AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 7-8, 1999

1. Opening Remarks of the Chair

   - Report on Actions Taken at the Judicial Conference Session

2. **ACTION** — Approval of Minutes

3. Report of the Administrative Office

   A. Adjournment of Congress

   B. Administrative actions

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Appellate Rules

6. Report of the Advisory Committee on Bankruptcy Rules

   A. Overview of proposed amendments published for comment

   B. Report on Bankruptcy Reform Legislation

   C. Minutes and other informational items (Materials to be sent at a later date)

7. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Proposed abrogation of copyright rules and amendment of Rules 65 and 81

   B. Overview of proposed amendments published for comment

   C. Minutes and other informational items

   D. Report on Mass Torts Working Group (Oral Report)

8. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** — Proposed new Rule 32.2 for approval and transmission to the Judicial Conference

   B. Grand Jury Report (Materials to be sent at a later date)

C. Minutes and other informational items

9. Report of the Advisory Committee on Evidence Rules

A. Overview of proposed amendments published for comment

B. Minutes and other informational materials

10. Request of Committee on Codes of Conduct to Consider Promulgating Rules Governing Disclosure of Financial Interests

11. Status Report on Proposed Rules Governing Attorney Conduct

- "McDade" provision governing conduct of government attorneys

12. Executive Committee's Request to Explore Shortening Rulemaking Process

13. Report of the Style Subcommittee (Oral Report)

14. Report of the Technology Subcommittee (Oral Report)

15. Local Rules Project

16. Bibliography

17. Next Committee Meetings: Boston, MA, June 14-15, 1999; and Location To-Be-Determined on January 6-7, 2000 (tentative date)

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Item I

Agenda F-18 (Summary)
Rules
September 1998

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 Judicial Conference:

1. Approve the proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 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. 2-6.

2. Approve proposed action on eight rules-related items contained in the National Bankruptcy Review Commission's report, including proposed action on the Commission's Recommendation 1.3.1, which is set out in the report of the Committee on the Administration of the Bankruptcy System. ..... pp. 6-16

3. Approve the proposed amendments to Civil Rule 6(b) and Form 2 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. ..... p. 18

4. Approve the proposed amendments to Criminal Rules 6, 11, 24, and 54 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. 22-25

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 ..... pp. 28-29
- Shortening the Rulemaking Process ..... p. 29
- Report to the Chief Justice ..... p. 29
- Status of Proposed Amendments ..... p. 29

Agenda F-18
Rules
September 1998

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:

The Committee on Rules of Practice and Procedure met on June 18-19, 1998. The Department of Justice was represented by Eric H. Holder, Deputy Attorney General and Deborah S. Smolover, Assistant to the Deputy Attorney General, who attended part of the meeting.

Representing the advisory rules committees were: Judge Will L. Garwood, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Fern M. Smith, chair, and Professor Daniel J. Capra, 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 Mark D. Shapiro, Deputy Chief of the Administrative Office's Rules Committee Support Office; Thomas E. Willging and Marie Leary 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.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no items for the Committee's action. A comprehensive revision of the appellate rules is now before Congress and will take effect on December 1, 1998, unless Congress acts otherwise. The advisory committee approved proposed amendments to several rules, but stayed further action on them until the bench and bar have had an opportunity to become familiar with the restylized rules and until a sufficient number of proposed amendments are accumulated in the future to be forwarded to the Committee for its consideration.

The advisory committee did remove several items from its study agenda, including proposals governing use, electronic dissemination, citation, and precedential value of unpublished opinions. The committee understands that other committees of the Judicial Conference are examining practices governing unpublished opinions, but it was convinced that no rule amendments on the items were advisable at this time.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 together with Committee Notes explaining their purpose and intent.

The proposed amendments to Rule 1017 (Dismissal or Conversion of Case; Suspension) would specify the parties who are entitled to a notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of

creditors, schedules, or statement of financial affairs. Instead of sending a notice of a hearing in a chapter 7 case to all creditors, as presently required, the notice would be sent only to the debtor, the trustee, and any other person or entity specified by the court.

The proposed amendments to Rule 1019 (Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, and Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case) would: (1) clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time specified in the rule expires; (2) provide that the holder of a postpetition, preconversion administrative expense claim is required to file a request for payment under § 503(a) of the Code, rather than a proof of claim under Rule 3002; (3) provide that the court may fix a time for filing preconversion administrative expense claims; and (4) conform the rule to the 1994 amendments to § 502(b)(9) of the Code and to the 1996 amendments to Rule 3002(c)(1) regarding the 180-day period for filing a claim by a governmental unit.

Rule 2002(a)(4) (Notices to Creditors, Equity Security Holders, United States, and United States Trustee) would be amended to delete the requirement that notice of a hearing on dismissal of a chapter 7 case based on the debtor's failure to file required lists, schedules, or statements must be sent to all creditors. The amendment conforms with the proposed amendment to Rule 1017, which requires that the notice be sent only to certain parties.

The proposed amendments to Rule 2003(d) (Meeting of Creditors or Equity Security Holders) would require the United States trustee to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. The amendment gives a party in interest ten days from the filing of the report — rather than from the date of the meeting of creditors — to file a motion to resolve the dispute.

The proposed amendments to Rule 3020(e) (Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case) would automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

Rule 3021 (Distribution under Plan) would be amended to conform to the amendments to Rule 3020 regarding the 10-day stay of an order confirming a plan in a chapter 9 or chapter 11 case.

A new subdivision (a)(3) would be added to Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements) that would automatically stay for ten days, unless the court orders otherwise, an order granting relief from the automatic stay so that parties will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 4004(a) (Grant or Denial of Discharge) would clarify that the deadline for filing a complaint objecting to discharge under § 727(a) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for filing a complaint objecting to a discharge must be filed before the time specified in the rule has expired.

Rule 4007 (Determination of Dischargeability of a Debt) would be amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The rule is also amended to clarify that a motion for an extension of time for filing a complaint must be filed before the time specified in the rule has expired.

Rule 6004(g) (Use, Sale, or Lease of Property) is added to automatically stay for ten days, unless the court orders otherwise, an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

A new subdivision (d) would be added to Rule 6006 (Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases) that would automatically stay for ten days, unless the court orders otherwise, an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) of the Code, so that a party will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 7001 (Scope of Rules of Part VII) would recognize that an adversary proceeding is not necessary to obtain injunctive relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan.

The proposed amendments to Rule 7004(e) (Process; Service of Summons, Complaint) would provide that the 10-day time limit for service of a summons does not apply if the summons is served in a foreign country.

The proposed amendments to Rule 7062 (Stay of Proceedings to Enforce a Judgment) would delete the references to the additional exceptions to Rule 62(a) of the Federal Rules of Civil Procedure. The deletion of these exceptions, which are orders in a contested matter rather than in an adversary proceeding, is consistent with amendments to Rule 9014 that render Rule 7062 inapplicable to a contested matter.

Rule 9006(c)(2) (Time) would be amended to conform to the abrogation of Rule 1017(b)(3).

Rule 9014 (Contested Matters) would be amended to delete the reference to Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Bankruptcy Procedure, as recommended by your Committee, are in Appendix A together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 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.

National Bankruptcy Review Commission

The Bankruptcy Reform Act of 1994 contained a provision authorizing the creation of a National Bankruptcy Review Commission to "investigate and study issues and problems" and report to Congress, the Chief Justice, and the President its findings and conclusions "together with its recommendations for ... legislative and administrative actions." The Commission filed its final report, containing 172 recommendations, on October 20, 1997. As part of a judiciary-wide effort, the advisory committee was requested to review and exercise primary committee jurisdiction over eight specific items in the report that might affect the Bankruptcy Rules. The rules-related Commission recommendations are set out below with the advisory committee's discussion and recommendations following. The Committee concurred with the advisory committee's recommendations, including the one on Commission Recommendation 1.3.1 relating to reaffirmation agreements and the treatment of secured debt. That recommendation is set out in the report of the Committee on the Administration of the Bankruptcy System at Agenda F-4.

Chapter 1: Consumer Bankruptcy — System Administration

Recommendation 1.1.4: Rule 9011

The Commission endorses the amended Rule 9011 of the Federal Rules of Bankruptcy Procedure, to become effective on December 1, 1997, which will make an attorney's

presentation to the court of any petition, pleading, written motion, or other paper a certification that the attorney made a reasonable inquiry into the accuracy of that information, and thus will help ensure that attorneys take responsibility for the information that they and their clients provide.

Recommendation: That the Judicial Conference express thanks for the endorsement of the 1997 amendments to Rule 9011 and follow the procedures set forth in the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077, for considering further amendments and recommending them to the Supreme Court.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules drafted and proposed the amended rule and recognizes that the current rule implicitly may include an obligation on the part of the debtor's attorney to make reasonable inquiry into the facts reported on the schedules, statements, lists and amendments, even though these documents are signed only by the debtor.

The Judicial Conference recommended the amended rule to the Supreme Court in October 1996.

The Advisory Committee on Bankruptcy Rules at its October 1998 meeting will consider amending the rule further to expressly provide that the attorney's obligation to make reasonable inquiry extends to a debtor's schedules, lists, statements, and amendments thereto. If the advisory committee determines that any amendments should be proposed, the Rules Enabling Act (28 U.S.C. § 2071 et seq.) specifies the procedures by which the amendments would become effective.

Chapter 2: Partnerships

Recommendation 2.3.2 Consent of Former Partners

The Bankruptcy Code and Rules should be amended to clarify that, notwithstanding Recommendation 1 (defining "general partner"), a former general partner of a partnership is not, absent a specific court order to the contrary, required to consent to a voluntary petition by a partnership, to be served with a petition or summons in an involuntary case

against a partnership, or to perform the duties of disclosure or procedural duties imposed on a general partner of a debtor partnership.

Recommendation: That the Judicial Conference urge Congress, if it enacts legislation, to defer to the provisions of the Rules Enabling Act for any procedural rules that may be required to implement changes in the Bankruptcy Code.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules, as a policy matter, does not anticipate legislation but only proposes rules to implement legislation that has been enacted. In accordance with this policy, the Advisory Committee on Bankruptcy Rules at its March 1998 meeting adopted a "wait and see" position concerning this recommendation.

At its March 1994 meeting, the Judicial Conference restated to Congress the Conference's opposition to legislation that would amend the federal rules of procedure without following the procedures prescribed in the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077. JCUS-MAR 94, p.14.

Recommendation 2.3.2 clarifies that the expanded definition of "general partner" set out in the preceding recommendation (Recommendation 2.3.1) is not intended to encumber the commencement of voluntary or involuntary bankruptcy cases by or against a partnership by involving in the pleadings and service of process partners that have withdrawn from the partnership. Likewise, this recommendation relieves former partners of disclosure duties, unless the court orders otherwise.

This recommendation would require amending Rules 1004 and 1007(g) of the Federal Rules of Bankruptcy Procedure, but only if Congress were to amend the Bankruptcy Code by enacting the revised definition of "general partner" also recommended by the Commission. Although Congress has the authority to enact procedural rules for the courts directly, the Judicial

Conference traditionally has opposed such congressional initiatives and exhorted Congress to defer to the provisions of the Rules Enabling Act.

Chapter 2: General Issues in Chapter 11

Recommendation 2.4.9 Employee Participation in Bankruptcy Cases

Changes to Official Forms, the U.S. Trustee program guidelines and the Federal Rules of Bankruptcy Procedure, are recommended to the Administrative Office of the U.S. Courts, the Executive Office of the U.S. Trustee, and the Rules Committee, as appropriate, in order to improve identification of employment-related obligations and facilitate the participation by employee representatives in bankruptcy cases. The Official Forms for the bankruptcy petition, list of largest creditors, and/or schedules of liabilities should solicit more specific information regarding employee obligations. The U.S. Trustee program guidelines for the formation of creditors' committees should be amended to provide better guidance regarding employee and benefit fund claims. The appointment of employee creditors' committees should be encouraged in appropriate circumstances as a mechanism to resolve claims and other matters affecting the employees in a Chapter 11 case.

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Recommendation: That the Judicial Conference inform Congress that the schedules that must be filed by a debtor (Official Form 6) already require disclosure of employee-related obligations and that action on the Commission's recommendation is unnecessary.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules at its March 1998 meeting considered whether to refer this recommendation to its Subcommittee on Forms with instructions to draft proposed amendments to the official forms. The advisory committee determined that disclosure of employee-related obligations such as wages, benefits, and pension fund obligations already is required by the current schedules and, accordingly, that no amendments are necessary.

Recommendation 2.4.10 *Enhancing the Efficacy of Examiners and Limiting the Grounds for Appointment of Examiners in Chapter 11 Cases*

Congress should amend section 327 to provide for the retention of professionals by examiners for cause under the same standards that govern the retention of other professionals.

The Advisory Committee on Bankruptcy Rules of the Judicial Conference should consider a recommendation that Federal Rule of Bankruptcy Procedure 2004(a) be amended to provide that "On motion of any party in interest or of an examiner appointed under section 1104 of title 11, the court may order the examination of any entity."

Congress should eliminate section 1104(c)(2), which requires the court to order appointment of an examiner upon the request of a party in interest if the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes or owing to an insider, exceed $5,000,000.

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Recommendation: That the Judicial Conference: (a) restate its support for limiting the circumstances under which a trustee or trustee's own firm can be retained as a professional by the trustee but take no position on this recommendation to permit examiners to retain professionals under the same standards that govern the retention of other professionals, because such a change in substantive bankruptcy law concerns a matter of public policy that is best addressed by Congress; and (b) with respect to the recommendation to consider an amendment to Rule 2004, note that the recommendation is addressed directly to the Advisory Committee on Bankruptcy Rules, which has considered the matter and determined, for the time being, simply to monitor any case law that develops and, accordingly, urge Congress to defer to the provisions of the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules at its March 1998 meeting considered this recommendation and declined to consider at this time proposing an amendment to Rule 2004 to include an examiner among those who may request an order authorizing an examination under Rule 2004, in part because the almost unlimited scope of such examinations conflicts with the limited duties of an examiner under section 1106(b) of the Bankruptcy Code. The advisory

committee will monitor any case law that develops on the issue, so the advisory committee can reconsider its position, if appropriate.

The Judicial Conference has no prior position concerning the Commission's proposals for amending the Bankruptcy Code to provide for the retention of professionals by examiners and limit the grounds for appointment of examiners in cases under chapter 11. At its March 1994 meeting, however, the Judicial Conference approved a recommendation of the Committee on the Administration of the Bankruptcy System that the circumstances under which a trustee, or trustee's firm, may also be retained as a professional by the trustee be restricted to four specific circumstances and agreed to seek a legislative amendment at an appropriate time. JCUS-MAR 94, p.11. At its March 1994 meeting, the Judicial Conference also restated to Congress the Conference's opposition to legislation that would amend the federal rules of procedure without following the procedures prescribed in the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077.

Chapter 2: Small Business Proposals

Recommendation 2.5.2 Flexible Rules for Disclosure Statement and Plan

Give the bankruptcy courts authority, after notice and hearing, to waive the requirements for, or simplify the content of, disclosure statements in small business cases where the benefits to creditors of fulfillment of full compliance with Bankruptcy Code § 1125 are outweighed by cost and lack of meaningful benefit to creditors which would exist if the full requirements of § 1125 were imposed:

The Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Rules Committee") shall be called upon to adopt, within a reasonable time after enactment, uniform safe-harbor standard forms of disclosure statements and plans of reorganization for small business debtors, after such experimentation on a local level as they deem appropriate. These forms would not preclude parties from using documents drafted by themselves or other forms, but would be propounded as one choice that plan proponents could make, which if used and completed accurately in all material respects, would be presumptively deemed upon filing to comply with all applicable requirements of Bankruptcy Code §§ 1123 and 1125. The forms shall be designed to fulfill the most practical balance between (i) on the one hand, the reasonable needs of the courts, the U.S. Trustee, and creditors and other parties in interest for reasonably complete information to

arrive at an informed decision and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors; and

Repeal those provisions of 11 U.S.C. § 105(d) which are inconsistent with the proposals made herein, *e.g.*, those setting deadlines for filing plans.

Amend the Bankruptcy Code to expressly provide for combining approval of the disclosure statement with the hearing on confirmation of the plan.

Recommendation: That the Judicial Conference express support for authorizing the bankruptcy courts to exercise greater flexibility in managing small business cases under chapter 11, but urge Congress, if it enacts legislation, to defer to the provisions of the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077, for any procedural rules or official forms that may be required to implement changes in the Bankruptcy Code.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules, as a policy matter, does not anticipate legislation but only proposes rules to implement legislation that has been enacted. In accordance with this policy, the advisory committee at its March 1998 meeting adopted a "wait and see" position concerning this recommendation.

The Committee on the Administration of the Bankruptcy System in June 1993 approved a recommendation of its Subcommittee on Long Range Planning that Congress should consider amending § 1125 of the Bankruptcy Code to authorize the bankruptcy court to grant conditional approval of a disclosure statement, in order to streamline the processing of small chapter 11 cases. At its June 1995 meeting, the Bankruptcy Committee noted that the conditional approval process had been enacted in the Bankruptcy Reform Act of 1994 for very small cases in which the debtor had elected special treatment as a small business. In light of the congressional action, the Bankruptcy Committee determined that its earlier recommendation should be reworded as a query for inclusion in a list of issues to be forwarded to the Commission for consideration.

At its March 1994 meeting, however, the Judicial Conference restated to Congress the Conference's opposition to legislation that would amend the federal rules of procedure without following the procedures prescribed in the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077.

The Bankruptcy Code in § 1125 specifies that the proponent of a chapter 11 plan must provide to creditors and equity holders, through a disclosure statement approved by the court, all the information a typical investor would require to cast an informed vote on the plan. The Commission's view was that this prospectus-type disclosure statement, which is appropriate in large corporate reorganizations, is more of a costly burden than an aid to reorganization in small chapter 11 cases. The Bankruptcy Committee supports the Commission's proposals to (1) allow the bankruptcy court, after notice and a hearing, to waive the requirements for, or simplify the content of, disclosure statements in small business cases, and (2) grant the court broad discretion to combine the disclosure and confirmation hearings in all small business cases.

This recommendation also would require amending the Federal Rules of Bankruptcy Procedure and prescribing a new official form, but only if Congress first amends the Bankruptcy Code to authorize the bankruptcy court, after notice and hearing, to waive the requirement for, or simplify the contents of, a disclosure statement and to combine approval of a disclosure statement with the hearing on confirmation of a plan. Although Congress has the authority to enact procedural rules for the courts directly, the Judicial Conference traditionally has opposed such congressional initiatives and exhorted Congress to defer to the provisions of the Rules Enabling Act.

Chapter 2: Small Business Proposals

Recommendation 2.5.3 Reporting Requirements

To create uniform national reporting requirements to permit U.S. Trustees, as well as creditors and the courts, better to monitor the activities of Chapter 11 debtors, the Rules

Committee shall be called upon to adopt, with (sic) a reasonable time after enactment, amended rules requiring small business debtors to comply with the obligations imposed thereunder. The new rules will require debtors to file periodic financial and other reports, such as monthly operating reports, designed to embody, upon the basis of accounting and other reporting conventions to be determined by the Rules Committee, the best practical balance between (i) on the one hand, the reasonable needs of the court, the U.S. Trustee, and creditors for reasonably complete information and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors. Specifically, the Rules Committee, shall be called upon to prescribe uniform reporting as to:

a. the debtor's profitability, *i.e.,* approximately how much money the debtor has been earning or losing during current and relevant recent fiscal periods;

b. what the reasonably approximate ranges of projected cash receipts and case disbursements (including those required by law or contract and those that are discretionary but excluding prepetition debt not lawfully payable after the entry of order for relief) for the debtor appear likely to be over a reasonable period in the future;

c. how approximate actual cash receipts and disbursements compare with results from prior reports;

d. whether the debtor is or is not (i) in compliance in all material respects with postpetition requirements imposed by the Bankruptcy Code and the Bankruptcy Rules and (ii) filing tax returns and paying taxes and other administrative claims as required by applicable nonbankruptcy law as will be required by the amended statute and rules and, if not what the failures are, and how and when the debtor intends to remedy such failures and what the estimated costs thereof are; and

e. such other matters applicable to small business debtors as may be called for in the best interests of debtors and creditors and the public interest in fair and efficient procedures under Chapter 11.

Recommendation: That the Judicial Conference take no position on the merits of this recommendation, but urge Congress, if it enacts legislation on the subject of small business cases under chapter 11 of the Bankruptcy Code, to defer to the provisions of the Rules Enabling Act, 28 U.S.C. §§ 2071 - 2077, for any procedural rules or official forms that may be required to implement changes in the Bankruptcy Code.

Rationale for Rules Committee Recommendation

Recommendation 2.5.3 is part of a series on the subject of small business bankruptcy cases. Amendments to the Federal Rules of Bankruptcy Procedure would be triggered only if legislation is enacted as suggested by the Commission in other recommendations. Although a majority of districts already require regular financial reporting similar to that recommended, the Commission noted the lack of any express, national requirement in either the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

Current law assigns to the United States trustee program administered by the Department of Justice the responsibility for supervising the administration of estates in bankruptcy cases. 28 U.S.C. § 586. Regional United States trustees perform this function in all but six federal judicial districts; in the six districts of Alabama and North Carolina, bankruptcy administrators appointed by the circuit councils supervise the administration of bankruptcy estates. Accordingly, it might be more appropriate to assign to the Executive Office for United States Trustees the development of uniform reporting requirements for small business debtors in chapter 11.

Chapter 4: Taxation and the Bankruptcy Code

Recommendation 4.2.3

The Commission should submit to the Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Rules Committee") a recommendation that the Federal Rules of Bankruptcy Procedure require that notices demanding the benefits of rapid examination under 11 U.S.C. § 505(b) be sent to the office specifically designated by the applicable taxing authority for such purpose, in any reasonable manner prescribed by such taxing authority.

Recommendation: That the Judicial Conference express general support for the principle of facilitating adequate and effective notice in bankruptcy cases to governmental units and note that proposed amendments to the Federal Rules of Bankruptcy Procedure that would provide better notice to all federal and state governmental units have been published for comment.

Rationale for Rules Committee Recommendation

The Advisory Committee on Bankruptcy Rules, at its March 1998, meeting approved preliminary draft amendments to the bankruptcy rules that would require the clerk of the bankruptcy court to maintain a register of mailing addresses for federal and state governmental units. The mailing address for any particular agency would be provided by the agency and use of that address would be conclusively presumed to constitute effective notice on the agency. The advisory committee has forwarded the proposed amendments to the Committee on Rules of Practice and Procedure ("Standing Committee") with a request that they be published for comment. If ultimately prescribed by the Supreme Court and not blocked or altered by Congress, amendments to the bankruptcy rules implementing this recommendation would become effective December 1, 2000.

The advisory committee has been working for several years, independently of the work of the Commission, on proposals to improve notice in bankruptcy cases to all governmental units. Preliminary draft amendments to the bankruptcy rules designed to accomplish that purpose have been forwarded to the Standing Committee with a request that they be published for comment. The proposed amendments will have a much broader effect than would have been accomplished by addressing only this recommendation.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 1006, 1007, 1014, 1017, 2001, 2002, 2004, 2007, 2014, 2016, 3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001, 4003, 4004, 5003, 6004, 6006, 6007, 9006, 9013, 9014, 9017, 9021, and 9034, and to Official Bankruptcy Forms 1 and 7 with a recommendation

that they be published for public comment. Many of these involve proposals to change motion practice and litigation in bankruptcy court.

At the request of the advisory committee, the Federal Judicial Center conducted an extensive survey of bankruptcy judges, lawyers, trustees, clerks, and other participants in the bankruptcy system to determine their satisfaction with the Federal Rules of Bankruptcy Procedure. The survey results indicated general satisfaction with the rules, but identified motion practice and litigation as areas of significant dissatisfaction. In particular, the lack of national uniformity and insufficient guidance regarding procedures governing the resolution of these disputes were major criticisms expressed often in the survey.

The advisory committee devoted more than two years: (1) studying the rules relating to motion practice and litigation in bankruptcy court; and (2) formulating proposed amendments designed to improve procedures for obtaining court orders and resolving disputes. In general, the proposed amendments would increase national uniformity and provide more detailed procedural guidance when a party requests relief unrelated to pending litigation; these amendments should reduce substantially the number of local rules.

Several of the proposals amend rules that are now being considered for approval and submission to the Judicial Conference. The rules committees often defer action on a particular proposed amendment if changes to other parts of the same rule are also under consideration. But the advisory committee recommended that the submission of the amendments to the Conference not be delayed until action on the proposed amendments submitted for public comment was completed, because the latter set of proposals represents an integrated single "litigation package" that should stand alone. The advisory committee concluded that the two sets of proposed

amendments should proceed on separate tracks. Your Committee agreed with the advisory committee's recommendations.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 6(b) and Form 2. The advisory committee concluded that the proposed changes were "technical or conforming," under paragraph 6(b) of the "Procedures for the Conduct of Business by the Judicial Conference's Committees on Rules of Practice and Procedure" and recommended that they be submitted directly to the Judicial Conference without being published for comment.

The proposed amendment to Rule 6(b) (Time) would delete the reference to Rule 74(a), which was abrogated in 1997.

Form 2 (Allegation of Jurisdiction) would be amended to delete the reference to a specific monetary amount in the allegation of diversity jurisdiction. The present form is outdated and refers to "fifty thousand dollars." Instead of substituting seventy-five thousand dollars, which is the present adjusted amount, the proposed amendment references the underlying statute that sets the minimum dollar value for diversity jurisdiction. Under the proposed changes, the form would no longer need to be revised to account for future statutory changes in the jurisdictional amount.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Civil Procedure and to Form 2 are in Appendix B together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rule 6(b) and Form 2 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.

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Civil Rules 4, 5, 12, 14, 26, 30, 34, and 37 and to Supplemental Admiralty Rules B, C, and E with a recommendation that they be published for comment. Most of the amendments involve proposals to amend the discovery rules.

The advisory committee embarked on its study of discovery prompted by the same concerns regarding cost and delay in litigation that underlay the enactment of the "Civil Justice Reform Act." To more fully understand the issues, the advisory committee attended a conference on the bench and bar's experiences with the Civil Justice Reform Act at the University of Alabama, and it later sponsored a conference specifically on discovery issues at the Boston College School of Law.

In addition to the practical experience related at the conferences, the advisory committee requested RAND's Institute on Civil Justice to refine and expand its CJRA findings on discovery issues and asked the Federal Judicial Center to survey the bar on discovery. It also received input from numerous national bar associations, including the American Bar Association (ABA), the American College of Trial Lawyers, and the Association of Trial Lawyers of America. The committee found that discovery is working effectively and efficiently in "routine" cases, which represent a large majority of all cases. In cases where discovery was actively used, however, it was frequently thought to be unnecessarily expensive and burdensome. Plaintiffs' lawyers seemed most concerned with the length, number, and cost of depositions, and defendants' lawyers seemed most concerned by the number of documents required by document production and the cost of selecting and producing them. In districts where mandatory disclosure is being

practiced, it is generally liked, and the users believe that it lessens the cost of litigation. But there was an overwhelming and emphatic support for national uniformity of the disclosure rules.

The proposed rule amendments are not intended to reduce the breadth of discovery, nor are they intended to undermine the policy of full and fair disclosure in litigation. When the proposed amendments narrow the scope of attorney-managed discovery, the original scope of discovery has been preserved under court supervision. Under the proposed changes, for example, attorney-managed discovery is no longer allowed for all matters related to the "subject-matter" of the litigation, but rather, it must be related to the parties' "claims or defenses." Judges would retain the discretion to permit discovery "of any information relevant to the subject matter involved in the action."

Some of the highlights of the proposed discovery rule amendments include:

- The initial disclosure requirement would be limited to information supporting the disclosing party's position. Moreover, specified "non-complex" categories of cases (e.g., prisoner cases, student loan cases, etc.) that do not need disclosure would be exempted, while complex cases could be exempted from disclosure by the court on a party's motion. National uniformity would be established.
- The scope of discovery defined by Rule 26(b)(1) would be retained, but divided to distinguish between attorney-managed and court-managed discovery. Information relating to the "subject-matter involved in the action" would be subject to discovery but only on court order for good cause.
- A deposition would be presumptively limited to "one day of seven hours." The time could be extended by stipulation of the parties and deponent or by court order.

- Rule 34(b) would be amended to make explicit the power to allow a party to pursue a discovery request that would otherwise violate the limits of Rule 26(b)(2) if the requesting party pays part or all of the reasonable costs of responding.
- Discovery and disclosure materials must not be filed until they are used in the proceeding or the court orders filing.

In addition to the discovery rules, the advisory committee proposed for publication amendments to Rules 4 and 12 to provide for service on the United States and 60 days to answer in an action brought against a federal officer or employee in an individual capacity and to Rules B, C, and E of the Supplemental Rules for Certain Admiralty and Maritime Claims, with conforming amendments to Civil Rule 14.

The Committee voted to circulate the proposed amendments together with proposed amendments to Rules B, C, and E of the Supplemental Rules for Certain Admiralty and Maritime Claims and conforming amendments to Civil Rule 14 to the bench and bar for comment.

Working Group on Mass Torts

The Chief Justice authorized the establishment of a Mass Torts Working Group that is to study mass tort litigation and report early next year. The report will include three parts. The first will describe mass-tort litigation and identify any problems that deserve legislative and rulemaking attention. The second will identify the legislative and rulemaking approaches that might be taken to reduce these problems. And the third will recommend a protocol for proceeding forward. The Working Group has held two conferences with small groups of highly experienced judges, lawyers, and academics. A third and final conference is scheduled for this fall.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 6, 7, 11, 24, 31, 32, 38, 54, and a new 32.2 together with Committee Notes explaining their purpose and intent. All except proposed new Rule 32.2, and the conforming amendments to Rules 7, 31, 32, and 38 are recommended for approval and transmission to the Supreme Court. The proposed amendments had been circulated to the bench and bar for comment in August 1997. A public hearing was held in Washington, D.C.

Rule 6 (Grand Jury Procedures)

Rule 6 (The Grand Jury) would be amended in subdivision (d) to allow the presence of an interpreter who is necessary to assist a juror who is hearing or speech impaired in taking part in the grand jury deliberations and voting. The scope of the proposal published for public comment was broader and would have authorized other types of interpreters, including language interpreters. On further consideration, the amendment was limited to permit only interpreters who assist hearing or speech impaired jurors.

The proposed change to subdivision (f) of Rule 6 would permit the grand jury foreperson or deputy foreperson to return an indictment in open court without requiring the presence of the entire grand jury as mandated under present procedures. The amendment would be particularly helpful when the grand jury meets in places other than in the courthouse and needs to be transported to discharge a ministerial function. A court might still require the presence of all the jurors if it had inquiries, for example, about the indictment.

Rule 11 (Change of Plea — Waiver of Appeal)

The proposed amendment of Rule 11 (Pleas) would require the court to determine whether the defendant understands any provision in a plea agreement that waives the right to appeal or to collaterally attack the sentence. The advisory committee initially considered the proposed amendment at the request of the Committee on Criminal Law, which observed that prosecutors around the country were increasingly incorporating waivers of appeal rights in plea agreements. Although several courts of appeals have upheld these waivers against constitutional or other challenges, the rules provide no guidance to the sentencing judges on accepting them.

The proposed amendment ensures that a complete record exists regarding the waiver provision, and that the defendant voluntarily and knowingly agreed to it. The advisory committee heard testimony from witnesses at the public hearings objecting to the proposed amendments, because the committee's action might signal tacit "official" approval of these waiver provisions. In recognition of the growing practice of using these waiver provisions and the string of appellate decisions uniformly upholding them, the advisory committee believed that the amendment would be helpful to a sentencing judge who decides to accept such a plea agreement. The Note to the amendment, however, explicitly states that the "Committee takes no position on the underlying validity of such waivers."

The amendment also conforms Rule 11 to current practices under sentencing guidelines and makes it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. It also distinguishes plea agreements made under Rule 11(e)(1)(B), which are not binding on the court, and agreements under Rule 11(e)(1)(C), which are binding.

Rule 24 (Alternate Jurors Not Discharged)

Rule 24 (Alternate Jurors) would be amended to permit a court to retain alternate jurors during deliberations if any regular juror becomes incapacitated. The alternate jurors would remain insulated from the other jurors until required to replace a regular juror. The option would be particularly helpful in an extended trial when two or more original jurors could not participate in the deliberations and a new trial would otherwise be required. If an alternate juror replaces a juror after deliberations have begun, the jurors must be instructed that they must begin their deliberations anew.

Rule 30 (Jury Instructions)

The proposed amendments to Rule 30 (Instructions), which would have permitted a court to require or permit the parties to file any requests for jury instructions before trial, were withdrawn. The advisory committee deferred consideration to coordinate further action on the proposed amendments with the Advisory Committee on Civil Rules, which is considering similar amendments to Civil Rule 51.

Rule 54 Technical Amendment

A technical amendment is proposed to Rule 54 removing the reference to the court in the Canal Zone, which no longer exists.

Rule 32.2 (Forfeiture Procedures)

The Committee voted not to approve new Rule 32.2. The proposed new Rule 32.2 (Forfeiture Procedures) would have set up a bifurcated post-guilt adjudication forfeiture procedure, consolidating several procedural rules governing the forfeiture of assets in a criminal case, including existing Rules 7(c)(2), 31(e), 32(d)(2), and 38(e). Under the proposal, a judge as part of the sentencing proceeding would enter an order forfeiting a defendant's ownership or

other interest in property that was subject to forfeiture. The defendant would no longer be entitled to a jury determination regarding the forfeiture.

In *Libretti v. United States*, 116 S. Ct. 356 (1995), the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case, and that the defendant has no constitutional right to have a jury decide any part of the forfeiture. Nonetheless, several committee members observed that *Libretti* may not reach all aspects of a defendant's right to a jury in a forfeiture proceeding, leaving some of the issues open to debate on policy grounds. In particular, they were uncertain that the elimination of a defendant's right to have a jury determine the nexus between a defendant's ownership or other property interests in property subject to forfeiture and the statutory requirements for forfeiture was conclusively resolved in *Libretti*. Several members expressed the view that although *Libretti* may not recognize a Sixth Amendment entitlement to a jury trial in these cases, a defendant should be provided a jury trial as a matter of policy. Other members voiced concerns regarding specific features of the proposed forfeiture procedures. In light of the Committee's vote not to approve the new rule, the chair of the advisory committee withdrew the proposed amendments to Rules 7, 31, 32, and 38, which were all grounded in the rejected new Rule 32.2.

The Committee concurred with the advisory committee's recommendations regarding proposed amendments to Rules 6, 11, 24, and 54. The proposed amendments, as recommended by your Committee, are in Appendix C together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 6, 11, 24, and 54 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.

Informational Items

The advisory committee is working with the Standing Rules Committee Style Subcommittee to comprehensively revise the Federal Rules of Criminal Procedure. As a general policy matter, the advisory committee decided that unless the adoption of a particular amendment was urgent it should be deferred pending completion of the style project.

The advisory committee considered and approved proposed amendments to Criminal Rule 5(c) consistent with instructions of the Judicial Conference and proposed amendments to 18 U.S.C. § 3060, which were approved in concept by the Magistrate Judges Committee. The advisory committee also evaluated the need for the amendment to Rule 5(c) and concluded that it was not urgent. After notifying the Magistrate Judges Committee, which had no objection, the advisory committee voted to defer submission of the proposed Rule 5(c) amendment until the completion of the style project.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules proposed amendments to Evidence Rules 701, 702, and 703 and recommended that they be published for public comment.

Under the proposed amendments to Rule 701 (Opinion Testimony by Lay Witnesses), a witness' testimony must be scrutinized under the Evidence Rules regulating expert opinion to the extent that the witness is providing scientific, technical, or other specialized information to the trier of fact. The proposed amendment is intended to eliminate the risk that the reliability factors contained in Rule 702 will be evaded through the simple expedient of proffering an expert as a lay witness. Any part of a witness' testimony that is based on scientific, technical, or other specialized knowledge would be governed explicitly by the standards of Rule 702 and the

corresponding disclosure requirements of the Civil and Criminal Rules. The representatives of the Department of Justice were particularly concerned with the disclosure requirements regarding law enforcement officers who were called to testify as lay witnesses, but whose testimony might also include expert testimony. The advisory committee carefully considered the department's concerns, but decided that the need to ensure the reliability of this type of testimony outweighed any disadvantages in disclosing a potential expert prior to trial.

Rule 702 (Testimony by Experts) would be amended in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). District courts and courts of appeals have reached different conclusions regarding *Daubert's* meaning and application in particular cases. The proposed amendments would affirm the trial court's role as gatekeeper and provide some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. In particular, the amendments require a showing of reliable methodology and sufficient basis, and that the expert's methodology must be applied properly to the facts of the case. The amendment provides that expert testimony of all types — not only the scientific testimony specifically addressed in *Daubert* — presents questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful.

The proposed amendments to Rule 703 (Bases of Opinion Testimony by Experts) would emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, it is the opinion or inference — and not the information — that is admitted as evidence. The underlying inadmissible information may be disclosed to the jury only if the trial court finds that the probative value of the information substantially outweighs its prejudicial effect. Under these circumstances, a limiting instruction must be given on request, which informs the jury that the underlying information can not be used for substantive purposes.

The Committee voted to circulate the proposed amendments for comment, along with proposed amendments to Rules 103, 404, 803(6), and 902 — which had been approved for publication at the Committee's January 1998 meeting.

Informational Items

Several bills were introduced in Congress that create evidentiary privileges, e.g., parent-child and taxpayer-preparer. The Judicial Conference has a longstanding policy opposing legislation that amends a federal rule of procedure or evidence outside the Rules Enabling Act rulemaking process. In accordance with that policy, the rules committees have opposed bills that directly create new privileges in the rules.

Some of the bills, however, create new privileges by statute. Ideally, all privileges should be contained in one place, preferably the Federal Rules of Evidence. But there is a general reluctance to authorize a specific privilege in the rules, because Rule 501 envisions a common-law development of privileges — the rules do not include any specific privilege. Moreover, Congress rejected a comprehensive treatment of privileges in the Evidence Rules in 1976, amending the Rules Enabling Act to require an Act of Congress to modify or create an evidentiary privilege. Most importantly, Rule 501 itself recognizes that privileges can be established by Congress directly by statute and not necessarily through the rulemaking process. As a result, the advisory committee has abstained from taking a position on legislation that codifies a privilege by statute.

RULES GOVERNING ATTORNEY CONDUCT

An ad hoc subcommittee consisting of members from each advisory committee was established to study proposed options involving rules governing attorney conduct. The Committee was advised of the current status of meetings between the Department of Justice and

the Conference of Chief Justices on contacting represented parties. In addition, the Committee was advised of the status of the ABA's Ethics 2000 project, which is undertaking a comprehensive revision of the ABA Model Rules.

