bar associations, and
- any lawyer, individual, or organization who requests distribution.

In addition to circulating the full text of all proposed rule amendments and advisory committee notes, the Administrative Office now prepares "user-friendly" pamphlets summarizing the proposed amendments and highlighting the dates of scheduled public hearings and the cut off date for written comments. The pamphlets are distributed together with the full text of the amendments and advisory committee notes. The bench and bar are informed in all publications that further information and materials may be obtained from the Secretary and the Rules Committee Support Office, whose address and telephone number are provided.

To supplement the general mailings, the advisory committees have sought to obtain important input through special mailings to targeted segments of the legal profession and interested organizations. In September 1994, for example, the Advisory Committee on the Rules of Evidence solicited public comment on statutory changes to Federal Rules of Evidence 413, 414, and 415, dealing with evidence of prior, similar acts in cases involving sexual assault or child molestation.[80] The mailing was sent to 900 professors of evidence, 40 women's rights organizations, and 1000 other interested individuals and organizations.

The goal of the committees is to stimulate greater participation by the bar in the rulemaking process by actively encouraging individuals and organizations to comment on specific amendments to the rules and to identify problems in the operation and effect of the rules

80. Congress enacted the new evidence rules as part of the Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, § 320935.

generally. The public comments are extraordinarily helpful and are taken very seriously by the committees. They regularly result in improvements in the amendments, and have led to the withdrawal of proposed amendments.[81]

In addition to increasing the amount, readability, and distribution of printed information on the rules, the advisory committees seek input from the bar outside the context of specific pending amendments. The Advisory Committee on Civil Rules has invited bar organizations to send representatives to attend its meetings, and it has, in appropriate cases, solicited the views of lawyers and professors on preliminary proposals before they were drafted.

The advisory committees have also convened special meetings with lawyers and nonlawyers to assess the potential need for rule changes to certain discrete areas of practice. The civil advisory committee, for example, has invited knowledgeable, experienced lawyers to meet with it to explore the problems of class actions and mass tort litigation. The bankruptcy committee has met with chapter 13 lawyers and trustees to examine the impact of the bankruptcy rules on chapter 13 cases. It has also invited publishers to provide input on the bankruptcy forms.

D. *Documentation of Changes*

People had voiced complaints that the deliberations of the committees were not adequately documented and that it was difficult to discern the rationale for proposed changes to the rules and to discover the minority views of members.[82] Additionally, some expressed concern that proposed amendments were materially changed after they had been circulated for comment and that no opportunity for further comment had been provided.[83]

Under current procedures, each action taken by a committee with regard to a proposed amendment is documented and included in the public record. The advisory committees are required to submit a separate "Gap" report, summarizing the public comments and explaining any changes made following publication. The Standing Committee submits a report to the Judicial Conference setting forth

81. For example, the Advisory Committee on Criminal Rules deferred action on proposed amendments to Criminal Rules 10 and 43 in response to generally negative written comments and public testimony. The proposed amendments would have permitted the use of video conferencing in arraignments and in other pretrial sessions when the accused was not present in the courtroom. H.R. DOC. NO. 65, 104th Cong., 1st Sess. 15-16 (1995).

82. *See* Lesnick, *supra* note 3, at 580.

83. *See* Wright, *supra* note 31, at 656.

the reasons for all proposed amendments and identifying any changes it made in the recommendations of the advisory committee. After the Conference approves amendments, the Administrative Office transmits to the Supreme Court the text of the proposed amendments, the advisory committee notes, pertinent portions from the advisory committee and Standing Committee reports, and a special report identifying any controversial proposals and explaining the source and nature of the controversy.

If an advisory committee or the Standing Committee makes any "substantial" change in a rule after publication, it normally provides an additional period for public notice and comment. Changes more extensive than the original publication are republished. On the other hand, if a change is similar to, but less extensive than the original publication, it will not generally be republished. Similarly, purely technical changes and corrections are not normally published for comment.

E. *Public Hearings*

During the course of the controversy over adoption of the Federal Rules of Evidence in the early 1970s, there were complaints that the judiciary had not held public hearings on the proposed rules.[84] Written statements were seen as an inadequate substitute for the opportunity of the public to appear in person and engage in a face-to-face dialogue with decisionmakers. Today, public hearings are scheduled on all proposed changes to the rules. Where the subject matter of the changes is controversial, such as the 1992 amendments to Rule 26 of the Federal Rules of Civil Procedure, large numbers of individuals and organizations will ask to testify. On the other hand, many hearings attract few or no requests to testify and are cancelled for lack of public interest.

F. *Open Meetings*

There had been criticism that the meetings of the Standing Committee and the advisory committees were not open to the public.[85] Until enactment of the 1988 amendments to the Rules Enabling Act, meetings of the Standing Committee and the advisory

84. *See, e.g.*, *1983-84 Hearings*, *supra* note 2, at 44 (statement of James F. Holderman, American Bar Association); Lesnick, *supra* note 3, at 580.

85. *See, e.g.*, *1983-84 Hearings*, *supra* note 2, at 34-36 (statement of Alan B. Morrison, Director, Public Citizen, Litigation Group) (describing process as "secretive"); *id.* at 125-28 (statement of Richard M. Schmidt, Jr., General Counsel, American Society of Newspaper Editors).

committees had generally been closed to the public. The 1988 amendments to the Rules Enabling Act require open meetings, but allow a committee to go into executive session for cause.[86]

All meetings of the rules committees are open to the public and are announced in advance in the *Federal Register* and leading legal publications. For the most part, though, public attendance is light, except when committees address controversial items.[87]

G. *Open Records*

There had been complaints that committee agendas and materials relied upon in promulgating rules were not made available to the public.[88] Filed comments were made available only to persons with a "legitimate purpose" in seeing them, and minutes, reporters' notes, memoranda, and drafts were not made public until 1980.[89]

Today, all records are open and readily available from the Administrative Office, including minutes of committee meetings, suggestions and comments submitted by individuals and organizations, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters. In addition, the reports of the Standing Committee to the Judicial Conference and the minutes of Standing Committee and advisory committee meetings are available on-line through computer-assisted legal research.

All records more than two years old—dating back to 1935—have been placed on microfiche and indexed. They are available for review either at the Administrative Office or at a government repository and may be purchased from a commercial service. Planning has begun on developing an electronic docket of all records and expanding the availability of materials electronically.

H. *Length of the Process*

The rulemaking process demands exacting and meticulous care in drafting proposed rule changes. It is time-consuming and involves a minimum of seven stages of formal input and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule, fourteen months of which is directly attributable to

86. 28 U.S.C. § 2073(c) (1988). The authority has been exercised rarely.

87. The April 1994 meeting of the Advisory Committee on Criminal Rules, which included a discussion of cameras in the courtroom, was televised on C-SPAN.

88. *1983-84 Hearings*, *supra* note 2, at 34, 35 (statement of Alan B. Morrison, Director, Public Citizen Litigation Group).

89. *See* BROWN, *supra* note 8, at 23, 27; *cf. 1983-84 Hearings*, *supra* note 2, at 36-39 (statement of Alan B. Morrison, Director Public Citizen Litigation Group) (noting that filed comments were not widely read).

the built-in statutory period for review by the Supreme Court and Congress. This seven-step process is discussed below.

1. *Initial consideration by the advisory committee*

Proposed changes to the rules are initiated in writing by lawyers, judges, clerks of court, law professors, government agencies, or other individuals and organizations. The Secretary acknowledges each suggestion and distributes it to the appropriate advisory committee, whose Reporter analyzes it and makes appropriate recommendations for consideration by the committee. The suggestions and the Reporter's recommendations are placed on the committee's agenda and normally discussed at its next meeting. The Secretary now advises each person making a suggestion of its eventual disposition. When an advisory committee decides that a particular change in the rules has merit, it normally asks its Reporter to prepare a draft amendment to the rules and an explanatory committee note.

2. *Publication and public comment*

Once an advisory committee has voted initially to pursue a new rule or an amendment to the rules, it must obtain the approval of the Standing Committee, or its chair, to publish the proposal for public comment. In seeking publication, the advisory committee must explain to the Standing Committee the reasons for its proposal, including any minority or separate views.

Once publication is approved, the Secretary arranges for printing and wide distribution of the proposed amendment to the bench and bar, to publishers, and to the general public. The public is normally given six months to comment on the proposal. During the six-month comment period, one or more public hearings on the proposed changes are scheduled.

3. *Consideration of the public comments and final approval by the advisory committee*

At the end of the public comment period, the Reporter is required to prepare a summary of the written comments received from the public and the testimony presented at the hearings. The advisory committee then takes a fresh look at the proposed rule changes in light of all the written comments and testimony.

If the advisory committee decides to proceed in final form, it submits the proposed rule or amendment to the Standing Committee for approval. Each proposal must be accompanied by a separate report summarizing the comments received from the public and

explaining any changes made by the advisory committee following the original publication.[90] The advisory committee's report must also include minority views of any members who wish to have their separate views recorded. If, on the other hand, the advisory committee decides to make any substantial change in its proposal, it will republish it for further public comment.

4. *Approval by the standing committee*

The Standing Committee considers the final recommendations of the advisory committee and may accept, reject, or modify them. If the Standing Committee approves a proposed rule change, it will transmit the change to the Judicial Conference with a recommendation for approval, accompanied by the advisory committee's reports and its own report explaining any changes it made. If the Standing Committee makes a modification that constitutes a substantial change from the recommendation made by the advisory committee, the proposal will normally be returned to the advisory committee with appropriate instructions.

5. *Judicial Conference approval*

The Judicial Conference normally considers proposed amendments to the rules at its September session each year. If it approves the amendments, they are transmitted to the Supreme Court.

6. *Supreme Court approval*

The Supreme Court has seven months, from the time the proposed amendments are received from the Conference until May 1, to review them, prescribe them, and transmit them to Congress.[91]

7. *Congressional review*

Congress has a statutory period of at least seven months to act on any new rules or amendments prescribed by the Supreme Court. If Congress does not enact positive legislation to reject, modify, or defer the rules or amendments, they take effect as a matter of law on December 1.[92]

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90. This report is commonly known as the "Gap" report. *See supra* Part II.D (discussing process of "Gap" report).

91. *See* 28 U.S.C. §§ 2074, 2075 (1988 & Supp. V 1993).

92. *See id.* The effective date of the Federal Rules of Bankruptcy Procedure (and other procedural requirements) were made consistent with the other federal rules by the Bankruptcy Reform Act of 1994. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(e), (f), 1994 U.S.C.C.A.N. (108 Stat.) 4106. Previously, the effective date had been 90 days after the Chief Justice reported the changes to Congress, i.e., about August 1. *See* 28 U.S.C. § 207

The lengthy process may be expedited when there is an urgent need to consider an amendment to the rules. This normally occurs when Congress has requested prompt consideration of a proposal or when legislation has been introduced in Congress to amend the rules directly by statute. The fourteen-month delay for review by the Supreme Court and Congress, however, is established by statute and cannot be reduced by the Judiciary.[93]

I. *Supreme Court Review*

It has been proposed that the Supreme Court be removed from the rulemaking process and that the rules be promulgated by the Judicial Conference.[94] The original version of the legislation that became the Rules Enabling Act amendments of 1988, for example, would have removed the Supreme Court from the rulemaking process.[95] The provision, however, was withdrawn after Chief Justice Burger informed the chairman of the House Judiciary subcommittee that "[t]he Justices conclude that it would be better to keep the ultimate authority of passing on rulemaking within the Court as it is now, but to allow the Court to defer to the decision of the Judicial Conference."[96]

On most occasions, the Court has deferred to the Judicial Conference and has prescribed without change proposed rules amendments submitted by the Judicial Conference.[97] Nevertheless, the Court has accorded serious, independent review to proposed amendments in the

(1988).

93. *See* 28 U.S.C. §§ 2074, 2075 (1988 & Supp. V 1993).

94. *See* WEINSTEIN, *supra* note 10, at 96-104, 147-49; *see also* Amendments to Rules of Civil Procedure for the U.S. District Courts, 374 U.S. 861, 869-70 (1963) (statement of Justices Black and Douglas) (opposing submission of proposed amendments to the Federal Rules of Civil Procedure); Reporter's Note on Order of Nov. 20, 1972, 409 U.S. 1132, 1133 (1963) (Douglas, J., dissenting) (arguing that Court is "mere conduit" to Congress and its approval of rules amendments is only perfunctory).

95. H.R. 4144, 98th Cong., 1st Sess. (1983).

96. Letter from Warren E. Burger, Chief Justice of the United States, to Chairman Robert W. Kastenmeier, *reprinted in 1983-84 Hearings*, *supra* note 2, at 195. The Conference of Chief Justices of the States also opposed elimination of a role for the Supreme Court, arguing that "the rule-making power is an inherent power necessary to the functioning of the judicial branch of government and . . . should be vested only in the Supreme Court itself." Letter of March 6, 1984 from Connecticut Chief Justice John A. Speziale to Robert W. Chairman Kastenmeier, *reprinted in 1983-84 Hearings*, *supra* note 2, at 231.

97. In voting to prescribe the 1993 amendments to the Federal Rules of Civil Procedure, Justice White stated that the Court should defer to the Judicial Conference and its committees if they have a rational basis for the proposed amendments to the rules. Justice White saw the Court's role as limited to transmitting the Judicial Conference's recommendations without change and without careful study, as long as the rules committee system has acted with integrity. *See* Communication from the Chief Justice, the Supreme Court of the United States, Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. § 2072, 113 S. Ct. 476, 575, 578-79 (1992) [hereinafter Amendments to the Federal Rules of Civil Procedure] (statement of Justice White).

1990s, deferring a proposed amendment to Rule 4 of the Federal Rules of Civil Procedure in 1991,[98] approving amendments to Rule 11 of the Federal Rules of Civil Procedure and five civil discovery rules[99] over three dissents in 1993,[100] and withholding part of the amendments to Rule 412 of the Federal Rules of Civil Procedure in 1994.[101] The Court's recent orders transmitting rules changes to Congress have specified that: "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."[102]

Although the length of the rulemaking process would be shortened by eliminating the role of the Supreme Court, the Court's enormous prestige clearly contributes to the legitimacy and credibility of the process.

III. CONTINUING RENEWAL EFFORTS

Most of the criticisms of the rulemaking process over the past twenty years have been addressed by procedural improvements made by the Judicial Conference and the 1988 amendments to the Rules Enabling Act. Nevertheless, the rules committees are continuing to examine other important procedural issues that have not been fully resolved.

A. *Long Range Planning*

The judiciary established a permanent long range planning process designed to identify the mission and future directions of the federal courts. The *Proposed Long Range Plan for the Federal Courts* (*Plan*) is the first major product of this planning process. With regard to the federal rules, the *Plan* encourages significant participation by the bar

98. Letter of Transmittal from William H. Rehnquist, Chief Justice of the United States to the U.S. Congress, 500 U.S. 964 (1991) (transmitting amendments to Federal Rules of Criminal Procedure).

99. Amendments to the Federal Rules of Civil Procedure, *supra* note 97, at 478 (granting order approving amendments to Federal Rules of Civil Procedure).

100. Amendments to the Federal Rules of Civil Procedure, *supra* note 97, at 581-87 (Scalia, Thomas, Souter, J.J., dissenting).

101. Communication from the Chief Justice, the Supreme Court of the United States, Transmitting an Amendment to the Federal Rules of Evidence as Adopted by the Court, Pursuant to 28 U.S.C. § 2076, 114 S. Ct. 682, 684-85 (1994) [hereinafter Communication from the Chief Justice] (noting in letter to John F. Gerry, Chair of the Executive Committee of the Judicial Conference, that Court withheld Rule 412); *see infra* notes 148-58 and accompanying text.

102. *See* Letter of Transmittal from William H. Rehnquist, Chief Justice of the United States, to Thomas S. Foley, Speaker of the U.S. House of Representatives (Apr. 22, 1993), *reprinted in* Amendments to the Federal Rules of Civil Procedure, *supra* note 97, at 477.

in the rulemaking process, exclusive adherence to the Rules Enabling Act process, and greater uniformity in federal practice and procedure.[103]

As part of the long range planning process, the Standing Committee on Rules of Practice and Procedure has appointed a long range planning subcommittee to conduct a study of the rulemaking process and make recommendations for procedural improvements. In addition, the advisory committees have initiated their own long range planning efforts. The Advisory Committee on Bankruptcy Rules, for example, has a standing subcommittee on automation that has been active in evaluating the impact of technology and in considering changes to the bankruptcy rules to take advantage of the benefits of automation.[104]

Likewise, the bankruptcy, appellate, and civil advisory committees have proposed and circulated for public comment proposed rule amendments that would allow individual courts to permit attorneys to file, sign, and verify documents with the court electronically.[105] If approved through the Rules Enabling Act process, the amendments would take effect on December 1, 1996.[106]

B. *Greater Participation by the Bar*

Despite substantial efforts to persuade attorneys to take the time to suggest improvements in the rules and comment on proposed amendments, the bar is considerably less active than the committees would like. A handful of bar organizations and individuals respond regularly to requests for public comments by providing comprehensive, balanced analyses of proposed rules amendments. But most judges, lawyers, and professors simply do not respond to requests for comments, and those who do, generally oppose specific amendments

103. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, recommendation 30, at 54.

104. As a result of the subcommittee's efforts, Rule 9036 of the Federal Rules of Bankruptcy Procedure took effect on August 1, 1993, authorizing the bankruptcy courts, or their designees, to send required notices by electronic means, rather than by mail, with the consent of the recipients. FED. R. BANKR. P. 9036. The rule is designed to expedite cases and reduce costs to litigants and the courts by allowing creditors to receive information on meetings of creditors, discharges, and other events by electronic transmission on their own computer terminals. *Id.* advisory committee's note.

105. *See* FED. R. APP. P. 25(a)(2)(D) (proposed amendments); FED. R. BANKR. P. 5005(a)(2) (proposed amendments); FED. R. CIV. P. 5(e) (proposed amendments), *in* Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Request for Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, 156 F.R.D. 339, 15, 113 (1994) [hereinafter Proposed Amendments].

106. *See* 28 U.S.C. § 2074(a) (1988 & Supp. V 1993).

on an ad hoc basis.[107] Accordingly, the public responses tend to be moderate in number and not necessarily representative of the bench and bar as a whole.

The *Proposed Long Range Plan for the Federal Courts* encourages an active partnership with the bar in the rulemaking process, both through membership of practicing attorneys on the rulemaking committees and greater participation by attorneys and bar associations in commenting on proposed amendments to the rules.[108] The *Plan* asks the rules committees to continue their outreach efforts in stimulating lawyers and bar associations to provide practical advice to the committees.[109]

As one of his many initiatives to improve judicial administration and service, Administrative Office Director L. Ralph Mecham established a Rules Committee Support Office in 1992 to provide legal and operational support to the Secretary and the rules committees and to provide a higher level of information services to the bar. To stimulate additional responses on rules issues by bar associations, individual lawyers, and academia, the mailing list for the rules is being expanded and rejuvenated. Every six months an additional 200 attorneys and 100 law professors selected at random will be added until an additional 2500 names are added. If no comments are received from addressees for three years, their names will be removed from the list and replaced with others.

The Standing Committee has also requested that the bar associations of each of the states designate an attorney as a point of contact to solicit and coordinate bar comments on proposed amendments. It is anticipated that the bar associations will encourage their members to discuss the rules and provide thoughtful and practical

107. Professor Hazard has suggested that most members of the bar and the public have little that is worth saying about procedural rules and do not take advantage of the abundant opportunity they have to provide input. Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284, 1291 (1978) (reviewing WEINSTEIN, *supra* note 10).

108. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, recommendation 30 commentary, at 54-55.

109. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, recommendation 30 commentary, at 54-55. In proposing the 1958 legislation that required the Judicial Conference to conduct a "continuous study of the operation and effect of the [federal] rules," it was contemplated that the bar would have an active and important part in formulating the rules. "[E]very member of the bar [should have] an ample opportunity to set forth his views, have them debated, and have them decided." *Symposium*, *supra* note 8, at 125 (statement of Chief Judge John Biggs, Jr., former Chief Judge of the Third Circuit). "What . . . lawyers expect and have a right to expect is an opportunity to state [their] view and assurances they will be given consideration." *Id.* at 120 (remarks of Thomas Scanlon, President of the Seventh Circuit Bar Association, former Chairman of the Committee on Civil Procedure of the Indiana Bar Association); *see also id.* at 118 (statement of Chief Justice Earl Warren) (agreeing with Chief Judge Biggs that bar will have active and important part in formulation of rules).

input to the advisory committees. It is also hoped that representatives of the bar will attend committee meetings and hearings.

In an effort to assess the practical operation of the rules, the Advisory Committee on Civil Rules scheduled two conferences in 1995 with members of the bar and academia to discuss class actions and the effectiveness of Rule 23 of the Federal Rules of Civil Procedure. In addition, members of the advisory committee will participate with attorneys and law professors in a conference to consider the strengths and weaknesses of the civil rules generally.

C. *Frequency of Rule Changes*

The 1958 statute assigning rulemaking responsibilities to the Judicial Conference requires the Conference to conduct a "continuous study of the operation and effect of the general rules of practice and procedure."[110] Contemporary commentators suggested that the rules committees should have ample staff, should engage in grassroots surveys, and should conduct hearings, regional meetings, and discussions with the bar to monitor the rules in practice.[111] More recently, Justice Scalia stated that it is essential to have constant reform of the federal rules to correct emerging problems.[112]

The requirement to conduct a continuous study of the operation and effect of the rules, however, does not compel the conclusion that amendments should be frequent. Nor does it imply that all perceived problems with the rules and all conflicts in case law should be rectified. To the contrary, one of the most persistent criticisms of the rules process is that there are simply too many amendments.[113]

Some amendments have been criticized as mere "tinkering" with the rules.[114] And it has been suggested that there should be no

110. 28 U.S.C. § 331 (1988 & Supp. V 1993).

111. *See Symposium*, *supra* note 8, at 123-24 (statement of Chief Judge John Biggs, Jr., former Chief Judge of the Third Circuit); *id.* at 131-32 (statement of Professor James W. Moore). The vision of activist committees with permanent monitoring capabilities, however, never came to pass. In fact, for many years Congress included a strict limit on funding for the rules committees in the judiciary's annual appropriations.

112. Amendments to the Federal Rules of Civil Procedure, *supra* note 97, at 581, 586-87 (Scalia, Thomas, Souter, J.J., dissenting).

113. *See* WRIGHT, *supra* note 2, at 435. Professor Wright noted that the criminal rules "have been amended so frequently that even scholars in the field find it difficult to follow the constant changes or to be certain what a particular rule provided at a particular time." *Id.* Likewise, he pointed out his difficulty in knowing what appellate rules were in effect at a given time, because four different sets of amendments to the Federal Rules of Appellate Procedure had recently been adopted or were proceeding to adoption. Charles A. Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 9 (1994) [hereinafter Wright, *Foreword*].

114. Order Prescribing Amendments to the Federal Rules of Civil Procedure, 446 U.S. 995, 1000 (1980) (Powell, J., dissenting); *see also* Michael E. Tigar, *Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea*, 14 REV. LITIG. 137, 138 (1994) (arguing that

change in a rule "unless there is substantial need for the change."[115] One critic even has argued for a moratorium on procedural law reform.[116]

Too many minor changes to the rules can lead to uncertainty and confusion in the bench and bar.[117] Constant changes, moreover, tend to undermine the stability and prestige of the rules as a whole. The challenge, therefore, is to weigh the benefits of a proposed improvement in the rules against the inherent cost of introducing change and possible uncertainty.

Some rule amendments, even though minor, are necessary to implement recent legislation,[118] to conform to modern language usage,[119] to correct improper statutory cross-references,[120] and to coordinate with pending congressional action.[121] As a general rule, however, there is now a reluctance to make changes to the rules unless they can be shown to be necessary to correct a serious problem in practice. Although many suggestions for improvements in the rules are received from the bench and bar to clarify or reconcile case law among the circuits, the advisory committees have generally opted to allow case law interpreting the rules take its course.[122]

there has been such "tinkering and fiddling" with Federal Rules of Civil Procedure that rulemakers are defeating primary objective of a "just, speedy, and inexpensive determination of every action").

115. *See* John P. Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883, 1884-85 (1989).

116. *See* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993).

117. *See* Frank, *supra* note 115, at 1884-85.

118. Congress, for example, enacted comprehensive bankruptcy reform legislation in 1984, 1986, and 1994, effecting both substantive and procedural changes, including establishment of a new court system, expansion of the U.S. trustee system, addition of Chapter 12 for family farmers, inclusion of numerous commercial and consumer bankruptcy changes, and addition of new procedural requirements. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333; Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088; Bankruptcy Reform Act of 1994, *supra* note 92. The first two statutes required extensive changes in the Federal Rules of Bankruptcy Procedure, which took effect in 1987 and 1991. H.R. DOC. NO. 54, 100th Cong., 1st Sess. 152 (1987); H.R. DOC. NO. 80, 102d Cong., 1st Sess. 170 (1991). Rules changes to accommodate the 1994 legislation are presently under consideration by the Advisory Committee on Bankruptcy Rules.

119. Each set of federal rules was amended in the mid-1980s to eliminate gender-specific language.

120. For example, the Judicial Conference in September 1994 approved an unpublished amendment to FED. R. CRIM. P. 49(e) to delete a reference to an abrogated section of the U.S. Code. JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 67 (1994) [hereinafter 1994 JUDICIAL CONFERENCE REPORTS].

121. *See infra* Part III.E (discussing relationship between judiciary and Congress).

122. To the contrary, in 1992 the Advisory Committee on Civil Rules proposed a general revision of the summary judgment rule, FED. R. CIV. P. 56, that would have codified case law. The proposal, however, was rejected by the Judicial Conference. 1992 JUDICIAL CONFERENCE

In September 1994, for example, the Advisory Committee on the Rules of Evidence published its tentative decisions *not* to amend twenty-five evidence rules.[123] The committee announced its philosophy that an amendment to a rule should not be undertaken absent a showing either that it is not working well in practice or that it embodies an erroneous policy decision.[124] The advisory committee pointed out that any amendment in the rules of evidence "will create new uncertainties as to interpretation and unexpected problems in practical application."[125]

To avoid the appearance of piecemeal changes, the advisory committees have begun to use the device of deferring and "batching" miscellaneous rule changes into a single package of amendments. One possible option for the advisory committees to consider in the future is to prescribe a set schedule for submitting non-urgent rules changes—perhaps every three to five years. This approach, although appealing, is complicated by unpredictable congressional activity that increasingly tends to interrupt any schedules or planning efforts. The 103d Congress, for example, passed a comprehensive bankruptcy reform law that will require rules changes,[126] and the 104th Congress, as part of the Republican "Contract with America," is considering a number of changes both in civil litigation and criminal law.[127]

It has also been recommended widely that rules changes be predicated on a sounder empirical basis.[128] To that end, the advisory committees have been increasing their requests for assistance from the Federal Judicial Center to conduct research on litigation practices and the impact of the rules. The Federal Judicial Center conducted a major study of Rule 11 of the Federal Rules of Civil Procedure before the Advisory Committee on Civil Rules proceeded with the 1993 amendments to that rule.[129] The civil advisory

REPORTS, *supra* note 67, at 82.

123. Proposed Amendments, *supra* note 105, at 484.

124. Proposed Amendments, *supra* note 105, at 484.

125. Proposed Amendments, *supra* note 105, at 484.

126. Bankruptcy Reform Act of 1994, *supra* note 92.

127. *See* Common Sense Legal Reform Act, H.R. 10, 104th Cong., 1st Sess. (1995); Taking Back Our Streets Act, H.R. 3, 104th Cong., 1st Sess. (1995).

128. The 1993 amendments to the Federal Rules of Civil Procedure, for example, were criticized for being promulgated without awaiting the results of the empirical studies carried out under the Civil Justice Reform Act of 1990. *See* Amendments to the Federal Rules of Civil Procedure, *supra* note 97, at 585-86 (Scalia, Thomas, Souter, J.J., dissenting); *see also* Burbank, *supra* note 116, at 844-46; Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994).

129. *See* Elizabeth C. Wiggins et al., *The F.J.C. Study of Rule 11*, F.J.C. DIRECTIONS 3 (Nov. 1991) (summarizing results of three separate analyses of Rule 11 activity in cases filed in five federal district courts); *see also* FED. R. CIV. P. 11 advisory committee's note 1993 (listing various empirical studies that committee considered).

committee also asked the Federal Judicial Center to conduct studies on the use and operation of protective orders under Rule 26(c), offers of settlement under Rule 68, consensual settlement of class actions under Rule 23, and the effect of mandatory disclosure under the 1993 amendments to Rule 26. The Advisory Committee on Criminal Rules considered the results of the Federal Judicial Center's study on cameras in the courtroom before approving amendments to Rule 53.[130]

D. *Content, Organization, and Style of the Rules*

Simplicity and uniformity were central goals of the drafters of the federal rules.[131] There are complaints, however, that the rules are no longer simple and uniform, but have become cumbersome, lengthy, and unpredictable.[132]

Commentators suggest that fundamental changes are needed and that it is time to take a fresh look at the rules.[133] It has also been suggested that it is time to reconsider the trans-substantive character of the rules, so that different categories of cases could be governed by different rules.[134] Obviously, such sweeping changes would take considerable time to effectuate and would require major input from the bar and academia, empirical research, substantial committee deliberations, and public hearings. The civil and bankruptcy advisory committees have, as part of their long range planning efforts, begun

130. FED. R. CRIM. P. 53. The advisory committee and the Standing Committee proposed an amendment to FED. R. CRIM. P. 53 that would have removed the rule's absolute prohibition on cameras in the courtroom in criminal cases, but the proposal was rejected by the Judicial Conference. 1994 JUDICIAL CONFERENCE REPORTS, *supra* note 120, at 67.

131. *See* Burbank, *supra* note 10, at 1042-98; Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1449, 1483 (1994).

132. *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1941 (1989) [hereinafter Burbank, *Transformation*]; Frank, *supra* note 115, at 1884-85.

133. *See generally* Frank, *supra* note 115, at 1884-85.

134. *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547 (1986) (arguing that trans-substantive premise of rules has proved "unworkable"); Mark C. Weber, *The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases*, 14 REV. LITIG. 113, 114-15 (1994) (suggesting need for special rules for small cases). *Compare* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Body of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2067 (1989) (arguing that rules must be applied trans-substantively, and that process is not competent to develop process of rules to be applicable to only one subject area) *with* Burbank, *Transformation*, *supra* note 132, at 1934-35 (arguing that legislative history does not support trans-substantive application of rules). The Civil Justice Reform Act requires the district courts to consider systems to separate civil cases into different "tracks," with different pretrial requirements based on the degree of a case's complexity, the time the case requires for trial preparation, and the resources it will require. 28 U.S.C. § 473(a) (Supp. V 1993).

to think about whether changes of such magnitude will eventually be necessary or desirable.

Apart from changes to substance, there are opportunities to improve the style, consistency, and readability of the rules. Under the leadership of Judge Robert E. Keeton, former chairman of the Standing Committee, efforts have been initiated to redraft the body of rules in clear and concise English—without substantive change—following the best conventions of modern statutory revision and the advice of legal writing teachers. There are no present plans to adopt the revised version of the rules, but at an appropriate point in the future—perhaps integrated with a major revision of the rules—the "re-styled" language could be substituted for the present language.

The Standing Committee is now assisted by a legal writing consultant and a style subcommittee, and it will publish a guide to clear and simple rule drafting.[135] The consultant works with the advisory committees and their reporters to promote clear and consistent language in proposed rules amendments.

As part of its long range planning efforts, the committees could also consider eventual integration of all five sets of federal rules into one. The result, for example, might be the consolidation of similar provisions that now appear separately in each of the rules, such as the provisions dealing with computation of time,[136] courts' and clerks' offices,[137] and local rules.[138]

E. *The Judiciary and Congress*

The success of the rulemaking process relies on a delicate balance of authority and continuing cooperation between the judicial and legislative branches of the government. The Rules Enabling Act of 1934, as reaffirmed by Congress in 1988, establishes a statutory structure under which the judiciary prescribes rules of procedure, practice, and evidence for the federal courts, after giving the bench, bar, and public a generous opportunity for input. Congress then retains the ultimate authority to accept, reject, amend, or defer proposed amendments to the rules. The process works exceedingly well when the procedures by which rules are crafted are credible and when mutual respect prevails between the two branches.

135. BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (forthcoming 1995).

136. *See* FED. R. BANKR. P. 9006; FED. R. CIV. P. 6; FED. R. CRIM. P. 45.

137. *See* FED. R. APP. P. 45; FED. R. BANKR. P. 5001; FED. R. CIV. P. 77; FED. R. CRIM. P. 56.

138. *See* FED. R. APP. P. 47; FED. R. BANKR. P. 9029; FED. R. CIV. P. 83; FED. R. CRIM. P. 57.

The credibility of the rulemaking process was seriously questioned during the 1970s' controversy over the Federal Rules of Evidence. Complaints were made that proceedings before the rules committees had been closed and that changes had been made in the proposals without public notice or input. Complaints about the procedures, combined with concerns that the rulemakers had exceeded their authority and abridged substantive rights, led opponents to petition Congress to defer or reject the rules.[139]

The credibility of rulemaking procedures has been enhanced by its current openness and accessibility.[140] When proposed changes to the rules are now submitted to Congress, an extensive public record has been developed to support the changes, including careful consideration by expert advisory committees, public comments, public hearings, and four levels of review. Members of Congress can be assured that the changes received thorough consideration and that all interested parties had an opportunity to comment, both in writing and at hearings. By comparison, it is extremely rare for any product of the legislative process to receive such objective consideration, public input, and expert review.

Congress has a legitimate interest in federal rule amendments because even procedurally neutral rules may affect substantive rights, may give a practical advantage to one type of litigant over another, and may require adjustment of comfortable habits and practices.[141] Persons and organizations displeased with proposed amendments, accordingly, are likely to exercise their political rights by encouraging Congress to reject or modify specific amendments. Congress, of course, is free under the Rules Enabling Act to make its own independent judgment on the merits of any proposal, but it should—and normally does—give considerable deference to rules amendments prescribed by the Supreme Court.[142]

139. Representative Kastenmeier suggested that "as a result of the shadowy nature of the rulemaking process, a number of proposed rules changes" were rejected by Congress in the 1970s and early 1980s. *1983-84 Hearings*, *supra* note 2, at 154 (statement of Rep. Kastenmeir from *Congressional Record* of Oct. 18, 1983).

140. Professor Wright suggests, however, "that the rulemaking process worked far better when it was carried on in private." Wright, *Foreword*, *supra* note 113, at 2-3 n.6.

141. It has been suggested that some amendments pushed "the rulemaking process into controversial uncharted areas of law and this has been affecting the rights of litigants in a fashion more likely to create the kind of pressure from the public and the legal profession that generates congressional response." Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 52 (1977). Any amendments, for example, that are seen as affecting the balance between the prosecution and the defense in criminal cases are likely to generate a congressional response.

142. William L. Hungate, *Changes in the Federal Rules of Criminal Procedure*, 61 A.B.A. J. 1203, 1207 (1975). Hungate states:

As the *Proposed Long Range Plan for the Federal Courts* points out, however, "[i]t is troubling . . . that bills are introduced in the Congress to amend federal rules directly by statute, bypassing the orderly and objective process established by the Rules Enabling Act."[143] In the 103d Congress, for example, at least thirteen provisions were introduced to amend the federal rules without following the prescribed statutory procedures.

Most of the provisions dealt with matters of considerable political interest, such as victims' rights,[144] evidence in sexual assault and child molestation cases,[145] and other criminal law issues.[146] For some controversial social policy issues, it is inevitable—or desirable—to have policy established by the legislature.[147] By avoiding the Rules Enabling Act process entirely, however, Congress loses the benefit of the extensive record developed by the rules committees, including the public comments and professional review by judges, lawyers, and law professors. Moreover, recent experience shows that some legislation amending the rules may be enacted without any hearings at all, without public input, and without thoughtful review by the bench and bar.

Two examples from the 103d Congress illustrate contrasting ways in which Congress has dealt with controversial statutory amendments to the rules. In the Violent Crime Control and Law Enforcement Act

> The result of [the judiciary's rulemaking] procedure is that any change proposed by the Supreme Court has received careful consideration by a number of able people. This does not mean that we in Congress should forgo our responsibility to make an independent judgment on the merit of any proposal. It does mean, however, that we should accord a healthy respect to any amendment proposed by the Supreme Court.

Id. Judge Weinstein suggests that Congress should confine itself "to the review of substantial principles," rather than "details of rules." WEINSTEIN, *supra* note 10, at 963.

143. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, recommendation 30 commentary, at 54.

144. Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, § 230101 (dealing with victim's right of allocution in sentencing).

145. Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, § 320935 (dealing with admissibility of evidence of similar crimes in sex offense cases).

146. Legislation, however, has also been introduced as a service to particular constituents. Newly enacted Federal Rule of Bankruptcy Procedure 7004(h), for example, requires that service of process on an insured depository institution in certain matters be made by certified mail, rather than first class mail. Bankruptcy Reform Act of 1994, *supra* note 36, § 114. The judiciary objected to the amendment on the grounds that it violated the Rules Enabling Act, was unnecessary, and added expense to the administration of estates. 1994 JUDICIAL CONFERENCE REPORTS, *supra* note 120, at 14.

147. Judge Weinstein has suggested that: "If a matter becomes important enough for detailed congressional intervention, legislation is probably desirable, with formal participation by both houses and the President." WEINSTEIN, *supra* note 10, at 940. It has also been suggested that rulemakers should not propose changes, even in matters of procedure, if the changes will have important effects on substantive rights. Wright, *Book Review*, *supra* note 31, at 654.

of 1994,[148] Federal Rule of Evidence 412 was completely revised and new Rules 413, 414, and 415 were added. The former received substantial public input and careful review by bench and bar. The latter did not.

The proposed revision of Rule 412, commonly known as the "rape shield" rule, was first included in comprehensive criminal legislation introduced in the Senate.[149] It was designed to extend to all criminal cases and all civil litigation the rule's long-standing prohibition against admitting evidence of a victim's past sexual behavior in a case where the defendant has been accused of a crime of sexual abuse. After the Senate bill was introduced, the judiciary committees of both the House and the Senate asked the Judicial Conference to consider the merits of the proposed rule on an expedited basis.[150]

The Advisory Committee on the Rules of Evidence drafted a substantially improved version of the Senate rule, circulated it for public comment, and conducted a public hearing.[151] The carefully crafted, revised rule met with overwhelming public approval,[152] including approval from women's rights groups,[153] and was subsequently adopted by the advisory committee, the Standing Committee, and the Judicial Conference.[154] As a result, the House decided not to include a revision of Rule 412 in its version of the crime legislation and chose, instead, to let the rule drafted by the advisory committee take effect in accordance with the normal operation of the Rules Enabling Act.[155]

In contrast to the cooperation between Congress and the judiciary in Rule 412, new Federal Rules of Evidence 413, 414, and 415 were added as floor amendments to the Senate crime control bill without

148. Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 42 U.S.C.).

149. Violence Against Women Act, S. 15, 102d Cong., 1st Sess. § E (1991).

150. H.R. DOC. NO. 250, 103d Cong., 2d Sess. 5 (1994).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. The Supreme Court later withheld approval of the portion of the rule approved by the Judicial Conference that extended its reach to civil cases. Members of the Court were concerned that the proposed rule might violate the Rules Enabling Act, which forbids the enactment of rules that "abridge, enlarge or modify any substantive right," and might encroach on the rights of defendants in sexual harassment cases because it might be inconsistent with Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). Letter from William H. Rehnquist, Chief Justice of the United States, to Judge John F. Gerry, Chairman of the Judicial Conference's Executive Committee (Apr. 29, 1994), *reprinted in* Communication from the Chief Justice, *supra* note 101, at 684.

Congressional conferees, however, restored the portion of the rule deleted by the Supreme Court, and Congress proceeded to enact revised Rule 412 in the form approved by the Judicial Conference. Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, § 40141.

public comment or hearings and without communication with the rules committees.[156] The new rules will admit evidence of a defendant's past similar acts in a criminal or civil case involving a sexual assault or child molestation offense "for its bearing on any matter to which it is relevant."[157] The rules contain no reference to Federal Rule of Evidence 403, which allows a court to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or needless delay. Neither do they reference the hearsay provisions of Article VIII of the Federal Rules of Evidence. Congressional conferees added a provision to the Senate version of the bill specifying that the new rules would take effect 150 days after enactment, unless the Judicial Conference within that period recommends against them or submits alternate recommendations, in which case the effective date of the rules will be delayed for an additional 150 days.[158]

As a practical matter, the only restraints on Congress are self-imposed. They include the existence of the Rules Enabling Act, which has codified a process of openness and inter-branch coordination; the ordinary respect that one branch of government owes the others; and the quality of the work product of the rulemaking process. Obviously, political and social policy imperatives may tempt legislators to bypass the objective and orderly process of the rulemakers in favor of quick and popular results. As the recent experience with Rule 412 shows, however, legislative objectives can be achieved—with a substantially superior product and in a reasonable

156. Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, § 320935 (dealing with admissibility of evidence of similar crimes in sex offense cases).

157. Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, § 320935.

158. Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, § 320935. The evidence, civil, and criminal advisory committees met and considered the new rules during the 150-day statutory period. The Advisory Committee on the Rules of Evidence also solicited public comment on the rules, sending the rules to 900 evidence professors and 40 women's rights organizations. The overwhelming majority of judges, lawyers, law professors, and organizations responding stated their opposition to the rules, principally on the grounds that they contained numerous drafting problems apparently not intended by their authors and would permit the admission of unfairly prejudicial evidence. The committee received 84 responses, representing 112 individuals and 16 organizations. Of the total responses, 100 individuals and organizations were opposed, 10 were supportive, and 18 either were neutral or recommended modifications. Law professors were opposed to the new rules by 56 to 3.

The Judicial Conference formally asked Congress to reconsider its decision to adopt the new rules, thereby delaying their effective date for another 150 days. Alternatively, the Conference recommended that Congress enact substitute language prepared by the Advisory Committee on the Rules of Evidence that would not change the substance of the congressional enactment but would clarify drafting ambiguities and eliminate possible constitutional infirmities. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995).

time—through adherence at least to the spirit of the Rules Enabling Act.

On occasion, members of Congress work cooperatively with the rules committees, deferring legislative proposals in order to give the rules committees the opportunity to consider them as part of the rulemaking process.[159] Congress also has the option of requesting that the Judicial Conference study a particular subject and report its findings and recommendations. The 1994 crime control legislation, for example, asked the Judicial Conference to evaluate and report on whether the Federal Rules of Evidence should be amended to guarantee that the confidentiality of communications between sexual assault victims and their therapists or counselors will be adequately protected in federal court proceedings.[160]

Recent experience, thus, suggests that a de facto dual track procedure might emerge to deal with rules amendments. On the one hand, the great majority of rules changes would continue to be handled through the Rules Enabling Act procedure. On the other hand, proposed changes with political implications might be referred by the judiciary committees of Congress to the rules committees of the Judicial Conference for consideration on an expedited basis.

F. *National Uniformity and Local Rules*

Local court rules have been criticized by Congress and commentators as a threat to the goal of uniform, simple rules of federal practice

159. In August 1993, Senator Herb Kohl introduced S. 1404, the Sunshine in Litigation Act. The bill proposed amending Rule 26(c) of the Federal Rules of Civil Procedure to require that federal judges make particularized findings before issuing protective orders to ensure that public health and safety would not be jeopardized. S. 1404, 103d Cong, 1st Sess. (1993). No action was taken on Senator Kohl's legislation while the Advisory Committee on Civil Rules reviewed the results of a Federal Judicial Center study on protective orders. The advisory committee completed its work within the Rules Enabling Act process and transmitted proposed amendments to Rule 26(c) to the Judicial Conference for consideration at its March 1995 session. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6-8 (1995). Assuming approval by the Conference, the amendments would be submitted to the Supreme Court with a recommendation that they be approved and transmitted to Congress.

160. Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36 § 40153(c) A similar approach has been followed by Congress on other occasions, when it has asked the Judicial Conference to report on such matters as the future of the federal defender program. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 318, 104 Stat. 5089; JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE FEDERAL DEFENDER PROGRAM (1993). Also, Congress has asked the Judicial Conference to report on the impact of drug activity on the federal courts. *See* Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, § 6159(b), 102 Stat. 4312; JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES TO THE CONGRESS—IMPACT OF DRUG RELATED CRIMINAL ACTIVITY ON THE FEDERAL JUDICIARY (1989).

and a serious trap for lawyers.[161] Criticism has also been directed at the sheer number of local rules, which makes it difficult for lawyers to practice effectively in more than one jurisdiction.[162] It has been argued, too, that some local rules are inconsistent with the national rules.[163]

The 1988 amendments to the Rules Enabling Act were designed in part to restrict the use of local rules. They set forth procedural requirements for courts to follow in adopting rules and provide an oversight mechanism to ensure their consistency with each other and with national rules.[164] Nevertheless, there are more than 5000 local rules regulating civil procedure alone, not including standing orders and other local procedural requirements.[165]

The Standing Committee established a Local Rules Project in 1985 to review the local rules of the district courts and the rules of the courts of appeals.[166] The project's analysis of the rules and internal operating procedures of the courts of appeals led the Advisory Committee on Appellate Rules to propose various amendments to the Federal Rules of Appellate Procedure that substitute a single, national rule for local variations.[167] The Local Rules Project has also informed the district courts of problems with their local rules, including inconsistencies with national rules or statutes, and it has devised a uniform numbering system for local civil rules keyed to the numbering of the national rules. Through voluntary cooperation with the courts and the circuit judicial councils, progress is being made toward reducing the number of local rules and improving their content.[168]

Federal rule amendments are pending in the Supreme Court that would require local court rules to conform to any uniform numbering

161. *See* H.R. REP. NO. 422, *supra* note 31, at 14-15; WRIGHT, *supra* note 2, at 431-32; John P. Frank, *Local Rules*, 137 U. PA. L. REV. 2059 (1989); Subrin, *supra* note 57, at 2018, 2021. *But see* Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A. L. REV. 213, 216 (1981) (arguing that local courts' rulemaking has been "well-reasoned and beneficial").

162. *See* Coquillette et al., *supra* note 57, at 62; Subrin, *supra* note 57, at 2018-26.

163. *See* H. REP. NO. 422, *supra* note 31, at 15; Coquillette et al., *supra* note 57, at 62.

164. *See supra* Part I.

165. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., LOCAL RULES PROJECT, PART I, at 1 (1988).

166. The Local Rules Project is under the direction of the Standing Committee's Reporter, Professor Daniel R. Coquillette of the Boston College Law School. The project director is Mary P. Squiers, Esquire.

167. *See* FED. R. APP. P. 28 advisory committee's note to 1993 amendment; Report of Advisory Committee on Appellate Rules to the Standing Committee, Dec. 1, 1992, 144 F.R.D. 459 (1992) [hereinafter Appellate Rules].

168. There is evidence, for example, that many courts are conducting thorough reviews of the content and numbering of their local rules. In addition, many courts and local rules committees have solicited assistance from the Local Rules Project's director, Mary P. Squiers, on how to re-number the rules and how to draft particular rules more precisely and coherently.

system that the Judicial Conference may prescribe, thereby making it easier for an increasingly national bar to locate a local rule that applies to a particular procedural issue.[169] The amendments would also provide that no local rule imposing a requirement of form may be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.[170] Finally, the rules would prohibit a court from imposing sanctions or other disadvantages for noncompliance with any requirement not set forth in federal law, federal rule, or local court rule, unless the alleged violator has been furnished with actual notice of the requirement in the particular case.[171]

The Civil Justice Reform Act of 1990 has been seen as an even greater threat to uniformity of federal practice.[172] The Act encourages each court to experiment and innovate procedurally, taking into account the assessments and recommendations of an advisory group of local lawyers and litigants.[173] It requires the courts to consider six case management "principles and guidelines" prescribed in the statute and authorizes them to include in their plan an additional five "techniques" of litigation management and cost and delay reduction.[174] The principles, guidelines, and techniques set forth in the Act, if adopted by a district court, have been claimed to supersede certain provisions of the Federal Rules of Civil Procedure.[175]

Some commentators argue that the Civil Justice Reform Act has resulted in much greater "balkanization"[176] of civil practice and procedure among the ninety-four district courts. In addition, the December 1, 1992 amendments to Federal Rule of Civil Procedure 26,

169. H.R. DOC. NO. 67, 104th Cong., 1st Sess. 3 (1995) (Bankruptcy Rule 9029); H.R. DOC. NO. 66, 104th Cong., 1st Sess. 5 (1995) (Appellate Rule 47); H.R. DOC. NO. 65, 104th Cong., 1st Sess. 7 (1995) (Criminal Rule 57); H.R. DOC. NO. 64, 104th Cong., 1st Sess. 6 (1995) (Civil Rule 83).

170. *See supra* note 169.

171. FED. R. APP. P. 47; FED. R. BANKR. P. 9029; FED. R. CIV. P. 83; FED. R. CRIM. P. 57. The amendments were approved by the Judicial Conference on September 24, 1994 and transmitted to the Supreme Court on November 2, 1994. *See* 1994 JUDICIAL CONFERENCE REPORTS, *supra* note 120, at 66-67.

172. *See* WRIGHT, *supra* note 2, at 436.

173. 28 U.S.C. §§ 471-473, 478 (Supp. V 1993).

174. *Id.* § 473(a), (b). The Act emphasizes strong judicial case management efforts, separate procedural tracks for different categories of civil cases, and increased use of alternate dispute resolution techniques.

175. *See* S. REP. NO. 101-416, 101st Cong., 2d Sess. 10-11 (1990). Professor Mullenix argues that the Civil Justice Reform Act effectively repealed the Rules Enabling Act and rendered impotent the federal rulemaking process that has traditionally relied on careful study to achieve simple and uniform national rules. Mullenix, *supra* note 10, at 379-80. The contrary view is well expressed in Robel, *supra* note 131, at 1448, 1464-70, 1473.

176. *See* Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992); *Article*, FEDERAL DISCOVERY NEWS, Dec. 1994, at 4-7.

dealing with pretrial disclosure and discovery, authorize the district courts individually to "opt out" of its provisions, thereby adding further variations to practice among the district courts.[177]

The Civil Justice Reform Act, however, contemplates a possible return to greater national uniformity following a review of the results of its mandated pilot programs. The Judicial Conference will consider the results of a comprehensive empirical study assessing the extent to which costs and delays will have been reduced as a result of the Act's pilot programs and experimentation.[178] The Conference must submit a report to Congress by December 31, 1996, recommending whether the Act's principles and guidelines should be made mandatory and incorporated in the federal rules. The Conference is further required to "initiate" appropriate changes to the federal rules to implement any changes recommended.[179]

Can greater national uniformity in federal practice and procedure be achieved? Probably so—but not before the period of experimentation and evaluation required by the Civil Justice Reform Act has been concluded. The *Proposed Long Range Plan for the Federal Courts* recognizes that some local rules are appropriate to account for differing local conditions and to allow experimentation with new procedures.[180] It declares, however, that the long term emphasis of the courts should be on promoting nationally uniform rules of practice and procedure.[181] To this end, the Plan calls for the Judicial Conference and the circuit judicial councils to exercise their statutory authority[182] to review local rules and reduce the number

177. FED. R. CIV. P. 26; *see* Randall Samborn, *Districts' Discovery Rules Differ*, NAT'L L.J., Nov. 14, 1994, at A1; Wright, *Forward*, *supra* note 113, at 10-11.

178. The Administrative Office has contracted with the RAND Corporation to conduct the statutorily required study. *See generally* 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. 1301 (1994).

179. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, sec. 105, 104 Stat. 5089, *amended by* the Judicial Amendments Act of 1994, § 4, 1994 U.S.C.C.A.N (108 Stat.) 4343.

180. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, recommendation 30 commentary, at 55.

181. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, recommendation 30 commentary, at 55.

182. 28 U.S.C. §§ 331, 2071(c) (1988 & Supp. V 1995). In March 1994, the Judicial Conference was asked for the first time to exercise this statutory oversight authority when five state attorneys general requested that the Judicial Conference modify or abrogate Local Rule 22 of the Ninth Circuit—regarding the processing of capital cases—asserting that the local rule was inconsistent with federal law. The request has been considered by the Advisory Committee on Appellate Rules and the Standing Committee and is still pending. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 21-22 (Sept. 1994).

of local rules and standing orders.[183]

CONCLUSION

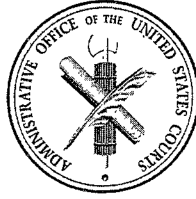
The organizational structure and the procedural approach of the rulemaking process are largely accepted as fundamentally sound by Congress, the bench, and the bar. Nevertheless, specific procedural aspects of the process have been criticized in recent years. In response, the process has been reexamined and periodically renewed as part of: (1) the Judicial Conference's "fresh look" at the process in the 1980s; (2) the five-year review of rulemaking by Congress that culminated in the 1988 amendments to the Rules Enabling Act; and (3) the judiciary's ongoing long range planning efforts.

Enormous progress has been made toward opening the rulemaking process and to stimulating participation by the bench, bar, academia, and the public. All activities of the rules committees are documented and readily accessible. Several important opportunities and challenges, however, remain to be addressed by the rules committees. The most common complaints are that the rules are not as simple, well written, and predictable as they once were and that federal practice is far less uniform than it should be. Moreover, Congress on occasion does not adhere to the time-tested and orderly process established by the Rules Enabling Act.

The newly approved *Long Range Plan for the Federal Courts* recognizes these problems and calls upon the judiciary to place greater emphasis on adopting rules that promote simplicity in procedure, fairness in administration, and the just, speedy, and inexpensive determination of litigation. It also calls for adherence to the Rules Enabling Act process, greater uniformity in federal practice, fewer local rules, and greater participation by the bar in the rulemaking process. The recommendations of the *Plan*, together with ongoing scrutiny by the bench, bar, academia, Congress, and the public, will ensure the continuing renewal of the federal rulemaking process.

183. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, recommendation 30 commentary, at 55.

Agenda Item 4



LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

December 4, 1996

MEMORANDUM TO THE STANDING RULES COMMITTEE

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

The following report briefly describes administrative actions and some major initiatives undertaken by the office to improve its support service to the rules committees.

New Initiatives

The Rules Committee Support Office undertook two major initiatives since the last standing committee meeting that are intended to assist the advisory committees.

The first is creating a docket sheet of all suggested amendments considered in the past four years for each set of rules. The docket sheets for Civil and Criminal Rules have been completed and are attached. Every suggested amendment along with the source and status or disposition of that suggestion is listed. We are developing a computer program to create a list of pending projects from the docket sheet. The office will work with the Appellate, Bankruptcy, and Evidence Committee reporters to create a docket sheet for those advisory committees.

The second initiative is to research our historical records for information regarding a committee's past action on every new proposed amendment submitted to an advisory committee. Our microfiche collection of rules-related documents was searched for prior committee action on each rule under consideration by the advisory committees at their respective fall meetings. Pertinent documents were forwarded to the appropriate reporter for consideration. Useful documents were found for each committee.

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 and 1992 have been catalogued and shipped to a government record center. We will catalogue and box the documents for 1993 over the next few 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. The software has been customized to our specifications by another private-sector consultant. The final testing of the system will take place soon. Once the testing is complete, a private-sector consultant will help us produce reports to ensure that data is entered properly and that all comments are acknowledged with appropriate follow-up responses explaining the committee's actions. The manual system is being maintained while we are developing and testing the automated system.

When implemented the system offers a high-speed scanner (2-3 seconds per page) and will 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. Since February 1996, we have been scanning all letters commenting on the proposed amendments. This summer the office had an intern who abstracted minutes and rules-related articles from our files and the microfiche collection and added them to the system. 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

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. For this public comment period, the office has already received, acknowledged, and forwarded more than one hundred comments and many suggestions to the appropriate committees. We numbered each comment consecutively, which enabled committee members to determine instantly whether they had received all of them.

Distribution of Proposed Rule Changes

We are continuing our efforts to improve the distribution of proposed rule amendments for public comment. The title page of the *Request for Comment* pamphlet, which contains the text of the proposed amendments to the rules, was reformatted to highlight the comment-seeking purpose of the publication and indicate which rules are being amended. The foldout brochure that summarizes the proposed rules amendments has proven useful. We have received many requests for it. We continue to monitor response to the *Request for Comment* and have taken 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 54 publishers. We have also been coordinating with the Bankruptcy Clerks Administration Division, the District Clerks Administration Division and the Appellate Court and Circuit Administration Division to distribute rules materials to members of the local bankruptcy, district, and appellate courts' rules committees.

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 August 1996 *Request for Comment* pamphlet. We received comments on the proposed rules amendments published in September 1995 from 22 state bar associations, several of whom commented on more than one set of rules.

Recently we began to update the points-of-contact list. We sent a letter to the points-of-contact requesting them to inform us if they had been replaced or would be replaced before the mailing of the next *Request for Comment* pamphlet on proposed amendments in August 1997.

Mailing List

The Administrative Office has purchased a new automated mailing list system. It became recently fully operational and should substantially reduce the time involved in maintaining and expanding the mailing list. During the transition period from the old system to the new system we suspended our efforts to expand the mailing list. Now that the new system is in place we will resume adding an additional 200 attorneys and 100 professors 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 be removed from the list, and we will replace the name.

Internet

The *Request for Comment* pamphlet is now available on the Internet (http://www.uscourts.gov). Internet access supplements, rather than replaces, our current system of targeted mailing. To date there have been more than three thousand "visits" to the *Request for Comment* published in September 1996 on Internet. We are exploring the possibility of making other rules-related documents available on the Internet and other electronic bulletin boards. We now are able to receive comments on the proposed rules amendments via the Internet, however, we are currently not doing so. The Technology Subcommittee has been asked to study the issue.

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 September 1996, the Judicial Conference approved and forwarded to the Supreme Court the proposed amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure approved by the Standing Committee at its June 1996 meeting. In October we forwarded those proposals to the Supreme Court.

On August 15, 1996, we published for comment in two separate pamphlets the *Preliminary Draft of the Proposed Revision of the Federal Rules of Appellate, Civil, and Criminal Procedure* and the *Preliminary Draft of the Proposed Revision of the Official*

Bankruptcy Forms. We also prepared and published a brochure summarizing the proposed amendments.

In November 1996, 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 24, 1996, would take effect on December 1, 1996.

In December 1996, we distributed to the court family the pamphlets printed by the General Printing Office for the House Judiciary Committee containing the recently effective amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and the Rules of Evidence. They do not print any pamphlets for the bankruptcy rules, and our effort to convince Congressman Henry Hyde, chair of the House Judiciary Committee, of the need for such a pamphlet has so far been unsuccessful.

The *Guidelines for Drafting and Editing Court Rules* have been so popular that we are arranging a second printing. The *Guidelines* will be reprinted in the *Federal Rules Decisions*. The report of the Subcommittee on Long Range Planing: A Self-Study of Federal Judicial Rulemaking will also be reprinted in *Federal Rules Decisions*.