SHORTENING THE RULEMAKING PROCESS

At the request of the Executive Committee, the advisory rules committees considered ways to shorten the rulemaking process. The duration of the rulemaking process is long (about three years) primarily because six institutional bodies are asked to separately review and approve proposed rule amendments, including the advisory rules committees, public, Standing Rules Committee, Judicial Conference, Supreme Court, and Congress.

The Committee considered various options that shortened the process by: (1) limiting or eliminating the current role of bodies responsible for reviewing and approving rule amendments, (2) reducing the time allocated for review, (3) increasing the frequency of publications, or (4) altering the effective date of rule changes. Each alternative raised serious policy issues. No consensus was readily reached, and the matter was deferred for further study.

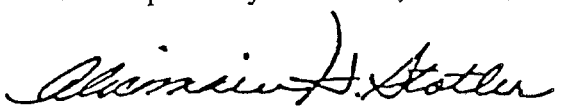
REPORT TO THE CHIEF JUSTICE

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

STATUS OF PROPOSED AMENDMENTS

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

Respectfully submitted,



Alicemarie H. Stotler
Chair

Frank W. Bullock, Jr.	James A. Parker
Geoffrey C. Hazard, Jr.	Morey L. Sear
Eric H. Holder, Jr.	Sol Schreiber
Phyllis A. Kravitch	A. Wallace Tashima
Gene W. Lafitte	E. Norman Veasey
Patrick F. McCartan	William R. Wilson, Jr.

APPENDICES

Appendix A —	Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix B —	Proposed Amendments to the Federal Rules of Civil Procedure
Appendix C —	Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix D —	Report to the Chief Justice on Proposed Rules Amendments Generating Controversy
Appendix E —	Chart Summarizing Status of Rules Amendments

granting a continuance of a preliminary examination in the absence of consent by the defendant.

Although the Magistrate Judges Committee had recommended that the Conference seek an amendment to the statute, it was suggested during Conference deliberations that the better course would be to follow the rulemaking process and amend Rule 5(c). Judge Stotler emphasized that this procedural matter had demonstrated the need for close coordination with other committees of the Judicial Conference on legislative proposals.

Judge Stotler reported that she had written a letter to Mr. Mecham, Director of the Administrative Office, expressing concern over a growing tendency in the Congress to pursue legislation that would amend the federal rules directly or otherwise circumvent the Rules Enabling Act. She noted, for example, that several provisions in the pending, comprehensive bankruptcy legislation — especially sections dealing with bankruptcy forms — reflected unfamiliarity with the rulemaking process established by the Act.

Judge Stotler said that she had acknowledged to Mr. Mecham the success of the Administrative Office's legislative efforts to protect the rulemaking process and deflect harmful statutory proposals. She had also urged greater interchange and dialog between the Legislative Affairs Office of the Administrative Office and the advisory committees, as well as additional dialog with both members and staff of the Congress.

Judge Stotler noted that Judge Niemeyer would represent the rules committees at the June 29, 1998 meeting of the long range planning committee liaisons of the Judicial Conference. She emphasized that defending the Rules Enabling Act process was a priority goal of the committee's long range planning process. Other long range planning priorities of the committee included restyling the federal rules and addressing the impact of technology on the rules.

Judge Sear reported that he had appeared at Judge Stotler's request on behalf of the committee before the ad hoc committee of the Judicial Conference studying: (1) the respective mission and authority of the Federal Judicial Center vis a vis the Administrative Office in education and training; and (2) the advisability of creating a special mechanism to resolve disputes between the two organizations. He stated that the ad hoc committee had emphasized that the Judicial Conference is the policy-making body for the judiciary, and that the Federal Judicial Center is the judiciary's primary educational body, but that the Administrative Office needs to maintain its own educational programs. He added that an interagency coordinating committee of senior managers of the two agencies had been formed to resolve disputes, but it was not expected that there would be a need for the committee to meet.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 8-9, 1998.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 28 bills and three joint resolutions were pending in the Congress that would affect the rules process. Summaries of each of the provisions, he noted, were set forth in the agenda report of the Administrative Office. (Agenda Item 3A) He added that 11 letters had been sent to the Congress on these legislative provisions expressing the views and concerns of the rules committees, and in some cases those of the Judicial Conference.

Mr. Rabiej stated that Judge Davis, chair of the Advisory Committee on Criminal Rules, had testified before the House Judiciary Subcommittee on Crime on proposed legislation that would amend FED. R. CRIM. P. 46 to authorize forfeiture of a bail bond only if the defendant fails to appear as ordered by the court.

He reported that the House had passed H.R. 1252. Section 3 of that legislation, now pending in a separate bill in the Senate, would authorize an interlocutory appeal of a decision to grant or deny certification of a class action. He pointed out that Judge Niemeyer had written to Senators Hatch and Leahy urging that they oppose section 3 on the grounds that: (1) it would achieve substantially the same results as new Rule 23(f) approved by the Supreme Court and due to take effect on December 1, 1998; and (2) it suffered from drafting problems that would introduce confusion and generate satellite litigation. He expressed confidence that if the legislation proceeded further, section 3 would either be eliminated or converted to a provision accelerating the effective date of new Rule 23(f).

Mr. Rabiej noted that S. 1352, introduced by Senator Grassley, would undo the 1993 amendments to FED. R. CIV. P. 30(b) and take away from parties the flexibility to use the most economical method of reporting depositions.

He pointed out that Judge Niemeyer had informed Representative Coble, chair of the House Judiciary Subcommittee on Courts and Intellectual Property, that the Advisory Committee on Civil Rules was planning to publish a proposed abrogation of the copyright rules for comment. At Mr. Coble's request, though, the committee had decided to defer the matter for another year.

Mr. Rabiej reported that the committee had notified Senator Kohl that the advisory committee had completed its discussion of protective orders and had decided to oppose his legislation that would require a judge to make particularized findings of fact before issuing a protective order under FED. R. CIV. P. 26(c). Mr. Rabiej also reported that the Administrative Office was continuing to monitor a bill that would federalize most class actions.

Administrative Actions

Mr. Rabiej reported that the Administrative Office was ready to place proposed amendments to the federal rules on the Internet for public comment. Some members suggested that the bar should be informed through notices in legal journals and newspapers about the opportunity to send comments electronically regarding the amendments on the Administrative Office's home page.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) She noted that the Center had conducted nearly 1,500 educational programs in 1997 that had reached 41,000 participants. The number of people reached, she said, will increase as a result of the new programs being developed for the Federal Judiciary Television Network.

She mentioned that the Center had more than 40 research programs pending and referred specifically to two of them: (1) a study of mass torts, focusing on policy and case management issues in the settlement of mass torts; and (2) a study on the use of expert testimony, specialized decision makers, and case management innovations in the National Vaccine Injury Compensation Program.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 12, 1998. (Agenda Item 5)

Judge Garwood stated that the advisory committee had approved several proposed amendments at its April 1998 meeting. But the committee had decided not to seek authority to publish the proposals for comment. Rather, it would hold them for publication in 1999 or 2000.

Judge Garwood said that a great deal of praise was due to Judge Logan for his prodigious and very successful efforts in achieving a complete restyling of the appellate rules. He noted that the restyled rules had recently been approved by the Supreme Court and would take effect on December 1, 1998.

Professor Schiltz reported that the advisory committee was considering a number of other potential changes in the appellate rules, but it wanted the bar to become familiar with the new, restyled appellate rules before requesting authority to publish any further proposed amendments. He added that several of the most recent changes approved by the advisory committee were intended to address complaints by the bar about the proliferation of local court rules. The advisory committee had decided to approve certain national provisions in order to promote national uniformity.

He pointed out that the advisory committee was very supportive of the concept of establishing a uniform effective date for all local rules. He added that it had approved a proposed amendment to FED. R. APP. P. 47(a)(1) that would establish an effective date of December 1 for all revisions to local court rules. The amendment would allow a court to establish a different effective date for a specific rule only if there were an "immediate need" for the rule. It would also provide that a local rule may not take effect until it is received in the Administrative Office. He noted, however, that the Administrative Office wanted an opportunity to study the likely administrative and logistical consequences flowing from the proposal.

Professor Schiltz reported that the advisory committee had announced at the last Standing Committee meeting that its priority long-term project was to consider promulgating uniform national rules on unpublished opinions in the courts of appeals. But, he said, that after careful consideration, the matter was removed from the committee's agenda.

Professor Schiltz also reported that the advisory committee at its last meeting had discussed the desirability of: (1) shortening the length of the Rules Enabling Act process; and (2) permitting public comments on proposed rules amendments to be submitted to the Administrative Office electronically through the Internet. He said that the consensus of the Advisory Committee on Appellate Rules was that the Rules Enabling Act process is too long, but it did not have specific recommendations to shorten it. With regard to Internet comments, the advisory committee favored the proposal.

He said that the advisory committee had also addressed whether there was a need for national rules governing attorney conduct. He noted that a national standard of conduct was set forth in FED. R. APP. P. 46, that the rule had worked well, and that the advisory committee was not aware of serious problems with attorney conduct in the courts of appeals. He added that the advisory committee would be pleased to appoint members to serve on an ad hoc

committee to consider attorney conduct, but the committee had no special expertise in this area. He also pointed out that some members of the advisory committee had expressed reservations regarding the proposed draft national rules on attorney conduct. He noted that they were broad in scope, and some of them went beyond conduct related to federal court proceedings. They governed, for example, conduct in a law office, such as confidentiality of client matters. Members of the advisory committee had also expressed concern as to possible limits on the authority of the rules committee to promulgate rules in this area.

Judge Stotler asked Judge Garwood and Professor Schiltz to share these comments and any other reservations of the advisory committee with the reporters of the other rules committees.

Professor Coquillette noted for the record that he personally did not advocate adoption of the 10 illustrative federal attorney conduct rules. He noted that he had been asked as reporter to prepare them only as a model of what national rules might encompass. He said that any set of national rules that the Standing Committee might adopt could be narrower than the 10 draft rules. He added that there was substantial support for a single national rule or a very small number of national rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier presented the report of the advisory committee, as set forth in his memorandum and attachments of May 11, 1998. (Agenda Item 6)

Rules Amendments for Judicial Conference Approval

Judge Duplantier reported that the advisory committee was recommending that the Judicial Conference approve proposed amendments to 16 rules. The proposals had been published in August 1997. The advisory committee had considered the comments at its March 1998 meeting and was now seeking final approval of the amendments.

Professor Resnick stated that seven of the 16 amendments dealt with the issue of an automatic 10-day stay of certain bankruptcy court orders which, if not stayed, could effectively moot any appeal by the losing party. Three of the amendments dealt with narrowing certain notice requirements. Several of the remaining amendments, he said, involved technical matters.

10-Day Stay Provision

FED. R. BANKR. P. 7062 and 9014

Professor Resnick explained that FED. R. BANKR. P. 7062, which applies to all adversary proceedings, incorporates FED. R. CIV. P. 62 by reference and imposes a 10-day stay on the enforcement of all judgments. The advisory committee would not change this provision.

Bankruptcy Rule 9014 governs contested matters, which are initiated by motion. It specifies that Rule 7062 (and Civil Rule 62) apply to contested matters, unless the court directs otherwise. But Rule 7062 — the adversary proceeding rule — sets forth a laundry list of specific categories of matters, added piece by piece over the years, that are excepted from the 10-day stay provision, all of them contested matters.

Professor Resnick said that the current structure and interaction of these rules was awkward, and it had caused problems in application. As a result, the advisory committee had appointed an ad hoc subcommittee to take a fresh look at the operation and effect of the 10-day stay on all types of contested matters.

After considerable study, the subcommittee and the full advisory committee concluded that it was appropriate to restructure the rules and separate the procedures for adversary proceedings from those for contested matters. First, it had decided to eliminate from Rule 9014 the reference to FED. R. BANKR. P. 7062 (and Civil Rule 62). Second, it would remove the list of excepted contested matters from Rule 7062. As a result, the rules would provide that orders in contested matters — unlike orders in adversary proceedings — would become effective upon issuance, and there would be no 10-day stay.

The committee decided, however, that there were a few types of contested matters to which the 10-day stay should apply as a matter of policy. Professor Resnick explained that the committee had concluded that it was best to relocate the stay provisions for these matters to the specific rules governing these contested matters.

FED. R. BANKR. P. 3020

Professor Resnick noted that Rule 3020 governs confirmation of a plan. He explained that the law today is ambiguous as to whether the court's confirmation order is stayed automatically. The advisory committee would amend the rule to make it clear that an order confirming a plan is stayed for 10 days after the entry of the order to allow a party to file an appeal. He added, though, that a bankruptcy judge would have discretion not to apply the 10-day stay in an individual case, or to shorten the length of the stay.

FED. R. BANKR. P. 3021

Professor Resnick stated that the proposed change in Rule 3021 was a technical amendment conforming to amended Rule 3020 and the 10-day stay of an order confirming a plan.

FED. R. BANKR. P. 4001

Professor Resnick stated that the proposed amendment to Rule 4001, dealing with relief from the automatic stay under section 362 of the Bankruptcy Code, was the most controversial proposal contained in the package of published amendments. He explained that, under the proposed revision, the parties would have 10 days to file an appeal from a judge's order granting a motion for relief from the automatic stay unless the judge ordered immediate enforcement.

He noted that the advisory committee had received 13 letters during the public comment period addressing this provision, the majority of which had expressed opposition to the amendment. Several commentators were concerned that it would not be fair to give a debtor — whose request to life the automatic stay under section 362 of the Bankruptcy Code is denied by the court — an additional automatic 10 days enjoyment of the premises or automobile that is the subject of the lift-stay motion. Professor Resnick said that the advisory committee had debated the merits of the matter carefully and had voted to proceed with the amendment on the merits. He added that the moving party may always ask for immediate enforcement of an order lifting the stay, and the court has authority to include a provision for immediate enforcement in its order.

FED. R. BANKR. P. 6004

Professor Resnick explained that Rule 6004 governs court orders authorizing the use, sale, or lease of property. He said that the most common use of the rule involves application by the debtor to sell assets out of the ordinary course of business. He reported that the advisory committee concluded that this was the type of order that should be stayed for 10 days to allow the losing party to file an appeal. The 10-day stay was necessary because otherwise the holder of the property could sell it immediately to a good faith purchaser and effectively moot any appeal.

FED. R. BANKR. P. 6006

Professor Resnick said that the advisory committee proposed a similar provision in Rule 6006. He explained that the assignment of an executory contract was akin to a sale of property under Rule 6004, and an order authorizing the assignment should be stayed for 10 days to allow an appeal before the assignment is consummated.

Professor Resnick said that the proposed amendments to rules 3020, 3021, 4001, 6004, and 6006 were based on considerations of fundamental fairness. The advisory committee was aware of the need for finality of judgments but, on balance, it believed that it was necessary to establish a presumption of a 10-day stay in these discrete categories of contested matters in order to prevent a party's right of appeal from being mooted.

Some of the members expressed concern over the proposed amendments on the ground that they would delay time-sensitive matters and shift the burden from the losing party to the successful moving party. They stated that in ordinary civil litigation, there are not the same time-sensitive considerations as in bankruptcy.

Professor Resnick explained that ordinarily in civil cases there is a 10-day stay of all judgments. The proposed amendments to the bankruptcy rules, however, would provide a general rule that there is no 10-day stay in contested matters. But the above amendments to Rules 3020, 3021, 4001, 6004, and 6006 were designed as specific exceptions to the general rule. Moreover, the moving party can always ask the judge to waive the 10-day stay on the grounds that there is time sensitivity in a given case. In other words, in the specified excepted categories of contested matters the proposed amendments give the losing party 10 days to appeal the judgment, as under FED. R. CIV. P. 62.

The committee approved the proposed amendments to Rules 3020, 3021, 4001, 6004, and 6006 by a vote of 8 to 4. It approved all the other proposed amendments without objection.

B. Other Proposed Amendments

FED. R. BANKR. P. 1017

Professor Resnick stated that Rule 1017 currently provides that when a motion to dismiss is made — either for failure of the debtor to file schedules or for failure to pay the filing fee — the clerk must send notice of the motion to all creditors. He explained that the advisory committee had been asked by the Administrative Office to save money by considering limits on the amount of noticing to be performed by the clerk. The proposed amendment would have the clerk serve notice of the motion only on the debtor, the trustee, and such other entities as the court may direct.

A new subdivision 1017(c) would be added to specify the parties who are entitled to receive notice of the motion to dismiss. Professor Resnick explained that without the new subdivision there would be a gap in the rules, in that there would be no way to ascertain who must receive notice of the motion.

Professor Resnick pointed out, however, that in the new "litigation package" of amendments recommended by the advisory committee for publication, the substance of Rule 1017(c) would be moved to Rule 9014 as part of a general restructuring of the rules dealing with litigation and motion practice. Accordingly, if the litigation package were to become law on schedule, the new subdivision 1017(c) would remain in effect for only one year.

The advisory committee, he said, was very sensitive to the general policy of avoiding frequent changes in the rules, especially when changes are proposed in the same rule. Nevertheless, if the litigation package were not to become law, the change in Rule 1017(c) would be needed permanently.

FED. R. BANKR. P. 1019

Professor Resnick stated that Rule 1019 governs conversion of a case from chapter 11, 12, or 13 to chapter 7. He noted that there is uncertainty in practice as to what document should be filed by one seeking to recover preconversion administrative expenses. Therefore, the advisory committee would amend subdivision (6) to specify that a holder of an administrative expense claim incurred after commencement of the case but before conversion must file a request for payment under section 503 of the Code, rather than a proof of claim. Notice of the conversion would be given to the administrative expense creditors.

He noted that the advisory committee had made a change in the rule following the public comment period by deleting a deadline for filing requests for payment of preconversion administrative expenses that would be applicable in all cases. Instead, the rule would have the court fix the deadline.

FED. R. BANKR. P. 2002

Professor Resnick reported that the proposed change in Rule 2002(a)(4) conformed the rule to the changes proposed in Rule 1017.

FED. R. BANKR. P. 2003

Professor Resnick stated that Rule 2003(d) deals with disputed elections of chapter 7 trustees. He explained that Rule 2007.1 — which governs disputed elections of chapter 11 trustees — was better written and clearer. Accordingly, the advisory committee had chosen to conform the language of Rule 2003 to that of Rule 2007.1.

FED. R. BANKR. P. 4004

Professor Resnick reported that the language of Rule 4004(a) would be amended to clarify that a complaint objecting to discharge must be filed within 60 days after the first date set for the meeting of creditors, whether or not the hearing is held on that date. Rule 4004(b) would be amended to specify that a motion to extend the time for filing a complaint objecting to discharge must be "filed," rather than "made."

FED. R. BANKR. P. 4007

Professor Resnick explained that Rule 4004 governs denial of a discharge, while Rule 4007 governs the dischargeability of a particular debt. He said that the proposed changes in Rule 4007 were parallel to those proposed in Rule 4004.

FED. R. BANKR. P. 7001

Professor Resnick pointed out that under the present rule, a request for injunctive relief requires the filing of an adversary proceeding. But in practice an injunction is often embodied in a chapter 11 plan, and adversary proceedings are not in fact commenced. The advisory committee proposed conforming the rule to the practice and provide explicitly that an adversary proceeding is not necessary to obtain injunctive or other equitable relief, if that relief is specified in a chapter 9, 11, 12, or 13 plan.

Professor Resnick stated that Department of Justice representatives had expressed reservations to the advisory committee that the proposed amendment did not provide adequate procedural protections to all parties that might be affected by injunctive relief. They suggested, for example, that injunctive relief provisions might be embedded in plans that parties would likely not see or recognize in the absence of an adversary proceeding.

Deputy Attorney General Holder and Professor Resnick added that the Department had been discussing the matter with the advisory committee. As a result, its initial objections had now been withdrawn with the understanding that Mr. Kohn of the Department would be presenting the advisory committee at its October 1998 meeting with proposed procedural protections for inclusion in other bankruptcy rules.

FED. R. BANKR. P. 7004

Professor Resnick stated that the proposed change in Rule 7004(e) would provide that the 10-day limit for service of a summons does not apply to service made in a foreign country.

FED. R. BANKR. P. 9006

Professor Resnick reported that the proposed change in Rule 9006(b), governing time, was a purely technical amendment that had not been published for public comment. He explained that the rule currently provides that a court may not enlarge the time specified in Rule 1017(b)(3). But since the advisory committee would abrogate Rule 1017(b)(3), the cross-reference in Rule 9006 would need to be eliminated.

The committee approved the proposed amendments without objection. It further voted to approve the amendment to Rule 9006 without publication.

Amendments for Publication

A. Litigation Package

Judge Duplantier reported that the Federal Judicial Center, at the request of the advisory committee, had conducted an extensive survey of the bench and bar in 1995 inquiring as to the effectiveness of the Federal Rules of Bankruptcy Procedure. The survey results had indicated general satisfaction with the rules, but had identified motion practice and litigation in connection with "contested matters" as areas of significant dissatisfaction that needed improvement.

He added that the bar had complained that the national rules had left too many procedures for handling contested matters to local variation. Some of the local rules, moreover, are inconsistent with the national rules. Many local rules, for example, require a response to a motion, even though the national rules do not require a response. In addition, the national rules specify that a motion must be served five days before a hearing on a motion. Local rules, however, often specify different time frames.

The advisory committee, accordingly, undertook to address in a comprehensive manner the problems of litigation and motion practice. Judge Duplantier stated that the project had proven to be very complex and controversial. The committee had appointed a special subcommittee, which worked for two years to produce a package of proposed amendments. In turn, the full advisory committee addressed the proposals at four meetings, and it had approved a package of amendments that it believed would provide substantially better guidance and national uniformity for the bar. He added, however, that two members of the advisory committee had dissented on the proposals, largely on the grounds that they believed that litigation and motion practice should be left to local practice.

Professor Resnick added that the terminology currently used in the Federal Rules of Bankruptcy Procedure is confusing. He pointed out that the proposed amendments would not

affect "adversary proceedings," which are akin to civil law suits in the district courts and are governed largely by the Federal Rules of Civil Procedures. Rather, they would govern the handling of proceedings that are presently called "contested matters."

"Contested matters," generally, are proceedings commenced by motion that initiate litigation unrelated to other litigation that may be pending in a bankruptcy case. But they are not akin to the kinds of motions filed in the district courts, which typically involve matters within a pending civil action. Rather, they embrace such subjects as the rejection of an executory contract, relief from the automatic stay, requests to obtain financing, and the appointment of a trustee in a chapter 11 case.

Professor Resnick said that the purpose of the proposed amendments is to provide greater guidance and uniformity in handling these important matters. At the same time, the amendments would allow more routine, non-contested matters to be resolved quickly, and normally without a hearing. The advisory committee's general restructuring would, thus, create three principal categories of bankruptcy proceedings: (1) adversary proceedings, governed by Part VII of the rules; (2) motions, governed by amended Rule 9014; and (3) applications, governed by amended Rule 9013.

The proposed amendments to Rules 9013 and 9014, he said, constituted the heart of the proposed package of amendments.

FED. R. BANKR. P. 9013

The amended Rule 9013 would establish a new category of proceedings called "applications," consisting of the 14 specific categories of matters set forth in subdivision 9013(a). These proceedings are normally non-controversial and unopposed, and the rule would allow them to be handled quickly and inexpensively. Included, for example, are such matters as motions to jointly administer a case and motions for routine extensions of time.

Rule 9014 would be the default rule. Accordingly, if a matter were not specifically listed as an application in subdivision (a), it would be governed by Rule 9014 or another rule expressed designated in Rule 9014(a).

Subdivision 9013(b) sets forth the requirements for requesting relief by application, and subdivision (c) specifies the manner of service. An application need not be served in advance and may be served at the same time that it is presented to the court. Service may be made in any manner by which a motion may be served under the bankruptcy rules, including service by electronic means, if authorized by local rule. Professor Resnick pointed out that the provision for electronic service represented an advance over FED. R. BANKR. P. 5005, which authorizes electronic means only for the filing of papers with the court.

A member of the committee asked why the advisory committee had chosen the term "application," rather than "motion." He pointed out that FED. R. CIV. P. 7 states explicitly that "an application for an order shall be by motion." Professor Resnick responded that the civil rules and the bankruptcy rules simply do not use the same terminology. He noted that a difference is made in bankruptcy between applications and motions. An application, in effect, is something less significant than a motion.

FED. R. BANKR. P. 9014

Professor Resnick explained that Rule 9014, as amended, would create a new category of proceedings called "administrative proceedings." They include more complex matters than applications and are more likely to be contested. Yet they do not require all the procedures of adversary proceedings under Part VII of the bankruptcy rules.

Subdivision 9014(a) carves out certain proceedings from the scope of Rule 9014, including involuntary bankruptcy petitions, petitions to commence an ancillary proceeding under section 304 of the Bankruptcy Code, bankruptcy appeals, adversary proceedings, and motions within adversary proceedings.

Professor Resnick stated that Rule 9014(b) provides that a request for relief in an administrative proceeding must be made by written motion entitled an "administrative motion." Unless made by a consumer debtor, the motion must be accompanied by supporting affidavits.

Rule 9014(c) governs service and provides that a copy of an administrative motion must be served at least 20 days before the hearing date on the motion. A response to the motion must be filed at least five days before the hearing. These dates currently are governed by local rules, which vary substantially from district to district. The proposed amendment to Rule 9014(c) also specifies the entities that must receive notice of the motion. Service may be made by any means by which a summons may be served or by electronic means if authorized by local rule. If the respondent fails to respond to the motion, the court may issue an order without a hearing.

Professor Resnick said that subdivision 9014(h) provides that the discovery provisions of the Federal Rules of Civil Procedure would be made applicable in administrative proceedings, with two exceptions: (1) the initial disclosure provisions of FED. R. CIV. P. 26(a); and (2) the requirement of a meeting of the parties under FED. R. CIV. P. 26(f). In addition, the 30-day time periods specified in the civil discovery rules, *i.e.*, FED. R. CIV. P. 30(e), 33(b)(3), 34(b), and 36(a), would be reduced to 10 days in order to expedite the processing of administrative proceedings.

Under subdivision 9014(i), witnesses would not be brought to an initial hearing. Professor Resnick explained that local rules of court currently contain great variations on this point. Under the proposed national rule, the court would conduct a hearing on the specified hearing date to determine whether there is a material issue of fact or law. The judge at that time would determine whether there is a need for an evidentiary hearing.

The amended rule provides that no testimony may be given at the initial hearing unless the parties consent or there is advance notice. If the court finds that there is an issue of fact, the hearing becomes a status conference. The evidentiary hearing would be held at a later date. The rule, however, provides exceptions for certain time-sensitive matters, such as relief from the automatic stay and preliminary hearings on the use of cash collateral or obtaining credit.

Professor Resnick pointed out that the proposed new subdivision 9014(j) would make FED. R. CIV. P. 43 inapplicable at an evidentiary hearing on an administrative motion. The advisory committee, he said, had decided as a matter of policy that live testimony, rather than affidavits, should be required at the hearing. He added that new subdivision 9014(l) specifies several of the Part VII adversary proceeding rules that would apply to administrative proceedings.

Finally, subdivision 9014(o) would operate as a safety valve and would authorize the court, for cause, to change any procedural requirements of the rule. But it requires the court to give the parties notice of any proposed changes in the requirements.

OTHER RULES

Professor Resnick reported that the advisory committee had determined that a few proceedings in the bankruptcy courts simply did not fit well into one of the three major categories of adversary proceedings, administrative motions, and applications. Therefore, it had excluded these proceedings from Rule 9014(a) and would have them governed by other specific rules. He offered as examples FED. R. BANKR. P. 2014, which would prescribe special procedures for the employment of an attorney, and FED. R. BANKR. P. 3020, which would govern the confirmation of a chapter 11 plan.

Professor Resnick explained that most of the remaining amendments in the litigation package were conforming changes to accommodate the provisions of Rules 9013 and 9014.

Judge Duplantier asked the Standing Committee to approve:

(1) publishing the proposed litigation package, consisting of amendments to FED. R. BANKR. P. 1006, 1007, 1014, 1017, 2001, 2004, 2007, 2014, 2016,

3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001, 6004, 6006, 6007, 9006, 9013, 9014, 9017, 9021, and 9034 ;

(2) publishing the accompanying commentary to the amendments, entitled, *Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice,* as a guide to bench and bar; and

(3) providing a five-month public comment period from August 1, 1998, to January 1, 1999.

Professor Resnick noted that the litigation package included amendments to 27 different rules. He said that the volume of the changes made it difficult to follow without an explanation focusing on the heart of the changes, set forth in Rules 9013 and 9014. Therefore, the advisory committee's accompanying commentary had been prepared to assist the Standing Committee and the public during the publication period. It was not intended to become a permanent committee note.

The committee approved the litigation package and the accompanying commentary for publication without objection. It also approved the proposed five-month public comment period without objection.

Other Rules Amendments

Judge Duplantier reported that the advisory committee recommended publication of changes in several other rules, three of which deal with providing notice to government entities.

Government Notice Provisions

FED. R. BANKR. P. 1007

Professor Resnick stated that Rule 1007 requires the debtor to file schedules and statements. The proposed amendments to Rule 1007(m) would provide that if the debtor lists a governmental unit as a creditor in a schedule or statement, it must identify the specific department, agency, or instrumentality of the governmental unit through which it is indebted. Failure to comply with the requirement, however, would not affect the debtor's legal rights.

FED. R. BANKR. P. 2002

Professor Resnick stated that when the government is a creditor, the debtor must mail notices both to the pertinent government department and the United States attorney. He noted that the Department of Justice had complained that the United States attorney normally

receives notices, but frequently does not know which government agency is involved. Accordingly, the proposed amendment to Rule 2002(j)(5) would require that the appropriate governmental department, agency, or instrumentality be identified in the address of any notice mailed to the United States attorney.

FED. R. BANKR. P. 5003

The proposed amendments to Rule 5003, dealing with records kept by the clerk, would require the bankruptcy clerk to maintain a register of the mailing addresses of federal and state governmental units within the state where the court sits.

Professor Resnick stated that concern had been expressed that if updates to the register were too frequent, lawyers might not have the latest edition at hand. Pending legislation in the House of Representatives would require the clerks to maintain a register and update it quarterly. The advisory committee, however, had decided that annual updates were sufficient.

The proposed amendment would not require the clerk to list more than one mailing address for any agency. But the clerk may do so and include information that would enable a user of the register to determine which address is applicable.

The mailing address listed on the register would be presumed conclusively to be the correct agency address. But failure by the debtor to check the register and use the proper address would not invalidate a notice if the agency in fact received the notice. Thus, the register would serve as a "safe harbor." A debtor who used it would be protected, and a debtor who did not would act at its own peril.

Other Provisions

FED. R. BANKR. P. 1017

The proposed amendment to Rule 1017, dealing with dismissal or conversion of a case, would authorize the court to rule on a timely-filed request for an extension of time to file a motion to dismiss a case for substantial abuse, whether or not it ruled on the request before or after expiration of the 60-day deadline specified in the rule.

FED. R. BANKR. P. 2002

Professor Resnick explained that the proposed amendment to Rule 2002(a)(6), dealing with notices, would provide an adjustment for inflation. Under the current rule, notice of a hearing on a request for compensation or expenses must be given if the request exceeds $500.

The rule has remained unchanged since 1987. The advisory committee would raise the threshold amount to $1,000.

FED. R. BANKR. P. 4003

Professor Resnick said that the proposed amendment to Rule 4003, dealing with exemptions, was very similar to that proposed in Rule 1017. A party currently has 30 days to object to the list of property claimed as exempt by the debtor unless the court extends the time period. Case law has held that the court must actually rule on the extension request within the 30-day period. The amendment would permit the court to grant a timely request for an extension of time to file objections to the list, as long as the request is made within the 30-day period.

FED. R. BANKR. P. 4004

Professor Resnick explained that the proposed change to Rule 4004, dealing with the grant or denial of discharge, is a technical one, designed to conform to the proposed change in Rule 1017(e). It would provide that a discharge will not be granted if a motion is pending requesting an extension of time to file a motion to dismiss the case for substantial abuse.

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

Proposed Amendments to the Official Forms

OFFICIAL FORMS 1 AND 7

Professor Resnick stated that the reasons for the proposed changes to the Official Forms were set forth at Tab 6D of the agenda book.

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

National Bankruptcy Review Commission Recommendations

Professor Resnick reported that the advisory committee was studying the recommendations contained in the October 1997 report of the National Bankruptcy Review Commission. He noted that the report was more than 1,300 pages long and contained 172 recommendations, some of which called specifically for changes in the Federal Rules of Bankruptcy Procedure and were addressed to the advisory committee.

Judge Duplantier noted that the Committee on the Administration of the Bankruptcy System was taking the lead for the Judicial Conference in preparing and coordinating responses to the Commission's various recommendations. It had referred a number of recommendations to the Advisory Committee on Bankruptcy Rules, which in turn had decided that it would not take a position on any Commission recommendations that called for substantive changes in the Bankruptcy Code as a precedent to rules amendments. Several of the recommendations, however, called on the advisory committee to make changes in the rules and forms independent of legislative action. The advisory committee concluded that the appropriate response was to recommend that the provisions of the Rules Enabling Act be followed with regard to such rules-related recommendations.

Professor Resnick also pointed out that many of the Commission's recommendations called for substantive changes in the Bankruptcy Code. In addition, he said, comprehensive bankruptcy legislation is pending in the Congress that would change many of the substantive provisions of the Code. He said that legislative enactment of these provisions would require the advisory committee to draft amendments to the bankruptcy rules to implement the statutory changes.

Judge Sear moved to adopt the recommendations of the advisory committee regarding the report of the National Bankruptcy Review Commission. **The committee voted to approve the recommendations without objection.**

Informational Items

Judge Duplantier reported that the advisory committee had considered the issue of establishing a uniform effective date for local rules. It concluded that the issue was not very important, but that if a single date were chosen, it should be December 1 of each year. It also concluded that a safety valve should be provided in the rule to take care of emergencies and newly-enacted legislation.

Professor Resnick reported that the advisory committee had considered the proposal to permit the public to comment on proposed rule amendments by e-mail. It favored implementing the proposal for a trial period, but was of the view that e-mail comments should be treated the same as written comments.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of May 18, 1998. (Agenda Item 7)

Amendments for Judicial Conference Approval

FED. R. CIV. P. 6

Professor Cooper reported that the proposed change to Rule 6, dealing with computing time, was purely technical. He explained that a conforming amendment was needed in Rule 6(b) to reflect the abrogation of Rule 74(a) in 1997. The rule would be amended to delete its reference to Rule 74(a). He added that since the change was technical, there was no need to publish it for public comment.

FORM 2

Professor Cooper reported that paragraph (a) of Form 2 sets forth an allegation of jurisdiction founded on diversity of citizenship. It asserts that the matter in controversy exceeds $50,000. But the governing statute, 28 U.S.C. § 1332, had been amended to raise the diversity jurisdiction threshold amount to its current level of $75,000. The advisory committee recommended that the language of Form 2 be amended to refer to the statute itself, rather than to any specific dollar amount.

Professor Cooper added that the advisory committee was of the view that this, too, was a technical change that did not require publication.

The committee approved the amendments to Rule 6 and Form 2 without objection and voted to forward them to the Judicial Conference without publication.

Amendments for Publication

Discovery Package

Judge Niemeyer reported that the advisory committee had been debating discovery issues for several years. Among other things, it had considered proposed amendments to FED. R. CIV. P. 26(c) as an alternative to pending legislation that would narrow or restrict the use of protective orders. More importantly, the committee had to address the impact on the district courts of the expiration of the Civil Justice Reform Act of 1990. Specifically, it had to decide whether the 1993 amendments to the civil rules — largely inspired by the Act and authorizing local variations in pretrial procedures — should be continued permanently or amended in certain respects.

The advisory committee had appointed a special discovery subcommittee — chaired by Judge David F. Levi and staffed by Professor Richard L. Marcus as special reporter — to study these issues and to take a comprehensive look at the architecture of discovery itself. Judge

Niemeyer said that the subcommittee had been asked to address such matters as whether discovery is too expensive in light of its contribution to the litigation process. And, if it is too expensive, are there changes that could be made that would preserve the existing system, which promotes disclosure of information, yet produce cost savings? He added that the subcommittee had also been asked to consider restoring greater national uniformity to the rules by eliminating or reducing local "opt out" provisions authorized by the 1993 amendments.

Judge Niemeyer reported that the advisory committee had conducted an important conference at Boston College Law School with leading members of all segments of the bar, interested organizations, the bench, and academia. It had also asked the Federal Judicial Center to conduct a survey of lawyers on discovery matters. The data from that survey showed that about 50% of the cost of litigation is attributable to discovery, and that in the most complex cases that percentage rises to about 90%. The lawyers responded that discovery was very expensive, and 83% of them stated that they favored certain changes in the discovery rules. In particular, they expressed support for providing: (1) greater access to judges on discovery matters; and (2) national uniformity in procedures.

Judge Niemeyer reported that there had been a consensus among the participants at the Boston College conference that:

1. Full disclosure of relevant information is an important element of the American discovery system that should be preserved.

2. Discovery works very well in a majority of cases.

3. In those cases when discovery is actively used, both plaintiffs and defendants believe that it is unnecessarily expensive. Plaintiffs complain that depositions are too numerous and expensive, and defendants complain most about the costs of document production, including the costs of selection, review to avoid waiver of privileges, and reproduction.

4. Where initial mandatory disclosure is being used, it is generally liked and is generally seen as reducing the cost of litigation.

5. National uniformity is strongly supported, and the local rule options authorized by FED. R. CIV. P. 26 should be eliminated.

6. The cost of discovery disputes could be reduced by greater judicial involvement.

7. The costs of document production are attributable in large part to the review of documents necessary to avoid waiver of the attorney-client privilege. Costs could be reduced if there could be a relaxation of the waiver rules for discovery purposes. (The advisory committee, however, was initially of the view that because privileges are generally governed by state law, it might be difficult to address this matter through the federal civil rules.)

8. Discovery costs could be reduced by imposing presumed limits on the length of depositions and the scope of discovery, particularly with regard to the production of documents.

9. An early discovery cutoff date and a firm trial date are the most effective ways of reducing costs. (The advisory committee concluded, however, that this matter could best be addressed by the Court Administration and Case Management Committee and by education of judges, rather than by rule amendments.)

Judge Niemeyer stated that the special discovery subcommittee had considered a wide variety of ideas and had presented the advisory committee with several different options. The central goal was to reduce the costs of discovery without undercutting the basic principles of open disclosure of relevant information. The advisory committee considered all the alternatives and concluded that any package of amendments that it would propose should be designed to enjoy general support from both plaintiffs and defendants.

He added that the political aspects of changes in the discovery rules were very important. Plaintiffs and defendants simply do not agree on some procedural matters. Nevertheless, the advisory committee was of the view that the package it had selected was very well balanced and fairly addressed the concerns of both sides. Judge Niemeyer reported that the advisory committee had chosen to proceed with proposals on which the vote was unanimous or represented a strong majority. On close votes, the committee either dropped the proposal or modified it to satisfy a significant majority.

Judge Niemeyer explained that the package adopted by the advisory committee did not reduce discovery. Rather, it would narrow attorney-managed discovery and make some of it court-managed discovery. The committee's proposal would limit attorney-managed discovery under FED. R. CIV. P. 26(b) to any matter, not privileged, that is relevant to a claim or defense of a party. Broader discovery of matters relevant to "the subject matter involved in the pending action" would still be available to the parties, but only on application to the court.

A proposed amendment to FED. R. CIV. P. 34(b) would authorize the court to limit discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party. Judge Niemeyer reported that the special discovery

subcommittee had recommended placing that provision in Rule 26, but the full advisory committee decided to retain it as an amendment to Rule 34. It also decided to include a note on the matter in the publication and invite public comment on the proper placement of the provision.

One of the members expressed strong opposition to the proposed changes, especially the amendment limiting the scope of attorney-managed discovery, and he described the amendments as "revolutionary." He said that they would "throw out" the present discovery system, which was well understood by the bar and had worked very well, and replace it with a system that required judges, rather than lawyers, to make discovery decisions. He also strongly objected to the amendment to Rule 34 authorizing the court to order cost sharing, which he described as "cost shifting." He predicted that defense lawyers would routinely challenge discovery requests by plaintiffs and seek to shift the costs of discovery to the plaintiffs.

Professor Cooper stated that the discovery subcommittee had not been discharged. It would continue to consider other matters, including the advisability of providing limited initial disclosure of documents without waiving attorney-client privileges in order to reduce the burdens of document production and a presumptive age limit on the production of documents. It would also explore whether it would be practicable to develop discovery protocols or guidelines for various kinds of civil cases.

Professor Cooper also reported that the advisory committee had decided not to proceed further with proposals to amend the protective order provision of FED. R. CIV. P. 26(c).

Several members of the committee complimented the advisory committee and its discovery subcommittee on producing a well-researched, carefully-crafted, and objective package of amendments that, they said, managed to accommodate many difficult and competing considerations and achieve national uniformity. They said that although they might have reservations about individual provisions in the proposed discovery package, they favored publication of all the proposed amendments.

Judge Niemeyer asked Professor Marcus to describe the proposed amendments to each of the rules.

FED. R. CIV. P. 5

Professor Marcus stated that the proposed amendment to Rule 5(d) would provide that discovery materials need not be filed until they are used in a proceeding or the court orders that they be filed. He explained that the rule had been amended in 1980 to authorize a court to

order that discovery materials not be filed with the clerk of court. Before that time, they had been filed routinely with the courts.

He reported that by the late 1980's about two thirds of the district courts had promulgated local rules prohibiting the filing of discovery materials generally. The Standing Committee's Local Rules Project had concluded that these rules were inconsistent with the national rules but had suggested consideration of amendment of the national rule. He added that the Judicial Council of the Ninth Circuit had recently recommended that Rule 5(d) be amended to authorize local rules to prohibit the filing of discovery materials, but the advisory committee had decided not to pursue that course of action.

Instead, the advisory committee had decided to propose a national rule that would excuse the filing of discovery materials and supersede existing local rules. The proposed Rule 5(d), which includes disclosures under Rule 26(a)(1) or (2) as well as discovery information, would provide that these materials "need not be filed." The committee note makes it clear that deposition notices and discovery objections would be covered by the rule. But medical examinations under Rule 35 would be unaffected by the amendment. Professor Cooper added that although discovery responses need not be filed under the proposed amendment, they could be filed if a party wished to file them.

Some members of the committee stated that clerks of court were experiencing serious space problems and that the filing of discovery materials would create burdens and costs for the courts. They suggested that the national rule be amended to prohibit the filing of all discovery materials except with court permission. Professor Marcus responded that public access to discovery materials was a controversial matter. Moreover, some lawyers wanted to reserve the opportunity to file certain materials with the clerk.

Judge Niemeyer noted that when Rule 5(d) had been amended in 1980, the press had expressed opposition on the grounds that the amendment would restrict its access to "court records." He added that the advisory committee had been concerned that a national rule banning the filing of discovery materials might provoke similar controversy and impede eventual passage of the amendment. Accordingly, it had decided to make only a modest change that would allow, but not require, parties to file materials.

Several members of the committee stated, however, that there was no requirement that discovery materials be made public, since they are not part of the public record unless actually used in a case. Justice Veasey moved to substitute the words "must not be filed" for the words "need not be filed" in line 7 of the proposed amendment to Rule 5(d). **The committee voted to approve the substitution without objection.**

Two of the members suggested that the proposed amendment include a provision placing an explicit responsibility on attorneys to preserve discovery materials. Other members stated, however, that local rules and case law adequately cover this matter.

The committee approved the proposed amendment for publication with one objection.

FED. R. CIV. P. 26

Professor Marcus reported the advisory committee had decided as a matter of policy to seek national uniformity in the rules regarding initial disclosures under Rule 26(a). He pointed out that mandatory disclosure was a controversial matter among the bench and bar, with strong views expressed both for and against it. He said that the advisory committee had considered three options: (1) to make the current Rule 26(a)(1) mandatory in all districts; (2) to abrogate Rule 26(a)(1) and preclude initial disclosure everywhere; or (3) to fashion a form of disclosure that would be nationally acceptable.

The advisory committee chose the third course. To that end, the proposed amendments to Rule 26(a)(1) would limit a party's disclosure obligation to materials "supporting its claims or defenses." Professor Marcus emphasized that the revised rule would promote national uniformity by eliminating the explicit authority of a court under the current rule to opt out of the disclosure requirements by local rule.

Two members questioned whether the phrase "supporting its claims or defenses" was broad enough to cover information that controverted an opponent's claims or defenses. They noted that this issue had been addressed in the committee note, but suggested that more comprehensive language might be incorporated in the rule itself. Professor Cooper responded that the advisory committee had deliberately chosen the language to be consistent with language already used elsewhere in the discovery rules. He pointed out, for example, that FED. R. CIV. P. 26(b), which defines the scope of discovery, refers only to "claims and defenses." He added that claims and defenses includes denials, but not impeaching materials.

One of the members suggested publishing alternative language on the scope of disclosure and soliciting public comment on the two versions. Judge Niemeyer responded that the advisory committee was of the view that only one version should be published for comment.

Professor Marcus stated that subparagraph 26(a)(1)(E) sets forth a list of 10 categories of civil actions that would be exempt from the initial disclosure requirements of the rule. He explained that discovery would be an unnecessary burden in these types of cases. He also pointed out that, after consulting with the chair and reporter of the Advisory Committee on

Bankruptcy Rules, the two bankruptcy exceptions set forth as items (i) and (ii) in the subparagraph were unnecessary. Accordingly, Judge Niemeyer, Professor Cooper, and Professor Marcus suggested eliminating them from the proposed amendment.

Some of the members asked whether the list of exemptions in Rule 26(a)(1)(E) was accurate and complete. Professors Marcus and Cooper responded that the advisory committee expected to use the public comment process to refine the list further. They noted that the publication would flag the issue and ask for public comment on whether the types of civil cases listed were proper for exclusion, whether they were properly characterized, and whether other categories of cases should also be excluded.

Professor Marcus pointed out that the parties would be given 14 days, rather than 10 days, following the conference of attorneys under Rule 26(f) to make the required disclosures. Later-added parties would have to make their disclosures within 30 days, unless a different time were set by stipulation. And minor changes would be made in paragraphs 26(a)(3) and (4) to conform with the proposed changes in Rule 5(d) on the filing of disclosure materials.

Professor Marcus said that the proposed amendments to Rule 26(b)(1) would limit attorney-controlled discovery. But the court would have authority to permit discovery beyond matters related to the claims or defenses of a party. The language would be amended to make it clear that evidence sought through discovery must be relevant, whether or not admissible at trial. He pointed out that a new sentence had been added at the conclusion of paragraph (b)(1) to call attention to the limitations on excessive or burdensome discovery imposed by subdivision 26(b)(2)(i), (ii), and (iii).

Professor Marcus pointed out that the amendments to Rules 26(d) and 26(f), dealing with the timing and sequence of discovery and the conference of the parties, were linked. The language of both provisions would be amended to exclude "low end" cases, *i.e.,* the categories of cases exempted from initial disclosure requirements under Rule 26(a)(1)(E). He added that the amended rule would require that the conference of the parties under Rule 26(f) be held seven days earlier than currently in order to give the court more time to consider the report and plan arising from the conference. The amended rule would no longer require a face-to-face meeting of parties or attorneys, but a court could by local rule or order require in-person participation.

The committee approved the proposed amendments, with the change to Rule 26(a)(1)(E) described above, for publication with one objection.

FED. R. CIV. P. 30

Professor Marcus stated that Rule 30(d)(2) would be amended to limit the duration of depositions. Unless otherwise authorized by the court or stipulated by the parties and the deponent, a deposition would be limited to one day of seven hours. The rule would also be amended to include non-party conduct within the rule's prohibition against individuals impeding or delaying the examination.

Some of the members expressed doubts that a uniform limit on the length of depositions would be effective in practice, especially in multi-party cases. They noted that many variables had to be considered, and attorneys often do not have control over the course of their own depositions. They suggested that time limits on depositions would be difficult to regulate by rule and would best be left to the attorneys and discovery plans. Professor Marcus responded that there had been a strong majority on the advisory committee for making the change. Many attorneys have complained that overlong depositions result in undue costs and delays. Professor Cooper added that Rule 26(b)(2) currently authorizes a court to impose limits on the number and length of depositions. Moreover, a court would retain the power to extend a deposition on a party's request.

One member recommended that the amended rule require that the party taking the deposition notify the deponent 10 days in advance which documents would be the subject of interrogation, that the moving party send the deponent pertinent documents in advance, and that the deponent be required to read the documents before taking the deposition. Some of the members agreed with the substance of the recommendation, but they suggested that the matter was one that should be left to good practice and trial strategy, rather than national rule. Judge Niemeyer added that the member's point was well taken, but that lawyers had told the advisory committee that the problem of unprepared witnesses rarely arose with experienced attorneys. In addition, there was a concern that deponents would be swamped with unrealistic volumes of documents submitted to protect any possible opportunity for use. Therefore, the advisory committee had decided not to include in the amendments an express requirement that the deponent read certain documents in advance.

The committee approved the proposed amendments for publication by a vote of 6 to 4.

FED. R. CIV. P. 34

Professor Marcus stated that the proposed amendment to Rule 34(b) would provide that when a discovery request exceeds the limitations of Rule 26(b)(2), the court could limit the discovery or require that the requesting party pay part or all of the reasonable expenses of producing it.

One of the members strongly objected to this provision, stating that it would be used routinely by defense counsel to shift costs to plaintiffs, thereby driving many poor or economically-limited litigants out of the court system. He said that it would alter the entire philosophy of federal practice and should be rejected. He added that the courts already had the power to limit discovery and should not be given the authority to impose costs on the parties requesting discovery, except in very large cases.

But another member disagreed, countering that the "discovery" problem was real and needed to be addressed. He said that the proposed advisory committee amendment was neutral and applied equally to defendants and plaintiffs. He added that it was inappropriate to characterize it as an attempt to drive poor litigants out of the court system.

One member observed that the proposed amendments to Rules 26(b) and 34(b) would establish two different regimes of discovery, which might be denominated as "regular discovery" and "supplemental discovery." The former would be self-executing and without cost to the requesting party. The latter, though, would require court approval and could entail the payment of costs by the requesting party. Judge Niemeyer agreed with this characterization.

Judge Niemeyer added that the advisory committee would invite public comment on whether the cost-bearing provision was properly placed as an amendment to Rule 34(b) or should be added to Rule 26(b)(2), dealing with discovery scope and limits.

The committee approved the proposed amendments for publication by a vote of 7 to 3.

FED. R. CIV. P. 37

Professor Marcus pointed out that the proposed change in Rule 37, dealing with sanctions, would add a cross-reference to Rule 26(e)(2). This would close a gap left by the 1993 amendments to the rules and authorize sanction power for failure to supplement discovery responses.

The committee approved the proposed amendment for publication without objection.

Service on the United States

Judge Niemeyer reported that the advisory committee had received a request from the Department of Justice to allow additional time for the government to respond in cases when an

officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with the performance of official duties. The committee agreed with the Department's position and recommended publishing proposed amendments to Rules 4 and 12.

FED. R. CIV. P. 4

Professor Cooper stated that when an officer of the United States is sued in an individual capacity, the proposed rule would give the officer 60 days in which to answer. Subparagraph 4(i)(2)(A) would govern service in cases when an officer of the United States is sued in an official capacity. Subparagraph 4(i)(2)(B) would govern service of an officer sued in an individual capacity for acts or omissions occurring "in connection with the performance of duties on behalf of the United States." Professor Cooper pointed out that the quoted language had been crafted carefully with the assistance of the Department of Justice and was designed to avoid using existing terms such as "color of office" or "scope of employment" or "arising out of the employment," because these terms had developed particular meanings over time.

Under subparagraph 4(i)(2)(B), when a federal officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States, service must be effected on both the officer or employee and the United States. The advantage of requiring service on the United States is that under Department of Justice regulations, the Department ordinarily defends officers sued individually if their acts were committed in the course of United States business.

Professor Cooper explained that new subparagraph 4(i)(3)(B) would allow a reasonable time to correct a service defect. Thus, if a plaintiff served only the affected officer or employee, additional time would be provided to correct the defect and effect service on the United States.

Deputy Attorney General Holder stated that the rule was beneficial and would provide a single set of clear and understandable rules to govern all suits against the United States.

FED. R. CIV. P. 12

Professor Cooper stated that the proposed changes to Rule 12, dealing with defenses and objections, would provide that a response is due by the United States or an officer or employee sued in an individual capacity within 60 days after service. He added that the Department of Justice needed 60 days to determine whether to provide representation to the defendant officer or employee. Thus, the response time would be the same, whether the officer or employee were sued in an individual capacity or an official capacity.

The committee approved the amendments to Rules 4 and 12 for publication without objection.

Informational Items

Judge Niemeyer provided the committee with a status report on the work of the Working Group on Mass Torts. He said that the issues raised in mass tort litigation were very complex and controversial, and the working group had conducted meetings with some of the most experienced judges, lawyers, and academics in the country. He added that the group was planning on producing a report that would describe mass-tort litigation and identify problems that may deserve legislative and rulemaking attention. He expressed the hope that the report could also present a preliminary blueprint for action by identifying the legislative and rulemaking steps that might be taken to reduce the problems. He expected that the working group force would file a draft report in time for consideration by the Standing Committee at its January 1999 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of May 15, 1998. (Agenda Item 8)

Rules Amendments for Judicial Conference Approval

Judge Davis reported that the Standing Committee had approved publication of proposed amendments to eight rules and the addition of one new rule at its June 1997 meeting. The advisory committee had considered the public comments at its April 1998 meeting and had conducted a public hearing addressing the proposed amendments on Rule 11 pleas and criminal forfeiture.

FED. R. CRIM. P. 6

Judge Davis stated that there were two amendments proposed in Rule 6, dealing with grand juries. The first, in subdivision 6(d), would authorize the presence of interpreters during deliberations to assist grand jurors who are hearing or speech impaired. He explained that under the current rule, no person other than the grand jurors themselves may be present during deliberations.

As authorized for publication by the Standing Committee, the rule had been broader in scope and would have allowed all types of interpreters to be present with the grand jury. But comments were received that it would not be legal to have interpreters assist jurors who do not

speak English, since 28 U.S.C. § 1865 requires that all grand jurors and petit jurors speak English. Accordingly, the advisory committee modified the amendment to permit only interpreters assisting hearing or speech impaired grand jurors to be present during deliberations and voting.

The second amendment would modify subdivision 6(f) to permit the grand jury foreperson to return the indictment in open court. The present rule requires that the whole grand jury be present for the return.

The committee approved the proposed amendments without objection.

FED. R. CRIM. P. 11

Judge Davis and Professor Schlueter pointed out that three changes were proposed in Rule 11, governing pleas. The first would make a technical change in subdivision 11(a) to conform the definition of an organizational defendant to that in 18 U.S.C. § 18.

The second change would amend Rule 11(e)(1) to reflect the impact of the Sentencing Guidelines on guilty pleas. It would recognize that a plea agreement may specifically address a particular sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. The proposed change would distinguish clearly between a plea agreement under subparagraph 11(e)(1)(B), which is not binding on the court, and one under subparagraph 11(e)(1)(C), which is binding once it is accepted by the court.

Some members of the committee expressed concern that the proposal would remove the court further from the sentencing process and give greater authority to the United States attorney and defense counsel. They pointed out, for example, that a judge might accept a plea initially, but later be required to reject it when the facts become known. The case, then, would have to be tried after considerable delay. Professor Schlueter responded that the advisory committee wanted only to address the reality of the current practice, under which the parties reach an agreement with regard to specific guidelines or factors. He added that a judge may always accept or reject such a plea agreement.

Judge Davis stated that the third proposed change, to Rule 11(c)(6), was also controversial, particularly with defense counsel. It would reflect the increasing practice of including provisions in plea agreements requiring the defendant to waive the right to appeal or to collaterally attack the sentence. The amendment would require the court to determine whether the defendant understands any provision in the plea agreement waiving such rights. A majority of the public comments had opposed the amendment, largely on the grounds that it would be seen as an endorsement of the practice of waiving appellate rights.

Judge Davis pointed out that most courts had upheld the kinds of waivers contemplated in the amendment, and the Criminal Law Committee of the Judicial Conference had recommended the provision to the advisory committee. The advisory committee, however, decided to add a sentence to the committee note stating that: "Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers."

The committee approved the proposed amendment to Rule 11(e) by a vote of 11 to 1. It approved the other amendments to Rule 11 without objection.

FED. R. CRIM. P. 24

Judge Davis reported that the proposed change to Rule 24(c), dealing with trial jurors, would give a trial judge discretion to retain alternate jurors if a juror becomes incapacitated during the deliberations. The current rule explicitly requires the court to discharge all alternate jurors when the jury retires to deliberate.

One member pointed out that the committee note set forth certain procedural protections to insulate the alternate jurors during the deliberative process. It stated that if alternates are in fact used, the jurors must be instructed that they must begin their deliberations anew. He recommended that the latter provision be placed in the language of the rule itself.

Judge Davis agreed to insert additional language in the rule. Accordingly, Judge Stotler asked him and Professor Schlueter to draft appropriate text and present it to the committee later in the meeting.

After consultation with the Style Subcommittee and further committee deliberations, Judge Davis and Professor Schlueter suggested adding the following language at the end of paragraph 24(c)(3): "If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew."

The committee voted without objection to approve the proposed amendment.

FED. R. CRIM. P. 32.2

Judge Davis reported that the proposed new Rule 32.2 was the heart of a major revamping and reorganization of the criminal forfeiture rules. He noted that the government proceeds in criminal forfeiture on an *in personam* theory. There must be a finding of guilt in order to forfeit property.

He explained that new Rule 32.2 states that no judgment of forfeiture may be made unless the government alleges in the indictment or information that the defendant has an interest in property that is subject to forfeiture in accordance with an applicable statute. Accordingly, a conforming change would be made in Rule 7(c)(2), prescribing the nature and contents of the indictment or information, to make it clear to the defendant that the government is seeking to seize his or her property.

Judge Davis pointed out that paragraph (b)(1) contained the principal change in the criminal forfeiture amendments and had attracted the most comments from the public. The new rule would eliminate any right of the defendant to a jury trial on the forfeiture count. The provision flowed from the decision of the Supreme Court in *Libretti v. United States,* 516 U.S. 29 (1995), where the Court held that criminal forfeiture is a part of sentencing. A defendant, accordingly, is not entitled to a jury trial on the forfeiture count.

The judge would have to make a decision on the nexus of the property to the offense "as soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere." This language would replace current Rule 32.1(e). Under the current rule, after returning a guilty verdict, the jury is required to hear evidence and enter a special verdict on the forfeiture count. Under the proposed rule, however, the jury would be excused once it has returned a guilty verdict, and the court would proceed right away on its own to decide upon forfeiture of the applicable property. The judge may use the evidence accumulated during the course of the trial or in the plea agreement, and it may take additional evidence at a post-trial hearing.

One of the members expressed concern as to whether the new rule afforded the defendant the opportunity to contest an allegation by the government that the property in question had been purchased with drug proceeds. Judge Davis responded that the court has considerable discretion to take evidence at a hearing and allow both sides to present additional evidence. The judge would not be required to hold a hearing, but would surely do so if a party asked for one. And the judge would have to hold a hearing if there were a dispute as to the facts. A hearing would be held, for example, if the defendant were to claim that he or she had purchased the property legitimately, without using drug proceeds. Professor Schlueter added that the rule was designed to give the trial judge maximum discretion and therefore did not specify all the steps that the judge must follow.

Judge Davis said that if a third party comes forward to assert an interest in the forfeited property, the court must conduct an ancillary proceeding. It would have discretion to allow the parties to conduct appropriate discovery. At the conclusion of the ancillary proceeding, the court must enter a final order of forfeiture. It would amend the preliminary order of forfeiture, if necessary, to account for disposition of the third-party petition.

Judge Davis stated that proposed Rule 32.2(b) contained two principal provisions. First, the court, rather than the jury, would determine whether there is a nexus between the offense and the property. Second, the court would defer until a later time the question of the defendant's interest in the property. Since *Libretti v. United States* had made it clear that criminal forfeiture is a part of sentencing, it makes sense for the judge, rather than the jury, to decide the ownership questions. He added that in most cases defense counsel currently waives a jury trial on forfeiture issues.

He added that subsection (b)(2) covers the situation when the court decides that the nexus between the property and the offense has been established, but no third party appears to file a claim to the property. In that case, the court may enter a final order forfeiting the property in its entirety. He said that the advisory committee had added a proviso after publication that the court must determine, consistent with the *in personam* theory of criminal forfeiture, that the defendant had an interest in the property.

Subsection (b)(3) states that the government may seize the property, and the court may impose reasonable conditions to protect the value of the property pending appeal.

Subdivision 32(c) would require an ancillary proceeding if a third party appears to claim an interest in the property. Paragraph (c)(4) was added following publication to make it clear that the ancillary proceeding is not a part of sentencing. Therefore, the rules of evidence would be applicable. Although the ancillary proceeding was designed to protect the rights of third parties, the defendant would have a right to participate in it. At the conclusion of the proceeding, the court would be required to file a final order of forfeiture of the property.

Subdivision (d) would authorize the court to issue a stay or impose appropriate conditions on appeal. Subdivision (e) would govern subsequently located property. The court would retain jurisdiction to amend a forfeiture order if property were located later. It also could enter an order to include substitute property.

In conclusion, Judge Davis summarized the sequence of events under the new Rule 32.2 as follows: the jury's verdict, a preliminary order of forfeiture by the court, a third party's petition, an ancillary proceeding, and a final order of forfeiture.

Some members pointed out that a defendant has the right to a jury trial in a civil forfeiture proceeding. They expressed concern about taking away the defendant's right to jury trial in criminal forfeiture proceedings, even though that right might not be constitutionally required under *Libretti v. United States.* One member added that he would vote against the proposal, as written, but would be inclined to support it if it retained the right to a jury trial on the single issue of the nexus of the property to the offense.

The committee rejected the proposed amendment by a vote of 7 to 4.

FED. R. CRIM. P. 7, 31, 32, and 38

Judge Davis said that the advisory committee would withdraw the amendments to these rules because they were part of the proposed criminal forfeiture package and were designed to conform to the proposed new Rule 32.2.

FED. R. CRIM. P. 54

Judge Davis stated that the change in Rule 54, dealing with application of the criminal rules, was purely technical. It would eliminate the current rule's reference to the Canal Zone, which no longer exists.

The committee approved the proposed amendment without objection.

Informational Items

Judge Davis stated that the advisory committee had discussed the draft attorney conduct rules at its April 1998 meeting. Some of the lawyer members on the committee, he said, had expressed opposition to the concept of having another set of conduct rules. The advisory committee agreed to appoint two of its members to serve on the ad hoc attorney conduct committee.

FED. R. CRIM. P. 5

Judge Davis reported that the advisory committee had approved a proposed amendment to Rule 5(c) that would authorize a magistrate judge to grant a continuance of a preliminary examination without the consent of the defendant. But, he added, the advisory committee had voted not to seek publication of the amendment until a later date.

He explained that the proposed amendment would conflict with 18 U.S.C. § 3060(c). Therefore, the advisory committee had recommended at its April 1997 meeting that the Judicial Conference seek a change in the statute. The Standing Committee, however, at its June 1997 meeting decided that it would be more appropriate to propose a change to Rule 5(c) through the Rules Enabling Act process. Accordingly, it remanded the matter back to the advisory committee for further action.

At its October 1997 meeting, the advisory committee considered the issue again. It decided not to pursue an amendment to Rule 5(c) and so advised the Standing Committee.

The Magistrate Judges Committee, however, presented the issue to the Judicial Conference at its March 1998 session with a request for a change in the statute.

Judge Davis added that the Judicial Conference had considered the matter, and following the Conference session, the chair of the Executive Committee had asked the advisory committee to consider publishing a proposed amendment to Rule 5(c). As a result, the advisory committee approved an amendment at its April 1998 meeting. But it decided not to seek publication on the grounds that: (1) the proposed amendment itself was not crucial, and (2) the committee had begun restyling the body of criminal rules and wished to avoid making piecemeal amendments in the rules until that process had been completed.

Judge Stotler said that the larger issue debated by the Judicial Conference at its March 1998 session was how best to coordinate proposed rules changes with proposed legislative changes. She emphasized that the debate had underscored the need for the rules committees to work closely with other committees of the Conference in coordinating changes that affect both rules and statutes. She added that the Executive Committee had acquiesced in the advisory committee's decision to defer publication of the proposed amendment to Rule 5(c).

FED. R. CRIM. P. 30

Professor Schlueter reported that the advisory committee had published a proposed amendment to Rule 30 that would permit the court to require the parties to submit pretrial requests for instructions. But, he noted, the Advisory Committee on Civil Rules was considering similar changes to FED. R. CIV. P. 51. Therefore the criminal advisory committee had decided to defer presenting the matter to the Standing Committee until further action is taken with regard to proposed amendments to the civil rule.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of May 1, 1998. (Agenda Item 9)

Amendments for Publication

Judge Smith reported that at the January 1998 meeting, the Standing Committee had authorized the advisory committee to publish proposed amendments to FED. R. EVID. 103, 404, 803, and 902. It was understood that these amendments would be included in the same publication as any additional amendments approved at the June 1998 meeting. She added that the advisory committee was sensitive to the need to limit the number and frequency of

changes in the rules. Therefore, it did not expect to recommend further amendments for some time, unless required by legislative developments.

Judge Smith said that the decision of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), had generated a great deal of controversy regarding testimony by expert witnesses. The advisory committee had decided as a matter of policy to delay acting on potential changes in the rules in order to allow sufficient time for case law to develop at both the trial and appellate levels on the impact of the decision. The committee, however, believed that the time was now appropriate to proceed. Accordingly, it voted to seek authority to publish amendments to three rules dealing with testimony of witnesses. She added that all the amendments had been designed to clarify *Daubert*, yet the advisory committee wished to make as few changes as possible in the existing rules of evidence.

FED. R. EVID. 702

Judge Smith stated that Rule 702, governing expert testimony, was the focal point of the *Daubert* decision. The advisory committee simply would add language at the end of the existing rule reaffirming the role of the district court as gatekeeper and providing guidance in assessing the reliability and helpfulness of proffered expert testimony. The amendment would make it clear that expert testimony of all types — scientific, technical, and specialized — are subject to the court's gatekeeping role.

Judge Smith pointed out that the *Daubert* decision had set forth a non-exclusive checklist of factors for the trial courts to consider in assessing the reliability of scientific testimony. The advisory committee had made no attempt to codify these factors, as *Daubert* itself made clear that they were not exclusive. Moreover, case law has added numerous other factors to be considered in individual cases in determining whether expert testimony is sufficiently reliable.

Judge Smith said that the *Daubert* decision also addressed the issue of methodology. It requires a judge to review both the methodology used by the expert and how it has been applied to the facts. She added that application of these factors to expert testimony will necessarily vary from one kind of expertise to another. She emphasized that the trial courts had demonstrated considerable ingenuity and wisdom in applying *Daubert*. The advisory committee, thus, determined that it was not necessary to set forth any specific procedural requirements in the rule for the trial courts to follow.

Some members expressed concern about the meaning of the terminology "sufficiently based upon," as used in the phrase "the testimony is sufficiently based upon reliable facts or data." Professor Capra explained that the opinion of an expert might be based on reliable

information, but it must also be based on sufficient facts or data. The phrase, thus, refers to the quantity, rather than the quality, of the information.

One member questioned whether there was a need to change the rule at all at this point. Professor Capra responded that the advisory committee had been unanimous in favoring amendments to the rule. He noted that the developing case law was inconsistent as to whether *Daubert* applies to all kinds of experts. Moreover, he said, legislation had been introduced in the Congress to modify the rule through legislation. Judge Smith affirmed the need to amend the rule at this point, and she emphasized again that the advisory committee had attempted to change the current rule as little as possible.

FED. R. EVID. 701

Judge Smith reported that the advisory committee would add a clause to the end of Rule 701, which deals with testimony by lay witnesses. The addition would clarify and emphasize the opening clause of the rule, which limits application of the rule to a witness who is not testifying as an expert. The rule then proceeds to state the limits on the testimony of a lay witness. Therefore, the amendment makes it clear that a lay witness may not provide testimony based on scientific, technical, or other specialized knowledge. She added that the advisory committee had been concerned over a growing tendency among attorneys to attempt to evade the expert witness rule by using experts as lay witnesses.

Judge Smith pointed out that representatives from the Department of Justice disagreed with the proposed amendment. They had said that the amendment would conflict with FED. R. CIV. P. 26 and require additional efforts by United States attorneys in providing reports of experts. Ms. Smolover of the Department stated that the agency believed that the amendment would effect a significant change in the law. She added that it attempted to draw a bright line between specialized knowledge and non-specialized knowledge in an area that was especially murky. She proceeded to provide two examples of factual situations where it would be difficult to distinguish specialized knowledge from non-specialized knowledge.

Professor Capra responded that three states currently have evidence rules in place that are similar to the proposed amendment and distinguish sharply between expert and lay testimony. He said that the courts in those states had experienced no difficulties in applying the rules. And, he said, the courts — federal and state — make these kinds of distinctions every day.

Judge Smith added that there may be close calls in some factual situations, but the courts normally handle these distinctions very well. She said that the potential harm that may be caused by attempts to evade Rule 702 greatly outweigh any problems of potential

uncertainty in distinguishing between specialized knowledge and non-specialized knowledge in certain cases. Several members of the committee expressed their agreement with Judge Smith on this point.

Judge Stotler asked the trial judges attending the meeting whether they had encountered problems in distinguishing expert testimony from lay testimony. Several of the judges responded that they already applied the law in the manner specified in the proposed amendment, and they had experienced no difficulty in doing so. They expressed strong support for the proposed amendment and stated that it would provide the bar with additional, necessary guidance on distinguishing among categories of proposed testimony and complying with the requirements of FED. R. CIV. P. 26 for an advance written report of expert testimony.

The members proceeded to discuss how the proposed amendment would be applied to a number of hypothetical situations. They generally anticipated few practical problems, but some noted that problems arise with regard to treating physicians. It was pointed out that the committee note to FED. R. CIV. P. 26 states explicitly that a written report of expert testimony is not needed from a treating physician. It was reported by several, though, that some attorneys call treating physicians as observing witnesses under Rule 701, but then attempt to use them as expert witnesses under Rule 702. Professor Capra emphasized that although there are "mixed" witnesses, the committee note accompanying the proposed amendment makes it clear that the rule distinguishes between expert and lay *testimony*, rather than between expert and lay *witnesses*.

FED. R. EVID. 703

Judge Smith reported that the advisory committee had been concerned about a growing tendency to attempt to present hearsay evidence to the jury in the guise of materials supporting expert testimony. Accordingly, the proposed amendment to Rule 703, dealing with bases of opinion testimony by experts, would provide that when an expert relies on underlying information that is inadmissible, only the expert's conclusion — and not the underlying information — would ordinarily be admitted. The trial court must balance the probative value of the underlying information against the safeguards of the hearsay rule, with the presumption that the facts or data upon which an expert bases an opinion or inference will not be admitted.

The committee approved proposed amendments to FED. R. EVID. 701, 702, and 703 for publication without objection.

Informational Items

Professor Capra reported that the advisory committee had approved the suggestion that the use of electronic mail be authorized for transmitting public comments on proposed amendments to the secretary.

He stated that the advisory committee was continuing to consider the impact of computerized evidence on the Federal Rules of Evidence, and it had produced a detailed report on the matter for the chairman of the Technology Subcommittee. The advisory committee had concluded that the courts were simply not having problems in applying the evidence rules to computerized records. Moreover, the committee had determined that it would be very difficult to amend the rules expressly to take account of computerized evidence. It would require changes in many of the rules or the drafting of new and difficult definitional provisions.

Professor Capra noted that Judge Stotler had asked the advisory committee to consider whether FED. R. CIV. P. 44 should be abrogated in light of its overlap with certain of the evidence rules. He explained that the committee had researched the matter in detail, had consulted with the Advisory Committee on Civil Rules, and had concluded that there was not a complete overlap between Rule 44 and the evidence rules. Moreover, there was no indication of any problems in the case law. Therefore, the committee decided not to pursue abrogating the rule.

Professor Capra reported that legislation had been introduced in the Congress to provide for a parent-child evidentiary privilege. The House bill would directly amend FED. R. EVID. 501 to include such a privilege, and the Senate bill would require the Judicial Conference to report on the advisability of amending the Federal Rules of Evidence to include a parent-child privilege. The advisory committee had considered the matter and concluded that the evidence rules should not be amended to include any kind of parent-child privilege.

Professor Capra stated that the proposed privilege would be contrary to both state and federal common law. Moreover, it would not be appropriate to create it by amending the Federal Rules of Evidence, since the Congress had rejected a detailed list of privileges in favor of a common law, case-by-case approach. Professor Capra added that the advisory committee had prepared a proposed response to the Congress to that effect.

Judge Smith said that the Congress had expressed a good deal of interest in privileges in recent years, including a possible rape counselor privilege, a tax preparer privilege, and now a parent-child privilege. She said that she had written to Congress stating that a piecemeal, patchwork approach to privileges would be a mistake. FED. R. EVID. 501 had

worked well in practice, and if the Congress were to act at all, it should consider making a comprehensive review of all privileges.

Professor Capra noted that the advisory committee had completed a two-year project to notify the public that certain advisory committee notes to the Federal Rules of Evidence may be misleading. He stated that the report identified inaccuracies and inconsistencies created because several of the rules adopted by the Congress in 1975 differed materially from the version approved by the advisory committee. He stated that the committee's report would be printed by the Federal Judicial Center and would appear in Federal Rules Decisions.

ATTORNEY CONDUCT

Professor Coquillette summarized his May 18, 1998, Status Report on Proposed Rules Governing Attorney Conduct, set forth as Agenda Item 10. He recommended the appointment of an ad hoc committee to work on attorney conduct matters consisting of two members from each of the advisory committees, Chief Justice Veasey, Professor Hazard, and representatives from the Department of Justice.

He stated that the debate, essentially, had come down to two options. The first would be to have a single dynamic conformity rule that would eliminate all local rules and leave attorney conduct matters up to the states. The second would be to adopt a very narrow core of specific federal rules on attorney conduct. He said that there were serious differences of opinion on these options, and the ad hoc committee would seek to reach a consensus on the matter.

Professor Coquillette pointed out that misleading articles had appeared stating that the committee was proposing enactment of the 10 draft attorney conduct rules. He noted that the rules had been drafted only for internal debate and added that American Bar Association officials had been informed that the committee was not making any proposals at this point.

He stated that another misconception had been that the committee was proposing to increase the amount of federal rulemaking regarding attorney conduct. In fact, he said, the committee was trying to accomplish just the opposite. The thrust of the committee's discussions to date had been to reduce the number of local federal court rules and turn attorney conduct matters over generally to the states.

Finally, Professor Coquillette said that the study of attorney conduct would not be completed quickly. Time would be needed to coordinate efforts with the American Bar Association, the American Law Institute, and other bar groups. Time would also be needed to

study attorney conduct issues in a bankruptcy context. Accordingly, the only action needed was for the Standing Committee to affirm the appointment of the ad hoc committee.

The committee voted without objection to appoint an ad hoc committee to study attorney conduct matters.

Professor Coquillette noted that the Court Administration and Case Management Committee had provided the committee with a set of principles to govern conduct in alternate dispute resolution proceedings. He said that no action was required on the part of the committee, but pointed out that there is likely to be more activity in this area at the local and national levels.

Professor Coquillette reported that two bills had been introduced in the Congress to govern attorney conduct. He said that the committee should respond to Congressional inquiries by referring to the ongoing attorney conduct project.

LOCAL RULES AND UNIFORM NUMBERING

Professor Squiers reported that about 70% of the district courts had renumbered their local rules, as required by the Judicial Conference. One member suggested that the circuit councils should be asked to assist the remaining courts in complying with the renumbering requirement.

Professor Squiers reported that the Civil Justice Reform Act of 1990 had expired and that many of the provisions contained in the district courts' individual civil justice expense and delay reduction plans had now been incorporated into local rules. The status and legality of other procedural requirements contained in local plans, however, was uncertain.

Judge Stotler praised the efforts of the Local Rules Project and pointed out that it had identified many good local rules that have now been adopted as national rules. She asked whether it would be helpful for the committee to commission a new national survey of local rules in light of the renumbering project, the 1993 amendments to the civil rules, and the expiration of the Civil Justice Reform Act. She suggested that Professor Squiers might consider preparing a specific proposal for committee consideration, including a provision for obtaining appropriate funding for a survey.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the Supreme Court had approved the restyled body of appellate rules with one minor amendment. He said that the restyling project had been successful because of the leadership shown by Judges Stotler and Logan and the hard work and expertise of Professor Mooney and Mr. Garner. Judge Stotler added that a great debt was also due to Judge Robert Keeton, who had initiated the project, and to Professor Charles Alan Wright, Judge George Pratt, and Judge James Parker.

Judge Parker said that the next project would be to restyle the body of criminal rules. He noted that a first draft had been prepared and would be considered by the Style Subcommittee. A final draft would likely be submitted to the Advisory Committee on Criminal Rules by December 1, 1998.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte referred to the docket sheet of technology issues set forth in the agenda book. He pointed out that electronic filing of court papers was the most significant technological development that would affect the federal rules. He noted that Mr. McCabe and his staff had prepared a paper summarizing the rules-related issues that had been raised in the 10 electronic filing pilot courts. He added that the paper would be circulated to the reporters and considered by the advisory committees.