John K. Rabiej

Attachments

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
Copyright Rules of Practice — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by committee 10/96 — Considered by committee **PENDING FURTHER ACTION**
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to committee 4/96 — Considered by committee 10/96 — Considered by committee, assigned to subcommittee **PENDING FURTHER ACTION**
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition **COMPLETED**
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied **COMPLETED**
[CV4(i)] — Service on government in Bivens suits	Frank Hunger and DOJ 10/96	10/96 — Referred to Reporter and Chair **PENDING FURTHER ACTION**
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by committee **DEFERRED INDEFINITELY**
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by committee 4/94 — Considered by committee 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**
[CV5] — electronic filing		10/93 — Considered by committee 9/94 — Published for comment 10/94 — Considered 4/95 — Committee approves amendments with revisions 6/95 — Approved by Stg Com 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV5] — Service by electronic means or by commercial carrier	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee **PENDING FURTHER ACTION**
[CV6(e)] — Time to act after service	Standing Committee 6/94	10/94 — Committee declined to act **COMPLETED**
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by committee 10/93 — Considered by committee 10/94 — Considered by committee 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by committee 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Committee for submission to the Jud Conf 6/96 — Stg Comm approved 9/96 — Approved by Jud Conf
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration **PENDING FURTHER ACTION**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by committee and deferred **DEFERRED INDEFINITELY**
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94	5/93 — Considered by committee 6/93 — Submitted for approval for publication, withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95 — Studied at meetings 4/96 — Forwarded to the ST Committee for submission to the Jud Conf 6/96 — Approved for publication by ST Committee 8/96 — Published for comment 10/96 — Discussed by committee **PENDING FURTHER ACTION**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV26] — Revamp current adversarial system of federal legal practice — RAND evaluation of CJRA plans	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College Trial Lawy	4/95 — Delayed for further consideration 11/95 — Considered by committee 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by committee, subcommittee appointed **PENDING FURTHER ACTION**
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94	5/93 — Considered by committee 10/93 — Published for comment 4/94 — Considered by committee 10/94 — Considered by committee 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by the Jud Conf 4/95 — Considered by committee 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers **PENDING FURTHER ACTION**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96; #1045	7/31/96 — Submitted for consideration 10/96 — Considered by committee, FJC to conduct study **PENDING FURTHER ACTION**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Committee 1/95 — Stg Comm approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory committee pending review of American with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox	10/94 — Considered by committee 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Committee 9/95 — Published for comment 4/96 — Considered and rejected by advisory committee **COMPLETED**
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by committee 7/95 — Proposed amendment approved for publication by ST Committee 9/95 — Published for comment 4/96 — Forwarded to the ST Committee for submission to the Jud Conf 6/96 — Stg Comm approves 9/96 — Jud Conf rejected 10/96 — Committee's post-mortem discussion **COMPLETED**
[CV50] — Uniform date for filing post trial motion	Bk Committee	5/93 —Approved for publication 6/93 — Stg Comm approves publication 4/94 — Approved by committee 6/94 — Stg Comm approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CV52] — Uniform date for filing for filing post trial motion	Bk Committee	5/93 —Approved for publication 6/93 — Stg Comm approves publication 4/94 — Approved by committee 6/94 — Stg Comm approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by committee 10/93 — Considered by committee 4/94 — Draft amendments to cv16.1 regarding "pretrial masters" 10/94 — Draft amendments considered **DEFERRED INDEFINITELY**
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by committee, draft presented 11/95 — Draft presented, reviewed, and set for further discussion **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV59] — Uniform date for filing for filing post trial motion	Bk Committee	5/93 —Approved for publication 6/93 — Stg Comm approves publication 4/94 — Approved by committee 6/94 — Stg Comm approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**
[CV64] — Federal prejudgment security	ABA proposal	11/92 — Considered by committee 5/93 — Considered by committee 4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by committee 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY**
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to committee's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 **PENDING FURTHER ACTION**
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996	10/96 — Recommend repeal rules to conform with statute and transmit to Standing Committee **COMPLETED**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV81(a)(1)] — applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Committee considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approve for publication 10/93 — Published for comment 4/94 — Revised and Approved by committee 6/94 — Approved by Standing Committee 9/94 — Approved by Jud Conf 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CV84] — Authorize Conference to amend rules		5/93 — Considered by committee 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by committee **DEFERRED INDEFINITELY**

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Committee 6/94 — Approved by Stg Com 9/94 — Approved by Jud Conf 12/95 — Effective **COMPLETED**
[CR 5(c)] — Misdemeanor defendant in custody is not entitled to preliminary examination. Cf CR58(b)(2)(G)	Magistrate Judge Robert B. Collings 3/94	10/94 — Deferred pending possible restylizing efforts **PENDING FURTHER ACTION**
[CR 5.1] — Extend production of witness statements in CR26.1 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — St Comm approved 8/96— Published for public comment **PENDING FURTHER ACTION**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Committee declined to act on the issue **COMPLETED**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Committee for public comment 10/94 — Discussed and no action taken **COMPLETED**
CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Committee decided that current practice should be reaffirmed **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 10] — Arraignment of detainees through video teleconferencing	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subcommittee appointed 4/93 — Considered 6/93 — ST Committee approved for publication 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/96	10/96 — Considered, draft presented **PENDING FURTHER ACTION**
[CR 11(d)] — Examine defendant's prior discussions with an government attorney	Judge Sidney Fitzwater 11/94	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcommittee on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Harris decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered **PENDING FURTHER ACTION**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements and Hyde decision	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered **PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcommittee appointed 4/96 — No action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 12(b)] — Require defense to give notice of intent to raise entrapment defense.		**PENDING FURTHER ACTION**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Committee took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Committee for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94	4/94 — Considered 6/94 — Approved for publication by ST Committee 9/94 — Published for public comment 7/95 — Approved by ST Committee 9/95 — Rejected by Judicial Conference 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Committee 6/96 — ST approved 9/96 — Jud Conf approved **COMPLETED**
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Committee 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Committee 9/95 — Rejected by Judicial Conference **COMPLETED**
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R. Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved by ST Committee for publication 9/95 — Published for public comment 4/96 — Rejected by advisory committee, but should be subject to continued study and education, FJC to pursue educational programs **COMPLETED**
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary	2/91 — ST Committee, after publication and comment, rejected CR Committee 1990 proposal 4/93 — No motion to amend **COMPLETED**
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96	10/96 — Considered **PENDING FURTHER ACTION**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony	Judge Stotler 10/96	10/96 — Discussed **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5.1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by committee 4/96 — Draft presented and approved 6/96 — St Comm approved 8/96 — Published for public comment **PENDING FURTHER ACTION**
[CR26.2(f)] — Definition of Statement	Crim Rules Comm 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Committee for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective **COMPLETED**
[CR 30] — Require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking should handle it **COMPLETED**
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — St Comm approved 8/96 — Published for public comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92	10/92 — Forwarded to ST Committee for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective **COMPLETED**
[CR 32(d)(2) — Forfeiture proceedings and procedures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Committee for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Stg Com approved 9/95 — Jud Conf approved 4/96 — Sup Ct approved 12/96 — Effective **COMPLETED**
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96	10/96 — Draft presented and considered **PENDING FURTHER ACTION**
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Stg Comm approved for publication 8/96 — Published for public comment **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Committee 6/96 — Approved by ST Committee for publication 8/96 — Published for public comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules **PENDING FURTHER ACTION**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Comm 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Stg Com approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Committee for publication 4/93 — Discussed 6/93 — Approved by ST Committee 9/93 — Approved by Judicial Conference 4/94 — Approved by Supreme Court 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 43(b)] — Arraignment of detainees by video teleconferencing; sentence absent defendant	DOJ 4/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved by ST Committee for publication 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Committee 6/94 — Stg Comm approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — St Comm approved for publication 8/96 — Published for public comment **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 46] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized **PENDING FURTHER ACTION**
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved by ST Committee for publication 4/94 — Considered 9/94 — No action taken by Judicial Conference because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other committees in Judicial Conference **COMPLETED**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — Stg Comm approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR53] — Cameras in the courtroom		7/93 — Stg Comm approved 10/93 — Published 4/94 — Considered and approved 6/94 — Stg Comm approved 9/94 — Jud Conf rejected 10/94 — Guidelines discussed by committee **COMPLETED**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Committee for public comment 6/93 — Approved by ST Committee for publication 9/93 — Published for public comment 4/94 — Forwarded to ST Committee 12/95 — Effective **COMPLETED**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Committee 6/93 — Approved by ST Committee for publication 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Committee 6/94 — Rejected by ST Committee **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Committee, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved by ST Committee for publication 4/92 — Considered 6/92 — Approved by ST Committee 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **PENDING FURTHER ACTION**
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment **PENDING FURTHER ACTION**

STATE BAR ASSOCIATIONS' POINTS OF CONTACT TO THE RULES COMMITTEES

Alabama State Bar
Frank M. Bainbridge, Esquire

Alaska Bar Association
Monica Jenicek, Esquire

State Bar of Arizona
Anthony R. Lucia, Esquire

Arkansas Bar Association
J. Thomas Ray, Esquire

The State Bar of California
Lee Ann Huntington, Esquire

The Colorado Bar Association
Frances Koncilja, Esquire

Connecticut Bar Association
Francis J. Brady, Esquire

Delaware State Bar Association
Gregory P. Williams, Esquire

Bar Association of the District of Columbia
Thomas Earl Patton, Esquire

The District of Columbia Bar
Anthony C. Epstein, Esquire

The Florida Bar
Anthony S. Battaglia, Esquire

Georgia State Bar Association
Glenn Darbyshire

Hawaii State Bar Association
Margery Bronster, Esquire

Idaho State Bar
Diane K. Minnich, Esquire

Illinois State Bar Association
Dennis Rendleman, Esquire

Indiana State Bar Association
Thomas A. Pyrz, Esquire

The Iowa State Bar Association
Donald Thompson, Esquire

Kansas Bar Association
Brian G. Grace, Esquire

Kentucky Bar Association
Norman E. Harned, Esquire

Louisiana State Bar Association
Patrick A. Talley, Esquire

Maine State Bar
Martha C. Gaythwaite, Esquire

Maryland State Bar Association, Inc.
Roger W. Titus, Esquire

State Bar of Michigan
Jon R. Muth, Esquire

Minnesota State Bar Association
Eric J. Magnuson, Esquire

The Missouri Bar
Robert T. Adams, Esquire

State Bar of Montana
Lawrence F. Daly, Esquire

Nebraska State Bar Association
Terrence D. O'Hare, Esquire

New Jersey State Bar Association
Raymond A. Noble, Esquire

State Bar of New Mexico
Carl J. Butkus, Esquire

New York State Bar Association
Mark H. Alcott, Esquire

The North Carolina State Bar
James M. Talley, Jr., Esquire

State Bar Association of
North Dakota
Sandi Tabor, Esquire

Ohio State Bar Association
Eugene P. Whetzel, Esquire

Oregon State Bar
Honorable Robert E. Jones

Pennsylvania Bar Association
H. Robert Fiebach, Esquire

Rhode Island Bar Association
Benjamin V. White, III, Esquire

South Carolina Bar
William Howell Morrison, Esquire

State Bar of Texas
Ronald F. Ederer, Esquire

Vermont Bar Association
John J. Kennelly, Esquire

Virginia State Bar
Mary Yancey Spencer, Esquire

Washington State Bar Association
Tim Weaver, Esquire

The West Virginia State Bar
Thomas R. Tinder, Esquire

State Bar of Wisconsin
Gary E. Sherman, Esquire

Wyoming State Bar
Richard E. Day, Esquire

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

December 4, 1996

MEMORANDUM TO THE STANDING RULES COMMITTEE

SUBJECT: *Legislative Activity Report*

The Congress considered several bills that affect the Federal Rules of Practice and Procedure since the committee last met in June 1996. The following discussion describes the bills and the actions taken by the rules committees regarding them.

Suits in Admiralty Law

In March 1995 the Judicial Conference adopted the recommendation of the rules committees to seek legislation eliminating the provision on service in the Suits in Admiralty law that was inconsistent with Civil Rule 4. The Administrative Office's Legislative Affairs Office contacted key Congressional offices, explained the justification for the changes, and pressed the recommendation for nearly one year.

Congress passed the Coast Guard Authorization Act of 1996 in September 1996. (Pub. L. No. 104-324.) Section 1105 of the Act deleted the inconsistent service provision in Title 46 of the United States Code, which required service forthwith on the government. The section-by-section analysis was based on our letter explaining the purpose of the amendment.

Federal Courts Improvement Act of 1996

The Federal Courts Improvement Act of 1996 took effect on October 19, 1996. (Pub. L. No. 104-317.) The legislation includes separate provisions that had been approved earlier by the Judicial Conference, including increases in filing fees

and raising the threshold from $50,000 to $75,000 in diversity cases. A copy of the bill is attached for your information. (See Attachment A.)

Several provisions in the Act amended the statutory provisions governing the jurisdiction of a magistrate judge in civil and criminal cases, which directly affected the rules implementing them. The Advisory Committees on Civil and Criminal Rules have recommended conforming amendments to their respective rules, which are discussed in their respective committee reports.

Immediately before the August Congressional recess, proposed amendments to Civil Rule 26(c) on protective orders and Civil Rule 23 on class actions were to be considered by the Senate Judiciary Committee as part of the Courts Improvement bill. Senator Herb Kohl was considering attaching proposed amendments to Rule 26(c) to the Courts Improvement bill, which he had earlier introduced as a separate bill. The amendments would require a court finding in each instance before issuing a protective order. The amendments to Rule 23 would have established procedures for state attorneys general to comment on every class action settlement.

A letter was sent from Judge Stotler to the Senate Judiciary Committee urging the members not to attach either amendment to the bill. (See Attachment B.) Neither amendment was included in the enacted legislation.

Child Pornography Prevention Act of 1995

In September 1996, Judge Stotler wrote to Senator Orrin G. Hatch, chair of the Senate Judiciary Committee, urging him and his committee colleagues to prevent the amendment of Criminal Rule 32 in the Child Pornography Prevention Act of 1995. (See Attachment C.) The amendment would have required a judge who is sentencing a defendant for an offense — which was subject to enhanced penalties for a later conviction of the same offense — to notify a defendant both verbally and in writing of the enhanced penalties for a later conviction of the same offense.

The Child Pornography Prevention Act ultimately was passed as part of an omnibus 1996 general government appropriations law. But the proposed amendment to Rule 32 was not included in it.

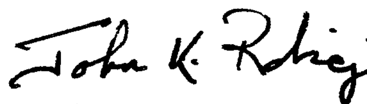
Victims of Crime Constitutional Amendment

Senate Joint Resolution 65 would amend the United States Constitution to entitle victims of crimes of violence to, among other things, notification of and an opportunity to appear and testify or submit statements at public proceedings relating to the crime. The Judicial Conference's Committee on Criminal Law, assisted by the Committee on Federal/State Jurisdiction, has been tasked with the primary responsibility to recommend a response from the judiciary to Congress on it. The former chair of that committee wrote to members of the Congressional Judiciary committees advising them of serious concerns and problems with the proposed constitutional amendment. The Advisory Committee considered the Congressional resolution and concurred with the concerns expressed earlier by the Criminal Law Committee chair.

The full Criminal Law Committee meets on December 9-10, 1996. At its meeting, it is expected to recommend adoption of a formal judiciary position on the Congressional resolution. A copy of the committee's recommendation will be circulated to the Standing Rules Committee as soon as possible.

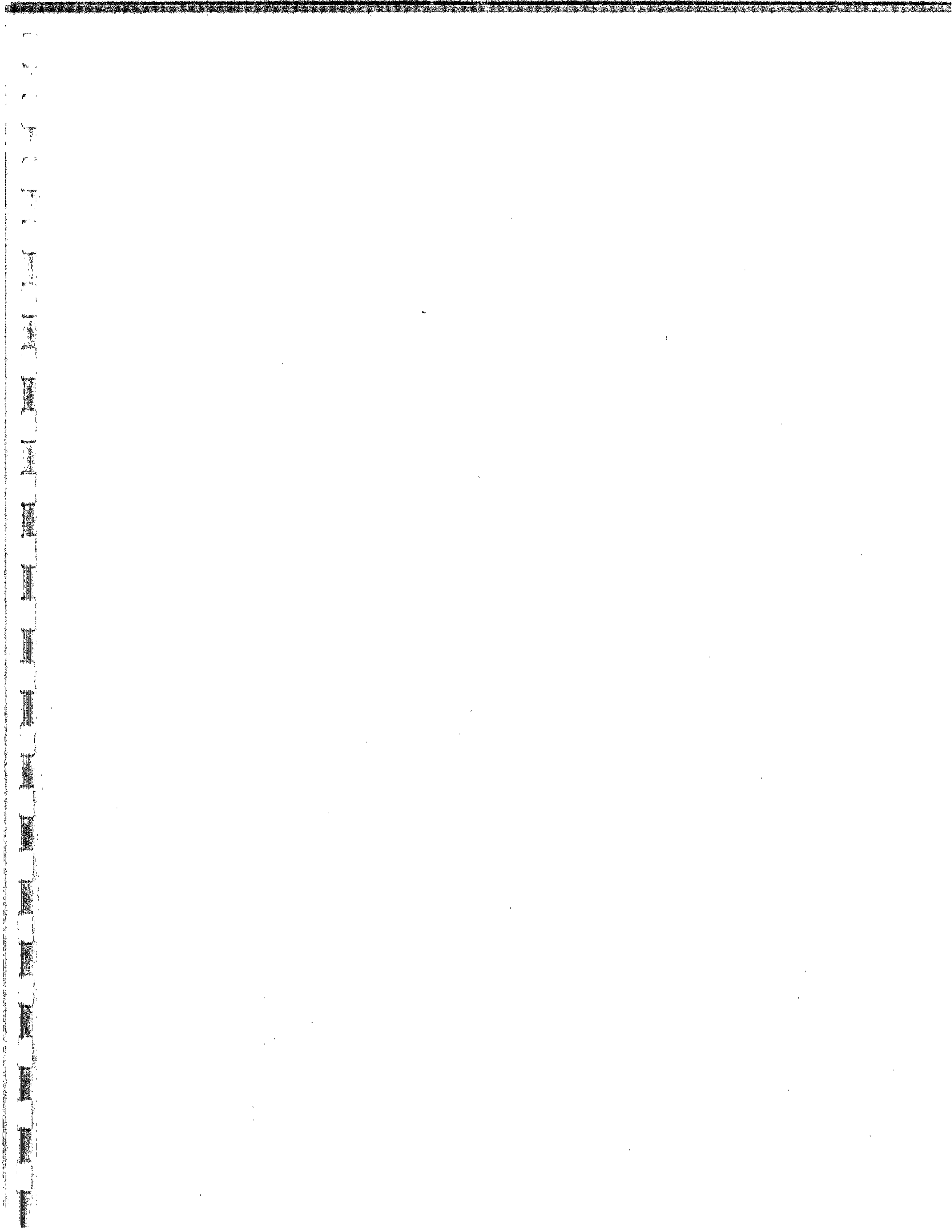
Effective Date of Evidence Rules 413-415

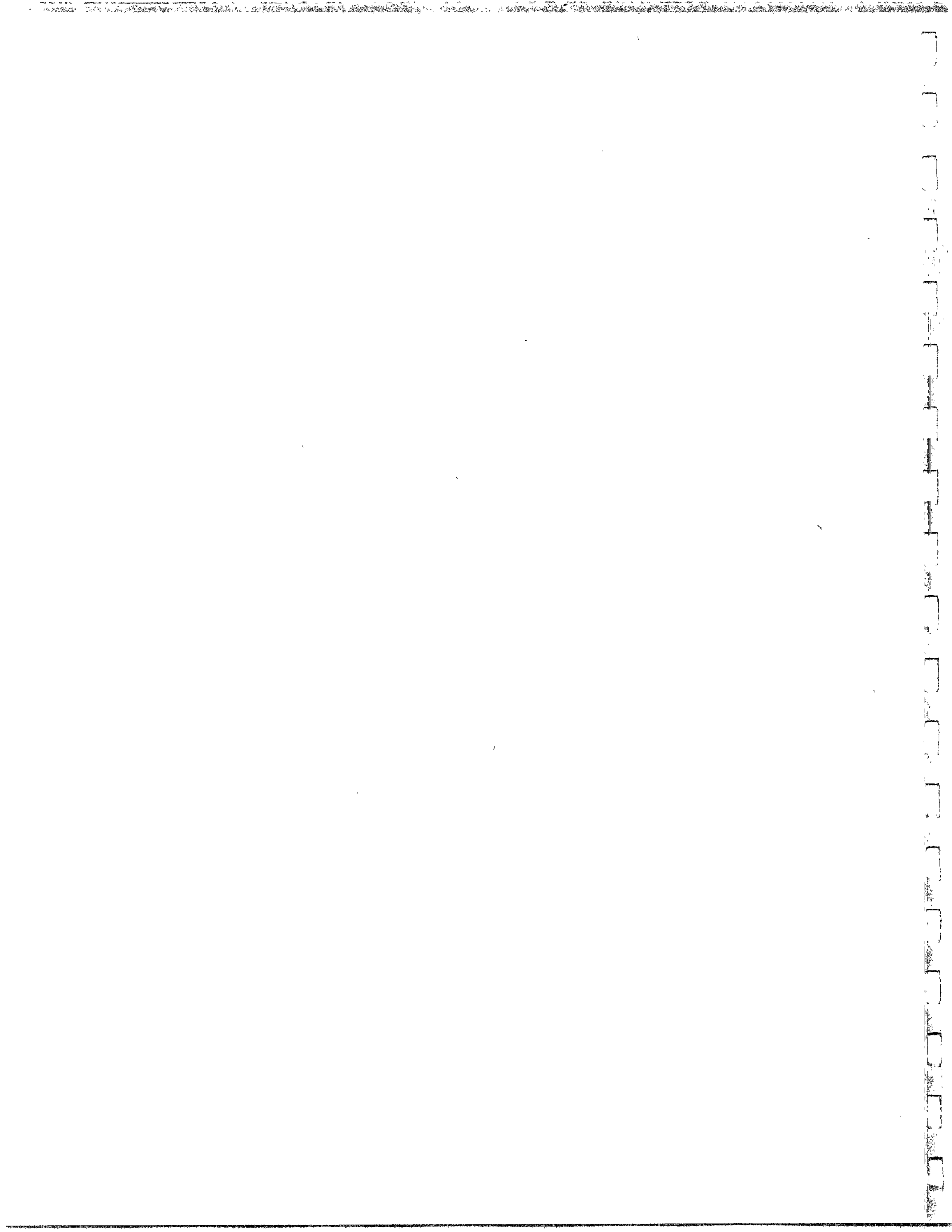
Under a proposal from the Department of Justice, new Evidence Rules 413-415 specifically would apply to an offense committed any time before the July 10, 1995 effective date. The proposal was included as part of the enacted general Appropriations Law and was submitted to Congress the night before the vote was taken on the legislation. The amendment addresses a contrary Tenth Circuit Court of Appeals' decision, which ruled the coverage inapplicable to an offense committed well before July 10, 1996.



John K. Rabiej

Attachments





LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

October 22, 1996

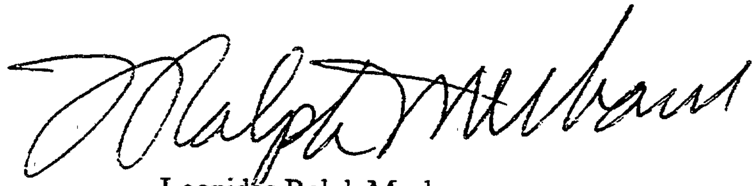
MEMORANDUM TO: **Chief Justice of the United States**
Associate Justices of the Supreme Court
Judges, United States Courts
Circuit Executives
District Court Executives
Clerks, United States Courts
Chief Probation Officers
Chief Pretrial Services Officers

SUBJECT: The Federal Courts Improvement Act of 1996 **(INFORMATION)**

The President signed S. 1887, the "Federal Courts Improvement Act of 1996," into law on October 19, 1996. The Act contains thirty-one provisions proposed to Congress by the Judicial Conference of the United States. In addition, section 206, concerning removal, was requested by the Department of Justice, and section 610, concerning venue for territorial courts, was added by the House. The Act's provisions address administrative, financial, jurisdictional, and personnel needs of the Judicial Branch. It affects judges, clerks of court, probation and pretrial services officers, court reporters, and court interpreters, among other court officials.

In reaching agreement on a courts improvement bill acceptable to both the House and Senate, however, Congress deleted several sections from the proposed bill transmitted to Congress by the judiciary. Of particular note, the provision to repeal section 140 of a 1982 congressional resolution, which requires affirmative congressional action before judges can receive a COLA, is not included in S. 1887. The Senate Judiciary Committee had approved the section 140 repealer. The Administrative Office was working toward Senate passage and a House vote on the provision when an extraordinary series of "holds," beginning on September 13, 1996, by a number of Senators regrettably made that impossible.

Attached is a copy of the text of the new law and a brief synopsis of its provisions. Also included in the synopsis are references to three Judicial Conference proposals processed by Congress separate from S. 1887: Pub. L. No. 104-175, which amends 28 U.S.C. § 46(c); Pub. L. No. 104-34, which amends 28 U.S.C. § 1391(a)(3); and Pub. L. No. 104-220, which amends 28 U.S.C. § 1392(a). For your convenience, the synopsis is organized by the type of judge, official or activity affected by the change in law. Further communication on particular sections of the Act from Administrative Office program offices to those affected by these changes in the law will be forthcoming. If you need additional information, please contact Mike Blommer, Assistant Director, Office of Legislative Affairs, at 202-273-1120.



Leonidas Ralph Mecham

Attachments

(c) APPLICABILITY.—The amendments made by this section apply to cases pending on the date of the enactment of this Act and to cases commenced on or after such date.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

S. 1887

One Hundred Fourth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Wednesday, the third day of January, one thousand nine hundred and ninety-six

An Act

To make improvements in the operation and administration of the Federal courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Courts Improvement Act of 1996".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—CRIMINAL LAW AND CRIMINAL JUSTICE AMENDMENTS

Sec. 101. New authority for probation and pretrial services officers.

TITLE II—JUDICIAL PROCESS IMPROVEMENTS

Sec. 201. Duties of magistrate judge on emergency assignment.
Sec. 202. Consent to trial in certain criminal actions.
Sec. 203. Registration of judgments for enforcement in other districts.
Sec. 204. Vacancy in clerk position; absence of clerk.
Sec. 205. Diversity jurisdiction.
Sec. 206. Removal of cases against the United States and Federal officers or agencies.
Sec. 207. Appeal route in civil cases decided by magistrate judges with consent.
Sec. 208. Reports by judicial councils relating to misconduct and disability orders.

TITLE III—JUDICIARY PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

Sec. 301. Senior judge certification.
Sec. 302. Refund of contribution for deceased deferred annuitant under the Judicial Survivors' Annuities System.
Sec. 303. Bankruptcy judges reappointment procedure.
Sec. 304. Technical correction related to commencement date of temporary judgeships.
Sec. 305. Full-time status of court reporters.
Sec. 306. Court interpreters.
Sec. 307. Technical amendment related to commencement date of temporary bankruptcy judgeships.
Sec. 308. Contribution rate for senior judges under the judicial survivors' annuities system.
Sec. 309. Prohibition against awards of costs, including attorney's fees, and injunctive relief against a judicial officer.

TITLE IV—JUDICIAL FINANCIAL ADMINISTRATION

Sec. 401. Increase in civil action filing fee.
Sec. 402. Interpreter performance examination fees.
Sec. 403. Judicial panel on multidistrict litigation.
Sec. 404. Disposition of fees.

TITLE V—FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

Sec. 501. Qualification of Chief Judge of Court of International Trade.

TITLE VI—MISCELLANEOUS

Sec. 601. Participation in judicial governance activities by district, senior, and magistrate judges.
Sec. 602. The Director and Deputy Director of the administrative office as officers of the United States.
Sec. 603. Removal of action from State court.
Sec. 604. Federal judicial center employee retirement provisions.
Sec. 605. Abolition of the special court, Regional Rail Reorganization Act of 1973.
Sec. 606. Place of holding court in the District Court of Utah.
Sec. 607. Exception of residency requirement for district judges appointed to the Southern District and Eastern District of New York.
Sec. 608. Extension of civil justice expense and delay reduction reports on demonstration and pilot programs.
Sec. 609. Place of holding court in the Southern District of New York.
Sec. 610. Venue for territorial courts.

TITLE I—CRIMINAL LAW AND CRIMINAL JUSTICE AMENDMENTS

SEC. 101. NEW AUTHORITY FOR PROBATION AND PRETRIAL SERVICES OFFICERS.

(a) PROBATION OFFICERS.—Section 3603 of title 18, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (8)(B);

(2) by redesignating paragraph (9) as paragraph (10); and

(3) by inserting after paragraph (8) the following new paragraph:

"(9) if approved by the district court, be authorized to carry firearms under such rules and regulations as the Director of the Administrative Office of the United States Courts may prescribe; and".

(b) PRETRIAL SERVICES OFFICERS.—Section 3154 of title 18, United States Code, is amended—

(1) by redesignating paragraph (13) as paragraph (14); and

(2) by inserting after paragraph (12) the following new paragraph:

"(13) If approved by the district court, be authorized to carry firearms under such rules and regulations as the Director of the Administrative Office of the United States Courts may prescribe.".

TITLE II—JUDICIAL PROCESS IMPROVEMENTS

SEC. 201. DUTIES OF MAGISTRATE JUDGE ON EMERGENCY ASSIGNMENT.

The first sentence of section 636(f) of title 28, United States Code, is amended by striking out "(a) or (b)" and inserting in lieu thereof "(a), (b), or (c)".

SEC. 202. CONSENT TO TRIAL IN CERTAIN CRIMINAL ACTIONS.

(a) AMENDMENTS TO TITLE 18.—(1) Section 3401(b) of title 18, United States Code, is amended—

(A) in the first sentence by inserting ", other than a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction," after "misdemeanor";

(B) in the second sentence by inserting "judge" after "magistrate" each place it appears;

(C) by striking out the third sentence and inserting in lieu thereof the following: "The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record."; and

(D) by striking out "judge of the district court" each place it appears and inserting in lieu thereof "district judge".

(2) Section 3401(g) of title 18, United States Code, is amended by striking out the first sentence and inserting in lieu thereof the following: "The magistrate judge may, in a petty offense case involving a juvenile, that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction, exercise all powers granted to the district court under chapter 403 of this title. The magistrate judge may, in any other class B or C misdemeanor case involving a juvenile in which consent to trial before a magistrate judge has been filed under subsection (b), exercise all powers granted to the district court under chapter 403 of this title.".

(b) AMENDMENTS TO TITLE 28.—Section 636(a) of title 28, United States Code, is amended—

(1) by striking out ", and" at the end of paragraph (3) and inserting in lieu thereof a semicolon; and

(2) by striking out paragraph (4) and inserting the following:

"(4) the power to enter a sentence for a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction; and

"(5) the power to enter a sentence for a class A misdemeanor, or a class B or C misdemeanor not covered by paragraph (4), in a case in which the parties have consented.".

SEC. 203. REGISTRATION OF JUDGMENTS FOR ENFORCEMENT IN OTHER DISTRICTS.

(a) IN GENERAL.—Section 1963 of title 28, United States Code, is amended—

(1) by amending the section heading to read as follows:

"§ 1963. Registration of judgments for enforcement in other districts";

(2) in the first sentence—

(A) by striking out "district court" and inserting in lieu thereof "court of appeals, district court, bankruptcy court,"; and

(B) by striking out "such judgment" and inserting in lieu thereof "the judgment"; and

(3) by adding at the end thereof the following new undesignated paragraph:

"The procedure prescribed under this section is in addition to other procedures provided by law for the enforcement of judgments.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 125 of title 28, United States Code, relating to section 1963 is amended to read as follows:

"1963. Registration of judgments for enforcement in other districts.".

SEC. 204. VACANCY IN CLERK POSITION; ABSENCE OF CLERK.

(a) IN GENERAL.—Section 954 of title 28, United States Code, is amended to read as follows:

"§ 954. Vacancy in clerk position; absence of clerk

"When the office of clerk is vacant, the deputy clerks shall perform the duties of the clerk in the name of the last person who held that office. When the clerk is incapacitated, absent, or otherwise unavailable to perform official duties, the deputy clerks shall perform the duties of the clerk in the name of the clerk. The court may designate a deputy clerk to act temporarily as clerk of the court in his or her own name.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 57 of title 28, United States Code, relating to section 954 is amended to read as follows:

"954. Vacancy in clerk position; absence of clerk.".

SEC. 205. DIVERSITY JURISDICTION.

(a) IN GENERAL.—Section 1332 of title 28, United States Code, is amended—

(1) in subsection (a) by striking out "$50,000" and inserting in lieu thereof "$75,000"; and

(2) in subsection (b) by striking out "$50,000" and inserting in lieu thereof "$75,000".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect 90 days after the date of enactment of this Act.

SEC. 206. REMOVAL OF CASES AGAINST THE UNITED STATES AND FEDERAL OFFICERS OR AGENCIES.

(a) IN GENERAL.—Section 1442 of title 28, United States Code, is amended—

(1) in the section heading by inserting "or agencies" after "officers"; and

(2) in subsection (a)—

(A) in the matter preceding paragraph (1) by striking out "persons"; and

(B) in paragraph (1) by striking out "Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office" and inserting in lieu thereof "The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 89 of title 28, United States Code, is amended by amending the item relating to section 1442 to read as follows:

"1442. Federal officers and agencies sued or prosecuted.".

SEC. 207. APPEAL ROUTE IN CIVIL CASES DECIDED BY MAGISTRATE JUDGES WITH CONSENT.

Section 636 of title 28, United States Code, is amended—

(1) in subsection (c)—

(A) in paragraph (3) by striking out "In this circumstance, the" and inserting in lieu thereof "The";

(B) by striking out paragraphs (4) and (5); and

(C) by redesignating paragraphs (6) and (7) as paragraphs (4) and (5); and

(2) in subsection (d) by striking out ", and for the taking and hearing of appeals to the district courts,".

SEC. 208. REPORTS BY JUDICIAL COUNCILS RELATING TO MISCONDUCT AND DISABILITY ORDERS.

Section 332 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(g) No later than January 31 of each year, each judicial council shall submit a report to the Administrative Office of the United States Courts on the number and nature of orders entered under this section during the preceding calendar year that relate to judicial misconduct or disability.".

TITLE III—JUDICIARY PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

SEC. 301. SENIOR JUDGE CERTIFICATION.

(a) RETROACTIVE CREDIT FOR RESUMPTION OF SIGNIFICANT WORKLOAD.—Section 371(f)(3) of title 28, United States Code, is amended by striking out "is thereafter ineligible to receive such a certification." and inserting in lieu thereof "may thereafter receive a certification for that year by satisfying the requirements of subparagraph (A), (B), (C), or (D) of paragraph (1) of this subsection in a subsequent year and attributing a sufficient part of the work performed in such subsequent year to the earlier year so that the work so attributed, when added to the work performed during such earlier year, satisfies the requirements for certification for that year. However, a justice or judge may not receive credit for the same work for purposes of certification for more than 1 year.".

(b) AGGREGATION OF CERTAIN WORK FOR PARTIAL YEARS.—Section 371(f)(1) of title 28, United States Code, is amended by adding at the end of subparagraph (D) the following: "In any year in which a justice or judge performs work described under this subparagraph for less than the full year, one-half of such work may be aggregated with work described under subparagraph (A), (B), or (C) of this paragraph for the purpose of the justice or judge satisfying the requirements of such subparagraph.".

SEC. 302. REFUND OF CONTRIBUTION FOR DECEASED DEFERRED ANNUITANT UNDER THE JUDICIAL SURVIVORS' ANNUITIES SYSTEM.

Section 376(o)(1) of title 28, United States Code, is amended by striking out "or while receiving 'retirement salary'," and inserting in lieu thereof "while receiving retirement salary, or after filing an election and otherwise complying with the conditions under subsection (b)(2) of this section,".

SEC. 303. BANKRUPTCY JUDGES REAPPOINTMENT PROCEDURE.

Section 120 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Public Law 98–353; 98 Stat. 344), is amended—

(1) in subsection (a) by adding at the end thereof the following new paragraph:

"(3) When filling vacancies, the court of appeals may consider reappointing incumbent bankruptcy judges under procedures prescribed by regulations issued by the Judicial Conference of the United States."; and

(2) in subsection (b) by adding at the end thereof the following: "All incumbent nominees seeking reappointment thereafter may be considered for such a reappointment, pursuant to a majority vote of the judges of the appointing court of appeals, under procedures authorized under subsection (a)(3).".

SEC. 304. TECHNICAL CORRECTION RELATED TO COMMENCEMENT DATE OF TEMPORARY JUDGESHIPS.

Section 203(c) of the Judicial Improvements Act of 1990 (Public Law 101–650; 104 Stat. 5101; 28 U.S.C. 133 note) is amended by adding at the end thereof the following: "For districts named in this subsection for which multiple judgeships are created by this Act, the last of those judgeships filled shall be the judgeship created under this subsection.".

SEC. 305. FULL-TIME STATUS OF COURT REPORTERS.

Section 753(e) of title 28, United States Code, is amended by inserting after the first sentence the following: "For the purposes of subchapter III of chapter 83 of title 5 and chapter 84 of such title, a reporter shall be considered a full-time employee during any pay period for which a reporter receives a salary at the annual salary rate fixed for a full-time reporter under the preceding sentence.".

SEC. 306. COURT INTERPRETERS.

Section 1827 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(l) Notwithstanding any other provision of this section or section 1828, the presiding judicial officer may appoint a certified or otherwise qualified sign language interpreter to provide services to a party, witness, or other participant in a judicial proceeding, whether or not the proceeding is instituted by the United States, if the presiding judicial officer determines, on such officer's own motion or on the motion of a party or other participant in the proceeding, that such individual suffers from a hearing impairment. The presiding judicial officer shall, subject to the availability of appropriated funds, approve the compensation and expenses payable to sign language interpreters appointed under this section in accordance with the schedule of fees prescribed by the Director under subsection (b)(3) of this section.".

SEC. 307. TECHNICAL AMENDMENT RELATED TO COMMENCEMENT DATE OF TEMPORARY BANKRUPTCY JUDGESHIPS.

Section 3(b) of the Bankruptcy Judgeship Act of 1992 (Public Law 102–361; 106 Stat. 965; 28 U.S.C. 152 note) is amended in the first sentence by striking out "date of the enactment of this Act" and inserting in lieu thereof "appointment date of the judge named to fill the temporary judgeship position".

SEC. 308. CONTRIBUTION RATE FOR SENIOR JUDGES UNDER THE JUDICIAL SURVIVORS' ANNUITIES SYSTEM.

Section 376(b)(1) of title 28, United States Code, is amended to read as follows:

"(b)(1) Every judicial official who files a written notification of his or her intention to come within the purview of this section, in accordance with paragraph (1) of subsection (a) of this section, shall be deemed thereby to consent and agree to having deducted and withheld from his or her salary a sum equal to 2.2 percent of that salary, and a sum equal to 3.5 percent of his or her retirement salary. The deduction from any retirement salary—

"(A) of a justice or judge of the United States retired from regular active service under section 371(b) or section 372(a) of this title,

"(B) of a judge of the United States Court of Federal Claims retired under section 178 of this title, or

"(C) of a judicial official on recall under section 155(b), 373(c)(4), 375, or 636(h) of this title,

shall be an amount equal to 2.2 percent of retirement salary.".

SEC. 309. PROHIBITION AGAINST AWARDS OF COSTS, INCLUDING ATTORNEY'S FEES, AND INJUNCTIVE RELIEF AGAINST A JUDICIAL OFFICER.

(a) NONLIABILITY FOR COSTS.—Notwithstanding any other provision of law, no judicial officer shall be held liable for any costs, including attorney's fees, in any action brought against such officer for an act or omission taken in such officer's judicial capacity, unless such action was clearly in excess of such officer's jurisdiction.

(b) PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS.—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended by inserting before the period at the end thereof ", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction".

(c) CIVIL ACTION FOR DEPRIVATION OF RIGHTS.—Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by inserting before the period at the end of the first sentence: ", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

TITLE IV—JUDICIAL FINANCIAL ADMINISTRATION

SEC. 401. INCREASE IN CIVIL ACTION FILING FEE.

(a) FILING FEE INCREASE.—Section 1914(a) of title 28, United States Code, is amended by striking out "$120" and inserting in lieu thereof "$150".

(b) DISPOSITION OF INCREASE.—Section 1931 of title 28, United States Code, is amended—

(1) in subsection (a) by striking out "$60" and inserting in lieu thereof "$90"; and

(2) in subsection (b)—

(A) by striking out "$120" and inserting in lieu thereof "$150"; and

(B) by striking out "$60" and inserting in lieu thereof "$90".

(c) EFFECTIVE DATE.—This section shall take effect 60 days after the date of the enactment of this Act.

SEC. 402. INTERPRETER PERFORMANCE EXAMINATION FEES.

(a) IN GENERAL.—Section 1827(g) of title 28, United States Code, is amended by redesignating paragraph (5) as paragraph (6) and inserting after paragraph (4) the following new paragraph:

"(5) If the Director of the Administrative Office of the United States Courts finds it necessary to develop and administer criterion-referenced performance examinations for purposes of certification, or other examinations for the selection of otherwise qualified interpreters, the Director may prescribe for each examination a uniform fee for applicants to take such examination. In determining the rate of the fee for each examination, the Director shall consider the fees charged by other organizations for examinations that are similar in scope or nature. Notwithstanding section 3302(b) of title 31, the Director is authorized to provide in any contract or agreement for the development or administration of examinations and the collection of fees that the contractor may retain all or a portion of the fees in payment for the services. Notwithstanding paragraph (6) of this subsection, all fees collected after the effective date of this paragraph and not retained by a contractor shall be deposited in the fund established under section 1931 of this title and shall remain available until expended.".

(b) PAYMENT FOR CONTRACTUAL SERVICES.—Notwithstanding sections 3302(b), 1341, and 1517 of title 31, United States Code, the Director of the Administrative Office of the United States Courts may include in any contract for the development or administration of examinations for interpreters (including such a contract entered into before the date of the enactment of this Act) a provision which permits the contractor to collect and retain fees in payment for contractual services in accordance with section 1827(g)(5) of title 28, United States Code.

SEC. 403. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION.

(a) IN GENERAL.—(1) Chapter 123 of title 28, United States Code, is amended by adding after section 1931 the following new section:

"§ 1932. Judicial Panel on Multidistrict Litigation

"The Judicial Conference of the United States shall prescribe from time to time the fees and costs to be charged and collected by the Judicial Panel on Multidistrict Litigation.".

(2) The table of sections for chapter 123 of title 28, United States Code, is amended by adding after the item relating to section 1931 the following:

"1932. Judicial Panel on Multidistrict Litigation.".

(b) RELATED FEES FOR ACCESS TO INFORMATION.—Section 303(a) of the Judiciary Appropriations Act, 1992 (Public Law 102–140; 105 Stat. 810; 28 U.S.C. 1913 note) is amended in the first sentence by striking out "1926, and 1930" and inserting in lieu thereof "1926, 1930, and 1932".

SEC. 404. DISPOSITION OF FEES.

(a) DISPOSITION OF ATTORNEY ADMISSION FEES.—For each fee collected for admission of an attorney to practice, as prescribed by the Judicial Conference of the United States pursuant to section 1914 of title 28, United States Code, $30 of that portion of the fee exceeding $20 shall be deposited into the special fund of the Treasury established under section 1931 of title 28, United States Code. Any portion exceeding $5 of the fee for a duplicate certificate of admission or certificate of good standing, as prescribed by the Judicial Conference of the United States pursuant to section 1914 of title 28, United States Code, shall be deposited into the special fund of the Treasury established under section 1931 of title 28, United States Code.

(b) DISPOSITION OF BANKRUPTCY COMPLAINT FILING FEES.—For each fee collected for filing an adversary complaint in a bankruptcy proceeding, as established in Item 6 of the Bankruptcy Court Miscellaneous Fee Schedule prescribed by the Judicial Conference of the United States pursuant to section 1930(b) of title 28, United States Code, the portion of the fee exceeding $120 shall be deposited into the special fund of the Treasury established under section 1931 of title 28, United States Code.

(c) EFFECTIVE DATE.—This section shall take effect 60 days after the date of the enactment of this Act.

TITLE V—FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

SEC. 501. QUALIFICATION OF CHIEF JUDGE OF COURT OF INTERNATIONAL TRADE.

(a) IN GENERAL.—Chapter 11 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 258. Chief judges; precedence of judges

"(a)(1) The chief judge of the Court of International Trade shall be the judge of the court in regular active service who is senior in commission of those judges who—

"(A) are 64 years of age or under;

"(B) have served for 1 year or more as a judge of the court; and

"(C) have not served previously as chief judge.

"(2)(A) In any case in which no judge of the court meets the qualifications under paragraph (1), the youngest judge in regular active service who is 65 years of age or over and who has served as a judge of the court for 1 year or more shall act as the chief judge.

"(B) In any case under subparagraph (A) in which there is no judge of the court in regular active service who has served as a judge of the court for 1 year or more, the judge of the court in regular active service who is senior in commission and who has not served previously as chief judge shall act as the chief judge.

"(3)(A) Except as provided under subparagraph (C), the chief judge serving under paragraph (1) shall serve for a term of 7 years and shall serve after expiration of such term until another judge is eligible under paragraph (1) to serve as chief judge.

SEC. 605. ABOLITION OF THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973.

(a) ABOLITION OF THE SPECIAL COURT.—Section 209 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719) is amended in subsection (b)—

(1) by inserting "(1)" before "Within 30 days after"; and

(2) by adding at the end thereof the following new paragraph:

"(2) The special court referred to in paragraph (1) of this subsection is abolished effective 90 days after the date of enactment of the Federal Courts Improvement Act of 1996. On such effective date, all jurisdiction and other functions of the special court shall be assumed by the United States District Court for the District of Columbia. With respect to any proceedings that arise or continue after the date on which the special court is abolished, the references in the following provisions to the special court established under this subsection shall be deemed to refer to the United States District Court for the District of Columbia:

"(A) Subsections (c), (e)(1), (e)(2), (f) and (g) of this section.

"(B) Sections 202 (d)(3), (g), 207 (a)(1), (b)(1), (b)(2), 208(d)(2), 301 (e)(2), (g), (k)(3), (k)(15), 303 (a)(1), (a)(2), (b)(1), (b)(6)(A), (c)(1), (c)(2), (c)(3), (c)(4), (c)(5), 304 (a)(1)(B), (i)(3), 305 (c), (d)(1), (d)(2), (d)(3), (d)(4), (d)(5), (d)(8), (e), (f)(1), (f)(2)(B), (f)(2)(D), (f)(2)(E), (f)(3), 306 (a), (b), (c)(4), and 601 (b)(3), (c) of this Act (45 U.S.C. 712 (d)(3), (g), 717 (a)(1), (b)(1), (b)(2), 718(d)(2), 741 (e)(2), (g), (k)(3), (k)(15), 743 (a)(1), (a)(2), (b)(1), (b)(6)(A), (c)(1), (c)(2), (c)(3), (c)(4), (c)(5), 744 (a)(1)(B), (i)(3), 745 (c), (d)(1), (d)(2), (d)(3), (d)(4), (d)(5), (d)(8), (e), (f)(1), (f)(2)(B), (f)(2)(D), (f)(2)(E), (f)(3), 746 (a), (b), (c)(4), 791 (b)(3), (c)).

"(C) Sections 1152(a) and 1167(b) of the Northeast Rail Service Act of 1981 (45 U.S.C. 1105(a), 1115(a)).

"(D) Sections 4023 (2)(A)(iii), (2)(B), (2)(C), (3)(C), (3)(E), (4)(A) and 4025(b) of the Conrail Privatization Act (45 U.S.C. 1323 (2)(A)(iii), (2)(B), (2)(C), (3)(C), (3)(E), (4)(A), 1324(b)).

"(E) Section 24907(b) of title 49, United States Code.

"(F) Any other Federal law (other than this subsection and section 605 of the Federal Courts Improvement Act of 1996), Executive order, rule, regulation, delegation of authority, or document of or relating to the special court as previously established under paragraph (1) of this subsection.".

(b) APPELLATE REVIEW.—(1) Section 209(e) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719) is amended by striking out the paragraph following paragraph (2) and inserting in lieu thereof the following:

"(3) An order or judgment of the United States District Court for the District of Columbia in any action referred to in this section shall be reviewable in accordance with sections 1291, 1292, and 1294 of title 28, United States Code.".

(2) Section 303 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 743) is amended by striking out subsection (d) and inserting in lieu thereof the following:

"(d) APPEAL.—An order or judgment entered by the United States District Court for the District of Columbia pursuant to subsection (c) of this section or section 306 shall be reviewable in accordance with sections 1291, 1292, and 1294 of title 28, United States Code.".

(3) Section 1152 of the Northeast Rail Service Act of 1981 (45 U.S.C. 1105) is amended by striking out subsection (b) and inserting in lieu thereof the following:

"(b) APPEAL.—An order or judgment of the United States District Court for the District of Columbia in any action referred to in this section shall be reviewable in accordance with sections 1291, 1292, and 1294 of title 28, United States Code.".

(c) TECHNICAL AND CONFORMING AMENDMENTS.—(1) Section 209 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719) is further amended—

(A) in subsection (g) by inserting "or Court of Appeals for the District of Columbia Circuit" after "Supreme Court"; and

(B) by striking out subsection (h).

(2) Section 305(d)(4) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 745(d)) is amended by striking out "a judge of the United States district court with respect to such proceedings and such powers shall include those of".

(3) Section 1135(a)(8) of the Northeast Rail Service Act of 1981 (45 U.S.C. 1104(8)) is amended to read as follows:

"(8) 'Special court' means the judicial panel established under section 209(b)(1) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719(b)(1)) or, with respect to any proceedings that arise or continue after the panel is abolished pursuant to section 209(b)(2) of such Act, the United States District Court for the District of Columbia.".

(4) Section 1152 of the Northeast Rail Service Act of 1981 (45 U.S.C. 1105) is further amended by striking out subsection (d).

(d) PENDING CASES.—Effective 90 days after the date of enactment of this Act, any case pending in the special court established under section 209(b) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719(b)) shall be assigned to the United States District Court for the District of Columbia as though the case had originally been filed in that court. The amendments made by subsection (b) of this section shall not apply to any final order or judgment entered by the special court for which—

(1) a petition for writ of certiorari has been filed before the date on which the special court is abolished; or

(2) the time for filing a petition for writ of certiorari has not expired before that date.

(e) EFFECTIVE DATE.—The amendments made by subsections (b) and (c) of this section shall take effect 90 days after the date of enactment of this Act and, except as provided in subsection (d), shall apply with respect to proceedings that arise or continue after such effective date.

SEC. 606. PLACE OF HOLDING COURT IN THE DISTRICT COURT OF UTAH.

(a) NORTHERN DIVISION.—Section 125(1) of title 28, United States Code, is amended by inserting "Salt Lake City and" before "Ogden".

(b) CENTRAL DIVISION.—Section 125(2) of title 28, United States Code, is amended by inserting ", Provo, and St. George" after "Salt Lake City".

SEC. 607. EXCEPTION OF RESIDENCY REQUIREMENT FOR DISTRICT JUDGES APPOINTED TO THE SOUTHERN DISTRICT AND EASTERN DISTRICT OF NEW YORK.

Section 134(b) of title 28, United States Code, is amended—

(1) by inserting "the Southern District of New York, and the Eastern District of New York," after "the District of Columbia,"; and

(2) by inserting at the end the following: "Each district judge of the Southern District of New York and the Eastern District of New York may reside within 20 miles of the district to which he or she is appointed.".

SEC. 608. EXTENSION OF CIVIL JUSTICE EXPENSE AND DELAY REDUCTION REPORTS ON DEMONSTRATION AND PILOT PROGRAMS.

(a) DEMONSTRATION PROGRAM.—Section 104(d) of the Civil Justice Reform Act of 1990 (28 U.S.C. 471 note) is amended by striking out "December 31, 1996," and inserting in lieu thereof "June 30, 1997,".

(b) PILOT PROGRAM.—Section 105(c)(1) of the Civil Justice Reform Act of 1990 (28 U.S.C. 471 note) is amended by striking out "December 31, 1996," and inserting in lieu thereof "June 30, 1997,".

SEC. 609. PLACE OF HOLDING COURT IN THE SOUTHERN DISTRICT OF NEW YORK.

The last sentence of section 112(b) of title 28, United States Code, is amended to read as follows:

"Court for the Southern District shall be held at New York, White Plains, and in the Middletown-Wallkill area of Orange County or such nearby location as may be deemed appropriate.".

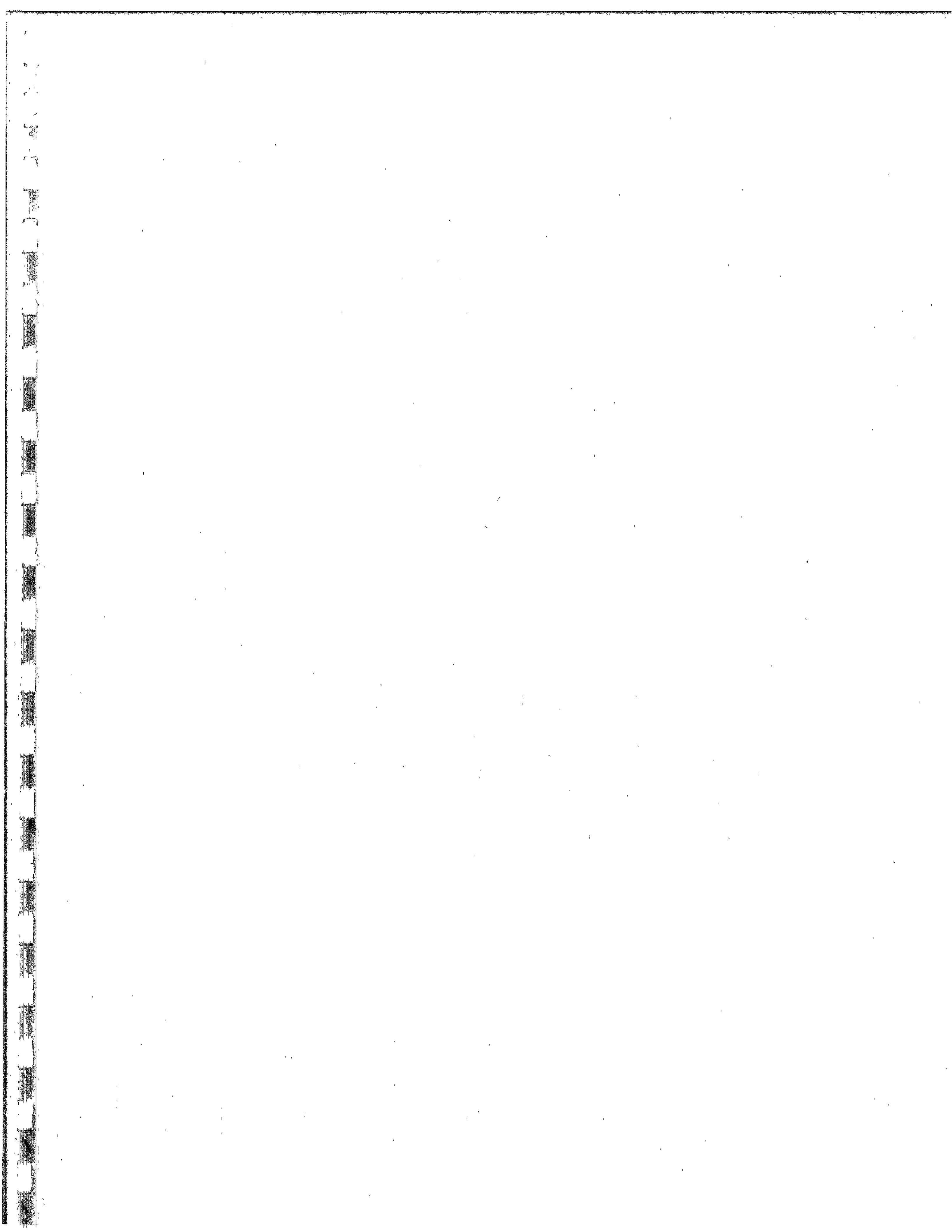
SEC. 610. VENUE FOR TERRITORIAL COURTS.

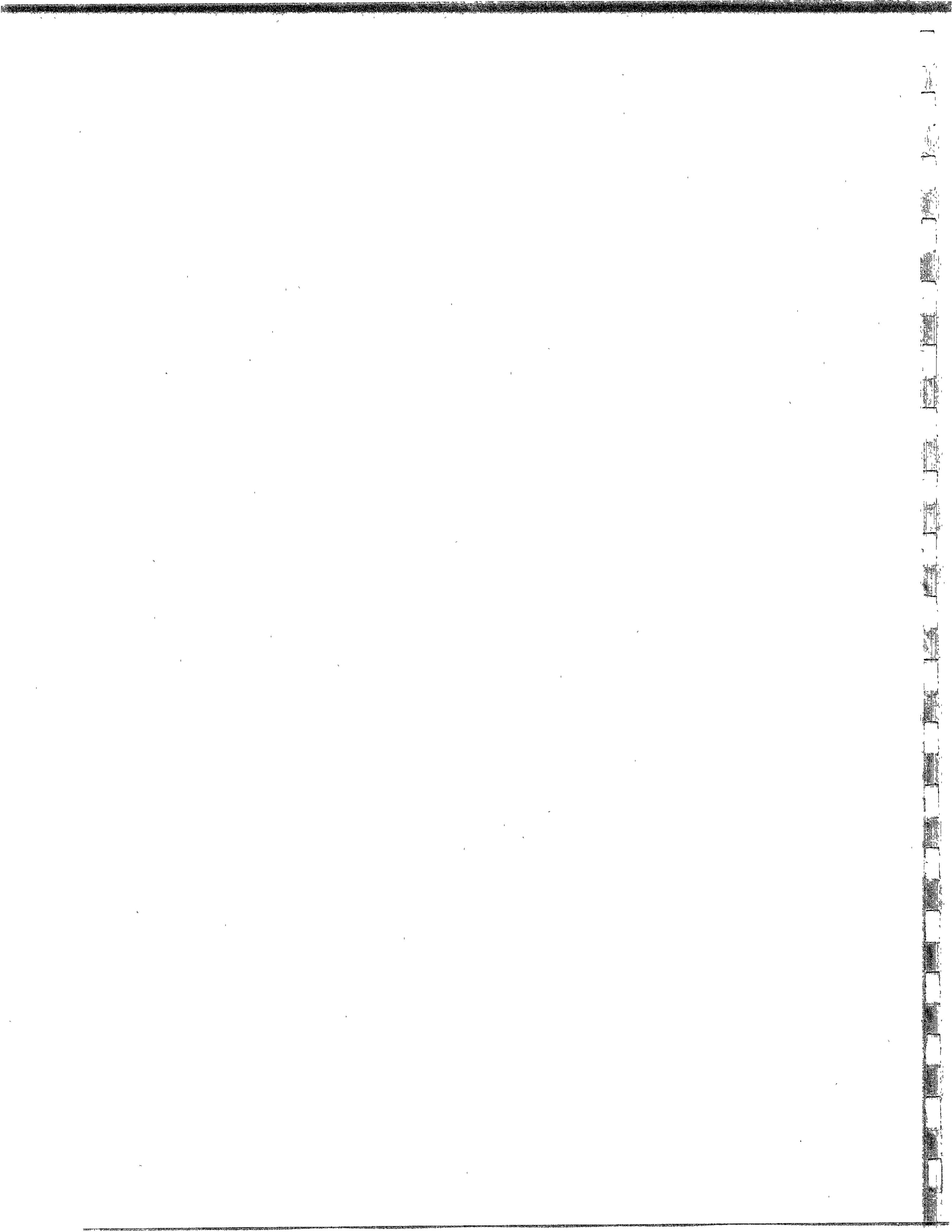
(a) CHANGE OF VENUE.—Section 1404(d) of title 28, United States Code, is amended to read as follows:

"(d) As used in this section, the term 'district court' includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term 'district' includes the territorial jurisdiction of each such court.".

(b) CURE OR WAIVER OF DEFECTS.—Section 1406(c) of title 28, United States Code, is amended to read as follows:

"(c) As used in this section, the term 'district court' includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term 'district' includes the territorial jurisdiction of each such court.".





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

July 22, 1996

Honorable Joseph R. Biden, Jr.
Ranking Minority Member
Committee on the Judiciary
United States Senate
Room 147, Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I write on behalf of the Judicial Conference's Standing Committee on Rules of Practice and Procedure to express our concerns regarding proposed legislation affecting Civil Rules 23 and 26(c) — which may be considered during the mark-up of the *Federal Courts Improvement Act of 1996* (S. 1887) — and to advise you of the ongoing work by the Judicial Conference's Advisory Committee on Civil Rules on proposed amendments to the same two rules.

I urge you and your colleagues on the Committee on the Judiciary to allow the rulemaking process to proceed as envisioned under the Rules Enabling Act and delay consideration of the "Sunshine in Litigation Act of 1996" and the "Protecting Class Action Plaintiffs Act of 1996" amendments to the legislation.

Civil Rule 23 — Class Actions

The Advisory Committee on Civil Rules commenced an intensive study of proposed changes to Civil Rule 23 dealing with class actions in 1991. It began with a review of a draft rule proposed in 1986 by the American Bar Association that would have substantially amended the rule. The advisory committee decided to obtain more data on the issues and requested the Federal Judicial Center to study all class actions terminated in a two-year period in four metropolitan districts.

Meanwhile, the advisory committee continued to study the rule. It invited experienced class action practitioners to meet with the advisory committee, held a conference at the University of Pennsylvania Law School, attended a symposium at Southern Methodist University Law School, and participated in a symposium at the New

York University Law School. In addition, many lawyers and representatives of bar groups attended and spoke at the Fall 1995 and Spring 1996 advisory committee meetings.

The advisory committee shared the concerns over the fairness of class action settlement agreements underlying the "Protecting Class Action Plaintiffs Act of 1996." It has now completed its comprehensive review of class actions and recommended proposed amendments to Civil Rule 23. Among other changes, the proposed amendments would require a court to hold a hearing when approving a settlement of a class action. The proposed change would provide parties and objectors to the settlement an opportunity to present their views on its fairness.

At its June 1996 meeting, the Standing Committee approved the advisory committee's request to publish for public comment the preliminary draft of proposed amendments to Rule 23. It will be published in late August or early September for a six-month period. Public hearings will also be scheduled. The public airing of the proposed amendments to Rule 23 will provide all interested persons and organizations an opportunity to express their views as contemplated under the Rules Enabling Act.

Civil Rule 26(c) — Protective Orders

The Advisory Committee on Civil Rules also shared the concerns over abuses involving protective orders underlying the "Sunshine in Litigation Act" and has actively considered proposed amendments to Civil Rule 26(c) since 1992. Indeed, proposed amendments to Rule 26(c) were published for public comment in 1993 and 1995.

Earlier versions of the "Sunshine in Litigation Act" prompted the advisory committee to study Rule 26(c). It sought to inform itself whether the problems suggested by these bills exist, and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. It also asked the Federal Judicial Center to undertake a study of protective order practice to shed light on the frequency of protective orders, the kinds of litigation in which protective orders are entered, the frequency of stipulated protective orders, and the kinds of information protected. It considered lengthy law review articles and the recommendations of the Federal Courts Study Committee.

These studies all suggest that there is no need to make it more difficult to issue discovery protective orders. The studies generally showed:

- that there is no evidence that protective orders in fact create any significant problems in concealing information about public hazards or in impeding efficient sharing of discovery information;
- that much information can be gathered from parties and nonparties during discovery that no one would have a right to learn outside the needs of a particular lawsuit;
- that discovery would become more burdensome and costly if the parties can not reasonably rely on protective orders; and
- that administration of a rule creating broader rights of public access would impose great burdens on the court system.