PROPOSALS TO SHORTEN THE RULEMAKING PROCESS

Judge Stotler stated that the Executive Committee of the Judicial Conference had asked the committee to consider ways to reduce the length of the rulemaking process. Each of the advisory committees had discussed the matter and had concurred in principle that there should be some shortening of the process. No specific proposals, however, had been forwarded.

At Judge Stotler's request, Mr. Rabiej distributed and explained a chart setting forth the time requirements for the rules process and setting forth various ways in which the times might be reduced. He noted that some of the suggestions made for shortening the process are controversial. He proceeded to explain each of the proposed scenarios.

Mr. Rabiej stated that proposed amendments are normally presented to the Supreme Court following the September meeting of the Judicial Conference each year. He explained that, except in emergency situations, the Conference does not send proposals to the Court

following the March Conference meetings because the justices do not have sufficient time to act on them before the May 1 period specified in the Rules Enabling Act.

One member questioned the need to shorten the process and asked the chair whether a policy decision had been made to shorten the process. She replied that no decision of the kind had been made, but that the Executive Committee had asked the rules committees to consider the issue. She added that the amount of time needed to consider a rule depends largely on the nature of the particular rule.

Another member suggested that it would be better to leave the existing, deliberative process in place, but to consider developing an emergency process that could be used to address special circumstances requiring prompt committee action. Several other members concurred in this judgment and suggested the need to develop a fast track procedure.

Several members noted that the need for accelerated treatment of an amendment usually arises because the Congress or the Department of Justice decides to act on a matter through legislation. They observed that the Congress in several instances has decided not to wait for the orderly and deliberative promulgation of a rule because the process was seen as taking too long. The chair replied that the advisory committees might consider certifying a particular rule for fast track consideration.

One of the participants suggested that consideration be given to eliminating one or more of the six entities that participate in considering an amendment, *i.e.*, advisory committee, public, standing committee, Judicial Conference, Supreme Court, and Congress. Others responded, however, that each entity plays an important part in the process. Therefore, it would be unwise, both substantively and politically, to consider elimination of any of them. Members pointed to the important role played by the standing committee in assuring quality and consistency in the rules and that of the Supreme Court in giving the rules great prestige and credibility.

One member recommended that the committees adopt a fixed schedule for submitting proposed amendments to the rules as packages, such as once every five years. The advisory committees could stagger their changes so that civil rules, for example, might be considered in one year and criminal rules in the next. He advised the committee to accept the inevitability that: (1) emergencies will arise on occasion; and (2) the Congress or the Department of Justice will continue to press for action outside the Rules Enabling Act when they feel the political need to do so. He concluded, therefore, that the committees should establish a firm schedule for publishing and approving rules amendments in multi-year batches, but also take due account of emergencies, political initiatives, and statutory changes.

Judge Stotler suggested that further thought be given to the issue of shortening the length of the rulemaking process and that additional discussion take place at the next committee meeting. She also suggested that further thought be given to the issue of making the chairs of the advisory committees voting members of the Standing Committee.

NEXT COMMITTEE MEETINGS

The committee is scheduled to hold its next meeting on Thursday and Friday, January 7 and 8, 1999. Judge Stotler asked the members for suggestions as to a meeting place so that the staff could begin making reservations. She also asked the members to check their calendars and let the staff know their available dates for the June 1999 committee meeting.

Respectfully submitted,

Peter G. McCabe
Secretary

Item 3A

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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
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December 3, 1998

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Legislative Report*

The 105th Congress adjourned in October 1998 (subject to the call of the chair). During the 105th Congress, we monitored 38 bills and 3 joint resolutions that would affect the Federal Rules of Practice and Procedure. These bills included 13 new bills that were introduced after the committee's June 1998 meeting. On behalf of the rules committees, five letters were sent since the last committee meeting to the House and Senate Judiciary Committees expressing rules-related concerns and drafting problems with pending legislation that involved the following issues:

- Civil Rule 30(b) — stenographic recording of depositions
- Evidence Rules 803 and 902 — admission of foreign records
- Various bankruptcy rules — authorizing or mandating the initiation of the rulemaking process with respect to five separate proposals for rule changes (three separate letters were sent)

Individual letters were also sent to Senator Hatch and Representatives Coble and McCollum transmitting the pamphlets containing the proposed rule amendments published in August 1998. The letters drew attention to several proposed amendments that included proposals (amendments to Evidence Rules 404, 702, 803, and 902) which were similar to ones contained in bills that had been introduced by the congressmen. Senator Hatch was also advised that the Supreme Court-approved Civil Rule 23(f), a provision similar to one in the Senator's bills, takes effect on December 1, 1998.

Copies of the letters are attached. Only three of the 41 pieces of legislation ultimately were approved and enacted into law.

The Taxpayer Confidentiality Act (Pub. Law No. 105-206) contains a provision amending the Internal Revenue Code establishing an evidentiary privilege for communications between a taxpayer and an authorized tax practitioner. It was decided not to transmit rules-related concerns regarding this bill to Congress because: (1) the bill did not amend the rules directly, and (2) Evidence Rule 501 itself recognizes the option of Congress to prescribe an evidentiary privilege by an Act of Congress outside the rulemaking process.

The Alternative Dispute Resolution and Settlement Encouragement Act (Pub. Law No. 105-315) requires each court to authorize and provide by local rules adopted under 28 U.S.C. § 2071 the option of voluntary ADR procedures. The original draft of the bill was revised at the request of the rules committees to include a specific reference to the Rules Enabling Act.

The Omnibus Appropriations Act contained a provision (commonly referred to as the McDade provision) subjecting government attorneys to attorney conduct rules established under state laws or rules. The provision will supersede the Thornburg memorandum and accompanying regulations, to the extent that they are inconsistent. The effective date of the provision is delayed for 180 days. The provision was formerly included in a stand-alone bill, Citizens Protection Act of 1998. The rules committees have not expressed a position on it.

Although not part of the enacted law, the conference report accompanying the Omnibus Appropriations Act requires the Judicial Conference to report its findings by April 15, 1999, on whether Criminal Rule 6 should be amended to entitle a witness appearing before a grand jury to be accompanied by counsel. An earlier version would have amended the rule directly, but was defeated. The Criminal Rules Committee had appointed a subcommittee, chaired by Judge David D. Dowd, to study grand jury reform proposals in general. Judge Davis later tasked the subcommittee with reporting on the specific issue dealing with a witness' right to have an attorney attend the grand jury session.

A major bankruptcy bill seemed to be headed for approval late in the congress. It would have required substantial revisions to the bankruptcy rules. In addition, several of its provisions raised serious rulemaking process concerns. In the end it failed. But it — or something like it — is likely to be reintroduced in the next congress.

Two bills were introduced and actively considered by the House and Senate Judiciary Committees, which would provide parties with the right to remove most class actions from state court to the federal court under certain criteria subject to the discretion of a federal judge. The Mass Torts Working Group is carefully considering the consequences of the bill, which is likely to be reintroduced early in the next congress. The Federal/State Jurisdiction Committee is also studying the bill.

A chart showing the status of the rules-related bills is attached.

John K. Rabiej

Attachments

LEGISLATION AFFECTING
THE FEDERAL RULES OF PRACTICE AND PROCEDURE
105th Congress

SENATE BILLS

S. 3 Omnibus Crime Control Act of 1997

- Introduced by: Hatch and others
- Date Introduced: January 21, 1997
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - *Sec. 501.* Increase the number of government peremptory challenges from 6 to 10 **[CR24(b)]**
  - *Sec. 502.* Allow for 6 person juries in criminal cases upon request of the defendant, approval of the court, and consent of the government **[CR23(b)]**
  - *Sec. 505.* Requires an equal number of prosecutors and defense counsel on all rules committees **[§ 2073]**
  - *Sec. 713.* Allow admission of evidence of other crimes, acts, or wrongs to prove disposition toward a particular individual **[EV404(b)]**
  - *Sec. 821.* Amends the language of CR35(b) (Reduction of Sentence) and the sentencing guidelines **[CR35(b)]**
  - *Sec. 904.* Amends the statute governing proceedings in forma pauperis **[AP Form 4]**

S. 79 Civil Justice Fairness Act of 1997 (See H.R. 903)

- Introduced by: Hatch
- Date Introduced: January 21, 1997
- Status: Referred to Committee on the Judiciary — letter from Standing Committee to Hatch (4/29/97)
- Provisions affecting the Rules:
  - *Sec. 302* Amends Evidence Rule 702 regarding expert testimony **[EV702]**
  - *Sec. 302* Amends Civil Rule 68 regarding offers of judgment **[CV68]**

S. 225 Sunshine in Litigation Act of 1997

- Introduced by: Kohl
- Date Introduced: January 28, 1997
- Status: Referred to Committee on the Judiciary — letter from Standing Committee to Hatch (4/1/97)
- Provisions affecting rules
  - *Sec. 2* Adds a new section to title 28 controlling procedures for entering and modifying protective orders **[CV26(c)]**

S. 254 Class Action Fairness Act of 1997

- Introduced by: Kohl
- Date Introduced: January 30, 1997
- Status: Referred to Committee on the Judiciary; Subcommittee on Oversight and Courts.
- Provisions affecting rules
  - *Sec. 2* requires class counsel to serve, after a proposed settlement, the State AG and DOJ as if they were parties to the class action. A hearing on the fairness of the proposed settlement may not be held earlier than 120 days after the date of that service. **[CV23]**

S. 400 Frivolous Lawsuit Prevention Act of 1997

- Introduced by: Grassley
- Date Introduced: March 5, 1997
- Status: Referred to Committee on the Judiciary; Subcom. on Oversight and the Courts
- Provisions affecting rules:
  - Section 2 amends Civil Rule 11(c) removing judicial discretion not to impose sanctions for violations of rule 11. **[CV11]**

S. 1081 Crime Victim's Assistance Act (See H.R. 924; H.R. 1322; S.J. Res 6)

- Introduced by: Kennedy and Leahy
- Date Introduced: July 29, 1997
- Status: Referred to Committee on Judiciary.
- Provisions affecting rules:
  - Section 121 would amend Criminal Rule 11 by adding a requirement that victims be notified of the time and date of, and be given an opportunity to be heard at a hearing at which the defendant will enter a plea of guilty or nolo contendere. **[CR11]**
  - Section 122 would amend Criminal Rule 32 to provide for an enhanced victim impact statement to be included in the Presentence Report. Victims should be notified of the preparation of the Presentence Report and provided a copy. **[CR32]**
  - Section 123 would amend Criminal Rule 32.1 by requiring the Government notify victims of certain crimes of preliminary hearings on revocation or modification of probation or supervised release. The victims will also be given the right of allocution at those hearings. **[CR32.1]**
  - Section 131 would amend Evidence Rule 615 to add victims of certain crimes to the list of witnesses the court can not exclude from the court room. **[EV615]**

S. 1301 Consumer Bankruptcy Reform Act of 1997

- Introduced by: Grassley
- Introduced: October 21, 1997;9/23/98 Senate passed companion measure H.R. 3150 in lieu of this measure
- Status: 5/21/98 - Ordered to be reported with amendments favorably; 6/4/98 placed on Senate Legislative Calendar; Jul 21, 1998 Senator Hatch from Committee on Judiciary; filed written report. Report No. 105-253(Additional and minority views filed.) Letter sent from Judge Stotler.
- Provisions affecting rules: None directly amending the rules or instructing judicial conference to propose rule amendments, will likely move with either H.R. 3150, S. 1914, or both, which do contain rules issues.

S. 1352 Untitled

- Introduced by: Grassley
- Date Introduced: October 31, 1997
- Status: Referred to Committee on the Judiciary — letter from Civil Rules Committee to Hatch (4/17/98)
  - 4/2/98 Approved by Subcom. on Oversight and Courts; Sent to full committee
- Provisions affecting rules
  - amends Civil Rule 30 restoring stenographic preference for recording depositions

S. 1721 Untitled

- Introduced by: Leahy
- Date Introduced: March 6, 1998
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules
  - requires the Judicial Conference to review and report to Congress on whether the FRE should be amended to create a privilege for communications between parents and children

S. 1737 Taxpayer Confidentiality Act (See Public Law 105-206; 7/22/98)

- Introduced by: Mack
- Date Introduced: March 10, 1998
- Status: Referred to Committee on Finance; included in the IRS restructuring Bill marked-up on 3/31/98 (HR 2676); HR 2676 passed the Senate on 5/7/98; June 24th Conference Report; House approves conference report, 6/25/98; Senate approves report, 7/9/98
- Provisions affecting rules
  - Amends the Internal Revenue Code to apply attorney-client privilege to communications between a taxpayer and any authorized tax practitioner (CPA, Enrolled Agent, etc) in noncriminal matters before the IRS and in federal court

S. 1914 Business Bankruptcy Reform Act

- Introduced by: Grassley
- Introduced: April 2, 1998
- Status: 6/2/98 Subcommittee on Oversight and Courts concluded hearings; letter from Judge Stotler sent.
- Provisions affecting rules: several provisions request the bankruptcy rules committee to propose for adoption rules or forms to implement statutory changes; See H.R. 3150 and S. 1301

S. 2030 Grand Jury Due Process Act (See S. 2260)

- Introduced by: Bumpers
- Date Introduced: May 4, 1998
- Status: Referred to Committee on Judiciary
- Provisions affecting rules
  - Would amend CR 6 [The Grand Jury] to allow witnesses before the grand jury the assistance of counsel while in the grand jury room

S. 2083 Class Action Fairness Act of 1998

- Introduced by: Grassley and Kohl
- Introduced on: May 14, 1998
- Status: 9/10/98: Subcommittee on Oversight and Courts. Approved for full committee consideration with an amendment in the nature of a substitute favorably.
- Provisions affecting rules
  - Limits attorney fees in class actions to a reasonable percentage of damages actually paid; general removal of class actions from state to federal courts; undoes 1993 amendments to Civil Rule 11 and requires sanction for frivolous filing **[CV11]**

S. 2163 Judicial Improvement Act of 1998 (See H.R. 660; H.R. 1252)

- Introduced by: Senator Hatch
- Introduced on: June 11, 1998
- Status: Committee on the Judiciary
- Provisions affecting rules
  - Section 3 deals with special masters;
  - Section 4 allows for interlocutory appeal of court orders granting or denying class action certification decisions

S. 2260 Appropriations for Department of Commerce; Justice, etc. - ***Amendment 3262***

- Introduced by: Bumpers
- Date Introduced: July 22
- Status: Amendment agreed to (S. 2260 passed the Senate 99-0 on 7/23/98); Not in bill, but conference report requires Judicial Conference to study the issue and report to Appropriations Committee by 4/15/99
- Provisions affecting rules:
  Requires Judicial Conference to issue a report on the grand jury amendments by 4/15/99

S. 2289 Grand Jury Reform Act of 1998 (SEE S. 2030)

- Introduced by: Senator Bumpers
- Introduced on: July 10, 1998
- Status: Committee on the Judiciary
- Provisions affecting rules
  - Section 2 would amend **CR6** [The Grand Jury] to list the rights and responsibilities of jurors and providing notice to witness of certain rights
  - Section 2 would also give Grand Jury witnesses the right to an attorney, paid for under 18 USC 3006A if necessary

S. 2373 Alternative Dispute Resolution of 1998

- Introduced by: Senator Grassley
- Introduced on: July 30, 1998
- Status: 10/13/ 98 Referred to Subcommittee on Oversight and Courts
- Provisions affecting rules
  - Requires courts to authorize by local rule adopted under 2071 the use of voluntary ADR procedures

HOUSE BILLS

H.R. 660 Untitled (See S. 2163)

- Introduced by: Canady
- Date Introduced: February 10, 1997
- Status: Referred to Committee on the Judiciary; letter from Standing Committee to Canady (4/1/97); Judge Niemeyer met with and discussed bill with Canady on 4/29/97
- Provisions affecting rules
  - *Sec. 1* would amend title 28 to allow for an interlocutory appeal from the decision certifying or not certifying a class **[CV23]**

H.R. 903 Alternative Dispute Resolution and Settlement Encouragement Act (See S. 79)

- Introduced by: Coble
- Date Introduced: March 3, 1997; Mar 7, 1997 Referred to the Subcommittee on Courts and Intellectual Property.
- Status: Letter to Hyde from Standing Committee (4/21/97)
- Provisions affecting rules:
  - Section 3 Amends title 28 to provide an offer of judgment provision **[CV68]** and
  - Section 4 amends Evidence Rule 702 governing expert witness testimony. **[EV702]**

H.R. 924 Victim Rights Clarification Act

- Introduced by: McCullum
- Date Introduced: March 5, 1997
- Status: Passed and signed into law.(Pub. L. No. 105-6)
- Provisions affecting the rules:
  - Adds new section 3510 to title 18 that prohibits a judge from excluding from viewing a trial any victim who wishes to testify as an impact witness at the sentencing phase of the trial. **[EV 615]**

H.R. 1252 Judicial Reform Act of 1997 (See H.R. 660; S. 2163)

- Introduced by: Hyde
- Date Introduced: April 9, 1997
- Status: 4/23/98 passed House; 4/24/98 referred to Senate—Letter from Civil Rules Committee to Hatch, re: Section 3 (5/7/98)
- Provisions affecting rules:
  - Section 3 amends title 28, section 1292(b), and would provide for interlocutory appeal of a class action certification decision. **[CV23]**
  - Provides discretion to judge to televise civil and criminal case proceedings, including trials
  - Sunsets provision governing CJRA plans

H.R. 1280 Sunshine in the Courtroom Act

- Introduced by: Chabot
- Date Introduced: April 10, 1997
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules:
  - Enacts a stand alone statute that would authorize the presiding judge to allow media coverage of court proceedings. Authorizes the Judicial Conference to promulgate advisory guidelines to assist judges in the administration of media coverage. **[CR53]**

H.R. 1492 Prisoner Frivolous Lawsuit Prevention Act of 1997

- Introduced by: Gallegly
- Date Introduced: April 30, 1997
- Status: Referred to Committee on the Judiciary, Subcommittee on Crime
- Provisions affecting rules:
  - Would amend Civil Rule 11 to mandate imposition of a sanction for any violation of Rule by a prisoner. **[CV11]**

H.R. 1536 Grand Jury Reduction Act

- Introduced by: Goodlatte
- Date Introduced: May 6, 1997
- Status: Referred to Committee on the Judiciary — CACM considered proposal 6/97; referred to ST, rec'd that Judicial Conference oppose the legislation; Rec. Approved 3/98; letter sent by Conference Secretary to Goodlatte (4/17/98)
- Provisions affecting rules:
  - Would amend Section 3321 of title 28, reducing the number of grand jurors to 9, with 7 required to indict. **[CR6]**

H.R. 1745 Forfeiture Act of 1997

- Introduced by: Schumer on behalf of the Administration —
- Date Introduced: May 22, 1997
- Status: Referred to Judiciary and Ways and Means
- Provisions affecting rules:
  - Several including §§102 and 105 directly amending Admiralty Rules and § 503 creating a new Criminal Rule 32.2 on forfeiture and related conforming amendments to other criminal rules **[CR32.2]**

H.R. 1965 (formerly H.R. 1835) *Civil Asset Forfeiture Reform Act*

- Introduced by: Hyde and Conyers
- Date Introduced: June 20, 1997
- Status: Reported to the House, 10/30/97; Letter with Judiciary's comments being coordinated by LAO; including concerns about time deadlines in admiralty cases; 10/20 98: Ways and Means and Commerce discharged
- Provisions affecting rules:
  - Section 12(b) amends Paragraph 6 of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims (extends the notice requirement from 10 days to 20).

H.R. 2135 Bail Bond Fairness Act of 1997

- Introduced by: McCollum
- Date Introduced: July 10, 1997
- Status: 3/12/98 Judge Davis testified at Subcommittee Hearings Held.
- Provisions affecting rules: Section 2 of the bill would amend CR46(e)

H.R. 2603 (became H.R.3528) *Alternative Dispute Resolution and Settlement Encouragement Act* (Pub. Law No. 105-315; 10/30/98)

- Introduced by: Coble and Goodlatte
- Date Introduced: October 2, 1997
- Status: April 21, 1998 passed House, amended; 04/22/98 Referred to Senate Committee on the Judiciary; 10/7/98, passed Senate, amended; 10/10/98 cleared for White House
- Provisions affecting rules:
  - Requires courts to authorize by local rule adopted under 2071 the use of voluntary ADR procedures

- Section 3 would amend § 1332 of title 28, United States Code, to provide for awarding reasonable costs, including attorneys' fees, if a written offer of judgment is not accepted and the final judgment is not more favorable to the offeree than the offer.

H.R. 3150 Bankruptcy Reform Act of 1998

- Introduced by: Gekas
- Introduced: February 3, 1998
- Status: 6/10/98 Passed House; 6/5/98 letter sent to Judiciary Committee leadership; 7/7/98 Placed on Senate Legislative Calendar, Calendar No. 457; died in conference
- Provisions affecting rules: several provisions request the bankruptcy rules committee to propose for adoption rules or forms to implement statutory changes

H.R. 3396 Citizens Protection Act of 1998 (See S. 2260)

- Introduced by McDade
- Introduced on March 5, 1998
- Status: referred on 3/5/98 to full Judiciary Committee (193 co-sponsors as of 8/4/8); passed as part of budget bill
- Provisions affecting rules: Subjects government lawyers to attorney conduct rules established by State laws or rules

H.R. 3577 Confidence in the Family Act (See H.R. 4286)

- Introduced by: Lofgren
- Date Introduced: March 27, 1998
- Status: Referred to Judiciary; attempt to add to HR 1252 failed
- Provisions affecting rules:
  - would amend **EV501** by adding a new section creating a privilege for communications between parents and children

H.R. 3745 Money Laundering Act of 1998 (See also H.R. 1756 and S. 2165)

- Introduced by: McCollum
- Date Introduced: May 5, 1998
- Status: 6/5/98 Forwarded by Subcommittee to Full Committee; 6/12/98 letter sent to Judiciary Committee leadership. Letter sent by Judge Smith 6/12/98.
- Provisions affecting rules: Section 11 provides for admission of foreign records in civil cases. It is consistent with the proposed amendments to EV 803 and 902, which will be published for comment this fall.

H.R. 3789 Class Action Jurisdiction Act of 1998

- Introduced by: Hyde
- Date Introduced: April 29, 1998
- Status: Referred to Judiciary; mark-up by subcommittee; mark-up by full committee 8/5; 9/10/98 : reported to full House
- Provisions affecting rules: The bill would give federal courts original jurisdiction in class actions in diversity cases without regard to the value of the item in controversy and provide for removal of all class actions from state courts.

H.R. 3905 Fairness in Asbestos Compensation Act of 1998

- Introduced by: Representative Hyde
- Date Introduced: May 20, 1998
- Status: Referred to Committee on the Judiciary
- Provisions affecting rules
  - Creates the Asbestos resolution Corporation to conduct medical reviews and ADR. Also sets out provisions governing asbestos litigation in courts, including offer of judgment provisions, limits on class actions, and pre-filing medical certification.

H.R. 4221 Untitled

- Introduced by: Representative Coble
- Date Introduced: July 16, 1998
- Status: Referred to Committee on the Judiciary — letter from Civil Rules Committee to Hatch (7/21/98); letter sent by Judge Niemeyer 8/7/98
- Provisions affecting rules
  - Amends Civil Rule 30 restoring stenographic preference for recording depositions

H.R. 4286 Parent-Child Privilege (See H.R. 3577)

- Introduced by: Representative Andrews
- Date Introduced: July 21, 1998
- Status: Referred to Committee on the Judiciary; 7/31/98 referred to Subcommittee on Courts and Intellectual Property
- Provisions affecting rules
  - Adds Rule 502 to Federal Rules of Evidence establishing a parent/child privilege
  - Has technical error in section b Clerical amendments and a very strange effective date.

S.J. Res. 6 (See also **S.J 44**; H.J. Res 71; HR 1322; S. 1081; H.R. 924))

- Introduced by: Kyl and Feinstein
- Date Introduced: January 21, 1997
- Status: Referred to Committee on the Judiciary; 4/28/98 hearing held (**S.J. 44**); amended 7/7/98; 7/7/98 Reported to Senate by Senator Hatch with an amendment in the nature of a substitute. Placed on Senate Legislative Calendar - Calendar No. 455.
- Provisions affecting rules:
  - Victim's rights **[CR32]**

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

ADRIAN G. DUPLANTIER
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CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

June 5, 1998

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

Dear Chairman Hyde:

I write on behalf of the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee) to express concern regarding certain provisions of H.R. 3150, the "Bankruptcy Reform Act of 1998" (Act). Section 503 of the Act would enact a provision that is similar to proposed rule amendments that the Advisory Committee on Bankruptcy Rules is presently studying and has recommended for publication and comment. In addition, five other provisions of the Act—though worded differently—would also undermine the Rules Enabling Act rulemaking process by authorizing the initiation of the rulemaking process outside the normal procedures. (28 U.S.C. §§ 2071-77.)

I urge you and your colleagues to decline to support § 503 pending the completion of the rulemaking process. I would also recommend that the wording of the five sections, which authorize or mandate the initiation of the rulemaking process, be revised to follow the procedures established by the Rules Enabling Act.

Section 503

Section 503 of the Act would require clerks of courts to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings. As with any large corporation, notices of bankruptcy filings have often been misdirected to the wrong office or unit within a given governmental agency. A delayed response to a bankruptcy filing has led to unfortunate consequences, including the loss of significant procedural and substantive protections.

In March 1995 the Advisory Committee on Bankruptcy Rules began working with the Department of Justice to develop a solution to the problem. After several meetings and discussions with affected persons and organizations, the advisory committee has now recommended that proposed amendments to Rules 1007, 2002, and 5003, which are designed to improve notice to governmental units, be published for comment. If approved by the Standing Committee, which meets in mid-June, the proposal will be published for comment in mid-August 1998.

The proposed rule amendments are similar in effect to § 503, but there are some important differences. Initially, the proposed rule amendments require only annual, and not quarterly, updates of the register. The advisory committee opted for the annual reporting for two reasons. First, the number of governmental units that need to be included in the register would be substantial. Updating the list by court personnel would be time consuming and laborious. More frequent updating of the list would also impose a greater burden on debtors and their attorneys who would be compelled to review the revised lists more often. Second, the proposed rule amendments provide for a "safe harbor" mailing address, but the failure to use that address does not invalidate any notice that is otherwise effective. Finally, the proposed rule amendments would not require the posting of addresses of municipalities and other local governments. Doing so would add thousands of entities to the register and would impose a costly burden on the clerk.

The advisory committee expects that the public comment stage will provide helpful insights into the differences between § 503 and the proposed rule amendments. The public comment stage will also provide an opportunity to those persons and organizations that are most affected by the proposed rule changes to respond to them. At the end of the rulemaking process, this added scrutiny by the public, rules committees, Judicial Conference, and Supreme Court, will provide Congress with a much better record on which to base its decision. For these reasons, further action on § 503 might be better deferred to allow the Rules Enabling Act rulemaking process to proceed.

Rule and Form Amendments Referred to the Rulemaking Process

Sections 233, 235, 410, 412, and 517(e) would authorize or mandate the initiation of the rulemaking process in regard to five separate proposals for rule changes. Each of these sections is worded differently, which may lead to unexpected consequences and may create some needless confusion.

- Section 233 states that the "Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States shall . . . propose for adoption" standard form disclosure statements and plans of reorganizations for small business debtors.
- Section 235 states that "after consultation with the Director of the Executive for the United States Trustees and the Judicial Conference . . . the Attorney General shall propose for adoption" amended Federal Rules of Bankruptcy Procedure and Official Forms...."
- Section 410 states that it is the "sense of Congress that rule 9011 be modified" to include a requirement that all documents be submitted to the court only after the debtor or the debtor's attorney has made a reasonable inquiry to verify the information contained in such documents.
- Section 412 provides that the "Judicial Conference shall establish" official forms to facilitate compliance with amendments made by §§ 101 and 102.
- Section 517 states that it is the "sense of Congress that the Advisory Committee . . . should . . . propose for adoption" amended rules that provide that a governmental unit may object to a confirmation of a plan on or before 60 days after the debtor files all tax returns.

Some of the above sections bypass the initial stages of the Rules Enabling Act process and needlessly undercut in varying degrees the proper role of the Judicial Conference and its committees in the rulemaking process. Under procedures promulgated pursuant to the Rules Enabling Act, the Judicial Conference's advisory rules committees are responsible for considering every rule change proposed from "any source, new statutes and court decisions affecting the rules, and legal commentary." In accordance with those procedures, a suggestion in any form from Congress, including a letter from an individual member, that proposes a particular rule change would be promptly referred to the pertinent advisory rules committee for consideration and the initiation of the rulemaking process. Moreover, the provision that requires the Conference to "establish" forms consistent with changes to the Bankruptcy Code (§ 412) is unnecessary because the advisory committee automatically reviews the rules and forms to identify and prescribe necessary amendments to conform to legislation amending the Code.

If the above five sections in H.R. 3150 are intended to initiate the rulemaking process, they may invite needless confusion in discerning possible degrees of difference because of the different wording. Moreover, the sections might compromise the integrity of the rulemaking process. Uniformly worded provisions that request the Judicial Conference to consider amending the rules would be easier to understand, and the initiation of the rulemaking process would begin without delay. The revision of these five sections in H.R. 3150 could be done easily consistent with the Rules Enabling Act and without frustrating the intent of the provisions.

Conclusion

The Judicial Conference of the United States strongly supports and promotes the integrity of the rulemaking process as prescribed by the Rules Enabling Act. The Act establishes a partnership between the courts and Congress designed to handle the daily business of the courts, which are matters of concern to all branches of the Government. This partnership has worked well. I urge you to: (1) oppose § 503 and allow the Rules Enabling Act rulemaking process to proceed; (2) revise §§ 233, 235, 410, and 517 by adopting uniform language requesting the Judicial Conference to consider amending the pertinent Bankruptcy Rules or forms; and (3) consider deleting § 412 as unnecessary because official forms are regularly revised to reflect new legislation.

Please feel free to contact me if you have any questions, or if I can be of any assistance to you on this matter.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

June 12, 1998

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

Dear Mr. Chairman:

I write on behalf of the Judicial Conference's Advisory Committee on Evidence Rules to express concern regarding a certain provision of H.R. 3745, the "Money Laundering Act of 1998," which was introduced by Representative Bill McCollum on April 29, 1998. Section 11 of the Act adds a new § 2466 to title 28, United States Code, which sets out procedures for the admission of foreign records in a civil case. The provision is substantively similar to, but more limited in scope than, proposed amendments to the Evidence Rules that have been approved for release for public comment by the Standing Committee on Rules of Practice and Procedure in accordance with the "Rules Enabling Act" rulemaking process. Accordingly, I urge you and your colleagues to decline to support § 11 of the Act pending completion of the rulemaking process.

Under Rules 803 and 902 of the Federal Rules of Evidence, foreign records of regularly conducted activity (e.g., business records) in a civil case, and domestic business records in a civil or a criminal case may be admitted as evidence only when certain foundation requirements substantiating the record's authenticity have been satisfied. The foundation requirements are usually established by a testifying witness, unless the parties stipulate otherwise. Under 18 U.S.C. § 3505, however, foreign business records may be admitted under a streamlined procedure in a criminal case if a certification of the record's authenticity is submitted by a qualified person, under circumstances in which the law of the foreign country would punish a false certification. In accordance with these procedures, foreign records may be admitted without the expense and inconvenience of producing time-consuming foundation witnesses. Section 11 of the Act would extend the streamlined procedure to the admission of foreign business records in civil cases.

The advisory committee concluded that the evidence rules should be amended to provide for uniform treatment of both foreign and domestic business records in civil and criminal cases based on the streamlined certification procedure in 18 U.S.C. § 3505. At its October 1997 meeting, the advisory committee recommended that proposed amendments to Evidence Rules

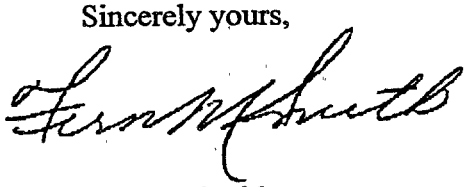
803(6) and 902 be published for public comment. The recommendation to publish the amendments was approved by the Standing Committee at its January 1998 meeting. The proposed amendments will be published for comment in mid-August. (A copy of the proposed amendments is attached for your information.)

The proposed amendments to Evidence Rules 803(6) and 902 provide a comprehensive scheme governing the admission of foreign and domestic records in the federal courts. H.R. 3745's addition of a new statutory provision in title 28 governing the admission of foreign records in civil cases may not be substantively inconsistent with the proposed amendments to the Evidence Rules. Nonetheless, it frustrates one of the key purposes of the Federal Rules of Evidence, which is to include all relevant evidentiary provisions in a single location. Section 11 of the Act would create the odd situation of having separate provisions in the federal rules, title 18, and title 28, United States Code, governing the admission of business records in civil and criminal cases. Worse still, § 11 may generate unnecessary confusion and wasteful satellite litigation either by careful attorneys attempting to discern differences between the rules and the statutory provisions or by attorneys unaware of these provisions scattered in the rules and the statutes.

The advisory committee expects that the public comment stage will provide helpful insights into the proposed rule amendments. The public comment stage will also provide an opportunity to those persons and organizations that are most affected by the proposed rule changes to respond to them. At the end of the rulemaking process, this added scrutiny by the public, rules committees, Judicial Conference, and Supreme Court, will provide Congress with a much better record on which to base its decision.

The elimination of § 11 from H.R. 3745 would not frustrate the purpose of the "Money Laundering Act of 1998." But its deletion would further the policies of the longstanding "Rules Enabling Act" rulemaking process that has been established by agreement of Congress and the courts. For these reasons, further action on § 11 of the Act might be better deferred to allow the Rules Enabling Act rulemaking process to proceed. I look forward to continuing this dialogue with you on this important matter.

Sincerely yours,



Fern M. Smith
United States District Judge

Attachment

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

June 16, 1998

Honorable Charles E. Grassley
Chairman, Subcommittee on
Administrative Oversight and the Courts
Committee on the Judiciary
United States Senate
Room 308 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I write on behalf of the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee) to express concern regarding certain provisions of S. 1914, the "Business Bankruptcy Reform Act of 1998" (Act). Section 501 of the Act would enact provisions that are similar to proposed rule amendments that the Advisory Committee on Bankruptcy Rules is presently studying and has recommended for publication and comment. In addition, three other provisions of the Act would also undermine the Rules Enabling Act rulemaking process (28 U.S.C. §§ 2071-77) by authorizing the initiation of the rulemaking process outside the normal procedures. Finally, the effective date set for one of the provisions in the bill is based on a misunderstanding of the rulemaking process that might create confusion and wasteful litigation.

I urge you and your colleagues to decline to support § 501 pending the completion of the rulemaking process. I would also recommend that the wording of the three sections, which mandate the initiation of the rulemaking process, be revised to take into account the Rules Enabling Act rulemaking process, and that the effective date provision in another section, which is tied into the rulemaking process, be clarified.

Section 501

Section 501 of the Act would require clerks of courts to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings. As with any large corporation, notices of bankruptcy filings have often been misdirected to the wrong office or unit within a given governmental agency. A delayed response to a bankruptcy filing has led to unfortunate consequences, including the loss of significant and substantive procedural protections.

In March 1995 the Advisory Committee on Bankruptcy Rules began working with the Department of Justice to develop a solution to the problem. After several meetings and discussions with affected persons and organizations, the advisory committee has now recommended that proposed amendments to Rules 1007, 2002, and 5003, which are designed to improve notice to governmental units, be published for comment. If approved by the Standing Committee, which meets in mid-June, the proposal will be published for comment in mid-August 1998.

The proposed rule amendments are similar in effect to § 501, but there are some important differences. Initially, the proposed rule amendments require only annual, and not quarterly, updates of the register. The advisory committee opted for the annual reporting for two reasons. First, the number of governmental units that need to be included in the register would be substantial. Updating the list by court personnel would be time consuming and laborious. More frequent updating of the list would also impose a greater burden on debtors and their attorneys who would be compelled to review the revised lists more often. Second, the proposed rule amendments provide a "safe harbor" address, but the failure to use that address does not invalidate any notice that is otherwise effective. Finally, the proposed rule amendments would not require the posting of addresses of municipalities and other local governments. Doing so would add thousands of entities to the register and would impose a costly burden on the clerk.

The advisory rules committee expects that the public comment stage will provide helpful insights into the differences between § 501 and the proposed rule amendments. The public comment stage will also provide an opportunity to those persons and organizations that are most affected by the proposed rule changes to respond to them. At the end of the rulemaking process, this added scrutiny by the public, rules committees, Judicial Conference, and Supreme Court, will provide Congress with a much better record on which to base its decision. For these reasons, further action on § 501 might be better deferred to allow the Rules Enabling Act rulemaking process to proceed.

Rules and Form Amendments Referred to the Rulemaking Process

Sections 403, 405, and 502 would mandate the initiation of the rulemaking process in regard to three separate proposals for rule changes.

- Section 403 states that the "Advisory Committee on Bankruptcy Rules of the Judicial Conference shall . . . propose for adoption standard form disclosure statements and plans of reorganizations for small business debtors. . . ."
- Section 405 states that the "Advisory Committee on Bankruptcy Rules of the Judicial Conference shall . . . propose for adoption revisions to the Federal Rules of Bankruptcy Procedure and Official Forms that would enable small business debtors . . . to comply with section 308 of title 11, United States Code."
- Section 502 states that the "Advisory Committee on Bankruptcy Rules of the Judicial Conference shall . . . propose for adoption rules under which federal, state, and local governmental units may designate the manner in which a trustee may make a request for the determination of any unpaid . . . liability for any tax incurred during the administration of the case. . . ."

The above sections bypass the initial stages of the Rules Enabling Act process and needlessly undercut the proper role of the Judicial Conference and its committees in the rulemaking process. Under procedures promulgated pursuant to the Rules Enabling Act, the Judicial Conference's advisory rules committees are responsible for considering every rule change proposed from "any source, new statutes and court decisions affecting the rules, and legal commentary." In accordance with those procedures, a suggestion in any form from Congress, including a letter from an individual member, that proposes a particular rule change would be promptly referred to the pertinent advisory rules committee for consideration and the initiation of the rulemaking process. Moreover, as soon as

legislation amending the Bankruptcy Code is enacted, the Advisory Committee on Bankruptcy Rules automatically reviews the rules and forms to identify and prescribe necessary rule amendments and form revisions to conform to it.

Modest changes in the three pertinent sections of the bill would accomplish the bill's goals without bypassing the initial stages of the Rules Enabling Act and compromising its integrity. For example, the language of the sections could easily be revised to request the Judicial Conference to consider amending the rules. These minor revisions would be consistent with the Rules Enabling Act, and the initiation of the rulemaking process would begin without delay.

Section 404 sets the effective date of a new § 308 of the Bankruptcy Code on "the date on which the Supreme Court . . . prescribes rules to provide for appropriate forms and reporting under § 308 of title 11, United States Code." Under the Rules Enabling Act, the Supreme Court prescribes and transmits rule amendments to Congress before May 1 of a given year. The rule amendments would then take effect on the following December 1 after Congress has had the opportunity to consider them. Under the bill, new § 308 of the Bankruptcy Code would probably take effect in June or July, well before December 1 when the rules designed to implement the section would take effect. It is unclear whether this timetable was intended. Moreover, unlike rule amendments, which are prescribed by the Supreme Court, the Official Bankruptcy Forms used in bankruptcy proceedings are prescribed by the Judicial Conference. (Rule 9009 of the Federal Rules of Bankruptcy Procedure.) The effective date provision in § 404 erroneously refers to the Supreme Court prescribing forms, which may create confusion.

Conclusion

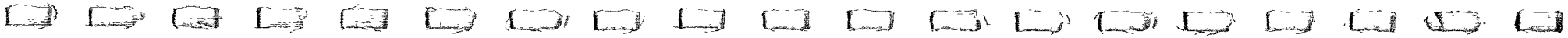
The Judicial Conference of the United States strongly supports and promotes the integrity of the rulemaking process as prescribed by the Rules Enabling Act. The Act establishes a partnership between the courts and Congress designed to handle the daily business of the courts, which are matters of concern to all branches of the Government. This partnership has worked well. I urge you to: (1) oppose § 501 and allow the Rules Enabling Act rulemaking process to proceed; (2) revise §§ 403, 405, and 502 by adopting language requesting the Judicial Conference to consider amending the pertinent Bankruptcy Rules or forms; and (3) consider clarifying the formulation of the effective date under § 404(b).

Please feel free to contact me if you have any questions, or if I can be of any assistance to you on this matter.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
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CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

August 7, 1998

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

Dear Mr. Chairman:

As chair of the Advisory Committee on Civil Rules and on behalf of the Judicial Conference of the United States, I am writing to express opposition to H.R. 4221, which was introduced on July 15, 1998. The bill would undo amendments to Civil Rule 30(b), which took effect on December 1, 1993. It would require recording of all oral depositions taken as part of a federal lawsuit by stenographic or stenomask means unless otherwise ordered by the court or stipulated by the parties. The overriding purpose of the 1993 rule amendments was to provide parties in litigation with the discretion to select recording means best suited to their individual needs.

The 1993 amendments to Rule 30 took effect after two lengthy rounds of public hearings and the review of hundreds of comments. All points of view, including the views of stenographic organizations, were heard and considered and all relevant considerations were carefully balanced. Only after the conclusion of this exacting process did the Judicial Conference and the Supreme Court affirmatively approve the amended rule and submit it to the Congress, which took no action to defer it. Since then, the Committee on Rules of Practice and Procedure has received no notification from any source suggesting any problem with the amended rule. Nor is it aware of any new arguments or other grounds that have not been previously considered.

The bill has three major shortcomings: it significantly reduces the flexibility of litigants to select the most efficient and economical method of recording depositions; it is based on a faulty assumption regarding the utility of the various methods of recording a deposition; and it amends the federal rules outside the Rules Enabling Act process.

The proposed legislation would substantially limit the options available to litigants. As now written, Federal Rule of Civil Procedure 30 permits a party taking a deposition to record it by sound, sound-and-visual, or stenographic means, without seeking the approval of the court or

the consent of other parties. The rule provides litigants with the flexibility to choose the recording mechanism that will best serve their requirements, which often vary because most depositions are used only for discovery purposes and not at trial. Moreover, it permits them to explore less-expensive options, which is critical in these times of upward spiraling litigation costs. I might add, as an aside, that our committee is currently exploring other methods to reduce the cost of discovery in civil litigation — a goal that we think worthy. Finally, the current rule accommodates parties who wish to use newer methods in the ever changing area of litigation technology.

Moreover, the legislation appears based on the belief that audio recording and other non-stenographic forms of recording are too unreliable, a contention that the Advisory Committee on Civil Rules concluded in recommending the 1993 amendments to Rule 30 did not withstand scrutiny. Although stenographic recording has served the courts admirably for decades, that by no means implies that other methods cannot be equally effective. Although Rule 30 only deals with methods of recording depositions, audio recording is a normal means of taking the official record in federal court proceedings, particularly in appellate and bankruptcy courts, and is similarly relied upon in Congressional hearings. Further, although no method of taking a record is absolutely fool-proof, there is no empirical evidence that stenographic reporting is any more reliable than the alternative methods. There are numerous cases cited under Federal Rule of Appellate Procedure 10 dealing with the difficulties of reconstructing the record when the method of taking the record fails; these cases include failures with both stenographic and non-stenographic record taking.

Perhaps most significantly, Rule 30 includes safeguards that insure the integrity and utility of any tape or other non-stenographic recording. Specifically, Rule 30:

- requires the officer presiding at the deposition to retain a copy of the recording unless otherwise ordered or stipulated;
- requires the presiding officer to state required identification information at the beginning of each unit of tape or other medium;
- prohibits the distortion of the appearance or demeanor of the deponents or counsel;
- acknowledges the court's authority to require a different recording method if warranted under the circumstances;
- permits the other party to designate an additional method for recording the deposition; and

- requires the parties to provide a written transcript if they intend to use a deposition recorded by non-stenographic means for other than impeachment purposes at trial or a motion hearing.

In addition, the legislation deals with a subject best analyzed under the Rules Enabling Act process. In enacting the Rules Enabling Act, Congress concluded that rules of court procedure were best promulgated by the judiciary in a deliberative process. The advantages of such a process are clear in this case.

If you would like to discuss any of these issues at greater depth, I am available at your convenience.

Sincerely,

Paul V. Niemeyer
United States Circuit Judge

cc: Committee on the Judiciary,
United States House of Representatives

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

September 1, 1998

Honorable Bill McCollum
United States House of Representatives
2266 House Rayburn Office Building
Washington, D.C. 20515-0908

Dear Representative McCollum:

I am pleased to send to you a pamphlet containing amendments to the Federal Rules of Civil Procedure and Evidence proposed by the Judicial Conference's Advisory Committees on Civil and Evidence Rules. In particular, I would like to draw your attention to proposed amendments to Evidence Rules 803 and 902 that are similar to the proposal contained in a bill introduced by you during this Congress.

Rule 803 is amended to establish a procedure by which parties can authenticate certain records of regularly conducted activity (e.g., business records), other than through the testimony of foundation witnesses. The proposal is based on the procedures governing the certification of foreign records of regularly conducted activity in criminal cases as provided by 18 U.S.C. § 3505. A conforming amendment is made to Rule 902. The amendments are intended to establish a comprehensive procedure for the admission of domestic and foreign records offered in civil cases. The proposed amendment addresses the same concerns raised in § 11 of the "Money Laundering Act of 1998" (H.R. 3745), which you introduced on May 5, 1998.

The bench, bar, and public have been invited to comment on the proposed rule amendments. Three public hearings have been scheduled to allow the public to express their opinions on the proposed Evidence Rule amendments. The public comment period on those amendments expires on February 1, 1999. Status reports on the rules committees' actions will be made available on the Judiciary's Internet site at <www.uscourts.gov>.

As part of their ongoing statutory responsibility to study the operation and effect of the rules of practice and procedure, the Judicial Conference's rules committees carefully consider all suggested changes. Of course, the rules committees pay particular attention to suggested changes contained in pending legislation introduced by you and all other members of Congress. I hope

that the cooperation on rulemaking between the Congress and the Judiciary will continue to remain strong. We look forward to continuing our dialogue with you on these important matters.

Sincerely,

Leonidas Ralph Mecham
Director

Enclosures

cc: Honorable Fern M. Smith, Chair
Advisory Committee on Evidence Rules

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

September 1, 1998

Honorable Orrin G. Hatch
United States Senate
131 Senate Russell Office Building
Washington, D.C. 20510-4402

Dear Senator Hatch:

I am pleased to send to you a pamphlet containing amendments to the Federal Rules of Civil Procedure and Evidence proposed by the Judicial Conference's Advisory Committees on Civil and Evidence Rules. In particular, I would like to draw your attention to several proposed rule amendments that are similar to ones contained in bills introduced by you during this Congress.

The proposed amendments to Evidence Rule 404 provide that when the accused attacks the character of a victim, a corresponding character trait of the accused is admissible. The proposal is similar to the one contained in § 713 of the "Omnibus Crime Control Act of 1997" (S. 3), which you introduced on January 21, 1997. The Advisory Committee on Criminal Rules is also taking action on proposed amendments to Criminal Rule 24(b) to equalize the number of peremptory challenges authorized for the defendant and the prosecution, similar to the provision in § 501 of the Act.

The proposed amendment to Evidence Rule 702 is in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and it attempts to address the conflict in the courts about the meaning of *Daubert*. The proposed amendment addresses the same concerns raised in § 302 of the "Civil Justice Fairness Act of 1997" (S. 79), which you introduced on January 21, 1997. Finally, the Supreme Court on April 24, 1998, prescribed a new Civil Rule 23(f), which authorizes a permissive interlocutory appeal in the sole discretion of the court of appeals from an order granting or denying class certification. The rule takes effect on December 1, 1998. It is similar in substance to the provision in § 4 of the "Judicial Improvement Act of 1998" (S. 2163), which you introduced on June 11, 1998.

The bench, bar, and public have been invited to comment on the proposed rule amendments. Three public hearings have been scheduled to allow the public to express their opinions on the proposed Evidence Rule amendments. The public comment period on those amendments expires on February 1, 1999. Status reports on the rules committees' actions will be made available on the Judiciary's Internet site at <www.uscourts.gov>.

As part of their ongoing statutory responsibility to study the operation and effect of the rules of practice and procedure, the Judicial Conference's rules committees carefully consider all suggested changes. Of course, the rules committees pay particular attention to suggested changes contained in pending legislation introduced by you and all other members of Congress. I hope that the cooperation on rulemaking between the Congress and the Judiciary will continue to remain strong. We look forward to continuing our dialogue with you on these important matters.

Sincerely,

Leonidas Ralph Mecham
Director

Enclosures

cc: Honorable Fern M. Smith, Chair
Advisory Committee on Evidence Rules
Honorable W. Eugene Davis, Chair
Advisory Committee on Criminal Rules

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

September 1, 1998

Honorable Howard Coble
United States House of Representatives
2239 House Rayburn Office Building
Washington, D.C. 20515-3306

Dear Representative Coble:

I am pleased to send to you a pamphlet containing amendments to the Federal Rules of Civil Procedure and Evidence proposed by the Judicial Conference's Advisory Committees on Civil and Evidence Rules. In particular, I would like to draw your attention to the proposed amendment to Evidence Rule 702 that is similar to the one contained in a bill introduced by you during this Congress.

The proposed amendment to Evidence Rule 702 is in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and it attempts to address the conflict in the courts about the meaning of *Daubert*. The proposed amendment addresses the same concerns raised in § 4 of the "Alternative Dispute Resolution and Settlement Encouragement Act" (H.R. 903), which you introduced on March 3, 1997.

The bench, bar, and public have been invited to comment on the proposed rule amendments. Three public hearings have been scheduled to allow the public to express their opinions on the proposed Evidence Rule amendments. The public comment period on those amendments expires on February 1, 1999. Status reports on the rules committees' actions will be made available on the Judiciary's Internet site at <www.uscourts.gov>.

As part of their ongoing statutory responsibility to study the operation and effect of the rules of practice and procedure, the Judicial Conference's rules committees carefully consider all suggested changes. Of course, the rules committees pay particular attention to suggested changes contained in pending legislation introduced by you and all other members of Congress. I hope

that the cooperation on rulemaking between the Congress and the Judiciary will continue to remain strong. We look forward to continuing our dialogue with you on these important matters.

Sincerely,

Leonidas Ralph Mecham
Director

Enclosures

cc: Honorable Fern M. Smith, Chair
Advisory Committee on Evidence Rules

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

September 29, 1998

Honorable Henry J. Hyde
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Representative Hyde:

On behalf of the Judicial Conference of the United States, I write to express concern with certain provisions of the bankruptcy reform bills currently pending action by the conference committee upon which you serve. The matters commented upon relate only to the administration of the law, and to the potential effects of the legislation on judicial branch financial and human resources.

- Appeal Procedures. Section 602 of the Senate-passed bill provides that, if a district court does not file a decision on a bankruptcy appeal within 30 days, jurisdiction of the appeal then lies with the court of appeals, or potentially, with a bankruptcy appellate panel (BAP). Section 411 of the House-passed bill provides that appeals from the orders and decisions of bankruptcy judges may only be considered by the appellate court.

  The Judicial Conference supports the simplification of appellate review of orders of bankruptcy judges. However, we respectfully recommend that the current appellate process not be altered until the Judicial Conference has an opportunity to study the matter and report the results of such study back to Congress. Currently, the caseload of the appellate courts is at record levels nationally. Some courts, notably the Second and Ninth Circuits, are in emergency conditions which negatively affect the administration of justice to the public. Expedited appeals would add an additional 3,800 cases to appellate court dockets. If the House provision to abolish BAPs were adopted, the Ninth Circuit caseload would increase by 12 percent. Given this serious situation, and, without a clear understanding of the level of appeals which might be generated by the bankruptcy law amendments in these bills, we urge a delay in making this fundamental change in the appellate process.

- Effective Date. There is a compelling need to have a delayed effective date for this Act to allow time for the courts, the United States trustees, the private trustees, and the parties and their lawyers to prepare for implementation of its provisions.

This new Act will make major changes in bankruptcy law and impose many new requirements on debtors. If it were to take effect immediately upon enactment, debtors would not be able either to comply completely or to obtain the services of an attorney to assist them, because neither debtors nor attorneys would yet have access to the law and know what is required of them. Even for those who have the skills to read the text of the bill once it becomes available on the Internet, the task of compliance will be daunting. Provisions affecting the same or related sections of the Bankruptcy Code are scattered throughout the bill. To represent a client responsibly, a practitioner will need a new copy of the Code, with the amendments printed in their proper places, according to the section affected. Accordingly, sufficient time is essential to allow publishers to produce and distribute updated copies of the Bankruptcy Code.

For one example, Section 301 of the Senate-passed bill and Section 111 of the House-passed bill require that before filing a bankruptcy case an individual debtor must receive information about debt counseling services and alternatives to bankruptcy. For these provisions to operate, the United States trustees and bankruptcy administrators must have established criteria for approving credit counseling agencies, must have identified agencies that meet those criteria, and have provided lists of approved agencies to each bankruptcy clerk. In addition, the United States trustees and courts must have developed an appropriate statement concerning alternatives to bankruptcy, distributed those statements to attorneys and bankruptcy petition preparers, and set up a mechanism for distributing them to debtors who do not have an attorney or use a petition preparer. These responsibilities are especially significant given that debt counseling is a prerequisite to eligibility for bankruptcy under both bills.

This Act does not require a general effective date delay of eleven months which was provided in the Bankruptcy Reform Act of 1978. However, we would suggest that the bill provide that its provisions, unless otherwise specifically provided in discrete sections, apply to cases filed on or after 270 days from the date of enactment.

- Filing of Debtors' Tax Returns. Section 301 of the Senate-passed bill requires certain petitioners to file copies of tax returns with the clerk of the bankruptcy court. Court files, with the narrow exception of sealed records, are public records available to anyone upon request. Sealed records are not maintained in a public case file, but, because they are a rarity, typically can be accommodated in the clerk's safe. Recognizing that the tax returns are not to be made available to the public, Section 301 requires the Director of the Administrative Office to establish procedures to safeguard the confidentiality of tax information and also to establish a system to make the information available to the United States trustee, case trustee, and any party in interest. To carry out this responsibility, it would be necessary to establish a separate filing system in each clerk's office for tax returns, as well as provide personnel to manage it so that unlawful dissemination of this

information would not occur. This would be a costly undertaking requiring additional office space and personnel.

Section 406 of the House-passed bill assigns the responsibility for accepting, storing, and making available debtors' tax returns to the United States trustee. As the United States trustee's files are not public records, limiting access to trustees and parties in interest would not require segregating tax returns and creating separate procedures governing access to them. The U.S. trustee's office also have personnel and procedures in place to deal with debtors. While the U.S. trustees may well need some additional resources to meet this responsibility, that cost would be far less than establishing a new separate system in the clerk's office. Also, it can be anticipated that because the tax returns are intended to be used by the trustees, these records would be included in the U.S. trustee's files whether or not the returns were in the bankruptcy clerk's office.

- Bankruptcy Statistical Data. Section 306 of the Senate-passed bill requires the clerks of court and the Administrative Office to compile and analyze information concerning the financial affairs of individual consumer debtors. At present, the judiciary compiles and publishes only statistics that reflect information from the clerks' case dockets. The Judicial Conference has directed that the judiciary collect and maintain such data as is required for its own operations, to fulfill statutory responsibilities, and inform the public of court operations.

  Section 441 of the House-passed bill assigns data collection and analysis to the Executive Office for United States Trustees. The statutory responsibilities of this Office are consistent with the task of providing information relating to debtors' assets and liabilities to Congress. This directly relates to the duties of trustees to administer estates, investigate allegations of fraud, distribute assets to creditors, and refine and correct inaccuracies in the financial information submitted by debtors. The Department of Justice has agreed in principle to assume this responsibility. We agree with the approach in the House-passed bill.

- Bankruptcy Judgeships. Section 322 of the Senate-passed bill would create 18 temporary bankruptcy judgeships, extend the temporary judgeship in the District of Delaware for five years, and extend the temporary judgeships in the Northern District of Alabama, the District of Puerto Rico, the District of South Carolina and the Eastern District of Tennessee for periods of three years.

  While the Judicial Conference welcomes these badly needed additional judicial resources, this provision does not fully authorize the positions recommended by the Conference. Of the 18 newly-authorized judgeships, the Judicial Conference respectfully requests that the four judgeships authorized for the Central District of California, one of the two

judgeships authorized for the District of Maryland, and the judgeships authorized for the District of New Jersey and the Western District of Tennessee be made permanent rather than temporary. In addition, the Judicial Conference requests that the current temporary judgeships in the Northern District of Alabama and the District of Puerto Rico be converted to permanent judgeships rather than extended for a term of three years. Finally, the Conference requests that the temporary judgeships in the District of South Carolina and the Eastern District of Tennessee be extended for periods of five years.

The Judicial Conference recommends authorizing permanent judicial positions only when those positions are fully justified as to current and future needs. The report of the Senate Judiciary Committee provides no explanation for rejecting the request for seven permanent judgeships and providing instead temporary judgeships. *See* S. Rep. No. 105-253 (1998). To the contrary, the House passed a bill in the first session of this Congress to accept the recommendations of the Judicial Conference regarding the request for these permanent judgeships (H.R. 1596).

Likewise, there is no explanation in the Senate report to explain why the extensions requested for judgeships in the Eastern District of Tennessee and the District of South Carolina were reduced from five years to three years, and why the Senate-passed bill provides a short term extension for judgeships in the Northern District of Alabama and the District of Puerto Rico rather than converting those judgeships to permanent positions.

The apparent desire of the Senate to create only temporary positions, and limit extension to very short periods of time, is counterproductive to sound judicial administration. It is also true that Congress has not seen fit to authorize new bankruptcy judgeships since 1992. We would imagine that from a congressional point of view, the eventual prospect of each Congress facing the task of repeatedly re-extending ever expanding lists of temporary judicial positions would not be a desirable use of scarce congressional resources.

- Travel Reporting Requirements. Section 322(e) of the Senate-passed bill requires the Director of the Administrative Office to collect information and compile a detailed report of travel by bankruptcy judges not related to case adjudication and not paid for personally by the judges. This would include travel expenses paid by the government or by private persons or entities.

  This provision apparently relates to a 1997 General Accounting Office (GAO) study of "non-case related" travel of 81 bankruptcy judges over a two-year period. The study showed that, on average, the judges traveled 14.5 work days, or 7 percent of the work year. Seventy-four percent of these travel work days were to attend education and

training programs provided by the Federal Judicial Center or the Administrative Office or judicial governance meetings. The remainder was primarily reimbursed travel to law schools and bar association meetings.

The GAO report did not find that bankruptcy judges whose travel was analyzed violated any regulation or law. The GAO did not find fault with any relevant travel regulation, nor how regulations were applied. The report does not demonstrate an abuse of travel by bankruptcy judges. To the contrary, the GAO report shows modest amounts of travel for fully justified purposes.

The travel expenses of bankruptcy judges reimbursed by non-government sources are already fully made public by the operation of Title I of the Ethics in Government Act of 1978. 5 U.S.C. app. 4 §§ 101-111. But, the requirements of Section 322(e) go well beyond what is already required by that law. For one example, bankruptcy judges would be the first and only government employees required to publicly disclose personal travel paid for by a spouse or other relative. The Ethics in Government Act reporting exception for gifts of less than $250 is also ignored. Therefore, as to private-source travel reimbursement, Section 322(e) would add to what is already public personal travel by a bankruptcy judge paid for by a spouse or a family member, much of which would likely be of *de minimis* value. This constitutes, in my opinion, a serious intrusion into the personal privacy of these judges.

The primary effect of Section 322(e) would be to make public the details of bankruptcy judges' official travel, reimbursed by the government, to and from the Federal Judicial Center and the Administrative Office for education programs and training, to court meetings, and for the performance of other duties related to court management.

The Judicial Conference of the United States, with the assistance of the judicial councils of each circuit and the Administrative Office, is responsible for managing the operations of the judicial branch. *See* 28 U.S.C. §§ 331, 332, 601-612. The travel of judicial officers, including bankruptcy judges, is already governed by many Judicial Conference-approved rules and regulations, as well as by the Ethics in Government Act of 1978. The Judicial Conference considered the proposal now contained in Section 322(e). *See* 28 U.S.C. § 456(a). For these reasons, and in full consideration of its statutory responsibilities, the Judicial Conference opposes the enactment of Section 322(e).

- Rules Issues. Section 503 of the House-passed bill requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings. The provision is similar to proposed rule amendments that the Advisory Committee on Bankruptcy Rules published for comment in August 1998. The proposed rule amendments are similar in effect to Section 503, but

there are some important differences. For example, the proposed rule amendments require only annual, and not quarterly, revision because updating the substantial number of governmental units will be time-consuming and laborious. The bill would also impose a greater burden on debtors' attorneys who would be compelled to review the revised lists more often. In addition, the proposed rule amendments provide for "safe harbor" mailing addresses. The failure to use that address, however, does not invalidate any notice that is otherwise effective.

The opportunity for public comment on the proposed amendments will allow those persons and organizations that are most affected by the proposed rule changes to respond to them. At the end of the rulemaking process, this added scrutiny by the public, rules committees, Judicial Conference, and Supreme Court, will have provided Congress with a much better record on which to base its decision. For these reasons, action on Section 503 might better be deferred pending completion of the Rules Enabling Act process.

Sections 233, 235, 410, 412, and 517(e) of the House-passed bill would authorize or mandate the initiation of the rulemaking process with respect to five separate proposals for rule changes. Some of these sections bypass the initial stages of the Rules Enabling Act process and needlessly undercut in varying degrees the proper role of the Judicial Conference and its committees in that process. Under procedures promulgated pursuant to the Rules Enabling Act, the Judicial Conference's rules advisory committees are responsible for considering every rules change proposed from "any source, new statutes and court decisions affecting the rules, and legal commentary." In accordance with those procedures, a suggestion in any form from Congress, including a letter from an individual member, is promptly referred to the pertinent advisory committee for consideration and initiation of the rulemaking process. Moreover, the provision of the House-passed bill that requires the Conference to "establish" forms consistent with changes to the Bankruptcy Code (§ 412) is unnecessary because the advisory committee automatically reviews any legislation amending the Code to identify and prescribe any necessary amendments to the rules and forms.

The Judicial Conference strongly supports and promotes the integrity of the rulemaking process as prescribed by the Rules Enabling Act. The Act establishes a partnership between the courts and Congress designed to handle the daily business of the courts, which are matters of concern to all branches of the government. This partnership has worked well, and the judiciary urges Congress to revise these sections by adopting uniform language requesting the Judicial Conference to consider amending the pertinent Bankruptcy Rules or forms.

- *In Rem* Orders. Both Section 121 of the House-passed bill and Section 303 of the Senate-passed bill include authority for the bankruptcy court to issue *in rem* orders (orders

against the property of the debtor). Under current law, the bankruptcy court can enter an order lifting the automatic stay against a debtor, but cannot order that the relief granted shall be *in rem* for a certain period to prevent collusion with future transferees of an interest in the property involved. Both bills would address that perceived problem by providing that, upon granting a motion for relief from the automatic stay, the court may also order that the relief granted shall be *in rem* either for a definite period not less than one year or indefinitely. Thereafter, the automatic stay would not apply to any property subject to such an *in rem* order in any case involving the debtor, and would not apply in any pending or later-filed bankruptcy case of any entity that claims or has an interest in the subject property. The effect of this provision would permit the bankruptcy court to deal with property rights of entities that are not in bankruptcy but that claim to have an interest in the property against which the order is issued and that subsequently file for bankruptcy.

The Judicial Conference urges that Congress defer action on these provisions until further study can be made of the due process implications raised by the issuance of *in rem* orders in these circumstances.

- Conversion of Chapter 11 Small Business Cases. Section 243 of the House-passed bill would authorize the bankruptcy court to convert a Chapter 11 small business case to a Chapter 7 case upon establishment of cause by the moving party. This section further provides that the court shall commence a hearing on any such motion not later than 30 days after it is filed and shall decide the motion within 15 days after commencement of the hearing, absent compelling circumstances or consent of the moving party to a continuance. While the Judicial Conference takes no position with regard to this substantive revision of bankruptcy law, it opposes the time deadlines established by this section and respectfully requests that they be deleted. Prescribing a national rule to regulate the time for certain judicial decisions interferes with the management of individual court dockets to the potential detriment of other pending matters.

- Debt Counseling. Sections 104 and 111 of the House-passed bill appear to contain several conflicting provisions concerning the process by which a credit counseling service is placed on the list of such services maintained by the clerk of court and how and by whom a credit counseling service can be removed from that list. These conflicts should be resolved so that the courts, United States trustees, and bankruptcy administrators can implement the bill consistent with the intent of Congress.

- Bankruptcy Administrators. Section 104 of the House-passed bill requires a debtor to file with the court a certificate stating that services were provided to the debtor from a credit counseling service that has been approved by the United States trustee or bankruptcy administrator. In two subsections, however, it is provided that "[o]nly the United States

trustee may make a motion for dismissal" on the ground that the debtor failed to comply with this provision. If this section is to operate as intended, technical corrections should be made at page 24, line 7, and page 25, line 1, of the bill inserting the phrase "or bankruptcy administrator" after "United States trustee."

Thank you for this opportunity to provide the views of the judiciary with regard to this significant legislation. Please feel free to contact Michael Blommer of the Office of Legislative Affairs at (202) 273-1120 if you have any questions or if we can otherwise be of assistance in this matter.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Peter Levinson

Item 3B

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 7, 1998

MEMORANDUM TO THE STANDING RULES COMMITTEE

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

The following report briefly describes administrative actions and some major initiatives undertaken by the office with its current authorized staffing of four to improve support service to the rules committees.

Update on New Initiatives

The docket sheets of all suggested amendments to Civil, Criminal, and Evidence Rules have been updated to reflect the committees' recent respective actions. Every suggested amendment along with its source and status or disposition is listed. We will update the docket sheets after each committee meeting, and they will be included in each agenda book.

The office continues to research our historical records for information regarding any past relevant committee action on every new proposed amendment submitted to an advisory committee. The microfiche collection of rules-related documents was searched for prior committee action on the rules under consideration by the advisory committees at their respective fall meetings. Pertinent documents were forwarded to the appropriate reporter for consideration.

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 1991 have been entered on microfiche and indexed. The documents for 1992 have been catalogued and shipped to a government records center. Congressional Information Services — the publisher of the microfiche collection — should complete the process of placing on microfiche and indexing documents for 1992 by December 1998. The documents for 1993 and 1994 will be catalogued and boxed to be shipped to the national record center before the January 1999 meeting. The microfiche collection continues to prove useful to us and the public in researching prior committee positions. Recently, at Judge

Davis's request and in response to pending legislation, staff used the collection to do extensive research on consideration of amendments regarding the size of the grand jury.

Automation Project (FRED)

Our automated document management system (FRED) will be enhanced and used as a prototype for an agency-wide system. The process of implementing the enhancements may, in the short term, slow our progress on FRED, but should result in better overall technical support and perhaps, finally provide direct access to documents on the system to the committee chairs and reporters. Examples of planned enhancements include: reports designed to ensure that data is entered properly and that all comments are acknowledged with appropriate follow-up responses explaining the committee's actions; document routing and workflow; checklists; enhanced indexing and searching capabilities; and possible remote access to the FRED database. The entire staff was given more "robust" personal computers, which alleviated most of the "migration to Windows 95" problems. The manual system is being maintained while we complete final testing of the automated system.

Manual Tracking

Our manual system of tracking comments continues to work well. For the current public comment period, the office has received, acknowledged, and forwarded approximately 100 comments and many suggestions to the appropriate committees as of December 1. Each comment has been numbered consecutively, which enables committee members to determine instantly whether they have received all of them.

Distribution of Proposed Rule Changes

Working with the Office of Public Affairs, we have disseminated several press releases updating the media on rules-related activity. At the direction of several rules committees' chairs, our office has taken additional steps to ensure the participation of a wide cross-section of the bench and bar at every stage of the rulemaking process.

State Bar Points-of-Contact

In August 1994, Judge Stotler sent a letter to the president of each state bar association 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. The Standing Committee outreach to the organized bar has resulted in 43 state bars designating a point-of-contact.

The points-of-contact list was again updated this year in time to include the new names in the *Request for Comment* pamphlet on proposed amendments published in August 1998. Several state bars updated their designated point-of-contact. The process will be repeated every year to ensure that we have an accurate and up-to-date list. We hope the points-of-contact will continue to be a fertile area for comments.

Mailing List

The Administrative Office has purchased a new automated mailing list system. It will replace several existing systems. The new system should be fully operational about August 1999 and should substantially reduce the time involved in maintaining and expanding the mailing list. A contractor will be hired to maintain all mailing lists for the Administrative Office. We plan to add attorneys and law professors at a 2:1 ratio to a temporary list every six months until the list contains 2,500 names.

Internet

The *Request for Comment* pamphlet will be available each fall on the Judiciary's Home Page (http://www.uscourts.gov). Internet access supplements, rather than replaces, our current system of targeted mailing.

The Judicial Conference has prescribed procedures governing the rulemaking process, which require that virtually all rules-related materials be made available to the public. Moreover, the Judicial Conference's Standing and five Advisory Rules Committees adopted — as part of their self-study plan — a recommendation that the Administrative Office use electronic technologies "to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees."

For the last few months we have been working with our Office of Public Affairs to develop a "Rules" area on the courts' website. Among the materials that will be on the website in the future are minutes of meetings, membership lists, a schedule of upcoming meetings, summaries of public comments on proposed amendments, and committee responses to comments. We are still working to develop a way to make local rules of court available on the Internet.

Beginning with the *Request for Comment* to be published in August 1998 we are, as a pilot project, receiving comments on the proposed rules amendments via the Internet. The Judiciary's website was redesigned to accommodate the submission of comments. This system is designed to acknowledge every comment automatically. We had discussed with the reporters a plan to handle what might be a crush of e-mail comments. As of December 1, 1998, we have received 1269 visits to the Civil and Evidence proposals and 983 visits to the Bankruptcy proposals on the website. But we have received only 20 comments via the Internet. The Technology Subcommittee, along with the reporters, will examine the results of the experiment.

Tracking Rule Amendments

The time chart showing the status of all rules changes has been updated. It will be distributed at the meeting.

Miscellaneous

In September 1998, the Judicial Conference approved the proposed amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure recommended by the Standing Committee at its June 1998 meeting. The formatting and proofreading of the proposed rules amendments were extensive. In November the proposals were forwarded to the Supreme Court.

On August 1, 1998, the *Preliminary Draft of the Proposed Amendments to the Federal Rules of Civil Procedure and Evidence* and the *Preliminary Draft of the Proposed Amendments to the Federal Rules of Bankruptcy Procedure* were published for comment. Brochures summarizing the proposed amendments were also prepared and published.

Since the last committee meeting, we have arranged for and held five advisory rules committee meetings, two Mass Tort Working Group Conferences, and two public hearings on proposed amendments. The work on the mass torts project has also included several meetings and numerous conference calls.

In November 1998, the courts were advised that the amendments to the Federal Rules of Evidence and Appellate, Civil, and Criminal Procedure approved by the Supreme Court on April 24, 1997, would take effect on December 1, 1998.

In December 1998, the pamphlets printed by the General Printing Office for the House Judiciary Committee containing the recently effective amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure and the Rules of Evidence were distributed to the court family. The House Judiciary Committee does not print any pamphlets for the Bankruptcy Rules, and our effort to convince Representative Henry Hyde, chair of the House Judiciary Committee, of the need for such a pamphlet has so far been unsuccessful.