The advisory committee also kept in mind the wide variety of interests that are involved with protective orders. It is common to focus on the often legitimate needs to protect trade-secret and other confidential commercial information. But protective orders often protect intensely personal privacy interests. The Federal Judicial Center study, for example, found that most frequent use of protective orders occurs in civil rights and employment discrimination litigation. The privacy interests protected often are those of nonparties, who have had no voice in the decision whether to institute litigation and little or no interest in the outcome.

An added concern has been that discovery has been designed from the very beginning to function without need of judicial supervision. Courts are not equipped to supervise the details of discovery. Voluntary exchanges of information remain indispensable. It would be counterproductive to attempt to add hurdles that impede the efficient entry of protective orders.

The advisory committee found little reason to believe that protective orders prevent desirable sharing of information in related litigation or defeat public access to information about unsafe products. Federal courts are sensitive to these issues and respond to them effectively. Perhaps more important, the advisory committee concluded that there is a better way to ensure that all courts follow the best and common present practice. Rule 26(c) can expressly provide for modification or dissolution of protective orders, including provision for modification or dissolution on motion by a nonparty.

Proposed amendments to Rule 26(c) were published for public comment in 1993. Substantial comments were made. The draft was revised in light of those comments and was published in 1995 for a second round of comment. Extensive comments were received.

The advisory committee reviewed all the comments and the testimony at the public hearings on proposed Rule 26(c). Comments supporting the proposal generally agreed that it would clarify and confirm the general and better current practice. Comments opposing the proposal expressed concern about explicit recognition of the widespread use of stipulated protective orders and also continued to advocate a broad public "right to know." Many of the opposing comments suggested that it would be better to leave Rule 26(c) unchanged.

Protective order practice is tied directly to the general scope and nature of discovery. At the suggestion of the American College of Trial Lawyers, the advisory committee has undertaken to study the general scope of discovery. After three decades of nearly continuous study and revision, discovery continues to raise procedural problems. Although discovery seems to work well in most cases, in a significant number of cases it continues to impose great, even extraordinary, burdens and expenses. If indeed the general scope of discovery is to be changed in some way, parallel changes in Rule 26(c) may well be appropriate.

The advisory committee will begin consideration of the scope of discovery at its October 1996 meeting. Long experience with efforts to cabin discovery shows that the task will be a long one. Important information may be provided by experience with local plans implementing the Civil Justice Reform Act, but understanding that experience will itself take some time. Further study of Rule 26(c) will become part of this process.

It is frustrating that responsible procedural reform takes so much time. If there is a problem with protective orders that impede access to information that affects the public health or safety, however, the problem is not widespread. Some careful students of the subject have examined the commonly cited illustrations and have concluded that information sufficient to protect public health and safety has always been available from other sources. It is important to approach whatever problem there may be with care, lest discovery be made even more complex and costly. Attempts to increase access to discovery information may indeed backfire, as parties become less and less willing to exchange information without prolonged discovery litigation.

CONCLUSIONS

For these reasons, I urge you not to attach the "Sunshine in Litigation Act of 1996" and the "Protecting Class Action Plaintiffs Act of 1996" amendments to the *Federal Courts Improvements Act*. I look forward to continuing this important dialogue with you and your colleagues on the Committee on the Judiciary. Please let me know if I can be of assistance. Thank you for your consideration.

Sincerely yours,

Alicemarie H. Stotler
United States District Judge

cc: Committee on the Judiciary,
United States Senate

ATTACHMENT C

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

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CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

September 19, 1996

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington D.C. 20510

Dear Chairman Hatch:

I write on behalf of the Judicial Conference's Standing Committee on Rules of Practice and Procedure to express our concerns regarding the proposed amendment to the Child Pornography Prevention Act of 1995 (S. 1237) that would amend Rule 32 (c)(3) of the Federal Rules of Criminal Procedure. The proposed amendment, which was introduced by Senator Howell Heflin, is intended to require a judge who is sentencing a defendant for an offense — which is subject to enhanced penalties for a later conviction of the same offense — to notify a defendant both verbally and in writing of the enhanced penalties for a later conviction of the same offense.

I urge you and your colleagues on the Committee on the Judiciary to prevent the amendment of Criminal Rule 32 by this legislation.

Inconsistent with the Rules Enabling Act

The proposed amendment of Criminal Rule 32 is inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071-77. Under the Act, proposed amendments to the federal rules are presented to Congress for approval only after being subjected to extensive and comprehensive scrutiny by the public, bar, and bench. The rulemaking process is laborious and time-consuming, but the painstaking process ensures a high level of draftsmanship that frequently obviates future satellite litigation over unforeseen contingencies or unclear provisions. It also ensures that all persons who may be affected by a rule change have had an opportunity to express their views on it, including the public. Direct amendment of the federal rules circumvents this careful process established by Congress.

Substantive Problems with the Pending Legislation

Although the rules committees have not had an opportunity to review carefully the proposed legislation, several problems and concerns are readily apparent.

First, the stated purpose of the proposed legislation is to warn a defendant who is being sentenced for an offense that bears an enhanced penalty for a subsequent conviction of the same offense of those severe penalties. But the language of the proposal is broader, and it could be read to require a judge to warn a defendant convicted of child pornography of enhanced penalties for a future conviction of a non child pornographic offense — because under the Sentencing Guidelines sentencing must take into account previous convictions that may result in a harsher sentence. It can also be read to apply to sentencing of virtually all defendants who are convicted again of the same offense, including non child pornographic offenses, because under the Sentencing Guidelines sentencing for a second conviction can include a more severe penalty for repeat offenders. At a minimum, the proposal should be changed to specify which specific offenses and enhanced penalties require the special notification.

Second, the addition of this procedural notification right will create opportunities for a defendant to allege error on appeal, generating wasteful satellite litigation. The range and extent of enhanced penalties can substantially vary depending on a host of factors under the Sentencing Guidelines. Advising a defendant accurately and fully of all possible enhanced penalties for a subsequent conviction is fraught with potential mischief. Scarce judicial resources will be spent on divining the precise potential sentencing consequences that must be told to a defendant.

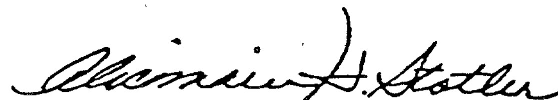
Third, there is no principled reason to prevent the expansion of this procedural right to all convictions, requiring judges to advise all defendants of other sentencing consequences.

Fourth, requiring written, in addition to oral, notification imposes an unnecessary burden on the court. Other more consequential rights of the defendant are routinely disposed of verbally on the record. The requirement for a written notification should be eliminated.

Conclusion

For these reasons, I urge you and your colleagues not to approve the amendment to Rule 32(c)(3) of the Federal Rules of Criminal Procedure as contained in the amendment to S. 1237. Please let me know if I can be of assistance. Thank you for your consideration.

Sincerely,



Alicemarie H. Stotler
United States District Judge

Agenda Item 5

Committee on Rules of Practice and Procedure
January 9-10, 1997
Information

FEDERAL JUDICIAL CENTER REPORT

This is an update of Federal Judicial Center projects and activities related to interests of the Standing Rules Committee.

I. Publications, Manuals, and Videos

1. ***Resource Guide for Managing Prisoner Civil Rights Litigation***. This new publication by the Center was released in October and has been distributed to all federal judges as well as pro se law clerks. It offers suggestions on how courts can manage prisoner civil rights cases and includes commentary on how they might adapt procedures to the requirements of the Prison Litigation Reform Act which was enacted in April 1996.

2. ***Benchbook for U.S. District Court Judges.*** A new edition of the *Benchbook* will be published in November having been updated and revised pursuant to the recommendations of the Center's Benchbook Committee. It incorporates several suggestions received through the Criminal Law Committee. Information from the Center's ongoing study of procedures for handling capital case litigation will be used to update the *Benchbook* section on death penalty cases.

3. **Guideline sentencing publications.** The Center continues to publish the newsletter *Guideline Sentencing Update* at least monthly and in December will publish a new edition of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues*. Judges and probation and pretrial services offices receive both publications.

4. ***Manual on Recurring Problems in Criminal Trials.*** A fourth edition of this manual, originally prepared by the late Judge Donald S. Voorhees (W.D. Wash.) was published in September.

5. ***Chambers to Chambers* on death penalty cases**. In September the Center published a *Chambers to Chambers* paper on management of the trial and penalty phases of a death penalty case. This was the third in a series of *Chambers to Chambers* on legal and practical issues unique to federal death penalty cases. The first paper was on appointment of counsel and jury selection; the second addressed compensation of counsel, investigators, and expert witnesses. 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.

6. **Media programs on capital cases.** The videotape of a panel presentation on capital case litigation by Judges Milton Shadur, Avern Cohn, and Henry Morgan at the Center's Workshop for Judges of the Fourth Circuit and an audiotape of a program at the Workshop for Judges of the Tenth Circuit by Judge Reena Raggi and counsel who have handled death penalty cases are now part of the clearinghouse of capital case materials that the Center is compiling from judges who have tried death penalty cases and is making available to judges seeking assistance on death penalty matters.

7. ***Habeas & Prison Litigation Case Law Update.*** In June the Center began publication of a newsletter to inform judges and other judicial branch personnel of selected federal court decisions interpreting the 1996 federal legislation on habeas petitions and prison litigation. Four issues of the ***Habeas & Prison Litigation Case Law Update*** have been published as of November 1.

8. **General information video on probation and pretrial services.** A video to provide general information about the probation and pretrial services systems, increase court employees' knowledge of the duties and responsibilities of probation and pretrial services officers, and for officers to use in presentations to citizens' groups and others is targeted for completion in November.

9. **District judge orientation videos.** During the next six months the Center will produce new versions of several programs in its video orientation series for district judges. Judge Alicemarie Stotler will tape a program on *Criminal Trial Procedure*; Judge Ann Williams will speak on *The Final Pretrial Conference and the Civil Trial*; and Judge Rya Zobel will be the speaker on *Case Management and Civil Pretrial Procedure*.

10. **Security awareness in the federal courts.** In August the Center completed a video on workplace security for federal court employees, which it produced at the request of the Committee on Security, Space, and Facilities. The Center has assisted the Committee in distributing copies of the video to courts and to the U.S. Marshals Service for use in training programs on court security.

II. Education and Training Seminars and Workshops

These seminars and workshops involving matters of interest to the Committee are a small portion of the Center's total educational offerings. In the last fiscal year, the Center's **Judicial Education Division** offered 65 seminars and workshops for judges, reaching over 2,400 participants. In September, the Center presented a satellite videoseminar on new developments in federal habeas corpus law, reaching nearly 1700 participants (a mix of judges, staff attorneys, law clerks, and federal defender attorneys) at 70 viewing sites. Also in FY1996, the **Court Education Division** provided or sponsored 1,412 educational programs that reached 27,855 federal judges and court staff. The Center developed or sponsored 458 programs that were developed specifically for probation and pretrial services personnel; 10,572 officers and staff attended those programs.

1. **Seminar on Juror Utilization and Management.** Teams consisting of judges, clerks, jury administrators and other staff from five district courts attended an April 29-May 1 jury program. A seminar session on notorious trials, long trials and the use of prescreening questionnaires included discussions on general vs. individual voir dire, anonymous juries, and sequestration.

2. **Capital Case Management Workshop.** An August 5-7 workshop for appellate court staff will include sessions on emergency circuit processes, coordination of capital case procedures with state and U.S. district courts, the role of the Supreme Court, and case-management techniques.

3. **Circuit Workshops.** During 1996, workshops have been held for judges of the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. Among the topics addressed at the workshops were sentencing, federal death penalty cases, federal capital habeas cases, and handling trials better and making juries more effective.

4. **Videoseminar on New Developments in Federal Habeas Corpus Law.** On September 12, 1996, the Center, in cooperation with the American Legal Institute-American Bar Association presented a satellite program on New Developments in the Federal Law of Habeas Corpus to nearly 1,700 participants at 70 sites across the country. This was the Center's first production from its studio in the Thurgood Marshall Federal Judiciary Building. The benefits to providing information via satellite broadcast are considerable: the Center was able to reach a much larger audience than we could bring to a travel-based program; we were able to include judicial law clerks, who typically are not invited to travel-based programs; and we were able to provide this program at an average cost of $50 per participant. We have also been able to provide copies of the videotape and program materials in response to another 500 requests, which further broadens the impact and reach of the program.

5. **Trial Skills for Judges.** In May and October of 1996, the Center held two sessions on trials skills training for new federal district judges. The sessions involved the judge presiding at a mock criminal trial, where live advocates and witnesses tried parts of a hypothetical case. The judge had to make evidentiary rulings and control courtroom behavior. The mock trials were videotaped in a triple-split screen format and an experienced federal judge critiqued the new judge's performance and reviewed the videotape with him or her. This type of training will continue to be made available to other new district judges.

6. **Federal Criminal Law and Procedure Seminar**. First offered in December 1992, this seminar is designed to discuss current criminal procedure and law in a participatory format. Topics include habeas corpus; money laundering; managing the high profile, multi-defendant criminal trial; criminal forfeiture; special problems in conspiracy cases; and issues of uncharged misconduct at trial and sentencing, including 404(b) and relevant conduct. The seminar is offered to 25 judges and was held most recently in August in Portland, Oregon.

7. **Conference on the Adjudication of Child Sexual Abuse Cases Occurring in Indian Country.** This program was conducted for judges of the Tribal Court-Department of Justice Partnership Projects and federal judges from Arizona and New Mexico in September in Denver. The conference was the first of its kind for the Center and provided an opportunity for the judges to learn about each other's judicial systems as well as address the problems which arise in these difficult cases in which both federal and tribal courts have jurisdiction.

8. **Sentencing Institute.** The institute is slated to be conducted at Fort Worth, Texas during January 6-8, 1997. The agenda will focus on national sentencing policy issues and will afford a number of district court judges, U.S. Attorneys, Federal Defenders, and chief probation officers selected by their courts in cooperation with the members of the Criminal Law Committee the opportunity to talk directly with members and staff of the Sentencing Commission and each other about important areas of concern with the sentencing guidelines. A half day program will be conducted at FMC-Fort Worth and FMC-Carswell. If this institute proves successful, additional institutes, subject to available funding, may be planned with the approval and guidance of the Criminal Law Committee.

9. **Effective Practices Guides.** These guides were introduced by the Center in 1995. They do two things: provide a training tool and assist probation and pretrial services officers in sharing valuable information and experiences. Practices on each topic were submitted by probation and pretrial services personnel in response to national surveys. They were selected by a cross-section of system participants at Center

symposia. Criteria for selection included: practicality, cost-effectiveness, reliance on current resources, and nationwide applicability. Our next guide, **Effective Practices: Case Management for Supervisors**, will be released in early 1997. It features more than 100 practices for supervising officers who monitor defendants and offenders.

10. **Leadership Program.** Applications are currently being accepted for participation in the fourth class of the Leadership Development Program for Probation and Pretrial Services Officers at the CL 28 level (formerly JSP 12) and above and who serve as supervisors or have had prior supervisory experience. The three-year, multiphase program enhances leadership knowledge and skills. Although participation in the Center's leadership development programs is neither a prerequisite for nor a guarantee to promotion, participants report that having completed the program has been beneficial when they have sought positions with enhanced management responsibility.

11. **Seminars and Workshops for Probation and Pretrial Services Officers.** In addition to a variety of in-district training programs that are designed for probation and pretrial personnel, the Center conducts week-long orientations for new officers, and special focus and Systems Impact Seminars for experienced officers. Eight orientations are tentatively scheduled for FY97. Our last report to the Committee described the Center's Systems Impact Seminars wherein participants are taught a process to identify and analyze district-specific problems and to develop action plans to outline potential solutions and implement change. A review of participants' follow-up reports from the first five seminars revealed that the action plans they developed at the programs have already affected the daily operations of numerous probation and pretrial services offices. Several action plans resulted in cost savings; others have led to innovative programs and cooperative efforts between federal and state agencies. Three Systems Impact Seminars are scheduled in FY97.

12. **Special Needs Offenders Series.** In March 1997, the Center will introduce a new series of training guides that are designed to help officers to better understand and manage the offenders in their caseload. Each guide in the series will describe a specific offender population's behavioral profiles and risk factors, and will suggest effective supervision strategies. The first guide will address gangs and other disruptive groups. A second guide will be available later in the year.

III. Research Projects

These research and evaluation projects involving matters of interest to the Committee are a small portion of the Center's research and planning program. In the last fiscal year, the Research Division of the Center completed 23 research projects and continued work on 71 others. In addition research staff responded to more than 166 informal requests for research assistance from courts, Judicial Conference committees, and others.

1. **Support to Court Administration and Case Management Committee.** The Center continued its support to the Court Administration and Case Management Committee, the district courts, and their Civil Justice Reform Act (CJRA) advisory groups. Much of our attention has been directed at analyzing data from the Congressionally-mandated study of the five demonstration programs established by the CJRA. The Center's report on the experiences of the CJRA demonstration districts was presented to the Committee in December.

2. **Support to Civil Rules Committee.** Over the years, the Center has produced a number of major studies of the discovery process in federal civil litigation. In late 1996, the Committee on Civil Rules asked the Center to assist in its upcoming comprehensive review of discovery practices. In response, we have begun to design a multi-faceted effort aimed at providing the Committee with a wide-range of information and data on contemporary discovery practices in the federal courts.

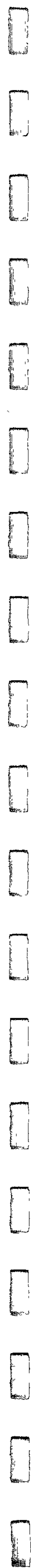
3. **Support to Bankruptcy Committee.** The Center continues to devote a considerable segment of its work to projects in support of the Conference's Committee on the Administration of the Bankruptcy System. In addition, during the past year the Center has increased its support to the Advisory Committee on Bankruptcy Rules. We are nearing the mid-point in our study of the congressionally-mandated three year pilot to examine the costs and benefits of waiving filing fees in chapter 7 cases for individual debtors who are unable to pay fees in installations. Much of our recent work on this project has involved program monitoring and data collection in the six pilot districts.

4. **Study of Procedures for Handling Death Penalty Cases.** Researchers have collected materials from federal judges who have handled death penalty cases and interviewed federal judges who have presided over death penalty cases and attorneys involved in these cases. The information collected was used in the revision of the *Benchbook* chapter on death penalty procedures. The study will also produce a longer report (slated for completion in 1997) 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.

5. **Risk Prediction Study**. At its December 1996 meeting, the Criminal Law Committee approved a new risk of recidivism instrument for utilization by federal probation officers as a caseload classification tool. The new instrument was developed by the Center to replace the RPS 80 which was produced by the Center nearly two decades ago.

6. **Sentencing Survey.** The results of the Center's survey of federal district and appellate judges and chief probation officers regarding the sentencing guidelines were presented to the Criminal Law Committee at its December meeting. The survey was undertaken with significant cooperation from both the Sentencing Commission and the Administrative Office.

7. **Sentencing Appeals Study.** At the June meeting of the Criminal Law Committee, the Judicial Center was asked to study several issues related to the appellate review of guideline sentences. The Center has begun designing this research as part of its larger ongoing study of various appellate court issues. As a first step, the Center has been examining available data sources, including information maintained by both the Administrative Office and the Sentencing Commission.



Agenda Item 6A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURES
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

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

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

FROM: **Hon. D. Lowell Jensen, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT **Report of Advisory Committee on Rules of Criminal Procedure**

DATE: **December 4, 1996**

I. INTRODUCTION.

At its meeting on October 7th and 8th, 1996, 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 and proposed amendments to Rule 58 are attached.

II. ACTION ITEMS

A. Action on Proposed Changes to Rule 58

After the Committee met in October, the President signed the Federal Courts Improvement Act of 1996 (S. 1887). Section 202 amended 18 U.S.C. § 3401(b) and (g) and 28 U.S.C. § 636(a); those amendments eliminated the requirement that a defendant consent to a trial before a magistrate judge in those cases where the defendant is charged with a petty offense which is either a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction. That same section also amended §3401(b) by allowing the defendant to consent to a trial by a magistrate judge in all other

misdemeanor cases either orally on the record or in writing. Those statutory changes will require conforming amendments to Rule 58, Procedure for Misdemeanors and Other Petty Offenses.

On the recommendation of Hon. Phillip M. Pro (Chair of the Committee on the Administration of the Magistrate Judges System) and with the assistance of Mr. Rabiej (who drafted suggested conforming language) the Criminal Rules Committee was polled and agreed that the changes should be forwarded to the Standing Committee for action at its January 1997 meeting. The Style Committee has reviewed the draft and has made its suggested changes.

Under the rule-making procedures, "The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary." The Committee views the proposed amendments as "conforming" changes resulting from the changes in the underlying statutory provisions and believes that public comment is not necessary. If the changes are forwarded without public comment, and assuming they are approved by the Supreme Court, they would go into effect on December 1, 1997. If the normal procedure of publication and comment is followed, they would not go into effect until December 1, 1998.

A draft of the proposed changes to Rule 58, the Committee Note, and a copy of Section 202 of the Federal Courts Improvement Act of 1996, are attached.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 58, without publication, and forward them to the Judicial Conference for approval.

III. INFORMATION ITEMS

1. Proposed Amendments to the Rules of Criminal Procedure Considered by the Advisory Committee

At its October 1996 meeting the Advisory Committee considered proposed changes to: Rule 11 concerning the impact of the Sentencing Guidelines on plea bargaining and plea procedures, and the ability of a defendant to withdraw a plea of guilty; Rule 24(c) (alternate jurors); Rule 25(b)(disability of judge); Rule 26 (taking of testimony); and Rule 32.2 (forfeiture procedures); Rule 40(a)(appearance before a magistrate judge). The Committee decided to consider draft amendments to Rules 11, 26, and 32.2 at its April 1997 meeting in Washington, D.C.

2. Position on Victims' Rights Amendment

The Committee discussed the pending congressional proposal concerning a victim's rights amendment. As a result of that discussion, the Committee authorized the Chairman to inform the Standing Committee that it believes that such an amendment would have an adverse impact on the operation of the Rules of Criminal Procedure.

3. Consideration of Proposed Amendments to Rule 103, Fed. R. Evid.

At the request of the Advisory Committee on the Rules of Evidence, the Committee discussed the proposed amendment(s) to Federal Rule of Evidence 103 regarding whether counsel must renew an evidentiary objection at trial to preserve error. Following discussion, the consensus of the Committee was that the issue should be left to caselaw development.

Attachments

Proposed Amendments to Rule 58
Excerpt from Federal Courts Improvement Act of 1996.
Minutes of Committee Meeting, Oct. 1996

Rule 58. Procedure for Misdemeanors and Other Petty Offenses

(a) SCOPE.

(1) *In General.* This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to district judges ~~of the district courts~~ in such cases tried by United States magistrate judges.

* * * * *

(b) PRETRIAL PROCEDURES.

* * * * *

(2) *Initial Appearance.* At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:

* * * * *

(C) ~~unless the charge is a petty offense for which appointment of counsel is not required,~~ the right to request the ~~assignment~~ appointment of counsel if the defendant is unable to obtain counsel, unless the charge is a petty offense for which an appointment of counsel is not required;

* * * * *

(E) the right to trial, judgment, and sentencing before a district judge ~~of the district court~~, unless:

(i) the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction; or

(ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge;

(F) ~~unless the charge is a petty offense,~~ the right to trial by jury before either a United States magistrate judge or a district judge ~~of the district court~~, unless the charge is a petty offense; and

(G) ~~if the defendant is held in custody and charged with a misdemeanor other than a petty offense,~~ the right to a preliminary examination in accordance with 18 U.S.C. § 3060, and the general circumstances under which the defendant may secure pretrial release, if the defendant is held in custody and charged with a misdemeanor other than a petty offense.

(3) *Consent and Arraignment.*

(A) TRIAL BEFORE A UNITED STATES MAGISTRATE JUDGE. ~~If the defendant signs a written consent to be tried before the magistrate judge which specifically waives trial before a judge of the district court, the magistrate judge shall take the defendant's plea.~~ A magistrate judge shall take the defendant's plea in a Class B misdemeanor charging a motor vehicle offense, a Class C misdemeanor, or an infraction. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or orally on the record to be tried before the magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere.

(B) FAILURE TO CONSENT. ~~If the defendant does not consent to trial before the magistrate judge,~~ In a misdemeanor case — other than a Class B misdemeanor charging a motor-vehicle offense, a Class C misdemeanor, or an infraction,— the ~~defendant shall be ordered~~ magistrate judge shall order the defendant to appear before a district judge ~~of the district court~~ for further proceedings on notice, unless the defendant consents to trial before the magistrate judge.

* * * * *

(g) APPEAL.

(1) *Decision, Order, Judgment or Sentence by a District Judge.* An appeal from a decision, order, judgment or conviction or sentence by a district judge ~~of the district court~~ shall be taken in accordance with the Federal Rules of Appellate Procedure.

(2) *Decision, Order, Judgment or Sentence by a United States Magistrate Judge.*

(A) INTERLOCUTORY APPEAL. A decision or order by a magistrate judge which, if made by a district judge ~~of the district court~~, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a district judge ~~of the district court~~ provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of court a statement specifying the decision or order from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate judge.

(B) APPEAL FROM CONVICTION OR SENTENCE. An appeal from a judgment of conviction or sentence by a magistrate judge to a district judge ~~of the district court~~ shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate judge.

* * * * *

(D) SCOPE OF APPEAL. The defendant shall not be entitled to a trial de novo by a district judge ~~of the district court~~. The scope of appeal shall be the same as an appeal from a judgment of a district court to a court of appeals.

* * * * *

COMMITTEE NOTE

The Federal Courts Improvement Act of 1996, Sec. 202, amended 18 U.S.C. § 3401(b) and 28 U.S.C. 636(a) to remove the requirement that a defendant must consent to a trial before a magistrate judge in a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction. Section 202 also changed 18 U.S.C. § 3401(b) to provide that in all other misdemeanor cases, the defendant may consent to trial either orally on the record or in writing. The amendments to Rule 58(b)(2) and (3) conform the rule to the new statutory language and include minor stylistic changes.

S. 1887

One Hundred Fourth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Wednesday, the third day of January, one thousand nine hundred and ninety-six

An Act

To make improvements in the operation and administration of the Federal courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Courts Improvement Act of 1996".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—CRIMINAL LAW AND CRIMINAL JUSTICE AMENDMENTS

Sec. 101. New authority for probation and pretrial services officers.

TITLE II—JUDICIAL PROCESS IMPROVEMENTS

Sec. 201. Duties of magistrate judge on emergency assignment.
Sec. 202. Consent to trial in certain criminal actions.
Sec. 203. Registration of judgments for enforcement in other districts.
Sec. 204. Vacancy in clerk position; absence of clerk.
Sec. 205. Diversity jurisdiction.
Sec. 206. Removal of cases against the United States and Federal officers or agencies.
Sec. 207. Appeal route in civil cases decided by magistrate judges with consent.
Sec. 208. Reports by judicial councils relating to misconduct and disability orders.

TITLE III—JUDICIARY PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

Sec. 301. Senior judge certification.
Sec. 302. Refund of contribution for deceased deferred annuitant under the Judicial Survivors' Annuities System.
Sec. 303. Bankruptcy judges reappointment procedure.
Sec. 304. Technical correction related to commencement date of temporary judgeships.
Sec. 305. Full-time status of court reporters.
Sec. 306. Court interpreters.
Sec. 307. Technical amendment related to commencement date of temporary bankruptcy judgeships.
Sec. 308. Contribution rate for senior judges under the judicial survivors' annuities system.
Sec. 309. Prohibition against awards of costs, including attorney's fees, and injunctive relief against a judicial officer.

TITLE IV—JUDICIAL FINANCIAL ADMINISTRATION

Sec. 401. Increase in civil action filing fee.
Sec. 402. Interpreter performance examination fees.
Sec. 403. Judicial panel on multidistrict litigation.
Sec. 404. Disposition of fees.

TITLE V—FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

Sec. 501. Qualification of Chief Judge of Court of International Trade.

TITLE VI—MISCELLANEOUS

Sec. 601. Participation in judicial governance activities by district, senior, and magistrate judges.
Sec. 602. The Director and Deputy Director of the administrative office as officers of the United States.
Sec. 603. Removal of action from State court.
Sec. 604. Federal judicial center employee retirement provisions.
Sec. 605. Abolition of the special court, Regional Rail Reorganization Act of 1973.
Sec. 606. Place of holding court in the District Court of Utah.
Sec. 607. Exception of residency requirement for district judges appointed to the Southern District and Eastern District of New York.
Sec. 608. Extension of civil justice expense and delay reduction reports on demonstration and pilot programs.
Sec. 609. Place of holding court in the Southern District of New York.
Sec. 610. Venue for territorial courts.

TITLE I—CRIMINAL LAW AND CRIMINAL JUSTICE AMENDMENTS

SEC. 101. NEW AUTHORITY FOR PROBATION AND PRETRIAL SERVICES OFFICERS.

(a) PROBATION OFFICERS.—Section 3603 of title 18, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (8)(B);

(2) by redesignating paragraph (9) as paragraph (10); and

(3) by inserting after paragraph (8) the following new paragraph:

"(9) if approved by the district court, be authorized to carry firearms under such rules and regulations as the Director of the Administrative Office of the United States Courts may prescribe; and".

(b) PRETRIAL SERVICES OFFICERS.—Section 3154 of title 18, United States Code, is amended—

(1) by redesignating paragraph (13) as paragraph (14); and

(2) by inserting after paragraph (12) the following new paragraph:

"(13) If approved by the district court, be authorized to carry firearms under such rules and regulations as the Director of the Administrative Office of the United States Courts may prescribe.".

TITLE II—JUDICIAL PROCESS IMPROVEMENTS

SEC. 201. DUTIES OF MAGISTRATE JUDGE ON EMERGENCY ASSIGNMENT.

The first sentence of section 636(f) of title 28, United States Code, is amended by striking out "(a) or (b)" and inserting in lieu thereof "(a), (b), or (c)".

SEC. 202. CONSENT TO TRIAL IN CERTAIN CRIMINAL ACTIONS.

(a) AMENDMENTS TO TITLE 18.—(1) Section 3401(b) of title 18, United States Code, is amended—

(A) in the first sentence by inserting ", other than a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction," after "misdemeanor";

(B) in the second sentence by inserting "judge" after "magistrate" each place it appears;

(C) by striking out the third sentence and inserting in lieu thereof the following: "The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record."; and

(D) by striking out "judge of the district court" each place it appears and inserting in lieu thereof "district judge".

(2) Section 3401(g) of title 18, United States Code, is amended by striking out the first sentence and inserting in lieu thereof the following: "The magistrate judge may, in a petty offense case involving a juvenile, that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction, exercise all powers granted to the district court under chapter 403 of this title. The magistrate judge may, in any other class B or C misdemeanor case involving a juvenile in which consent to trial before a magistrate judge has been filed under subsection (b), exercise all powers granted to the district court under chapter 403 of this title.".

(b) AMENDMENTS TO TITLE 28.—Section 636(a) of title 28, United States Code, is amended—

(1) by striking out ".", and" at the end of paragraph (3) and inserting in lieu thereof a semicolon; and

(2) by striking out paragraph (4) and inserting the following:

"(4) the power to enter a sentence for a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction; and

"(5) the power to enter a sentence for a class A misdemeanor, or a class B or C misdemeanor not covered by paragraph (4), in a case in which the parties have consented.".

SEC. 203. REGISTRATION OF JUDGMENTS FOR ENFORCEMENT IN OTHER DISTRICTS.

(a) IN GENERAL.—Section 1963 of title 28, United States Code, is amended—

(1) by amending the section heading to read as follows:

"§ 1963. Registration of judgments for enforcement in other districts";

(2) in the first sentence—

(A) by striking out "district court" and inserting in lieu thereof "court of appeals, district court, bankruptcy court,"; and

(B) by striking out "such judgment" and inserting in lieu thereof "the judgment"; and

(3) by adding at the end thereof the following new undesignated paragraph:

"The procedure prescribed under this section is in addition to other procedures provided by law for the enforcement of judgments.".

Agenda Item 6B

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 7-8, 1996
Gleneden, Oregon

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Gleneden, Oregon on October 7th and 8th, 1996. 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 7, 1996. 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. Edward E. Carnes
Hon. Sam A. Crow
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. B. Waugh Crigler
Prof. Kate Stith
Mr. Darryl W. Jackson, Esq.
Mr. Robert C. Josefsberg, 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: Hon 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. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. Jim Eaglin from the Federal Judicial Center, and Ms. Mary Harkenrider from the Department of Justice.

The attendees were welcomed by the chair, Judge Jensen, who recognized a new member to the Committee, Judge Edward E. Carnes. Judge Jensen recognized the contributions of Judge Crow, whose term on the Committee had expired.

II. APPROVAL OF MINUTES OF APRIL 1996 MEETING

Following minor changes to the minutes of the October 1995 meeting, Judge Marovich moved that they be approved. Following a second by Judge Davis, the motion carried by a unanimous vote.

III. RULES PUBLISHED FOR PUBLIC COMMENT AND PENDING FURTHER ACTION BY THE COMMITTEE

The Reporter informed the Committee that the Standing Committee, at its June 1996 meeting in Washington, D.C., had approved a number of proposed amendments for publication and public comment: Rule 5.1 (Preliminary Examination; Production of Witness Statements); Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings); Rule 31 (Verdict; Individual Polling of Jurors); Rule 33 (New Trial; Time for Filing Motion); Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence). Written comments on the proposed amendments are due not later than February 15, 1997. A hearing has been scheduled in Oakland, California for witnesses who wish to present oral testimony on the proposed amendments.

IV. RULES APPROVED BY STANDING COMMITTEE AND FORWARDED TO JUDICIAL CONFERENCE

Judge Jensen reported that the Standing Committee had approved and forwarded the Committee's proposed amendment to Rule 16 to the Judicial Conference. The amendment to Rule 16(a)(1)(E) and 16(b)(1)(C), which addresses reciprocal disclosure of information on expert witnesses, had originally been included in a package of proposed amendments to Rule 16 submitted to the Judicial Conference in March 1995. The Conference had generally rejected the amendments although the opposition had focused specifically on those amendments in Rule 16(a)(1)(F), addressing the pretrial disclosure of witness names. At its meeting in April 1996, the Advisory Committee considered the amendment anew and resubmitted the matter to the Standing Committee. That Committee made several minor changes to the language of the amendment and forwarded it, without further publication, to the Judicial Conference.

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 11. Pleas.

The Reporter indicated that several interrelated matters affecting guilty pleas and the sentencing guidelines were on the agenda for the meeting. Several judicial decisions and correspondence had generated interest in amending Rule 11.

1. Rule 11(e); Report of Subcommittee; Impact of Sentencing Guidelines on Plea Bargaining; Ability of Defendant to Withdraw Plea

In a continuation of discussions begun at the April 1996 meeting, a Subcommittee consisting of Judge Marovich (chair), Professor Stith, Mr. Martin, and Mr. Pauley, presented an oral report on possible amendments to Rule 11. Judge Marovich reported that the subcommittee had considered the possible impact of *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995), which read Rule 11(e)(4) to also apply to (e)(1)(B) plea agreements regarding sentencing facts or calculations. The subcommittee had concluded that *Harris* was not consistent with the language or history of Rule 11 and recommended that some amendments be made to Rule 11(e) which would clearly include references to guideline sentencing factors vis a vis plea bargains.

Judge Marovich indicated that the subcommittee had focused initially on the question of the amount of notice and information each side should have regarding applicable sentencing guidelines; the subcommittee believed that the process would work more smoothly and efficiently, if the government and the defendant had a clearer idea--going into the plea bargaining process--of the possible reaction of the court to a proposed plea agreement. Lawyers, he noted, should be able to accurately assess the probability that a plea agreement will be accepted by the court.

Judge Jensen added that Judge Conaboy, the Chair of the Sentencing Commission, had expressed interest in the Committee's action on any proposals to amend Rule 11. He had informed Judge Jensen that the Commission would welcome any input on the impact or role of sentencing guidelines in the plea bargaining process.

Mr. Pauley expressed concern about the slow process of amending Rule 11, should the Committee decide to consider global changes to the rule. He believed that the amendment addressing the *Harris* case should be moved forward now. Ms. Harkenrider added that the subcommittee's proposed amendment would make it clear that the parties might be able to agree on sentencing factors or guidelines, and not just on an agreed-to

sentence. Mr. Pauley added that the proposed language would not directly affect the right of a defendant to appeal.

Professor Stith distributed a chart she had prepared from data provided by the Sentencing Commission which demonstrated the reduction of cases going to trial. Judge Jensen noted in particular that the national average of cases being disposed of in a plea process was 92 %. He reiterated that the genesis of the discussion on the binding nature of (e)(1)(B) agreements was the *Harris* decision and that the decision in *United States v. Hyde*, 82 F.3d 319 (9th Cir. 1996) had raised the question of the impact of deferring acceptance of a guilty plea until after preparation of the Presentencing Report.

Judge Marovich observed that the Circuits may have different practices relating to when a plea is accepted and he repeated the concern that the parties may not fully know what they are facing when the plea is entered. Ms. Harkenrider noted that although the Solicitor General's office had not yet decided whether to appeal the *Hyde* decision it appeared that an appeal would be filed. Ms. Harkenrider also expressed the view that in light of such an appeal, the Committee should defer any action which would amend Rule 11 in response to the *Hyde* decision.

Professor Stith raised the question of whether it might be appropriate to amend Rule 11 to clarify when the plea could, or must, be accepted. Judge Crigler responded that any amendment to Rule 11 be as clear and straightforward as possible. Following discussion on how the sentencing guidelines had affected the plea bargaining process, Judge Dowd observed that the process is now more complicated and that Rule 11, as written, does not adequately accommodate the realities of plea bargaining and guilty pleas.

In discussing the possible process of amending Rule 11 at this point to address the *Harris* problem, Judge Jensen commented that the proposed changes should be forwarded to the Sentencing Commission. A consensus emerged that some amendment was appropriate and the discussion turned to specific language used in the proposed language submitted by the Standing Committee, which in turn had been suggested by the Department of Justice. Judge Marovich stated that the amendments were a step in the right direction.

Ultimately, Judge Davis moved to adopt the subcommittee's proposed amendments to Rule 11(e)(1)(B), (C), and (e)(4). Judge Marovich seconded the motion. Judge Carnes expressed concern about amending a criminal procedure rule specifically to address a court decision from one circuit. Several members added that it should be clear that the proposed amendment does not address the *Hyde* problem of when a plea could be accepted. The Committee approved the amendment unanimously. The reporter indicated that he would draft the appropriate language and committee note for the April 1997 meeting.

2. Rule 11(c); Advice to Defendant Regarding Waiver of Right to Appeal

The Reported stated that the Committee on Criminal Law had proposed an amendment to Rule 11(c)(6) which would require the court to discuss with the defendant any terms or provisions in a plea agreement which would waive the right to appeal or collateral attack the sentence. Ms. Harkenrider moved that the proposed amendment be approved. Judge Davis seconded the motion.

The Committee discussion focused on whether the amendment would affect the defendant's constitutional rights and what is actually waived. Professor Stith expressed concern about the breadth of such waivers and Judge Carnes commented that he had always understood that the rules of procedure and any waivers are subject to the Constitution. Mr. Martin added that there might be other waiver provisions in a plea agreement, for example, provisions dealing with immigration or asset forfeiture. Ultimately, Professor Stith moved that the proposed language be amended to reflect that (c)(6) applied to terms or provisions in a plea agreement and delete the language requiring the court to discuss with the defendant the "consequences" of any waiver provision. The motion to amend was seconded by Judge Carnes and carried by a vote of 10 to 1. The Committee, by a vote of 8 to 3, approved the proposed amendment to Rule 11(c).

3. Rule 11(e)(4). Rejection of Plea Agreement.

Judge Davis suggested that the Committee consider an amendment to Rule 11(e)(4), in addition to the approved amendments to (e)(1)(B) and (C), supra, which would clearly address the issue in *United States v. Harris*. Following brief discussion, the Reporter was asked to draft proposed language for the April meeting which would address that decision and also draft an alternate version which would address both *Harris* and *United States v. Hyde*.

4. Rule 11. Summary of Pending Amendments and Action

Judge Jensen provided a summary of the Committee's actions regarding Rule 11: It had approved amendments to Rule 11(e)(1)(B) and (C), Rule 11(c)(6)(new provision). The Reporter was asked to finalize a draft of the amendments so that the Sentencing Commission would have an opportunity to review it. Second, the Committee had requested the Reporter to draft alternative versions of possible amendments to Rule 11(e)(4) which would deal with the issues raised by the *Harris* and *Hyde* decisions. Finally, Judge Jensen asked the Rule 11 Subcommittee to continue its work with a view toward additional amendments to that Rule.

B. Rule 24(c). Alternate Jurors

The Reporter indicated that the Committee had received a letter from Judge Selya of the Court of Appeals for the First Circuit in which the judge suggested that it would be appropriate to consider an amendment to Rule 24(c). Although that rule currently provides that alternate jurors (who are designated as replacements) are to be discharged after the jury retires to deliberate. In *United States v. Houlihan*, not yet reported, the First Circuit concluded that the trial judge committed harmless error in not discharging the alternate jurors.

Mr. Josefsburg believed that an amendment to Rule 24(c) was in order and Mr. Pauley observed that there was a certain tension between the provisions in Rule 24(c) and 23(b), citing statistics which indicate that it is less desirable to make substitutions in jurors. Following additional brief discussion, Judge Marovich moved that Rule 24(c) be amended to eliminate the mandatory language in that rule. Judge Dowd seconded the motion which carried by a vote of 8 to 2, with one abstention. The Reporter indicated that he would draft language for the Committee's consideration at its next meeting.

C. Rule 25(b). Judge Disability

Judge Jensen informed the Committee that Judge Kazen had proposed that the Committee consider a clarifying amendment to Rule 25(b) concerning the ability of using different judges to hear guilty pleas and handle pretrial motions. Mr. Jackson expressed the concern that judges not be viewed as fungible in the eyes of the community. Mr. Josefsburg gave several examples of state practice where judge may be rotated before completing a case. Several members of the Committee expressed the view that Rule 25(b) is not violated by substituting a judge to complete a case when another judge has found the defendant guilty following a guilty plea. Judge Jensen noted that a consensus had seemed to emerge that no change was needed at the present time; but he asked the Reporter to review the history of Rule 24(b) and make sure that it is clear the rule does not cover guilty pleas procedures.

D. Rule 26. Taking of Testimony

The Reporter informed the Committee that Judge Stotler, Chair of the Standing Committee, had requested the Criminal Rules Committee to consider an amendment to Criminal Rule 26 which conform that rule to amendments to Civil Rule 43, which take effect on December 1, 1996. Those amendments delete the requirement that the testimony be taken orally in open court. The change is apparently designed to permit testimony to be given in court by means if the witness is not able to communicate orally, e.g., using sign

language. Additionally, Rule 43 is being amended to permit presentation of testimony by transmission from another location in compelling circumstances.

Mr. Rabiej provided some additional background information on the civil rule amendment and Mr. MaCabe indicated that the Ninth Circuit's pilot program of electronic transmission of proceedings was on hold--criminal defendants are apparently not consenting to those procedures. Following additional brief discussion, Mr. Josefsburg moved that Rule 26 be amended by deleting the word "orally" and that the rule be restyled to conform to the civil rule. That motion was seconded by Ms. Harkenrider. It carried unanimously.

E. Rule 32.2. Forfeiture Procedures

Mr. Pauley introduced the Justice Department's proposed new rule 32.2 which would accomplish two key points: It would consolidate several existing rules into one rule, i.e., Rule 32 and 31. Second, the new rule would eliminate the role of the jury in criminal forfeiture proceedings. He indicated that in framing the rule, the Department had polled United States Attorneys and members of the Asset Forfeiture Division. Mr. Pauley provided a detailed background of current forfeiture provisions and indicated that within the Department there is some disagreement on whether the proposed rule will help or hinder the Government's interests.

In the ensuing discussion, Professor Coquillette questioned whether the provisions for forfeiting property belonging to a third party, without a jury trial, might violate the Constitution. Other members questioned whether the rule would be consistent with existing statutory provisions governing forfeiture. Several other members suggested possible changes to the draft of the rule which first, make it clear that the court must find a nexus between the property and the defendant, second, address the issue of the right to appeal a ruling adverse to the Government. Mr. Pauley indicated that the Department would continue to work on the draft of the rule and welcomed suggested changes to address the issues raised by the Committee.

F. Rule 40(a). Appearance Before Federal Magistrate Judge

The Reporter provided a brief overview of proposed changes and discussion regarding Rule 40(a). He noted that in October 1994, the Committee had considered a proposed amendment from Magistrate Judge Robert Collings (Boston) to amend Rule 40(a) to provide that a defendant arrested in a district other than where the offense occurred could be taken to that latter district if the magistrate was located within 100 miles of the place of arrest. The Committee deferred any further action pending input from the Department of Justice. In recent correspondence between Magistrate Judge

Crigler and the Department, the issue had been revived. Following discussion of the matter, the Committee reached a consensus that no action was required; as written, the rule does not explicitly require that an arrested defendant be taken to a magistrate in the district of arrest. It only requires that the defendant be taken before the nearest available magistrate.

VI. RULES PENDING BEFORE OTHER COMMITTEES HAVING IMPACT ON RULES OF CRIMINAL PROCEDURE

1. Bankruptcy Committee Proposal to Provide for Electronic Service of Motions.

The Reporter informed Committee that the Bankruptcy Rules Committee was considering an amendment to Rules 9013 and 9014 which would permit electronic filing of motions on the other party, under technical standards established by the Judicial Conference. He added that the parallel criminal rule, Rule 49, specifically cross-references the Civil Rules, and that in the past that committee had taken the lead in considering any changes in the method of service. Judge Jensen indicated that he was not interested in changing that approach. Judge Dowd observed that the bankruptcy bar might be more attuned to using electronic filing methods than members of the criminal justice bar. No action was taken on the matter.

2. Rules of Evidence Committee Proposal to Amend Fed. R. Evid. 103 Re Preservation of Error

The Reporter and Mr. Rabiej indicated that the Evidence Rules Committee had considered an amendment to Federal Rule of Evidence 103 which would clearly indicate whether counsel must renew an evidentiary objection at trial to preserve the issue for appeal. The Evidence Committee had been unable to reach a clear consensus on the issue and had requested the Civil and Criminal Rules Committees to review the issue and provide any additional input. Following a discussion of the issue, to the effect that the members did not perceive any need to amend the current rule, a consensus emerged to inform the Evidence Committee that the issue should be left to caselaw development.

VII. ORAL REPORTS; MISCELLANEOUS

A. Status Report on Legislation Affecting the Federal Rules of Criminal Procedure

whether, and to what, extent, the Committee might make its views known, Judge Wilson recommended that the chair send a letter stating the Committee's reservations about the resolution. Judge Carnes responded that in his view, this matter was outside the purview of the federal courts. Professor Stith believed that there was good arguments for being a part of the debate on the resolution in pointing out potential problems with any amendment.

Professor Coquillette stated that the Committee had a role under the Rules Enabling Act and that the Criminal Law Committee was perhaps the best body for expressing any views on the appropriateness of the amendment. Judges Wilson and Smith expressed the view that the Committee could provide invaluable expertise on the practical implications of any amendment affecting criminal procedure. Judge Davis indicated that any input from the Committee should focus on the criminal rules and the rule-making process and Judge Dowd observed that the judiciary should speak with one voice on this matter. Mr. Rabiej added that the Committee could legitimately comment on any legislation potentially affecting the rules of criminal procedure--given its mandate to perform a continuous study and evaluation of criminal procedure matters.

Following additional discussion concerning the process of preparing the Committee's views, Judge Jensen indicated that he would draft a letter to the Standing Committee.

B. Oral Report on Restyling of Appellate Rules of Procedure.

Mr. Rabiej reported that the publication and comment period on the re-styled Appellate Rules was proceeding and that the Committee had received some favorable comments on the new format for the rules.

C. Oral Report on Legislatively Proposed Language to Rule ----

The Committee was informed by Mr. Rabiej that a part of the Child Pornography Bill would have amended Rule 32 to require judges to apprise defendants of the possible consequences of sentencing for certain offenses. He indicated that the Administrative Office had been successful in deterring that amendment.

D. Oral Report on Change in Effective Date of Amendments to Federal Rules of Evidence 413-415.

Finally, Mr. Rabiej informed the Committee that the Justice Department had succeeded in asking Congress to amend the effective date of Rules 413-415. Those rules, in effect, now apply to conduct committed before the effective date of those rules.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee decided to hold its next meeting in Washington, D.C., at the Thurgood Marshall Federal Judiciary Building, on April 7th and 8th, 1997.

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter

Agenda Item 7A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURES
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

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

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

FROM: Honorable Fern M. Smith, Chair
Advisory Committee on Evidence Rules

DATE: December 1, 1996

RE: **Report of the Advisory Committee on Evidence Rules**

Introduction

The Advisory Committee on Evidence Rules met on November 12, 1996, in San Francisco, California. At the meeting, the Committee took action on the question of whether the Federal Rules of Evidence should be amended to include a rape counselor privilege. The Committee's resolution of this question is discussed in Part I of this report. The Committee also set an agenda for the near future--agreeing to consider some possible amendments to the Evidence Rules and not to consider others at this time. The discussion on these matters is summarized in Part II of this report, and is more fully set forth in the draft minutes of the November meeting, which are attached to this report.

I. Action Item

Congress, in 42 U.S.C.§ 13942(c) (1996), directed that:

The Judicial Conference of the United States shall evaluate and report to Congress its views on whether the Federal

Rules of Evidence should be amended, and if so, how they should be amended, to guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors will be adequately protected in Federal court proceedings.

The Evidence Rules Committee examined the advisability of amending the Federal Rules of Evidence to include a specific privilege protecting confidential communications from victims of sexual assault to their therapists and counselors. The Committee examined state laws and cases, federal cases, and a Report to Congress prepared by the Department of Justice, dated December, 1995, entitled "The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors." After this extensive review by the Committee, and discussion at the November meeting, the Evidence Rules Committee has concluded that it is not advisable to amend the Federal Rules of Evidence to include a privilege for confidential communications from sexual assault victims to their therapists or counselors.

The Evidence Rules Committee recommends that the Standing Committee make the following recommendation to the Judicial Conference:

> The Federal Rules of Evidence should not be amended to include a privilege for confidential communications from sexual assault victims to their therapists or counselors. An amendment is not necessary to guarantee that the confidentiality of these communications will be fairly and adequately protected in federal court proceedings.

> Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Recently the Supreme Court, operating under the common law approach mandated by Rule 501, recognized the existence of a privilege under federal law for confidential statements made in psychological therapy sessions. The Court specifically held that this privilege protected confidential statements made to a licensed clinical social worker in a therapy session. *Jaffee v. Redmond,* 116 S.Ct. 812 (1996). The *Jaffee*

Court further held that the privilege was absolute rather than qualified.

While the exact contours of the privilege recognized in *Jaffee* remain to be developed, the Court's generous view of the therapeutic privilege can be adequately applied to protect confidential communications from sexual assault victims to licensed therapists or counselors. In light of the recency of *Jaffee*, and the well-entrenched common law approach to privileges set forth in the Federal Rules, the Committee concludes that legislative intervention at this time is neither necessary nor advisable. There is every reason to believe that confidential communications from victims of sexual assault to licensed therapists and counselors are and will be adequately protected by the common law approach mandated by Rule 501. At the very least, the federal courts should be given the chance to apply and develop the *Jaffee* principle before legislative intervention is considered.

Most importantly, it is not advisable to single out a sexual assault counselor privilege for legislative enactment. Amending the Federal Rules to include a sexual assault counselor privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law. The Committee believes that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving sexual assault in the federal courts. Granting special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar.

For these reasons, the Committee recommends that the Federal Rules of Evidence not be amended to include a specific privilege for confidential communications from sexual assault victims to their therapists or counselors.

II. Information Items

A. Issues the Committee Will Pursue

After discussion at the November meeting, the Evidence Rules Committee agreed to research and consider the following issues:

1. *Rule 103(e)*: While the Committee's proposal to amend Rule 103 was withdrawn, the Committee voted to revisit whether the Rule should be amended to provide instruction to litigants as to when an *in limine* motion must be renewed at trial.

2. *Rules 404(b) and 609*--The Committee will determine whether it would be useful to provide a more structured procedure for trial courts to follow in considering the admissibility of evidence of uncharged misconduct and prior convictions.

3. *Rule 615*--The "Victim of Crime Bill of Rights," 42 U.S.C. 10606, passed in 1990, places some limits on Rule 615, the Rule which requires sequestration of witnesses. The statute guarantees victims the right to be present at trial under certain circumstances. The Committee has agreed to explore the relationship between Rule 615 and the Victim of Crime Bill of Rights, and to consider whether Rule 615 should be amended.

4. *Rule 703*--The Committee will consider whether Rule 703, which permits an expert to rely on inadmissible evidence, is being used as a means of improperly evading the hearsay rule.

5. *Rule 706*--The funding of court-appointed experts in the breast implant litigation has raised a question for the Committee concerning the requirement of party-funding set forth in Rule 706. Judges in the breast implant litigation have argued that a party-funding requirement is unfair when the expert's testimony will be used in many subsequent trials. It has also been argued that Rule 706 is not even applicable when the court-appointed expert's testimony is used in more than one trial. Another important question is whether Rule 706 has any applicability where the expert is retained by the court for technical assistance, rather than to testify as a witness. The Committee has agreed to consider whether Rule 706 should be amended to

accomodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the Rule should be amended to permit funding by the government in civil cases.

6. *Self-authenticating Business Records*--The Committee voted to consider whether Rule 803(6) should be amended to dispense with the requirement of a qualified witness.

7. *Obsolete or Inaccurate Rules and Notes*--The Committee will conduct a complete review of the Evidence Rules and the original Advisory Committee Notes, in order to identify where the Rules and/or notes are obsolete or inaccurate. Consideration will be given to whether the original Advisory Committee Notes can and should be updated, or whether supplementary notes should be added, to account for developments in the case law.

8. *Circuit Splits*--The Evidence Rules Committee has begun a long-term project to identify evidentiary issues on which the circuit courts are split, and to determine whether these circuit splits warrant amending the Evidence Rules.

9. *Statutes Bearing on Admissibility of Evidence*--The Committee has begun a long-term project to identify all of the statutory provisions, outside the Evidence Rules, which regulate the admissibility of evidence proffered in federal court. The Committee will then consider whether the Evidence Rules should be amended to incorporate by reference all of the statutes identified.

10. *Automation*--The Committee will investigate whether the Evidence Rules should be amended to accomodate changes in automation and technology.

B. Issues the Committee Has Decided Not to Pursue

After discussion at the November meeting, the Evidence Rules Committee has decided not to pursue the following issues at this time:

1. *Rule 201:* Rule 201(g) makes no reference to whether a criminal defendant should or must be permitted a conclusive fact against the government. Also, the Rule in general makes no

attempt to delineate the distinction between legislative and adjudicative fact. The Committee decided, however, that the Rule was not presenting a problem for courts or counsel.

2. *Rule 301*--Rule 301 applies to evidentiary presumptions but does not apply to substantive presumptions. The Committee agreed that it might be useful to develop a definitional hierarchy as to what effect a given presumption would have. But the Committee concluded that it would be prudent to wait to see the results of the Uniform Rules Committee, which is currently drafting a proposal on presumptions.

3. *Rule 404b*--The Committee decided not to act on a proposal that uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.

4. *Privileges*--The Committee decided not to attempt to codify the federal law of privileges at this time.

5. *Rule 611*(b)--The Committee concluded that it would not pursue a proposal to amend Rule 611(b) to provide that the scope of cross-examination would not be limited by the subject matter of the direct.

6. *Admissibility of Videotaped Expert Testimony*--The admissibility of videotaped expert testimony will probably arise in the breast implant litigation. At the November meeting, the Committee agreed to continue to monitor the phenomenon of videotaped expert testimony, but concluded that no action should be taken at this time.

7. *Rule 803(8)(B)*--The Rule does not on its face permit a law enforcement report favorable to the criminal defendant to be admitted against the government. The Committee concluded, however, that the courts have construed the Rule to permit such reports to be admitted in favor of a criminal defendant, so the Rule as applied was not posing any problems.

8. *Rule 806*--No mention is made in the Rule as to whether extrinsic evidence, which would be excluded under Rule 608(b) if offered against a testifying witness, would be admitted to impeach the character for veracity of a hearsay declarant. The Committee agreed, however, that the Rule was not creating a problem in the courts.

9. *Residual Exception*--The Committee determined that the residual exception was working reasonably well, that any conflict in the courts with respect to the residual exception was not serious, and that the exception need not be amended at this time.

10. *Sentencing Proceedings*--The Committee decided not to pursue the question whether the Evidence Rules should be amended to apply to sentencing proceedings. A proposal to extend the Evidence Rules to sentencing proceedings was determined to be bound up with policy questions that are beyond the scope of the Committee's jurisdiction.

III. Minutes

The Reporter's draft of the minutes of the Evidence Rules Committee's November meeting are attached to this report. These minutes have not yet been approved by the Advisory Committee.

Agenda Item 7B

ADVISORY COMMITTEE ON EVIDENCE RULES

Draft Minutes of the Meeting of November 12, 1996

San Francisco, California

The Advisory Committee on the Federal Rules of Evidence met on November 12, 1996 in the Park Hyatt Hotel in San Francisco, California.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair
Hon. David C. Norton
Hon. Jerry E. Smith
Hon. James T. Turner
Professor Kenneth S. Broun
Frederic F. Kay, Esq.
Gregory P. Joseph, Esq.
John M. Kobayashi, Esq.
Roger Pauley, Esq.
Dean James K. Robinson
Professor Daniel J. Capra, Reporter

Hon. Milton I. Shadur, Hon. Ann K. Covington, and Mary F. Harkenrider, Esq., were unable to attend.

Also present were:

Hon. David S. Doty, Liaison to the Civil Rules Committee

Hon. David D. Dowd, Liaison to the Criminal Rules Committee

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

Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure

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

Professor Rob Aronson, Uniform Rules of Evidence Committee

Joe Cecil, Esq., Federal Judicial Center

John K. Rabiej, Esq., Chief, Rules Committee Support Office

Opening Business

Judge Smith called the meeting to order at 8:30 a.m. She acknowledged with gratitude the services of the previous Chair, Judge Ralph Winter, and the previous Reporter, Professor Margaret Berger. The minutes of the meeting of April 22, 1996 were then approved by the Committee.

Judge Smith brought the Committee up to date on the status of the amendments proposed by the Committee. The Judicial Conference has approved, and passed on to the Supreme Court, the following: the proposed amendments to Rules 407 and 801; new Rule 804(b)(6); and the movement of the residual exceptions to a single Rule 807.

Self-Evaluation Report

The Judicial Conference has directed that each of its committees prepare a self-evaluation report. At the Committee meeting, the Chair described the form provided by the Judicial Conference and proposed answers to the questions on the form. After discussion, the following responses were agreed to by the Committee:

1. The Committee should continue to exist, given the constant state of change in the law of evidence, and the continuing need for a deliberative body of experts to respond to new developments.

2. The Committee has the appropriate amount of work.

3. The size of the Committee is appropriate.

4. The Committee membership is representative.

5. The work of the Committee is consistent with its jurisdictional statement.

6. The Committee's jurisdiction overlaps, to some extent, the jurisdiction of the Civil and Criminal Rules Committees, as well as that of the Committee on Court Administration. However, the Evidence Rules Committee is necessary because the Federal Rules of Evidence are trans-substantive, and there is no other committee with the jurisdiction to consider the impact of proposed amendments to the Evidence Rules on all types of federal litigation. Judge Stotler, elaborating on this point, noted that the Judicial Conference had considered the possibility, before the Evidence Rules Committee was reconstituted, of forming a

committee with members from the Civil Rules Committee and the Criminal Rules Committee. This proposal was rejected in favor of a free-standing Evidence Rules Committee.

7. There are no areas within the jurisdiction of other committees that would be better placed with the Evidence Rules Committee.

8. The Committee meets twice per year, 50% of the time in Washington, D.C.

9. The Committee has no suggested changes for its own structure or for the Judicial Conference committee structure in general.

Rape Counselor Privilege

Congress, in 42 U.S.C.§ 13942(c) (1996), directed that the Judicial Conference report on whether the Federal Rules of Evidence should be amended to include a privilege for confidential communications from sexual assault victims to their counselors. The Evidence Rules Committee directed the Reporter to prepare a proposed statement of the Committee on this issue. After some discussion, the Committee voted unanimously to adopt the statement, which would recommend to the Standing Committee that the Federal Rules of Evidence not be amended to include such a privilege. The Committee concluded that it would be anomalous to have the rape counselor privilege as the only codified

privilege in the Federal Rules of Evidence. Nor would such a codification be necessary, since the Supreme Court, in *Jaffee v. Redmond,* recently established a privilege for statements to psychotherapists and licensed social workers; and it is probable that a rape counselor privilege comes within the *Jaffee* rule. The Chair expressed concern that the *Jaffee* protection might not extend to social workers and other therapists who are unlicensed, but opined that we should wait to see how the *Jaffee* rule develops before proposing any amendments. All Committee members agreed with this assessment. The Committee also agreed that it was unnecessary to address the constitutional issues that might arise in a criminal case when confidential statements of a prosecution witness are shielded by a rape counselor privilege; nothing the Committee could propose would change or resolve this constitutional question.

Uniform Rules of Evidence

Professor Rob Aronson, a member of the Committee on the Uniform Rules of Evidence, brought the Committee up to date on recent proposals for amending the Uniform Rules. The Uniform Rules Committee has reviewed all the articles up to Article 8. Professor Aronson described the following proposals:

1. *Rule 103*--The Rule would provide that a pretrial objection must be renewed, unless the court states on the record

that a ruling is final.

2. *Article 3*--The Uniform Rules Committee proposed no change. The concern was that other uniform laws use the term "presumption" in various substantive ways. Professor Aronson noted that it would be useful to have a single rule governing the use of presumptions, but that much of the law of presumptions is based on policy beyond evidence. The Uniform Rules reporter has been instructed to try to draft an all-encompassing rule, but Professor Aronson is not optimistic about its passage.

3. *Rule 404*--Changes were made in this Rule in response to Federal Rules 413-15. The Reporter to the Uniform Rules Committee has been instructed to draft a "lustful disposition" rule of admissibility, such as exists in many states--permitting evidence of prior unlawful sexual conduct directed toward the same victim. Professor Aronson noted that there is overwhelming support in the Uniform Rules Committee for restricting Rule 404b. The Uniform Rules Committee proposal includes an in camera hearing requirement, as well as a requirement of advance notice (with a good cause exception); it requires clear and convincing proof that the opponent committed the bad act before it can be admitted; and it requires that the probative value of the bad act for its not-for-character purpose must substantially outweigh its prejudicial effect. The Chair asked whether there has been any negative reaction from trial judges as to the proposed in camera requirements. Professor Aronson said that trial judges had been positive about these requirements and that his sense was that

trial judges wanted direction in handling evidence of uncharged misconduct.

4. *Rule 407*--The proposed amended Uniform Rule would apply specifically to product liability cases. No change has been made to the "after the event" language of the rule, but a comment will say that the relevant event is the time of sale rather than the time of injury.

5. *Rule 408*--This Rule would be modified to make it clear that it would include statements made during the course of an alternative dispute resolution.

6. *Rule 412*--The proposal adds a legislative purpose section indicating that the purpose of the rule is to protect the privacy of rape victims. Prior sexual conduct of the victim would be admissible only to show source of injury, consent, bias, or the source of sexual knowledge in a case involving a child-victim. The proposed amendment would apply the rule in both civil and criminal cases.

7. *Privileges*--Unlike the Federal Rules, the Uniform Rules contain a detailed set of privileges. Two amendments to these rules are proposed. First, the psychotherapist-patient privilege would be expanded to cover statements made to licensed social workers. A licensing requirement was thought necessary because otherwise there would be no way to meaningfully limit the therapeutic privilege. Second, the procedural rules concerning invocation and waiver of privileges would be revised and expanded, consistently with the case and statutory law that has

developed.

8. *Rule 609*--A requirement of pretrial notice, parallel to that in Rule 404(b), has been added. Also, when the criminal defendant is the witness, impeachment would not be permitted with non-crimen falsi crimes unless the probative value of the conviction substantially outweighs the prejudice to the defendant.

9. *Bias*--Uniform Rule 616 currently permits impeachment for bias, subject to the 403 test. The Uniform Rules Committee is recommending that this rule be deleted, due to concern that the rule, by negative implication, could have a confining influence on other methods of impeachment not mentioned in the Rules.

10. *Writings*--The Uniform Rules Committee would amend every rule in which the term "writing" is used. The term "writing" would be changed to "record", and the term "record" would then be defined as any means of preserving information, much like the definition in the Federal best evidence rule. This change was thought necessary to account for technological developments in preserving writings and records.

Developments in Technology

The proposed change in the term "writings" in the Uniform Rules engendered some discussion about technological advances and their impact on the Federal Rules of Evidence. Judge Stotler

pointed out that the problem of electronic data cuts across all the rules, not only the Evidence Rules, as we move toward the "electronic courtroom." The Chair observed that the problems created by technological change are more problems of validity and reliability than definitional. The Chair announced that in response to the challenges created by new technology, Judge Stotler has formed a subcommittee, consisting of one member from each of the advisory committees, as well as the reporters from each advisory committee. The purpose of this subcommittee is to consider how best to respond to changes in data retrieval and presentation in the federal courts. Judge Turner has been appointed by the Chair and has agreed to serve on the technology subcommittee.

Grants of Certiorari

Roger Pauley suggested that one of the Reporter's duties should be to keep Committee members apprised of cases taken by the Supreme Court involving the interpretation of the Federal Rules of Evidence. A short discussion ensued about the current case in front of the Supreme Court, *United States v. Old Chief*, which presents the question whether the prosecution must accept a stipulation to a felony in a felon firearm possession prosecution; Roger Pauley noted that there is currently no provision in the Federal Rules which specifically discusses

stipulations. The Reporter agreed to keep Committee members apprised of cert. grants involving the Federal Rules of Evidence.

Issues for the Committee to Pursue

The Chair then asked each member of the Committee whether there was any issue that he or she thought the Committee should pursue. Many issues were discussed.

The Committee agreed to take up the following issues at the next meeting:

1. *Rule 103(e)*: While the Committee's proposal to amend Rule 103 was withdrawn, the Committee unanimously voted to revisit the question of amending the rule to provide instruction to litigants as to when an in limine motion must be renewed at trial. Judge Turner noted that the conflict in the circuits on this question has not gone away. Judge Turner, Greg Joseph and the Reporter were instructed to work on a draft which would provide a neutral solution for the problem, i.e., a solution which would not opt for excusing a trial objection in all cases or for requiring it in all cases, which would provide concrete guidance to litigants, and which would not unduly burden trial judges. Judge Doty noted that the Civil Rules Committee was opposed to the original proposal of the Evidence Rules Committee, which would have required the renewal of an objection unless the "context"

instructed otherwise. The Civil Rules Committee thought that wording too ambiguous. It was further suggested in discussion that the Uniform Rules provision should be considered to see if it would be helpful.

2. *Rules 404(b) and 609*--The Committee generally agreed that it would be useful to provide for a more structured procedure for trial courts to follow in considering the admissibility of evidence of uncharged misconduct and prior convictions. The Reporter was instructed to review how other jurisdictions are dealing with these matters--including the Uniform Rules and the Michigan Rules of Evidence. The Reporter was also instructed to consider whether a common notice provision could be applied to both rules. The Reporter will review the extant alternatives and set forth options for the Committee at the next meeting.

3. *Rule 615*--The Reporter informed the Committee that the "Victim of Crime Bill of Rights," 42 U.S.C. 10606, passed in 1990, places some limits on Rule 615. Subsection (b) of the statute sets forth seven rights of victims of crimes. Although the statute is not a model of clarity, paragraph (4) of subsection (b) sets forth the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." It appears that Congress intended to create a limited exception to

Rule 615. This exception, which is narrowly tailored to take account of the interests of crime victims and is more recently enacted than the Rule, would take precedence over Rule 615. The relationship between Rule 615 and the Victim of Crime Bill of Rights is currently being tested in the Oklahoma City bombing trial. The Reporter stated that he would report more fully on this issue at the next meeting.

4. *Rule 703*--The Reporter was directed to prepare a report on whether Rule 703, which permits an expert to rely on inadmissible evidence, has been used, as a practical matter, as a means of improperly evading the hearsay rule. The Reporter agreed to survey the law and practice under Rule 703 and report back to the Committee at the next meeting.

5. *Rule 706*--Judge Stotler and Joe Cecil informed the Committee that funding had been approved for Judge Pointer's plan to appoint expert witnesses in the breast implant litigation, but that Judge Jones' request for similar funding had been denied. This raised the question of the adequacy of the funding mechanism provided by Rule 706 for court-appointed experts in civil cases. Rule 706 provides that the parties shall pay for court-appointed experts in civil cases, but Judges Pointer and Jones argue that this provision is unfair when the expert's testimony will be used in many subsequent trials. It has been argued that Rule 706 is not even applicable when the court-appointed expert's testimony

is used in more than one trial. Another important question is whether Rule 706 has any applicability where the expert is retained by the court for technical assistance, rather than to testify as a witness.

The Committee instructed the Reporter to work with Joe Cecil to develop a proposal for the Committee to consider whether Rule 706 should be amended to accomodate some of the concerns expressed by the judges involved in the breast implant litigation, especially the question of funding by the government.

6. *Self-authenticating Business Records*--The Committee voted to consider whether Rule 803(6) should be amended to dispense with the requirement of a qualified witness. The Reporter will survey the law of other jurisdictions and prepare a report on the advisability of such an amendment for the next meeting.

7. *Obsolete or Inaccurate Rules and Notes*--Several Committee members observed that the original Advisory Committee notes are incorrect in some respects. For example, the Note to Rule 104 contains a "not", which creates the opposite impression from what the Advisory Committee intended. The Note to Rule 301 has little or nothing to do with the Rule ultimately adopted. John Rabiej agreed to contact West to determine whether editor's notes could be used to alert the reader to some of these obvious errors.

More broadly, several Committee members observed that the Committee could do a service by updating the original Advisory

Committee notes to account not only for discrepancies but for subsequent case developments. As Judge Jerry Smith noted, practitioners rely on the Advisory Committee comments more than they rely on treatises, etc. Some doubt was expressed, however, as to whether the Advisory Committee notes could be updated outside of any process of amending or re-enacting the Rules. Professor Coquillette agreed to pass along the suggestion that the Evidence Rules should be re-enacted so that the Advisory Committee notes could be updated. Another possible solution discussed was to add a new note after the old note, rather than to amend the original note. Questions were raised about whether changes to the notes, independent of any amendment process, would require the three-year process attendant to amending the Rules themselves.

The Reporter was directed to go through the Rules and the Advisory Committee comments to determine where the Rules or the comments are obsolete, contradictory, or clearly wrong. The Reporter will report back on this matter at the next meeting. Special consideration will be given to the Notes prepared by the Federal Judicial Center, which are included in some published versions of the Federal Rules and which point out where the Advisory Committee Notes are inaccurate or outmoded.

Professor Coquillette informed the Committee that the reporters of all of the committees are going to get together in January to look at anachronisms and inconsistencies throughout the rules and committee notes. One topic of discussion will be

the proper procedure for amending the committee notes where appropriate. The Reporter will report back on the results of the reporters' meeting at the next Committee meeting.

8. *Circuit Splits*--John Kobayashi suggested that it would be a useful long-term project for the Committee to investigate evidentiary issues on which the circuit courts are split. The Reporter agreed to prepare a memorandum on circuit splits for the next meeting.

9. *Statutes Bearing on Admissibility of Evidence*--The Committee agreed with Dean Robinson's suggestion that the Committee would perform a valuable service by incorporating by reference, in the Federal Rules, all of the many specific statutory provisions outside the Rules which regulate the admissibility of evidence proffered in federal court. The Reporter agreed to conduct a survey of all provisions outside the Rules which affect admissibility, and to report back to the Committee before the next meeting.

10. *Automation*--John Kobayashi suggested, as a long-term project, that the Committee investigate whether the Evidence Rules should be amended to accomodate changes in automation. The issues are not limited solely to a definition of what constitutes a writing. For example, another issue is: how does one authenticate an electronically produced document? How do the

litigants and the court deal with materials presented in interactive form? It was also noted that it would be helpful for trial counsel to have some certainty as to what the judges will do with modern visual evidence--when and whether the judge will reach a determination. Mr. Kobayashi agreed to prepare a memorandum on these issues for the next meeting.

The following issues were discussed, and the Committee decided not to proceed on them at this time:

1. *Rule 201:* Rule 201(g) makes no reference to whether a criminal defendant should or must be permitted a conclusive fact against the government. Also, the Rule in general makes no attempt to delineate the distinction between legislative and adjudicative fact. The Committee decided, however, that the Rule was not presenting a problem for courts or counsel.

2. *Rule 301*--Professor Broun noted that Rule 301 applies to evidentiary presumptions but doesn't apply to substantive presumptions, and that it could be useful to develop a definitional hierarchy as to what effect a given presumption would have. The Committee was of the opinion that this would be a massive project with uncertain results. It was noted that the Uniform Rules Committee is investigating whether a rule of evidence can be fashioned to provide a definitional context for all presumptions. The Committee decided to review the Uniform

Rules proposal on presumptions when it is completed, and to determine at that point whether such a project should be undertaken.

3. *Rule 404b*--Frederic Kay suggested that Rule 404(b) should be amended along the lines of the Uniform Rules proposal, so that uncharged misconduct could not be admitted unless the probative value substantially outweighs the prejudicial effect. While there was much sympathy for this position, the Committee unanimously agreed that the proposal would be rejected by Congress, and therefore decided not to pursue the suggestion at this time.

4. *Privileges*--The Chair noted that the Committee had never considered in detail whether to codify the federal law of privileges. Greg Joseph remarked that codification would be a problematic effort because, under the Enabling Act, any evidentiary rule on privilege must be affirmatively adopted by Congress. The Chair observed that in light of the Committee's recommendation against an amendment for the rape counselor privilege, it might be anomalous at this point to propose any amendment to the Rules with regard to privileges. Judge Stotler pointed out that questions about the scope of a privilege do create problems for the courts. For example, there is an issue of whether the state or federal law of privilege applies in actions brought under the Federal Tort Claims Act. The Committee decided not to attempt to codify the federal law of privileges at this

time.

5. *Rule 611*(b)--Dean Robinson suggested that the Committee might consider whether the Rule should be amended so that the scope of cross-examination would not be limited by the subject matter of the direct. But the Committee decided not to proceed on this matter at this time.

6. *Admissibility of Videotaped Expert Testimony*--Dean Robinson suggested that the Committee might explore whether the Evidence Rules should be amended to provide for admissibility of videotaped expert testimony. Greg Joseph noted that a rule had been proposed to this effect by the Civil Rules Committee, but that the proposal had been withdrawn. John Kobayashi suggested that experts could be saved the inconvenience of testifying at trial through the method of videoconferencing, but questions were raised as to whether the trial judge would have jurisdiction over the witness in such circumstances. It was pointed out that Judge Pointer's plan in the breast implant litigation is for the videotaped testimony of the experts appointed by the court to be admissible in all breast implant trials. It was ultimately concluded that the Committee would continue to monitor the phenomenon of videotaped expert testimony, but that no action should be taken at this time.

7. *Rule 803(8)(B)*--The Rule does not on its face permit a

law enforcement report favorable to the criminal defendant to be admitted against the government. It was pointed out, however, that the courts had construed the rule to permit such reports to be admitted in favor of a criminal defendant, so the rule as applied was not posing any problems.

8. *Rule 806*--No mention is made in the Rule as to whether extrinsic evidence, which would be excluded under Rule 608(b) if offered against a testifying witness, would be admitted to impeach the character for veracity of a hearsay declarant. The Committee agreed, however, that this anomaly was not creating a problem in the courts.

9. *Residual Exception*--At the last meeting, the Reporter was asked to prepare reports on two aspects of the residual exception: 1. Whether there are conflicts in the cases regarding the notice requirement; and 2. Whether the residual exception has been improperly expanded to admit evidence of dubious reliability. The Reporter prepared a report on each of these issues, and sent them in advance of the meeting to the Committee members.

At the meeting, the Reporter summarized the conclusions of these reports. First, as to the notice requirement, there is some disagreement among the courts as to whether the requirement can be excused for good cause. Also, there is some dispute about whether the proponent must provide notice of a specific intent to

invoke the residual exception. Finally, the Reporter pointed out that no consistent approach is taken to the notice requirements found scattered throughout the Evidence Rules.

As to the trustworthiness requirement, the Reporter noted that the disputed question of law was whether "near misses" (hearsay which misses one of the admissibility requirements of one of the categorical exceptions) can qualify as residual hearsay. Most courts have held that the term "not specifically covered" in the residual exception means "not admissible under" one of the other exceptions; thus most courts find near misses to potentially qualify as residual hearsay. As to whether evidence of dubious reliability is being admitted under the residual exception, the Reporter observed that this is largely a subjective question, dependent on one's view of the hearsay rule and its exceptions.

The Committee discussed the issues presented by the Reporter's memoranda. Judge Jerry Smith stated that the current residual exception is a useful tool for trial judges, since the other exceptions are not always well-conceived, and are sometimes underinclusive. John Kobayashi contended that it would be useful to impose a specific number of days before trial as a date for the pre-trial notice requirement. Roger Pauley argued that there was no reason to conform the notice requirements found throughout the Evidence Rules, contending that each Rule has a reason for a different approach as to notice.

Professor Broun stated his impression that the residual

exception is being overused, and that it would be useful to give guidance, either by a more specific and stricter definition of trustworthiness, or by a specific exclusion of "near miss" hearsay. But he acknowledged that the question of overuse is to a large extent a normative question on which people can differ. The Chair expressed the opinion that the role of the Committee is not to reduce the discretion of trial judges, but to determine whether rules are unnecessarily ambiguous, incorrect, or are the subject of conflicting opinions among the circuits. Under this standard, there appeared to be no need at this time to amend the residual exception.

A vote was taken and two Committee members were in favor of proceeding and the rest of the members were opposed to proceeding on any amendment to the residual exception at this time.

10. *Sentencing Proceedings*--Some interest was expressed in extending the Federal Rules of Evidence to sentencing proceedings, given the fact that Guidelines proceedings are so fact-driven. However, there was a general concern that the issue created policy conflicts beyond the scope of the Committee's jurisdiction--given the existence of a statute and a Sentencing Guideline which specifically provide for flexible admissibility, and given the historically broad discretion of the court to consider all information presented at the sentencing hearing. Therefore, the Committee decided not to proceed on this matter at this time.

Criminal Forfeiture

Roger Pauley reported to the Committee, for information purposes only, on a Justice Department proposal to make criminal forfeiture part of the ancillary proceedings to a criminal trial, rather than a question for the jury. At this time, this proposal has no immediate impact on the Evidence Rules. Judge Stotler expressed the hope that eventually the patchwork of forfeiture provisions will be made into an integrated whole; but she noted that there are no current proposals to change the Federal Rules of Evidence in any way that would bear upon forfeiture proceedings.

Liaison Reports

Judge Doty, the liaison to the Civil Rules Committee, reported on the discussion within that Committee of the proposed and withdrawn amendment to Federal Rule of Evidence 103. That Committee concluded that the Evidence Committee's former proposal would have created more problems than it solves.

Judge Dowd, the liaison to the Criminal Rules Committee, reported that the Committee was working on integrating forfeiture provisions. Also, the Committee is considering how Rule 11 guilty pleas were working in light of the Sentencing Guidelines. The Committee is trying to fashion a fair, streamlined procedure to permit defendants and lawyers to determine exactly how Guidelines will affect a plea. The Committee is also concerned about the

growing insistence by the government that a defendant waive the right to appeal and to bring a collateral attack as a condition to entering into a plea; the Committee is considering whether to amend Rule 11 to prevent this kind of waiver. The Committee is also considering how to treat alternate jurors once the jury has retired. Judge Dowd noted that none of the described developments has any immediate impact on matters within the jurisdiction of the Evidence Rules Committee.

Restylized Appellate Rules

Judge Stotler reported that the Appellate Rules have been restyled, so that they are more concise, consistent and clear. She noted that commentary on the changes has been very positive. Those Committee members familiar with the changes unanimously expressed the opinion that the modifications in style are a great improvement. Judge Stotler noted that there is no immediate plan to restyle the Federal Rules of Evidence.

Evidence Project

The Chair informed the Committee that she had been contacted by Professor Rice of American University Law School, concerning a project that he has sponsored. This project proposes a total overhaul of the Federal Rules of Evidence. After discussion, the Committee determined that while it would monitor the progress of this project, it found no need for a full-scale revision of the

Evidence Rules.

Next Meeting

The Chair announced that the next meeting of the Committee would take place on April 14th and 15th in Washington, D.C.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

Agenda Item 8

BOSTON COLLEGE

LAW SCHOOL

TO: Committee on Rules of Practice and Procedure

FROM: Daniel R. Coquillette, Reporter

DATE: December 4, 1996

INTERIM REPORT ON STUDY OF RULES GOVERNING ATTORNEY CONDUCT

Introduction

During the past year, this Committee conducted two special invitational study conferences on federal rules governing attorney conduct. The first was on January 9-10, 1996 in Los Angeles and the second on June 18-19, 1996 in Washington, D.C. Distinguished experts attended these conferences, representing all important constituencies of the bench and bar. They were fairly unified in their conclusions, which are set out in the Committee Minutes of June 19-20, 1996 at pages 31-33, (hereafter, "Minutes").

One of these conclusions was that the Committee should seriously consider recommending a model local rule similar to that recommended by the Committee on Court Administration and Case Management (hereafter "CACM") in 1978. That rule, which was included in the Model Federal Rules of Attorney Disciplinary Enforcement (1978) as Model Rule 4, is set out in Appendix A to this Interim Report.

Before acting on this recommendation, however, this Committee requested the Reporter and the Federal Judicial Center to provide four additional studies. See Minutes, page 33. The studies are as follows: 1) a report on the actual experience in those 23 district courts that have local rules loosely based on the 1978 CACM Model Rule 4; 2) a report on the frequency with which federal courts have handled attorney discipline matters directly instead of referring them to state disciplinary authorities; 3) a report on cases on attorney conduct in the bankruptcy court system and on the impact on such cases of Section 327 of the Bankruptcy Code; and 4) a report on cases on attorney conduct in the courts of appeals, with particular attention to Fed. R. App. P. 46.

The Federal Judicial Center, with the special assistance of Marie Cordisco, has kindly undertaken Studies 1 and 2. I have undertaken Studies 3 and 4 as Reporter. All four studies should be completed in time to be circulated with the materials for the June 19-20, 1997 meeting of this Committee.

STUART HOUSE, 885 CENTRE STREET, NEWTON, MASSACHUSETTS 02159-1163
617-552-8550 FAX 617-552-2615

PURPOSE OF THE REPORTS

The purpose of these four reports is to complete the Committee's study of local rules governing attorney conduct, and to permit action by the Committee at the June, 1997 meeting. As indicated in the Minutes, pages 31-33, the options recommended by the Special Study Conference experts are either to ask the Judicial Conference to promulgate a model local rule similar to the 1978 CACM model ("Option 4", page 32) or to recommend to the Judicial Conference a few carefully focused uniform federal rules that are limited to certain special federal interests, leaving the rest of attorney governance to state law ("Option 5", page 32). Success of negotiations between the Conference of Chief Justices and the Department of Justice on ABA Model Rule 4.2 and other matters could influence this choice. It was also left undecided as to whether any recommendations should include bankruptcy courts or courts of appeals.

Study No. 1, undertaken by the Federal Judicial Center, is designed to ascertain whether those district courts which have already adopted a version of the 1978 CACM Model Rule 4 have had a good experience with it in practice. Obviously, this report should inform the Committee's decision whether or not to recommend to the Judicial Conference promulgation of a model local rule similar to the 1978 CACM Model, or whether to recommend a different rule.

The 1978 CACM Model Rule 4 is currently incorporated in the Federal Rules of Disciplinary Enforcement. See Appendix "A" to this Interim Report. It establishes a "dynamic conformance" to state law, i.e. it incorporates the rules of professional conduct of the highest court of the state in which the district court sits, "as amended from time to time by the state court," except otherwise provided by other specific local rules of the district court. One reason for this "dynamic conformance" with state law is the ability it gives to refer problems of attorney conduct directly to state disciplinary authorities, rather than having a separate federal apparatus for investigation and enforcement.

Study No. 2 is designed to ascertain whether such referrals to state disciplinary authorities have, in general, been successful, or whether federal district courts have had to do direct federal investigations and engage in direct bar discipline. See, for example, In re Rufus Cook, 49 F.3d 263 (1995) 1995 WL 73098 (7th Cir.). This study should be of direct assistance to the Committee on the decision of whether to recommend a model rule that incorporates "dynamic conformity" with state law, such as Model Rule 4.

Study No. 3 addresses the special issues presented by bankruptcy courts and the bankruptcy bar. Throughout the two special invitational study sessions, I was greatly assisted by Gerald K. Smith, the ethics liaison from the Advisory Committee on Bankruptcy Rules, and by Patricia S. Channon, Deputy Assistant Chief, Bankruptcy Division. They have made a compelling case that no rules should be

adopted that include bankruptcy courts without careful study of actual cases in the bankruptcy courts and the effect of the Bankruptcy Code, particularly Section 327. (11 U.S.C. § 328). See also Edwin Smith et al "Ethical Standards in Bankruptcy Contexts: Disinterestedness" PL1 Order No. A4-4503 (April 22-23, 1996); Gerald Smith, et al, "Simultaneous Representation — Bankruptcy Representation — Bankruptcy Code and Applicable Ethical Rules," ABA Spring Meeting Materials for Professional Ethics in Bankruptcy Cases Subcommittee (March 29, 1996). Study No. 3 should assist the Committee in whether to include bankruptcy courts in any recommended new rules, or whether to suggest development of independent standards.

Courts of appeals also present special concerns. To begin, of course, there is already a uniform federal rule governing attorney conduct in courts of appeals, Fed. R. App. P. 46. Rule 46(b) states that a member of the bar will be subject to supervision or disbarment from the court when it is shown: (1) that the attorney has been suspended or disbarred from any other court of record or (2) has been guilty of "conduct unbecoming a member of the bar." Rule 46(b) also provides an opportunity for the attorney to show good cause why suspension or disbarment would be unjustified. Rule 46(c) states that a member of the bar practicing before the court will be subject to disciplinary action for (1) "conduct unbecoming a member of the bar" or (2) "for failure to comply with these rules or any rule of the court." Id. Rule 46(c) requires the court to provide "reasonable notice and an opportunity to show cause to the contrary" before taking any disciplinary action against the attorney. Id.

The Supreme Court has defined the phrase "conduct unbecoming a member of the bar." In In re Snyder, 472 U.S. 634, 105 S.Ct. 2874, 2881 (1985), the court interpreted this phrase to require "conduct contrary to the professional standards that shows an unfitness to discharge the continuing obligations to clients or the courts, or conduct inimical to the administration of justice." Id. The Supreme Court further stated that case law, applicable court rules and the codes of professional conduct provide guidance in determining the scope of these affirmative obligations. Id.; see also Matter of Hendrix, 986 F.2d 195, 201 (7th Cir. 1993) (Rule 11 of the Federal Rules of Civil Procedure and the Rules of Professional Conduct provide guidance as to actions sanctionable under Rule 46); In re Bithony, 486 F.2d 319, 324 (1st Cir. 1973) (complex code of behavior embodied in Code of Professional Responsibility helps define "conduct unbecoming a member of the bar."). Indeed, the Supreme Court's own rules also contain the "conduct unbecoming a member of the bar standard. See S.Ct. R. 8.

Because the Rule 46 "conduct unbecoming" standard has been read to include reference to "professional standards," seven courts of appeals have adopted local rules that provide more specific standards. See Report on Local Rules Regulating Attorney Conduct (July 5, 1995) page 8 and Chart III ("Rules of Professional Conduct in the 12 Circuit Courts"), prepared by me at the request of this Committee. Three have adopted local rules with a "dynamic conformity" to the rules adopted by the

highest court of the state in which attorney is admitted to practice. The 11th Circuit also has a rule adopting such a standard, but only to the extent that the state rules "are not inconsistent with the ABA Model Rules, in which case the model rules govern." Both the 11th Circuit and the Court of Appeals of the District of Columbia have local rules that show signs of influence from CACM Model Local Rule 4. Five courts of appeals have no local rules to supplement Rule 46, but the 4th and 8th Circuits have Internal Operating Procedures and the Clerk's Office of the 5th Circuit states that "it is longstanding court practice to look to and follow the ethical rules adopted by the highest court in the state of the attorney's domicile, while always being mindful of the ABA Model Rule." See Chart III, supra, page 2.

The uniformity of these local appellate rules — or lack thereof — has been the subject of a major study by Professor Gregory C. Sisk of Drake University, "The Balkanization of Federal Appellate Justice," about to be published in the University of Colorado Law Review. Professor Sisk believes that "Ideally, the vague standard in Federal Rule of Appellate Procedure 46 should be deleted and replaced by a new standard through the Rules Enabling Act. However, although FRAP 46 does contain a uniform national ethical standard, a model local rules approach could still be applied in this context, in the nature of a clarifying or specifying local rule giving meaningful content to the "conduct unbecoming a lawyer" standard." (Letter, June 26, 1996)

Study No. 4 will address this issue by reviewing all reported cases of attorney discipline in the courts of appeals and the reported record of all applications of F.R. App. P. 46. This study should certainly assist this Committee in deciding whether to recommend a model local rule for application in courts of appeals, as well as district courts.

CONCLUSION

These four studies are all underway. Four other extensive studies have already been completed, and are available from the Rules Committee Support Office of the Administrative Office. (Tel. 202-273-1820; Fax. 202-273-1826). These studies are:

1. "Report on Local Rules Regulating Attorney Conduct" (July 5, 1995). (This report includes charts of the local rules in effect in all district courts and courts of appeal.)

2. Marie Cordisco, "Eligibility Requirements for, and Restrictions on, Practice before the Federal District Courts," Federal Judicial Center, (November 7, 1995). (This excellent report describes the rules governing attorney admission in all federal district courts.)

3. "Study of Recent Cases (1990-1995) Involving Rules of Attorney Conduct" (December 1, 1995). (This report contains charts breaking down all recent federal cases by rule and subject categories.)

4. "Supplement to Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct" (May 14, 1996). (This study includes all reported federal cases between July 1, 1995 and March 23, 1996).

Together, the eight studies will cover all aspects of rules governing attorney conduct in all federal courts. Assistance or suggestions from Committee members is always welcome. Please feel free to contact the Federal Judicial Center, Care of Marie Cordisco, or myself, at the following addresses:

Marie Cordisco
Research Division
The Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20002-8003
Tel: 202-273-4070
Fax: 202-273-4021

Daniel Coquillette
Monan University Professor
Boston College Law School
885 Centre Street
Newton Centre, MA 02159
Tel: 617-552-8650
Fax: 617-576-1933

APPENDIX A

Proposed Model Local Rule, Committee on Court Administration and Case Management, Judicial Conference in the United States. From "Rules of Attorney Disciplinary Enforcement" (1978).

MODEL RULE (4)

Standards for Professional Conduct

A. For misconduct defined in these Rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this Court may be disbarred, suspended from practice before this Court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant.

B. Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility [or Rules of Professional Conduct]** adopted by this court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility [or Rules of Professional Conduct]** adopted by this court is the Code of Professional Responsibility [or Rules of Professional Conduct]** adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state.

MS1

** Bracketed language is commonly found in districts using this model rule after the adoption of the ABA Model Rules of Professional Conduct in 1983.

Agenda Item 9

COMMITTEE ON RULES OF PRACTICE AND PROCEDURES
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

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

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 5, 1996

The Advisory Committee on Appellate Rules has very little to report and will not be presenting any items for action by the Standing Committee. The Advisory Committee did not meet this fall because it decided to delay work on any new projects until after the close of the comment period on the "style" packet, which period ends December 31, 1996.

Since the Standing Committee's meeting last June, however, the Advisory Committee has completed two tasks.

1. **Further improvement of the proposed changes to Form 4.** Pursuant to a request from the Clerk of the United States Supreme Court, last June the Advisory Committee presented for your consideration a revised Form 4 from the appendix of forms that accompanies the appellate rules. The Supreme Court rules require parties desiring to proceed *in forma pauperis* to file an affidavit or declaration in the form prescribed by Appellate Form 4. The Clerk advised that Form 4 needs to be changed to include more detailed financial information. At almost the same time, the Congress passed legislation affecting *in forma pauperis* appeals by prisoners. The legislation requires detail on "all assets" of the prisoner and requires a certified statement of the receipts, expenditures, and balances in the prisoner's institutional account during the preceding six months. At the June meeting the Standing Committee approved in principle the recommended changes in Form 4 but further simplification of the language was suggested.

Bryan Garner redrafted the form using simpler language and the Advisory Committee conferred by telephone on final changes to the language. The form as redrafted was published in August along with proposed changes in Appellate Rules 5 and 5.1.

2. **Advisory Committee's self-evaluation.** In October Judge Wm. Terrell Hodges, Chairman of the Executive Committee of the Judicial Conference of the United States, asked each of the Judicial Conference committees to conduct a self-evaluation. Because the Executive Committee plans to review the self-evaluations at a February 1997 meeting and the Advisory Committee did not plan to meet prior to that time, I polled the members of the Advisory Committee by mail. On the basis of their responses I prepared a draft of the self-evaluation for review by the members of the Advisory Committee. With their approval, the report was submitted. In short, we recommend the committee's continued existence.

With regard to the style project, thus far we have received surprisingly few comments; they are generally favorable. The comments contain some suggestions for improvement and clarification as well as some new substantive suggestions; the latter will be placed on the Advisory Committee's docket for later consideration.

An updated version of the Advisory Committee's Table of Agenda Items is included for your information.

Advisory Committee on the Federal Appellate Rules
Table of Agenda Items -- Revised December 1996

FRAP Item	Proposal	Source	Current Status
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 en 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 Approved for submission to Standing Committee 4/96 Approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97
90-1	Amend FRAP 35(b) and (c) to change "suggestion" for an en banc to a "petition" for an en 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 Standing Committee approved new draft for publication 1/96 Published 4/96

FRAP Item	Proposal	Source	Current Status
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 Standing Committee approved new draft for publication 1/96 Published 4/96

FRAP Item	Proposal	Source	Current Status
[illegible]	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 Became effective 12/1/96
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91

FRAP Item	Proposal	Source	Current Status
91-24	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 Approved for submission to Standing Committee 4/96 Approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97
91-25	Amendment of Rule 35 to specify contents of suggestions for rehearing en 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 Approved for submission to Standing Committee 4/96 Approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97

FRAP Item	Proposal	Source	Current Status
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 Standing Committee approved new draft for publication 1/96 Published 4/96
92-4	Amendment of Rule 35 to include intercircuit conflict as ground for seeking en 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 Approved for submission to Standing Committee 4/96 Approved by Standing Committee 7/97; will be forwarded to Judicial Conference with restyled rules 8/97

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 Became effective 12/1/96
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
93-3	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 Approved for submission to Standing Committee 4/96 Approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97

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 Approved for submission to Standing Committee 4/96 Approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97
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 Approved for submission to Standing Committee 4/96 Approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97
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 Approved for submission to Standing Committee 4/96 Approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97
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

FRAP Item	Proposal	Source	Current Status
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
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	Approved for submission to Standing Committee 4/96 Approved by Standing Committee for publication 7/96 Published 8/96
96-1	Amend Form 4 to obtain information about living expenses.	Wm. Suter, Clerk of the Supreme Court	Approved for submission to Standing Committee 4/96 Approved by Standing Committee for publication 7/96 Published 8/96
96-2	Amend Rule 4(b) so that an extension of time to file a notice of appeal can be granted in a criminal case even without excusable neglect.	Hon. R. Posner (CA-7)	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
96-3	Add presumption against oral argument for all matters other than the substance of the appeal (in Rule 34?).	Advisory Committee	Awaiting initial discussion

Agenda Item 104

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

From: Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules

Date: December 6, 1996

Re: Report of the Advisory Committee on Civil Rules

I Introduction

The Advisory Committee on Civil Rules met on October 17 and 18, 1996, at the Administrative Office of the United States Courts in Washington, D.C. A brief summary of the topics considered at the meeting is provided in this Introduction. Part II recommends that this Committee transmit to the Judicial Conference changes to conform the Civil Rules to the repeal of the statutory provision that allowed parties that had agreed to trial before a magistrate judge to agree also that the first appeal would be taken to the district court. Part III(A) notes the developing events during the continuing comment period for the Civil Rule 23 proposals that were published in August. Part III(B) describes the progress made to implement the discovery study that was sketched in the May 17, 1996 Report of the Civil Rules Advisory Committee to this Committee.

Several committees of the Advisory Committee were appointed to help focus the work of the Advisory Committee. The committees appointed to address current projects include the Admiralty Committee, Discovery Committee, RAND Report Committee, and Technology Committee. An Agenda and Policy Committee also was appointed.

Early, nonfinal drafts of the RAND report on experience with local plans implementing the Civil Justice Reform Act were discussed. Judge Jerome Simandle, of the Court Administration and Case Management Committee, was present and made valuable contributions to the discussion of means of coordinating the work of the advisory committees and this Committee with the Court Administration and Case Management Committee. It is anticipated that close coordination will be possible during the very brief time that will be available for offering advice to the Judicial Conference. No concrete advice was offered or considered, however, because too many aspects of the enterprise remain work in progress. The Advisory Committee will not be able to consider the recommendations of the Court Administration and Case Management Committee in time for this Report. A supplemental report will be provided once the recommendations are known.

A variety of other topics were considered. Proposals to amend the Admiralty Rules, advanced by the Department of Justice and the Maritime Law Association, were referred to the Admiralty Committee for further review and drafting under the uniform style

conventions. The continuing problem of developing good advice about the Copyright Rules was discussed. Proposals to permit private carrier or electronic service of papers after the initial summons and complaint were referred to the Technology Committee. Note was taken of the Judicial Conference decision to fund a court-appointed panel of neutral experts in the consolidated MDL litigation involving silicone gel breast implants. The Evidence Rules Advisory Committee request for review of proposed Evidence Rule 103(e) was met by discussion and a report of the draft Minutes to the Evidence Rules Committee. Answers were prepared for the quinquennial questionnaire that asks the Advisory Committee to consider its own continuing role and function.

The draft Minutes of the October meeting are attached as an appendix.

II ACTION ITEMS

Rules Transmitted for Judicial Conference Approval

Rules 73, 74, 75, 76

Section 207 of S. 1887, the Federal Courts Improvement Act of 1996, Act of October 19, 1996, reshapes the 28 U.S.C. § 636 provisions for appeal from a judgment entered by a magistrate judge following consent to trial before the magistrate judge. Section 636(c) formerly provided two alternative appeal paths. Appeal could be taken to the court of appeals, or, alternatively, the parties could agree at the time of consenting to trial before a magistrate judge that any appeal would be taken to the district court. The judgment of the district court on appeal from the magistrate judge could be reviewed only by petition to the court of appeals for leave to appeal. This second appeal path has been rescinded, leaving only the path of direct appeal to the court of appeals.

Portions of Civil Rule 73 refer to the former provision for appeal to the district court. Civil Rules 74, 75, and 76 establish the procedure for appeal to the district court. Rule 73 must be conformed to the statute as amended, and Rules 74, 75, and 76 must be abrogated. Portions of Forms 33 and 34 also must be changed to conform to the statutory and rules changes. To conform these rules to the statutory changes, the Advisory Committee recommends the changes shown below in the usual form.

The Advisory Committee also recommends that these changes be transmitted to the Judicial Conference without any period of public comment, with the recommendation that they be sent on to the Supreme Court for submission to Congress. Part I(4)(d) of the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure authorizes this Committee to "eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it

determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception."

Parties no longer can consent to appeal from the judgment of a magistrate judge to the district court. Perpetuation of the Civil Rules describing such appeals serves no purpose and may mislead some parties to consent to trial before a magistrate judge for the purpose of also achieving a hoped-for speedy and inexpensive opportunity to appeal "at home." Even if the comment and hearing requirement is excused, conforming amendments can become effective only on December 1, 1997, more than a full year after the statutory change. With comment and hearing, the date would be pushed back to December 1, 1998. Once Congress has made the decision to abolish this means of appeal, the only question for the Enabling Act Process is the technical one of making the right conforming changes. The Advisory Committee believes that the conforming changes are sufficiently clear to justify prompt action.

It is possible that on December 1, 1997, some cases will remain pending before magistrate judges in which the parties have consented to appeal to the district court. There is no need to defer conforming changes for fear of the impact on these cases. The retroactive effect of the statutory change is not a matter to be resolved by court rule. The effect of the conforming rules changes will be governed by the Supreme Court order making the amendments; the usual provision in rules orders is that the changes take effect on December 1 and "govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." 28 U.S.C.A. § 2074(a) provides that changes do not apply to pending proceedings "to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies."

Conforming Changes: Rules 73, 74, 75, 76; Forms 33, 34

Rule 73. Magistrate Judges; Trial by Consent and Appeal ~~Options~~

(a) Powers; Procedure. * * * * * A record of the proceedings shall be made in accordance with the requirements of Title 28, U.S.C. § 636(c)(~~7~~5).

* * * * *

(c) ~~Normal~~ Appeal ~~Route~~. In accordance with Title 28, U.S.C. § 636(c)(3), ~~unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule,~~ appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

~~**(d) Optional Appeal Route.** In accordance with Title 28, U.S.C. § 636(c)(4), at the time of reference to a magistrate judge, the parties may consent to appeal on the record to a district judge~~

~~of the court and thereafter, by petition only, to the court of appeals.~~

Committee Note

The Federal Courts Improvement Act of 1996 repealed the former provisions of 28 U.S.C. § 636(c)(4) and (5) that enabled parties that had agreed to trial before a magistrate judge to agree also that appeal should be taken to the district court. Rule 73 is amended to conform to this change. Rules 74, 75, and 76 are abrogated for the same reason. The portions of Form 33 and Form 34 that referred to appeals to the district court also are deleted.

~~**Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)**~~

~~**(a) When Taken.** When the parties have elected under Rule 73(d) to proceed by appeal to a district judge from an appealable decision made by a magistrate judge under the consent provisions of Title 28, U.S.C. § 636(c)(4), an appeal may be taken from the decision of a magistrate judge by filing with the clerk of the district court a notice of appeal within 30 days of the date of entry of the judgment 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 of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days thereafter, or within the time otherwise prescribed by this subdivision, whichever period last expires.~~

~~The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing of any of the following motions with the magistrate judge by any party, and the full time for appeal from the judgment entered by the magistrate judge commences to run anew from entry of any of the following orders: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.~~

~~An interlocutory decision or order by a magistrate judge which, if made by a district judge, could be appealed under any provision of law, may be appealed to a district judge by filing a notice of appeal within 15 days after entry of the decision or order, provided the parties have elected to appeal to a district judge under Rule 73(d). An appeal of such interlocutory decision or order shall not stay the proceedings before the magistrate judge unless the magistrate judge or district judge shall so order.~~

~~Upon a showing of excusable neglect, the magistrate judge may extend the time for filing a notice of appeal upon motion filed not later than 20 days after the expiration of the time otherwise prescribed by this rule.~~

~~**(b) Notice of Appeal; Service.** The notice of appeal shall specify the party or parties taking the appeal, designate the judgment, order or part thereof appealed from, and state that the~~

~~appeal-is-to-a-judge-of-the-district-court.--The-clerk-shall-mail copies-of-the-notice-to-all-other-parties-and-note-the-date-of mailing-in-the-civil-docket.~~

~~(c)-**Stay-Pending-Appeal.**--Upon-a-showing-that-the-magistrate judge-has-refused-or-otherwise-failed-to-stay-the-judgment-pending appeal-to-the-district-judge-under-Rule-73(d),-the-appellant-may make-application-for-a-stay-to-the-district-judge-with-reasonable notice-to-all-parties.--The-stay-may-be-conditioned-upon-the-filing in-the-district-court-of-a-bond-or-other-appropriate-security.~~

~~(d)-**Dismissal.**--For-failure-to-comply-with-these-rules-or-any local-rule-or-order,-the-district-judge-may-take-such-action-as-is deemed--appropriate,--including--dismissal--of--the--appeal.---The district-judge-also-may-dismiss-the-appeal-upon-the-filing-of-a stipulation-signed-by-all-parties,-or-upon-motion-and-notice-by-the appellant.~~

Committee Note

Rule 74 is abrogated for the reasons described in the Note to Rule 73.

~~**Rule-75.--Proceedings-on-Appeal-From-Magistrate-Judge-to-District Judge-Under-Rule-73(d)**~~

~~(a)-**Applicability.**--In-proceedings-under-Title-28,-U.S.C.-§ 636(c),-when-the-parties-have-previously-elected-under-Rule-73(d) to-appeal-to-a-district-judge-rather-than-to-the-court-of-appeals, this-rule-shall-govern-the-proceedings-on-appeal.~~

~~(b)-**Record-on-Appeal.**~~

~~--(1)-*Composition.*--The-original-papers-and-exhibits-filed with-the-clerk-of-the-district-court,-the-transcript-of-the proceedings,-if-any,-and-the-docket-entries-shall-constitute the-record-on-appeal.--In-lieu-of-this-record-the-parties, within-10-days-after-the-filing-of-the-notice-of-appeal,-may file-a-joint-statement-of-the-case-showing-how-the-issues presented--by--the--appeal--arose--and--were--decided--by--the magistrate-judge,-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.~~

~~--(2)-*Transcript.*--Within-10-days-after-filing-the-notice-of appeal--the--appellant--shall--make--arrangements--for--the production-of-a-transcript-of-such-parts-of-the-proceedings-as the-appellant-deems-necessary.--Unless-the-entire-transcript is-to-be-included,--the-appellant,-within-the-time-provided above,-shall-serve-on-the-appellee-and-file-with-the-court-a description-of-the-parts-of-the-transcript-which-the-appellant intends-to-present-on-the-appeal.--If-the-appellee-deems-a transcript-of-other-parts-of-the-proceedings-to-be-necessary, within-10--days--after--the--service--of--the--statement--of--the appellant,-the-appellee-shall-serve-on-the-appellant-and-file with--the--court--a--designation--of--additional--parts--to--be included.---The--appellant--shall--make--arrangements--for--the inclusion-of-all-such-parts-unless-the-magistrate-judge,-upon~~

~~motion, exempts the appellant from providing certain parts, in which case the appellee may provide for their transcription.~~

~~*(3) Statement in Lieu of Transcript.* If no record of the proceedings is available for transcription, the parties shall, within 10 days after the filing of the notice of appeal, file a statement of the evidence from the best available means to be submitted in lieu of the transcript. If the parties cannot agree they shall submit a statement of their differences to the magistrate judge for settlement.~~

~~**(c) Time for Filing Briefs.** Unless a local rule or court order otherwise provides, the following time limits for filing briefs shall apply.~~

~~(1) The appellant shall serve and file the appellant's brief within 20 days after the filing of the transcript, statement of the case, or statement of the evidence.~~

~~(2) The appellee shall serve and file the appellee's brief within 20 days after service of the brief of the appellant.~~

~~(3) The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee.~~

~~(4) If the appellee has filed a cross appeal, the appellee may file a reply brief limited to the issues on the cross appeal within 10 days after service of the reply brief of the appellant.~~

~~**(d) Length and Form of Briefs.** Briefs may be typewritten. The length and form of briefs shall be governed by local rule.~~

~~**(e) Oral Argument.** The opportunity for the parties to be heard on oral argument shall be governed by local rule.~~

Committee Note

Rule 75 is abrogated for the reasons described in the Note to Rule 73.

~~**Rule 76. Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs**~~

~~**(a) Entry of Judgment.** When the parties have elected under Rule 73(d) to appeal from a judgment of the magistrate judge to a district judge, the clerk shall prepare, sign, and enter judgment in accordance with the order or decision of the district judge following an appeal from a judgment of the magistrate judge, unless the district judge directs otherwise. The clerk shall mail to all parties a copy of the order or decision of the district judge.~~

~~**(b) Stay of Judgments.** The decision of the district judge shall be stayed for 10 days during which time a party may petition the district judge for rehearing, and a timely petition shall stay the decision of the district judge pending disposition of a petition for rehearing. Upon the motion of a party, the decision of the district judge may be stayed in order to allow a party to petition the court of appeals for leave to appeal.~~

~~**(c) Costs.** Except as otherwise provided by law or ordered by the district judge, costs shall be taxed against the losing party; if a judgment of the magistrate judge is affirmed in part or reversed in part, or is vacated, costs shall be allowed only as~~

~~ordered-by-the-district-judge.--The-cost-of-the-transcript,-if necessary-for-the-determination-of-the-appeal,-and-the-premiums paid-for-bonds-to-preserve-rights-pending-appeal-shall-be-taxed-as costs-by-the-clerk.~~

Committee Note

Rule 76 is abrogated for the reasons described in the Note to Rule 73.

Form 33. Notice of Availability of Magistrate Judge to Exercise Jurisdiction ~~and-Appeal-Option~~

* * * * *

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. ~~Alternatively,-upon-consent-by-all parties,-an-appeal-from-a-judgment-entered-by-a-magistrate-judge may-be-taken-directly-to-a-district-judge.--Cases-in-which-an appeal-is-taken-to-a-district-judge-may-be-reviewed-by-the-United States-court-of-appeals-for-this-judicial-circuit-only-by-way-of petition-for-leave-to-appeal.~~

Copies of the Form for the "Consent to Jurisdiction by a United States Magistrate Judge" ~~and-"Election-of-Appeal-to-a District-Judge"~~ are available from the clerk of the court.

Form 34. Consent to Exercise of Jurisdiction by a United States Magistrate Judge~~,-Election-of-Appeal-to-District-Judge~~

* * * * *

~~**ELECTION-OF-APPEAL-TO-DISTRICT-JUDGE**~~

~~[Do-not-execute-this-portion-of-the-Consent-Form-if-you-desire-that the-appeal-lie-directly-to-the-court-of-appeals.]~~

~~In-accordance-with-the-provisions-of-Title-28,-U.S.C.-§ 636(c)(4),-the-undersigned-party-or-parties-elect-to-take-any appeal-in-this-case-to-a-district-judge-of-this-court.~~

~~---Date------------------------Signature~~

Note: Return this form to the Clerk of the Court if you consent to jurisdiction by a magistrate judge. Do not send a copy of this form to any district judge or magistrate judge.

III Informational Items

A. Rule 23 Hearings

In August, 1996, proposed amendments to Civil Rule 23 were published for comment. Written comments are beginning to arrive. Three public hearings have been scheduled. The first hearing was held in Philadelphia on November 22, drawing nearly three dozen witnesses. Virtually every feature of the proposed amendments drew extensive comment. The comments ranged from full support for the proposals through suggestions for improvement to strong opposition. Although in one sense the comments reflected themes that had been made familiar during the lengthy process that led to proposal of these amendments, they also provided much ground for further reflection. The specific focus provided by specific proposals is doing much to enhance the process. Further hearings are scheduled for December 16 in Dallas and for January 17, 1997, in San Francisco.

One of the proposed amendments would add a new subdivision (b)(4) to Rule 23, resolving a difference among the circuits on the proper role of classes certified for purposes of settlement only, not for trial. More than two months after publication of the proposals, the Supreme Court granted certiorari in one of these cases, *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir.), *certiorari granted* ___ 117 S.Ct. ___ (No.96-270, November 1, 1996). It is not possible to anticipate the ways in which the Supreme Court's disposition of this case may affect the shape of any settlement class provision. That matter must await the event.

B. Discovery Project

In reaction to the same forces that produced the Civil Justice Reform Act, Rule 26 was amended in 1993 to provide for the experimental local option of mandated initial disclosure in civil cases. The practices that were subsequently employed by the 94 districts vary widely and are now susceptible of study. From the beginning, it was understood that it would be necessary to analyze the experiences and adopt the best approach as a new national rule.

Also in response to the Civil Justice Reform Act's urging that procedures be discovered to reduce delay and cost in litigation and in response to similar demands of attorneys directed more specifically at the cost of discovery, the Advisory Committee decided to undertake a more comprehensive look at the discovery rules, principally to determine their cost to litigation and to discover paths to reduce the cost without reducing fairness in the resolution of disputes.

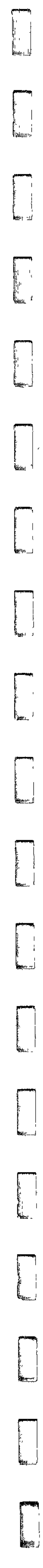
The Advisory Committee accordingly decided at its October meeting to address these discovery issues as part of a long-term and comprehensive discovery project that also will include long-standing projects of the Committee to review the grounds for

vacating or modifying Rule 26(c) protective orders, to review the scope of discovery provided by Rule 26(b)(1), and to review discovery abuse.

The Discovery Committee was appointed. A special Reporter, Professor Richard L. Marcus, has accepted appointment for work on the discovery study. The Federal Judicial Center has agreed to undertake a new empirical study of discovery, working in conjunction with the Discovery Committee to plan the proper scope of the study. A conference on discovery is being planned for September, 1997, to attempt to gather as many reform ideas as possible. If these efforts are successful, the October, 1997 meeting of the Advisory Committee will seek to identify promising approaches to be developed by the Discovery Committee for consideration by the Advisory Committee at the spring, 1998 meeting.

It is far too early to speculate on the directions that discovery reform may take. One possible combination, for example, would strengthen and nationalize initial disclosures; permit a limited area of party-directed discovery; and require a formal discovery plan, approved by the court, for more extensive discovery. Many variations on this three-layer, "neapolitan," approach can be imagined.

Because discovery is so important, the Advisory Committee hopes to find changes that are recognized as improvements by judges and by lawyers on all sides of the litigation process. Care must be taken to avoid changes that predictably and systematically work more to the advantage of defendants, or more to the advantage of plaintiffs. At the end of this project, it may be concluded that significant changes are not possible because there is good reason for the substantial controversy that surrounds any proposal. It may instead be concluded that there is no need to reform the discovery rules — that there are no problems that can be cured without incurring undue costs, or that whatever problems may exist can be cured by better use of the discovery rules we now have. Whatever the lessons may be, and whatever proposals for rules amendments may emerge, a thorough study of present experience may help put the broad discovery issues to rest.



Agenda Item 10B-C

1 **DRAFT MINUTES**

2 **CIVIL RULES ADVISORY COMMITTEE**

3 **October 17 and 18, 1996**

4 **Note: This Draft Has Not Been Reviewed by the Committee**

5 The Civil Rules Advisory Committee met on October 17 and 18,
6 1996, at the Administrative Office of the United States Courts in
7 Washington, D.C. The meeting was attended by members Judge Paul V.
8 Niemeyer, chair, Judge John L. Carroll, Judge David S. Doty,
9 Justice Christine M. Durham, Francis H. Fox, Esq., Assistant
10 Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge
11 David F. Levi, Judge Lee H. Rosenthal, Professor Thomas D. Rowe,
12 Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip
13 A. Wittmann, Esq. Edward H. Cooper was present as reporter. Judge
14 Patrick E. Higginbotham, outgoing chair, also attended. Judge
15 Alicemarie H. Stotler, Chair of the Committee on Rules of Practice
16 and Procedure, was present. Sol Schreiber, Esq., attended as
17 liaison member of the Committee on Rules of Practice and Procedure,
18 and Judge Jane A. Restani attended as liaison member of the
19 Bankruptcy Rules Advisory Committee. Judge Jerome B. Simandle
20 attended as representative of the Committee on Court Administration
21 and Case Management. Joseph Spaniol, consultant to the Committee
22 on Rules of Practice and Procedure, attended. Peter McCabe, John
23 K. Rabiej, and Mark D. Shapiro represented the Administrative
24 Office of the United States Courts; Mark Siska and Melanie Gilbert
25 of the Administrative Office also were present. Joe S. Cecil,
26 Donna Stienstra, and Thomas E. Willging represented the Federal
27 Judicial Center. Observers included Alfred W. Cortese, Jr., Steve
28 France, Charles Harvey (liaison, American College of Trial
29 Lawyers), Russell Jackson, Fred S. Souk, H. Thomas Wells, Jr.
30 (liaison, ABA Litigation Section), and Sam Witt.

31 Judge Niemeyer opened the meeting by welcoming Judge Rosenthal
32 as a new member, and announcing the reappointment of several
33 members.

34 Judge Higginbotham was greeted with expressions of great
35 praise and deep gratitude for the energy and dedication he brought
36 to leading the committee through several challenging projects
37 during his term as chair, and for the remarkable programs he put
38 together to reach out to all parts of the bench and bar in taking
39 the Committee's class action study through to publication of
40 recommended revisions in Civil Rule 23.

41 The Minutes of the April, 1996 meeting were approved.

42 **CHAIRMAN'S REMARKS**

43 Judge Niemeyer opened the discussion of the Committee's agenda
44 by developing issues of program and structure.

45 The work of the Committee meetings has been heavy, and
46 promises to continue to be heavy. To make best use of the limited
47 time the Committee can work together, several working committees
48 will be formed to enhance the work that can be done at full

49 Committee meetings.

50 The Agenda and Policy Committee is responsible for reviewing
51 all materials that are put on the agenda for each Committee
52 meeting. It also will be responsible for considering the long-
53 range program of the Committee in discharging its statutory
54 responsibility to assist the Judicial Conference with the duty
55 imposed by 28 U.S.C. § 331 to "carry on a continuous study of the
56 operation and effect of the general rules of practice and
57 procedure." The members of the Agenda and Policy Committee are
58 Judge Scirica, chair, Judge Levi, and Phillip Wittmann.

59 The Technology Committee is responsible for considering the
60 many issues that will arise in attempting to adapt court practices
61 to the growing shift away from hard paper communication to
62 electronic communication. The members of the Technology Committee
63 are Judge Carroll, chair, Judge Rosenthal, and Professor Rowe. The
64 Bankruptcy Rules Advisory Committee has worked with these problems
65 regularly, and has been eager to adopt rules that will facilitate
66 use of electronic means for filing and, eventually, service. The
67 Standing Committee has created its own Technology Committee, to be
68 composed of representatives from each of the Advisory Committees.
69 Judge Carroll is the Civil Rules Committee's representative.

70 The RAND report on experience with the Civil Justice Reform
71 Act will require close study by this Committee. The first need is
72 to maintain contact with the Court Administration and Case
73 Management Committee as that committee prepares to make
74 recommendations to the Judicial Conference looking toward the
75 report that the Judicial Conference is required to make to Congress
76 by the end of June, 1997. This Committee will attend the March,
77 1997 meeting organized by the American Bar Association to study the
78 RAND report. The committee on the RAND report is Justice Durham,
79 chair, Assistant Attorney General Hunger, and Professor Rowe.

80 Discovery questions have been continually before the Committee
81 for many years. It has been several years, however, since the
82 Committee last explored the most fundamental issues going to the
83 scope of discovery and the relationship between "notice" pleading
84 and discovery. The time may have come to consider changes more
85 fundamental than those made in recent years. The Civil Justice
86 Reform Act manifests concern with the costs and delays associated
87 with discovery, and may justify further study. The new disclosure
88 practice authorized by Civil Rule 26(a) also must be studied.
89 These matters are discussed further below. The Discovery Committee
90 is Judge Levi, chair, Judge Doty, Judge Rosenthal, Carol J. Hansen
91 Posegate, and Francis Fox. Because the work of this committee will
92 be particularly heavy, efforts should be made to appoint an
93 associate reporter especially charged with working with this
94 committee.

95 Several changes in the admiralty rules are on the agenda for
96 this meeting. The specialized nature of admiralty practice
97 justifies appointment of a committee to review these proposals and
98 become responsible for the admiralty rules. The Admiralty

99 Committee is Mark Kasanin, chair, Judge Vinson, and Professor Rowe.

100 The Committee Reporter is ex officio a member of each of these
101 committees, and of the Standing Committee technology committee.

102 With the help of the Agenda and Policy committee, the
103 Committee must continue to think about the character of the tasks
104 it undertakes. Of the four proposals that were published for
105 comment in August, 1995, only one — a modest revision of the
106 interlocutory admiralty provisions of Civil Rule 9(h) — has been
107 sent to the Supreme Court by the Judicial Conference. Proposed
108 changes in the discovery protective order provisions of Rule 26(c)
109 provoked substantial controversy, and have been held for further
110 study in conjunction with the broader study of discovery issues to
111 be launched over the next year. A proposal to amend Rule 47(a) to
112 create a right of party participation in the voir dire examination
113 of prospective jurors revealed a sharp division of views between
114 judges and members of the bar. The committee concluded that rather
115 than persist with a rule change, it would be better to address the
116 misunderstandings between bench and bar by encouraging mutual
117 educational efforts. Judges should be made more aware of the
118 inadequacies that many lawyers perceive in judge-conducted voir
119 dire examination. Lawyers should be more willing to deny the
120 temptation to misuse the opportunity to participate that a majority
121 of federal judges now afford. The proposal to amend Rule 48 to
122 restore the 12-person civil jury was rejected by the Judicial
123 Conference, a matter discussed later in the meeting. It was known
124 from the beginning that these proposals would generate controversy.
125 Such controversies may in turn reflect competing interests that are
126 not easily reconciled in explicit rule provisions. One concern the
127 Committee may want to bear in mind is that proposals that reveal
128 sharp divisions among identifiable groups may not be the fair
129 balancing of competing interests that the Committee had intended.

130 It also is necessary to keep in mind the constant concern that
131 frequent changes in the rules are unsettling. Each transition to
132 a new way of doing things imposes costs, not only in learning of
133 the new rules and coming to understand them, but also in shaking
134 out the problems that arise in actual implementation. It is
135 tempting to amend a rule merely because it can be made, in some
136 way, better. The cost of actually implementing change must be
137 weighed carefully before indulging the temptation.

138 Once the Committee determines that a rule change is
139 worthwhile, it must be committed to pursuing the change with vigor.
140 The Committee should determine that each proposal is important and
141 clearly right, and then support it in every way appropriate.

142 **Rule 23 Report**

143 Judge Niemeyer introduced the current state of the Committee's
144 class-action proposals. The process of studying Rule 23 began in
145 1991. The elaborate efforts made by the Committee to reach out to
146 concerned constituencies proved enormously beneficial in showing
147 what the issues are. Many of the issues proved to be larger than

148 the grasp of the Rules Enabling Act process. A taste of these
149 larger issues is provided by Parts I and II of the August 7
150 memorandum that was written to introduce the proposed changes and
151 included in the agenda materials for this meeting.

152 Events inevitably continue apace outside the process of
153 amending the rules. One current phenomenon involves increasing
154 resort to state courts with actions on behalf of national classes.
155 The Supreme Court has recently granted review in a case that raises
156 the question whether a state court can recognize a mandatory
157 national class on terms that deny any right to opt out while
158 seeking to bind all members of the class. A direct answer to this
159 question may have dramatic effects on the development of mass tort
160 class actions, settlement classes, and related matters.