John K. Rabiej

Attachments

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Financial disclosure statement]	Request by committee on Codes of Conduct 9/23/98	11/98 — Comte considered **PENDING FURTHER ACTION**
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by cmte 10/96 — Considered by cmte 10/97 — Deferred until spring '98 meeting 3/98 — Deferred until fall '98 meeting 11/98 — Request for publication **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 cmte 4/96 — Considered by cmte 10/96 — Considered by committee, assigned to subc 5/97— Considered by cmte 10/97 — Request for publication and accelerated review by ST Cmte 1/98 — Stg. Com. approves publication at regularly scheduled time 8/98 — Published for comment **PENDING FURTHER ACTION**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Subc **PENDING FURTHER ACTION**
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/4 — Referred to reporter and chair **PENDING FURTHER ACTION**
[Non-applicable Statute]— 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[Admiralty Rule C(4) — Amend to satisfy constitutional concerns regarding default in actions *in rem*	Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[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	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Subc 5/97 — Discussed in reporter's memo. 3/98 — Comte approved draft 6/98 — Stg Comte approves 8/98 — Published for comment **PENDING FURTHER ACTION**
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by cmte **DEFERRED INDEFINITELY**
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by cmte 4/94 — Considered by cmte 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Humphrey Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV5] — Electronic filing		10/93 — Considered by cmte 9/94 — Published for comment 10/94 — Considered 4/95 — Cmte approves amendments with revisions 6/95 — Approved by ST Cmte /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; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Subc 11/98 — Referred to Tech. Subcommittee **PENDING FURTHER ACTION**
[CV5(b)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV5(d)] — Whether local rules against filing of discovery documents should be abrogated or amended to conform to actual practice	Gregory B. Walters, Cir. Exec., for District Local Rules Review Cmte of Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Subc 3/98 — Comte. approved draft 6/98 — Stg Comte approves with revision 8/98 — Published for comment **PENDING FURTHER ACTION**
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97	10/97 — Referred to cmte 3/98 — Comte approved draft with recommendation to forward directly to the Jud Conf w/o publication 6/98 — Stg Comte approves **PENDING FURTHER ACTION**
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte 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 cmte 10/93 — Considered by cmte 10/94 — Considered by cmte 4/95 — Declined to act **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Cmte for submission to Jud Conf 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court 12/97 — Effective **COMPLETED**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by committee **PENDING FURTHER ACTION**
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G) #2830	5/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV11] — Should not be used as a discovery device or to test the legal sufficiency or efficiency of allegations in pleadings	Nicholas Kadar, M.D. 3/98 (98-CV-B)	4/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[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 5/97 — Reporter recommends rejection 11/98 — rejected by committee **COMPLETED**
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97 (97-CV-R)	12./97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV12(a)(3)] —Conforming amendment to Rule 4(i)		3/98 — Comte approved draft 6/98 — Stg Comte approves 8/98 — Published for comment **PENDING FURTHER ACTION**
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV14(a) & (c)] — Conforming amendment to admiralty changes		6/98 — Stg Comt approves 8/98 — Published for comment
[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 cmte and deferred **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV 15(c)(3)(B)] —Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	19/98 — Referred to chair, reporter, and Agenda Subc **PENDING FURTHER ACTION**
[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; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 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 ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by committee 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by comte deferred pending mass torts working group deliberations **PENDING FURTHER ACTION**
[CV23] — Standards and guidelines for litigating and settling consumer class actions	Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves **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 — including disclosure and discovery provisions (scope of discovery)	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College of Trial Lawyers; Allan Parmelee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by cmte 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by cmte; subc appointed 1/97 — Subc held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Subc 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte 3/98 — Comte approved draft 6/98 — Stg Comte approves 8/98 — Published for comment **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; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by subc and left for consideration by full cmte 3/98 — Comte determined no need has been shown to amend **COMPLETED**
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Subc. 5/97 — Reporter recommends that it be considered part of discovery project **PENDING FURTHER ACTION**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair 11/98 — rejected by committee **COMPLETED**
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Subc 11/98 — rejected by committee **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV30(d)(2)] — presumptive one day of seven hours for deposition		3/98 — Comte approved draft 6/98 — Stg Comte approves 8/98 — Published for comment **PENDING FURTHER ACTION**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study 5/97 — Reporter recommends that it be considered part of discovery project **PENDING FURTHER ACTION**
[CV34(b)] — requesting party liable for paying reasonable costs of discovery		3/98 — Comte approved draft 6/98 — Stg Comte approves 8/98 — Published for comment **PENDING FURTHER ACTION**
[CV36(a)] — To not permit false denials, in view of recent Supreme Court decisions	Joanne S. Faulkner, Esq. 3/98 (98-CV-A)	4/98 — Referred to reporter, chair, and Agenda Subc 11/98 — rejected by committee **COMPLETED**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV37(c)(1)] — Sanctions for failure to supplement discovery		3/98 — Comte approved draft 6/98 — Stg Comte approves 8/98 — Published for comment **PENDING FURTHER ACTION**
[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 Cmte 1/95 — ST Cmte 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 cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV44 — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Subc. 3/98 — Comte determined no need to amend **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**
[CV45] — Discovering party must specify a date for production far enough in advance to allow the opposing party to file objections to production	Prof. Charles Adams 10/1/98 (98-CV-G)	10/98 — Referred to chair, reporter, Agenda Subc, and Discovery Subc **PENDING FURTHER ACTION**
[CV45(d)] — Re-service of subpoena not necessary if continuance is granted and witness is provided adequate notice	William T. Terrell, Esq. 10/9/98 (98-CV-H)	12/98 — Referred to chair, reporter, and Agenda Subc **PENDING FURTHER ACTION**
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox, Esq.	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Considered by advisory cmte; recommended increased attention by Fed. Jud. Center at judicial training **COMPLETED**
[CV47(b)] — Eliminate peremptory challenges	Judge Willaim Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and Agenda Subc 11/98 — Committee declined t take action **COMPLETED**
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by cmte 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — ST Cmte approves 9/96 — Jud Conf rejected 10/96 — Committee's post-mortem discussion **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV50] — Uniform date for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Subc **PENDING FURTHER ACTION**
[CV51] — Jury instructions filed before trial	Judge Stotler (96-CV-E) Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	11/8/96 — Referred to chair 5/97 — Reporter recommends consideration of comprehensive revision 1/98 — Referred to reporter, chair, and Agenda Subc 3/98 — Comte considered 11/98 — Comte considered **PENDING FURTHER ACTION**
[CV52] — Uniform date for filing for filing post trial motion	BK Rules Cmte	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16.1 regarding "pretrial masters" 10/94 — Draft amendments considered 11/98 — Subcom appointed to study issue **DEFERRED INDEFINITELY**
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Subc 5/97 — Reporter recommends rejection **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion **PENDING FURTHER ACTION**
[CV59] — Uniform date for filing for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmteapproves publication 4/94 — Approved by committee 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 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 cmte 5/93 — Considered by cmte 4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV65(f)] — rule made applicable to copyright impoundment cases	see request on copyright	11/98 — Request for publication **PENDING FURTHER ACTION**
[CV65.1] — To amend to avoid conflict between 31 U.S.C. § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Subc 11/98 — Committee declined to act in light of earlier action taken at March 1998 meeting **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Subc. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring **PENDING FURTHER ACTION**
[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 5/97 — Reporter recommends continued monitoring **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 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Committee should handle the issue **PENDING FURTHER ACTION**
[CV77(d)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N)	9/97 — Mailed to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV77(d)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	11/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Subc. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to copyright proceedings and substitution of notice of removal for petition for removal	see request on copyright	11/98 — Request for publication **PENDING FURTHER ACTION**
[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 5/97 — Reporter recommends that it be included in next technical amendment package **PENDING FURTHER ACTION**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I)	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Subc **PENDING FURTHER ACTION**
[CV Form 1] — Standard form AO 440 should be consistent with with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Subc **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C)	5/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Subc **PENDING FURTHER ACTION**

AGENDA DOCKETING

ADVISORY COMMITTEE ON EVIDENCE RULES

Proposal	Source, Date, and Doc #	Status
[EV 101] — Scope		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 102 — Purpose and Construction		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 103] — Ruling on EV		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 103(a)] — When an *in limine* motion must be renewed at trial (earlier proposed amendment would have added a new Rule 103(e))		9/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Approved for publication by ST Cmte. 5/95 — Considered. Note revised. 9/95 — Published for public comment 4/96 — Considered 11/96 — Considered. Subcommittee appointed to draft alternative. 4/97 — Draft requested for publication 6/97 — ST Cmte. recommitted to advisory committee for further study 10/97 — Request to publish revised version 1/98 — Approved for publication by ST Cmte. 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV104] — Preliminary Questions		9/93 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 105] — Limited Admissibility		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Remainder of or Related Writings or Recorded Statements		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 106] — Admissibility of "hearsay" statement to correct a misimpression arising from admission of part of a record	Prof. Daniel Capra (4/97)	4/97 — Reporter to determine whether any amendment is appropriate 10/97 — No action necessary **COMPLETED**
[EV 201] — Judicial Notice of Adjudicative Facts		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to amend **COMPLETED**
[EV 201(g)] — Judicial Notice of Adjudicative Facts		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided to take no action **DEFERRED INDEFINITELY**
[EV 301] — Presumptions in General Civil Actions and Proceedings. (Applies to evidentiary presumptions but not substantive presumptions.)		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
[EV 302] — Applicability of State Law in Civil Actions and Proceedings		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 401] — Definition of "Relevant Evidence"		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 402] — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 403] — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 404] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Sen. Hatch S.3, § 503 (1/97)(dealing with 404(a)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Considered with EV 405 as alternative to EV 413-415 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Recommend publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **PENDING FURTHER ACTION**
[EV 404(b)] — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other crimes, wrongs, or acts. (Uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.)	Sen. Hatch S.3, § 713 (1/97)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 10/94 — Discussed 11/96 — Considered and rejected any amendment 4/97 — Considered 6/97 — Stotler letter to Hatch on S.3 10/97 — Proposed amendment in the Omnibus Crime Bill rejected **COMPLETED**
[EV 405] — Methods of Proving Character. (Proof in sexual misconduct cases.)		9/93 — Considered 5/94 — Considered 10/94 — Considered with EV 404 as alternative to EV 413-415 **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 406] — Habit; Routine Practice		10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. **COMPLETED**
[EV 407] — Subsequent Remedial Measures. (Extend exclusionary principle to product liability actions, and clarify that the rule applies only to measures taken after injury or harm caused by a routine event.)	Subcmte. reviewed possibility of amending (Fall 1991)	4/92 — Considered and rejected by CR Rules Cmte. 9/93 — Considered 5/94 — Considered 10/94 — Considered 5/95 — Considered 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Approved & submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Enacted **COMPLETED**
[EV 408] — Compromise and Offers to Compromise		9/93 — Considered 5/94 — Considered 1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 409] — Payment of Medical and Similar Expenses		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
EV 410] — Inadmissibility of Pleas, Plea Discussions, and Related Statements		9/93 — Considered and recommended for CR Rules Cmte. **COMPLETED**
[EV 411] — Liability Insurance		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 412] — Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 10/92 — Considered by CR Rules Cmte. 10/92 — Considered by CV Rules Cmte. 12/92 — Published 5/93 — Public Hearing, Considered by EV Cmte. 7/93 — Approved by ST Cmte. 9/93 — Approved by Jud. Conf. 4/94 — Recommitted by Sup. Ct. with a change 9/94 — Sec. 40140 of the Violent Crime Control and Law Enforcement Act of 1994 (superseding Sup. Ct. action) 12/94 — Effective **COMPLETED**
[EV 413] — Evidence of Similar Crimes in Sexual Assault Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 414] — Evidence of Similar Crimes in Child Molestation Cases		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 415] — Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation		5/94 — Considered 7/94 — Considered by ST Cmte. 9/94 — Added by legislation 1/95 — Considered 1/95 — Reported to but disregarded by Congress 7/95 — Effective **COMPLETED**
[EV 501] — General Rule. (Guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors be adequately protected in Federal court proceedings.)	42 U.S.C., § 13942(c) (1996)	10/94 — Considered 1/95 — Considered 11/96 — Considered 1/97 — Considered by ST Cmte. 3/97 — Considered by Jud. Conf. 4/97 — Reported to Congress **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 501] — Privileges, including extending the same attorney client privilege to in-house counsel as to outside counsel		11/96 — Decided not to take action 10/97 — Rejected proposed amendment to extend the same privilege to in-house counsel as to outside counsel 10/98 — Subcomte appointed to study the issue **PENDING FURTHER ACTION**
[EV 501] Parent/Child Privilege	Proposed Legislation	4/98 — Considered; draft statement in opposition prepared
[EV 601] — General Rule of Competency		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 602] — Lack of Personal Knowledge		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 603] — Oath or Affirmation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 604] — Interpreters		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 605] — Competency of Judge as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 606] — Competency of Juror as Witness		9/93 — Considered 10/94 — Decided not to amend (Comprehensive Review) 1/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 607] —Who May Impeach		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 608] — Evidence of Character and Conduct of Witness		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 609] — Impeachment by EV of Conviction of Crime. See 404(b)		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Declined to act **COMPLETED**
[EV 609(a) — Amend to include the conjunction "or" in place of "and" to avoid confusion.	Victor Mroczka 4/98 (98-EV-A)	5/98 — Referred to chair and reporter for consideration 10/98 — Comte declined to act **COMPLETED**
[EV 610] — Religious Beliefs or Opinions		5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611] — Mode and Order of Interrogation and Presentation		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 611(b)] — Provide scope of cross-examination not be limited by subject matter of the direct		4/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Decided not to proceed **COMPLETED**
[EV 612] — Writing Used to Refresh Memory		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 613] — Prior Statements of Witnesses		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 614] — Calling and Interrogation of Witnesses by Court		9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment **COMPLETED**
[EV 615] — Exclusion of Witnesses. (Statute guarantees victims the right to be present at trial under certain circumstances and places some limits on rule, which requires sequestration of witnesses. Explore relationship between rule and the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997 passed in 1996.)	42 U.S.C., § 10606 (1990)	9/93 — Considered 5/94 — Decided not to amend (Comprehensive Review) 6/94 — Approved for publication by ST Cmte. 9/94 — Published for public comment 11/96 — Considered 4/97 — Submitted for approval without publication 6/97 — Approved by ST Cmte. 9/97 — Approved by Jud. Conf. 4/98 — Sup Ct approved **COMPLETED**
[EV 615] — Exclusion of Witnesses	Kennedy-Leahy Bill (S. 1081)	10/97 — Response to legislative proposal considered; members asked for any additional comments **COMPLETED**
[EV 701] — Opinion testimony by lay witnesses		10/97 — Subcmte. formed to study need for amendment 4/98 — Recommend publication 6/98 — Stg. Comte approves request to publish 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **PENDING FURTHER ACTION**
[EV 702] — Testimony by Experts	H.R. 903 and S. 79 (1997)	2/91 — Considered by CV Rules Cmte. 5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered and revised by CV and CR Rules Cmtes. 6/92 — Considered by ST Cmte. 4/93 — Considered 5/94 — Considered 10/94 — Considered 1/95 — Considered (Contract with America) 4/97 — Considered. Reporter tasked with drafting proposal. 4/97 — Stotler letters to Hatch and Hyde 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Comte approves request to publish 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[EV 703] — Bases of Opinion Testimony by Experts. (Whether rule, which permits an expert to rely on inadmissible evidence, is being used as means of improperly evading hearsay rule.)		4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 5/94 — Considered 10/94 — Considered 11/96 — Considered 4/97 — Draft proposal considered. 10/97 — Subcmte. formed to study issue further 4/98 — Recommend publication 6/98 — Stg. Comte approves request to publish 8/98 — Published for comment 10/98 — Comte considered comments and statements from witnesses **PENDING FURTHER ACTION**
[EV 705] — Disclosure of Facts or Data Underlying Expert Opinion		5/91 — Considered by CV Rules Cmte. 6/91 — Approved for publication by ST Cmte. 8/91 — Published for public comment by CV Rules Cmte. 4/92 — Considered by CV and CR Rules Committees 6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective **COMPLETED**
[EV 706] — Court Appointed Experts. (To accommodate 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.)	Carnegie (2/91)	2/91 — Tabled by CV Rules Cmte. 11/96 — Considered 4/97 — Considered. Deferred until CACM completes their study. **PENDING FURTHER ACTION**
[EV 801(a-c)] — Definitions: Statement; Declarant; Hearsay		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] — Definitions: Statements which are not hearsay. Prior statement by witness.		1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 9/95 — Published for public comment **COMPLETED**
[EV 801(d)(1)] Hearsay exception for prior consistent statements that would otherwise be admissible to rehabilitate a witness's credibility	Judge Bullock	4/98 — Considered; tabled **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[EV 801(d)(2)] — Definitions: Statements which are not hearsay. Admission by party-opponent. (*Bourjaily*)	Drafted by Prof. David Schlueter, Reporter, 4/92	4/92 — Considered and tabled by CR Rules Committee 1/95 — Considered by ST Cmte. 5/95 — Considered draft proposed 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 802] — Hearsay Rule		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(1)-(5)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(6)] — Hearsay Exceptions; Authentication by Certification (See Rule 902 for parallel change)	Roger Pauley, DOJ 6/93	9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 11/96 — Considered 4/97 — Draft prepared and considered. Subcommittee appointed for further drafting. 10/97 — Draft approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment **PENDING FURTHER ACTION**
[EV 803(7)-(23)] — Hearsay Exceptions; Availability of Declarant Immaterial		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 803(8)] — Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports.		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered regarding trustworthiness of record 11/96 — Declined to take action regarding admission on behalf of defendant **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 803(24)] — Hearsay Exceptions; Residual Exception	EV Rules Committee (5/95)	5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 10/97 — Effective **COMPLETED**
[EV 803(24)] — Hearsay Exceptions; Residual Exception (Clarify notice requirements and determine whether it is used too broadly to admit dubious evidence)		10/96 — Considered and referred to reporter for study 10/97 — Declined to act **COMPLETED**
[EV 804(a)] — Hearsay Exceptions; Declarant Unavailable: Definition of unavailability	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. for publication 1/95 — Considered and approved for publication 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(1)-(4)] — Hearsay Exceptions		10/94 — Considered 1/95 — Considered and approved for publication by ST Cmte. 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 804(b)(5)] — Hearsay Exceptions; Other exceptions		5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 10/97 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 804(b)(6)] — Hearsay Exceptions; Declarant Unavailable. (To provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence.)	Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92)	4/92 — Considered by CR Rules Cmte. 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by ST Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. **COMPLETED**
[EV 805] — Hearsay Within Hearsay		1/95 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 806] — Attacking and Supporting Credibility of Declarant. (To eliminate a comma that mistakenly appears in the current rule. Technical amendment.)	EV Rules Committee 5/95	5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 806] — To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant		11/96 — Declined to act **COMPLETED**
[EV 807] — Other Exceptions. Residual exception. The contents of Rule 803(24) and Rule 804(b)(5) have been combined to form this new rule.	EV Rules Committee 5/95	5/95 — This new rule is a combination of Rules 803(24) and 804(b)(5). 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf. 6/96 — Approved by St. Cmte. 9/96 — Approved by Jud. Conf. 10/96 — Expansion considered and rejected 4/97 — Approved by Sup. Ct. 12/97 — Effective **COMPLETED**
[EV 807] — Notice of using the provisions	Judge Edward Becker	4/96 — Considered 11/96 — Reported. Declined to act. **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 901] — Requirement of Authentication or Identification		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 902] — Self-Authentication		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 10/98 — Comte considered comments and statements from witnesses **COMPLETED**
[EV 902(6)] — Extending applicability to news wire reports	Committee member (10/98)	10/98 — to be considered when and if other changes to the rule are being considered **PENDING FURTHER ACTION**
[EV 902 (11) and (12)] — Self-Authentication of domestic and foreign records (See Rule 803(6) for consistent change)		4/96 — Considered 10/97 — Approved for publication 1/98 — Approved for publication by the ST Cmte. 8/98 — Published for comment **PENDING FURTHER ACTION**
[EV 903] — Subscribing Witness' Testimony Unnecessary		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions		9/93 — Considered 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1001] — Definitions (Cross references to automation changes)		10/97 — Considered **PENDING FURTHER ACTION**
[EV 1002] — Requirement of Original. Technical and conforming amendments.		9/93 — Considered 10/93 — Published for public comment 4/94 — Recommends Jud. Conf. make technical or conforming amendments 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1003] — Admissibility of Duplicates		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[EV 1004] — Admissibility of Other Evidence of Contents		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1005] — Public Records		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1006] — Summaries		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1007] — Testimony or Written Admission of Party		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1008] — Functions of Court and Jury		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1101] — Applicability of Rules		6/92 — Approved by ST Cmte. 9/92 — Approved by Jud. Conf. 4/93 — Approved by Sup. Ct. 12/93 — Effective 5/95 — Decided not to amend 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment 4/98 — Considered 10/98 — Reporter submits report **COMPLETED**
[EV 1102] — Amendments to permit Jud. Conf. to make technical changes	CR Rules Committee (4/92)	4/92 — Considered by CR Rules Cmte. 6/92 — Considered by ST Cmte. 9/93 — Considered 6/94 — ST Cmte. did not approve 5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**
[EV 1103] — Title		5/95 — Decided not to amend (Comprehensive Review) 7/95 — Approved for publication by ST Cmte. 9/95 — Published for public comment **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Admissibility of Videotaped Expert Testimony]	EV Rules Committee (11/96)	11/96 — Denied but will continue to monitor 1/97 — Considered by ST Cmte. **PENDING FURTHER ACTION**
[Attorney-client privilege for in-house counsel]	ABA resolution (8/97)	10/97 — Referred to chair 10/97 — Denied **COMPLETED**
[Automation] — To investigate whether the EV Rules should be amended to accommodate changes in automation and technology	EV Rules Committee (11/96)	11/96 — Considered 4/97 — Considered 4/98 — Considered **PENDING FURTHER ACTION**
[Circuit Splits] — To determine whether the circuit splits warrant amending the EV Rules		11/96 — Considered 4/97 — Considered **COMPLETED**
[Obsolete or Inaccurate Rules and Notes] — To identify where the Rules and/or notes are obsolete or inaccurate.	EV Rules Committee (11/96)	5/93 — Considered 9/93 — Considered. Cmte. did not favor updating absent rule change 11/96 — Considered 1/97 — Considered by the ST Cmte. 4/97 — Considered and forwarded to ST Cmte. 10/97 — Referred to FJC 1/98 — ST Cmte. Informed of reference to FJC **COMPLETED**
[Privileges] — To codify the federal law of privileges	EV Rules Committee (11/96)	11/96 — Denied **COMPLETED**
[Statutes Bearing on Admissibility of EV] — To amend the EV Rules to incorporate by reference all of the statutes identified, outside the EV Rules, which regulate the admissibility of EV proffered in federal court		11/96 — Considered 4/97 — Considered and denied **COMPLETED**
[Sentencing Guidelines] — Applicability of EV Rules		9/93 — Considered 11/96 — Decided to take no action **COMPLETED**

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 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98	5/98 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 5] — To allow initial appearances, arraignments, attorney status hearings, and possibly petty pleas to be taken by video conferencing.	Judge Durwood Edwards 6/98	6/98 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 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(c)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. 3/98 — Jud Conf instructs rules committees to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — Stg Comte concurs with deferral **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **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**
[CR6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte 10/97—Adv Cmte unanimously voted to oppose any reduction in grand jury size. 1/98—ST Cmte voted to recommend that the Judicial Conference oppose the legislation. 3/98 — Jud Conf concurs **COMPLETED**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by Stg Comte **PENDING FURTHER ACTION**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte 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 — Cmte 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**
[CR6 (f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and aprroved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of R. 32.2 rejection by Stg. Comte 10/98 — revised and resubmitted to stg comte for transmission to conference **PENDING FURTHER ACTION**
[CR8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter C. Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter and chair 10/97—Referred to subcom for study **PENDING FURTHER ACTION**
[CR 10] — Arraignment of detainees through video teleconferencing	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 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 10] — Defendant's presence not required		10/97 — Considered in lieu of video transmission 4/98 — Approved for publication, but deferred until completion of style project 10/98 — Considered by comte; reporter to redraft and submit at next meeting **PENDING FURTHER ACTION**
[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 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Comte **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**

Proposal	Source, Date, and Doc #	Status
[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 (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment **PENDING FURTHER ACTION**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation.
[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**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR12.2]—authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting.	10/97—Adv Cmte voted to consider draft amendment at next meeting. 4/98 — Deferred for further study of constitutional issues 10/98 — Approved draft but deferred request to publish until spring meeting **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte 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**

Proposal	Source, Date, and Doc #	Status
[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 for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 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 Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 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**
[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; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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 Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **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**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97—Adv. Cmte voted to oppose the legislation 1/98— ST Cmte expressed grave concern about any such legislation. **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 for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, 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; Judge Acker (97-CR-E); pending legislation S-3.	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED** 10/97—Adv. Cmte decided to take no action on proposal to randomly select petit and venire juries and abolish peremptory challenges. 10/97—Adv. Cmte directed reporter to prepare draft amendment equalizing preemptory challenges at 10 per side. 4/98 — Approved, subject to Stg Comte determination when to publish **PENDING FURTHER ACTION**
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by Stg Comte **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcommittee will be appointed 10/97—Subcommittee recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study 10/98 — Comte approved, but deferred request to publish until spring meeting **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[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 for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 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 cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 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 for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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 Cmte 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 Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcommittee appointed 4/96 — Rejected by subcommittee **COMPLETED**
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Deferred for further study 10/98 — Considered by comte **PENDING FURTHER ACTION**
[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 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Comte 10/98 — revised and resubmitted to stg comte for transmission to conference **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—mental examination of defendant in capital cases	An extension of a proposed amendment to CR 12.2(DOJ) at 10/97 meeting.	10/97 Adv Cmte voted to proceed with the drafting of an amendment. **PENDING FURTHER ACTION**
[CR32]—release of presentence and related reports	Request of Criminal Law Committee	10/98 — Reviewed recommendation of subcom and agreed that no rules necessary **COMPLETED**
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Comte 10/98 — revised and resubmitted to stg comte for transmission to conference **PENDING FURTHER ACTION**
[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**

Proposal	Source, Date, and Doc #	Status
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter **4/98 — Approved, but deferred until style project completed** **PENDING FURTHER ACTION**
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcommittee in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Rejected by Stg Comte 10/98 — revised and resubmitted to stg comte for transmission to conference **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 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **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 Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **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 38(e)] — Conforming amendment to CR 32.2		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Comte 10/98 — revised and resubmitted to stg comte for transmission to conference **PENDING FURTHER ACTION**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 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 Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 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 Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**
[CR 41(c)(2)(D)] — recording of oral search warrant	J. Dowd 2/98	4/98 — Tabled until study reveals need for change **DEFERRED INDEFINITELY**
[CR 43(b)] —Ssentence absent defendant	DOJ 4/92	10/92 — Subcommittee appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 43(b)] — Arraignment of detainees by video teleconferencing		10/98 — Subcomte appointed **PENDING FURTHER ACTION**
[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 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court **PENDING FURTHER ACTION**
[CR 43(c)(5) — Defendant to waive personal arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I)	10/97 — Referred to reporter and chair 4/98 — Approved for publication, but deferred until completion of style project **PENDING FURTHER ACTION**
[CR 43]—defendant to waive presence at arraignment	Mario Cano 97---	10/97—Adv Cmte voted to consider amendment (and related amendment to CR 10) at next meeting 10/98 — Comte considered; reporter to submit draft at next meeting **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 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**

Proposal	Source, Date, and Doc #	Status
[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 (e)] — Forfeiture of bond	H.R. 2134	4/98 — Opposed amendment **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf 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 Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair 4/98 — Referred to Technology Subcmte **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CR-J)	11/97 — Referred to reporter and chair **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 —Approved by Stg Comte **PENDING FURTHER ACTION**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 57] — Uniform effective date for local rules	Stg Comte meeting 12/97	4/98 — Considered an deferred for further study **PENDING FURTHER ACTION**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Committee and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct **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 Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97—Adv Cmte appointed subcom to study issues 4/98 — Considered and further study 10/98 — Comte approved proposals, but deferred request for publication until next meeting **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **COMPLETED**
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment 4/98 — Advised that Style Subc intends to complete first draft by the end of the year 12/98 — Style subcomte completes its draft **PENDING FURTHER ACTION**

Item 4

Agenda Item IV
Committee on Rules of Practice and Procedure
January 1999
Information

Federal Judicial Center Report

The Federal Judicial Center welcomes the opportunity to provide the following report of education and research projects that may be of interest to the Committee on Rules of Practice and Procedure.

I. Selected Educational Programs

A. Federal Judicial Television Network

The FJTN refers to the satellite antennas that the Administrative Office is installing in federal courthouses across the country to receive educational and informational broadcasts from the Center's main television studio and from a second "automated studio" for classroom-type instruction, that uses fewer video technicians. As of mid-October, downlinks have been installed in more than 160 court locations, with installations in progress at 20 additional sites.

The Center's program schedule in 1998 featured some twenty-five original programs that range from interactive teletraining sessions to informational broadcasts to alert judges and court staff to job-related developments. In September, shortly after new law clerks begin their appointments, the Center aired a two-day *Orientation Program for Law Clerks* over the FJTN. Our broadcast schedule for court personnel included programs on leadership and project management for all court staff and an educational television magazine. The Center publishes a periodic program guide, the *FJTN Bulletin*, that lists the proposed audience, broadcast time, date, and information about upcoming programs of the Center and the AO. The schedule is also available at the Center's J-Net site.

B. Judges

The Center provides a full range of orientation and continuing education programs for judges. Six phase-one video orientations are offered this year: three for district judges, one for bankruptcy judges, and two for magistrate judges. In addition, three phase two orientation programs are offered: one each for district, bankruptcy, and magistrate judges.

Continuing education programs in 1998 include circuit-based workshops for court of appeals and district judges, national workshops for magistrate and bankruptcy judges, and special-focus workshops on subjects ranging from employment law and intellectual property law (for Article III judges) to mediation and settlement (for magistrate and bankruptcy judges). Wherever possible, our special-focus programs are collaborations with

academic institutions, such as, this year, the University of California at Berkeley and New York University. Following is a small sampling of Center training programs for judges.

1. Workshop on Section 1983 Litigation for District and Magistrate Judges. This workshop, scheduled for fifty district and magistrate judges in July, will allow concentrated study of Section 1983 litigation. Separate sessions will cover Supreme Court cases, Fourth Amendment claims, retaliation claims, absolute and qualified immunity, prisoner litigation, municipal and superior officer liability, and substantive due process.

2. Presentation Skills for Judges. Two programs will be offered this summer to enhance the teaching, presentation, and seminar leadership skills of the twenty-five judges who will attend. The program includes instruction about the adult learning process and requires participants to develop, prepare, give, and receive a group critique of a brief presentation.

C. Court Staff

In addition to the training offered through the FJTN, the Center will use seminars, workshops, local court programs and computer- and audio-based conferences to provide educational programs for court staff. Highlights of some of the programs scheduled through mid-1999 include:

- informing new probation and pretrial services officers and court training specialists about their roles and responsibilities;
- preparing mid-level court employees to assume top management positions through our leadership development programs;
- helping court managers do more with less by using modern techniques for maximizing productivity;
- explaining the skills and techniques of project management to mid-level managers; and
- teaching interviewing skills to managers.

1. Leadership Programs. The Center's multi-phased, multi-year leadership programs prepare court managers for positions of increasing leadership responsibility. The fifth class of the Leadership Development Program for Probation and Pretrial Services Officers will commence in 1999.

II. Selected Research and Planning Projects

Following are examples of the more than forty active research projects that are currently under way and several which have been completed since our last report to this Committee:

A. New Projects

1. State court practices in capital cases with court-ordered mental examinations. The Advisory Committee on Criminal Rules is considering an amendment to Rule 12.2 of the Federal Rules of Criminal Procedure (Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition). The Advisory Committee is interested in learning more about how certain states with the death penalty handle court-ordered mental examinations. The Advisory Committee has asked us to examine and report on mental examination disclosure procedures and practices in six states: California, Florida, Georgia, Texas, Alabama, and Ohio. We expect to have the results of this study available for the Advisory Committee's spring meeting.

2. Survey of attorney conduct in bankruptcy courts. At its October 1998 meeting, the Advisory Committee on Bankruptcy Rules asked the Center to conduct a survey of attorney conduct rules in the bankruptcy courts. This request is an outgrowth of a similar study we conducted of the district court rules on attorney conduct for this Committee. In addition to surveying bankruptcy judges, the study will seek the views of a sample of bankruptcy attorneys who are members of the Business Bankruptcy Subcommittee of the ABA and the National Association of Bankruptcy Trustees. The results of the study will be presented to the Advisory Committee at its March 1999 meeting.

3. Evaluation of digital recording technology. We have been asked by the Committee on Court Administration and Case Management (CACM) to conduct a one-year study of the Judicial Conference-approved pilot of the use of digital audio recording equipment as a means of taking the official record of court proceedings. CACM has selected twelve sites for participation in the pilot study. A total of eighteen courtrooms and one judge's chambers, across the twelve pilot sites, have now been equipped with digital recording technology. The purpose of the study is to inform CACM's decision whether to recommend to the Judicial Conference that digital audio recording be added as an approved method of taking the official record in federal courts as required by 28 U.S.C. §753(b).

The study will continue through March 1999 and our report will be presented to CACM at its June 1999 meeting.

4. Current judicial practices involving expert evidence. As a follow-up to the Center's1994 study on the subject, we are undertaking a survey of federal judges and attorneys to determine current practices and concerns regarding the use of expert testimony in federal civil litigation. We will compare findings of the current survey to those made in 1994 to assess changes in judicial practices since the decision by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993).* The attorneys' survey will explore a complementary set of issues, as well as changes in the use of consulting (nontestifying) experts. The results of the survey will be used to inform current debates regarding expert evidence and will be released next spring with the publication of the new edition of the Center's *Reference Manual on Scientific Evidence.*

5. Changes in summary judgement practice. The Research Division is developing a study intended to identify changes in summary judgment practice over the past twenty years. Docket sheets are being examined for evidence of summary judgment activity for five time periods between 1975 and 1995 in six large federal district courts (Eastern District of Pennsylvania, District of Maryland, Southern District of New York, Northern District of Illinois, Central District of California, and the Eastern District of Louisiana). Changes associated with the trilogy of summary judgment cases decided by the Supreme Court in 1986, and changes within types of cases representing certain causes of action (e.g., employment discrimination, product liability) are of particular interest.

B. Recently Completed Projects

1. Death Penalty Law Clerks in the Ninth and Tenth Circuits. At the request of the Ninth and Tenth Circuits and in coordination with the Judicial Conference's Committee on Court Administration and Case Management (CACM) and the Judicial Resources Committee, the Center conducted and completed a study of the death penalty law clerks allocated to the Ninth and Tenth Circuits. The results were presented at the spring 1998 meetings of both Committees. After considerable discussion, CACM recommended that the Judicial Resources Committee authorize all of the circuit to establish death penalty law clerk positions where needed.

2. Ethical problems in mediation in bankruptcy cases. In response to recent expansion of mediation in bankruptcy courts, the Advisory Committee on Bankruptcy Rules asked the Center to conduct a nationwide survey to assess the need for national rules. Our findings were reported to the Committee at its March 1998 meeting and the study report was published this summer. Our report focused on ethical problems and found a very low incidence of breaches of confidentiality, mediator conflicts of interest, and *ex parte* contacts between mediators and judges.

C. Ongoing Projects

1. Assistance to the mass torts work group. The Center has been assisting the working group on mass torts that has been chaired by Judge Anthony Scirica (3rd Cir.). Over the past months, the work group has held hearings and conferences on Rule 23 to explore a wide range of possible measures to address the mass tort problems, including rule changes and legislation.

The Research staff drafted a list of issues, many of which were pursued by the work group. We also conducted a literature review of issues relevant to the work group and along with Professor Elizabeth Gibson, of the Duke University School of Law, we conducted case studies of the use of bankruptcy in mass torts. Results of our work has already been incorporated in the work group's draft report which is due to be delivered to the Advisory Committee on Civil Rules in March of next year. At this point, it is our understanding that the Chief Justice has authorized the creation of a task force on mass torts to continue the efforts of the work group. We expect to continue to be involved in the work of the task force. Our involvement builds on prior Center efforts in the area of mass torts.

2. ADR training assistance and technical support to the federal district and state courts of Alaska. The U.S. District Court for the District of Alaska and the Alaska state courts developed and conducted a joint federal-state ADR training program for all judges in Alaska. The district court asked the Center to assist in this effort. Research staff provided advice on program design and implementation. The Judicial Education Division also provided "local program" training funds as a supplement to funds provided by the Alaska court system, the U.S. District Court, and the State Justice Institute.

The program took place in early October near Anchorage. Approximately 70 judges attended, including nearly all Alaska state court judges and nearly all federal district, magistrate, and bankruptcy judges in Alaska. Topics ranged from selecting cases for ADR referral to handling ethical problems.

The program had two purposes. The first was to train the judges in mediation techniques so they can make better-informed decisions on referrals to ADR. A related objective was to provide the participating judges with mediation skills that might be used in judicial settlement conferences. The program's second purpose was to introduce the judges to some of the issues that arise in managing cases with respect to ADR.

The program is the first of its kind to have incorporated mediation skills and ADR case management.

3. Assistance to help courts respond to new Alternative Dispute Resolution Act requirements. In October, the President signed the Alternative Dispute Resolution Act of 1998, which authorizes use of ADR in civil cases and bankruptcy adversary proceedings and requires each federal district court to make available at least one ADR process. The Act also requires that courts, in establishing their ADR programs, adopt local rules on a number of matters, including procedures for disqualifying ADR neutrals and ensuring confidentiality of the ADR proceedings. Recognizing that many courts established ADR programs under the Civil Justice Reform Act, the Act instructs those courts to examine the effectiveness of their programs. The Act authorizes the Center and the Administrative Office to assist the courts in implementing the Act. The Center will be considering, in consultation with the courts, relevant Judicial Conference committees, and the Administrative Office, how best to meet the courts' research and education needs in this rapidly developing area. An inter-divisional working group has been created within the Center for this purpose.

4. Assistance to multi-state mediation project. In cooperation with five state court systems and several universities, the Center is participating in a Multi-State Mediation Project, designed to study different modes of delivering mediation services. The project is examining six methods for providing mediation, including provision of mediation through mediators on the court staff, through private mediation centers on contract to the court, and through volunteer attorneys from the private bar.

5. National Institute of Justice. We are working with staff of the National Institute of Justice to develop the agenda for the National Conference on Science and Law, to be convened in April, 1999. This conference will focus on emerging problems of scientific evidence in criminal litigation and is co-sponsored by the American Bar Association, American Academy of Forensic Sciences, and the National Academy of

Sciences. The Center's official participation in this conference will be in the role of a collaborator.

6. American Association for the Advancement of Science and the American Bar Association. The Center assisted a joint committee of the American Association for the Advancement of Science and the American Bar Association in preparing a proposal for a demonstration project that will link judges' requests for assistance in identifying individuals to serve as court-appointed experts with scientists and engineers nominated by professional societies. This proposal was endorsed by Associate Justice Breyer in a speech at the past annual meeting of the American Association for the Advancement of Sciences. The Center will evaluate the implementation of the demonstration project in federal courts.

7. National Academy of Sciences. The Center is working with staff members of the National Academy of Sciences to develop a Program in Science, Technology, and Law. This program anticipates bringing together members of the law and science communities on a regular basis to explore common interests and tensions that affect the intersection of science and law. The National Academy of Sciences recently approved the program and efforts are underway to develop the agenda for the first of three annual meetings.

8. National Center for State Courts. We have had a long record of cooperation and collaboration with the National Center for State Courts. In our most recent effort, the Center has agreed to develop a coordinated set of state-federal jury studies based on a proposal by Thomas Munsterman of the National Center for State Courts and a consortium of law professors and social scientists. The studies are intended to build on existing research on jury selection and functioning, with an emphasis on exploring ways of improving the ability of juries to consider complex information.

Item 5

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

DATE: December 7, 1998

TO: Judge Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Will Garwood, Chair
Advisory Committee on Appellate Rules

Detailed information about the recent and future activities of the Advisory Committee on Appellate Rules can be found in the minutes of the Committee's October 1998 meeting and in the Committee's docket, both of which are attached to this report. At this time, the Committee is not seeking Standing Committee action on any proposals.

I wish to report on four matters:

1. Amendments Approved for Later Submission to the Standing Committee. As you may recall, the Advisory Committee has determined that, barring an emergency, no proposed amendments to FRAP will be forwarded to the Standing Committee until the bench and bar have had an opportunity to become accustomed to the restylized rules. However, the Committee is continuing to consider and approve proposed amendments. All amendments approved by the Committee will be held until they are presented as a group to the Standing Committee, most likely at its January 2000 meeting.

At the Advisory Committee's October meeting, the following amendments were approved:

a. An amendment that would abrogate FRAP 1(b). FRAP 1(b) now states that "[t]hese rules do not extend or limit the jurisdiction of the court of appeals." That is unlikely to remain true, give that the Supreme Court now has authority to use FRAP (as well as the other rules of practice and procedure) to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291 and to authorize interlocutory appeals that are not already provided for by 28 U.S.C. § 1292.

b. An amendment to FRAP 4(a)(4) that would clarify that the time to appeal an order that amends a judgment runs from the later of the entry of the amended judgment or the entry of the order directing that the judgment be amended.

c. An amendment to FRAP 4(a)(7) that would eliminate the requirement that an order denying one of the post-judgment motions listed in FRAP 4(a)(4)(A) must be entered on a separate document in compliance with FRCP 58.

d. An amendment to FRAP 4(a)(7) that would permit (but not require) a party to appeal an order or judgment that is required to be entered on a separate document in compliance with FRCP 58 but that has not yet been so entered.

e. An amendment to FRAP 4(a)(5)(A)(ii) that would clarify that a district court may extend the time to file a notice of appeal in a civil case for either excusable neglect or good cause, regardless of whether the extension is sought before or during the 30 days after the original deadline for appealing expires. At present, some circuits hold that only the good cause standard applies to requests made before the original deadline expires, and only the excusable neglect standard applies thereafter.

f. An amendment to FRAP 15(f) that would provide that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing (or similar petition) with the agency, any petition to review or application to enforce that agency order will be held in abeyance by the court and become effective when the agency disposes of the last such finality-blocking petition. The amendment would align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal under FRAP 4(a)(4)(B)(i).

g. An amendment to FRAP 26 that would provide that intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over. At present, the demarcating line in FRAP is 7 days, while the demarcating line in the FRCP and FRCrP is 11 days. The amendment would ensure that deadlines are computed in the same way under all three sets of rules. We anticipate that, at our April 1999 meeting, the Advisory Committee will approve amendments that would shorten a few of the deadlines in FRAP to take into account the new method of calculation.

The full text of these amendments, as well as the accompanying Committee Notes, can be found in the appendix to the minutes of the Committee's October meeting.

2. Use of the Term "Advisory Committee Note." At the June 1998 meeting of the Standing Committee, Prof. Coquillette informed the Reporters for the Advisory Committees that they should use the term "Committee Note," rather than "Advisory Committee Note," in drafting

amendments and notes. The Advisory Committee on Appellate Rules will accede to the request, but members of the Committee asked me to inform the Standing Committee that they would prefer to continue to use the term "Advisory Committee Note," which, in their view, is more accurate substantively and is almost universally used within the legal profession. *See, e.g.*, Letter from Chief Justice William H. Rehnquist to Speaker of the House Newt Gingrich (Apr. 24, 1998) (transmitting amendments to FRAP and accompanying "Advisory Committee notes").

3. Amendment to FRAP 47(a). At its April 1998 meeting, the Advisory Committee approved an amendment to FRAP 47(a)(1) that would provide that a local rule may not be enforced before it is received by the AO, and that all changes to local rules must take effect on December 1, except in cases of "immediate need." At the June 1998 meeting of the Standing Committee, Judge Stotler asked us to share with the other advisory committees the text of the amendment and committee note, as well as the relevant portion of our minutes. We have done so.