161 Just before the Rule 23 proposals were presented to the
162 Standing Committee, a letter signed by a large group of concerned
163 law professors urged that the Standing Committee not approve the
164 proposals for publication. The concerns raised by the letter are
165 in large part addressed by the Committee Note, which had not been
166 completed — and necessarily had not been made available — when the
167 letter was written. Several of these concerns may have abated, at
168 least with respect to many of the signers, in the wake of actual
169 publication of the proposals and note.

170 The Rule 23 proposals can be grouped into five categories.
171 First are the modifications of the factors listed in Rule 23(b)(3)
172 as bearing on the superiority of class treatment and the
173 predominance of common issues. These modifications will generate
174 controversy, particularly the balancing of costs and benefits
175 introduced by factor (F). As a group, these changes can be read
176 either to encourage or to discourage small-claim class actions. A
177 more accurate assessment is that they increase trial court
178 flexibility, expanding discretion in ways that will further reduce
179 the scope of effective appellate review. Second is the (b)(4)
180 settlement class. This has been the most misunderstood proposal.
181 In fact it retains all the requirements of subdivision (a), as well
182 as (b)(3), and — as a (b)(3) class — includes the requirements of
183 notice and opportunity to elect exclusion from the class. Third is
184 the change from the requirement that a certification decision be
185 made as soon as practicable to a requirement that it be made when
186 practicable. Fourth is the addition of an explicit requirement
187 that a hearing be held before approving a proposed class
188 settlement. These two changes are not likely to be controversial.
189 Finally is the provision for permissive interlocutory appeal from
190 certification decisions. Although the appeal provision has often
191 engendered doubts when first described, it has not been difficult
192 to demonstrate its virtues.

193 Public comment is likely to focus on (b)(3) and (b)(4). All
194 Committee members should encourage interested students of Rule 23
195 to participate in one of the three scheduled public hearings. And
196 as many members as can attend should do so. It is important, in a
197 process that naturally focuses on differences of opinion, to find

198 out whether there is general support for the proposals, general
199 opposition, or a deep division of opinion.

200 Judge Higginbotham then described the course of the Rule 23
201 proposals since the April meeting of this Committee. The first
202 caution is to remember that the proposal package represents a
203 minimalist approach to change. The issues the Committee decided
204 not to address are far more complex, and in many ways more
205 important. There are good reasons for the decisions not to address
206 these larger issues. The proposals do not deal with classes that
207 seek to include and bind future claimants, including those who have
208 not yet even experienced the injuries that eventually will make
209 them members of the class. Early proposals that would have allowed
210 a court to deny the right to be excluded from a (b)(3) class were
211 not pursued. Several letters were written to the Standing
212 Committee to challenge a proposal that this Committee had not made;
213 the misdirection made it easy to respond, but the misdirection also
214 can obscure the real issues. The letter signed by so many
215 academics was prepared without full knowledge of the process, and
216 should not be taken to represent a widespread judgment about the
217 merits of the proposals actually made. Much press attention
218 similarly was devoted to attacking a proposal that the press
219 thought had been made, but was not. And a good part of the initial
220 reactions has come from people concerned with pending litigation,
221 and the impact that the proposals might have on positions important
222 to the litigation. The August 7 memorandum in the agenda materials
223 was written to ensure public understanding of the proposals,
224 protecting against the risk of premature summaries, and to
225 underscore drafting options as well as to note some of the
226 proposals that were put aside. It was not published with the
227 proposals because it had not been before the Standing Committee at
228 the June meeting.

229 The Standing Committee seemed to understand the message that
230 the amount of attention devoted to the Rule 23 proposals so early
231 in the process reflects the importance of the underlying issues.
232 Attention and controversy should not defeat the proposals. Instead
233 close attention must be paid to all the public comments and
234 challenges. The Committee then must decide what is best, recommend
235 the best, and support it. The (b)(3)(F) proposal will draw a lot
236 of attention and comment. The Committee will benefit from it. And
237 it is important to adhere to the minimalist approach.

238 It seems likely that the next major developments in class
239 action doctrine will come in substantial part from developments on
240 the constitutional front. The Supreme Court review of the Alabama
241 mandatory class ruling will be an important beginning. It is
242 important to remember that the (b)(4) settlement class proposal
243 retains the right to opt out. The proposal in fact protects the
244 right to opt out better than many classes that are certified for
245 litigation and then settled after expiration of the opt-out period.
246 Under the (b)(4) proposal, the settlement agreement must be reached
247 before certification; the decision whether to opt out can be made
248 with knowledge of the settlement terms. In litigation classes that

249 settle after expiration of the opt-out period, the right to opt out
250 is protected only if the terms of the settlement provide it.

251 Discussion of the Rule 23 proposals reflected the minutes of
252 the Standing Committee draft minutes that were included in the
253 agenda materials. It was observed that although the Standing
254 Committee approved the proposals for publication and comment, many
255 members expressed strong reservations about several features of the
256 proposals. It will be important to find ways to make clear the
257 dependence of the (b)(4) settlement class proposal on (b)(3) class
258 status. And it will be even more important to provide information
259 in the Note that will help district judges know what to do with
260 proposed settlement classes. Consumer advocates will be up in arms
261 about the (b)(3)(F) class; many of the objections again can be met
262 by small changes that make it clear that many small-claims classes
263 will remain proper.

264 The law professors who expressed concern by writing the
265 Standing Committee have been invited to file further comments and
266 to appear at the public hearings. Their suggestions will be
267 important.

268 It was further suggested that there are three main sets of
269 class action problems today. First are federal-state problems.
270 Plaintiffs are moving more and more to state courts, particularly
271 in the wake of the Supreme Court decision that seems to entrench
272 the full-faith-and-credit effects of state class-action judgments.
273 There are serious questions whether it is desirable to allow a
274 single state to bind all states by certifying a national class.
275 Second are classes involving future claimants. The proposals leave
276 this problem to be worked out in the courts. Third are attorney
277 fees; perhaps proposals should be made to guide judges toward
278 better fee awards.

279 Further discussion of the federal-state relations problems
280 recognized the need to develop means of cooperation outside the
281 rules. Means of liaison with state judges are important. The
282 Conference of Chief Justices has a Mass Torts Litigation Committee.
283 All the district judges who have been assigned MDL cases meet
284 regularly, and discuss problems of relationships with state courts
285 and state litigation. A special master has been appointed in the
286 federal silicone gel breast implant litigation for the particular
287 purpose of facilitating coordination among state courts and between
288 state courts and federal courts.

289 The Committee was reminded that it had put aside proposals to
290 amend Rule 23(e) by adding a check-list of factors to be considered
291 in evaluating a proposed settlement.

292 Turning to the Judicial Conference rejection of the proposal
293 to amend Rule 48 to restore the 12-person jury, Judge Higginbotham
294 observed that the rejection was inevitable after the district
295 judges in the Conference concluded that various circuit district
296 judges associations were opposed to the proposal. The associations
297 did not have all of the background materials that provided

298 important information to this Committee in its deliberations. It
299 is difficult to find ways of educating district judges about the
300 important values served by proposals on topics that seem to yield
301 readily to the immediate lessons of their own experience. Six-
302 person juries are more convenient, and do not lead to manifestly
303 wrong verdicts. It is difficult to communicate to busy judges the
304 vastly improved representational quality of 12-person juries.

305 The 12-person jury enterprise should not be abandoned
306 entirely. The Judicial Conference came close to returning the
307 proposal to this Committee for further study, and the grounds for
308 the opposition were never explained. Although concern about
309 increased cost was a common element of the public comments, there
310 was no concern on that score. Instead there seemed to be a general
311 perception that smaller juries are working. Many judges now have
312 not had any experience with 12-person civil juries. There is an
313 apparent fear that given an opportunity for a 12-person jury, many
314 defendants will remove actions from state courts that otherwise
315 would remain in state court. This fear seems ill-founded; many
316 factors control the removal decision. Another argument is that the
317 number of peremptory challenges would not be increased; this
318 argument ignores the fact that the number was set more than a
319 century ago, and persisted for many years with 12-person juries.
320 The reduction to smaller juries simply increased the effect of the
321 unchanging statutory provision. A return to 12-person juries would
322 merely return to the situation that had prevailed for a long time.

323 One possible strategy would be to reconsider the unanimous
324 verdict requirement, considering a package that would combine a
325 10/12 jury verdict with restoration of the 12-person jury. This
326 approach, however, ignores the effect of the unanimity requirement.
327 As the Committee has regularly observed, hung juries are rare even
328 with 12-person criminal juries that must agree beyond a reasonable
329 doubt. The impact of the requirement is on the dynamics of
330 decision within the jury, not the ability to reach a verdict. A
331 unanimity requirement forces the jury to pay close attention to
332 each member, considering the views of each and responding or
333 adjusting all views to reach a consensus. More viewpoints are
334 represented in a 12-member jury, and all viewpoints are considered
335 when unanimity is required.

336 It is not possible to argue that a 6-person jury is better
337 than a 12-person jury. It is very difficult to argue that it is as
338 good.

339 Committee discussion of the Rule 48 proposal noted that in
340 some districts it may be difficult to find 12 qualified jurors for
341 some cases because the population is thin, and some cases involve
342 employers or institutions that involve many members of the
343 community.

344 It also was asked, as a general matter, whether it is possible
345 to find ways to get information to the circuit district judges
346 associations in ways that will encourage better deliberated
347 responses to Committee proposals. No concrete means were

348 suggested.

349 Discussion of the 12-person jury proposal led back to review
350 of the proposal for party participation as a matter of right in
351 voir dire examination. The committee devoted a lot of time to the
352 endeavor. The result has been not a rule change, but work with the
353 Federal Judicial Center that has given a more important role to
354 voir dire in the programs of instruction for district judges.
355 There may be other means of educating judges about the importance
356 of 12-person juries. Judges have the discretion to seat more than
357 6 jurors now, and many routinely select 8 or 10 in cases that are
358 likely to be at all protracted. Continued attention to the subject
359 may encourage more use of larger juries. Experience may in turn
360 help prepare the way for reconsideration of the 12-person jury
361 proposal in a few years.

362 **RAND CJRA REPORT**

363 Members of the Committee have reviewed the September, 1996
364 draft report prepared by the RAND Institute for Civil Justice to
365 evaluate local experiments under the Civil Justice Reform Act. The
366 report is Kakalik, Dunworth, Hill, McCaffrey, Oshiro, Pace, and
367 Vaiana, Just, Speedy, and Inexpensive? An Evaluation of Case
368 Management under the Civil Justice Reform Act. This draft is
369 described as "a final report of a project. It has been formally
370 reviewed but has not been formally edited." At the same time, it
371 is "not cleared for open publication."

372 Judge Jerome Simandle, of the Court Administration and Case
373 Management Committee (CACM), attended this meeting to explain the
374 work being done by CACM with the Rand Report. CACM is the Judicial
375 Conference Committee that has overseen the RAND study, and will
376 prepare recommendations for the report that the Judicial Conference
377 is required to make to Congress by June 30, 1997. The Judicial
378 Conference will meet in early March. CACM meets early in December.
379 It is expected that CACM will share its anticipated report and
380 recommendations with this committee as soon as it is practicable to
381 do so. CACM plans to deliver its materials to the Judicial
382 Conference no later than February 11.

383 Preliminary discussion raised the question whether any of the
384 findings in the RAND report suggest changes in the Civil Rules.
385 The RAND researchers were frustrated because the Civil Justice
386 Reform Act did not set up a formal experiment along the lines that
387 support careful social science research and conclusions. Cases
388 were not assigned at random to different management tracks. Few
389 judges made any significant changes from the ways they had managed
390 cases before the local plans were adopted. What was possible,
391 then, was a comparison of large numbers of cases that in fact were
392 managed in different ways. The only clear conclusion is that in
393 cases that lie outside the "minimal management" category, it is
394 possible to achieve a shortened time to disposition without
395 increasing costs only by a combination of three management
396 techniques: early case management, early discovery cutoff, and an
397 early trial date. All of these techniques are authorized under the

398 present Civil Rules. The only change that might be made in
399 response to this finding would be to change the present
400 authorization into a mandate.

401 The lack of obvious occasions for change was approached from
402 another perspective. Many had expected that the report would
403 provide a real opportunity for reexamining many aspects of present
404 procedure. Instead, the findings seem noncontroversial. At least
405 on first view, they seem generally to reinforce received views
406 about good case management practice. Even the indications that in
407 some settings it costs more to achieve speedier disposition than to
408 allow litigation to take its course according to the natural pace
409 of the parties is not surprising.

410 The findings about the effects of Civil Rule 26(a)(1)
411 disclosure, and the many variations adopted by different district
412 plans, will be of great interest to this committee. At the same
413 time, they are remarkably tentative. There is a repeated emphasis
414 on the findings through lawyer surveys that lawyers in districts
415 that have adhered to mandatory disclosure do not like the policy,
416 but that lawyers who have actually engaged in mandatory disclosure
417 seem to like it. This seeming puzzle may reflect a general
418 hostility arising from anticipated fears about disclosure that are
419 assuaged by actual experience with disclosure. But a close look
420 will be necessary to determine whether this is the explanation, or
421 whether there is some other explanation. Other studies also are
422 being made of mandatory disclosure, particularly as districts
423 evaluate experience under their own plans. There will be much to
424 be learned from them.

425 This discussion of mandatory disclosure led to comments
426 anticipating the later general discussion of discovery. Concerns
427 have been expressed with the lack of uniformity arising from the
428 explicit provision in Rule 26(a)(1) that authorizes local rules
429 that opt out of the national rule. When the CJRA expires, local
430 choices to opt out must be expressed by local rule. The Federal
431 Judicial Center surveys of disclosure practices indicate that most
432 of the districts that have opted out of the national rule indeed
433 have adopted local rules. When the opt-out provision was adopted,
434 it was partly with a view to learning from experience with
435 different local approaches. The Standing Committee Self-Study
436 suggested that this Committee may wish to reevaluate the opt-out.
437 At the same time, it will take several years of experience to
438 support intelligent evaluation of experience with the national
439 rule. The rule was greeted with widespread hostility. Even if it
440 had been warmly received, time is required for lawyers to adjust to
441 the best means of using disclosure and the Rule 26(f) conference.
442 Time also will be required before large numbers of cases have gone
443 through all discovery and trial. Actual trial of substantial
444 numbers of cases will be required to provide information about
445 failures to disclose and the sanctions that result. The RAND
446 report found a de minimis level of pretrial disclosure motions; the
447 predictions that Rule 26(a)(1) would engender substantial pretrial
448 dispute have not been borne out in these years in these districts.

449 But the fear that evidence will be challenged and often excluded at
450 trial for failure to disclose remains to be tested.

451 Close coordination with the Court Administration and Case
452 Management Committee will play an important role in addressing the
453 RAND report. Other work will remain to be done, however. This
454 committee will attend the ABA conference on the RAND report in
455 Tuscaloosa next March, shortly after the Judicial Conference meets
456 to consider its report to Congress. The Judicial Conference report
457 will be an important event in the aftermath of the CJRA
458 experiments, but it will not be the final chapter. The ABA
459 conference will be a very important next step, drawing from a wide
460 cross-section of bench, bar, and legislative representatives. It
461 will have the benefit of time to reflect on the RAND report, the
462 CACM recommendations, and perhaps to other early reactions to the
463 report. One of the topics for the conference will be study of the
464 ways in which the RAND findings and the underlying data can be
465 brought to bear on the rulemaking process.

466 Discussion of the RAND report concluded with focus on the ways
467 in which this Committee can interact with the Court Administration
468 and Case Management Committee. Judge Simandle noted that the RAND
469 report points in certain directions on judicial management. It
470 measures time and money, however, and cannot address such matters
471 as detailed discovery policy. RAND has designed a report true to
472 the intent of Congress. There never has been a study like this.
473 They were devoted in collecting the data. The data, however, do
474 not point ineluctably in any precise directions. The final
475 Judicial Conference Report must report on the six principles and
476 six management guidelines identified in the Act, and on whether any
477 of these principles or guidelines should be implemented by changes
478 in the Civil Rules. If adoption of these principles and guidelines
479 is not recommended, the Judicial Conference report also is to
480 identify alternative, more effective programs to reduce cost and
481 delay. The Judicial Conference also is invited to initiate
482 proceedings for adoption of rules implementing its recommendations.
483 For all of these possible effects on this Committee, it is the
484 Court Administration and Case Management Committee that is charged
485 with Judicial Conference administration of the Judicial Conference
486 response. The role of this Committee will be to coordinate as
487 effectively as possible through the new Committee on the Rand
488 Report.

489 **DISCOVERY**

490 When appointment of the Discovery Committee was announced, it
491 was observed that most studies of the causes of popular
492 dissatisfaction with the administration of civil procedure focus in
493 large part on discovery. Discovery is expensive. Discovery is
494 often conducted in a mean-spirited way. Discovery is used as a
495 strategic tool, not to facilitate resolution of a controversy.
496 Attorney self-regulation too often fails to work, as adversariness
497 gets in the way of more professional behavior. Egos and tactics
498 intrude. Over-use by discovery out of any reasonable proportion to

499 the needs of the case may be more common than more direct abuse.
500 The new disclosure practice is badly fractured as many districts
501 have opted out of the national rule and adopted different local
502 variations. The American College of Trial Lawyers has proposed
503 that it is once again time to reconsider the basic scope and nature
504 of discovery. If any aspect of the rules is broken, discovery is
505 it. The most optimistic inquiry will be the search for relatively
506 modest changes that could bring substantial improvements. This
507 quest will be successful if changes can be found that meet with
508 general acceptance by plaintiffs and defendants. If a proposed
509 change is generally regarded as unfair by one side or the other,
510 there is a real prospect that in fact it is unfair. If we are to
511 look at discovery, the project will require several years to bring
512 to fruition. The problems are complex.

513 As complex as the problems are, caution is necessary. Lawyers
514 and judges do not like frequent rule changes. Discovery practice
515 has been changed many times. The Civil Rules, moreover, have
516 become "organic" in the sense that they are understood and
517 implemented as a seamless whole. Changes are appropriate only when
518 there is a clear case for the change.

519 One possible approach would be to adopt a three-stage process.
520 First would come disclosure, perhaps modified to require actual
521 production of documents, deleting the option to simply identify
522 them. The second stage would be lawyer-directed discovery. This
523 stage could be limited in various ways. The numbers of
524 interrogatories and depositions permitted by present rules might be
525 reduced. The length of depositions could be limited. Document
526 discovery could be cabined. Even the number of requests for
527 admissions might be curtailed. The third stage would require court
528 management. Discovery conferences, or other pretrial management
529 formats, would be a mandatory element of more expansive discovery
530 tailored to the actual needs of individually complex cases.

531 The old ABA proposal to narrow the scope of discovery
532 authorized by Rule 26(b)(1) has been reviewed by this Committee in
533 the past. It does not seem likely that it would effect substantial
534 changes if it were adopted. At a minimum, it needs more study
535 before it might be embraced.

536 As discussed in reviewing the RAND study, disclosure practice
537 is fragmented. If the mandatory disclosure system of Rule 26(a)(1)
538 proves successful, it might be useful to amend it to require actual
539 production of documents, at least as to "core" documents.

540 Rule 26(c) protective order practice remains on the Committee
541 agenda. The Committee's proposal was sent back by the Judicial
542 Conference for further study. The proposal was republished,
543 extensive comments were provided, and the Committee concluded that
544 protective orders are so directly related to broader discovery
545 topics that they must be studied together.

546 The organic aspect of the rules is nowhere more apparent than
547 in the relation between discovery and pleading. Notice pleading

548 was adopted with the view that discovery would become the primary
549 means of developing and exchanging information before trial.
550 Discovery in fact has assumed the major role. Discovery relies on
551 the lawyers to regulate themselves. In some cases, at least, the
552 result seems to be disproportionate expenditure of money and effort
553 in the quest for the elusive "smoking gun" that litigants hope may
554 exist, or in the effort to beguile a deponent into saying unwilling
555 things.

556 If the Committee is to undertake a broad reexamination of
557 discovery, it will be important to follow the model that was used
558 with consideration of Rule 23. At the very outset, means must be
559 found to solicit the views and proposals of organized groups. The
560 American College of Trial Lawyers has provided an excellent dossier
561 of information and suggestions. The ABA, ATLA, other bar groups,
562 and judges groups should be consulted. The views of this Committee
563 and the suggestions received from other groups could be used by the
564 Discovery Committee to provide the focus for a conference that
565 would address the most important-seeming ideas. The conference
566 might be scheduled for early next September. At the October
567 meeting following the conference, this Committee could reflect on
568 the papers and ideas presented at the conference and establish a
569 set of projects for study by the Discovery Committee. The spring,
570 1998 meeting could begin work on specific proposals drafted by the
571 Discovery Committee. Throughout this process, efforts should be
572 made to help the bench and bar become aware of the proposals being
573 considered. If possible, it should be made clear that the
574 proposals have been made to the Committee by the many sources that
575 are to be consulted. They will become Committee proposals only
576 when adopted as recommendations.

577 General discussion of discovery topics followed. One
578 observation was that indeed discovery practice is deteriorating,
579 and that one source of the problem is that much discovery is
580 conducted by "litigators" who are not trial lawyers. These
581 litigators have no idea of what is possible or necessary at trial,
582 and cast the discovery net far wider than any plausible trial use.

583 Notice pleading remains a problem for disclosure.
584 Particularly in product liability litigation, the initial pleadings
585 commonly give no coherent picture of what the problems will be.

586 Another view was that, at least as a matter of intuition,
587 there does not seem to be much abuse. The proposal to narrow the
588 scope of Rule 26(b)(1) does not seem likely to change much. There
589 are problems of overusing discovery in marginal cases.

590 It was suggested that state experience should be studied. At
591 the Dallas conference in 1995, Stephen Susman described Texas
592 proposals to control discovery. New Jersey has a tracking system.
593 Other courts have tracking systems. There may be much to be
594 learned from experience with these systems.

595 The "rocket docket" system in the Eastern District of Virginia
596 also deserves attention. Many lawyers report, often informally,

597 that it works well in many cases but also has problems. The
598 problem most often identified is a lack of flexibility — a
599 perception that it is too difficult to win variations in the set
600 schedule even for cases that genuinely need more time. But it is
601 a great place to file a case if your client cannot afford extensive
602 discovery. With adjustments, this model might prove very
603 attractive.

604 In contrast, Louisiana was described as a state in which a
605 trial cannot be scheduled while discovery remains "open," and in
606 which trial can be avoided indefinitely simply by refusing to close
607 discovery.

608 One of the observers suggested that discovery reform is a
609 noble cause, but that it is too timid. Notice pleading should be
610 on the agenda, and the very framework of trials. The simplest
611 solution may be the most direct and radical — discovery might be
612 abolished entirely. Of course this would require different
613 pleading rules, and time limits on trial, along with limits on the
614 numbers of witnesses. Anything remotely resembling current
615 discovery practices cannot survive into the 21st Century.

616 This suggestion met the response that in some continental
617 systems, discovery is actually integrated with trial. Trial is
618 held in phases. There is a hearing, more facts are gathered in
619 response to the issues indicated by the hearing, another hearing is
620 held, and so on. Of course this approach would prove difficult
621 with jury trial. But it has been used in bench trials in this
622 country, and might prove useful in more general practice.

623 The Criminal Rules were held up as a model of a procedure with
624 limited discovery, with the suggestion that they are not
625 satisfactory. Time limits on depositions were suggested as a more
626 practicable remedy for at least one part of the problem.

627 Members of the Committee have suggested in the past that
628 perhaps the rules for document discovery should be separated from
629 the general scope of discovery, and narrowed. It also has been
630 suggested that discovery might be controlled by requiring that the
631 demanding party state the facts that make desired discovery
632 relevant. These are interesting ideas. The statement of fact
633 relevance could help avoid the snares of notice pleading.

634 Discussion returned to the fragmentation of disclosure
635 practice under Rule 26(a). It was suggested that it had been a
636 mistake to allow for local variations. One of the results will be
637 that each district will become comfortable with its own particular
638 practice, and resist change to a uniform national system.
639 Uniformity is a high value, and we should seek to restore it to
640 disclosure. Diverse local rules are valid under Rule 83, at least
641 after expiration of the Civil Justice Reform Act, only because Rule
642 26(a) authorizes them. The Standing Committee self-study has
643 commended the importance of national uniformity, and indeed the
644 desire to reduce local variations is one of the driving forces
645 behind the Local Rules Project. At the same time, there are strong

646 pressures from the district courts for local autonomy, for
647 "district rights," that will be hard to resist.

648 The desire to establish a nationally uniform disclosure
649 practice does not immediately dictate what the uniform practice
650 shall be. It is important to know whether the system adopted by
651 Rule 26(a) is the right one. Initial reactions were hostile.
652 Growing experience seems to be softening attitudes. The survey by
653 the Eastern District of Pennsylvania of local disclosure experience
654 revealed a high level of satisfaction among lawyers, and an even
655 higher level of satisfaction among judges. Other CJRA reports may
656 tell us more.

657 A motion to approve the discovery project outlined above was
658 passed unanimously.

659 **Magistrate Judge Appeals**

660 Section 207 of S. 1887, the Federal Courts Improvement Act of
661 1996, to be signed into law this month,[1] reshapes the provisions
662 in 28 U.S.C. § 636 for appeal from a judgment entered by a
663 magistrate judge following consent to trial before the magistrate
664 judge. Section 636(c) formerly provided two alternative appeal
665 paths. Absent agreement by the parties at the time of consenting
666 to trial before the magistrate judge, the judgment of the
667 magistrate judge is entered as the judgment of the district court
668 and appeal lies to the court of appeals in the ordinary course.
669 The parties, however, could agree at the time of reference to the
670 magistrate judge that any appeal would be taken to the district
671 court. The judgment of the district court on appeal from the
672 magistrate judge could be reviewed only by petition to the court of
673 appeals for leave to appeal. The power to choose initial review in
674 the district court has been rescinded.

675 Removal of the opportunity to consent to appeal to the
676 district court requires conforming amendments to the Civil Rules.
677 Civil Rules 74, 75, and 76 govern appeals from the magistrate judge
678 to the court of appeals; they are now redundant and should be
679 abrogated. Portions of Civil Rule 73 also must be made to conform,
680 with appropriate changes in the title and catchlines. The
681 reference to § 636(c)(7) in Rule 73(a) now should be made to §
682 636(c)(5). Rule 73(d), which describes the optional appeal route
683 to the district court, must be abrogated. In Rule 73(c), the
684 clause "unless the parties otherwise agree to the optional appeal
685 route provided for in subdivision (d) of this rule" likewise must
686 be deleted. Portions of Forms 33 and 34, as well as their
687 captions, must be changed to reflect these changes.

688 The Committee agreed by consensus that these changes must be
689 made. Discussion centered on the timing of the changes.

690 The first timing question goes to the effect of the changes on
691 cases pending at the time of the statute's enactment. There will

692 [1] The legislation was in fact signed on October 19, 1996.

693 be many cases – for the most part concentrated in a few districts
694 – in which the parties have consented both to trial before the
695 magistrate judge and to appeal to the district court. The
696 opportunity for appellate review quickly and inexpensively close to
697 home may have been, in some of these cases, a significant reason
698 for agreeing to trial before a magistrate judge. It seems likely
699 that the courts will conclude that although the statute effects a
700 procedural change that should apply to all pending cases in which
701 the parties have not yet consented to a district-court appeal, they
702 also may be persuaded that established consents should be honored.
703 Many of these cases will have concluded before final action can be
704 taken to remove the now redundant portions of the Civil Rules.
705 Some, however, may be expected to linger on for many months. Not
706 only may some cases prove complex, but in some the initial judgment
707 may be reversed by the district court with a remand for further
708 proceedings before the magistrate judge.

709 This timing question sets the framework for the second
710 question. The ordinary requirements that rules changes be
711 published for public comment can be suspended for changes that
712 merely conform the rules to statutory changes. The proposed
713 amendments do no more than recognize the elimination of the
714 district-court appeal alternative. If publication is not ordered,
715 it would be possible for the Standing Committee to recommend the
716 changes for adoption by the Judicial Conference at its March, 1997
717 meeting. If the Judicial Conference approves the changes, they
718 could be forwarded to the Supreme Court promptly. Given advance
719 warning that the rules changes may be coming, the Court would have
720 more than a month to review the changes before the deadline for
721 submission to Congress. If submitted to Congress, the earliest the
722 changes could take effect would be December 1, 1997, more than a
723 full year after enactment of the new statute. The alternative path
724 of publication and public comment would mean that the earliest
725 effective date for the changes would be December 1, 1998.

726 It was pointed out that under 28 U.S.C. § 2074(a), when the
727 Supreme Court adopts rules of procedure, the Court fixes the extent
728 to which a new rule applies to pending proceedings, "except that
729 the Supreme Court shall not require the application of such rule to
730 further proceedings then pending to the extent that, in the opinion
731 of the court in which such proceedings are pending, the application
732 of such rule in such proceedings would not be feasible or would
733 work injustice, in which event the former rule applies." This
734 provision confirms the conclusion that the present rules will
735 continue to apply to any case in which the courts conclude that the
736 opportunity to appeal to the district court remains available. It
737 is the application of the statutory changes to pending cases that
738 will control, not the effective date of the Civil Rules changes.

739 The Committee concluded unanimously that there is no need for
740 public comment on the proposed conforming changes, and that it is
741 better to seek to delete the misleading provisions of these rules
742 as soon as possible. It is the Committee's recommendation that the
743 Standing Committee recommend the conforming changes to the Judicial

744 Conference for adoption without any period for public comment, and
745 for timely action by the Supreme Court.

746 The Committee also discussed the question raised by several
747 Seventh Circuit cases in which new parties are added to an action
748 after the original parties have all consented to trial before a
749 magistrate judge. Even when the new parties proceed without
750 objection through trial, the Seventh Circuit has ruled that the
751 right to a district-court appeal has not been waived and that an
752 appeal from the final judgment of the magistrate judge must be
753 dismissed. This problem could be corrected by amending Civil Rule
754 73(b). One approach would be to require that the reference to the
755 magistrate judge be withdrawn unless the new parties are given the
756 opportunity to consent and expressly consent. Another approach
757 would be to provide that failure to object to trial before the
758 magistrate judge waives the right to district-court trial. This
759 approach could be triggered in many ways: failure to object within
760 a stated period; failure to object within a stated period after
761 actual notice that the original parties have consented to trial
762 before a magistrate judge; failure to object before beginning trial
763 before the magistrate judge; or yet some other event. Judge
764 Restani reported that the Bankruptcy Rules Committee has twice
765 considered this issue and concluded not to act. There is some
766 sense that this problem may be unique to the Seventh Circuit — that
767 other courts have found effective ways to deal with the problem
768 that do not require wasting a trial completed before the magistrate
769 judge.

770 The issue of consent by parties added after all original
771 parties have agreed to trial before the magistrate judge will be
772 kept on the Committee agenda.

773 **Admiralty Rules B, C, E**

774 The Maritime Law Association and the Department of Justice
775 have proposed several changes in Admiralty Rules B, C, and E.
776 Among the many changes, four should be regarded as the most
777 important. Rule B(1) would be amended to adopt the alternatives to
778 service by a marshal that were earlier adopted for Rule C(3); there
779 is no clear reason to explain the failure to adopt these provisions
780 in Rule B(1) at the time they were adopted for Rule C(3). Rule
781 B(2) would be amended to reflect the ways in which Civil Rule 4 was
782 restructured in 1993. Rule B(2)(b) has incorporated the service of
783 process provisions of former Rule 4(d). Those provisions have been
784 redeployed throughout Rule 4, and conforming changes must be made.

785 Rule C(2) would be amended to reflect the many recent statutes
786 that provide for forfeiture proceedings in one district involving
787 property situated outside the district. And Rule C(6) would be
788 amended by adopting a new subdivision (a) governing forfeitures.
789 The Department of Justice has long been anxious to adapt the in rem
790 procedures of Rule C to the needs of forfeiture proceedings. The
791 most significant difference is that Rule C(6)(a) would provide for
792 direct participation by all persons who have claims against the
793 property to be forfeited. Rule C(6)(b), on the other hand, would

794 provide for direct initial participation only by those claiming
795 possessory or ownership interests in the property attached in an in
796 rem proceeding. Those having other claims against the property
797 would continue to be subject to an intervention requirement,
798 although this requirement has not been spelled out on the face of
799 the rule.

800 Discussion of these proposals followed several paths.

801 The proposals were drafted in the style of the current
802 Supplemental Rules, in an effort to hold changes to a bare minimum.
803 The present style, however, is often confusing. In reviewing the
804 proposals, the Admiralty Rules Committee was asked to review and
805 incorporate the suggestions of the Standing Committee's Style
806 Committee.

807 A question was raised as to the continuing need for any
808 admiralty rules. It was suggested that the rules have continued to
809 play a vital role since the basic integration of admiralty
810 procedure with the general Civil Rules.

811 The reference in the draft of Rule C(6) to "equity ownership
812 interest" also was questioned. This term appears both in
813 subdivision (a), which applies to forfeitures, and in subdivision
814 (b). Although it is asserted that admiralty practitioners will
815 understand that equity ownership embraces legal ownership, it was
816 suggested that "ownership interest" is a safer and more
817 encompassing term. This suggestion may prove true not only for
818 judges and attorneys not fully familiar with admiralty practice,
819 but also and especially true for land-based lawyers who confront
820 the term in the forfeiture rule. One alternative would be to refer
821 to "legal or equity ownership interest," but even that alternative
822 might seem to exclude some forms of ownership, particularly those
823 that may arise under the laws of other countries. Consideration
824 should be given to changing the draft so that it refers only to
825 "ownership interest," to be supplemented by a comment in the
826 Committee Note that all forms of ownership interest are included.

827 A question also was raised as to the portions of Civil Rule 4
828 to be incorporated into Rule B(2). As it stood, the B(2)
829 incorporation of Civil Rule 4(d) included the provisions for
830 service on the United States and on states. The proposal is that
831 these provisions, now separately numbered, not be incorporated in
832 the new B(2) because of the problems with immunity against
833 attachment of property owned by the federal or state governments.
834 The justification for making this change in the rule should be
835 explored further.

836 Rule C(6) now allows interrogatories to be served with the
837 complaint, and calls for answers to the interrogatories at the time
838 of answering the complaint. It was asked whether this procedure
839 corresponds to special needs of admiralty practice that justify
840 departure from the timing provisions of Civil Rule 26(f).

841 The materials submitted with the proposals include the
842 observation that at times a federal court may entertain a

843 proceeding for forfeiture under state law. This question should be
844 explored further.

845 Judge Stotler observed that the Criminal Rules Committee has
846 been considering forfeitures under Criminal Rule 32, and that the
847 project is being developed further to address the problems of
848 third-party claims. There also may be jury-trial questions in
849 civil forfeitures, although nothing in the proposed rules addresses
850 these questions in any way.

851 The Admiralty Committee was asked to have a proposal ready for
852 action in time for the spring meeting of this Committee. The
853 Agenda Committee will then be able to determine whether there is
854 time on the spring meeting agenda to consider the questions that
855 may remain.

856 **Copyright Rules**

857 A report was made on the lack of progress in seeking expert
858 advice on the way to approach the Copyright Rules of Practice. In
859 1964, the Committee recommended to the Standing Committee that
860 these rules should be repealed; at the same time, it recognized
861 that the Standing Committee might deem it wise to defer to
862 Congress, which even then was considering proposals that eventually
863 led to adoption of the 1976 Copyright Act. The Standing Committee
864 did choose to defer, apart from repeal of former Copyright Rule 2.
865 Even in 1964, the Committee believed that the no-notice impoundment
866 procedures provided by the Copyright Rules were fundamentally
867 unfair. The due process tests that limit ex parte judicial action
868 have developed significantly since 1964, and the seizure provisions
869 of the 1976 Act, 17 U.S.C. § 503, seem inconsistent with the
870 Copyright Rules. The 1964 proposal was that a new Civil Rule 65(f)
871 should be adopted, explicitly invoking the procedures for temporary
872 restraining orders and interlocutory injunction orders. This
873 proposal would have the advantage of bringing copyright practice
874 fully into the uniform rules of procedure. It also would retain
875 the power to grant no-notice impoundment on a showing that notice
876 might defeat the opportunity to grant effective relief.

877 After discussion about the difficulty of finding impartial
878 sources of advice — a difficulty that was felt by the Committee in
879 1964 — it was moved that advice should be sought from such
880 organizations as could be found. Unless cogent contrary advice
881 should be provided, the next step should be to draft an amendment
882 of Rule 81(a) that would delete the limits on application of the
883 Civil Rules to copyright actions, and also to draft a repeal of the
884 Copyright Rules. These drafts should be submitted to the ABA,
885 selected copyright lawyers, and the Department of Justice for
886 reactions. Unless some good reason is found for maintaining a
887 special set of copyright procedures, the 1964 approach still seems
888 sound. If indeed reason is found to continue to have special
889 copyright rules, then advice must be sought on the ways in which
890 the present rules should be reformed.

891 **Rule 81(a)(1)**

892 The Reporter was instructed to determine whether the United
893 States District Court for the District of Columbia continues to
894 exercise jurisdiction in mental health proceedings. If this
895 jurisdiction has been transferred to the District courts, the final
896 sentence of Rule 81(a)(1) should be repealed.

897 **Rule 5: Service by Private Carrier or Electronic Means**

898 Two quite distinct proposals have been made to amend Rule 5.
899 One is that service by private express service should be made
900 available as an alternative to service by mail. The other is that
901 the way should be opened for service of documents other than the
902 original summons and complaint by electronic means. The Bankruptcy
903 Rules Committee has been considering provisions that would allow
904 adoption of local rules authorizing service by electronic means.
905 These proposals were referred to the Technology Committee.

906 **Expert Witness Panels; Mass Litigation Trial Depositions**

907 The Judicial Conference has appropriated funds to support a
908 court-appointed panel of neutral experts in the consolidated MDL
909 litigation involving silicone gel breast implants. This procedure
910 is regarded as an experiment; it is being reviewed by another
911 Judicial Conference committee.

912 This development was brought to the Committee's attention
913 because it may lead to future proposals to amend the Civil Rules as
914 well as the Evidence Rules. The order in the breast implant cases
915 contemplates that the court-appointed experts may be deposed for
916 the purpose of generating testimony that will be admissible,
917 through the depositions, in all of the MDL cases once they are
918 remanded for trial in the districts of original filing. It is
919 hoped that many state courts as well will find means of admitting
920 the depositions in evidence. The MDL order invokes an analogy to
921 Civil Rule 32(a)(3)(D) and (E). There may be an occasion in the
922 future to consider adoption of revisions to Rule 32, and perhaps
923 other rules, to facilitate once-for-all depositions of both expert
924 and fact witnesses whose testimony is relevant in many repeated
925 trials. The time to consider such possibilities remains in the
926 future.

927 Committee discussion reflected some concerns about the
928 practice of using court-appointed experts. It was also noted,
929 however, that there are real problems in persuading the best
930 qualified experts to appear as expert trial witnesses under present
931 trial procedures.

932 **Evidence Rule 103**

933 In 1995, the Evidence Rules Committee published a proposal to
934 add a new Evidence Rule 103(e) to govern the effects of in limine
935 rulings on proffers of, or objections to, anticipated trial
936 evidence. The proposal would have required both objections and
937 proffers to be renewed at trial unless the court explicitly states
938 that its ruling is final, or unless the context clearly
939 demonstrates that the ruling is final. This proposal reflects the

940 majority rule among the circuits, but would revise the practice in
941 some circuits. Public comments on the rule were mixed. Some
942 comments supported the rule. Other comments suggested that the
943 presumption should be reversed — that the rule should provide that
944 pretrial objections or proffers need not be repeated at trial
945 unless the court explicitly indicates that its ruling is tentative.
946 The Evidence Committee divided into three groups. A majority
947 favored adopting a rule, but divided equally on the choice between
948 these two rules. A strong minority preferred to adopt no rule.
949 The Evidence Committee decided to solicit the advice of the Civil
950 and Criminal Rules Committees.

951 Discussion found the Committee as uncertain as the Evidence
952 Rules Committee. It was pointed out that the problem is that
953 things change at trial. Because the full context of trial may not
954 be the context that was assumed in making the in limine ruling, it
955 should be required that objections or proffers be renewed. There
956 is a risk that the trial court will rule in the pretrial context,
957 but be reviewed by the appeals court on the basis of a trial
958 context that was not considered by the trial court because the
959 question was not renewed at trial.

960 It was suggested that the most serious problem arises in the
961 situation of criminal defendants who seek pretrial rulings on the
962 admissibility of prior convictions for impeachment purposes. The
963 Supreme Court has ruled that a criminal defendant cannot obtain
964 review of a pretrial ruling unless the defendant takes the stand at
965 trial. That range of problems is better addressed by the Criminal
966 Rules Committee, along with the related question whether the
967 pretrial objection is waived by a defendant who chooses to
968 introduce at trial evidence that the court refused to exclude by a
969 pretrial ruling. A defendant may wish to introduce the evidence to
970 reduce the impact of having it introduced by the prosecution, but
971 may fear waiver of the pretrial ruling. The Committee was advised,
972 however, that the Criminal Rules Committee has concluded that it
973 has no advice to offer on the proposed evidence rule.

974 Another observation was that trial lawyers are too cautious
975 now, routinely renewing every objection and proffer without
976 offering any additional ground for consideration. By encouraging
977 even more of this behavior, the published proposal is a step
978 backward. It was rejoined, however, that it would be dangerous for
979 a trial lawyer to rely on a pretrial ruling. If a pretrial ruling
980 is unfavorable, a good lawyer will try to reach the desired result
981 in a different way, particularly by offering excluded evidence in
982 a different form. The opposing lawyer may feel uncertain whether
983 the pretrial ruling covers the new gambit. The trial judge also
984 may feel caught unaware when a pretrial question is not renewed.

985 To further confuse the issue, it also was suggested that in
986 almost all cases the context of the pretrial ruling makes it clear
987 whether renewal at trial is required. Many judges simply defer
988 most in limine questions to trial. Others make expressly
989 conditional rulings. It was suggested that it is a trap to try to

990 cover all possibilities in the rule.

991 Reference also was made to the provisions of Civil Rule 46,
992 which abolish the need for formal exceptions, and the analogous
993 provisions of Criminal Rule 51. The spirit of these provisions
994 seems inconsistent with the published evidence proposal.

995 A straw vote on the question whether to advise adoption of
996 some rule by the Evidence Committee produced 2 votes in favor of
997 adopting a rule and 7 votes against. A second straw vote on
998 whether the published proposal should be the rule adopted, if some
999 rule is to be adopted, produced 2 yes votes.

1000 Two specific suggestions were made for transmission to the
1001 Evidence Rules Committee. One was that there may be special
1002 difficulties in the draft Rule 103(e) reference to a "final"
1003 ruling. Finality is a risky concept that may mislead the court or
1004 the parties about the court's continuing power at trial to
1005 reconsider and revise an in limine ruling. If the Evidence Rules
1006 Committee goes forward with a proposal, it would be better to
1007 delete the reference to finality and to address the problem by
1008 providing that a pretrial motion need — or need not — be renewed.
1009 The other suggestion was that any new rule should be drafted in a
1010 way that does not make the trial judge responsible for making it
1011 clear whether an in limine ruling excuses any need for renewal at
1012 trial. A party who wants a clear pretrial determination whether
1013 renewal at trial is excused should bear the responsibility for
1014 explicitly requesting an explicit determination at the time of the
1015 in limine proceeding.

1016 The Reporter will communicate the substance of this discussion
1017 to the Reporter for the Evidence Rules Advisory Committee.

1018 **Self-Study**

1019 Judge Wm. Terrell Hodges, chair of the Judicial Conference
1020 Executive Committee, has sent the quinquennial questionnaire asking
1021 this Committee to consider its continuing role and function. The
1022 Committee considered the several questions and responded: (1) this
1023 Committee should continue to function. (2) The workload of the
1024 Committee seems appropriate, neither too great nor too small. (3)
1025 The size of the Committee is desirable. (4) Committee membership
1026 seems generally to be adequately representative, although it would
1027 be desirable to have greater representation of lawyers who
1028 regularly represent plaintiffs. (5) The work performed by the
1029 Committee seems appropriate to its assigned jurisdiction. (6) Many
1030 of the topics addressed by the Committee overlap with other
1031 committees. Overlap is particularly common with the other rules
1032 advisory committees, as might be expected; the Standing Committee
1033 continues to devise and revise means of coordinating the work of
1034 the advisory committees. Liaison members among the advisory
1035 committees are very helpful in this respect. There also is some
1036 overlap with other Judicial Conference committees. There is
1037 frequent overlap with matters handled by the Court Administration
1038 and Case Management committee, as illustrated by the discussion of

1039 the Rand report at this meeting. It would be desirable to
1040 establish a formal liaison between the Rules Committees and the
1041 Court Administration and Case Management Committee. There also is
1042 frequent overlap on issues of technology. The newly created
1043 Standing Committee Technology Committee will help to coordinate
1044 with other Judicial Conference committees in this area. Finally,
1045 this Committee urges continuing consideration of a question raised
1046 by the Standing Committee's Self-Study committee, whether the
1047 chairs of each of the advisory committees should be made voting
1048 members of the Standing Committee.

1049 **Next Meeting**

1050 It is too early to tell whether there will be so much work to
1051 do before the June meeting of the Standing Committee that this
1052 Committee cannot discharge all its responsibilities in conjunction
1053 with its meeting in conjunction with the ABA Rand Report program in
1054 March. April 24 and 25 were tentatively chosen as the dates for a
1055 second meeting should one be required.

1056 Respectfully submitted,

1057 Edward H. Cooper, Reporter

Agenda Item 11

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

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 2, 1996

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 26-27, 1996, in San Francisco, California. A draft of the minutes is attached to this report.

II. Action Items

The Advisory Committee on Bankruptcy Rules will not be presenting any matters for action at the Standing Committee's meeting in Tucson, Arizona, on January 9-10, 1997.

III. Information Items

A. At its June 1996 meeting, the Standing Committee authorized the publication for comment by the bench and bar of a preliminary draft of proposed amendments to the Official Bankruptcy Forms. The preliminary draft was published in August and the deadline for submitting comments is February 15, 1997. The Advisory Committee will consider comments at its next meeting to be held on March 13-14, 1997, and it is expected that proposed amendments to the Official Bankruptcy Forms will be presented for approval by the Standing Committee at its June 1997 meeting.

B. At its meetings held in September 1995, March 1996, and September 1996, the Advisory Committee considered and approved proposed amendments to 14 Bankruptcy Rules (Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7062, 9006, and 9014). It is expected that these proposed amendments -- as well as others if approved by the Advisory Committee at its March 1997 meeting -- will be presented to the Standing Committee in June 1997 with a request for publication for comment by the bench and bar. Preliminary drafts of these proposed amendments have been forwarded to the Standing Committee's Style Subcommittee for its comments. The Advisory Committee has received the Style Committee's comments regarding several of these

rules, and expects to receive its stylistic comments regarding the others. All stylistic comments of the Standing Committee's Style Subcommittee will be forwarded to the Advisory Committee's Style Committee for its consideration and recommendations to the Advisory Committee at its March 1997 meeting.

C. The Subcommittee on Litigation has been working on possible amendments that would substantially revise the rules governing adversary proceedings, contested matters, applications, and other litigation procedures. Preliminary drafts of proposed amendments to Bankruptcy Rules 9013 (motions) and 9014 (contested matters) were presented as works-in-progress to the Advisory Committee at its September 1996 meeting. After a lengthy discussion, the Advisory Committee encouraged the subcommittee to continue its work, to consider comments and issues raised by the Advisory Committee at the meeting, and to present revised drafts of proposed amendments at the March 1997 meeting. The subcommittee is scheduled to meet in Tucson on January 8, 1997, to continue this work.

D. The Subcommittee on Rule 2014 Disclosure Requirements has been working on revising the rule that requires professionals seeking to be retained in a case to disclose all connections with parties in interest. The subcommittee presented to the Advisory Committee at its September 1996 meeting a preliminary draft of proposed amendments to Rule 2014. The Advisory Committee gave the subcommittee further direction regarding the draft and it is expected that the subcommittee will present a revised draft at the March 1997 meeting.

E. The Advisory Committee has been considering a number of proposed amendments to Rule 2004 on examinations of the debtor and other persons. After discussing proposed amendments to Rule 2004 at the September 1996 meeting, the chair formed a new subcommittee on Rule 2004 to study the rule and to consider alternative proposals.

Attachments:

Draft of minutes of the Advisory Committee meeting of September 26-27, 1996

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 26 - 27, 1996

San Francisco, California

Minutes

DRAFT

The following members were present at the meeting:

Bankruptcy Judge Paul Mannes, Chairman
Circuit Judge Alice M. Batchelder
District Judge Adrian G. Duplantier
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge A. Jay Cristol
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

District Judge Alicemarie M. Stotler, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee"), and District Judge Thomas S. Ellis, III, liaison to the Committee from the Standing Committee, also attended. Circuit Judge Edward Leavy, former Chairman of the Committee, attended part of the meeting. District Judge Paul A. Magnuson, Chairman of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Administration Committee"), and District Judge Donald E. Walter, a member of the Bankruptcy Administration Committee, also attended part of the meeting. In addition, Bankruptcy Judge Thomas C. Small, who recently had been appointed to the Committee for a term beginning October 1, 1996, attended.

The following additional persons 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; Joseph G. Patchan, Director, Executive Office for United States Trustees; Patricia S. Channon, Bankruptcy Judges Division, and Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Elizabeth C. Wiggins and Robert Fagan, Federal Judicial Center ("FJC").

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. Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold**.

Introductory Items

The Chairman introduced the guests in attendance and the newly-appointed member and welcomed them to the meeting.

The Committee approved the minutes of the March 1996 meeting.

Professor Resnick reported on the June 1996 meeting of the Standing Committee. The Standing Committee had approved the rules amendments forwarded by the Advisory Committee from its March 1996 meeting, he said, and these were considered by the Judicial Conference on September 17, 1996. Mr. McCabe reported that the Judicial Conference had approved the amendments to the bankruptcy rules, but that the proposed amendments to Rule 48 of the civil rules, which would have required a court to empanel 12 jurors in a civil case, had not been approved. Professor Resnick stated that the Standing Committee also had approved for publication and comment the proposed amendments to the official forms.

The Reporter reminded the Committee that Form 1, the Voluntary Petition, had undergone further change after the March 1996 meeting, at the request of the Bankruptcy Administration Committee. The Bankruptcy Administration Committee, at its June 1996 meeting, had requested the Committee to consider two changes designed to improve the statistical information about large chapter 11 cases and to include them in the form when it was published for comment. One change was to add an additional statistical category to the part of the form on which a debtor reports its total assets and total liabilities and the other was to add a question to the form asking the debtor to state whether the assets and liabilities

being reported were for an aggregate of affiliated debtors or for only the debtor listed in the particular petition. By mail ballot, he said, the Committee had approved the inclusion of the additional statistical category. The question concerning whether assets and liabilities for more than one debtor were being aggregated, he reported, had drawn a tie vote. The Chairman had broken the tie by voting against the proposal, and the Standing Committee then had approved the forms for publication with the additional statistical category, he said.

The Reporter noted that several members had included with their votes against the aggregation question comments about their reasons for voting against it and their reservations about whether a question would be effective in obtaining the information being sought. The comments indicated doubts about requiring all debtors to answer a question that is applicable only to a few and worries about whether such a question would give the impression that it is acceptable to aggregate assets and liabilities of more than one debtor. In addition, the members noted that the form is simply being published for comment and that the question could be added later if the Committee's concerns were resolved. Other alternatives suggested were converting the question to a statement and directing debtors to provide information for "the above-named debtor only."

Ms. Wiggins noted that both requests had originated with an FJC study of "mega" cases in the Southern District of New York. Ms. Wiggins said she had discussed the Committee's questions and comments with the clerk of the court. The clerk had observed that many debtors who aggregate assets and liabilities do so because they don't know what the assets and liabilities are for each debtor separately. She agreed that requiring all debtors to respond to the question might cause more confusion than the information is worth, and said she could continue to handle large cases involving numerous affiliates on an ad hoc basis. The clerk also had said she would rather know the aggregate amount than nothing and she feared attorneys would leave the statistical boxes blank if they lacked information for the debtors separately but were directed to answer for a particular debtor only.

Professor Resnick reported that the Standing Committee's style subcommittee had undergone a turnover of membership. He said the new subcommittee will review draft amendments early, usually before final approval by the Committee, and that the Committee recently had received a style markup of the proposals in the agenda book for the instant meeting. The Reporter suggested that the Committee focus on the substance of the proposed amendments, which might be voted down. If amendments are approved, the Committee should look at the style markup. He said the Standing Committee's policy of respecting the Advisory Committee's style decisions remains unchanged. Judge Duplantier warned that the Committee could bog down in style discussions and suggested delegating style issues to the Committee's own style subcommittee if matters should become protracted.

Mr. Smith reported on the second session of the Special Study Conference on Federal Rules Governing Attorney Conduct held in June 1996 and organized by Professor Daniel R. Coquillette, reporter to the Standing Committee. Mr. Smith praised the written materials which detailed the great diversity of ethical standards that exists today among the various states. He said this diversity is further complicated by the fact that some federal courts also have adopted the underlying American Bar Association ("ABA") Code or, in some cases, the old ABA Canons of Professional Responsibility. He said the ideal would be to have one rule, but that would appear to be impossible. Mr. Smith said it is possible that bankruptcy practice presents a sufficiently special situation that a national rule may be needed. At the end, the symposium authorized Professor Coquillette to draft a model interim rule for future consideration, but all decision-making was postponed.

Professor Resnick reported that he and Judge Mannes also had attended a session of a working group of the National Bankruptcy Review Commission. He was informed that the Commission had discussed the absence of a supersession clause for bankruptcy rules in the Rules Enabling Act, but that the Commission does not seem to support change in that area. He said he believes it likely that any suggestions for rules changes ultimately recommended by the Commission would be addressed to the Committee (rather than to Congress). Judge Mannes added that Bankruptcy Judge Robert Ginsberg, a member of the Commission, has

expressed a desire to brief the Committee about the Commission's work at the spring 1997 meeting.

Judge Stotler noted that the pamphlet in which the proposed amendments to the Official Bankruptcy Forms have been published is eight-and-a-half by eleven inches, full page size. She said she believes the large size to be a major improvement, particularly for attracting comment on the proposed amendments. Judge Stotler said she would like the pamphlets containing rules amendments also to be full page size, but that the Rules Committee Support Office had informed her the cost would be too high. Professor Resnick added that the number of forms pamphlets mailed had been reduced to offset the additional cost of their larger size.

Judge Stotler said the Standing Committee is aware that the Committee has its own style subcommittee and is the only advisory committee that does. The Committee's approach to style is good, she said. She added that, with respect to full-scale restyling, the Standing Committee is following the advice of the Chief Justice, using the draft of the appellate rules as a bellwether, to see what the reaction is, and exempting the evidence rules from the restyling effort, because of their substantive nature.

Action Items

Rule 2004. At its September 1995 meeting, the Committee had approved amendments to Rule 2004 to make it clear that the court in which a case is pending can order an examination that will take place outside the district in which that court is located and that an attorney admitted to practice in the district where the case is pending can issue the subpoena for an examination to be held in a "distant" district. These proposed amendments, however, had given rise to a discussion of whether the request for an examination could or should be considered by the court ex parte. The Committee had requested the FJC to conduct a study to determine the existing practices under Rule 2004, which requires a motion to be filed. The Committee Note states that the motion may be heard either ex parte or on notice. The

Committee had asked the FJC also to survey the courts concerning the dispositions of the motions and whether it would be advisable to adopt a procedure similar to that for taking depositions under the civil rules. The FJC study showed that the bankruptcy bench is about equally divided between judges who hear the motions ex parte and those who hear them on notice, with few objections being filed (or granted) under either practice. The Reporter had prepared a memorandum presenting several alternatives for the Committee's consideration.

After a discussion of the various alternative approaches and the findings of the FJC study, there was **a motion for the appointment of a subcommittee to study further the materials prepared by the Reporter and the FJC and make recommendations to the Committee, which motion carried with none opposed. Chairman Mannes appointed Judge Cordova to chair the subcommittee and Judge Robreno, Judge Kressel, Professor Tabb, Mr. Batson, and Mr. Kohn to serve as members.**

Rule 9031 and Special Masters. The Reporter briefly stated the history of the proposal and referred the Committee to several alternative amendments, starting at page 17 of his memorandum. Judge Walter said the Bankruptcy Administration Committee had offered the idea of authorizing a bankruptcy judge to appoint a special master as simply another tool that could be used in appropriate cases, adding that any such authorization should be tailored to the bankruptcy situation. Judge Magnuson added that the Bankruptcy Administration Committee had its own long range planning subcommittee which had recommended bringing the proposal to the Advisory Committee as a form of help to the judge.

Judge Robreno, noting that the Reporter's memorandum seemed to indicate that the special master concept might be at odds with several provisions of the Bankruptcy Code, asked whether it is appropriate for the Committee to decide these underlying policy issues. Mr. Klee noted that, prior to the enactment of the 1978 Code, there had been a history of patronage in bankruptcy and that receivers (which are prohibited in the Code) and special masters were part of that patronage. Even today, he said, bankruptcy judges are appointing mediators in cases. Judge Ellis suggested that the Committee should hear from Judges

Merhige and Shelley in Richmond, who had managed the "Dalkon Shield" case with the help of an examiner (an officer specifically authorized by the Code). Mr. Rosen said he thought the idea of special masters might be workable if limited to appointment by a district judge when the reference has been withdrawn. Professor Tabb said he thought Alternative No. 6, which contains the fewest restrictions on an appointment, was acceptable. He said he has confidence in both bankruptcy judges and district judges and added that judges already make such appointments under the name "examiner." Judge Kressel said he thinks the Bankruptcy Administration Committee's proposal seems acceptable and that he would like to have the tool, even though in 14 years he could think of only one case in which he might have considered using it.

Mr. Batson, however, said he is not convinced the authority is needed. He said the mass tort situation, such as the "Dalkon Shield" case, calls for estimation of the claims under § 502 of the Code, a core matter that is not delegable. He said he could not think of case over the prior 15 years where a court would have used a special master. Judge Magnuson noted that the "Dalkon Shield" case was filed in Virginia and that Judge Merhige also was the multi-district litigation judge who had been appointed to hear the civil tort actions involving the Dalkon Shield device. He said he thinks the Dow Corning case is different because the multi-district litigation and the bankruptcy case are in different jurisdictions. Mr. Batson said he is participating in the Dow Corning case and that he expects the bankruptcy court to estimate the claims, after which the plan will establish a trust from which to pay them. He said he is not convinced there is a role a special master could play.

Judge Cordova said he has never needed a special master yet, but favors removal of the prohibition. Judge Cristol said he had experienced coordinating with a special master who was appointed in a criminal case. Judge Small said he sees no harm in adding suitably limited authority for special masters. Mr. Rosen said he sees appointments of examiners or fee experts because judges are frustrated when a case does not move; then, he said, the parties are frustrated at having a person in the case that they don't want.

Mr. Sommer said he was concerned about conflict with the Bankruptcy Code if the estate were to pay a special master. Judge Restani said she believes the issue was thought out during the drafting of the 1978 Code and that she disfavors special masters generally, even in district court, and particularly in jurisdictional matters.

Mr. Klee pointed out that the Bankruptcy Code presently contains checks and balances, one of them being that any examiner is appointed by the United States trustee, not the judge, although Rule 706 of the Federal Rules of Evidence permits a judge to appoint an expert. He asked what differentiates a special master from an examiner or an expert. Judge Walter said the difference is that a special master's findings must be accepted unless clearly erroneous. **Judge Batchelder made a motion, seconded by Judge Restani, that the rules not be amended to permit special masters, which motion carried by a vote of 8 to 5.**

Rules 1019(6) and 9006. The Reporter referred the Committee to his memorandum. Rule 1019, he said, currently provides for the filing of claims for debts incurred postpetition but before conversion in a case that is converted to chapter 7. The rule invokes Rules 3001(a) - (d) and 3002, which govern the filing of proofs of claim. Most postpetition claims, however, are for administrative expenses, for which § 503(a) of the Code directs the filing of a "request for payment" rather than a proof of claim. Several courts have ruled, however, that an administrative expense claimant must file a proof of claim in a converted case in order to obtain payment. One recent decision, In re Pro Set, Inc., states affirmatively that no provision of the Code or the rules imposes such a requirement. Accordingly, the Reporter said, he had drafted amendments to clear up the growing confusion over the proper procedure.

The proposed amendments would expressly require an administrative expense claimant to file a request for payment and would set the same 90-day deadline that already is in place for a creditor to file a proof of claim. Professor Tabb noted that the Committee might have to change the § 341 Notice forms to include mention of a request for payment of an administrative expense. Mr. Kohn requested that the government be given 180 days to file. **A motion directing the Reporter to redraft the amendments to provide for a 180-day**

filing period for a government entity carried with none opposed. A motion to approve the Reporter's draft amendment to Rule 9006 to protect against shortening of the time also carried unopposed. Upon considering the recommendations of the Standing Committee's style subcommittee, **the Committee approved adding on line 15 after the word "entities" the phrase "listed on the schedule of unpaid debts" and referred the amendments to both Rule 1019(6) and Rule 9006 to the Committee's own style subcommittee for further review.**

Rules 4004(a) and 4007(c). The Reporter said that several recent decisions described in his memorandum had ruled that the 60-day deadlines for filing a complaint objecting to the debtor's discharge or to determine the dischargeability of a debt under § 523(c) of the Code are to be counted from the date the meeting of creditors is held rather than from the first date set for the meeting, as stated in the rule. The Reporter said the language of these rules includes the word "held," which apparently was used to support the recent decisions. Accordingly, he had drafted amendments deleting the word "held" from both rules. Professor Resnick added that the Committee already had voted at a prior meeting to delete the word "held" from Rule 4007(c) for style reasons at the time it approved the substantive change to "filed" from "made." The text of the previously-approved amendments to Rule 4007(c) appears at Tab 22 of the agenda book. The Reporter suggested expanding the previously approved Committee Note to Rule 4007(c) to explain the substantive effect of the amendment. **A motion to approve the Reporter's draft carried unopposed.**

Rule 2003(d). In September 1995 the Committee approved amendments to conform Rule 2003(d) to amendments being proposed to Rule 2007.1, in furtherance of the amendments to the Bankruptcy Code made by the Bankruptcy Reform Act of 1994. Both rules concern the election of a trustee in a bankruptcy case. In March 1996, the Committee approved changes to the published draft of Rule 2007.1, in response to comments from the Executive Office for United States Trustees. The Reporter explained that the proposed changes to Rule 2003(b) would conform the rule to the revisions made to Rule 2007.1. **By consensus, the words "Report of" were deleted from the title of subdivision (2) of the proposed rule.** The

Committee then reviewed the markup forwarded by the Standing Committee's style subcommittee. **The Committee approved changing the introductory phrase in subdivision (1) to "In a chapter 7 case, if . . . " and to add a reference to chapter 7 in subdivision (2), but rejected the other style suggestions. A motion to approve the amendments and refer further consideration of style to the Committee's style subcommittee carried with none opposed.**

Presentation

Mr. Fagan of the FJC demonstrated for the Committee an interactive tutorial program he had developed on the bankruptcy rules. The program is intended as a training tool for deputy clerks, he said, and numerous clerks, judges, and Administrative Office attorneys served as advisers during its development. He said the program was about to undergo review by court and Administrative Office personnel prior to distribution to the courts as a CD-ROM. The Committee made suggestions about the program content, and several members offered to review the program material for accuracy and assist the FJC in revising the program material.

Subcommittee Reports

Litigation Subcommittee. Mr. Klee reminded the Committee that the subcommittee's work had originated with the former long range planning subcommittee and the FJC survey of the level of satisfaction with the existing rules requested in 1995 by that subcommittee. The FJC study had disclosed general satisfaction with the rules except in the area of litigation and, especially, motion practice. The long range planning subcommittee subsequently had been restructured into two subcommittees, one charged with addressing motion practice (litigation subcommittee) and the other with professional responsibility issues (Rule 2014 subcommittee). A year of work, he said, had produced a consensus on approach and two draft rules for the Committee's consideration, one on "administrative motions" and the other on "general motions." He added that Judge Robreno had expressed concern about the drafts, particularly whether it is appropriate for a national rule to delineate procedures with so much specificity.

Judge Robreno said the question is how broadly a national rule should mandate specific procedures each judge should use in all types of cases and in all courts, some urban and some not. He cautioned that changes on the scale proposed may invite the law of unintended consequences. He said he is not sure the Committee should sweep aside local practices on such matters as the number of days to answer and mandated status conferences. He said he thinks the draft [general motions] rule is an excellent local rule; he questioned only whether it should be imposed on everyone. Mr. Klee responded that there is a tension in the system between natural preferences for local practices and the fact that the Bankruptcy Code is a national law under which there is a national practice.

Judge Robreno noted that there is an ongoing study by the Rand Corporation of Civil Rule 26 and mandatory disclosures, under which the current rule provides for an opt-out. He said it might be wise to await the results of that study. Judge Restani said she favored proceeding with the subcommittee's work. She said there are problems over local rules in district court also, and the Committee should not await the results of the Rand study, which she believes will show no beneficial effect resulting from the opt-out.

Judge Mannes said he thinks there should be no objection to the proposed draft of Rule 9013 on administrative motions, most of which are pro forma. Professor Tabb questioned whether it is appropriate to include item (5), dismissal of a chapter 12 or chapter 13 case at the request of the debtor. Judge Mannes said that the fact that a court has done something a certain way in the past does not make that court's way the right one. He said he thought the items listed in the draft Rule 9013 should be standardized. [A motion the next day to move (5) to the negative notice category resulted in a 5-5 tie vote.]

Mr. Smith said the lack of a basic, national structure for motion practice has caused local rules (all different) to proliferate. He noted that contested matters can be more complex than adversary proceedings, yet nobody thinks adversary proceedings should be conducted under local rules instead of using the Federal Rules of Civil Procedure. He said the Committee should not leave contested matters with only [the current] Rule 9014.

Mr. Sommer said the Committee has received much feedback that people experience problems litigating motions under Rule 9014. For example, he said, the discovery deadlines of Rule 26 don't work in the short time frames of motion practice and it is unclear whether an answer must be specifically ordered. He said he thinks there will be resistance to the idea of detailed national rules, but that the Committee should proceed.

Judge Restani said that a contested matter in bankruptcy, although initiated by motion, is really like a complaint and the subcommittee's draft Rule 9014 is really more like "complaint practice." Professor Resnick said that a contested matter really is a separate litigation or lawsuit, which may be why there are so many local rules on the subject and why there is a perceived need for a national rule such as the subcommittee's draft Rule 9014. Draft Rule 9013, he said, would replace the current expedited application process. The concept is not revolutionary, he said, as the applications and motions filed currently under Rule 9013 generally are those that are listed as "administrative motions" in the subcommittee's draft Rule 9013. Rule 9014 now is titled "contested matters," a confusing term of uncertain meaning and in need of being replaced.

Mr. Kohn suggested circulating the subcommittee's drafts to obtain more feedback, possibly as an attachment to an FJC questionnaire. Professor Resnick explained that, if the material is to be circulated to the bar, it needs to go through the Standing Committee, which means it has to be a finished product rather than a work in progress. He also noted a lot of other rules would have to be changed because they would be affected, meaning that much work would be required. Judge Ellis said he doubted a survey would reveal more than the reaction in the meeting room.

Judge Duplantier said that he would like the Committee to use the adversary proceeding rules wherever possible. Mr. Sommer said the subcommittee's draft Rule 9014 has moved the bankruptcy rules in the direction of the civil rules to the extent that perhaps contested motions should be conducted under the adversary proceeding rules. The motion with attachments, he noted, closely resembles a motion for summary judgment. Judge Restani

said she formerly agreed with Judge Duplantier's view, but changed her mind because she realized it isn't possible, often due to provisions in the Bankruptcy Code.

Judge Robreno asked whether the negative notice procedure prescribed in the local bankruptcy rules for the Southern District of Florida would be inconsistent with the subcommittee's draft Rule 9014. [Judge Cristol had circulated copies of these local rules to the Committee.] Mr. Klee said he believes the draft Rule 9013 is consistent with the negative notice concept and directed the Committee's attention to page 9, line 108, of the draft as an example of a negative notice procedure in the draft itself. Judge Robreno asked whether attorneys generally would have to change their procedures under the subcommittee's draft rules. Mr. Klee said he does not see the subcommittee's proposals as disrupting existing practices. Judge Cristol said he considers his district's local rules 913 and 914 to be a sign that the district's local practice is ahead of the national rules and that national attention is needed on the subject of motion practice.

Judge Restani raised as an issue the provision in the subcommittee's draft Rule 9014 for a mandatory status conference, which, she said, appeared to trouble several members. Judge Kressel said lawyers need to know whether they must bring their witnesses or not. [A matter that is unclear under, for example, § 362(e) of the Code and Rule 4001(a).] Mr. Klee directed the Committee to page 11 of the drafts and said that, generally, the participants would not have to bring witnesses and supply exhibits, except with respect to matters listed there.

Judge Mannes suggested thinking about how a motion to assume and assign an executory contract would be handled under the subcommittee's draft Rule 9014. Since the matter is not on the administrative motions list, he said, it would be a general motion. The subcommittee's draft Rule 9014 would direct the movant to file the motion, stating the relief sought, and to attach an affidavit supporting the motion. The draft rule also would advise the movant of the requirement to file proofs of service indicating that the movant had served the person or persons against whom relief is sought, the attorney for the debtor, and the creditors

committee, and had transmitted a copy of the motion to the United States trustee. Opposers of the motion would be required to respond. If there were no response, the judge would dispose of the motion. If one or more responses were filed, the judge would hold a status conference to set discovery and schedule the "trial" [hearing]. Under the current Rule 6006, there is not much guidance, and an attorney must obtain a district's local rule to know how to proceed.

Mr. Klee compared the process under proposed Rule 9014 to an adversary proceeding in which the plaintiff serves the defendant with a summons. Under the rules applicable in an adversary proceeding, any compulsory counterclaim the defendant may have must be asserted or waived. Thus, a "counterclaimant" must submit to bankruptcy court jurisdiction or waive its counterclaim, a procedural requirement that effectively expands the bankruptcy court's jurisdiction, he said. Judge Restani added that any rule that applies the adversary proceeding rules to contested motions would have to eliminate the requirement to file a compulsory counterclaim and provide a separate rule for service. Mr. Smith said the subcommittee tried to follow the civil rules, but ended up adopting the substance of the draft proposed by the subcommittee. Mr. Batson said he thinks the existing Rule 9014 also evolved from an attempt to apply the civil rules and that today's Rule 9014 was the best they could do. He said the bankruptcy community still needs the subcommittee's draft Rule 9013 (administrative motions), however.

Judge Duplantier asked whether the Committee could define the phrase "contested matter." The Reporter stated that he had written a memorandum on the subject during which he had come to realize that some matters that frequently are contested are not governed by Rule 9014, while other matters that never actually are contested are nevertheless handled under Rule 9014. He added the Committee should be prepared for the prospect that attempting to change the parties' long-held habits and customs will provoke a major "political" battle similar to the struggle over the local rules project.

Judge Robreno said the subcommittee had educated the Committee by means of the discussion and suggested that the drafts be sent back to the subcommittee for further work in light of the feedback presented during the discussion. Mr. Rosen suggested that the subcommittee 1) think about economically using the civil rules to develop a procedure for general motions, 2) borrow the language of the civil rules to the extent possible, 3) treat the subject of motions within motions, and 4) continue also to refine its draft of Rule 9013 (administrative motions). Mr. Klee requested a non-binding "view" of the Committee concerning the direction the subcommittee's work should take before the subcommittee invests more time in the project.

A proposal that motion practice should continue to be governed by local rule and the subcommittee should limit its work to fine-tuning the draft of Rule 9013 did not attract any votes. **A motion that the subcommittee continue its work carried with one opposed.**

Mr. Klee asked Mr. Sommer to draft his proposal to use the adversary proceeding rules, so that it could be compared to the subcommittee's revised draft at the March 1997 meeting. Mr. Sommer agreed to the request.

Judge Duplantier said that during the time remaining to the Committee at the meeting he would like to debate some of the points raised during the discussion. Chairman Mannes accepted this proposal and said the Committee would discuss how to help the subcommittee proceed at the next day's session.

On the second day of the meeting, Mr. Klee resumed the discussion by suggesting that the subcommittee continue its deliberations and return in March 1997 with new drafts that would include a breakdown into more categories of motions than the two presented in the drafts submitted to the meeting. Mr. Klee identified six categories: 1) administrative motions (limited to customary matters), 2) administrative proceedings (major litigation but not an adversary proceeding), 3) expedited motions (as set forth in subdivision (i) of the draft of Rule 9014), 4) motions within motions, 5) motions in adversary proceedings, and 6) an

intermediate category that would be handled on a "negative notice" basis "after notice and a hearing." He inquired whether the Committee agreed about the number and types of the categories.

Judge Duplantier said he would call administrative motions simply "motions" and the same for motions in adversary proceedings. He said he would have multiple laundry lists within these categories, and would use a different word, perhaps "petition," for the matters dealt with in the subcommittee's draft of Rule 9014 (the "general" motions). Mr. Rosen suggested leaving Rule 9014 as a hybrid between an adversary proceeding and a motion, calling the matters addressed therein "administrative proceedings," and listing them in the rules. He said this approach would avoid encroaching on normal motion practice while affording appropriate attention to important bankruptcy administration matters. He said he would not favor putting any "real" motions into draft Rule 9013.

Mr. Heltzel expressed concerns about the notice provisions of the subcommittee's draft Rule 9013. He said that a motion (now an application) to pay the filing fee in installments is a matter about which there does not need to be any notice or any hearing, because there is no natural opposition to the request. He also questioned the need for notice of the filing as well as of the granting of requests for action on several of the other matters listed in draft Rule 9013. Mr. Klee explained that draft Rule 9013 does not contemplate that there would be two notices but rather only the notice after the court rules, as already required under the current rules for most of the actions listed. Mr. Heltzel said, however, that the second sentence of subdivision (e) of the draft [the "after" notice] should not apply to an installment order and that subdivision (c) [the "before" notice] also should not apply to some items, such as motions to pay filing fees in installments.

The Reporter suggested moving the notice and service requirements for installment payments to Rule 1006, which contains provisions concerning the number and timing of installment payments. Ms. Wiggins said the survey that prompted the creation of the litigation subcommittee had shown strong preference by practitioners for having all the

directions in one place and suggested that the Committee refrain from sprinkling around to other rules too many of the items in draft Rule 9013. Judge Restani also cautioned against too much proliferation, but the consensus was that placement in Rule 1006 would work for a motion to pay the filing fee in installments.

Professor Tabb said, as a general matter, he thought the "after" notice provisions of subdivision (e) of the draft Rule 9013 were the more important and that the "before" notice that would be required under subdivision (c) of the draft could be deleted. Professor Resnick disagreed; he said he thought the "before" notice of subdivision (c) was the more important one. Mr. Klee said that some items in the draft Rule 9013 might be better handled under a negative notice procedure. The consensus, however, was that for a truly _ex parte_ matter the "after" notice of subdivision (e) would be sufficient.

With respect to the subcommittee's draft Rule 9013, the Committee agreed specifically to --

• move notice/service requirements on installment payments to Rule 1006;

• bracket [] item (5) on dismissal under §§ 1208(b) and 1307(b), to reflect the 5-5 tie vote by the Committee on moving this item to the negative notice category;

• move a motion/order to enlarge the time for filing schedules and statements to Rule 1007, and add that matter to the list of those excepted from Rule 9013 treatment in item (9);

• combine item (10), waiver of a filing fee, with item (1), installment payments, and add it to Rule 1006 and possibly other rules;

• carve out chapter 9 and chapter 11 cases from item (11), (form of, manner of sending, or publication of a notice), and require negative notice for this motion in those cases.

Mr. Heltzel and Mr. Sommer both stressed that it is important, throughout, to focus on what is appropriate and functional in the large number of cases and not to be distracted by the rare or exceptional circumstances in which a generally applicable rule would not work as intended. Exceptional cases, they emphasized, can be dealt with by the parties and the court as necessary.

Subcommittee on Rule 2014 Disclosure Requirements. Mr. Smith referred the Committee to the subcommittee's proposed draft and to his letter of exception to the draft in the agenda book. Mr. Rosen said the original draft amendments considered by the subcommittee had tried to clarify the information to be supplied to the court, but that the subcommittee thought the draft did not accomplish its purpose. Moreover, Mr. Klee said, the subcommittee determined that no rule could accomplish the purpose in light of the Bankruptcy Code's definition of "disinterested person" in § 101(14) and the inclusion in the statute of the requirement to disclose any "connection." Mr. Klee pointed out a number of improvements over the current rule in the subcommittee's draft, including the change from an application to a motion, the addition of a notice requirement to replace the existing ex parte procedure, and the addition of an express statement of the ongoing duty to disclose changes in circumstances.

Mr. Smith said the original draft tried to give more guidance on what must be disclosed, even though the statute also provides some direction. He added that he would prefer to avoid an ex parte order, perhaps by utilizing a negative notice procedure, but would want a means of allowing counsel to go forward during the notice period. He said he also thinks the subcommittee draft improves on the existing rule by directing the disclosure of anything that might be an adverse interest.

Mr. Smith asked the Committee members' views on whether the courts currently are obtaining the disclosure they should. Mr. Rosen said attorneys tend to use general language, because it is impossible to list every connection, but there is more specificity than a mere statement that "we have some connections with others in the case, but we don't think they're significant." He said a bright line test, however, such as that an attorney would not have to disclose a connection with a creditor who represents less than ten percent of the firm's business, would violate the Bankruptcy Code.

Mr. Smith summarized the differences between the subcommittee's draft Rule 2014 and the current rule. He began by noting that the draft states who files the motion and who is to be served, that the draft requires the movant to aver concerning the professional's eligibility

and uses some specifics (*e.g.,* "duty to another client") taken from the Restatement of the Law Governing Lawyers, although without any intent to lessen the movant's obligation to employ only someone eligible. The draft authorizes an immediate order, he said, but allows for a hearing on ten days notice at the court's discretion, a timing that might need to be reconciled with the 20-day notice period provided in the subcommittee's companion draft amendment to Rule 2002. In addition, the draft would require a verified statement by the professional to be employed that discloses any relationship which might cause a "reasonable person" to conclude there is an adverse interest, in language borrowed from both the Restatement and § 101(14), and which is, therefore, more expansive than the current rule. He noted also the addition of a requirement for a supplemental statement and the addition of language covering changes in membership of a partnership during the course of the representation.

It was noted that the Bankruptcy Code addresses the issues of conflict and potential conflict in several places and that the standards differ from section to section. For example, § 101(14) describes when a person is not disinterested and defines an adverse interest; § 327(a) requires a professional employed by a "trustee" to be disinterested with no adverse interest; § 328(c) authorizes a court to deny compensation to anyone who is found not to have lived up to the "disinterested with no adverse interest" standard required for employment; but § 327(c) permits employment by the "trustee" of a professional who also represents a creditor, subject to disapproval of the employment if an actual conflict is shown. It also was noted that the National Bankruptcy Review Commission is examining these issues.

Judge Cordova moved to adopt the subcommittee's draft amendments to Rules 2014 and 2002. Mr. Rosen questioned the expansion in draft Rule 2014, subdivision (b), clause (3), to include "connections" to any party in interest. Mr. Klee said the Committee should adhere to the statute by limiting disclosure of connections to those with the debtor and investment bankers and should use adverse interest as the standard for creditors. Judge Kressel said he would prefer to have a hearing before authorizing employment, but was concerned about the resulting delay in signing an order and how to approve payment for prior work. Professor Resnick suggested that "negative notice" could work for authorizing

employment, but Judge Kressel said there would still be a problem of waiting for the objection period to run. Mr. Sommer suggested using an interim order that would ripen into a final order if no objection were filed. Professor Resnick suggested instead that a regular order followed by notice, with no stated period for objecting, would still allow a party in interest to object. Mr. Sommer also said he thinks that subdivision (b) clause (2) (the reasonable person test) creates a new standard with new uncertainties. Judge Robreno observed that the drafts lack Committee Notes and that there seem to be both technical and conceptual problems with the proposed amendments. Mr. Klee offered **an amendment to the motion to adopt the subcommittee's draft Rule 2014 that would revise subdivision (b) by striking clause (2) and requiring instead the disclosure of any adverse interest and representation of any adverse interest, and by striking the language after the third comma in clause (3) and inserting "the debtor or an investment banker" as set forth in § 101(14). The motion as amended carried with none opposed.** Professor Tabb offered a further **amendment to prescribe an interim employment order, followed by notice, with the order to ripen into a final order if no objection is filed. The amendment carried with none opposed.** The Reporter asked **whether the Committee wanted him to conform lines 15 through 19 of subdivision (a) to the changes approved in subdivision (b), to which the response was, by consensus, affirmative. A motion to table further consideration until the March 1997 meeting and request the Reporter to prepare new drafts and Committee Notes carried without opposition.** Judge Robreno requested that the Reporter also prepare a **memorandum providing the Committee with information and background, discussing the meaning of "disinterested," and the present condition of the law.**

Subcommittee on Rule 7062. Judge Kressel reviewed for the Committee the history of the proposed amendments. The project began, he said, with the Committee's instructions to delete from Rule 7062 the list of "additional exceptions" to the ten-day stay of enforcement of a judgment. The reasons were that the exceptions are contested matters and not adversary proceedings and that the list kept growing. The first task for the subcommittee was to identify those matters in which there should be time to appeal before the parties take action based on a court order. The choices are to 1) stay none, 2) stay all except those specified, or

3) stay none except those specified. The subcommittee chose the third option. This option would have the effect of changing the "default" mode for the selected items from immediate implementation to delayed implementation, unless the court orders otherwise in a particular matter.

Next, the subcommittee considered which items should be stayed and where to put the stay provision, whether in one rule or sprinkled around in the rules that govern the substantive issues. The subcommittee did not resolve the placement issue, and the drafts present the amendments both ways. Taking up the specific matters that currently are listed in Rule 7062 as "additional exceptions" and are, therefore, immediately enforceable, the subcommittee chose to "stay" some of these matters and added confirmation of a chapter 11 plan to the group. Rather than retain the word "stay," however, the subcommittee decided to use separate language to indicate what really is meant in each of the specific contested matters, that is, the postponement of implementation.

A motion signifying the Committee's general agreement to change the default as recommended by the subcommittee carried unopposed. A motion to place the amendment provisions in the various rules governing the substantive issues, rather than in Rule 9014, carried by a vote of 7 - 2.

A motion to adopt the proposed amendment to Rule 7062, deleting all but the first sentence of the existing rule, carried with none opposed. In considering the subcommittee's draft Rule 9014, members questioned the carving out of the trustee and the debtor in possession from the ten-day stay. After discussion, **a motion to adopt only the subcommittee's proposed amendment deleting Rule 7062 from the list of rules applicable in contested matters (line 11) and not adopt the proposed new sentence at the end of the draft carried unopposed.**

Turning to the subcommittee's proposed amendment to Rule 1017, which would add a new subdivision (f) to provide for delaying the effect of an order converting or dismissing a

case, Judge Small said an order of dismissal should not be stayed, because assets will disappear during the ten-day period. **A motion to revise the subcommittee's draft to provide for the immediate implementation of an order dismissing a case carried by a vote of 9 to 2. A motion to make an order converting a case effective immediately also carried by a vote of 9 to 3.**

The subcommittee's proposed amendment to Rule 4001(a) would stay the effect of an order granting relief from the automatic stay for ten days. **A motion to adopt the subcommittee's draft carried by a vote of 8 to 2.** The subcommittee's proposed amendment to Rule 6004 would stay for ten days the effect of an order authorizing the use, sale, or lease of property other than cash collateral. **A motion to adopt the subcommittee's draft carried by a vote of 10 to 2.** Both amendments give the court discretion to order immediate effectiveness in a particular matter. Judge Kressel noted that the amendment to Rule 6004 also refers to § 363(m) of the Code, which provides protection for a bona fide purchaser of estate property if the sale is overturned on appeal. Concerning the subcommittee's proposed amendment to Rule 6006, Judge Kressel pointed out that the provision for a ten-day stay would apply only to the assignment of an executory contract or unexpired lease and not to either assumption or rejection. **A motion to adopt the subcommittee's draft carried on a voice vote.** The subcommittee also had submitted draft amendments to Rules 3020 and 3021 to delay for ten days the implementation of a confirmed chapter 11 plan and any distribution under a confirmed plan. **A motion to adopt the subcommittee's draft amendments to these rules also carried on a voice vote.**

Mr. Klee said that in all of these amendments the phrase "if an order is entered" or similar language should be used instead of the wording in the drafts which uses "if the court enters." Judge Duplantier suggested revising all the amendments uniformly to characterize the court's action as "entry" of the order concerned.

Subcommittee on Forms. Mr. Sommer reported that the proposed amendments to the official forms have been published, and the subcommittee is awaiting comments on the proposals. The deadline for comments is February 15, 1997.

Subcommittee on Local Rules. Judge Duplantier reported that courts are in the process of converting the local rule numbers to conform to the Judicial Conference directive, a process due to be completed by April 15, 1997. Ms. Channon reported that she receives four to five calls a month from courts having questions about the renumbering.

Subcommittee on Alternative Dispute Resolution (ADR). Professor Tabb said the subcommittee has been monitoring local ADR programs and that 18 bankruptcy courts currently operate mediation programs. He said he expects the American Bar Association's work on a proposed model local rule on ADR to be completed soon and that he will report to the Committee in March 1997 about whether the model rule will make it advisable to amend any bankruptcy rules. In response to a question about how bankruptcy judges select mediators, Professor Tabb said there are various methods and that the more recent local rules contain more provisions covering the selection process. Professor Tabb referred the Committee to a law review article by former Committee member Ralph R. Mabey and himself that appeared in the South Carolina Law Review. Mr. McCabe said the Rand Corporation is due to submit a subreport on ADR by November 30 to the Committee on Court Administration and Case Management, and that the report should be available to other committees by the March 1997 meeting.

Subcommittee on Technology. Mr. Heltzel reported that the amendments authorizing electronic filing are to become effective December 1, 1996, and that some experiments with the process have already begun. The bankruptcy court for the Western District of Oklahoma has been imaging all documents filed for several months, and the Prince Georges County, Maryland, state court is accepting electronic filings in several types of cases, as described in the material at tab 16 in the agenda book. He said that he is accepting filings on disk at the

bankruptcy court for the Eastern District of California and is engaged in limited electronic data interchange (EDI) transactions with the case trustees in the district.

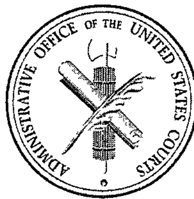
Liaison with Advisory Committee on Civil Rules. Judge Restani, after noting that much of her subject had already been covered in connection with the report on the meeting of the Standing Committee, stated that draft amendments to Rule 23 had been published for comment. The next rule on which the civil committee will focus, she said, is Rule 26(b) concerning the scope of discovery. She added that the draft amendments to Rule 26(c) on protective orders, even though complete, probably will be held until the civil committee completes its draft of Rule 26(b). Mr. McCabe said that the outgoing chair of the civil committee has conducted a series of focus meetings around the country and that the work on class actions and discovery arose from bar comments at those meetings.

Respectfully submitted,

Patricia S. Channon

Agenda Item 12-14

Update LRP Implementation chart to include amendments to Civil & Criminal Rules re MAG JUDGES Rec. 23



LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

December 5, 1996

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Long-Range Planning*

The Judicial Conference's Executive Committee has requested the Standing Committee, along with other committees, to consider developing a long-range planning agenda for the next three years. The committees are asked: (1) to begin implementing — as appropriate — the Long Range Plan for the Federal Courts, which was approved in September 1995; and (2) to continue the long-range planning process of identifying trends that may require future action.

For your information, I have attached the three following documents:

- A July 29, 1996, memorandum from the Director to selected chairs of Judicial Conference committees advising them of the status of long-range planning in the federal courts.

- A November 21, 1996, memorandum from Judge Glenn L. Archer, liaison from the Judicial Conference's Executive Committee, explaining the network of committee contacts established to coordinate long-range planning in the judiciary. Attachments suggest ways to implement the Long Range Plan.

- A chart showing the status of recommendations contained in the Long Range Plan. Page 18 includes the four recommendations directly involving the rules committees.

The four recommendations in the Long Range Plan, which directly affect the rules committees, provide guidance in promulgating rules changes and have been taken into account during the rulemaking process by the advisory rules committees. For the most part, these four recommendations have already been implemented.

Judge Stotler now would like to begin a preliminary discussion of how best to set up a regularized means to continue the long range planning process. In particular, she requests that you review the attachment to Judge Archer's correspondence, which suggests several ways to maintain the long range planning efforts in the federal judiciary.

John K. Rabiej

John K. Rabiej

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

July 29, 1996

MEMORANDUM TO SELECTED CHAIRS OF COMMITTEES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (See Attached List)

SUBJECT: Continuation of Long-range Planning (**ACTION REQUESTED**)

I write to update you on recent developments concerning the organization of long-range planning activities in the Judicial Conference and its committees, and to request that you take the action described below to initiate the new planning mechanism.

As you are aware, the Judicial Conference completed the initial phase of its strategic planning efforts last fall when it approved the first *Long Range Plan for the Federal Courts*. In November, I advised all Conference committees that responsibility for implementation of the plan rests with the committees responsible for the respective subject areas. Since that time, the plan has been published and distributed widely inside and outside the judiciary. The relevant Conference committees have considered and, in some cases, taken action to implement certain recommendations in the Plan, including legislative proposals now pending before Congress and other policy matters that have been or will be presented to the Conference.

In March 1995, the Conference resolved that a planning mechanism for identifying and pursuing the strategic goals and objectives of the federal judiciary should be maintained in the Conference organization and at all levels of the judicial branch. Although a long range plan now exists, the current plan does not address the complete range of strategic issues, but instead leaves a number of matters to be addressed for the first time or more fully in ongoing planning efforts. For example, Chapter 11 of that document lists a variety of topics for future consideration.

The Chief Justice met recently with members of the Conference's Executive Committee to discuss how to organize this continued planning process. As a result of their discussion, the Chief Justice determined that long-range planning should be treated as an intrinsic part of each Conference committee's policy-making function, with any subsequent additions or changes in the existing plan to be handled in the ordinary course of business (i.e., through recommendations to the Conference from the appropriate committee(s)). Whenever a more thorough update is

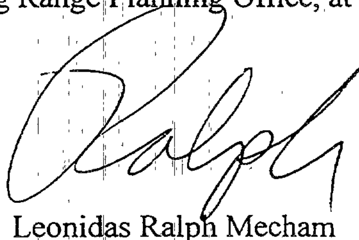
needed (perhaps every five to ten years), the Chief Justice may appoint another long-range planning committee to undertake that effort. In the meantime, the Chief Justice will occasionally appoint one or more ad hoc committees to address issues of major importance (e.g., mass tort litigation) that cut across the jurisdictions of the regular Conference committees.

Absent a separate long-range planning committee, the Executive Committee will be responsible for coordination of planning activities, including referrals of high priority issues for study and report by the appropriate committees. To aid in that task, the chair of each committee with significant long-range planning responsibility will designate a special liaison member to promote and continue planning within the committee. These liaison members may also be called upon collectively to serve as an ad hoc advisory group on matters requiring a broad perspective. Committees may wish to include a discussion of long-range planning activities in their regular reports to the Conference.

The Administrative Office will support the planning efforts of Conference committees by conducting strategic studies and assisting with implementation of the current plan. The AO's Long Range Planning Office, which facilitates and encourages planning throughout the judiciary, will be available to provide technical assistance, research, and analytical support on planning-related matters. With cooperation from the regular committee staffs, the Long Range Planning Office will track implementation of the plan and continued planning by the Conference and its committees. The Office will also work closely with the designated liaison members to aid in coordination of committee planning activities.

At this time, I would ask that you proceed at your earliest opportunity to designate a planning liaison for your committee and then advise me of which committee member will serve initially in that capacity. Once that designation is made, your committee will be ready to carry out its role in the ongoing planning process, perhaps starting at the winter meeting with discussion of a planning agenda for the next three years.

If you have any questions about the *Long Range Plan* or strategic planning in general, please contact Jeffrey Hennemuth, chief of the Long Range Planning Office, at (202) 273-1810.



Leonidas Ralph Mecham

Attachment

cc: AO Senior Staff

United States Court of Appeals
for the Federal Circuit

Chambers of
Glenn L. Archer, Jr.
Chief Judge

717 Madison Place, N.W.
Washington, D.C. 20439
Phone: 202-633-5846

November 21, 1996

MEMORANDUM

TO: The Planning Liaison Members of Committees of the Judicial Conference of the United States

FROM: Glenn L. Archer, Jr.

RE: Long-Range Planning Liaisons – Beginning our Work

I have been asked by Judge Terry Hodges, Chair of the Executive Committee, to act as that committee's liaison on long range planning. You are now serving in the same capacity for your respective Judicial Conference committees. I look forward to working with you and am confident that our communication and coordination will be important to the implementation of the *Long Range Plan of the Federal Courts* and to the other long range planning that needs to be done.

As you know, each committee of the Judicial Conference is now primarily responsible for planning efforts within its jurisdiction, subject to Executive Committee coordination. Our task as liaisons is twofold. First, we should encourage our committees to implement the *Long Range Plan for the Federal Courts* as appropriate. Second, we should work with our committees to continue the process of examining strategic – i.e., economic, legal, demographic, political, and social – trends and identifying specific subjects that may require future Conference action.

Through the liaison network, your committees will be able to keep in touch with each other's planning efforts and pursue long-range goals and objectives consistent with the broader interests of the judiciary. The Executive Committee may periodically call upon all or some of us to share our committees' perspectives and advise on coordination of planning activities involving more than one committee.

In the near term, I anticipate that the bulk of committee planning efforts will be devoted to carrying out the *Long Range Plan*. To aid you in that effort, I am enclosing a chart, prepared by the Long Range Planning Office at the Administrative Office, that depicts the status of *Plan* implementation in light of recent or recurring actions and events. The Planning Office has also prepared the enclosed paper describing the Conference planning process and suggesting possible approaches to *Long Range Plan* implementation.

Over time, it will also be necessary for the Conference and its committees to consider additional matters that were not addressed fully or at all in the first *Long Range Plan*. Chapter 11 of the December 1995 version lists a number of topics that the Committee on Long Range Planning identified for future study. The Executive Committee intends to examine that list and determine which items should be addressed by one or more committees. Each committee should also consider whether any "big picture" issues facing the judiciary should be addressed by the committee from a planning perspective during the next three to five years.

As we move ahead, it is important that we share information and ideas, and I encourage you to raise with me any concerns or suggestions on how we should proceed. It would be helpful if each of you would provide, following your next committee meeting, a brief written description of your committee's proposals for implementation of the *Long Range Plan* and its intended approach to further long-range planning. Please forward that description to the AO's Long Range Planning Office, which will distribute copies to me and the other liaisons. With the information you provide, the Executive Committee will be better equipped to assess and provide further direction for committee planning efforts at its meetings during the coming year.

I look forward to our working together to aid our committees and the Judicial Conference in anticipating and managing the planning activities that will be undertaken. Please do not hesitate to contact me if you have any questions on this subject. Further information is also available from the AO's Long Range Planning Office, whose staff can be reached at 202/273-1810.

Glenn L. Archer, Jr.

Enclosures:

1. *Long Range Plan for the Federal Courts* (December 1995) – Status of Recommendations and Implementation Strategies
2. Continued Long-Range Planning and Implementation of the *Long Range Plan*
3. *Judicial Branch Planning Guide* (AOUSC, Nov. 1993)

cc: Honorable Wm. Terrell Hodges
Honorable Richard S. Arnold
Honorable Ann Claire Williams
Honorable George P. Kazen
Honorable Emmett Ripley Cox
Honorable Stephen H. Anderson
Honorable Barefoot Sanders
Honorable Julia Smith Gibbons
Honorable Philip M. Pro
Honorable Norman H. Stahl
Mr. Leonidas Ralph Mecham

Continued Long-Range Planning and Implementation of the *Long Range Plan*

Planning, simply stated, is the process of defining a desired future and developing the means to achieve it. The Judicial Conference's strategic planning process reached a significant milestone in September 1995 with the approval of the first *Long Range Plan for the Federal Courts*. Since that time, the Chief Justice has determined that responsibility for planning and *Plan* implementation should rest with the Conference committees responsible for the respective subject areas. The relevant committees have considered and, in some cases, taken action to implement certain recommendations in the *Plan*, including policy matters that have been or will be presented to the Conference and legislative proposals that have been or may be acted on by Congress.

To ensure that the *Long Range Plan* remains current, the planning process should continue concurrently with implementation efforts. An effective approach would permit both incremental adjustments and periodic reevaluation of the first *Plan*. The *Plan* could be revised periodically to reflect any new or different goals identified through the customary policy making process. Revisions need not be extensive and might be based in part on experience gained through *Plan* implementation. Inevitably, however, new planning issues will arise within the judiciary, thereby continuing the need for strategic discussions.

Absent a separate long-range planning committee, the Executive Committee will be responsible for coordination of planning activities, including referrals of high priority issues for study and report by the appropriate committees. The chair of each committee with significant long-range planning responsibility was asked to designate a liaison member to promote and continue planning within the committee. These liaison members may also be called upon collectively to serve as an ad hoc advisory group on matters requiring a broad perspective. Committees may wish to include a discussion of long-range planning activities in their regular reports to the Conference.

Individual committees retain substantial flexibility as to timing and substance of planning and *Plan* implementation activities, with external coordination only as required for consistency and continuity. (An attachment to this paper provides suggestions on how committees might approach implementation.) The Conference might conduct planning as a cyclical process in which committees could be asked every three or four years to identify long-term issues or trends on which basic policy direction is needed. Such identification might be accomplished in committee "brainstorming" sessions or through more general reflection and discussion of potential issues a committee sees in its area of responsibility. A key factor for the success of planning is that this function be part of normal business, with broad commitment and participation.

Following those discussions, the liaison members could share with each other their committees' views and work together to devise a loosely-coordinated planning agenda that the Executive Committee could consider and possibly endorse. A general agenda would enable each committee to make decisions with a better sense of what issues are of broader significance to the

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This paper has been prepared by the Long Range Planning Office, Administrative Office of the United States Courts, to aid the members and staff of the Judicial Conference

judiciary. On topics cutting across committee jurisdictional lines, the liaisons—either as a whole or in smaller groups representing the relevant subject areas— could be asked to articulate possible goals for consideration by the appropriate committees.

The planning process will continue to receive staff support of the kind provided during development of the *Long Range Plan*. The Administrative Office will support planning efforts of the Conference and its committees by conducting strategic studies and aiding implementation of the current *Plan*. Additional assistance can also be obtained, as necessary, from the Federal Judicial Center. In cooperation with regular committee staff, the AO's Long Range Planning Office will provide technical, research, and analytical support on planning-related matters, track implementation of the *Plan*, and assist the designated liaison members in promoting and coordinating committee planning activities.

November 1996 ATTACHMENT

Long Range Plan for the Federal Courts: Implementation by Committees of the Judicial Conference

As shown through the experience of numerous successful governmental and business organizations, planning is an integral component of effective policy making. A planning process therefore exists to support an organization's programs and decision making, not to replace (or to divert time and attention from) those activities. With an approved *Long Range Plan for the Federal Courts*, the Judicial Conference and its committees can discharge their responsibilities aware of how their actions accord with a generally accepted view of where the judiciary is headed. The Plan also gives direction to the legislative program, allowing the judiciary's representatives to respond more quickly and effectively to new developments. This proactive approach to the future adds a healthy context to everyday decisions.

The Long Range Plan serves primarily as a guide for future administration and policy making in the judicial branch. Not all recommendations and implementation strategies in the Plan call for immediate or, in some cases, any action by the Conference or its committees. Some items reflect values and aspirations that might never be fully operational. Others reflect a current state of affairs that need only be maintained or involve areas for which other judicial branch authorities (circuit councils, individual courts, AO, etc.) are responsible. Some objectives are being pursued under existing Conference or other internal policies, while others should be considered only if certain circumstances come to pass. Still others require additional research and assessment before specific action can be considered. In certain recommendations and strategies, the Conference has already made the requisite policy choices (*e.g.*, identifying the need for particular legislation or programs), and thus responsibility for implementing those items falls to the Administrative Office or other judicial branch staff—subject, as always, to general supervision, monitoring, and (in appropriate situations) direction by the Conference and its committees.

To begin the task of implementation, each Conference committee should decide in its area of jurisdiction which, if any, items in the Plan require action, and at what pace that action should occur. This will principally require the committee to answer basic questions about the meaning of the Plan and its implications for the committee's work. In doing so, the committee can determine more precisely which efforts can be undertaken now, which must be deferred temporarily, and which, however desirable, remain only theoretical possibilities. Since the Plan was developed through general consensus and had substantial prior input from committees, it is likely that some efforts will be made to implement the Plan immediately.

In seeking to apply the Plan as a guide, a committee might first review the status of the recommendations and implementation strategies falling within its jurisdiction, considering the historical background and any current policies or practices. Next, it might determine whether a particular item calls for new initiatives or changes in policies or practices that require committee action. The priority of any new actions should be assessed within the framework of the committee's current agenda and external realities.

This paper has been prepared by the Long Range Planning Office, Administrative Office of the United States Courts, to aid the members and staff of the Judicial Conference

After establishing general priorities (at least tentatively), the committee can follow these basic steps to implement Plan recommendations and strategies:

- *Estimate the probable costs (if any), and assess whether the necessary resources (i.e., time, budget, staff support) are potentially available.*
- *Determine whether the requisite statutory or other legal authority exists and whether further Conference authorization is required before action can be taken.*
- *Review and confirm relative priorities for implementation.*
- *Develop appropriate actions for carrying out each recommendation selected for implementation (see below).*
- *Periodically inform the Conference on the status of Plan items within the committee's jurisdiction, including continued assessment of whether the stated goals or objectives remain appropriate and attainable.*

If the committee decides to take action with respect to a particular recommendation or strategy, it might consider one or more of the following measures:

- *Form an ad hoc subcommittee to develop, by a certain date, an action plan for implementing the stated goal or objective, or to undertake a preliminary review of current policy and practice and possible changes therein.*

- *Determine that the full committee will develop a specific implementation plan at a particular meeting or meetings.*

- *Ask others responsible for implementation (other Conference committees/circuit councils/individual courts) to give increased priority to the particular item.*

- *Determine that no further formal Conference action is needed but ask judicial branch staff to take appropriate steps. For example, the committee might request that the Administrative Office expedite or (as the case may be) defer efforts toward securing legislation involving policies that the Conference has fully endorsed in the Plan itself or in separate action. At the same time, the Conference should be kept apprised of these staff actions—standardized report language is being developed that may be used for this purpose.*

- *If other Conference committees have already begun examining the specific issue or situation, defer further action pending the outcome of those efforts.*

- *Ask another committee currently looking at a related issue to consider both issues and their possible interaction.*

- *Ask some other expert body to review the issue and make realistic assessments.*

- *Where the scope or implications of a particular program cannot be determined without experience, propose implementation on an experimental or pilot basis.*

- *Ask the committee staff or other advisors to identify ways in which a goal or objective involving administrative action can be carried out most efficiently, and to identify and assess possible actions (including budgetary implications) for implementing a particular Plan item.*

Long Range Plan for the Federal Courts (December 1995) Status of Recommendations and Implementation Strategies

The purpose of the following chart is to inform the members and staff of the Judicial Conference and its committees on recent and ongoing developments, both inside and outside the judicial branch, that relate to recommendations and implementation strategies in the *Long Range Plan*.

- This chart not only lists actions and events consciously inspired or aided by the *Long Range Plan* but also identifies independent activities that are directly or indirectly pertinent to (if not always consistent with) the goals and objectives set forth in the *Plan*.

- The Judicial Conference committees with primary jurisdiction to implement the *Plan* are listed in this chart merely for ease of reference. Those committees, however, are *not* necessarily responsible for actions or events listed in the right-hand column.

- Given the breadth of many *Plan* recommendations, this chart is not intended to be an exhaustive catalog of relevant activities. However, it does provide an oveview of notable developments so that the Judicial Conference and its committees can assess the need for action on particular recommendations and identify those areas in which the *Plan* might be enhanced or revised.

Long Range Plan Recommendation/ Implementation Strategy	Judicial Conference Committee(s) with Primary Jurisdiction*	Recent and Ongoing Developments**
Chapter 4. Judicial Federalism		
Recommendation 1: Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.	Federal-State Jurisdiction (civil) Criminal Law (criminal)	In July 1996, the chair of the Criminal Law Committee wrote to the ranking minority member of the Senate Judiciary Committee to suggest "thorough, exhaustive deliberation" and consideration of a statutory alternative (i.e., one not applicable to state court actions) before Congress undertakes a "victims rights" amendment to the Constitution (e.g., S.J. Res. 52 and 65, 104th Cong.) (see also I.S. 91b below).
Recommendation 2: In principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount. Congress should be encouraged to allocate criminal jurisdiction to the federal courts only in relation to the following five types of offenses: (a) The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government; or the Congress has evinced a clear preference for uniform federal control over this activity. (b) The proscribed activity involves substantial multistate or international aspects. (c) The proscribed activity, even if focused within a single state, involves a complex commercial or institutional enterprise most effectively prosecuted by use	Criminal Law	In July 1996, the chair of the Criminal Law Committee wrote to the relevant subcommittee chairs in the Senate and House Judiciary Committees to comment on the potential impact on federal judicial workload of several bills in the 104th Congress that would likely expand federal prosecution of juvenile offenders.

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Long Range Plan **Recommendation/ Implementation Strategy**	**Judicial Conference Committee(s) with Primary Jurisdiction***	**Recent and Ongoing Developments****
of federal resources or expertise. When the states have obtained sufficient resources and expertise to adequately control this type of crime, this criterion should be reconsidered. (d) The proscribed activity involves serious, high-level, or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter. (e) The proscribed activity, because it raises highly sensitive issues in the local community, is perceived as being more objectively prosecuted within the federal system.		
RECOMMENDATION 3: Congress should be encouraged to review existing federal criminal statutes with the goal of eliminating provisions no longer serving an essential federal purpose. More broadly, a thorough revision of the federal criminal code should be undertaken so that it conforms to the principles set forth in Recommendation 2 above. In addition, Congress should be encouraged to consider use of "sunset" provisions to require periodic reevaluation of the purpose and need for any new federal offenses that may be created.	Criminal Law	
RECOMMENDATION 4: Congress and the executive branch should be encouraged to undertake cooperative efforts with the states to develop a policy to	Criminal Law	[According to comments by Deputy Attorney General Jamie Gorelick at the January 1996 "three-branch" conference (see I.S. 91d below), the Justice

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
determine whether offenses should be prosecuted in the federal or state systems.		Department continues to examine its prosecutorial policies and work with state prosecutors to determine which crimes should be prosecuted in federal court and state court, respectively.]
4a There should be an increase in federal resources allocated to state criminal justice systems for prosecution of matters now handled by federal prosecutors because of lack of state resources.	Criminal Law	
4b The practice of cross-designating both federal and state prosecutors to gain efficiencies of prosecution should be increased.	Criminal Law	
4c State courts should be authorized to adjudicate certain federal crimes for which there currently is no statutory grant of concurrent jurisdiction.	Criminal Law	The possibility of concurrent federal court and state court jurisdiction of federal offenses was discussed at the January 1996 "three-branch" conference (see I.S. 91d below). Both favorable and unfavorable opinions were heard and no conclusions were reached.
RECOMMENDATION 5: The executive branch should be encouraged to develop standards on which the Justice Department will base the promulgation of prosecutorial guidelines. Specifically, standards should be considered— (a) that are consistent with sound jurisdictional boundaries for federal criminal prosecution as described in Recommendation 2; and (b) under which the potential for harsher federal sentencing policies and greater capacity in the federal prisons would be insufficient grounds, by themselves,	Criminal Law	

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to warrant prosecution under a federal, rather than a state, criminal statute.		
RECOMMENDATION 6: Congress should be encouraged to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified federal interests. Federal court jurisdiction should extend only to civil matters that— (a) arise under the United States Constitution; (b) deserve adjudication in a federal judicial forum because the issues presented cannot be dealt with satisfactorily at the state level and involve either (1) a strong need for uniformity or (2) paramount federal interests; (c) involve the foreign relations of the United States; (d) involve the federal government, federal officials, or agencies as plaintiffs or defendants; (e) involve disputes between or among the states; or (f) affect substantial interstate or international disputes.	Federal-State Jurisdiction	The Federal-State Jurisdiction Committee continues to review and, when appropriate, recommend Judicial Conference responses to legislative proposals that might create or expand federal court litigation of matters traditionally governed by state law. For example, during the 104th Congress, the committee monitored the progress of legislation (not ultimately enacted) that would authorize federal court enforcement of parental rights and responsibilities (S. 984 and H.R. 1946).
RECOMMENDATION 7: Congress should be encouraged to seek reduction in the number of federal court proceedings in which jurisdiction is based on diversity of citizenship through the following measures: (a) eliminating diversity jurisdiction for cases in which the plaintiff is a citizen of the state in which the federal district court is located; and	Federal-State Jurisdiction	• Section 205 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) increases the amount-in-controversy requirement from $50,000 to $75,000. • On the Conference's behalf, the Administrative Office continues to pursue legislation to eliminate diversity jurisdiction for "in-state" plaintiffs and

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Long Range Plan Recommendation/ Implementation Strategy	Judicial Conference Committee(s) with Primary Jurisdiction*	Recent and Ongoing Developments**
(b) otherwise limiting diversity jurisdiction by— (1) amending the statutes conferring original and removal jurisdiction on the district courts in diversity actions to require that parties invoking diversity jurisdiction plead specific facts showing that the jurisdictional amount-in-controversy requirement has been satisfied; (2) raising the amount-in-controversy level and indexing the new floor amount to the rate of inflation; and/or (3) amending the statutory specification of the jurisdictional amount to exclude punitive damages from the calculation of the amount in controversy.		provide for increases in the jurisdictional amount-in-controversy every five years based on the consumer price index. Provisions to that effect were included in the federal courts improvement bills (S. 1101, H.R. 1989) originally introduced in the 104th Congress, but were not included in the legislation as enacted (S. 1887).
Recommendation 8: The states should be encouraged to adopt certification procedures, where they do not currently exist, under which federal courts (both trial and appellate) could submit novel or difficult state law questions to state supreme courts.	Federal-State Jurisdiction	[In June 1996, a bill (S.B. 616) to create a statewide commerce court with jurisdiction to answer legal questions certified by a federal appellate court was reported from the Judiciary Committee of the Pennsylvania Senate. To date, however, no further action on that bill has occurred.]
Recommendation 9: Congress and the agencies concerned should be encouraged to take measures to broaden and strengthen the administrative hearing and review process for disputes assigned to agency jurisdiction, and to facilitate mediation and resolution of disputes at the agency level.	Federal-State Jurisdiction	The Social Security Administration (SSA) is pursuing "reengineering" of its disability claims process with a view toward improving the quality and timeliness of its administrative decisions. Based on Judicial Conference policy established in 1994, the judiciary continues to express concern about the part of the reengineering plan that, when fully implemented,

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		would eliminate a request for consideration by the SSA Appeals Council as a prerequisite to seeking judicial (i.e., district court) review of Social Security disability claims.
9a *Legislation should be requested to improve the adjudicative process for Social Security disability claims by establishing a new mechanism for administrative review of ALJ decisions and limiting the scope of appellate review in the Article III courts.*	Federal-State Jurisdiction	
9b *Legislative and other measures should be pursued to give agencies the requisite authority and resources to review and, where possible, achieve final resolution of disputes within their jurisdiction.*	Federal-State Jurisdiction	• [The Administrative Dispute Resolution Act of 1996 (Pub. L. No. 104-320) permanently authorizes the administrative agency alternative dispute resolution provisions of the Administrative Dispute Resolution Act of 1990 (which originally expired in October 1995).] • In the commentary on this recommendation, the *Long Range Plan* specifically noted that the Administrative Dispute Resolution Act of 1990 is "an important means of promoting final resolution of disputes before they require federal court review" and should be extended. • In response to proposed legislation that provided for automatic Benefits Review Board affirmance of ALJ decisions under the Longshore and Harbor Workers' Compensation Act pending before the Board for one year, Administrative Office staff suggested an additional provision under which

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		Board proceedings could be continued for another 90 days at the option of the party seeking Board review. The legislation ultimately enacted (Pub. L. No .104-134, 110 Stat. 1321, 1321-219) allows petitioners to continue proceedings before the Board for an additional 60 days.
RECOMMENDATION 10: Where constitutionally permissible, Congress should be encouraged to assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding.	Federal-State Jurisdiction	
RECOMMENDATION 11: Congress should be encouraged to enact legislation to— (a) generally prohibit agencies from adopting a policy of non-acquiescence to the precedent established in a particular federal circuit; and (b) require agencies to demonstrate special circumstances for relitigating an issue in an additional circuit when a uniform precedent has been established already in multiple courts of appeals.	Federal-State Jurisdiction	The Federal Judicial Center's soon-to-be published analysis of unresolved intercircuit conflicts (see Rec. 19 below) includes discussion of non-acquiescence and forum shopping by multi-circuit litigants.
RECOMMENDATION 12: Congress should be encouraged to refrain from providing federal district court jurisdiction over disputes that primarily raise questions of state law or involve workplace injuries where the state courts have substantial experience. Existing federal jurisdiction in these matters should be elim-	Federal-State Jurisdiction	

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inated in favor of dispute-resolution or compensation mechanisms available under state law.		
12a Congress should be encouraged to eliminate federal court jurisdiction over work-related personal injury actions, such as that provided by the Federal Employers' Liability Act and the Jones Act, where the states have proven effective in resolving worker compensation disputes in other industries and occupations.	Federal-State Jurisdiction	
12b The jurisdiction of the federal courts to adjudicate routine claims for benefits under ERISA employee welfare benefit plans should be abolished, except when application or interpretation of federal statutory or regulatory requirements are at issue.	Federal-State Jurisdiction	On the Conference's behalf, the Administrative Office continues to pursue legislation to prohibit removal to federal court of any claim based on the concurrent jurisdiction authorized by section 502(a)(1)(B) of ERISA. Provisions to that effect were included in the federal courts improvement bills (S. 1101, H.R. 1989) originally introduced in the 104th Congress, but were not included in the legislation as enacted (S. 1887).
*12c Any new cooperative federal-state program to establish national standards for employee benefits (*e.g.*, health care) should designate state courts as the primary forum for review of benefit denial claims. However, any such program should include establishment of an administrative remedial process that must be exhausted before a state court action may be filed.*	Federal-State Jurisdiction	
RECOMMENDATION 13: When legislation is considered that may affect the federal courts directly or	Federal-State Jurisdiction	• The Administrative Office continues to analyze the legal and workload impact of proposed

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indirectly, Congress should be encouraged to take into account the judicial impact of the proposed legislation, including the increased caseload and resulting costs for the federal courts.		legislation on the federal courts. During the 104th Congress, formal judicial impact statements were provided to Congress on six legislative and executive branch initiatives. In addition, five preliminary or draft impact assessments were provided to legislative staff or congressional support agencies on an informal basis, and other cost and workload estimates were provided to the Congressional Budget Office on many other legislative proposals with little or no expected impact on the judiciary. • In response to proposed legislation (S. 250, 104th Cong.) that would require the Administrative Office to analyze the impact of every bill or resolution reported from a congressional committee on state (as well as federal) courts, other federal, state, and local agencies, and the private sector, both the Administrative Office and the Executive Committee advised Congress that the impact analyses prepared by the AO should pertain only to the effect of legislation on the federal judiciary. The legislation in question did not receive further action.
RECOMMENDATION 14: In considering measures that would shift jurisdiction away from the federal courts or provide new jurisdiction through the establishment of concurrent jurisdiction, Congress should also be	Federal-State Jurisdiction	

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encouraged to consider and address the impact of the proposed legislation on the states. Specifically, it should be urged to— (a) consult with state authorities and state judicial leaders in defining any new limits on federal jurisdiction; and (b) provide federal financial and other assistance to state justice systems to permit them to handle the increased workload that would result from the reduction or elimination of existing federal court jurisdiction or the creation of new concurrent jurisdiction.		
RECOMMENDATION 15: The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction.	Judicial Resources	• In March 1996, the Judicial Conference agreed to include, in the biennial surveys of judgeship needs, a review of the possible elimination of judgeships or a moratorium on filling certain judgeships. Recommendations based on that review would be submitted along with any requests for additional judgeships so that Congress could consider them as a total package). At its June 1996 meeting, the Judicial Resources Committee tentatively approved, and agreed to circulate for circuit council comment, a preliminary method for evaluating whether vacant judgeships should not be filled or should be eliminated. • In June 1996, the Executive Committee asked the

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		Judicial Resources Committee to consider the possibility of seeking authorization for the Judicial Conference to reallocate to courts needing additional resources those vacant judgeships that do not need to be filled in their existing locations. • Concurrent with the above-described actions, the September 1996 Judicial Conference agreed to advise the relevant circuit judicial councils not to fill certain vacant *bankruptcy* judgeships absent a demonstrated need, and it approved instituting a notification system to ensure that the relevant circuit council will be provided current data on which to assess whether to commence the process for filling a vacant bankruptcy judgeship. • [Senators Grassley and Kyl proposed legislation in the 104th Congress (S. 2058) that would reduce the number of authorized judgeships on the D.C. Circuit from 12 to 11. The bill did not receive further action.]
15a The limited jurisdiction of the federal courts should be preserved as described in Recommendations 1 through 12.	Federal-State Jurisdiction (civil) Criminal Law (criminal)	
15b The Judicial Conference should employ up-to-date, comprehensive methods to evaluate judgeship needs.	Judicial Resources	• In September 1996, the Judicial Conference approved a new judgeship survey process for the courts of appeals (initially excluding the D.C. and Federal Circuits).

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15c The need for additional judgeships should be reduced through control of federal court caseloads as described in this plan (including the appropriate reallocation of cases to state courts and other forums), and by operational improvements in the courts that increase efficiency without sacrificing either quality in the judicial work product or access to the remedies available only in a federal forum.	Federal-State Jurisdiction (jurisdictional issues) Court Administration and Case Management (operational improvements)	
CHAPTER 5. STRUCTURE		
RECOMMENDATION 16: The federal appellate function should be performed primarily in: (a) a generalist court of appeals established in each regional judicial circuit; and (b) a Court of Appeals for the Federal Circuit with nationwide jurisdiction in certain subject-matter areas.	Federal-State Jurisdiction	• Section 605 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) authorizes appellate review in the U.S. Court of Appeals for the District of Columbia Circuit in future cases arising under the Regional Rail Reorganization Act of 1973 and related statutes (see Rec. 24 below). The legislative history notes that this provision, endorsed by the Judicial Conference in March 1996, is consistent with Recommendations 16 and 24 of the *Long Range Plan for the Federal Courts*, which express a preference for litigation in generalist trial and appellate courts. • The Administrative Office has prepared for the Federal-State Jurisdiction Committee a discussion paper on specialized federal courts that serves as an analytical framework and information resource whenever the committee considers proposals to create, alter, or eliminate specialized courts.

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RECOMMENDATION 17: Each court of appeals should comprise a number of judges sufficient to maintain access to and excellence of federal appellate justice. Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.	Court Administration and Case Management	• Ninth Circuit representatives cited this recommendation at congressional hearings in 1995 in stating opposition to proposed legislation that would divide the Ninth Circuit into two judicial circuits. • [Proposed legislation (S. 956, 104th Cong.) that would establish a special commission to study appellate court structure and alignment (especially the Ninth Circuit) passed the Senate on March 20, 1996. Although that bill did not receive further legislative action, the Judiciary Appropriations Act, 1997 (Pub. L. No. 104-208) provides funding for such a commission in the expectation that authorizing legislation would be moved separately. In May 1996, the Judicial Conference decided against taking any position on the proposed commission.]
RECOMMENDATION 18: To the extent practicable, workload should be equalized among judges of the courts of appeals nationally.	Court Administration and Case Management	
RECOMMENDATION 19: The United States Supreme Court should continue to be the sole arbiter of conflicting precedents among the courts of appeals.	Federal-State Jurisdiction	The Federal Judicial Center will soon publish an analysis of the ramifications of unresolved intercircuit conflicts and the likely impact of intercircuit conflicts that remain unresolved by the Supreme Court. This report was prepared in response to 1990 legislation that implemented certain recommendations of the Federal Courts Study Committee.

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RECOMMENDATION 20: In general, the actions of administrative agencies and decisions of Article I courts should be reviewable directly in the regional courts of appeals. For those cases in which the initial forum for judicial review is the district court, further review in the court of appeals should be available only on a discretionary basis except with respect to constitutional matters and questions of statutory or regulatory interpretation.	Federal-State Jurisdiction	
RECOMMENDATION 21: The existing mechanism for review of dispositive orders of bankruptcy judges should be studied to determine what appellate structure will ensure prompt, inexpensive resolution of bankruptcy cases and foster coherent, consistent development of bankruptcy precedents.	Bankruptcy Administration	• In June 1995, the Bankruptcy Administration Committee deferred consideration of changes in the bankruptcy appeals process pending action by the National Bankruptcy Review Commission. • The Federal Judicial Center is designing a study of bankruptcy appellate panels in light of the apparent increased interest in such panels among the circuits. • A statistical reporting system for bankruptcy appellate panels will be implemented in December 1996.
RECOMMENDATION 22: Pending completion of the study of bankruptcy appellate structure recommended above, the dispositive orders of bankruptcy judges should be reviewable directly in the court of appeals in those cases where the district court or bankruptcy appellate panel (BAP) certifies that such review is needed immediately to establish legal principles on	Bankruptcy Administration	(see Rec. 21 above)

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which subsequent proceedings in the case may depend.		
Recommendation 23: Where parties to a civil action have consented to the case-dispositive authority of a magistrate judge, judgments entered in such actions should be reviewable only in the courts of appeals, and not by a district judge.	Magistrate Judges	**Implementation Completed:** Section 207 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) eliminates district court review of judgments entered by magistrate judges with the consent of the parties under 28 U.S.C. § 636(c). The legislative history notes that Judicial Conference recommended this change in the *Long Range Plan for the Federal Courts*.