To date, we have received input on the amendment from only the Advisory Committee on Bankruptcy Rules. That Committee expressed the view that (a) the enforcement of local rules should be contingent upon their being *published* in a manner prescribed by the AO (rather than upon their being *received* by the AO), and (b) changes to local rules should be effective whenever a majority of a court's judges so desire, whether or not there is "immediate need" for the change.

The Advisory Committee on Appellate Rules discussed the views of the Advisory Committee on Bankruptcy Rules and respectfully disagrees. A "publication" requirement would not accomplish the goal of creating a single national repository for all local rules currently in force in the federal courts and would not comply with 28 U.S.C. § 2071(d) (which expressly requires that local rules be *provided* to the AO, and not merely that they be published as the AO directs). Moreover, the strict "immediate need" standard (which is borrowed from 28 U.S.C. § 2071(e)) is necessary to bring about uniformity; permitting local rules to take effect on a date other than December 1 at the whim of a majority of a court's judges would not appreciably improve the current situation.

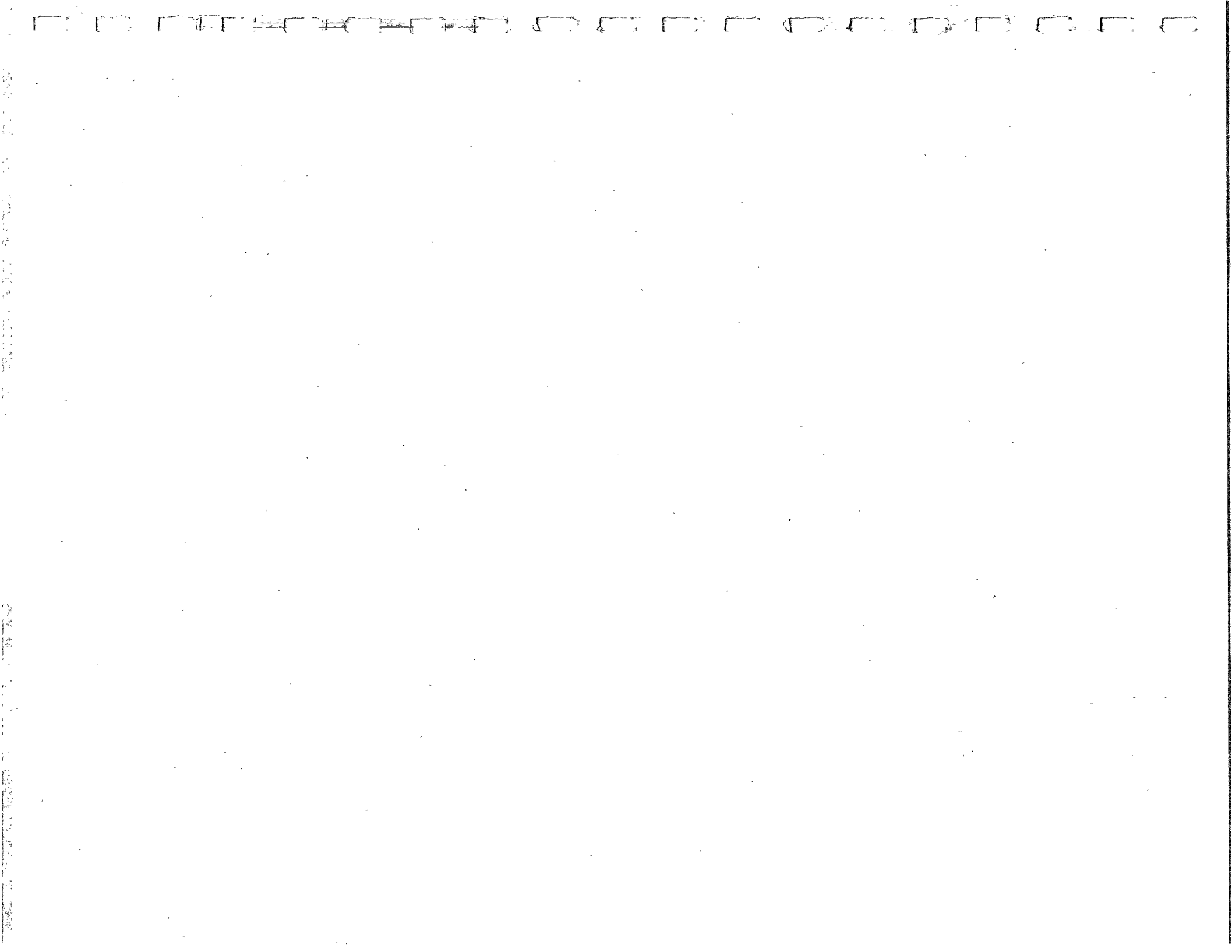
4. Disclosure and Recusal Obligations. We were informed by the AO that the Committee on Codes of Conduct is considering various proposals for assisting judges in meeting their disclosure and recusal obligations, including the possible incorporation of a rule similar to FRAP 26.1 in the FRCP, FRCrP, and FRBP. We were asked for our "preliminary views" regarding this proposal. The Advisory Committee briefly discussed the proposal and, on balance, thought it worthwhile. Also, the Advisory Committee discussed the possibility of broadening FRAP 26.1. Although there was consensus that FRAP 26.1 is far from ideal — among other problems, the recusal statute (28 U.S.C § 455) applies to a much broader array of financial interests than does FRAP 26.1 — members of the Advisory Committee also recognized that, as has proven true in the past, attempting to broaden FRAP 26.1 would involve an extremely difficult drafting exercise. If the Standing Committee decides that a provision similar to FRAP 26.1 should be included in all of the rules of practice and procedure, the question of broadening FRAP 26.1 would perhaps be best addressed by an ad hoc committee comprised of members of all of the advisory committees.

Advisory Committee on Appellate Rules
Table of Agenda Items — Revised December 1998

FRAP Item	Proposal	Source	Current Status
95-03	Amend FRAP 15(f) to conform to new FRAP 4(a)(4)(B)(i).	Hon. Stephen F. Williams (CADC)	Awaiting initial discussion Retained in part on agenda with medium priority 9/97 Draft approved 10/98 for submission to Standing Committee after 12/1/98
95-04	Amend computation of time to conform to Civil Rules method. (Related to No. 97-1.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee after 12/1/98
95-07	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 10/98 for submission to Standing Committee after 12/1/98
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to No. 95-4.)	Advisory Committee & Los Angeles County Bar Assn.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee after 12/1/98
97-05	Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-09	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98

FRAP Item	Proposal	Source	Current Status
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.	Standing Committee	Awaiting initial discussion Retained on agenda with low priority 9/97 Discussed and retained on agenda 4/98
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with high priority 9/97 Draft approved 10/98 for submission to Standing Committee after 12/1/98
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion Draft approved 9/97 for submission to Standing Committee after 12/1/98
97-22	Amend FRAP 34(a)(1) to establish a uniform federal rule governing party statements as to whether oral argument should or should not be permitted.	Advisory Committee	Awaiting initial discussion Retained on agenda with medium priority 9/97
97-30	Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with high priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-32	Amend FRAP 12(a) to require the appellate caption to identify only the parties to the appeal.	Methods Analysis Program	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from appellate clerks
97-33	Amend FRAP 3(c) to require that an appellant file with the notice of appeal a statement identifying all appellants, all appellees, and counsel for all represented parties.	Methods Analysis Program	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from appellate clerks

FRAP Item	Proposal	Source	Current Status
97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Solicitor General Waxman	Awaiting initial discussion Draft approved 4/98 for submission to Standing Committee after 12/1/98
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office.	Standing Committee	Awaiting initial discussion Draft approved 4/98 for submission to Standing Committee after 12/1/98
98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A). (Related to former item No. 95-08)	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee after 12/1/98
98-03	Amend FRAP 29(e) to increase the time for amici to file their briefs and to clarify the status of local rules on amicus briefs, and amend FRAP 31(a)(1) so that the time to file a reply brief runs from the filing of the amicus brief rather than the service of the appellee's brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice, et al.
98-06	Amend FRAP 4(b)(3)(A) to clarify whether and to extent the filing of a FRCrP 35(c) motion for correction of sentence tolls the time to file appeal.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice
98-07	Amend FRAP 22(a) to permit circuit judges to deny applications for writs of habeas corpus.	Hon. Kenneth F. Ripple (CA7)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice
98-08	Amend unspecified rules to provide for appeals from Tax Court decisions that meet the criteria of FRCP 54(b).	Hon. Richard A. Posner (CA7)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting report from Department of Justice



DRAFT

Minutes of the Fall 1998 Meeting of the
Advisory Committee on Appellate Rules
October 15 & 16, 1998
New Orleans, Louisiana

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 15, 1998, at 8:30 a.m. at Le Meridien Hotel in New Orleans, Louisiana. The following Advisory Committee members were present: Judge Samuel A. Alito, Jr., Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, and Mr. Michael J. Meehan. Mr. Douglas N. Letter, Appellate Staff, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Judge Phyllis A. Kravitch was present as the liaison from the Standing Committee, and Mr. Charles R. "Fritz" Fulbruge, III, was present as the liaison from the appellate clerks. Also present were Mr. Luther T. Munford, whose term as a member of the Advisory Committee expired on October 1, 1998, as well as Mr. John K. Rabiej and Mr. Mark D. Shapiro from the Administrative Office and Ms. Judith McKenna from the Federal Judicial Center.

Judge Garwood announced that Mr. W. Thomas McGough, Jr., had been appointed to the Committee to replace Mr. Munford, but was unable to attend the meeting because he was in trial. Judge Garwood also announced that Judge Anthony J. Scirica, the newly appointed Chair of the Standing Committee, was unable to attend the meeting because of an illness in his family.

II. Approval of Minutes of April 1998 Meeting

The minutes of the April 1998 meeting were approved with the following changes:

1. In the third line of the fourth full paragraph on page 4, change "sixth" to "six."

2. In the last line of the third full paragraph on page 26, change "that" to "than."

3. Change all references to "Advisory Committee Note" to "Committee Note."

The last change, suggested by the Reporter, was the subject of substantial discussion. The Reporter said that, at the last meeting of the Standing Committee, Prof. Daniel R. Coquillette (the Standing Committee's reporter) had informed the reporters for the advisory committees that Judge Alicemarie H. Stotler (who then chaired the Standing Committee) had directed that the term "Committee Note" be used instead of "Advisory Committee Note." According to Prof. Coquillette, Judge Stotler believes that use of "Committee Note" better reflects the fact that

notes are produced through the joint efforts of the advisory committees and the Standing Committee, and not by the advisory committees alone.

Several members objected and said that they preferred "Advisory Committee Note." Some members pointed out that throughout the profession — in courts, in law offices, and in law school classrooms — reference is made to "Advisory Committee Notes," not to "Committee Notes." Other members pointed out that most written resources — such as judicial opinions, statutory and rule compilations, treatises, and law school casebooks — also refer to "Advisory Committee Notes."

Mr. Rabiej said that an additional reason for using "Committee Note" is that it permits the Standing Committee to make changes to a note, with the agreement of the chair and reporter of the relevant advisory committee, without requiring the amended note to be approved by the entire advisory committee. A member responded that, in that circumstance, the chair and reporter are acting *on behalf of* the advisory committee, and thus the note can still be considered the advisory committee's. After further discussion, the Committee agreed to accede to the request of the Standing Committee, but directed that its objections be noted on the record.

III. Report on June 1998 Meeting of Standing Committee

Judge Garwood asked the Reporter to report on the Standing Committee's June 1998 meeting.

The Reporter said that Judge Garwood had informed the Standing Committee that this Committee had approved a number of amendments to the Federal Rules of Appellate Procedure ("FRAP") — and that the amendments and accompanying Committee Notes appeared as an appendix to the draft minutes of this Committee's April 1998 meeting. Judge Garwood once again told the Standing Committee that this Committee will not seek permission to publish proposed amendments until January 2000, so that the bench and bar can become accustomed to the restylized rules before being asked to comment on amendments to those rules.

The Reporter also said that he had described for the Standing Committee the amendment to Rule 47(a) that had been approved by this Committee. Under that amendment, changes to local rules would take effect on December 1, unless there was an immediate need for a change. In addition, no amendment to local rules could be enforced until it had first been received by the Administrative Office ("AO"). The Reporter informed the Standing Committee that this Committee might revisit the issue of whether the ability to enforce a change in a local rule should be contingent upon the *receipt* of that change by the AO, in light of the AO's fears that it might be overwhelmed with inquiries from attorneys.

The Reporter mentioned that Judge Stotler had asked him to distribute the amendment to Rule 47(a) to the other reporters. The Reporter said that he had done so, and that the Advisory Committee on Bankruptcy Rules had already reviewed the amendment and lodged objections to

it. The Reporter distributed an October 12, 1998 letter from Prof. Alan N. Resnick describing those objections. The Bankruptcy Committee recommends that the ability to enforce local rules be contingent upon their being *published* in a manner prescribed by the AO (rather than upon their being *received* by the A.O.) and that changes to local rules be permitted to take effect on a date other than December 1 if a majority of the court's judges desire that result (rather than only upon immediate need).

Members expressed disagreement with the Bankruptcy Committee on both points. First, members pointed out that the purpose of blocking enforcement until receipt by the AO was to ensure that there was a single national repository for all local rules currently in force in the federal courts; a "publication" requirement would not accomplish that goal. One member mentioned that, in addition, courts are required *by statute* to provide local rules to the AO, and not merely to publish local rules as the AO directs. *See* 28 U.S.C. § 2071(d). Another member argued that the AO's concerns about being inundated with calls from attorneys wondering whether new local rules had been received could easily be alleviated if the AO would simply post all local rules on its website. Mr. Rabiej agreed, but said that some technical issues would have to be worked out before the AO would be prepared to do that.

As to the Bankruptcy Committee's suggestion that changes in local rules be permitted to take effect on some date other than December 1 upon the mere agreement of a majority of a court's judges, members argued that the purpose of the amendment was to bring about uniformity and that a strict "immediate need" standard was necessary to accomplish that goal. One member pointed out that the "immediate need" standard was a familiar one, having been borrowed from 28 U.S.C. § 2071(e).

The Committee briefly discussed other possible changes to the amendment to Rule 47(a), but ultimately decided to await the input of the other advisory committees.

The Reporter, finishing his report on the Standing Committee's June 1998 meeting, said that he had informed the Standing Committee that this Committee supported the shortening of the Rules Enabling Act ("REA") process and had no objection to permitting comments on proposed rules to be sent to the AO electronically. The Reporter also told the Standing Committee that, while this Committee would contribute members to an ad hoc committee to draft Federal Rules of Attorney Conduct, this Committee remained skeptical that any changes in Rule 46 were necessary, was troubled about the ad hoc committee's lack of expertise regarding legal ethics, and was concerned that the ad hoc committee take seriously the limits on its authority under the REA. Finally, the Reporter informed the Standing Committee that this Committee had removed from its study agenda the topic of unpublished judicial opinions.

The Committee next turned to the action items on its agenda.

IV. Action Items

A. Item No. 95-03 (FRAP 15(f) — premature petitions to review agency action)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention

(f) **Petition or Application Filed Before Agency Action Becomes Final.** A petition for review or application to enforce filed after an agency announces or enters an order but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final (and thus non-appealable) becomes effective to appeal or seek enforcement of such order upon agency disposition of the last such petition for rehearing, reopening, or reconsideration.

Committee Note

Subdivision (f). Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeals. Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-final and hence non-appealable. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g.*, *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f) provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition.

Subdivision (f) is intended to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-final (and hence non-appealable) by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam); *see also Chu v. INS*, 875 F.2d 777, 781 (9th Cir. 1989), *overruled on other grounds by Pablo v. INS*, 72 F.3d 110 (9th Cir. 1995); *West Penn Power Co. v. EPA*, 860 F.2d 581, 588 (3d Cir. 1988); *Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review with the court after the petition for rehearing is denied by the agency, that party will find itself shut out of court: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (f) removes this trap.

Mr. Letter said that he had talked with Judge Stephen F. Williams, who had initially proposed this change to Rule 15, and to Mark J. Langer, the Clerk of the D.C. Circuit, as well as to the agencies most often involved in litigation in federal court. Mr. Letter said that the consensus of all of those with whom he spoke was that the procedural trap that the amendment seeks to remove does not arise frequently, but that the amendment would cause no harm and might do some good. The only concern that had been expressed was Mr. Langer's concern that the statistics regarding the size and age of the D.C. Circuit's caseload would look worse.

A member said that he opposed the amendment, given that there was no hue and cry for change.

Another member expressed concern about whether the amendment was within the authority of this Committee under the REA. He pointed out that Rule 4(a)(4)(B)(i) was designed to eliminate a procedural trap created by *Rule 4 itself*. By contrast, the procedural trap that the amendment to Rule 15 purports to eliminate was created because the D.C. Circuit, in interpreting the *governing statutes*, had concluded that a premature petition to review agency action was a nullity. If the D.C. Circuit is correct, then the amendment represents an attempt to use FRAP to effectively amend those governing statutes. A couple members responded that, while that was true, the Supreme Court has authority under the REA to promulgate *procedural* rules that supercede statutes, which is precisely what is being proposed here.

Several members spoke in favor of the proposed amendment, arguing, in essence, that the procedural trap addressed by the amendment undoubtedly exists — although it doesn't seem to arise frequently — and that there was no "downside" to eliminating it.

A member moved that Item No. 95-03 be removed from the Committee's study agenda. The motion was seconded. The motion failed (2-5).

A member suggested stylistic changes to the proposed amendment. The Reporter also informed the Committee of other stylistic changes that had been proposed by the Subcommittee on Style. After further discussion and redrafting, it was moved and seconded that the following amendment to Rule 15 be approved:

> **(f)** **Petition or Application Filed Before Agency Action Becomes Final.** If a petition for review or application to enforce is filed after an agency announces or enters its order — but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final and non-appealable — the petition or application becomes effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

The motion carried (5-2).

By consensus, the Committee accepted the following suggestions of the Subcommittee on Style with respect to the Committee Note:

1. In the third line of the first paragraph, change "appeals" to "appeal."

2. In the first line of the second paragraph, change "intended" to "designed."

3. In the ninth line of the second paragraph, delete "with the court."

4. In the tenth line of the second paragraph, change "shut out of court" to "out of time."

By consensus, the Committee rejected the suggestion of the Subcommittee on Style that the word "trap" at the very end of the Note be changed to "problem." The Committee thought that "trap" was clearer, as it more clearly communicated that it was referring to the same "trap" mentioned in the first sentence of the second paragraph.

B. Item No. 95-07 (FRAP 4(a)(5) — application of both "good cause" and "excusable neglect" standards to extensions of time to appeal)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(5) **Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) <u>regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires,</u> that party shows excusable neglect or good cause.

Committee Note

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its

motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Notwithstanding the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought after the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir.1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Committee Note to the 1979 amendment to Rule 4(a)(5). What these courts have overlooked is that the Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or after the time prescribed by Rule 4(b) expires.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The Reporter stated that, for the reasons given in his memorandum to the Committee, he thought it unlikely that the courts of appeals would fix the circuit split over Rule 4(a)(5)(A). He recommended that the Committee amend the rule as proposed, unless the Committee concludes that the difference between the "good cause" standard and the "excusable neglect" standard is of too little practical consequence to justify an amendment to FRAP.

A member expressed support for the amendment. He said that the difference between "good cause" and "excusable neglect" is not just theoretical; when interpreting other rules of

practice and procedure, the courts have consistently held that the "good cause" standard is substantially less demanding than the "excusable neglect" standard.

Another member also expressed support for the amendment. He pointed out that the "good cause" and "excusable neglect" standards appear elsewhere in the rules of practice and procedure (e.g., FRCP 6(b)), and that it is important that the standards be interpreted consistently.

Mr. Munford, who initially suggested amending Rule 4(a)(5), said that he does not strongly object to the *substance* of the position taken by the majority of the courts of appeals. His concern is that the text of the rule fails to give litigants fair notice of that position. He supports the proposed amendment, but he would also have no objection to amending the rule to adopt the majority position. In fact, adopting the majority position would bring Rule 4(a)(5) in line with FRCP 6(b). His concern is simply that, one way or another, the rule be applied as written.

One member asked why "excusable neglect" is not considered an example of "good cause." Others responded that, while in theory one might think that "excusable neglect" is a form of "good cause," in practice courts had distinguished between the two.

A member moved that the amendment and Committee Note be approved. The motion carried (unanimously).

The Reporter informed the Committee that the Subcommittee on Style had recommended that Rule 4(a)(5) read as follows:

> (5) **Motion to Extend Time.** Upon a showing of excusable neglect or good cause, the district court may extend the time to file a notice of appeal for a period not to exceed 30 days from the time otherwise prescribed by this Rule 4(a).

Several members objected, pointing out that this purportedly stylistic suggestion would result in a major substantive change to the rule by eliminating the requirement that a *motion* be filed. The Subcommittee on Style took its suggested language directly from Rule 4(b)(4), apparently without realizing that extensions can be granted in criminal cases without motion, but in civil cases only upon motion. It was moved and seconded that the Subcommittee on Style's suggestion be rejected. The motion carried (unanimously).

The Subcommittee on Style recommended two changes to the Committee Note:

1. In the first line of the second paragraph, change "[n]otwithstanding" to "despite." By consensus, the Committee accepted the suggestion.

2. In the second line of the last paragraph, delete "in this respect." By consensus, the Committee rejected this suggestion. The amendment to Rule 4(a)(5)(A)(ii) brings

Rule 4(a)(5) in harmony with Rule 4(b)(4) only in one specific respect, and not in others, and the Note as drafted more accurately reflects that fact.

C. Item No. 97-04 (FRAP 15(c)(1) — notice to parties in proceedings to review informal rulemaking)

Mr. Letter introduced the following proposed amendment and Committee Note:

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention

(c) **Service of the Petition or Application.** The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

(1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except that the petitioner need not serve ~~for~~ the respondents and, in cases involving informal agency rulemaking, the petitioner need not serve any party unless the law requires otherwise;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough copies of the petition or application to serve each respondent.

Committee Note

Subdivision (c)(1). Under Rule 15(c), it is the responsibility of the circuit clerk to serve a copy of the petition for review or application for enforcement on the respondents, and it is the responsibility of the petitioner to serve a copy of the petition for review or application for enforcement on "each party admitted to participate in the agency proceedings." An ambiguity arises when "agency proceedings" involve informal rulemaking, such as informal rulemaking conducted pursuant to 5 U.S.C. § 553. It is common for hundreds or thousands of people to submit comments to the agency in the course of informal rulemaking proceedings. If each commentator is deemed to be a "party admitted to participate in the agency proceedings," then the petitioner will have to serve its petition for review or application for enforcement on hundreds or thousands of people, perhaps making it prohibitively expensive to seek judicial review.

To forestall that result, subdivision (c)(1) has been amended to make clear that, when a petition for review or application for enforcement pertains to informal rulemaking, the petitioner is not required to serve all commentators. Indeed, the petitioner is not required to serve *anyone*

(again, the respondents will be served by the circuit clerk), except when a statute requires that service be made on the United States or another entity or person. *See, e.g.*, 28 U.S.C. § 2344. This amendment to subdivision (c)(1) is patterned after D.C. Cir. R. 15(a), which appears to have worked well.

Mr. Letter said that there is a need for this amendment. For example, in one informal rulemaking proceeding regarding the regulation of tobacco, the FDA received comments from over 500,000 people. Each of those commentators might have been considered a "party" entitled to service of a petition to review the FDA's final action. D.C. Cir. R. 15(a) has worked well. The only concern that anyone has expressed about the amendment is that a party who wishes to file a petition for review if and only if another party files such a petition will not get formal notice of the filing of the other party's petition. The party will have to periodically call the clerk's office to inquiry whether a petition for review has been filed by any other party. When there are many parties, and any of those parties might file a petition for review in any of the circuits, the burden on such a party might be substantial. Agencies are supposed to note on their dockets when they are served with petitions for review — and thus, in theory, such a party could simply check with the agency — but not all agencies update their dockets promptly. One possible solution to this problem is to require the clerks to publish notice in the Federal Register of all petitions for review of agency action received by the courts. Another is simply to trust that courts will use their discretion to permit late requests to intervene.

A member pointed out that the Ninth Circuit has recently held — citing D.C. Cir. R. 15(a) — that those who submit comments in an informal rulemaking proceeding are not "parties" for purposes of Rule 15(c). Mr. Letter said that the D.C. Circuit certainly did not think that its local rule defined commentators in informal rulemaking as non-parties.

A member asked if the proposed amendment to Rule 15(c) would have any impact on *formal* rulemaking. Two members explained that it would not.

A member expressed opposition to the amendment. She said that the D.C. Circuit, which hears the vast majority of petitions to review agency action, has already solved this problem with its local rule. The clerks of the other circuits, in response to Judge Garwood's survey, uniformly reported that this problem has not arisen outside of the D.C. Circuit. Given the potential problems with the amendment described by Mr. Letter, why approve it? Several members agreed.

A member moved that Item No. 97-04 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

D. Item No. 97-18 (FRAP 1(b) — assertion that rules do not limit jurisdiction)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 1. Scope of Rules; Title

(b) ~~**Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.~~ [Abrogated]

Committee Note

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use FRAP to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use FRAP to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

The Reporter stated that, for the reasons given in his memorandum to the Committee, he did not believe that abrogating Rule 1(b) was required by the case law characterizing the limitations of Rules 3 and 4 as "mandatory and jurisdictional." However, the abrogation of Rule 1(b) was clearly appropriate in light of the amendments to §§ 1292(e) and 2072(c).

The Reporter said that Mr. Rabiej had suggested that the phrase "federal rules of practice and procedure" be substituted for the word "FRAP" in the fourth and sixth lines of the Committee Note. As written, the Note misleading suggests that the Supreme Court can define finality or provide for interlocutory appeals only in FRAP, when, in fact, the Court can also do so in any of the other rules of practice and procedure.

Several members briefly expressed support for the amendment. No member expressed opposition.

A member moved that the amendment and Committee Note be approved, with the changes suggested by Mr. Rabiej. The motion was second. The motion carried (unanimously).

E. Item No. 98-02 (FRAP 4 — clarify application of FRAP 4(a)(7) to orders granting or denying post-judgment relief/apply one way waiver doctrine to requirement of compliance with FRCP 58)

Mr. Munford introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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

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

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

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

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

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

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

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered or when the judgment altered or amended in response to such a motion is entered, whichever comes later.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time

prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion or the entry of the judgment altered or amended in response to such a motion, whichever comes later.

(iii) No additional fee is required to file an amended notice.

* * *

(7) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure, except that compliance with Rule 58 is not required when an order denies all relief sought by a motion or motions under Rule 4(a)(4)(A). The failure of any order or judgment that must be entered in compliance with Rule 58 to comply with Rule 58 will not invalidate an otherwise timely appeal from that order or judgment.

Committee Note

Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii). The Committee intends that when a district court, in ruling upon one of the post-judgment motions listed in Rule 4(a)(4)(A), orders that a judgment be altered or amended, the time to appeal that order and the altered or amended judgment runs from the date on which the altered or amended judgment is entered. At present, Rule 4(a)(4)(B)(ii) leaves that matter in some doubt by providing that an appeal from an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) should be brought "within the time prescribed by this Rule measured from the *entry of the order*," rather than from the entry of the altered or amended judgment. Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii) have been amended to eliminate that ambiguity.

Subdivision (a)(7). The courts of appeals are divided on the question of whether an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) must be entered on a separate document in compliance with Fed. R. Civ. P. 58 before that order can be appealed and before the time to appeal the original judgment begins to run. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3950.2, at 113 (1996) ("The caselaw is in disarray on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions."). The First and Second Circuits (as well as at least one decision of the Ninth Circuit) hold that Fed. R. Civ. P. 58 applies to all orders disposing of post-judgment motions. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 234 (1st Cir. 1992) (en banc); *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1458 (9th Cir. 1989); *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir. 1987). The Fifth and Seventh Circuits (as well as at least one decision of the Ninth Circuit) hold that Fed. R. Civ.

P. 58 applies when post-judgment relief is granted, but not when such relief is denied. *See Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231 (9th Cir. 1989). The Eleventh Circuit holds that Fed. R. Civ. P. 58 never applies to orders granting or denying post-judgment relief. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560-61 (11th Cir. 1991), *cert. denied*, 502 U.S. 1049 (1992).

Subdivision (a)(7) has been amended to adopt the position of the Fifth and Seventh Circuits. The time to appeal an order *granting* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) does not begin to run until it is entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order usually alters or amends a judgment, the order should be entered with the same formality as a judgment. The time to appeal an order *denying* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) begins to run immediately upon entry of the order, whether or not the order has been entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order does not disturb the original judgment, compliance with the separate document requirement of Fed. R. Civ. P. 58 seems unnecessary.

Subdivision (a)(7) has been further amended to apply the one-way waiver doctrine when an order or judgment is required to be entered in compliance with Fed. R. Civ. P. 58 but is not. In that situation, the party against whom the order or judgment is entered has two options. First, the party can choose to appeal the order or judgment, and thereby waive its right to have the order or judgment entered in compliance with Fed. R. Civ. P. 58. The appeal will be heard, even if the appellee objects to the lack of a Fed. R. Civ. P. 58 order or judgment. Second, the party can wait until the order or judgment is entered in compliance with Fed. R. Civ. P. 58 and then appeal. In theory, the party could wait forever to appeal, but, in practice, that is highly unlikely to occur. Nevertheless, "[v]ictorious litigants wishing to write *finis* to the case would do well to ensure that the district court adheres to Rule 58." *Otis v. City of Chicago*, 29 F.3d 1159, 1167 (7th Cir. 1994) (en banc).

The incorporation of the one-way waiver doctrine in subdivision (a)(7) reflects the fact that the separate document requirement is imposed for the benefit of the losing party. If that party wishes to waive that requirement by bringing a premature appeal, it seems pointless to dismiss the appeal, require the district court to enter the order or judgment on a separate document, and force the party to appeal a second time. "Wheels would spin for no practical purpose." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978). At the same time, the right of the losing party to have an order or judgment entered in compliance with Rule 58 should not be lost through the party's silence. Cases to the contrary — in particular, *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229 (1st Cir. 1992) (en banc) — are expressly rejected.

Mr. Munford said that three ambiguities gave rise to this amendment:

1. **The "Applicability" Question:** Does FRCP 58 apply to the "order" referred to in Rule 4(a)(4)(A) — that is, to "the order disposing of the last such remaining motion"?

2. **The "Prematurity" Question:** If FRCP 58 does apply to the "order" referred to in Rule 4(a)(4)(A) — and thus the time to bring an appeal in a civil case does not begin to run until an order granting or denying post-judgment relief is entered in compliance with FRCP 58 — what happens if a party brings an appeal *before* such an order is entered?

3. **The "Timing" Question:** When a post-judgment motion is granted and the judgment is amended, does the time for appealing the amended judgment run from the date on which the district court orders the judgment to be amended or from the date on which the clerk enters the amended judgment?

Mr. Munford said that the Reporter's memorandum accurately described these questions and the need for the amendment.

A member said that it was not clear to him that, under current law, orders that deny post-judgment motions need to be entered in compliance with FRCP 58. Mr. Munford said that he agreed that FRCP 58 *should* not apply, but several courts have held that, under Rule 4, it *does* apply. He said that it was important to amend the rule to clarify the situation.

Another member asked about the purpose of FRCP 58. Members explained that its purpose was to clearly signal when the time to bring an appeal begins to run, so that a potential appellant does not unwittingly lose her right to appeal.

Judge Kravitch asked whether the ambiguity regarding the application of FRCP 58 was limited primarily to orders denying post-judgment motions. Mr. Munford said that, while the question can arise in other settings (such as collateral orders), the disagreement in the courts pertains to orders disposing of post-judgment motions.

A member said that he had some sympathy with the First Circuit approach. He was concerned that, under the amendment, a party who wishes to appeal an order that *grants* a post-judgment motion but is not entered in compliance with FRCP 58 might wait for years before bringing an appeal. But another member responded that such a result, although theoretically possible, was highly unlikely to occur in reality, and that a party whose motion is granted can always protect itself against such a result by asking the judge to enter the order in compliance with FRCP 58.

Mr. Munford expressed concern that the Committee Note to the amendment to Rule 4(a)(7) should more clearly state that the one-way waiver doctrine applies to the appeal of *any* order that must be entered in compliance with FRCP 58, and not just orders granting post-judgment motions. He proposed changes in the language of the Note. In response, the Reporter suggested that, in the second line of the third paragraph of the Note:

1. "an" be changed to "any", and

2. "— whether or not it disposes of a post-judgment motion —" be inserted after "judgment" and before "is required."

Mr. Munford stated that he preferred the Reporter's formulation and withdrew his suggestion. By consensus, the Committee approved the change to the Committee Note recommended by the Reporter.

The Reporter reviewed with the Committee the changes that had been recommended by the Subcommittee on Style:

1. In the text of Rule 4(a)(4), the Subcommittee recommended substituting "the amended judgment changed in response" for "the judgment altered or amended in response" in the three places that the latter phrase appeared. By consensus, the Committee rejected the suggestion, on grounds that the original language was clearer and more accurate.

2. In the text of Rule 4(a)(7), the Subcommittee recommended a number of changes, most of which were accepted. By consensus, the Committee redrafted the amendment to Rule 4(a)(7) to read:

   (7) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure, but compliance with Rule 58 is not required when an order denies all relief sought by any motion listed in Rule 4(a)(4)(A). The failure to enter an order or judgment under Rule 58 when required does not invalidate an otherwise timely appeal from that order or judgment.

3. In the Committee Note to Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii), the Subcommittee recommended deleting the phrase "[t]he Committee intends that" in the first line of the first paragraph. By consensus, the Committee rejected the recommendation. If the Note were changed as the Subcommittee recommended, the Note would appear to be describing the law as it presently exists — and therefore would be inaccurate — rather than the changes that the Committee intends to make to the law.

4. In the Committee Note to Subdivision (a)(7), the Subcommittee recommended two changes to bring the citations into compliance with the Bluebook. Those changes were accepted by consensus. The Subcommittee also recommended changing the word "that" to "this" in the eighth line of the third paragraph, inserting a period after the word "unlikely" in the same line, and deleting "to occur" in the following line. By consensus, the recommendation was approved.

The Committee also made a stylistic change of its own in the ninth line of the second paragraph, changing "seems" to "should be."

A member moved that the amendment and Committee Note, as changed, be approved. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

Possible Amendments to Rule 26.1

In April 1998, the Kansas City *Star* published a series of articles describing the alleged failure of federal judges to recuse themselves from cases in which they had a financial interest. These articles have spurred the Committee on Codes of Conduct to consider anew how judges might be assisted in meeting their disclosure and recusal obligations. One option under consideration is incorporating a provision similar to Rule 26.1 into the civil, criminal, and bankruptcy rules. After the agenda book was distributed, the AO circulated a memorandum to the chairs and reporters of the advisory committees asking them to be prepared to share their "preliminary views" on this proposal at the January 1999 meeting of the Standing Committee.

Mr. Rabiej introduced this topic. He mentioned that, in addition to incorporating a provision similar to Rule 26.1 into the other rules of practice and procedure, consideration was being given to amending Rule 26.1 to broaden its scope and to require that corporate disclosure statements be updated during the course of litigation.

Several members said that they would be favorably inclined to consider proposals to broaden Rule 26.1. Among other problems with Rule 26.1, members mentioned in particular the fact that the recusal statute (28 U.S.C. § 455) addresses a much broader array of financial interests than does the rule. Rule 26.1 applies only to publicly traded corporate parties — not, e.g., to privately held companies or partnerships.

Other members warned that broadening Rule 26.1 would be very difficult. As initially proposed, Rule 26.1 was broader than the version that was eventually adopted. The broader version of Rule 26.1 attracted a great deal of opposition from the chief judges. In addition, the Committee had difficulty drafting workable language that would reach all of the financial interests that should be addressed.

One member said that his court already requires, by local rule, disclosure that is broader than that required by Rule 26.1. For example, parties to a bankruptcy proceeding are required to identify all creditors. Another member said that other circuits similarly require broader disclosure.

A couple of members stressed that the disclosure and recusal process should be as mechanical as possible. Ideally, a computer program should be developed, so that judges would not have to personally review corporate disclosure statements in every case. Some of those statements are so long that it is easy for a judge's mind to wander and for the judge to make a

mistake. Mr. Rabiej responded that the Committee on Codes of Conduct is exploring various software alternatives.

The members discussed the practices of various circuits. In some circuits, the judges give the clerk's office a list of individuals and entities whose interest in a case should result in the recusal of the judge, and the clerk's office then screens the corporate disclosure statements for the judges. Judges do not see the corporate disclosure statements until the judges are assigned to a panel and get the briefs — and, even then, if the system has worked as it should, no judge should have to recuse herself. In other circuits, the judges must review corporate disclosure statements for *every* case — even cases being heard by panels to which the judge has not been assigned. In other circuits, the judges must review corporate disclosure statements only in the cases being heard by panels to which they've been assigned, as well as in all cases in which petitions for rehearing en banc have been filed.

Some members had specific suggestions for amending Rule 26.1. One member said that it should be amended to require the disclosure of partnerships in which a publicly traded company participates. Another said that it should specifically address limited liability companies.

After further discussion, the committee reached a consensus that it may be worthwhile to examine the question of whether Rule 26.1 should be broadened. The Committee will await further guidance from the Committee on Codes of Conduct and/or the Standing Committee.

The Committee broke for lunch at 12:30 p.m. and reconvened at 2:00 p.m.

A. Item Nos. 95-04 & 97-01 (FRAP 26(a) — making time computation under FRAP consistent with time computation under FRCP and FRCrP)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than ~~7~~ 11 days~~, unless stated in calendar days~~.

Committee Note

Subdivision (a)(2). The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed.

R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Fed. R. App. P. 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure, as are deadlines of 1, 2, 3, 4, 5, and 6 *calendar* days. This creates a trap for unwary litigants.

No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days and will be counted when computing deadlines of 11 days and over. In addition, the rules will no longer state some deadlines in "days" and others in "calendar days." All deadlines will be stated in "days," and all deadlines will be calculated in the same manner.

The Reporter stated that three questions are before the Committee:

1. Does the Committee wish to amend Rule 26(a)(2), so that intermediate Saturdays, Sundays, and legal holidays will not be counted when deadlines are less than 11 days — instead of less than 7 days?

2. Does the Committee wish to amend FRAP so that the rules no longer distinguish between "calendar days" and "days"?

3. If the Committee wishes to make either or both of these changes, does the Committee wish to change any of the deadlines in FRAP to take into account the new, more generous way of calculating deadlines?

A member said that some deadlines — such as Rule 4(b)(1)(A)'s 10 day deadline for appealing criminal cases — are so fixed in the minds of judges and practitioners that they are best left alone, even if amending Rule 26(a)(2) will extend them as a practical matter. However, other deadlines — particularly some of the 7 day deadlines — were originally set by the Committee upon the assumption that Saturdays, Sundays, and legal holidays counted, and probably should be shortened if that no longer remains true. With respect to the deadlines stated in calendar days, the member said that only three deadlines in FRAP are stated in calendar days, and those deadlines are *delivery* deadlines rather than deadlines by which parties must act. He favored leaving those three deadlines undisturbed.