Recommendation 24: Except in certain limited contexts (*i.e.*, bankruptcy proceedings, international trade matters, and claims against the federal government), the primary trial forum for disputes committed to federal jurisdiction should be a generalist district court whose judges are affiliated with, and required to reside in, the court's general geographic region, and whose facilities are reasonably accessible to litigants, jurors, witnesses, and other participants in the judicial process.	Federal-State Jurisdiction (court structure)
	
	Court Administration and Case Management (judges' residency and other issues)
		• The Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) contains provisions (sections 605 and 607), endorsed by the Judicial Conference in March 1996, that—
		  • Dissolve the Special Court established under the Rail Reorganization Act of 1973 and transfer its exclusive, nationwide original jurisdiction to the U.S. District Court for the District of Columbia (see Rec. 16 above).
		  • Allow judges of the U.S. District Courts for the Eastern and Southern Districts of New York to reside outside, but within a 20-mile radius of, their respective districts.
		• During the 104th Congress, the Committee on Federal-State Jurisdiction monitored several legislative proposals that would have clarified, or expanded, the jurisdiction of the Court of Federal

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		Claims. With the one exception noted below, those proposals did not receive further action. • [Section 12 of the Administrative Dispute Resolution Act of 1996 (Pub. L. No. 104-320, amending 28 U.S.C. § 1491) expands the jurisdiction of the Court of Federal Claims to include protests filed after (as well as before) a federal contract is awarded. The legislation also authorizes a study of whether concurrent district court jurisdiction over bid protests should be retained and establishes a "sunset" date of January 1, 2001, after which district court jurisdiction will terminate absent further action by Congress.] • The discussion paper on specialized federal courts prepared by the Administrative Office for the Federal-State Jurisdiction Committee (see Rec. 16 above) can be applied when analyzing the issue of judicial specialization at the trial level as well as in appellate courts. • The Federal Judicial Center expects to complete by January 1997 an evaluation of the Vaccine Injury Compensation Program to assess the effect of locating jurisdiction for a specific cause of action in a specialist court.
RECOMMENDATION 25: The judicial districts should continue to be allocated among and within the states	Court Administration and Case Management	

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so that each district comprises a single state or part of a state.		
RECOMMENDATION 26: The impact of district alignment on access to the courts and efficient judicial administration should be studied periodically. Any such study should examine the functional and administrative costs and benefits which merger or division of districts would produce.	Court Administration and Case Management	
RECOMMENDATION 27: Each district court should continue to include a bankruptcy court consisting of fixed-term judges with expertise in the field of bankruptcy law.	Bankruptcy Administration	
27a The bankruptcy court should exercise the original jurisdiction of the district court in bankruptcy matters to the extent constitutionally and statutorily permissible.	Bankruptcy Administration	
27b Congress should be encouraged to clarify the authority of the bankruptcy courts. For example, legislation should be enacted that expressly recognizes the civil contempt power of bankruptcy judges and also affords them limited jurisdiction to hold litigants or counsel criminally liable for misbehavior, disobedience, or resistance to a lawful order.	Bankruptcy Administration	• In June 1995, the Bankruptcy Administration Committee deferred consideration of proposals regarding bankruptcy judge contempt powers while the issue undergoes judicial review and pending action by the National Bankruptcy Review Commission. • Despite a request for reconsideration from the Bankruptcy Administration Committee, the Bankruptcy Rules Advisory Committee has declined to seek a change in the Federal Rules of Bankruptcy Procedure to authorize appointment

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		of special masters in bankruptcy cases and proceedings.
CHAPTER 6. ADJUDICATION		
RECOMMENDATION 28: Rules of practice, procedure, and evidence for the federal courts should be adopted and, as needed, revised to promote simplicity in procedure, fairness in administration, and a just, speedy, and inexpensive determination of litigation.	Rules of Practice and Procedure	
28a *Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.*	Rules of Practice and Procedure	
28b *The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures.*	Rules of Practice and Procedure	
28c *In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches.*	Rules of Practice and Procedure	
RECOMMENDATION 29: The Judicial Conference should continue and strengthen efforts to express judicial concerns about sentencing policy.	Criminal Law	At the request of the Criminal Law Committee, the Federal Judicial Center conducted a survey in 1996 of all district and circuit judges and chief probation officers regarding current operation of the sentencing guidelines and how they might be made simpler, more

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
		flexible, and less burdensome. Initial findings from the survey were presented to the Criminal Law Committee in May 1996, and final results will be presented at the Committee's December 1996 meeting and released in a report shortly thereafter. The final survey results will be available to aid decision making by the Committee, the U.S. Sentencing Commission, and other interested parties.
RECOMMENDATION 30: The legal standards for criminal sentencing should encourage both uniformity of practice and attention to individual circumstances.	Criminal Law	• In April 1995, the United States Sentencing Commission proposed to eliminate in the guidelines the disparity in sentencing policy between offenses involving "crack" cocaine and powder cocaine. The guideline changes, however, were disallowed through legislation enacted in October 1995. • In cooperation with the Criminal Law Committee, the Federal Judicial Center will conduct, in early January 1997, a national institute of district judges, chief probation officers, federal defenders, and U.S. Attorneys to analyze sentencing policy issues and topics and inform the work of the Committee and the Sentencing Commission.
30a Congress should be encouraged not to prescribe mandatory minimum sentences.	Criminal Law	In May 1995, the chair of the Criminal Law Committee wrote to the chair of the Senate Judiciary Committee to express the judiciary's deep concern about legislation imposing mandatory victim

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		restitution requirements. She also testified on that subject before the Senate Judiciary Committee in November 1995.
30b The United States Sentencing Commission should be encouraged to develop sentencing guidelines that— *(1) afford sentencing judges the ability to impose more alternatives to imprisonment;* *(2) encourage departures from guideline levels where factual differences should appropriately be taken into account; and* *(3) enable sentencing judges to consider within the guideline scheme a greater number of offender characteristics.*	Criminal Law	The Criminal Law Committee periodically provides comments and suggestions to the U.S. Sentencing Commission on possible changes in the sentencing guidelines. Between December 1995 and August 1996, the Committee chair wrote to the chair of the Sentencing Commission to— • support revision of the guidelines concerning "acceptance of responsibility," role in the offense, fraud and theft offenses, and "offenses occurring near protected locations" • support harmonizing related specific offense characteristics that have differing definitions in various guidelines • support exempting Class A misdemeanors from the guidelines • support reexamination or reinterpretation of the "25% rule" • support revision of the guidelines on role in the offense • oppose retroactive application of a "safety valve" allowing lower sentences for less culpable offenders in certain circumstances.
RECOMMENDATION 31: A well supported and managed system of highly competent probation and	Criminal Law	• In July 1996, a symposium on the future of pretrial services was held in Washington, D.C.

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Long Range Plan Recommendation/ Implementation Strategy	Judicial Conference Committee(s) with Primary Jurisdiction*	Recent and Ongoing Developments**
pretrial services officers should be maintained in the interest of public safety and as a necessary source of accurate, adequate information for judges who make sentencing and pretrial release decisions.		Among its purposes was development of long range plans for the pretrial services program, addressing management issues, automation and technology, resource development, defendants' special needs, and risk prediction. • The judiciary's FY 1997 budget submission to Congress included an overview of probation and pretrial services officers's responsibilities and the system's current trends and needs. • The Federal Judicial Center continues to provide orientations for new probation and pretrial services officers and seminars and other training for experienced officers. • At the request of the Criminal Law Committee, the Federal Judicial Center has developed a new statistical "risk of recidivism" tool to be used by probation officers in classifying their supervision workloads. • Section 101 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) authorizes probation and pretrial services officers to carry firearms under rules prescribed by the Director of the Administrative Office provided the district court approves. This change eliminates the need for such authorization under state law.
RECOMMENDATION 32: In the interests of promoting justice and fairness, all aspects of the administration	Court Administration and Case Management	• In September 1996, the Judicial Conference declined to recommend to the Supreme Court a

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and operation of the jury system—grand juries, criminal, petit, and civil—should continue to be studied and improved.		revised Civil Rule 48 that would restore the general requirement of a 12-person jury in civil cases. • In May 1996, the Board of the Federal Judicial Center approved a project to develop systematic information and analysis about jury roles, selection, and operations that would be used to assist judges and others in recognizing and evaluating current and anticipated challenges to the jury system. The Center is designing studies of new "electronic courtroom" technologies that will complement the work of the electronic courtroom project undertaken by the Administrative Office (see Rec. 70 below).
RECOMMENDATION 33: Steps must be taken to confront the growing demands pro se litigation places on the federal courts.	Court Administration and Case Management	
33a A broad-based study, with participation from within and outside the courts, should be conducted to evaluate the impact of pro se litigation and recommend changes.	Court Administration and Case Management	• The Federal Judicial Center continues to pursue an initiative, begun in September 1994, to coordinate its educational and research efforts to assist the federal courts in handling pro se litigation. • At the request of the District Court for the District of Columbia, the Center has developed an interactive, multi-media kiosk to help pro se litigants and other court users. This kiosk, which became available to the public in October 1996, is

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		similar to those previously implemented in Arizona and other state courts.. • The Center's ongoing study of jurisdictional defects in appellate filings includes a study of pro se litigation and will examine the extent to which such defects arise from problems in timing of notices of appeal or problems in the substantive law of appellate jurisdiction.
33b *Alternative avenues for pro se prisoner litigation should be explored.*	Court Administration and Case Management	[The Prison Litigation Reform Act of 1996 (Pub. L. No. 104-134, tit. VIII) contains provisions that significantly affect procedures and limit remedies in prisoner civil rights litigation in the federal courts.]
33c *The courts should develop workable standards for addressing the substantive and procedural problems presented by pro se prisoner litigation.*	Court Administration and Case Management	• As part of its pro se litigation initiative (see Rec. 33 above), the Federal Judicial Center has: (1) conducted workshops on prisoner litigation in March 1995 and September 1996, and (2) published both a *Resource Guide for Managing Prisoner Civil Rights Litigation* and a special issue of *FJC Directions* presenting information from Center research and educational activities (including pro se case management techniques from various courts). • The Administrative Office and the Federal Judicial Center are working to assist the courts with implementation of the Prison Litigation Reform Act (see I.S. 33b above). The Administrative Office is providing guidance on

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		new requirements relating to filing fees, special masters, and screening procedures. The Center publication *Habeas and Prison Litigation Case Law Update* includes summaries of appellate and district court decisions involving the PLRA and the new habeas corpus legislation. • Both the Administrative Office and the Federal Judicial Center are working to provide data and other appropriate support to an American Bar Association project, funded by a Bureau of Justice Assistance grant, that seeks to develop a technical assistance manual on pro se prisoner litigation for courts, prosecutors, and corrections officials.
33d The district courts should make more effective use of pro se law clerks.	Court Administration and Case Management	The FJC workshops on prisoner litigation (see I.S. 33c above) include sessions on the role of pro se law clerks.
RECOMMENDATION 34: The federal court system should continue to study possible shifting of attorneys' fees and other litigation costs in particular categories of cases.	Court Administration and Case Management	
RECOMMENDATION 35: The courts of appeals should exchange information on appellate case management.	Court Administration and Case Management	In September 1995, a subcommittee of the Committee on Court Administration and Case Management determined, following a limited survey of appellate judges and review of other materials, that sufficient avenues for exchanging appellate case management information already exist.

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RECOMMENDATION 36: The federal court system should collect and analyze information on various courts of appeals' case management practices.	Court Administration and Case Management	Case opening in appellate clerk's offices has been studied as part of the judiciary's "MAP" program (see Rec. 74 below).
RECOMMENDATION 37: The courts of appeals should adopt internal procedures and organizational structures to promote the effective delivery of high-quality appellate justice and to maintain the consistency of circuit law.	Court Administration and Case Management	
37a *There should be further development of appellate adjudicative programs, such as the Civil Appeals Management Plan ("CAMP").*	Court Administration and Case Management	• All circuits now have appellate settlement programs. A five-year staffing plan (FYs 1996 through 2000) for these programs was approved by the Conference in March 1995. • The Federal Judicial Center continues to conduct or assist evaluations of civil appeals management programs, with assistance currently being provided to the Seventh Circuit.
37b *Innovative management of appeals should continue and be expanded as needed.*	Court Administration and Case Management	
37c *Appellate courts should consider the use of nonjudicial staff and adjunct judicial officers to handle certain routine matters that do not involve the appellate review function reserved to Article III judges.*	Court Administration and Case Management	The Ninth Circuit is experimenting with an enhanced staff attorney (styled an "appellate commissioner") who is empowered by the court to make findings and recommendations on ancillary (e.g., fee and contempt) issues, and to conduct settlement processes.
37d *Opinions should be restricted to appellate decisions of precedential import. A uniform set of procedures and mechanisms for access to court of*	Court Administration and Case Management (generally)	• At the September 1996 session, the Judicial Conference agreed to ask the courts of appeals to review existing slip opinion dissemination

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appeals opinions, guidelines for publication or distribution, and clear standards for citation should be developed.	Automation and Technology (computerized opinion reporting)	practices to ensure that the versions made available by the circuits on electronic bulletin boards and Internet sites are consistent with the printed texts, and that all substantive changes to opinions are reflected in electronic as well as printed versions. • In August 1996, the ABA House of Delegates approved a recommendation that all federal and state courts adopt a uniform form of electronic/ print citation for judicial opinions. The Judicial Conference's Committee on Automation and Technology plans to hold hearings on the ABA proposal and report to the Conference in September 1997.
37e *Internal efforts to maintain the consistency of circuit law should be continued and enhanced.*	Court Administration and Case Management	
Recommendation 38: The district courts should enhance efforts to manage cases effectively.	Court Administration and Case Management	• RAND Corporation has prepared an assessment of implementation of the Civil Justice Reform Act (CJRA) in pilot districts as compared with case management procedures followed in courts of similar size and workload. The Federal Judicial Center has evaluated programs in five demonstration districts established under the CJRA and will present the results to the Court Administration and Case Management Committee in December 1996. After consideration of the RAND and FJC assessments, the Committee will

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		prepare for Judicial Conference consideration a report to Congress with recommendations on civil litigation cost and delay reduction based on experience in the CJRA pilot and demonstration districts. Section 608 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) extends the due date for the Conference's report to June 30, 1997. • The Federal Judicial Center's orientation and continuing education programs continue to provide advice on case management techniques and alternative approaches to new and experienced district judges.
RECOMMENDATION 39: District courts should be encouraged to make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation.	Court Administration and Case Management	• The RAND assessment of CJRA implementation (see Rec. 38 above) includes a separate study of ADR issues. • The Federal Judicial Center continues to conduct district court workshops to provide information on ADR procedures, and it has published *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers*, which describes ADR procedures in each district court.
CHAPTER 7. GOVERNANCE: MANAGEMENT AND ACCOUNTABILITY		
RECOMMENDATION 40: In the interests of administrative efficiency, accountable resource utilization, and effective external relations, the present distribu-	Court Administration and Case Management	In July 1996, the Committee on the Administrative Office directed the AO to conduct a thorough review of the purposes, functions, activities, and costs of the

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tion of governance authority among the national, regional (circuit), and individual court levels should be preserved. Governance structures and mechanisms should continue to strike a careful balance among individual judge autonomy, local court initiative and control, and coordination of effort.		advisory, umbrella and other work groups/processes the AO utilizes to consult with, and receive advice from, judges and other court officials.
40a *The judicial branch should obtain funding for the operation of the courts solely through appropriations administered by the Administrative Office of the United States Courts and expended under the direction and supervision of the Judicial Conference of the United States. Appropriated funds should not be obtained directly by a circuit council or any other regional or local body.*	Budget	
40b *The agencies of judicial administration at the national level should continue to decentralize administrative responsibility wherever appropriate, while maintaining sufficient oversight to ensure that courts are accountable for the proper use of the authority vested in them.*	Administrative Office Committee	• Effective October 1, 1996, each court can receive authority under the new Court Personnel System (CPS) to make its own decisions regarding the classification, compensation, and qualifications of most court employees. • In September 1996, the Judicial Conference agreed to decentralize decision-making authority with respect to continuation of chambers staffing in cases of death or other unanticipated judgeship vacancies. The Conference also approved changes in regulations governing the recall of retired magistrate judges and bankruptcy judges to eliminate the need to obtain AO approval for

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		the recall and for attendant staffing and facilities costs.
Recommendation 41: The Chief Justice of the United States should remain the head of the federal judicial system, retaining the traditional authority and responsibility of that office in matters of judicial administration.	N/A	
Recommendation 42: Consistent with the authority conferred by Congress, the Judicial Conference of the United States should continue to develop policy and exercise oversight with respect to matters of judicial branch administration in which a unified national approach is necessary and appropriate. The Conference should continue to focus attention on broad-scale policies and critical issues.	Executive Committee	
Recommendation 43: The leadership role of the Judicial Conference's Executive Committee should be enhanced.	Executive Committee	
43a The Executive Committee should be allowed a more active role in steering the Conference and acting on its behalf.	Executive Committee	
43b Consideration should be given to at least partial reduction in the chair's judicial workload, so as to offset the time required for performance of administrative duties.	Executive Committee	
Recommendation 44: The Judicial Conference	Executive Committee	As directed by the Judicial Conference in September

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should continue to rely on a broad committee structure for policy development. It should strengthen the committees' ability to provide sound advice and needed information.		1987, all committees of the Conference re-evaluate their continued existence, areas of responsibility, and composition every five years. In October 1996, each committee was asked to perform this reevaluation and present recommendations for review at the February 1997 meeting of the Executive Committee.
44a Membership in Conference committees should continue to rotate periodically, to provide new and diverse perspectives while at the same time preserving the insight, experience, and legislative contacts that come with long-term committee service.	Executive Committee	
44b The Conference should afford the committee chairs a meaningful role in relevant Conference debates and an opportunity to meet together at least once a year.	Executive Committee	
RECOMMENDATION 45: The number of judges participating in the Judicial Conference and its committees should not increase in proportion to growth in the judiciary overall.	Executive Committee	
RECOMMENDATION 46: The Administrative Office of the United States Courts and the Federal Judicial Center should retain their separate institutional status and respective missions. The officially adopted policies of the Judicial Conference represent the view of the judicial branch on all matters and should be respected as such by the Administrative Office and the Federal Judicial Center when dealing with	Executive Committee	

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members of Congress or the executive branch.		
Recommendation 47: The basic organization and authority of governance institutions at the regional and individual court levels should be retained.	Court Administration and Case Management	
47a *Circuit judicial councils should continue to provide administrative coordination and oversight to all courts within the respective regional circuits.*	Court Administration and Case Management	
47b *The chief judges of the courts of appeals and district courts should continue to be selected on the basis of seniority subject to statutory limitations on age and tenure.*	Court Administration and Case Management	Section 501 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) provides that the chief judge of the Court of International Trade (heretofore designated by the President) will be selected in the future on the same seniority basis (with age and tenure limitations) as chief circuit and district judges.
Recommendation 48: To assist the governance process and enforce its decisions, the judicial branch should continue to develop and enhance the capabilities of court administrators and managers.	Court Administration and Case Management	• The Administrative Office and the Federal Judicial Center each continue to provide technical assistance and educational programs, respectively, to aid court clerks and other managers in carrying out their duties. • The NAPA report on trial court administrative structures (see Rec. 72 below) includes a recommendation that judges and staff be afforded training and/or technical assistance to help them explore how best to organize administrative functions.
Recommendation 49: All judicial governance institutions should continue to develop and integrate long range planning capabilities into their policy-	All committees within their respective jurisdictions	• In June 1996, the Chief Justice established a planning mechanism for the Judicial Conference organization that relies primarily on individual

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making processes.		committee efforts, coordination by the Executive Committee, and a network of designated "planning liaison" members who promote planning activity within, and effective communication between, the Conference committees with significant planning responsibility. • Pursuant to a May 1996 recommendation of the FJC Director and the FJC Board, the Chief Justice has appointed a strategic planning committee to develop recommendations as to the priority the Center should give to the various missions and objectives within its statutory mandate. This committee held its first meeting in October 1996. • A number of individual courts and court units are engaged in, have completed, or are contemplating strategic planning activities. To aid these efforts, the Federal Judicial Center presents occasional workshops on strategic planning for judges and court staff and, upon request, the Center and the Administrative Office each provide advice and technical assistance to local court planners.
RECOMMENDATION 50: There should be broad, meaningful participation of judges in governance activities at all levels.	Court Administration and Case Management	
50a District judges should be afforded the opportunity to participate effectively in national and		

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regional governance. To that end—		
(1) *district judge members of the Judicial Conference should be afforded a term of service comparable to the average tenure of chief circuit judges (i.e., five years); and*	Executive Committee	Section 601 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) authorizes the circuit and district judges in each circuit to determine, by majority vote, the term of service (not less than three years nor more than five years) for that circuit's district judge representative in the Judicial Conference.
(2) *each circuit judicial council should have an equal number of district judge and circuit judge members, including the chief circuit judge.*	Court Administration and Case Management	
50b *Senior judges should be afforded a greater opportunity to participate in governance. To that end—*		
(1) *senior judges should be expressly authorized to serve on the Judicial Conference;*	Executive Committee	**Implementation Completed:** Section 601 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) contains a provision expressly recognizing the eligibility of senior judges to serve on the Judicial Conference.
(2) *senior judges should be authorized to serve on the Board of the Federal Judicial Center;*	Executive Committee	**Implementation Completed:** Section 601 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) contains a provision expressly authorizing senior circuit and district judges to serve on the FJC Board.
(3) *senior judges should be authorized to serve on circuit judicial councils; and*	Court Administration and Case Management	

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(4) *individual courts should take appropriate steps to include senior judges in local governance mechanisms.*	Court Administration and Case Management	
50c *Non-Article III judges should be afforded the opportunity for meaningful participation in governance. To that end—*		
(1) *the Board of the Federal Judicial Center should include a magistrate judge as well as a bankruptcy judge; and*	Executive Committee	**Implementation Completed:** Section 601 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) contains a provision creating a magistrate judge seat on the FJC Board.
(2) *individual district courts should take appropriate steps to involve bankruptcy judges and magistrate judges in local governance.*	Court Administration and Case Management	
RECOMMENDATION 51: Administration of federal court facilities, programs, or operations should be primarily the responsibility of the judicial branch.	The committees with jurisdiction over the respective programs	• The Executive Committee (acting on behalf of the Judicial Conference) strongly opposed proposed legislation in the 104th Congress (S. 1446) that would have established a presidentially appointed Inspector General in the Administrative Office. That legislation did not receive further action. • As a corollary to this principle, the Judicial Conference often takes positions that the judicial branch should not be responsible for providing administrative support to programs or activities for which the executive branch should be responsible. For example: • The Conference has recommended that the Administrative Office not be required to

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		provide support for independent counsels whose prosecutorial function should receive support from the Department of Justice. • The Conference has recommended that the U.S. Parole Commission or a successor agency be maintained within the executive branch—a position reiterated by the chair of the Criminal Law Committee in a November 1995 letter to the chair of the Senate Judiciary Committee seeking continuation of the Parole Commission beyond its scheduled expiration in November 1997. (Note: Public Law No. 104-232 extended the Commission by an additional five years to 2002.) • In 1996, the Executive Committee agreed on the Conference's behalf to pursue legislation making the Justice Department responsible for tracking and receiving criminal fine payments (a function the AO had been required to perform under 1987 legislation). • In April 1996, the chair of the Criminal Law Committee expressed concern to the Senate Judiciary Committee about a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132) that requires probation officers to advise crime victims about their mandatory restitution

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Long Range Plan Recommendation/ Implementation Strategy	Judicial Conference Committee(s) with Primary Jurisdiction*	Recent and Ongoing Developments**
		rights under that Act (a function more properly performed by the Justice Department).
51a Administrative oversight and policy-making responsibility for the following programs should reside with the institutions of judicial governance or agencies operating under their supervision: · *judicial space and facilities program* · *court and judicial security program; and* · *bankruptcy estate administration (*i.e., *the U.S. trustee system).*	Security, Space, and Facilities (for space and facilities and security issues) Bankruptcy Administration (for bankruptcy estate administration)	• No legislation to transfer executive branch responsibility for judicial space and facilities was introduced in the 104th Congress. There are, however, continuing discussions with GSA regarding specific aspects of its relationship with the judicial branch. • In July 1996, the Judicial Conference expressed concern about proposed legislation (S. 1005, 104th Cong.) that included a provision making GSA responsible for judicial space design guides and standards. The provision was subsequently dropped from the bill (which did not receive further action). • [Senator Grassley reported in 1996 that circuit and district judges responding to his judicial survey believe that GSA's responsibility for judicial branch buildings should be reexamined.] • Although several high-level contacts have occurred in recent years between the judiciary and the Justice Department to discuss possible replacement of the U.S. Trustee program with a system of bankruptcy administrators operating within the judicial branch, the Department remains opposed. As a result, in September 1995,

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
		the Executive Committee decided to proceed on the assumption that the U.S. Trustee program would continue for the time being. It asked the Bankruptcy Administration Committee to develop recommendations for improving both the U.S. Trustee and bankruptcy administrator programs. The latter committee appointed a subcommittee to study the matter and submit a report at the committee's January 1997 meeting. To aid in that process, the Federal Judicial Center conducted surveys in February 1996 regarding the operation of the two programs.
51b Responsibility for developing and presenting to Congress requests for funding of the federal courts and agencies of judicial administration should remain solely within the judicial branch.	Budget	In January 1995, the chairman of the Executive Committee expressed the judiciary's opposition to legislation (subsequently enacted) under which judicial branch appropriations would be subject to line-item veto by the President.
RECOMMENDATION 52: The judicial branch should continue to develop and enhance a mechanism for effective coordination and review in budget formulation and execution.	Budget (formulation) Executive Committee (execution)	Under guidance from the Economy Subcommittee of the Budget Committee, numerous initiatives to reduce judicial branch spending are underway or have been completed. Cost reductions in staffing, automation, space, defender services, security, probation and pretrial services, and the Administrative Office have been achieved as a result. These initiatives are described in "Highlights of the Federal Judiciary's Economy Efforts" published in February 1996.
RECOMMENDATION 53: The existing mechanisms for	Review Circuit Council	• In response to the August 1993 report of the

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
judicial discipline should be retained. In particular, the impeachment process should continue to be the sole method of removing Article III judges from office.	Conduct and Disability Orders	National Commission on Judicial Discipline and Removal, the Judicial Conference and its Committee to Review Circuit Council Conduct and Disability Orders have approved revisions in the "Illustrative Rules Governing Complaints of Judicial Misconduct and Disability" and other actions intended to improve and enhance judicial disciplinary procedures under 28 U.S.C. § 372(c). • [Section 208 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) requires each circuit judicial council to report annually to the Administrative Office concerning the number and nature of orders entered in the preceding calendar year under 28 U.S.C. § 332 with respect to judicial misconduct or disability. Although the House of Representatives initially included in that legislation a provision that would have required review of a conduct or disability complaint against a judge in a circuit other than the judge's home circuit, the provision was dropped in the enacted bill.]
CHAPTER 8. RESOURCES		
RECOMMENDATION 54: The federal courts should obtain resources adequate to ensure the proper discharge of their constitutional and statutory mandates.	Budget	
RECOMMENDATION 55: Congress, when enacting legislation affecting the federal courts, should be	Budget	(see Rec. 13 above)

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encouraged to appropriate sufficient funds to accommodate the cost to the courts of the impact of new legislation.		
RECOMMENDATION 56: Federal judges should receive adequate compensation as well as cost-of-living adjustments granted to all other federal employees.	Judicial Branch	
56a Congress should be encouraged to refrain from the current practice of linking judicial and congressional pay raises.	Judicial Branch	Senator Heflin proposed legislation in the 104th Congress (S. 1344) that would authorize automatic, annual cost-of-living increases for federal judges regardless of whether other federal officials or employees are provided such increases. The bill did not receive further action.
56b Congress should be encouraged to repeal section 140 of Public Law No. 97-92.	Judicial Branch	• The version of the Federal Courts Improvement Act of 1996 reported by the Senate Judiciary Committee (S. 1887, 104th Cong.) contained a provision, later dropped from the legislation, that would have repealed section 104 of Public Law No. 97-92. • S. 1344 (see I.S. 56a above) also included a provision that would have repealed section 140.
RECOMMENDATION 57: Congress should be encouraged to include appropriations for the constitutionally mandated functions of federal courts as part of the non-discretionary federal budget.	Budget	
RECOMMENDATION 58: The federal courts, including the bankruptcy courts, should obtain funding primar-	Budget	

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Long Range Plan Recommendation/ Implementation Strategy	Judicial Conference Committee(s) with Primary Jurisdiction*	Recent and Ongoing Developments**
ily through general appropriations.		
Recommendation 59: Incentives should be created to allow the courts to attract and retain the best-qualified persons as judges and eliminate disincentives to long judicial service. Federal judges should be encouraged to stay on the bench for the lifetime tenure that the Constitution contemplates and guarantees.	Judicial Branch	
Recommendation 60: Service-year credit toward benefits vesting for service already rendered as federal judicial officers should be awarded to bankruptcy and magistrate judges elevated to the Article III bench.	Judicial Branch	In June 1996, the Judicial Branch Committee considered seeking legislation to implement this recommendation but declined to recommend action at that time in light of potential congressional reaction and other judiciary priorities. Following its August 1996 meeting, the Executive Committee asked the Judicial Branch Committee to reconsider the issue, and the latter committee is proceeding to do so.
Recommendation 61: Adequate security protection should be provided for judges and court personnel at all court facilities and when they are away from the courthouse.	Security, Space, and Facilities	
61a Where necessary, home security systems and portable emergency communications devices should be provided.	Security, Space, and Facilities	In FY 1996, funding was made available to purchase cellular telephones for judges where such phones would be used for business purposes (including security) and be beneficial to the court, and where court funds were not available for that purpose.
61b New judges and their families should receive security briefings.	Security, Space, and Facilities	

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61c *Training for judges in security should be made available.*	Security, Space, and Facilities	• At the request of the Security, Space, and Facilities Committee, the Federal Judicial Center produced and distributed for training purposes to each court and the U.S. Marshals Service a video on *Security Awareness in the Federal Courts*. • The version of the Federal Courts Improvement Act of 1996 reported by the Senate Judiciary Committee (S. 1887, 104th Cong.) contained a provision, later dropped from the legislation, that would have authorized active, senior, and certain retired judges to carry concealed or other firearms in accordance with Judicial Conference regulations; and would have required the Justice Department to cooperate with the Conference in providing firearms training to those judges.
61d *Judges and probation officers should receive information whenever prisoners are released. The notification should include an assessment of the violent nature of the prisoner and the potential risk he or she poses to judicial branch personnel.*	Security, Space, and Facilities	
Recommendation 62: Standards and procedures for the assignment of circuit, district, magistrate, and bankruptcy judges to perform judicial duties in other jurisdictions should be flexible.	Intercircuit Assignments (Article III judges) Magistrate Judges (magistrate judges) Bankruptcy Administration	• In January 1997, the Bankruptcy Administration Committee will consider possible improvements in the system for tracking the temporary assignments of bankruptcy judges to other districts. • Section 201 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) provides that

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	(bankruptcy judges)	magistrate judges who are temporarily assigned to another judicial district can be authorized, in that district, to conduct proceedings and enter judgment in civil cases with the consent of the parties under 28 U.S.C. § 636(c).
Recommendation 63: The courts should use senior and recalled judges—a significant portion of federal judge power—as much as needed to achieve the goal of carefully controlled growth.	Intercircuit Assignments (Article III judges) Magistrate Judges (magistrate judges) Bankruptcy Administration (bankruptcy judges)	• In March 1996, the Judicial Conference rescinded a policy (established in 1964) that required annual renewal of designations of senior judges to sit in their own courts. • Periodic surveys regarding the need for additional magistrate judge and bankruptcy judge positions include inquiries about whether a court's needs might be met through recall of retired judges and use of visiting judges. • Public Law No. 104-175 (enacted August 6, 1996) authorizes senior judges to continue participation in en banc decision making in cases that were heard or reheard en banc before they took senior status.
Recommendation 64: The value of senior judge status should be recognized, and policies and procedures that affect senior judges should be periodically reviewed, in order to insure that senior judge status is an attractive alternative.	Judicial Branch	• In March 1996, the Judicial Conference approved a new policy under which issues of senior judge discipline and disability will be handled only in accordance with 28 U.S.C. § 372(c). • Section 301 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) mitigates the workload certification requirement under 28 U.S.C. § 371(f) by allowing a senior judge to

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		obtain retroactive certification when additional workload in a subsequent year is sufficient to offset reduced workload in a prior year.
Recommendation 65: Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy. Individual districts should retain flexibility, consistent with the national goal of effective utilization of all magistrate judge resources, to have magistrate judges perform judicial services most needed in light of local conditions and changing caseloads.	Magistrate Judges	• Section 202 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) authorizes magistrate judges to try certain misdemeanors and other petty offenses without the defendant's consent and to try all other misdemeanors upon the defendant's oral or written consent. • In March 1996 the Judicial Conference declined to adopt recommended "Principles of Magistrate Judge Utilization."
Recommendation 66: Magistrate judges should be vested with a limited contempt power to punish summarily for misbehavior committed in their presence, and to punish for disobedience or resistance to their lawful orders in civil cases referred to them for disposition with the consent of the parties.	Magistrate Judges	In March 1996, the Judicial Conference agreed to seek legislation authorizing magistrate judges to exercise limited contempt authority in civil and criminal cases. Because of timing considerations, the judiciary did not seek to include this proposal as part of the 1996 federal courts improvement bill. It will, however, be presented to Congress when a suitable legislative vehicle is identified.
Recommendation 67: Attention should be given to the problem of frequent, prolonged judicial vacancies in the federal courts. The executive branch and the Senate should be encouraged to fill vacancies promptly, and the judicial branch should utilize procedures and policies to mitigate the impact of vacancies on the capacity of the courts to conduct judicial business.	Judicial Resources (judgeship and other resource issues) Judicial Branch (interbranch relations)	• In March 1996, the Judicial Conference agreed to encourage the filling of judicial vacancies as they occur. • [In May 1996, a "blue-ribbon, bipartisan" commission at the Miller Center of Public Affairs, University of Virginia, issued a report on "Improving the Process of Appointing Federal

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		Judges." The report contains recommendations, generally consistent with those in the *Long Range Plan for the Federal Courts*, that are aimed at streamlining the judicial selection process and making it less intrusive and burdensome to judicial candidates.]
67a *Delays in filling judicial vacancies should be reduced by encouraging retiring judges and those taking senior status to provide substantial* (i.e., *six-month or one-year) advance notice of that action.*	Judicial Resources (judgeship and other resource issues) Judicial Branch (judicial retirement)	• This position, originally endorsed by the Judicial Conference in March 1988, is periodically brought to judges' attention through such publications as *The Third Branch*. Despite these advisories, some judges still provide relatively short notice of their retirement decisions. • The monthly list of judicial vacancies published by the Administrative Office (see I.S. 67b below) includes a listing of the courts in which future retirements and elevations are expected to create vacancies.
67b *Statistics should be maintained concerning the number, length, and impact of judicial vacancies (including data which relates to judicial emergencies) in each court, and benchmarks or timelines should be created for the nomination and confirmation of all judges. The judicial branch should publicize all vacancies extending beyond these limits, and all data on judicial emergencies, to Congress and the President by means of semi-annual reports.*	Judicial Resources	• The Administrative Office distributes, both in print and electronically on the World Wide Web, a monthly list showing the number, location, and length of judicial vacancies and the courts in which prolonged vacancies (18 months or longer) exist. Numbers of vacancies are also reported in monthly issues of *The Third Branch*. • [Among other things, the report of the Miller Center commission on judicial appointments (see Rec. 67 above) includes proposed time frames or

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		deadlines for completing various stages in the appointment process.**]**
67c Procedures for the temporary assignment of judges should emphasize the importance of providing assistance to courts with vacant judgeships.	Intercircuit Assignments	
67d Procedures and policies governing the transaction of court business should seek to address special circumstances arising as a result of prolonged judicial vacancies. Among other things, rules governing the number of visiting or senior judges serving on panels in the courts of appeals should be held in abeyance during the existence of vacancies on a court constituting a judicial emergency.	Court Administration and Case Management	
Recommendation 68: To match responsibility with authority, the budget execution function should be further decentralized so that each court may control spending of appropriated funds to meet its needs.	Executive Committee	• Starting in FY 1996, the Cost Control Monitoring System (CCMS) is operating in all courts. Under CCMS, the courts allocate their own resources and plan necessary salary expenditures for court support functions on a two-year cycle.
Recommendation 69: Use of court-related technology should be expanded to improve the ability of the federal courts to provide efficient, fair, and comprehensible service to the public.	Automation and Technology	• The Conference, at the recommendation of the Automation & Technology Committee, approves annual fiscal year updates to the *Long Range Plan for Automation in the Federal Judiciary*. The FY 1996 update includes a mission statement identical to the one set forth in Chapter 2 of the *Long Range Plan for the Federal Courts*. • In September 1996, the Executive Committee (acting on the Conference's behalf and on the

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		recommendation of the Administrative Office Committee) approved for publication "The Administration of Justice: A Strategic Business Plan for the Federal Judiciary." This strategic business plan, which was required by the 1994 legislation reauthorizing the Judiciary Automation Fund, provides a broad framework for the annual updates to the *Long Range Plan for Automation in the Federal Judiciary*. It is a "brief, high-level, relatively timeless" description of the judiciary's mission, goals, and objectives and is consistent with the *Long Range Plan for the Federal Courts*. • The automated kiosk at the District Court for the District of Columbia provides multimedia access to court information for litigants and other court users (see I.S. 33 above).
Recommendation 70: The courts must remain current with emerging technologies and how they can be employed to improve the administration of justice generally.	Automation and Technology	• In June 1996, the Automation and Technology Committee decided to pursue a series of strategic initiatives intended to reduce the judiciary's reliance on paper records and achieve economies: (1) electronic case files; (2) videoteleconferencing; (3) electronic courtroom; and (4) Internet/ Intranet. Activities aimed at carrying out these initiatives are underway in the Administrative Office and the courts. • Based on exploratory work by the Federal

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		Judicial Center and a recommendation from the Administrative Office, the Executive Committee, in August 1996, authorized the expenditure of $1.75 million to equip courthouses with satellite downlink equipment for receiving educational and administrative video broadcasts. • As of December 1996, the federal rules of appellate, civil, criminal, and bankruptcy procedure will be amended to authorize courts to accept electronic filing of pleading, motions, and other case-related documents, subject to any technical standards the Judicial Conference may prescribe. The Administrative Office is currently developing interim standards for possible adoption. • In March 1996, the Judicial Conference authorized expanding videoconferencing of pre-trial proceedings in prisoner civil rights cases to any district courts that meet criteria established by the Court Administration and Case Management Committee; in June 1996, the CACM Committee designated certain courts to receive videoconferencing funding in FYs 1996 and 1997.
Recommendation 71: The judicial branch should maintain a comprehensive space and facilities program, giving careful attention to economy in a time	Security, Space, and Facilities	• In March 1996, the Judicial Conference instituted a new space cost containment program ("Space Management Initiatives in the Federal Courts")

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of austerity.		and adopted a space rental reduction plan. At the September 1996 session, the Conference agreed to provide courts with incentives to reduce their space rentals. • In March 1997, the Court Administration and Case Management Committee, with input from the Automation and Technology Committee and other committees, will report to the Judicial Conference with proposed criteria for acquiring and releasing judicial branch space and a policy recommendation on sharing of courtroom among judges.
Recommendation 72: To achieve economies of scale, eliminate unnecessary duplication, and otherwise improve administrative efficiency and effectiveness, the courts should study alternative methods of organizing and allocating judicial support functions.	Court Administration and Case Management	• In September 1996, the Judicial Conference referred the National Academy of Public Administration (NAPA) report on trial court administrative structures to its Judicial Resources, Automation and Technology, Criminal Law, and Bankruptcy Administration Committees and the Economy Subcommittee for appropriate action. It also encouraged all courts to examine their administrative services delivery systems, consider the applicability of alternative administrative models, and (where appropriate) adopt more efficient structures for provision of administrative services in light of the NAPA report. • Under direction from the Committee on Judicial Resources, the Administrative Office will

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		incorporate into future court staffing formulas any work process changes adopted as a result of the judiciary's MAP program (see Rec. 74 below). • The Federal Judicial Center's "Maximizing Productivity" program provides individual courts specific instruction on strategies to eliminate unnecessary processes and achieve economies.
RECOMMENDATION 73: To refine both operations and policy, the federal courts should define, structure and, as appropriate, expand their data-collection and information-gathering capacity.	Judicial Resources	At the September 1996 session, the Judicial Conference adopted a policy requiring that all automation projects initiated by the Administrative Office for national implementation or multi-circuit use must conform with the core requirements of an Information Systems Architecture (ISA), adhere to the established automation management process, fully integrate with other projects and products, and utilize existing ISA communications and processing infrastructures.
73a To obtain better data for reporting, policy-making, and planning purposes, the Judicial Conference should establish a steering group to coordinate and define the process. Members of the group should include representatives from all primary data sources, judicial branch users, and outside researchers.	Judicial Resources	• The Administrative Office has established an internal staff task force to study data collection needs and processes with a view toward possible administrative changes and policy recommendations to the relevant JCUS committees. The task force will first devote attention to the area of bankruptcy statistics, auditing the existing data collection process and reviewing the nature and scope of data collected. • The Federal Judicial Center's 1995 *Annual Report*

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		included suggestions from the Center Director on how this recommendation might be implemented.
73b This steering group should: *(1) Conduct a data needs assessment that includes but is not limited to: courts of appeals, district courts, and bankruptcy courts; magistrate judge reporting; Administrative Office program reporting; research; budgetary impact analysis; and long range planning.* *(2) Inventory and catalog data collection efforts. Utilize recent surveys conducted by Conference committees and other organizations.* *(3) Evaluate the ability of current statistical data holdings to support planning and policy.* *(4) Determine how best to collect and maintain such data. Determine how best to organize and manage such efforts. Determine training requirements.* *(5) Design the most appropriate single or coordinated network of data bases.*	Judicial Resources	The primary objective of the MJSTAR (Magistrate Judge Statistics Through Automated Records) project is improvement of the uniformity, reliability, and efficiency of collecting and presenting magistrate judge workload information. As part of that effort, the project team is charged with reexamining the type of information needed to adequately reflect the workload of magistrate judges.
RECOMMENDATION 74: The courts should maintain and foster high-quality judicial support services.	Judicial Resources	• The Judiciary Methods Analysis Program (MAP), launched in 1994, continues to study various court functions and operations in order to identify and suggest to courts those business practices that might result in greater efficiency and effectiveness. • The Federal Judicial Center's "Maximizing

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		Productivity" program (see Rec. 72 above) addresses this recommendation.
RECOMMENDATION 75: The courts should improve working conditions and arrangements for all court support personnel.	Judicial Resources	• In developing a report to Congress under the Congressional Accountability Act of 1995 (CAA), the Judicial Resources Committee has examined the possibility of applying the Occupational Safety and Health Act of 1970, the Fair Labor Standards Act, and other employment or workplace laws to judicial branch employees. The CAA report was approved by the Judicial Conference in September 1996 and will be transmitted to Congress by the end of 1996. • In March 1996, the Judicial Conference approved a national compensatory time policy mandating certain elements in the policies of those court units that choose to use compensatory time for their employees.
RECOMMENDATION 76: High-quality continuing education for judges should focus on the law, case management (including use of appropriate dispute-resolution processes), and cultural diversity.	N/A	• Through seminars, workshops, video-based training, and publications, the Federal Judicial Center provides new federal judges with orientations to their new positions and continuing education for other judges on legal developments, techniques of court and case management, and non-legal topics faced in litigation. • The Administrative Office provides orientations on administrative matters for new chief judges and newly appointed judges, and a variety of

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		training programs and technical support for all judges in use of technology and other operational issues.
RECOMMENDATION 77: All federal court staff should be trained to ensure outstanding service to the public through adopting a "customer service" approach to justice. They should be educated regularly in the use of court technology.	Judicial Resources (personnel issues) Automation and Technology (technology issues)	• The Federal Judicial Center provides a variety of educational programs and workshops for court staff; the "Maximizing Productivity" program (see Rec. 72 above) includes a customer service component. • The Administrative Office provides training of court staff in administrative and operational matters and use of automation equipment.
CHAPTER 9. THE FEDERAL COURTS AND SOCIETY		
RECOMMENDATION 78: Since both intentional bias and the appearance of bias impede the fair administration of justice and cannot be tolerated in federal courts, federal judges should exert strong leadership to eliminate unfairness and its perception in federal courts.	Court Administration and Case Management	• In developing a report to Congress under the Congressional Accountability Act of 1995 (CAA), the Judicial Resources Committee addressed the potential application of the Civil Rights Act of 1964 and other fair employment practices laws and policies to judicial branch employees. The CAA report was approved by the Judicial Conference in September 1996 and will be transmitted to Congress by the end of 1996. Pursuant to that report, a new model employee dispute resolution plan is being developed for consideration by the Conference in March 1997. • In August 1996, the Executive Committee authorized expenditure of FY 1997 funds (subject to availability) for completion of the judiciary's

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		ongoing gender/race bias studies by Sept. 30, 1997. • The Federal Judicial Center publication *Studying the Role of Gender in the Federal Courts: A Research Guide* provides guidance for those who conduct gender bias studies. • Individual courts continue to present court managers and staff a training curriculum on sexual harassment awareness developed by the Federal Judicial Center.
RECOMMENDATION 79: Federal judges and all court personnel should strive to understand the diverse cultural backgrounds and experiences of the parties, witnesses, and attorneys who appear before them.	Court Administration and Case Management	The Federal Judicial Center's curriculum guide for local diversity training programs continues to help court staff in understanding the diversity of court users.
RECOMMENDATION 80: Justice should be made fully accessible to individuals with disabilities. Facilities should be constructed or renovated to ensure physical access and to remove attitudinal barriers to providing full and equal justice to those with disabilities.	Security, Space, and Facilities	• In developing a report to Congress under the Congressional Accountability Act of 1995 (CAA), the Judicial Resources Committee has examined the possibility of applying the Americans With Disabilities Act of 1990 to judicial branch employees. The CAA report was approved by the Judicial Conference in September 1996 and will be transmitted to Congress by the end of 1996. • In March 1996, the Judicial Conference approved guidelines for providing sign language interpreters and other auxiliary aids to hearing-impaired and other participants in court

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
		proceedings (except for jurors and spectators) with communications disabilities. Section 306 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) authorizes courts to appoint sign-language interpreters (subject to the availability of appropriated funds) to aid hearing-impaired participants regardless of whether the proceeding is instituted by the United States or another party.
RECOMMENDATION 81: Court interpreter services should be made available in a wider range of court proceedings in order to make justice more accessible to those who do not speak English and cannot afford to provide these services for themselves.	Court Administration and Case Management	In March 1996, the Judicial Conference directed that all resources available for certification of court interpreters be devoted, with an emphasis on appropriate cost savings, only to certification of Spanish-language interpreters. Certification of interpreters in all other languages is suspended pending an Administrative Office reevaluation of the alternatives to certification.
RECOMMENDATION 82: Litigants should pay reasonable filing fees, and certain services above a basic level should be funded by reasonable user fees.	Court Administration and Case Management	• In September 1996, the Judicial Conference approved inflation-based increases in the miscellaneous fees charged by the courts, with the proviso that legislation be enacted to permit the judiciary to retain the funds obtained through the increased fees. • Section 401 of the Federal Courts Improvement Act of 1996 (Pub. L. No. 104-317) increased the filing fee in civil actions from $120 to $150, and the additional $30 was made available in a special

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		Treasury account to offset funds appropriated for federal court operation and maintenance. • In January 1997, the Bankruptcy Administration Committee will receive a subcommittee report on a systematic review of all bankruptcy fees and fee issues that is guided by the fee principles approved by the Court Administration and Case Management Committee (reprinted in the *Long Range Plan for the Federal Courts*). Any changes recommended as a result of that report will then be considered by the CACM Committee and the Judicial Conference.
RECOMMENDATION 83: Federal defender organizations should be established in all judicial districts (or combined districts), where feasible, to provide direct representation to financially eligible criminal defendants and serve as a resource to private defense counsel who provide such representation.	Defender Services	• On the Conference's behalf, the Administrative Office continues to pursue legislation that would authorize establishment of a federal defender organization for any district or part of a district or combination of districts in which more than 200 persons annually require the appointment of counsel (the current prerequisite) *or* where the JCUS determines that such an organization would be cost effective or would serve the interests of effective representation. Provisions to that effect were included in the federal courts improvement bills (S. 1101, H.R. 1989) originally introduced in the 104th Congress, but were not included in the legislation as enacted (S. 1887). • The number of federal defender organizations

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
		have increased from 50 to 63 since 1993; defender organizations now serve 73 judicial districts (up from 57 in 1993) and represent 57% of all criminal defendants who are financially eligible for appointed counsel. • The Administrative Office continues to assist interested districts that qualify for, but are not yet served by, a defender organization. The Northern District of Indiana, for example, has invited the AO's Defender Services Division to make a presentation on establishment of a community defender organization in that district. • Congressional approval is being sought for establishment of a new defender organization in the Western District of North Carolina.
83a *Full-time federal defenders should train and serve as a resource to panel attorneys, thus assuring competence of appointed counsel.*	Defender Services	• The AO's Defender Services Division encourages federal defenders to provide training to local CJA panel attorneys and assesses that training in regular management assessments and reports to the relevant chief judges. Federal defender organizations are also encouraged to send newsletters to members of local CJA panels. • Federal defender organization staff serve as faculty for regional and local panel attorney training programs. For example, a unit within the federal defender organization in the District of Columbia sponsors CJA panel attorney training

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
		programs, including an advice "hotline" and assistance with appellate advocacy.
83b A study should be conducted to determine whether guidelines may be developed to enable federal defender organizations to represent more than one defendant in a multi-defendant case, if such representation is otherwise appropriate.	Defender Services	• The AO's Defender Services Division plans to ask federal defenders or another appropriate group to produce a paper on the policy implications of allowing federal defenders to represent more than one defendant in a multi-defendant case. • The federal defender organizations in the Southern District of Illinois and the Eastern District of Missouri are arranging, in coordination with their respective district courts, to allow each of those organizations to represent one defendant in multi-defendant cases in the two districts. The AO's Defender Services Division is working with the respective federal defender organizations to determine the feasiblity of a similar arrangement in the District of Kansas and the Western District of Missouri, and it intends to explore the idea with the federal defender organizations in New Jersey and the Eastern District of Pennsylvania.
83c Federal defender organizations should represent individuals who present more complicated issues or otherwise require more defense resources.	Defender Services	• In nine federal defender organizations, special units have been established to provide representation in capital habeas cases, which are typically more complex and resource-intensive. • The AO's Defender Services Division assesses and reports to the relevant chief judge on district

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Long Range Plan Recommendation/ Implementation Strategy	Judicial Conference Committee(s) with Primary Jurisdiction*	Recent and Ongoing Developments**
		efforts to assign more complex cases to federal defender organizations. That division intends to expand and improve its evaluations in this area.
Recommendation 84: Highly qualified, fairly compensated, and optimally sized panels of private attorneys should be created to furnish representation in those cases not assigned to a defender organization.	Defender Services	• The Judicial Conference's Model CJA Plan calls for CJA panels large enough to support the caseload yet small enough to keep panel members proficient through frequent appointments. At chief judge orientation programs and in CJA panel assessments, the AO's Defender Services Division regularly encourages districts to evaluate the size of their panels.
84a *The judiciary should establish local qualification standards, provide better training, and seek improved compensation for panel attorneys.*	Defender Services	• In FY 1996, a $5.00 per hour rate increase was provided for CJA panel attorneys—the first fee increase in 78 districts since 1984. A similar increase will be provided in FY 1997 if the necessary reprogramming is approved, and efforts are underway to provide annual $5.00 per hour increases until a $75.00 per hour rate is reached for all districts. • Panel attorneys share resource information at national conferences and receive training support (including resource materials) through regional and local programs supported by the Committee on Defender Services, the AO's Defender Services Division, federal defender organizations, and the courts. Federal defender organizations are encouraged to support panel attorneys in their

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		districts by making libraries and brief banks available and offering appropriate advice and counsel.
84b To improve the quality of representation, adequate funding should be obtained so that the Administrative Office, in coordination with the federal defenders, the Federal Judicial Center, the United States Sentencing Commission, bar associations, and local courts, can provide panel attorneys with the training needed to assure effective assistance of counsel to their clients.	Defender Services	The Administrative Office, working with the Judicial Conference and the Defender Services Committee, continues to seek necessary funding from Congress for panel attorney training programs. The AO's Defender Services Division assesses training requirements and arranges training opportunities in consultation with the Defender Services Committee, the courts, federal defenders, panel attorneys, and bar associations.
84c In districts and locations where it is not feasible to establish a federal defender organization, the courts should be encouraged and afforded sufficient funding to establish panel attorney support offices which can provide the needed advice and assistance.	Defender Services	• On the Conference's behalf, the Administrative Office continues to pursue legislation that would authorize establishment of panel attorney support offices in districts that do not have a federal defender organization. Provisions to that effect were included in the federal courts improvement bills (S. 1101, H.R. 1989) originally introduced in the 104th Congress, but were not included in the legislation as enacted (S. 1887). • Resource counsel provide training and assistance to panel attorneys in four districts without defender organizations; in certain districts served by defender organizations, initiatives to provide additional assistance have been developed and will be evaluated on a case-by-case basis.

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Long Range Plan Recommendation/ Implementation Strategy	Judicial Conference Committee(s) with Primary Jurisdiction*	Recent and Ongoing Developments**
84d *The Judicial Conference should continue its efforts to obtain sufficient funding to permit compensation rates to be adjusted up to the maximum amount authorized by law.*	Defender Services	(see I.S. 84a above)
84e *The federal courts should continue to seek authority under the Criminal Justice Act to establish and modify dollar limitations on panel attorney and other compensation.*	Defender Services	• On the Conference's behalf, the Administrative Office continues to pursue legislation that would eliminate statutory dollar-amount limits on panel attorney and other compensation and authorize the Judicial Conference to set the appropriate compensation. Provisions to that effect were included in the federal courts improvement bills (S. 1101, H.R. 1989) originally introduced in the 104th Congress, but were not included in the legislation as enacted (S. 1887). • Until the Judicial Conference receives general authority to adjust compensation, efforts will be directed at raising the maximum amounts for CJA case compensation for panel attorneys.
84f *Adequate funding for the defender services program should be secured by ensuring that the program is efficient and well-managed.*	Defender Services	• The AO's Defender Services Division is: • identifying the "best practices" of federal defender organizations and shares that information with all federal defender organizations • identifying areas of vulnerability and inefficiency in federal defender organization management and administration, and recommends improvements

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
		• developing an office assessment guide to aid in self-management and administration of federal defender organizations • developing a plan for establishing work measurement formulas and standards to assess the quality of representation by federal defenders and panel attorneys • drafting a Federal Defender Operations Manual to inform federal defenders more fully about applicable policies and procedures, and • monitoring trends in caseloads and spending through analysis of defenders' monthly workload and staffing reports and quarterly financial reports (a Defender Services Management Information System is being developed to facilitate these analyses). • The Administrative Office is studying districts with high case volumes and CJA outlays to determine how savings might be achieved, and it is preparing a report on use of case budgets in capital habeas proceedings. • Efforts are underway to establish a more modern, automated CJA panel attorney payment system allowing for collection and analysis of more comprehensive data on attorney and expert payments

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		• Pursuant to Judicial Conference policy, CJA cost-containment committees have been established in many districts, and exemplary ideas identified by those committees have been disseminated throughout the judiciary.
84g Courts should be discouraged from peremptorily reducing fees to panel attorneys and should strive to create a system that ensures fair compensation to such attorneys.	Defender Services	• Initiatives to improve the fairness, integrity, and efficiency of the voucher review process are proposed, or underway, in various districts; some federal defender organizations provide assistance to the courts in reviewing vouchers. The Defender Services Committee will be asked to review and possibly endorse these projects. • The AO's Defender Services Division receives reports on CJA voucher claims pending for more than 90 days with a view toward expediting action on those vouchers. The division's standardized forms for excess panel attorney compensation claims are distributed to the courts.
RECOMMENDATION 85: Provision of counsel should be increased for civil litigants, and mechanisms, including legal aid societies and similar organizations, for handling indigent and pro se cases in federal courts should be enhanced.	Court Administration and Case Management	
85a Bar associations should be encouraged to promote pro bono programs to make civil counsel available to assist litigants who otherwise would have to represent themselves in federal courts. Funding	Court Administration and Case Management	Some courts have formed pro bono panels for representation of pro se litigants. Those efforts might provide models for development of similar programs in other courts.

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
sources should be developed for provision of legal assistance by legal aid societies and similar organizations.		
85b Law schools should be encouraged to expand legal clinics to provide competent counsel for prisoner claims, and to low and moderate income persons in need of counsel.	Court Administration and Case Management	
85c Federal courts should adopt local rules authorizing law students involved in legal clinics to represent—with appropriate supervision—parties in need of counsel in federal courts.	Court Administration and Case Management	
85d Special mechanisms should be created to handle pro se cases efficiently. The frequency of pro se filings, and the frequency of repeat filings by particular litigants, should be tracked through the judiciary's statistical system to allow informed assessment of the amount and impact of judge time and court resources devoted to pro se filings.	Court Administration and Case Management (management of pro se litigation) Judicial Resources (statistical system)	(see Rec. 33 and I.S. 73a. above)
85e Through the use of centralized staff operating under court supervision, district courts and courts of appeals should continue to screen pro se cases.	Court Administration and Case Management	
RECOMMENDATION 86: The judicial branch should act to enhance understanding of the federal courts and ensure that the fundamentals of the litigation process are understood by all who use it. The federal courts should encourage feedback from the public on how successfully the judicial branch meets public expec-	Judicial Branch	• Administrative Office staff are working to revise and expand an existing publication on *Understanding the Federal Courts* and develop similar publications to inform the public better about how the judiciary operates. • New editions of *Welcome to the Federal Courts*

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
tations about the administration of justice.		and *Federal Courts and What They Do* have been completed. These publications, which appeared initially in the 1980's, are prepared by the Federal Judicial Center and printed and distributed by the Administrative Office for use by general public and student visitors to courthouses. • The Commerce Department's National Audio-Visual Center continues to make available to the public the Federal Judicial Center court employee training videos that provide a general orientation to the federal courts and dramatize federal criminal, civil, bankruptcy, and appellate cases.
86a Information on using the courts should be provided through community institutions and in formats aimed at an increasingly diverse citizenry.	Judicial Branch	
86b Judicial outreach programs should be brought to educational and community organizations and other public institutions.	Judicial Branch	
86c Relations with the bar and law schools should be maintained and enhanced by participating in legal education and training programs and activities that enlist those institutions in educating the public about the legal system.	Judicial Branch	
86d Press and public access to court proceedings should be presumptively unrestricted, but access should be balanced with the court's primary mission to administer justice.	Court Administration and Case Management	• At its March 1996 session, the Judicial Conference authorized individual courts of appeals to permit taking of photographs in, and radio and television coverage of,

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
		appellate arguments, subject to restrictions contained in statutes, national and local rules of court, and Conference guidelines. The Conference strongly urged each circuit judicial council to adopt orders reflecting both the new policy and the September 1994 Conference decision against cameras or radio/television coverage of district court proceedings (and calling for abrogation of any conflicting local rules). • To date, two courts of appeals (2d & 9th Circuits) have specifically approved camera coverage of appellate cases, seven courts of appeals (1st, 4th, 5th, 7th, 8th, 10th, and 11th Circuits) have specifically barred it, and seven circuit judicial councils (1st, 3rd, 5th, 7th, 8th, 9th, and 11th) have adopted the Conference's policy against camera coverage of district court proceedings. • In September 1996, the Judicial Conference approved revising the *Guide to Judiciary Policies and Procedures* to reflect the Conference's September 1994 and March 1996 policy positions on camera coverage of court proceedings. • **[**Section 235 of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L.

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		No. 104-132) requires closed-circuit televising of criminal trials for victims of crime in cases where venue is changed to an out-of-state location more than 350 miles away.]
RECOMMENDATION 87: Public understanding of the nature and significance of the federal judiciary's role in the constitutional order (and the constraints under which the judiciary functions) should be improved.	Judicial Branch	The March 1996 conference on the "Compleat Appellate Judge," co-sponsored by the Federal Judicial Center and the American Bar Association's Judicial Administration Division, dealt in part with a judge's obligation to promote community outreach activities on the role of courts in society.
RECOMMENDATION 88: A comprehensive program should be developed to educate jurors about the role and function of federal courts.	Court Administration and Case Management	The Federal Judicial Center recently produced for the district courts a videotaped orientation program for jurors.
RECOMMENDATION 89: The judiciary should seek public support on specific issues where the objective is approved by the Judicial Conference and where the issue has wide acceptance among the judiciary as a whole.	Judicial Branch	
RECOMMENDATION 90: Mechanisms should be established or simplified to receive and address public complaints about improper treatment by judges, attorneys, or court personnel in federal court proceedings and operations.	Review Circuit Council Conduct and Disability Orders	In November 1995, the Committee to Review Circuit Council Conduct and Disability Orders wrote to the chief judges of the courts of appeals and district courts to request that their courts consider creation of lawyer committees to ease the perceived threat of retaliation against complainants in the process under 28 U.S.C. § 372(c).
RECOMMENDATION 91: Positive communication	Executive Committee	• The Judicial Branch Committee will continue in

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Long Range Plan Recommendation/ Implementation Strategy	Judicial Conference Committee(s) with Primary Jurisdiction*	Recent and Ongoing Developments**
and coordination between the judicial branch and the executive and legislative branches should be enhanced.		the 105th Congress (1997-98), a program of encouraging individual courts to invite their respective members of Congress (especially new members) to visit the court with a view toward improving mutual understanding and communication at that level. • In response to Senator Charles Grassley's survey of all circuit and district judges, the Executive Committee, in February 1996, submitted a report discussing various topics addressed in the survey from the institutional (as opposed to individual judge) standpoint. Among other sources, the report cited numerous recommendations and implementation strategies from the *Long Range Plan* to illustrate the judiciary's current policies, core values, and long-term goals.
91a The Chief Justice should annually deliver an address to the nation regarding the state of the federal judiciary.	N/A	The Chief Justice continues to issue a written statement on behalf of the federal judiciary at the end of each calendar year.
91b Congress should be encouraged to require the legislative staff of all substantive congressional committees and the Offices of Legislative Counsel in the Senate and the House of Representatives, when reviewing proposed legislation for technical problems, to satisfy to the greatest extent possible a legislative "checklist."	Federal-State Jurisdiction	• In July 1996, the chair of the Criminal Law Committee, wrote to the ranking member of the Senate Judiciary Committee to comment on the lack of clarity in several ambiguous provisions of a proposed "victims rights" amendment to the Constitution (S.J. Res. 52, 104th Cong.; see also S.J. Res. 65, 104th Cong.). • The Judicial Conference expressed general

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LONG RANGE PLAN RECOMMENDATION/ IMPLEMENTATION STRATEGY	JUDICIAL CONFERENCE COMMITTEE(S) WITH PRIMARY JURISDICTION*	RECENT AND ONGOING DEVELOPMENTS**
		support for legislation introduced in the 104th Congress (S. 136) that would have created a statutory presumption that all new legislation has only prospective effect, does not create private causes of action, and does not preempt state law. The bill in question did not receive further action.
91c Judicial branch representatives should continue to hold periodic meetings with Justice Department officials and members of Congress to discuss matters of common interest.	Executive Committee	The Executive Committee continues to hold regular meetings with Attorney General, and various working groups of DOJ and judicial officers and staff continue to operate.
91d A permanent National Commission on the Federal Courts should be created, consisting of members from the executive, legislative, and judicial branches of the federal government, and members from the state judiciary and academic world, to study on a continuing basis and to make periodic recommendations regarding a number of issues concerning the federal courts including, but not limited to, their appropriate civil and criminal jurisdiction.	Executive Committee	The Senate and House Judiciary Committees hosted the second "three-branch" conference of legislative, executive, and judicial branch representatives on January 26, 1996. A third conference, to be hosted by the judiciary, is planned for sometime in 1997.
91e All courts of appeals should be encouraged to participate in the pilot project to identify technical deficiencies in statutory law and to inform Congress of same.	Judicial Branch	The pilot projects described in this implementation strategy continue in at least three courts of appeals.
RECOMMENDATION 92: The federal and state courts should communicate and cooperate regularly and effectively.	Federal-State Jurisdiction	• The Federal-State Jurisdiction Committee continues to coordinate with the Conference of Chief Justices on policy issues of mutual interest to the federal courts and state courts.

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		• The Federal Judicial Center continues to promote the operation of state-federal judicial councils. The Center publishes a quarterly newsletter on judicial federalism for federal and state judges, and it will soon publish, in cooperation with the National Center for State Courts, a manual illustrating specific mechanisms for state-federal judicial cooperation through interchange.
RECOMMENDATION 93: The federal courts should work closely with the bar to enhance the quality of representation, to elicit support for needed improvements in the courts, and to generate better understanding of the special role of the federal courts in the justice system.	Judicial Branch	

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Agenda Item 15

COMMITTEE ON RULES OF PRACTICE AND PROCEDURES
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

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

December 5, 1996

MEMORANDUM TO JUDGE FRANK H. EASTERBROOK

SUBJECT: *Ongoing Automation Projects*

The Committee on Automation and Technology (CAT) is responsible for overseeing several hundred automation projects in the federal judiciary. The judiciary's automation efforts are supported by an elaborate hierarchial structure that consists of eleven umbrella groups each of which is aided in turn by user groups. The umbrella groups are supported by Administrative Office staff and include federal judges, clerks of court and their computer specialists, and other court staff. Umbrella groups advise the Director on the automation needs of their constituency. After initial implementation of particular software, the user groups manage the maintenance and design, testing, and deployment of software modifications.

Each automation project is developed using a Life Cycle Management approach, which consists of five distinct sequential stages that must be completed in turn. For your information only, I have attached a chart showing the status of all the current automation projects underway. (Attachment 1)

Below is a list of those automation projects, which we have identified as potentially bearing some relevance to the rulemaking process. The first category includes "Major Projects" that have probable rules implications. The second is "Other Projects," which may be broad in scope or otherwise important, but the individual projects do not appear to have a significant impact on the rules. This very brief summary should provide you and your subcommittee with a good overview of the automation work being done in the judiciary. If you wish more information on any project, please contact me.

MAJOR PROJECTS

ELECTRONIC COURTROOM PROJECT (Attachment 2)

The Chambers and Courtroom Umbrella Group has undertaken the study and evaluation of existing and emerging technologies readily available in the marketplace that show promise for facilitating courtroom proceedings. An interim report is expected to be issued later this month. The study will look at technology for presenting testimony (remote video conferencing), presenting other evidence (e.g., computer animation, document camera, cd-rom storage, and retrieval of documents, etc.), in-court case administration (e.g., computer-assisted exhibit management, etc.), in-court access to ancillary information (e.g., lawyer and judge access to CALR, judge access to chambers, etc.), and public access (e.g., assisted listening, etc.)

ELECTRONIC CASE FILES PROJECT (Attachment 3)

An electronic case files project was initiated in March 1996 as an Administrative Office effort under the sponsorship of the Committee on Automation and Technology (CAT). The purpose of the project is to conduct an assessment of the legal and policy issues and technical requirements associated with developing electronic case files. Theoretically the electronic case files system is designed to replace the current paper record with an electronic record. The project is in its infancy. A discussion paper is scheduled to be released in early 1997, and a final report is to be issued in September 1997.

Part of the electronic case files project is designed to implement the December 1, 1996 amendments to Appellate Rule 25, Civil Rule 5 and Bankruptcy Rule 5005, which permit filing by electronic means. Staff to CAT has prepared draft technical guidelines and standards (Attachment 4*) that will be widely distributed for comment. The guidelines and standards will be reviewed later by that committee for eventual submission to the Judicial Conference, probably at its September 1997 session. An earlier version of the technical guidelines and standards was circulated to the reporters and chairs of the advisory rules committees to identify any apparent rulemaking process conflict.

Several important policy concerns that will be considered by the project include custody and control of the docket, fees, public access, and signature authority.

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* The Committee on Automation and Technology requested that the attachment not be included in the agenda materials at this time because it is subject to change. Copies will be available after that committee meets on December 17-18, 1996.

RECEIPT OF COMMENTS VIA THE INTERNET

My office now has the capability to receive public comments on proposed amendments directly on the Internet via E-mail. An E-mail address can be established at my office and we could receive all electronic comments, reproduce them, and circulate hard copies to each committee member. (Pending an agency-wide decision, we are still unable to communicate electronically with all members of the rules committees.)

We have identified several arguments for and against the proposal. Electronic communication would be consistent with the rules committees' policy of reaching out to the bar and the public and informing them of proposed rules changes and encouraging public input. Moreover, electronic communication meets recommendation No. 5 of the Standing Committee's Self-Study Plan, which recommends to the Administrative Office that: "Electronic technologies should be used to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees." The text of the plan includes a specific recommendation that "Persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee."

On the other hand, comments via E-mail are less likely to be as well thought out as comments submitted in writing, and many may not be serious. Under the Judicial Conference rulemaking procedures, each reporter also must "prepare a summary of the written comments received and the testimony presented at the public hearings." Summarizing all Internet comments may be burdensome. Online comments may be viewed as non-written comments, or a clear disclaimer could be included on the Internet Home Page stating that all electronic comments will be circulated to each committee member, but will not be included in the summary of comments. But such treatment may perceived as establishing a "second-class" category of comments.

Finally, although not required by the Judicial Conference rulemaking procedures, my office has acknowledged each comment and followed it up with a communication explaining the advisory committee's response. Continuing to respond to each electronic comment would probably be impossible, but we could provide a generic explanation of the committee's actions and place it on the Internet.

OTHER PROJECTS

BANKRUPTCY RELATED PROJECTS

The Advisory Committee on Bankruptcy Rules has been monitoring the progress of the various automation projects that relate to bankruptcy proceedings. The advisory committee and the Committee on the Administration of the Bankruptcy System closely coordinate actions regarding any automation project affecting the Bankruptcy Rules.

- Bankruptcy Noticing Center — a national center for publication of bankruptcy court notices. Possible rules issues include: (1) an anticipated change in postal regulations that might jeopardize the judiciary's bulk mail discount rates due to conflicts with Rule 2002(g); and (2) the continuing need for the electronic confirmation requirement Rule 9036. There is also an Electronic Bankruptcy Noticing (EBN) project experimenting with the use of Electronic Document Interchange (EDI) to send bankruptcy notices.

- BANCAP, NIBS, and NewBATS — three different systems consisting of docketing and case management software. BANCAP is a UNIX-BASED system, which is designed for a single mid-frame computer instead of multiple personal computers; NIBS is a DOS-BASED system; and NewBATS is a DOS-BASED system designed for Bankruptcy Administrators.

- Electronic Public Access — bankruptcy courts currently have three different systems (PACER, VCIS, and MIRROR) designed to allow electronic public access to case information. In response to requests for statistical information the EPA user group has initiated the Bankruptcy Statistical and Case Information Records Access project.

- Electronic Scheduling Program — a project to develop an automated system for setting hearings on a judge's calendar that interfaces with BANCAP.

- Paper Document Management/Claims Imaging — a project underway in three courts to experiment with imaging technology to ease document management in bankruptcy cases.

DISTRICT COURT PROJECTS

- DCAP — district court applications. A compilation of software applications used by the district courts. Sample applications include Attorney Admission software; case assignment software; and ICMS Civil and Criminal. ICMS is a UNIX-based electronic docketing and case management system that also provides statistical information to the Administrative Office.

- Automated Jury Selection — various vendors provided systems that prepare master jury wheels and print qualification questionnaires and summonses. There is a jury modernization project underway designed to privatize the creation of the master jury wheel at a national center and track jury utilization.

- Automated JS-10 Application — allows courts to maintain a data base of district judge activity from which statistical information can be extracted.

- PACER — Electronic Public Access. See discussion under Bankruptcy Related Projects.

- Electronic Document Management and Imaging System — consists of scanning case orders, judgments, and notices that are then electronically transmitted to parties. The document images are also available to chambers.

APPELLATE COURT PROJECTS

- Integrated Library Systems — a series of integrated programs designed to automate library management and service operations.

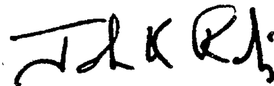
- Appellate Voice Information System (AVIS) — is based on the Bankruptcy VCIS and will provide free access to basic docket information via touch-tone phone.

- Slip Opinion Transmission, Printing, and Distribution — involves the electronic transmission of final published and unpublished opinions to a commercial printer for proofreading, reproduction, and distribution.

- Inter-ICMS Management and Statistics — a project designed to extract data from district court databases and send the data to the appellate courts.

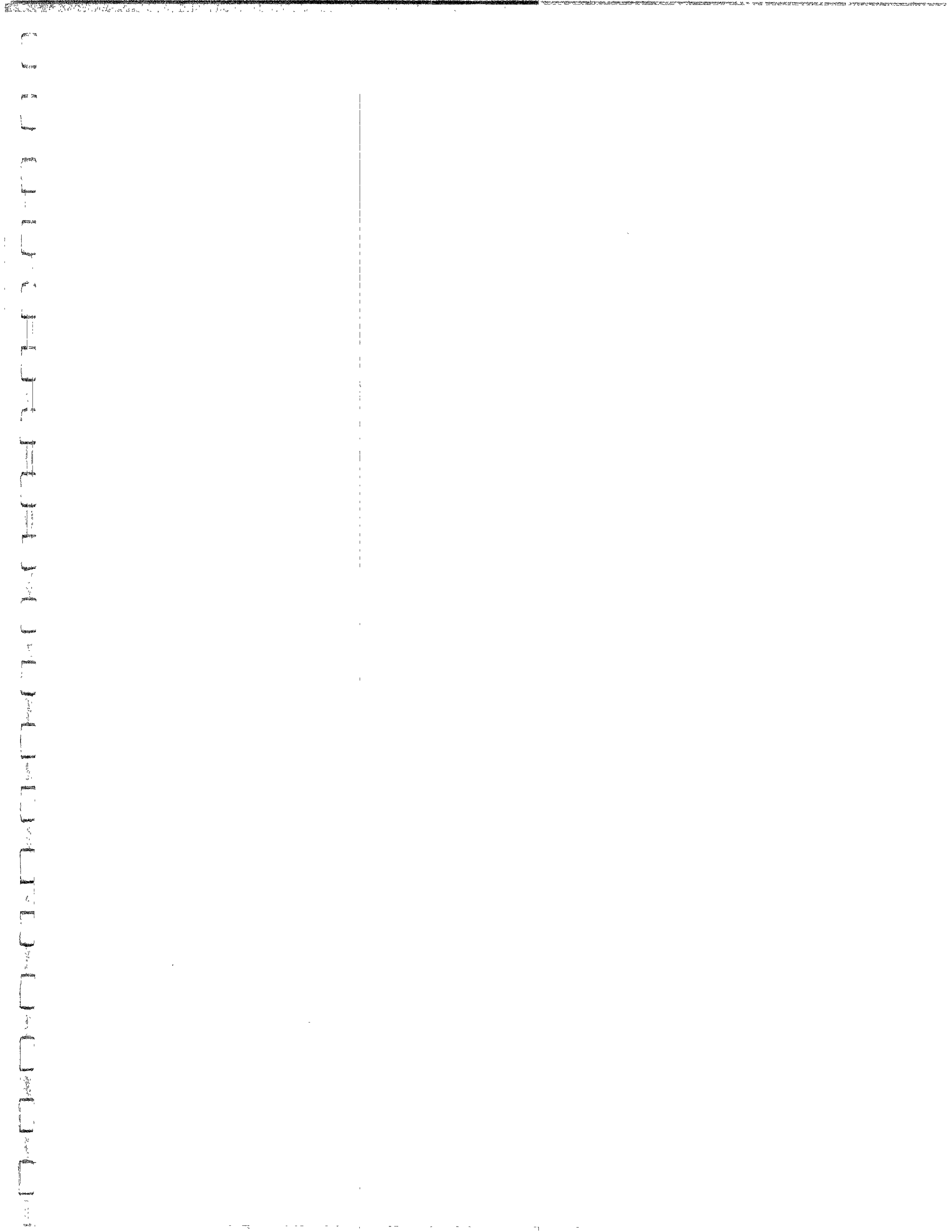
MISCELLANEOUS

- Judge Office Automation Training — designed to help judges and chambers staff become more proficient in computer use.
- Judges Automation Catalog Operations and Maintenance — identifies chambers innovations for national distribution and use.
- Chaser — allows judges and their staff to obtain information contained in ICMS and to produce a variety of reports.
- Opinions Retrieval System (ORS) — will create a database that permits text searches of the court's opinions and internal memoranda.
- MJSTAR — integrates statistical reporting for magistrate judges with ICMS, eliminating the need for the JS-43 workload report.



John K. Rabiej

Attachments



Agenda
December 1996
Information

ELECTRONIC COURTROOM PROJECT

The Chambers and Courtroom Umbrella Group, a committee of judges and other court representatives advising the Administrative Office on the uses and benefits of technology for judges, has undertaken an "Electronic Courtroom Project" to study and evaluate technologies that show promise for facilitating courtroom proceedings. This project is among the key initiatives of the Committee on Automation and Technology's three-to-five year vision for the future. The project staff will conduct market surveys, user surveys, and in-court examinations of courtroom technologies; it will identify technologies that are effective and cost beneficial. Upon completion, planned for March 1998, the project staff will produce recommended guidelines for the judiciary's acquisition, implementation, and use of courtroom technologies.

BACKGROUND

The convergence of several trends compels immediate study and assessment of courtroom technology:

- General awareness of technology in courtroom settings is increasing as a result of the expanded availability of vendors' products designed for courtroom use and through the use of such technology by litigants. This awareness is also being promoted by several prominent law schools, which have equipped mock courtrooms with technology for experimentation and clinical training.
- Courts are increasingly using technology to produce efficiencies in all areas of case handling and judicial proceedings.

- The judiciary's courthouse construction/renovation program is expanding, highlighting the need for building design guidelines that accommodate new technologies.

As a result of these trends, there is a significantly increased interest in the use of technology to facilitate court proceedings. Almost weekly, the Administrative Office receives inquiries concerning the use, technical capabilities, infrastructure considerations, and funding and procurement sources of various types of courtroom technology. Unfortunately, there are no formal judiciary or AO-approved guidelines or standards for the general use of courtroom technology, and there is a lack of unified budgeting for the courtroom technology initiatives that have been undertaken by some courts. The judiciary is, therefore, challenged to establish a blueprint for implementation of courtroom technologies and a mechanism to underwrite their acquisition.

PROJECT APPROACH

A project work group has been established. It is comprised of AO staff from the Office of Judges Programs; the Office of Court Programs; the Office of Facilities, Security and Administrative Services; the Office of Information Technology; and the Office of the General Counsel. The work group coordinates closely with the Office of Finance and Budget, the Office of Human Resources and Statistics, and the Office of Management Coordination. It also includes liaisons from the Federal Judicial Center's Research Division and Planning and Technology Division. Court participation on the work group includes judges and other court personnel with significant experience with courtroom technologies, and representatives from the sponsoring Chambers and Courtroom Umbrella Group. Finally, the views of the Federal Defenders and the United States Attorneys are formally sought through active participation of

their representatives. Also serving as consultants to the project are two nationally recognized experts: Professor Frederic Lederer from Courtroom 21, a joint project of the College of William & Mary's Marshall-Wythe School of Law and the National Center for State Courts in Williamsburg, Virginia; and Professor Winton Woods from the Courtroom of the Future, a project of the University of Arizona Law School, in Tucson, Arizona.

Project staff will develop recommendations based upon the results of a cost-benefit analysis of a variety of courtroom technologies in different courtroom settings. Although a great variety of configurations is possible and available in the marketplace, much of the study effort will focus on visual courtroom technologies, primarily evidence presentation and videoconferencing capabilities. Complementing these visual technologies are a variety of office automation services (such as word processing and e-mail) and databases (including PACER/CHASER and CALR). In addition to drawing upon the expertise gained from reviewing established demonstration courtrooms, project staff will study a wide range of court sizes, case types, and volumes of particular proceedings in order to perform economic analysis, and ascertain the implications of use in particular proceedings. All study courtrooms will be working courtrooms adapted with various technologies for the purposes of evaluation. Since current usage of courtroom technologies within the federal judiciary is sparse and variable, evidence has been collected through a survey of judges and will be obtained by a controlled study of actual use and cost-benefit analysis. Special emphasis will be given to courts actively planning for extensive courtroom technology or using some courtroom technology. Where feasible, project staff will work with courts already equipped with the necessary technology and may supplement the study courtrooms if necessary. A report of the

study findings and recommendations is planned for completion by the end of 1997, followed by implementation guidelines in March 1998.

This approach affords approximately a full year to identify quantifiable costs (such as purchase and installation of equipment, recurring transmission line charges, space requirements, and personnel hours for operations and training) and quantitative benefits (such as savings in travel and per diem costs, and reduction in non-productive personnel hours), as well as qualitative costs (such as statutory and policy concerns and suitability for particular proceedings) and qualitative benefits (such as ability to expedite trial activities and improve security). Anecdotal evidence suggests that use of evidence presentation technologies can result in significant improvements in trial efficiency and effectiveness. Prior studies of videoconferencing of prisoner pretrial and bankruptcy proceedings have demonstrated some savings in travel by judges and parties. Similarly, anecdotal evidence suggests that use of evidence presentation and videoconferencing technologies can enhance understanding of the information presented, perhaps resulting in improved decision making. It is not expected, however, that introduction of courtroom technologies will result in significant savings in the areas of staff resources (other than freeing up some of the time of some courtroom participants), space, or printing and postage. Formal study of usage of courtroom technologies in a variety of courtroom proceedings will verify the wide range of tangible and intangible costs and benefits.

In addition to producing empirical data, the formal study may identify policy, legal, and other issues associated with technology use in discrete courtroom applications. Recognizing the interests of various committees in the project, the Director will refer policy

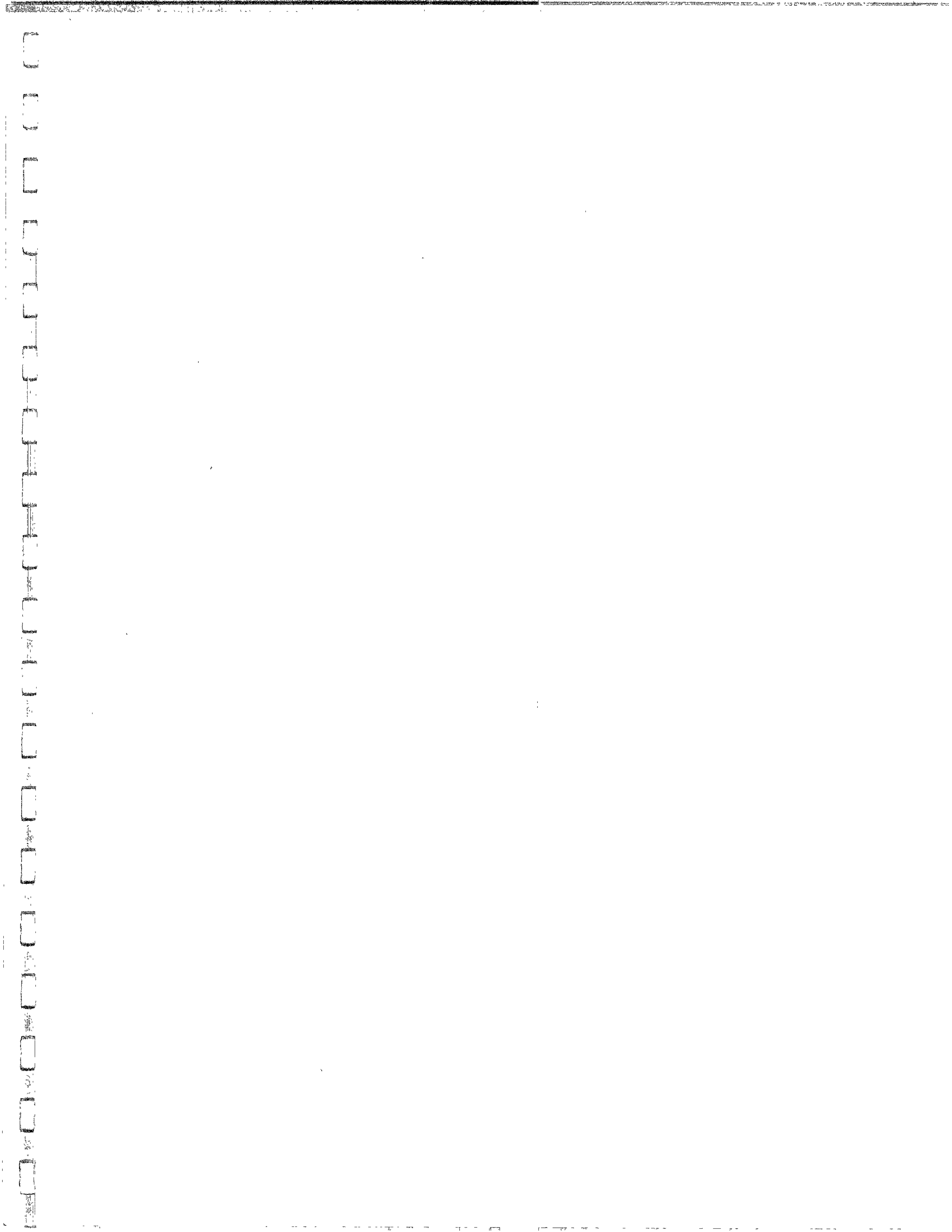
and other issues that are raised during the course of the study to this and other relevant committees for consideration.

Because information about courtroom technologies is needed now by many judges considering their use, an interim informational report will be issued by the Chambers and Courtroom Umbrella Group in December 1996. This interim report will provide information about mainstream courtroom technologies in use in the Judiciary as a supplement to the Administrative Office's *Interim Guide to Courtroom Technologies* published in December 1995. In conjunction with the project, the Administrative Office has developed a central repository of courtroom technology information and provides assistance to courts as part of its Courtroom Technology Help Desk. In the near future, the Administrative Office will make this and other information about courtroom technology, particularly courtroom designs and plans, available on the judiciary's new intranet, the "J-Net." In addition, many of the pioneering judges are planning to make their courtrooms available for demonstration purposes or use by other judges interested in courtroom technology. The availability of these various informational sources will enable courts to make informed decisions about the introduction and use of courtroom technologies.

The goal of the project is not to develop a software application, but rather to recommend courtroom technologies readily available in the marketplace, possibly resulting in a large-scale procurement of some commercially available courtroom technologies. However, many courts are already acquiring these technologies on their own, indicating that a decentralized approach may be appropriate. In either case, a source of funding must be identified. The total cost for implementation will depend entirely upon the recommended

technologies and the suggested course of action for procurement of the technologies. Because of the impact of courtroom technologies on non-judiciary entities (including United States Attorneys, the private bar, the Bureau of Prisons and state prison authorities, and the public in general) and the implications of cost-shifting, actual costs to the judiciary are impossible to predict at this point. Beyond the technologies themselves, there are likely to be building infrastructure costs associated with implementation.

As information is gathered on courtroom technology, the project staff will proceed in consultation with this committee as well as other relevant committees with an interest in the results. It is expected that various committees will elect to contribute advice and suggestions. Therefore, the Administrative Office intends to keep this committee and other committees fully advised on the project's activities at the Summer 1997 meetings, and it may solicit committee comment on the project's areas of study.



ATTACHMENT III

Bankruptcy Committee, Agenda C.7.
January 9-10, 1997

SUBJECT: Automation Initiatives

(a) <u>Electronic Case Files Project</u>

An electronic case files study was initiated in March 1996 as a staff effort in the Administrative Office under the sponsorship of the Committee on Automation and Technology. The purpose of the project is to conduct an organized assessment of the legal and policy issues, technical requirements, and other decisions associated with implementing electronic case files, including assessing available prototypes and developing a preliminary estimate of benefits and costs.

Several factors have prompted the initiation of this project. Many courts have expressed interest in electronic filing and electronic document management. Already, a few bankruptcy courts have started local experiments with electronic filing or document imaging. Some are involved with the Administrative Office in experiments and others are using commercial products. In addition, amendments to the Federal Rules of Bankruptcy Procedure took effect on December 1, 1996, that allow the courts to permit documents to be filed electronically, provided they are consistent with technical standards that the Judicial Conference may establish.

The study will lay the foundation for the creation of systems to provide judges ready, electronic access to case files and other information in a manner similar to their access to the law via computer-assisted legal research. In concept, an electronic case file system would substitute electronic records for paper records and permit attorneys and parties to file documents with the court electronically. Attorneys, parties, and the public would have access to the case file through an office or home computer or from a public-use terminal in the clerk's office.

The study will also begin collecting data on the costs and benefits (including savings) associated with moving from paper processing and management to electronic case file management. The project is currently in Phase 0 (Identification of Need) of its life cycle.

The Committee on Automation and Technology has identified electronic filing as one of its four strategic initiatives to reduce the Judiciary's reliance on paper and achieve economies. Within the Administrative Office, the electronic case files study is under the supervision of the Assistant Directors for Judges programs, Court programs, and Information and Technology. An 18-month schedule has been established for completion of the study, with a discussion paper to be

circulated in late 1996 or early 1997 and a final report to be issued in September 1997.

Staff resources for the project are being provided by the Bankruptcy Judges Division and other program divisions at the Administrative Office. In addition, several bankruptcy judges and clerks have agreed to participate in the project as advisors and members of a bankruptcy work group. These include bankruptcy judges Geraldine Mund, J. Rich Leonard, James J. Barta, and Dennis D. O'Brien and clerks Richard G. Heltzel, Robert M. Wily, and John M. Greacen.

The discussion paper is being prepared by Administrative Office staff, with the assistance of interested judges and clerks. It is intended to promote discussion and constructive action within the Judiciary about the opportunities -- and challenges -- of moving to electronic case files as a complete or partial alternative to traditional paper files.

(b) Electronic Courtroom Project

(Cecilee)

(c) Bankruptcy CHASER

(Sandy)

(d) NewBATS

(Wendy)

(e) Satellite Downlink Equipment

The Executive Committee of the Judicial Conference approved a modification to the FY 1996 financial plan authorizing the expenditure of $1.75 million to equip more than 100 court sites with satellite downlink equipment for receiving educational and administrative video broadcasts. These broadcasts would originate from the Federal Judicial Center, Administrative Office, Sentencing Commission, other government agencies, and universities. The Administrative Office will hold the carryover funds centrally and provide them to courts lacking sufficient local funds to acquire downlinks.

The Technology Enhancement Office of the Office of Information Technology at the Administrative Office is working to develop a plan for implementing the program. Courts will be advised of the criteria for participation in the program in the near future.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 22, 1996

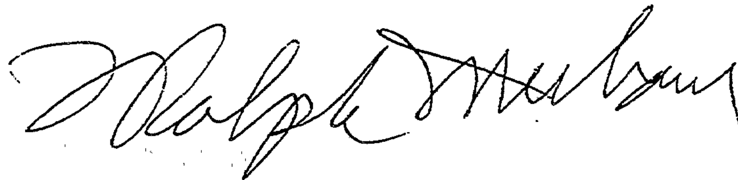
MEMORANDUM TO: JUDGES, UNITED STATES COURTS
CLERKS, UNITED STATES COURTS

SUBJECT: Electronic Filing (**INFORMATION**)

The Supreme Court has prescribed amendments to Fed. R. App. P. 25, Fed. R. Civ. P. 5 and Fed. R. Bank. P. 5005, which would permit electronic filing in appellate, district, and bankruptcy courts under certain circumstances. These amendments will take effect on December 1, 1996. Under the revisions, a court may permit, by local rule, electronic filing if consistent with technical standards, if any, established by the Judicial Conference. The Committee Note to the proposed revision to Fed. R. Civ. P. 5 states that it is anticipated that the Conference will promulgate technical standards for transmission of data, such as the formatting of data, the speed of transmission, the means to transmit supporting documentation, and the security of communication. The Administrative Office is currently developing proposed technical guidelines which will soon be distributed for court and public comment and thereafter submitted for consideration by the Committee on Automation and Technology and, subsequently, by the Judicial Conference of the United States.

In addition to technical issues, the use of electronic filing raises important policy concerns that were identified by the Court Administration and Case Management Committee of the Judicial Conference at its June 1996 meeting. In that regard, the Committee directed the Administrative Office to bring these issues to the attention of the courts prior to December 1, 1996. These concerns include: custody and control of the court docket; fees; public access; and reporting issues. In addition to these issues, there are certain issues relating to electronic filing which arise only when an outside party is responsible for the implementation and/or administration of electronic filing services. All of these issues, along with many others, are currently being considered by the Administrative Office as part of the Electronic Case Files (ECF) study. The ECF study expects to produce a draft report in December 1996 for consideration and comment by the court community. A second report, due September 1997, will address these issues further and will provide guidance to courts wishing to implement electronic filing. In the interim, however, it is important that courts be aware of these operational issues as they begin to consider electronic filing alternatives which may affect clerk's office responsibilities. The attached document is intended to provide courts with preliminary information concerning the operation of an electronic filing system.

Any questions on the issues discussed in this memorandum may be addressed to Mary Louise Mitterhoff or Mary Fritsche, Attorneys, Office of Court Programs, 202/273-1547.



Leonidas Ralph Mecham

Attachment

cc: Circuit Executives
District Court Executives
Chief Probation Officers
Chief Pretrial Services Officers

OUTLINE OF MAJOR ISSUES RELATED TO IMPLEMENTATION OF ELECTRONIC FILING

Introduction

Implementation of electronic filing programs will have a significant impact on clerks' office procedures as well as on their responsibilities. The following guidance is provided to assist clerks as they consider implementation of electronic filing programs.

1. Control of Docket and Docketing Responsibility

Control of and responsibility for the court's dockets is a primary function of a clerk's office.[1] In some of the electronic filing experiments currently in use in federal courts, the docketing function has been removed from the clerk's office. With the exception of orders, which would still be entered by deputy clerks, docketing, i.e., the naming of a document and its entry onto the docket, is, in some cases, actually performed by the filing party. This procedure increases the possibility that a document could be improperly docketed.[2] Therefore, the clerk must ensure, when docket entries are made by an outside party, that necessary precautions are taken to safeguard the integrity of the court's dockets, which means that the clerk must regularly and systematically monitor docket entries made by parties.

As noted above, responsibility for the court's dockets is a primary function of a clerk's office which is set forth by statute or federal rule. This requirement does not mean, however, that the clerk must maintain actual physical custody of the court's records at all times. As long as the clerk retains effective control over the court's records, including electronic records, his or her

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1 For courts of appeals, this responsibility is set forth in Fed. R. App. P. 45(b), which provides that "[t]he 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." For district courts, Fed. R. Civ. P. 79(a) requires that "[t]he clerk shall keep a book known as 'civil docket' of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable.... All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket...." In addition, Fed. R. Bank. P. 5003(a) provides that "The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case...." 28 U.S.C. 156(e) provides that "the bankruptcy clerk shall be the official custodian of the records and dockets of the bankruptcy court."

2 An improperly captioned docket entry can create many potential problems. For example, a docket entry relating to real property which is improperly captioned could result in a title search being incorrect or in the irrevocable sale of property. In addition, an incomplete caption could result in parties being unaware of response dates.

status as official custodian of the records is not abrogated.[3] This may mean that in order to control and preserve the records, the clerk must be in possession of an identical and contemporaneous database separate from that of a vendor.

2. Fees

Filing fees for the federal courts are set forth by statute, and by the Judicial Conference pursuant to authority granted to them by statute, 28 U.S.C. §§ 1913, 1914, 1926 and 1930. Clerks of the various federal courts may only charge those fees as provided by statute or set by the Judicial Conference. To date, although alternative fee structures for electronic filing are under consideration by the ECF study, the Judicial Conference has not promulgated any fees that relate to electronic filing. Therefore, absent Judicial Conference action in this area, no fees, in addition to those set forth by statute or in the Miscellaneous Fee Schedules, should be charged by any clerk's office for electronic filing. However, participants in electronic filing programs should be notified that a supplemental fee may be imposed at a later date.

As noted above, a prescribed fee must accompany the filing of certain documents.[4] Courts that wish to establish an electronic filing system must develop a procedure for collecting filing fees when a document is filed electronically.

Another issue regarding fees may be raised in situations where a vendor is providing the electronic filing system. Care should be taken to ensure that the relationship between the clerk's office and the vendor is structured so that the vendor is not construed to be collecting fees as an agent of and on behalf of the court. If the vendor were viewed as an agent, the vendor might therefore be required to give those fees to the Treasury under the miscellaneous receipts statute, 31 U.S.C. § 3302(b).

3. Signature Authority

Electronic filing also affects the issue of signature authority. Federal rules typically require an "original" signature on documents filed with the court. Signature requirements provide some form of verification that the document being filed is indeed being filed by the purported filing party. An electronic signature filed in accordance with the local rule of a court can provide such verification by using, for example, a password.[5] The clerk must ensure that whatever means a court chooses to accept to meet signature requirements provides security and is set forth clearly in a local rule, standing order, or court operating procedure available to the bar.

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3 Office of General Counsel Memorandum regarding Complex Litigation Automated Docket, August 24, 1995, page 4.

4 For example, federal rules require a bankruptcy petition to be accompanied by the filing fee. Fed.R.Bankr.P. 1006(a).

5 Office of General Counsel Memorandum regarding Complex Litigation Automated Docket states "this purpose can be fully met by an electronic signature, such as the filing of attorney's initials and the last four digits of that attorney's social security number." August 24, 1995. p.4.

4. Public Access

The records and dockets of the federal courts are public records and should be available and open to examination at reasonable times without charge. The clerk must ensure that whatever electronic filing process is adopted, adequate access to these records is granted to the public, i.e., parties that are not able to access electronic records from a remote location via modem.

5. Reporting Requirements

The clerk has statistical reporting responsibilities, both to the court and to the Administrative Office. Currently, these responsibilities are simplified and expedited by the court's automated database and docketing systems, which have the capacity to generate reports and information for the court. The clerk must ensure that all national and local reporting requirements are met, regardless of the type of electronic filing process utilized by the court, and that his or her ability to access necessary information quickly and efficiently is not compromised by the court's decision to adopt electronic filing.

6. Procurement

When a third party vendor is being sought to provide a court's electronic filing system, the general principles of government procurement law apply. These principles require that the choice of an automation provider to administer electronic filing services be made through the appropriate procurement procedures. A court that wishes to contract with an outside vendor for the provision of electronic filing services should ensure that the award is made only in accordance with the provisions of the Guide to Judiciary Policies and Procedures, Volume XIII, Chapter XIV. To the extent that such services are paid by government funds, they must be expended through the Judiciary Information Technology Fund using monies reprogrammed from the local court.[6]

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[6] Projects funded through the Judiciary Information Technology Fund should: conform to the judiciary's Information Systems Architecture (ISA); adhere to the automation management process; fully consider integration with other projects and products; and utilize to the extent possible existing communications, and computing hardware and software components that comprise the communications and processing infrastructures of the ISA.

Agenda Item 16-17

COMMITTEE ON RULES OF PRACTICE AND PROCEDURES
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

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

Memorandum

TO: Honorable Alicemarie Stotler,
Committee on Rules of Practice and Procedure,
Chairs and Reporters of Advisory Committees

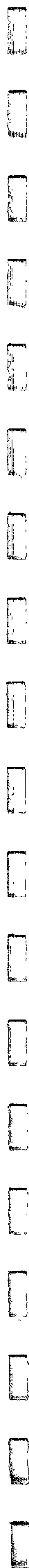
FROM: Mary P. Squiers

RE: Annotated Bibliography

DATE: December 5, 1996

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 July 1, 1995 through the summer of 1996. 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, the third covering material from June, 1992 through June, 1993, and the fourth covering June 1, 1993 through the summer of 1995. This document is the result of long work from my research assistant, Lara Thyagarajan, who is now a second-year law student at Boston College. Lara'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 material.



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1. Introduction

This document is the fourth edition of an annotated bibliography of scholarly articles and other writings that discuss court cost and delay in the federal civil justice system. It covers articles published between July 1, 1995 and September of 1996. It contains twenty-nine 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.

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. 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 JULY 01, 1995)

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 JULY 01, 1995)

To find articles by some of the leading writers in the field (for example):

> AU (ROBEL DUNWORTH STIENSTRA SUBRIN) & DATE (AFTER JULY 01, 1995)

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

3.1. Is There a Litigation Crisis?

Thomas A. Eaton & Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform,* 30 GA. L. REV. 627, Spring 1996.

The authors provide an interesting, perhaps surprising, empirical analysis of tort litigation in Georgia and its effect in delaying the civil justice system. In that last several years, there has been a great deal of political debate over the burden tort litigation puts on the courts. Many have argued that tort litigation reform is essential if America is to continue to be economically competitive. The authors urge that, as more proposals for tort reform are considered, lawmakers need good data to inform them on whether changes in the system should be made. The authors conducted a four year study in four counties in the state of Georgia and found that "(1) tort cases constitute a small percentage of civil litigation; (2) the number of tort filings has not increased over a four year period; (3) a large percentage of tort cases involve relatively simple disputes; (4) only a small percentage of tort suits filed actually go to trial; (5) plaintiffs and defendants enjoy almost equal rates of success in the cases that go to trial; (6) in those cases in which the plaintiff does not prevail, compensatory damages tend to be relatively modest in amount and outside of Fulton County, punitive damages are rarely awarded." (at 634). The authors conclude that the tort system in Georgia is not in crisis.

3.2. The Civil Justice Reform Act of 1990 (CJRA)

Joseph J. Biden, Jr., *The Civil Justice Reform Act of 1990,* FOR THE DEFENSE vol. 37, No. 9, September 1995, at 4.

In this article, Senator Biden argues that Congress has an important role in helping to reduce expense and delay in the federal courts. Senator Biden supports the encouragement of local experimentation inherent in the CJRA because it will encourage innovation which may then be applied broadly. 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. The article concludes that adherence to the CJRA will create lasting efficiency. Note, this article is based on the author's article entitled *Congress and Our Courts: Our Mutual Obligation, 46 Stan. L. Rev. 1285 (1994),* which was included in the 1993-1995 edition of this bibliography.

William F. Day, Jr. et al., ***Civil Justice Reform Act Advisory Group Report for the District of South Dakota the Civil Justice Reform Act of 1990 Advisory Group for the District of South Dakota (1991-1992),*** **40 S. D. L. REV. 342 (1995).**

This report of the Advisory Group to the Federal District Court of the District of South Dakota details the Group's work in evaluating the court's docket and its proposals for expense and delay reduction under the CJRA. The Group found that, overall, the condition of the civil docket in comparison to many other districts was good and that, on the whole, the resources of the district were satisfactory.

Judge J. Thomas Greene, ***The Need for Cautious and Deliberate Reforms in the Civil Justice System,*** **8 SEP UTAH B.J. 4, August/September 1995.**

This is a speech given by Judge Greene in March of 1995. Judge Greene discusses the public perception of the legal profession as well as current developments relating to legal reform. Anecdotally, he provides some insight into the efforts of Utah, a pilot district under the CJRA, to meet the goals of decreasing court cost and delay.

Frank W. Hunger & Cynthia C. Lebow, ***The Civil Justice Reform Act and the Rulemaking Process: Where Do We Go From Here?,*** **FOR THE DEFENSE vol. 37, No. 9, September 1995, at 8.**

The policy behind enactment of the CJRA was to use the judicial districts as laboratories for developing efficient case management. The CJRA, as well as other more recent legislative efforts to change the way cases move through the litigation process, represent growing frustration with the perceived inefficiency of the federal courts. However, the authors point out that the implementation of local rules decreases the uniformity which the Federal Rules of Civil Procedure strive to achieve. The authors express further concern over the "opt-out" provision of the 1993 amendments to F.R.C.P. 26. At the time this article was written, thirty-one districts had "opted-out." Because of this, there is no longer uniformity in the discovery process. The authors conclude that we must consider the outcome of the experimentation process under the CJRA and how we will continue to ensure uniformity and fair access to the courts without sacrificing the flexibility of the courts in case management.

David Rauma & Donna Stienstra, ***The Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook,*** **FED. JUD. CENTER, 1995.**

This is a highly useful 350 page summary of expense and delay reduction plans that have been implemented in each federal judicial district as a result of the CJRA. It contains 17 tables that analyze the plans. While each plan is different from the next, some patterns have been noted. Many of the districts have implemented differentiated case management (DCM)

systems. Where DCM systems have been put in place they generally track cases as expedited, standard or complex. Some districts have more specialized tracking. Most, if not all courts have implemented some type of alternative dispute resolution (ADR). Among the most common are court-annexed settlement conferences and mediation. In terms of controlling discovery, many plans have developed schedules and timelines. However, the district courts have dealt with discovery in widely different ways and, at the time the data for this sourcebook was collected, many courts were waiting to see what the outcome of the then-proposed 1993 amendments to F. R. C. P. 26 would be.

Lauren K. Robel, *The Civil Justice Reform Act and the Goal of Uniform Federal Procedure: Resolving the Tension,* FOR THE DEFENSE vol. 37, No. 9, September 1995, at 13.

The author argues that the CJRA does not mandate or authorize the district courts to create local procedural rules in conflict with the existing Federal Rules of Civil Procedure 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. Note: This article is based on the author's article entitled *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 Stan. L. Rev. 1447 (1994), which was included in the 1993-1995 edition of this bibliography.

Margaret L. Sanner and Carl Tobias, *The Civil Justice Reform Act Amendment Act of 1995,* 164 F.R.D. 577 (1996)

This two page piece expresses the opinion of the authors that the CJRA Amendments of 1995, which extend the completion time for the Federal Judicial Center's study of the efforts of the districts in the CJRA demonstration program was necessary to ensure consistency with the study being completed by the RAND Corporation of the ten pilot districts. This technical amendment was passed to harmonize the timelines of the demonstration program study with that of the pilot project study (the extension for the RAND study was approved in the CJRA Amendments of 1994). The extensions for both studies are needed, in part, because many of the cases being followed would not have reached completion by the earlier date.

Carl Tobias, *Extending the Civil Justice Reform Act of 1990,* U. CIN. L. REV. 105, Fall 1995.

This short essay voices support for the 1994 Judicial Amendments Act, which provided a one year extension of time for the RAND

Corporation's study of the progress of the ten pilot districts implementing delay and expense reduction plans under the CJRA. The CJRA mandate that the federal courts look at their system to determine how best to achieve swifter, cheaper justice is a difficult task which deserves the time to be assessed. In the opinion of the author, Congress's decision to extend the time for the RAND study to be concluded was important because it will allow a more accurate picture of the CJRA's impact and efficacy to be shown.

3.3. Other Legislative Activity

A. Fletcher Mangum, Editor, *Conference on Assessing the Effects of Legislation on the Workload of the Courts, Papers and Proceedings,* FED. JUD. CENTER, 1995.

This compilation of papers delivered at a conference hosted by the FJC in 1993 provides an interesting look at the relationship between legislation and court workload. (at 1). Of note, is the empirical information presented in the final paper by the Planning and Technology Division of the FJC. The data that is reviewed is taken from available filing data for criminal and civil cases. While not comprehensive, the short evaluation is useful in assessing ways in which data can be used to analyze court workload and how data collection can be improved to make it more useful.

Carl Tobias, *Continuing Federal Justice Reform in Montana,* 57 MONT. L. REV. 143, Winter 1996.

Professor Tobias provides another short update on developments effecting the civil justice system nationally and in Montana. Three pieces of legislation were considered during the 104th Congress that would have modified the way cases are handled. Of the three, only the Securities Litigation Reform Act, which would adopt the British loser pays rule in some cases as well as implement heightened pleading standards succeeded. In Montana, experimentation under the CJRA continues and changes to local rules were finalized and are currently under review by the local rules review committee.

Carl Tobias, *Ongoing Federal Civil Justice Reform in Montana,* 57 MONT. L. REV. 511, Summer 1996.

This very brief essay takes a look at new developments in civil justice reform at the national level and in the District Court for the District of Montana. Professor Tobias notes that on the national front, there are no new developments that directly impact civil justice reform. However, recent Congressional efforts to enact various litigation reform measures—specifically the way product liability and securities cases are handled—merit addressing for their potentially substantial impact on the civil justice system.

While most of theses congressional efforts failed in the last Congress, they are almost certain to reappear in some form in the future. Furthermore, the author recommends against congressional litigation reforms that alter procedure or fee shifting because they may negatively impact the uniform national rulemaking process.

3.4. State Court Programs

Alex Wilson Albright, *New Discovery Rules: The Supreme Court Advisory Committee's Proposal*, 15 REV. LITIG. 275, Spring 1996.

This article discusses efforts in the state of Texas to curb discovery abuses. The Texas Supreme Court Advisory Committee (SCAC) recently proposed changes to the discovery system that would significantly alter the face of civil litigation in Texas. The article provides a comparison of current discovery rules in Texas to the proposed rules as well as an analysis of the proposed rules. The proposed rules limit the use of discovery and overhauls the "discovery vehicles" employed in the state. The authors conclude that the new rules would seriously alter the shape of discovery in Texas to essentially institutionalize the need for early preparation and planning with a goal of resolving cases with substantially reduced pretrial costs.

Daniel A. Fulco, Note, *Delaware's Response to Inefficient, Costly Court Systems and a Comparison to Federal Reform*, 20 DEL. J. CORP. L. 937 (1995).

The state of Delaware enacted the Delaware Summary Proceedings Act (DSPA) to accomplish much the same task as the CJRA -- reduce expense and delay in civil litigation. The DSPA, however, embodies a strict approach to dealing with discovery in commercial disputes. The author compares the key components of the DSPA to the CJRA. In doing so, the author notes that some of the flexibility that is allowed for in the CJRA would be useful in the DSPA. Furthermore, he cautions that speed and efficiency in the pre-trial process may not result in reduced costs and may in fact result in the reduction of some of the rights of the parties involved. The author maintains that Delaware was correct in acting swiftly to deal with its growing litigation problem, particularly in light of its reliance on revenue from its corporate citizens.

4. Federal Rules of Civil Procedure

4.1 Rule 11

John Shapard, George Cort, Marie Cordisco, Thomas Willging, Elizabeth Wiggins & Kim McLaurin, *Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure,* FED. JUD. CENTER, 1995.

This empirical study by the FJC evaluates the views of judges and attorney's concerning the effectiveness of the 1993 amendments to F.R.C.P. 11 in decreasing "groundless litigation." In response to questionnaires sent to 1,130 federal trial attorneys and 148 federal district judges, the FJC concluded that the respondents were generally supportive of the 1993 amendments and not supportive of some versions of proposed changes that were offered in the 104th Congress. Notably, the majority of judges and attorneys found the problem of groundless litigation had neither increased or decreased as a result of the 1993 amendments. The study contains seven tables which quantify the survey results.

4.2. Rule 23

Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules,* report of the Federal Judicial Center 1996.

This comprehensive empirical study of class actions in the Eastern District of Pennsylvania, the Southern District of Florida, the Northern District of Illinois and the Northern District of California provides useful data on the effect of class action suits on court cost and delay as well as whether or not class actions work to encourage settlement. The report, containing 83 graphs and 56 tables, worked from the assumptions articulated in the ABA Committee Report on Class Action improvements which were that (1) there would be significant litigation over the appropriate Rule 23 category, (2) there would be an unwillingness for the courts to reach the merits of the cases prior to ruling on class certification, (3) and there would be limited ability to make interlocutory appeals on certification rulings. (at 89). The FJC's findings suggest the first two assumptions are inaccurate but the last is correct. Notably, the study found that the percentage of class actions that settled or went to trial was similar to other civil cases. The report also points out the need for research in several areas including determinations of the incidence or volume of class actions throughout the ninety-four districts of the federal system. (at 91).

Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, ***An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges,*** **71 N.Y.U. L. REV (Apr. - May 1996).**

This article is substantially the same as the above report of the FJC. In addition to the findings discussed in the FJC report, the authors provide a review of the history of F.R.C.P. 23.

4.3. Rule 26

Joyce B. Klemmer, ***Cutting IP Litigation Expenses Through Cost Effective Discovery,*** **7 NO. 9 J. PROPRIETARY RTS. 6, Sept. 1995.**

In the opinion of this author, a practicing intellectual property attorney, the 1993 amendments to the Federal Rules of Civil Procedure, while trying to reduce abuse of the discovery process in fact complicate the discovery process in certain ways (*e.g.*, mandatory disclosure, joint plans). With that in mind, this short article can be seen as a pragmatic guide to reducing litigation costs in intellectual property cases in light of the 1993 amendments to the Federal Rules of Civil Procedure.

Eric F. Spade, Note, ***A Mandatory Disclosure and Civil Justice Reform Proposal Based on the Civil Justice Reform Act Experiments,*** **43 CLEV. ST. L. REV. 147, 1995.**

This note looks at the impact of mandatory disclosure provisions of the CJRA. The author advocates that mandatory disclosure should not be a part of the Federal Rules of Civil Procedure. It is important, when trying to reduce discovery abuses and court delay, to allow judges greater discretion in case management. Mandatory disclosure can be beneficial in improving the efficiency of the court system. However, it is not the magic solution to discovery problems that some supporters would like it to be.

4.4. Rule 68

John Shapard, ***Likely Consequences of Amendments to Rule 68, Federal Rules of Civil Procedure,*** **FED. JUD. CENTER, 1995.**

This report details the results of a 1994 FJC study on the need for and possible outcome of proposed amendments to F.R.C.P. 68. The rationale behind modifying Rule 68 is that many cases are agreeable to settlement and settlement could be achieved with less delay and cost to the litigants. Using questionnaire responses from trial attorneys involved in 800 federal civil cases, the study details the median cost of federal civil litigation, the proportion of cases that could have reached earlier settlement, and the proportion of litigation expenses that might be saved through settlement.

The survey results reflect support for a more effective Rule 68 which, if implemented, would probably influence the outcome of litigation in approximately 50 per cent of civil cases—causing more and earlier settlement.

4.5. Rule 83

Barry Friedman and Erwin Cherminsky, *The Fragmentation of the Federal Rules*, 79 JUDICATURE 67, Sept.-Oct. 1995.

This article is premised on the question: "Is it really a good idea for every district court in the country to go its own way in developing civil process?" (at 67). The authors briefly sketch some of the problems inherent in the use of local rules, namely the increased likelihood of forum shopping, the unnecessary resultant cost, and widespread confusion as to which rules are in play. The authors further make the case for uniformity in the rules and urge that local rules only take effect upon approval by a central authority and even then only where a unique problem at the district level necessitates a departure from the federal rules. While experimentation in the rules should be encouraged, it should be encouraged on a national level.

5. Alternate Dispute Resolution

5.1 In General

Elizabeth Plapinger and Donna Stienstra, *ADR and Settlement in Federal District Courts, a sourcebook for judges & lawyers*, FED. JUD. CENTER & CPR INST. FOR DISP. RESOL., 1996.

This is an excellent guide for anyone interested in comparing the alternative dispute resolution (ADR) techniques employed in the federal district courts. In addition to the summaries of each judicial district's ADR practices, the authors employ 7 tables to illustrate the usage of court-based ADR programs on a system-wide basis. Most districts were found to employ more than one type of ADR device. Mediation was most frequently employed, followed by arbitration, early neutral evaluation, settlement week and case valuation, and summary jury trial. The increased utilization ADR, due in part to the CJRA, has resulted, not surprisingly, in large ADR caseloads. Also noteworthy is that today, unlike in the past, many ADR referrals are not mandatory by case type. Another departure from the past is that today most courts require a fee to be paid to the neutral evaluator or mediator for services (except in arbitration). Finally, increased interest and reliance on ADR has led to the development of more formal procedures and rules governing ADR in the courts.

Edward F. Sherman, ***Policy Issues for State Court ADR Reform,*** **13 ALTERNATIVES TO HIGH COST LITIG. 142, Nov. 1995.**

As ADR becomes the rule rather than the exception in many court systems, more and more attention has been focused on determining how to best utilize it to reduce expense and delay in litigation. This article takes a very quick look at some issues raised by judicial reformers interested in ADR, including what forms of ADR should be court-annexed, who should pay for it, whether it should be mandatory, what kinds of confidentiality provisions are appropriate, and how it should be regulated as a profession. (at 143).

5.2. Summary Jury Trial

Ann E. Woodley, ***Saving the Summary Jury Trial: A Proposal to Halt the Flow of Litigation and End the Uncertainties,*** **1995 J. DISP. RESOL. 213 (1995).**

As part of the CJRA, courts were encouraged to adopt alternatives to litigation. One such alternative is the summary jury trial (SJT). While beneficial in reducing court costs and litigation, uncertainties in the application of SJT threaten its utility. This article identifies five major issues that pose difficulties to the SJT: (1) uncertain authority for SJT's lack of mandatory participation in SJT; (2) lack of authority for summoning jurors from the regular jury pool to serve on SJT; (3) issues relating to press access to SJT; (4) lack of certainty regarding confidentiality and the appropriate use of SJT information and verdicts; and (5) uncertainty in authority to award sanctions in SJT proceedings. (at 214). The author also surveyed federal judges for their reactions to some of these issues. After analyzing the various legal challenges raised by the five major issues, the author advocates the adoption of federal legislation to correct these problems.

5.3. Mediation

Michael A. Perino, ***Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act,*** **SETON HALL L. REV. 1 (1995).**

Pursuant to the Civil Justice Reform Act of 1990, the federal district courts are to implement plans to reduce court expense and delay. One means of furthering this goal is alternative dispute resolution (ADR). Since the enactment of the CJRA, many courts have implemented mediation programs. Meditation is a promising means of reducing cost and delay in the court system. However, the author stresses that, for the mediation process to be effective, clear, well-drafted confidentiality provisions must be put in place. Because mediation, by its nature, requires parties to fully disclose obstacles to resolution of the conflict, the parties must be fully certain of confidentiality in the process. The author evaluates confidentiality provisions in several

districts where mediation is utilized and finds that the biggest concern is that provisions often fail to strike the proper balance resulting in either over- or under-inclusive provisions.

6. Differentiated Case Management

Marie Cordisco, *District of Nevada Uses Early Hearings to Cope with State Prisoner Pro Se Civil Rights Caseload,* FJC DIRECTIONS NO. 9, June 1996.

This article presents the efforts undertaken by the District of Nevada to reduce expense and delay resulting from increased prisoners' civil rights cases. In Nevada 24 per cent of civil filings in 1994 were state prisoner civil rights actions. The author notes that increases nationwide in pro se prisoner civil rights cases results in a greater workload for the courts in terms of processing time, screening procedures to determine if the litigant is in forma pauperis, and weeding out frivolous claims. The Nevada pilot program utilizes "triage hearings" which provide a brief opportunity for the court and the pro se prisoner plaintiff to convene shortly after the initial complaint is filed to dispense with initial issues so that cases may move more quickly through the system. The result of the program has been "increased early dismissals, narrowing of counts and defendants, and a reduction in number of summonses issued."(at 19).

David Rauma & Charles P. Sutelan, *Analysis of Pro Se Case Filings in Ten U.S. District Courts Yields New Information,* FJC DIRECTIONS NO. 9, June 1996.

Analyzing data from the federal district courts with the largest number of civil case filings between 1989 and 1994, this report provides information as to the quantity and type of cases in which one or more litigants is going forward pro se. The article reflects significant increases in pro se filings between 1991 and 1994. As a result, the article concludes, courts must find new methods of dealing with the specific problems these types of cases present.

***Resource Guide for Managing Prisoner Civil Rights Litigation,* FED. JUD. CENTER, 1996.**

This report is a useful guide to understanding the Prisoner Litigation Reform Act (PLRA) and the case-management issues associated with it. While the report is not billed as a comprehensive guide, it provides a useful comparison of the pre-PLRA and post-PLRA law. Of particular interest is the section on case management procedures and options that judges face as they handle prisoner civil rights petitions.

William W. Schwarzer, ***Let's Try a Pro Se and Small-Stakes Civil Calendar in the Federal Courts,*** **FJC DIRECTIONS NO. 9, June 1996.**

Noting that 50 per cent of civil filings in some districts involve pro se parties and that many small-stakes cases are not economically able to proceed through discovery and trial, the author of this short article advocates that districts create an expedited calendar for disposition of pro se and small-stakes cases to lighten the burden they place on the federal courts. The author outlines a plan for such a calendar that would hinge on consent of all parties. The courts could establish such a track by local rule and then, once consent is obtained, cases would skip pre-trial proceedings and go to trial within thirty days of filing consent. While this proposal raises many questions, it is worth evaluating these types of options further for their possible assistance in reducing expense and delay in the courts.

7. **Other Publications, Sources, and Articles.** (The following articles, while not focusing on court cost and delay in the federal civil justice system, may be of interest because of their broader policy arguments on civil justice reform and related issues):

Barb L. Bettenhausen, Note, ***Revolution or Restoration? District Advisory Groups Under the 1990 Civil Justice Reform Act and the Rules Enabling Act of 1934,*** **4 GEO. MASON L. REV. 297 (1996).**

Sally Lloyd-Bostock, ***Alternative Dispute Resolution and Civil Justice Reform: Is ADR Being Used to Paper Over the Cracks?,*** **11 OHIO ST. J. DISP. RESOL. 397 (1996).**

Paul D. Carrington, ***A New Confederacy? Disunionism in the Federal Courts,*** **45 DUKE L. J. 929 (1996)**

Marcia Coyle and Claudia MacLachlan, ***Probing the Backlog, the NLJ Finds That Most Intractable Cases Involve Business Disputes,*** **NAT'L L. J., Aug. 7, 1995, at C1.**

O.C. Hamilton, Jr. and J. Shelby Sharpe, ***Discovery Rule Proposals -- Two Different Philosophies,*** **15 REV. LITIG. 341(1996)**

Nathan L. Hecht, ***Discovery Lite -- Consensus for Reform,*** **15. REV. LITIG. 267, SPRING 1996.**

Carol Krafka, Joe S. Cecil, and Patricia Lombard, ***Stalking the Increase in the Rate of Federal Civil Appeals,*** **FED. JUD. CENTER, 1995.**

Paul B. Lewis and Matthew R. Kipp, *Legislatively Directed Judicial Activism: Some Reflections on the Meaning of the Civil Justice Reform Act,* 28 U. MICH. J. L. REFORM 305 (1995).

Marjorie O. Rendell, *Gianella Lecture: What is the Role of the Judge in our Litigious Society?* 40 VILL. L. REV. 1115 (1995)

Lauren Robel, *Impermeable Federalism, Pragmatic Silence, and the Long Range Plan for the Federal Courts,* 71 IND. L.J. 841, Fall 1996.

Fred S. Souk, *No Disclosure! No Discovery! No Nonsense! Faster, Cheaper, Better Civil Justice,* v37, No. 9 FOR THE DEFENSE 28 (1995).

David H. Taylor, *Rambo as Potted Plant: Local Rulemaking's Preemptive Strike Against Witness-Coaching During Depositions,* 40 VILL. L. REV. 1057 (1995)

Carl Tobias, *Common Sense and Other Legal Reforms,* 48 VAND. L. REV. 699 (1995)