Mr. Letter said that the Justice Department favored amending Rule 26(a)(2) to bring it into line with FRCP 6(a) and FRCr P 45(a) and saw no reason to shorten any of the deadlines in FRAP to take into account the new method of calculation. Mr. Letter also said that the Justice Department had no objection to leaving the three calendar day deadlines undisturbed.

A member opposed making any change to Rule 26(a)(2). He said that the rule is clear and that only attorneys who do not bother to read it carefully will get trapped. He also feared that adopting the FRCP/FRCrP counting method may result in unanticipated problems.

Mr. Fulbruge, on behalf of the clerks, also opposed the change. He said that the clerks will have to retrain their staffs on how to calculate deadlines and that many local rules will have to be changed to take into account the new calculation method.

A member supported the change. He argued that most appellate lawyers are primarily trial lawyers and are accustomed to the FRCP/FRCrP calculation method. It is understandable that they get trapped and, given that this trap serves no good purpose, it should be eliminated. One factor that aggravates the trap is the fact that some deadlines — such as 28 U.S.C. 1292(b)'s 10 day deadline — are *statutory* and trial attorneys would naturally assume that those deadlines would be calculated pursuant to the FRCP/FRCrP method. Several other members agreed with these sentiments.

A member pointed out that the proposed change was a *forgiving* one. In other words, any attorney who calculated deadlines under the current Rule 26(a)(2) method rather under than the proposed method would merely find that he had *more* time to act then he thought. Another member agreed. She acknowledged that there would be transition problems, but those problems would not *hurt* anyone, except that some lawyers may hurry to file papers earlier than necessary.

A member said that, if the FRCP/FRCrP calculation method is adopted, then she would favor shortening the deadlines for responding to motions. Another member said that she agreed, but that she would otherwise leave the 7 and 10 day deadlines unchanged.

A member said that one way of shortening 7 or 10 day deadlines is to simply state them in calendar days. A couple members objected to that technique, arguing that the use of calendar days should be restricted, as it is now, to delivery deadlines.

A member said that, in considering whether any 7 or 10 day deadlines should be shortened, the Committee should take into account the fact that some deadlines begin running upon *service*, while others begin running upon *filing* or *entry*. In the latter case, the attorney may not learn of the triggering event until several days later.

[Prof. Daniel R. Coquillette, Reporter to the Standing Committee, joined the meeting at this point.]

A member moved that (1) Rule 26(a)(2) be amended so that intermediate Saturdays, Sundays, and legal holidays will not be counted when deadlines are less than 11 days (instead of less than 7 days), and (2) no change be made to Rule 26(a)(2) with respect to "calendar days." The motion was seconded. The motion carried (unanimously). The Reporter was directed to make the necessary changes to the draft amendment and Committee Note that he had prepared.

The Reporter informed the Committee that, even though the only change necessary in Rule 26(a)(2) was inserting "11" in place of "7," the Subcommittee on Style had nevertheless recommended extensive stylistic changes to the rule. Several members objected that it should not be necessary to restylize a rule that the Subcommittee had already restylized. Other members added that to extensively rewrite the rule would camouflage the simplicity of the substantive change that had been made and confuse judges and practitioners. By consensus, the Committee rejected the Subcommittee's recommendations.

The Subcommittee also recommended that, in the third line of the second paragraph of the Committee Note, the word "and" be changed to "but." By consensus, the recommendation was approved.

The Committee next turned to the question of which deadlines in FRAP, if any, should be shortened to take into account the new method of calculation.

A member argued that the 10 day deadline in Rule 27(a)(3)(A) for filing responses to motions should be shortened to 7 days. Under the new calculation method, all 10 day deadlines in FRAP will, as a practical matter, become at least 14 day deadlines. Fourteen days is too long to wait for a response to a motion. The member was also concerned about Rule 41(b)'s 7 day deadline for the issuance of mandates. He pointed out that, under the "old" calculation method, that 7 day deadline had always meant 7 actual days, and judges and clerks were quite accustomed to the deadline. Mr. Fulbruge agreed.

A member suggested that Rule 41(b)'s 7 day deadline be stated in calendar days. Although this would expand the use of calendar days beyond service-related delivery deadlines, Rule 41(b) sets a deadline for *clerks*, not attorneys, so the change should not sow too much confusion among the bar.

A couple members argued in support of shortening the deadline in Rule 27(a)(3)(A) to 7 days. One member argued that, at the same time, the deadline in Rule 27(a)(4) for *replying* to responses to motions should be shorted from 7 days to 5 days. Under the "new" calculation method, all 7 day deadlines in FRAP will, as a practical matter, become at least 9 day deadlines, and 9 days is too long to wait for a reply to a response to a motion. Although changing the deadline in Rule 27(a)(4) to 5 days may be a bit confusing for the bar, Rule 27(a)(4) is a new rule that will not even take effect until December 1, 1998, and thus the bar will not have long to get used to the 7 day deadline.

A member expressed concern about the 7 day deadline in Rule 29(e) (regarding the filing of amicus briefs), but said that discussion of his concern should be postponed until the Committee considers agenda item V(D)(13) (study agenda Item No. 98-03).

A member asked whether the 10 day deadlines of Rule 10(c) and Rule 30(b)(1) should be shortened. A couple members argued that they should not, as they are not terribly important deadlines and not much is to be gained by changing them.

A member cautioned that the deadline in Rule 27(a)(3)(A) was set at 10 days in the first place in an attempt to cut down on the number of motions filed by attorneys seeking an extension of time within which to file responses to motions. If the 10 day deadline in Rule 27(a)(3)(A) is cut back to 7 days, the courts could see an increase in requests for extensions. Another member responded that when a serious substantive motion is made, parties are going to seek extensions, whether the deadline is 7 days or 10 days. However, for routine procedural motions, it makes sense to cut the deadline back to 7 days.

A member moved:

1. that Rule 27(a)(3)(A) be amended by substituting "7" for "10";

2. that Rule 27(a)(4) be amended by substituting "5" for "7"; and

3. that Rule 41(b) be amended by inserting the word "calendar" after "7" and before "days."

The motion was seconded. The motion carried (unanimously).

The Reporter was directed to prepare the appropriate amendments and Committee Notes and to place them on the agenda for the Committee's spring 1999 meeting.

B. Item No. 96-02 (FRAP 4(b) — permit time to appeal criminal case to be extended, even without good cause or excusable neglect)

Generally speaking, Rule 4(b) provides that a criminal defendant must file a notice of appeal within 10 days after entry of the judgment or order that he seeks to appeal. The district court is authorized to extend the 10 day deadline up to an additional 30 days. Under the current version of Rule 4(b), the district court may do so only "[u]pon a showing of excusable neglect." Under the restylized version of Rule 4(b) (effective December 1), the district court will be able to grant an extension only "[u]pon a finding of excusable neglect or good cause." Under neither the current nor future version of Rule 4(b) may a district court extend the time to appeal beyond the 40th day following entry of the judgment or order.

In *United States v. Marbley*, 81 F.3d 51 (7th Cir. 1996), Chief Judge Richard A. Posner urged that Rule 4(b) be amended so that a district court could extend the 10 day deadline up to an additional 30 days whether or not the defendant makes a showing of excusable neglect or good cause. One way or another, he contends, the court of appeals is going to end up examining the merits of the appeal — either immediately on direct appeal or later when the defendant collaterally attacks his conviction. In Judge Posner's view, it would be better for all concerned if Rule 4(b) would "permit untimely appeals in any criminal case in which the district judge and the court of appeals agreed that the appeal should be heard" rather than giving that permission only when there is excusable neglect or good cause, thereby forcing "the appeal [to be] heard later through

the Sixth Amendment route." *Id.* at 53. This, he says, "introduces real delay into the system of criminal justice." *Id.*

At Judge Garwood's request, the Reporter circulated a memorandum to the Committee outlining several problems with Judge Posner's suggestion, including (1) the fact that the Committee just rewrote Rule 4(b) — changing the "excusable neglect" standard to "excusable neglect or good cause" — and may not be inclined to change the standard yet again; (2) the fact that it is questionable whether the Judicial Conference and the Supreme Court would approve a change to Rule 4(b) that would permit district courts to extend the venerable 10 day deadline for any or even no reason; (3) the fact that it simply is not true, as Judge Posner seems to assume, that every defense attorney who cannot show excusable neglect or good cause for failing to file a timely appeal has committed ineffective assistance of counsel; (4) the fact that one could justify waiving many of the requirements of FRAP — or, for that matter, of the FRCrP or FRE — in the same way that Judge Posner justifies waiving the requirements of Rule 4(b); and (5) the fact that the scenario that Judge Posner fears seems to occur quite infrequently in practice.

Mr. Letter said that the Justice Department strongly supports removing Judge Posner's suggestion from the study agenda, largely for the reasons stated in the Reporter's memo.

A member asked whether the desire to avoid a § 2255 attack would itself provide the "good cause" necessary to extend the deadline. Another member said that he was unaware of any case so holding. A third member pointed out that no such case *could* exist, as the "good cause" standard will not be incorporated into Rule 4(b) until December 1.

A member argued that a *defendant* may have good cause for an extension if his attorney failed to file a timely appeal, despite being instructed to do so. Another member responded that, in such a case, the allegation of the defendant — and, presumably, the denial of the attorney — *should* be the subject of a § 2255 proceeding, so that the district court can take testimony and evidence on the issue.

A member moved that Item No. 96-02 be removed from the study agenda. The motion was seconded.

A couple members spoke in favor of retaining Item No. 96-02 on the study agenda. They thought Judge Posner's suggestion had merit, and favored giving district courts carte blanche to extend the deadline.

Judge Kravitch pointed out that, even if district courts had such discretion, an attorney would be taking a big risk by not filing a timely appeal or timely request for an extension, as the attorney would have no guarantee that the district court would exercise its discretion favorably.

A member argued in favor of removing Item No. 96-02 from the study agenda. He said that, among other problems, he did not know how the appellate courts could possibly review

district court decisions to grant or not to grant extensions. If district courts had carte blanche to use their discretion to grant extensions, what would constitute an abuse of that discretion?

After further discussion, the motion to remove Item No. 96-02 carried (4-3).

C. Item No. 97-19 (FRAP 4(b)(1)(B)(ii) — timing of government's notice of appeal in multi-defendant criminal cases)

Rule 4(b)(1)(B) provides that, when the government is entitled to bring an appeal in a criminal case, its notice of appeal must be filed "within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant." The use of the phrase "any defendant" creates an ambiguity in multi-defendant cases: Does the 30 days begin to run after the *first* notice of appeal is filed by a defendant or not until the *last* notice of appeal is filed by a defendant? Or does the 30 days begin to run after the particular defendant as to whom the government is considering bringing a cross-appeal files his notice of appeal? The Committee attempted to correct this problem at its April 1997 meeting, but the complexity of the problem soon became apparent, and the Committee postponed further discussion.

Mr. Letter argued that this matter should be removed from the study agenda. Mr. Letter said that he had consulted with his colleagues in the Justice Department and learned that this issue rarely arises in practice and does not pose a real problem for federal prosecutors. The Justice Department thought it likely that an attempt to fix this ambiguity would create more problems than it would solve. Moreover, Mr. Letter pointed out that the ambiguous language was inserted into Rule 4(b) directly by Act of Congress. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VIII, § 7111, 102 Stat. 4419 (Nov. 18, 1988).

Several members briefly spoke in favor of removing this item from the study agenda. No member spoke in favor of continuing to study this issue.

A member moved that Item No. 97-19 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

D. Items Awaiting Initial Discussion and Prioritization

The Committee next turned to a series of proposals that were awaiting initial discussion.

1. Item No. 97-32 (FRAP 12(a) — require caption to identify only the parties to the appeal)

Agenda items V(D)(1) through V(D)(9) (study agenda Item Nos. 97-32 through 97-40) all arise out of suggestions made by the appellate working group of the Methods Analysis Program ("MAP"). Judge Garwood asked Mr. Fulbruge to introduce these items.

Mr. Fulbruge first described the background of the MAP and stated that the appellate working group had drafted 115 recommendations for making appellate practice more efficient. Nine of those 115 recommendations would require amendments to FRAP. However, at an August 1998 meeting of the clerks of the appellate courts, the clerks agreed that six of the nine proposals for amending FRAP should be withdrawn:

Agenda Item V(D)(3) (Study Agenda Item No. 97-34): The appellate working group had proposed that Rule 3(d)(1) be amended to specify precisely when district court clerks should forward updated docket entries to appellate court clerks. The appellate clerks decided to withdraw this suggestion because the district court clerks were sure to oppose it, because this has not been a major problem in practice, and because any rule would, as a practical matter, be unenforceable. By consensus, the Committee removed this item from its study agenda.

Agenda Item V(D)(4) (Study Agenda Item No. 97-35): The appellate working group had proposed that FRAP be amended to specify how complex cases — such as class actions, multidistrict litigation, and complex bankruptcy cases — should be captioned. The appellate clerks decided to withdraw this suggestion because it needs more thought and because it might better be addressed to the Advisory Committee on Civil Rules and Advisory Committee on Bankruptcy Rules. By consensus, the Committee removed this item from its study agenda.

Agenda Item V(D)(6) (Study Agenda Item No. 97-37): The appellate working group had proposed that FRAP be amended to require that counsel who represented a criminal defendant at trial must represent that defendant on appeal unless specifically permitted to withdraw by the appellate court. The appellate clerks decided to withdraw this suggestion because most courts already impose this requirement by standing order or local rule and because the suggestion is better addressed to the Advisory Committee on Criminal Rules. By consensus, the Committee removed this item from its study agenda.

Agenda Item V(D)(7) (Study Agenda Item No. 97-38): The appellate working group had proposed that FRAP be amended to forbid counsel who represented a criminal defendant at trial to withdraw from that representation before filing a notice of appeal. The appellate clerks decided to withdraw this suggestion for the same reasons that they decided to withdraw the previous suggestion. By consensus, the Committee removed this item from its study agenda.

Agenda Item V(D)(8) (Study Agenda Item No. 97-39): The appellate working group had proposed that Rule 15(c) be amended to require that a petitioner seeking review of agency action file with the court of appeals a list of all parties to the agency action and identify for the court the name and address of the respondent agency. The appellate clerks decided to withdraw this suggestion because this problem has arisen only in the D.C. Circuit and can best be addressed by a local rule of that court. By consensus, the Committee removed this item from its study agenda.

Agenda Item V(D)(9) (Study Agenda Item No. 97-40): The appellate working group had proposed that FRAP be amended to require advance notice and pre-filings in death penalty

cases. The appellate clerks decided to withdraw this suggestion because counsel in death penalty cases are already providing advance notice and pre-filings, so problems are not being experienced in practice. Mr. Letter said that the Justice Department did not object to removing this item from the study agenda, but noted that, as the number of federal capital cases increases, the Department may return to this Committee sometime in the future and propose amendments to FRAP regarding the handling of such cases. By consensus, the Committee removed this item from its study agenda.

Mr. Fulbruge returned to Agenda Item V(D)(1) (Study Agenda Item No. 97-32). At present, Rule 12(a) requires the circuit court to docket an appeal "under the title of the district-court action." District court captions sometimes identify hundreds of parties and run several pages long. It is often a waste of effort for appellate clerks to docket cases under these captions, particularly when only a few of those parties are involved in the appeal. Mr. Fulbruge said that the appellate clerks would like Rule 12(a) redrafted to give them more flexibility in docketing appeals.

A member supported the suggestion. He said that, in complex cases, appellate clerks have a terrible time trying to docket the cases and correctly identify appellants, appellees, cross-appellants, and the like, resulting in frequent motions to recaption.

Another member said that he had reservations about the suggestion. He saw an advantage to using the district court caption. He wondered whether Rule 12(a) might be amended to require use of the district court caption, but, in cases exceeding ten parties or so, require only some of the parties to be identified.

Mr. Fulbruge said that the real problem is cases involving hundreds of parties or complex cases in which it is very difficult for the clerks to ascertain not just who are the appellants and appellees, but who were plaintiffs, defendants, intervenors, and the like in the district court.

After further discussion, the Committee decided by consensus to retain Item No. 97-32 on its study agenda. Judge Garwood asked Mr. Fulbruge to work with the appellate clerks on drafting a specific amendment to Rule 12(a) and then to return to the Committee with that proposed amendment.

2. Item No. 97-33 (FRAP 3(c) — require filing of statement identifying all parties and counsel)

Mr. Fulbruge said that appellate clerks waste a substantial amount of time trying to ascertain which attorneys represent which parties on appeal. Rule 12(b) requires only the attorney who filed the notice of appeal to file a representation statement; no such requirement is imposed upon appellees or intervenors.

One member asked about the possibility of addressing this problem by local rule. Another pointed out that some circuits now require all attorneys to file representation statements. Prof.

Coquillette said that the Standing Committee is very hostile to the use of local rules to address a problem that affects all courts of appeals equally, such as the problem under consideration.

A member moved that Item No. 97-33 be retained on the Committee's study agenda and that the appellate clerks be asked to draft a specific amendment to Rule 3 or Rule 12. The motion was seconded. The motion carried (unanimously).

3. Item No. 97-34 (FRAP 3(d)(1) — specify when district clerk must forward updated docket entries)

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

4. Item No. 97-35 (uniform standards for docketing of complex cases)

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

5. Item No. 97-36 (FRAP 25(a)(4) — authorize clerk to refuse to accept non-complying documents for filing)

Mr. Fulbruge said that, while the appellate clerks had no illusions about their likelihood of success, they once again wanted to ask the Committee to restore their authority to reject documents that do not comply with FRAP or the local rules of a court. At present, Rule 25(a)(4) states: "The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice." Mr. Fulbruge said that, in the view of the clerks, Rule 25(a)(4) makes it impossible for them to deal effectively with improper filings.

According to Mr. Fulbruge, 53% of the cases in the Fifth Circuit are filed pro se. The figure is 48% in the Fourth Circuit. In *every* circuit, at least a third of the filings are pro se. These pro se filings are often in blatant violation of the rules, yet, under Rule 25(a)(4), the clerks must stamp them, enter them on the docket, review them, and then send a letter to the litigant advising him of how his filing violates the rules and requesting a corrected filing. Often, that spurs arguments between the litigant and the clerk's office. If the litigant does comply with the clerk's request, the clerk has to again stamp, docket, and review the corrected pleading; often, the corrected pleading has not solved the original problem or suffers from additional problems. If the litigant does not comply with the clerk's request, the clerk has to get a judge to enter an order. The inability of the clerks to reject deficient filings wastes thousands of hours every year and undermines morale in the clerks' offices.

The problem is not limited to pro se parties, Mr. Fulbruge said. Paid counsel will sometimes file deficient pleadings with the court in order to meet a deadline, knowing that they will have an opportunity to correct the deficiencies after the deadline.

Mr. Fulbruge said that the appellate clerks urge this Committee to amend Rule 25(a)(4) so that clerks are required to *receive* deficient papers, but not to *file* them until and unless corrections are made.

Mr. Letter said that the Justice Department opposes the request. He reminded the Committee that Rule 25(a)(4) resulted from the unreasonable practices of some clerks' offices. With the myriad of local and national rules, it is extremely difficult for even the most conscientious attorney to file a perfect brief every time. Before the rule was changed, the Justice Department was finding that a large percentage of its briefs were getting bounced back for one hypertechnical violation or another.

Mr. Fulbruge said that the restylized rules should mitigate the problem described by Mr. Letter. The rules are much more specific and understandable, and thus the number of problems should be substantially reduced. Also, clerks have to meet increasingly high caseloads without additional staff, reducing the incentive to pick fights with counsel over hypertechnical violations. Mr. Letter responded that, while the restylized rules will help, a large number of conflicting and confusing local rules remain.

A member agreed with Mr. Letter. He said that the first recommendation of the clerks — "[r]eturn to the former version of Rule 25" — was "D.O.A.," not only in this Committee, but in the Standing Committee. The second recommendation of the clerks — "[a]dopt a local rule which provides that when a document does not comply with the rules, the clerk shall nonetheless file the document but notify the party of the defect [and which permits e]ither a judge, a panel, or the clerk (by delegated authority) [to] strike the document if the defect is not timely cured" — seems to simply restate existing law, except that clerks cannot be delegated the authority to strike documents.

Another member asked if that was true. Why can't clerks be delegated the authority to strike documents by local rule? Mr. Fulbruge said that it was because clerks are not considered "judicial officers." Prof. Coquillette reminded the Committee that, in addition, such a use of local rules would be highly disfavored by the Standing Committee.

A couple members said that, while they could not support the clerks' suggestion, they sympathized with the problem, and hoped that other means could be found for addressing it. Judges Motz and Kravitch both reported that the PLRA had reduced the number of frivolous pro se filings in their circuits. Mr. Fulbruge said that the Fifth Circuit had not seen a similar decline.

A member moved that Item No. 97-36 be removed from the study agenda. The motion was seconded. The motion carried (6-1).

6. Item No. 97-37 (require counsel who represents criminal defendant at trial to continue to represent defendant on appeal)

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

7. Item No. 97-38 (prohibit district courts from permitting counsel who represents criminal defendant at trial to withdraw before notice of appeal is filed)

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

8. Item No. 97-39 (FRAP 15(c) — require petitioner seeking review of agency order to identify respondents and attach agency order)

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

9. Item No. 97-40 (require advance notice and pre-filings in state and federal death penalty cases)

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

Report on Federal Rules of Attorney Conduct

At Judge Garwood's request, Prof. Coquillette updated the Committee on efforts to address the wide variety of local rules governing attorney conduct. Prof. Coquillette said that there had been a substantial amount of misinformation circulated about the issue. Contrary to public reports, the Standing Committee has *not* decided how to address this problem, but only that something has to be done to bring about uniformity. The Conference of Chief Justices favors a "dynamic conformity" approach, under which attorney conduct in federal court would be governed by the professional conduct rules of the state in which the federal court sits. The Justice Department opposes dynamic conformity and instead favors the promulgation of "Federal Rules of Attorney Conduct" that would apply in all federal courts. The Standing Committee and the advisory committees appear to be closely divided between these two approaches, and even those who favor the federal rules approach disagree about the scope of such rules.

Prof. Coquillette reported that an ad hoc committee has been formed to study this issue and make a proposal to the Standing Committee. Judge Alito and Mr. Thomas will represent this advisory committee on the ad hoc committee. Judge Scirica will chair the ad hoc committee, and Prof. Coquillette will serve as its reporter. Each advisory committee has appointed two

representatives. The Standing Committee will be represented by Chief Justice E. Norman Veazy and Prof. Geoffrey C. Hazard, Jr., both of whom have considerable expertise in legal ethics. Also, the Justice Department will have two representatives on the ad hoc committee.

Prof. Coquillette said that Judge Scirica wants the ad hoc committee to proceed slowly and not get too far out ahead of the ABA's Ethics 2000 project. In addition, Judge Scirica wants to give negotiators for the Justice Department and the Conference of Chief Justices time to work out a compromise on the applicability of Model Rule 4.2 to federal investigations. Finally, the Federal Judicial Center is undertaking a study of attorney conduct matters for the Bankruptcy Committee, and Judge Scirica wants to await the results of that study.

After some brief questioning of Prof. Coquillette, Judge Motz raised a related issue. Judge Motz noted that several of her colleagues objected to the fact that, under Rule 46(b)(2), an attorney cannot be suspended or disbarred without a hearing, even if he has already been suspended or disbarred by a state supreme court. In the view of some members of the Fourth Circuit, it is a waste of judicial resources to afford hearings to attorneys who have already been suspended or disbarred for unethical conduct, presumably after notice and hearing.

One member said that he sympathized with the views of Judge Motz's colleagues. Other members and the Reporter disagreed. Some expressed the view that the benefits of affording a hearing to an attorney who had already been suspended or disbarred by a state court outweighed the relatively minor judicial inconvenience. Hearings in such obvious cases are rarely requested and can be conducted quickly. At the same time, such hearings ensure both the appearance and reality of fairness and help to head off constitutional challenges.

10. Item No. 97-42 (FRAP 3(d) — permit service of notice of filing of appeal by fax or e-mail)

Item No. 97-42 arises from a suggestion by several district court clerks that the FRCP, FRCrP, and FRAP be amended to permit clerks to serve notices by fax or e-mail. The Reporter asked the Committee to remove this item from its study agenda. The Reporter said that this proposal is squarely within the jurisdiction of the Subcommittee on Technology and that it would be ill-advised for this or any advisory committee to move forward on its own. The proposal itself recognizes that the amendments it seeks will not be feasible until the Judicial Conference establishes certain technical standards, and that is precisely what the Subcommittee on Technology was created to do.

Several members agreed with the Reporter, and Item No. 97-42 was removed from the study agenda by consensus.

11. Item No. 97-43 (FRAP 22 — prescribe time period for seeking certificate of appealability)

Mr. John McCarthy, who is incarcerated in a federal prison, submitted a lengthy handwritten letter to the Committee in which he makes two primary complaints. First, he complains that no time period is prescribed for seeking a certificate of appealability ("COA"). Second, he claims that when a notice of appeal is filed before a COA is sought, it is "ambiguous" under Rule 22(b)(1) whether the district court is supposed to await a formal request for a COA or instead rule sua sponte on whether a COA should issue.

The Reporter recommended that this item be removed from the study agenda. He pointed out that a litigant presumably has to seek a COA within the time for filing a notice of appeal; if the litigant does not, then he will provide a compelling justification for the court to deny the COA (i.e., the COA will be denied because the time to appeal has expired). The Reporter also said that restylized Rule 22 seems to make it clear that a district court should decide sua sponte whether to issue a COA if a notice of appeal is filed without a formal request for a COA.

Several members agreed with the Reporter, and Item No. 97-43 was removed from the study agenda by consensus.

12. Item No. 97-44 (permit appeal of district court's refusal to stay enforcement of judgment pending resolution of post-trial motions)

Under FRCP 62(a), a judgment in a civil action may not be executed or enforced until 10 days after its entry. A district court may, at its discretion, stay execution or enforcement of the judgment for a longer period of time — e.g., to give the court time to consider post-judgment motions. However, if the district court chooses not to grant such a stay, the judgment may be executed or enforced on the 11th day after entry, even if post-judgment motions are pending.

Mr. Michael F. Dahlen, an Illinois attorney, was recently involved in a case in which the district court refused to extend the automatic 10-day stay pending its ruling on the defendant's post-judgment motions. Mr. Dahlen, who represented the defendant, feared that the plaintiff would garnish his client's bank accounts and, in effect, put his client out of business before his client's post-judgment motions were even decided. Mr. Dahlen found, to his chagrin, that no means existed for seeking immediate appellate review of the district court's refusal to extend the 10-day stay pending resolution of post-judgment motions.

A member said that Mr. Dahlen's suggestion is better directed to the Advisory Committee on Civil Rules. After all, it is FRCP 62(a) that expressly gives the district court discretion to decide whether to extend the 10-day stay pending resolution of post-trial motions. The member said that, in his view, the "default" rule should be the opposite — that is, enforcement of all civil judgments should be stayed pending resolution of post-trial motions unless the district court orders otherwise. Such an order would be appropriate where it appeared that the judgment debtor was attempting to waste or hide assets.

A member moved that Mr. Dahlen's suggestion be referred to the Advisory Committee on Civil Rules and removed from this Committee's study agenda. The motion was seconded.

A member asked whether changing FRCP 62(a) as suggested would take care of the problem described by Mr. Dahlen. Mr. Dahlen's complaint was that, when a district court permitted enforcement of a judgment prior to disposing of post-judgment motions, there was no way for the judgment debtor to get immediate appellate review of that decision. That problem would remain even if FRCP 62(a) was redrafted as suggested. Another member responded that, especially if FRCP 62(a) was redrafted as suggested, a judgment debtor in the position of Mr. Dahlen's client could use mandamus to seek appellate review.

The motion to refer Mr. Dahlen's suggestion to the Advisory Committee on Civil Rules carried (unanimously).

A member asked that the referral make it clear that this Committee takes no position on the merits of Mr. Dahlen's suggestion. The member thinks that FRCP 62(a) works well as drafted and is concerned that redrafting the rule as suggested would lead to widespread wasting and hiding of assets by judgment debtors. He does not want to imply that this Committee endorses Mr. Dahlen's suggestion.

13. Item No. 98-03 (FRAP 29(e) & 31(a)(1) — timing of amicus briefs)

Under the present version of Rule 29(e), an amicus brief is due at the same time as the principal brief of the party whom the amicus is supporting. Under restylized Rule 29(e) (effective December 1), an amicus brief will be due 7 days after the principal brief of the party whom the amicus is supporting. This 7 day period will begin to run with the filing of the principal brief in court — and not from the time that the brief is served or that the amicus becomes aware of the brief's filing. Mr. Paul Alan Levy of Public Citizen Litigation Group has raised a number of concerns about restylized Rule 29(e):

First, Mr. Levy asks whether Rule 29(e) is intended to supercede local rules (such as those of the D.C. and Fifth Circuits) that give amici a longer period of time to file their briefs. Rule 29(e) states that "[a] court may grant leave for later filing, specifying the time within which an opposing party may answer," but does not make clear whether the court may "grant leave" in *all* cases through a local rule or only in *particular* cases through orders entered in those cases. (By contrast, Rule 31(a)(2) uses the more specific phrase, "either by local rule or by order in a particular case.")

Second, Mr. Levy argues that 7 days is an insufficient period of time to allot to amici in cases in which the party being supported by an amicus does not permit the amicus to see its brief before the brief is filed.

Third, Mr. Levy describes a problem that can develop under restylized Rule 29(e) when an amicus wishes to file a brief supporting an appellee. Suppose that, on June 1, an appellee located

in Washington, D.C., mails its briefs to the Ninth Circuit for filing and hand delivers a copy of its brief to the appellant. Suppose further that the Ninth Circuit receives and files the appellee's brief on June 4. Under these circumstances, the brief of the amicus in support of the respondent would be due on June 11 (7 days after *filing*), and the reply brief of the appellant would be due on June 15 (14 days after *service*) — meaning that the appellant would have only 4 days to review and respond to the arguments raised by the amicus *if it received the amicus brief on the day it was filed*. If the amicus served and filed its brief by mail, the appellant might not see it at all before its reply brief is due. Mr. Levy suggests that this problem could be solved if the time for appellees to file their principal briefs ran from the service of the briefs of amici supporting the appellant (rather than from the service of the briefs of appellants) and if the time for appellants to file reply briefs ran from the service of the briefs of amici supporting the appellee (rather than from the service of the briefs of appellees).

Mr. Letter said that the problems identified by Mr. Levy were real ones that are likely to affect the Justice Department, and that Mr. Levy's suggestions should be retained on the study agenda. The Reporter responded that, although Mr. Levy's concerns are valid, his suggested alternative — running the deadlines for the filing of principal briefs from the service of amici briefs — seems problematic. Mr. Letter agreed and offered to meet with Public Citizen and with other groups who frequently file amicus briefs to try to draft an amendment to Rule 29(e).

A member moved that Item No. 98-03 be retained on the study agenda and that the Justice Department be asked to propose a specific amendment to Rule 29(e), after consultation with others who often file amicus briefs. The motion was seconded. The motion carried (unanimously).

14. Item No. 98-04 (docketing fees/certificates of appealability)

Under 28 U.S.C. § 2253(c), a prisoner may not appeal the denial of habeas relief unless either the district court or a judge of the circuit court issues a COA. When a prisoner applies to a circuit judge for a COA, must the prisoner pay the docketing fee at that point, or only if and when the COA is issued?

In August, Judge Kenneth F. Ripple of the Seventh Circuit informed the Reporter that the circuits have not been answering this question consistently. Judge Ripple said that he was not certain that FRAP needed to be amended to address the problem; perhaps the fee resolution of the Judicial Conference could be changed to specify when the fee should be collected.

At Judge Garwood's request, Mr. Fulbruge surveyed the circuit clerks. Seven clerks reported that they require the fee to be paid before an application for a COA is even *considered*, while two reported that they require the fee to be paid only if and when a COA is *granted*.

A member said that perhaps FRAP should be amended to specify that the fee must be paid before an application for a COA is even considered. Another member agreed; she said that the decision whether to grant a COA is practically indistinguishable from the decision whether habeas

relief will be granted, and the fee should be paid before a court is asked to undertake such a detailed review of the case. She said that it made no sense to collect the fee only if, in essence, the appeal is won.

Mr. Rabiej suggested that this Committee formally refer this matter to the Committee on Court Administration and Case Management ("CACM"), which has authority over the Judicial Conference fee schedule. CACM may be able to resolve this problem either through some gentle persuasion directed at the two "renegade" clerks' offices or by inserting a provision in the fee schedule making it clear that the fee must be collected before an application for a COA is even considered.

A member moved that Item No. 98-04 be referred to CACM and removed from this Committee's study agenda. The motion was seconded. The motion carried (unanimously).

The Committee adjourned for the day at 5:30 p.m.

The Committee reconvened on Friday, October 16, at 8:30 a.m. Chief Justice Pascal F. Calogero, Jr., joined the Committee.

15. Item No. 98-05 (FRAP 15(a)(1) — joint appeals/Hobbs Act cases)

Mr. Charles H. Montange, a Seattle attorney, has suggested that FRAP be amended, essentially to supercede the venue provisions of the Hobbs Act. Under the Act, a person aggrieved by an agency action may file a petition for review in (1) the D.C. Circuit, or (2) the circuit in which the petitioner resides, or (3) the circuit in which the petitioner maintains its principal place of business. 28 U.S.C. § 2343. Mr. Montange complains that, under this provision, two petitioners who want to file a joint petition but do not want to file it in the D.C. Circuit are out of luck, unless they reside or maintain their principal places of business in the same circuit. Mr. Montange recommends that FRAP be amended to permit a joint petition for review of agency action to be filed in the D.C. Circuit or in any circuit in which at least one of the joint petitioners resides or maintains its principal place of business.

Several members briefly stated their opposition to the suggestion. The members thought that, even if it could do so under the REA, this Committee should not use FRAP to supercede the venue provisions of the Hobbs Act. No member spoke in favor of retaining Mr. Montange's suggestion on the study agenda.

A member moved that Item No. 98-05 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

16. Item No. 98-06 (FRAP 4(b)(3)(A)) — effect of filing of FRCrP 35(c) motion on time to appeal)

FRCrP 35(c) states that a district court, "acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Suppose that a defendant is sentenced on June 1. Suppose further that the defendant files a FRCrP 35(c) motion on June 2. Finally, suppose that the district court does not act upon the motion until June 30 — long after the "7 days" referred to in FRCrP 35(c) have come and gone. This scenario raises at least two questions:

First, did the filing of the FRCrP 35(c) motion toll the time for the defendant to file a notice of appeal under Rule 4(b)(1)? Rule 4(b)(3)(A) lists certain post-judgment motions, the filing of which explicitly tolls the time to appeal under Rule 4(b)(1). FRCrP 35(c) motions are *not* among those listed in Rule 4(b)(3)(A). However, some of the courts of appeals have held that the list of motions in Rule 4(b)(3)(A) is not exclusive, and that under the "*Healy* doctrine" of the common law, any "motion for reconsideration" is sufficient to toll the time to appeal under Rule 4(b)(1). Is a FRCrP 35(c) motion such a "motion for reconsideration"?

In *United States v. Carmouche*, 138 F.3d 1014 (5th Cir. 1998), the Fifth Circuit fractured badly on this question. Judge DeMoss concluded that the particular motion filed by the defendant in *Carmouche*, although *labeled* a FRCrP 35(c) motion, was not, in fact, a FRCrP 35(c) motion, but was instead a "motion for reconsideration," and (apparently for that reason) tolled the time to appeal. Judge Duhé, joined by Judge Garwood, concluded that FRCrP 35(c) motions *do* toll the time to appeal, and that the particular motion filed by the defendant in *Carmouche* was exactly what it purported to be — a FRCrP 35(c) motion. Thus, all three judges agreed that the motion filed by the defendant tolled the time to appeal for *some* length of time, although they disagreed as to why.

The second question is this: Given that a district court has authority to correct a sentence under FRCrP 35(c) only when "acting within 7 days after the imposition of sentence," what happens when a timely FRCrP 35(c) motion is filed but the district court does not rule upon the motion until, say, 30 days after imposition of sentence? Again, the judges in *Carmouche* disagreed. Judge DeMoss argued that the authority of a district court to grant a motion should not necessarily be deemed coextensive with the tolling effect of that motion. Thus, even though a district court cannot grant a FRCrP 35(c) motion after the 7 day period expires, the time to appeal should continue to be tolled until the district court actually denies the motion. Judges Duhé and Garwood disagreed. They argued that, after the 7 day period of FRCrP 35(c) expires, any FRCrP 35(c) motion should be deemed denied — since the district court has lost any authority to grant that motion — and the time to appeal under Rule 4(b)(1) should begin to run. Thus, in the view of Judges Duhé and Garwood, if a defendant is sentenced on June 1 and files a FRCrP 35(c) motion on June 2, but the district court does not rule on the motion until June 30, the time to appeal begins to run on June 8. This is the law of the First Circuit, *see United States v. Morillo*, 8 F.3d 864, 867-70 (1st Cir. 1993), and, in the opinion of Judges Duhé and Garwood, it should be the law of the Fifth Circuit. However, an unpublished opinion of the Fifth Circuit is to the

contrary, *see United States v. Moya*, No. 94-10907 (5th Cir. July 25, 1995), and, under Fifth Circuit rules, that precedent binds the circuit until overturned by the en banc court.

Judge Garwood, who placed Item No. 98-06 on the Committee's study agenda, introduced this matter and reiterated his views. Judge Garwood also pointed out, in support of his position, that Rule 4(b)(5) specifically states that a FRCrP 35(c) motion does not "affect the validity of a notice of appeal filed before entry of the order disposing of the motion." In other words, Rule 4(b)(5) specifically provides that FRCrP 35(c) motions do not render the underlying judgments non-final.

Mr. Letter stated that the Justice Department strongly agrees with the First Circuit view advocated by Judges Duhé and Garwood in *Carmouche*. He urged that the issue be retained on the agenda and offered to make a specific proposal for amending Rule 4(b) at the next meeting of the Committee. Judge Garwood stated that he would welcome such a proposal from the Justice Department.

A member moved that Item No. 98-06 be retained on the study agenda. The motion was seconded. The motion carried (unanimously).

17. Item No. 98-07 (FRAP 22(a) — permit circuit judges to deny habeas applications)

Rule 22(a) requires that a habeas petition be filed in the district court and that, if it is erroneously presented to a circuit judge, it be transferred to the district court. Judge Kenneth F. Ripple has suggested that Rule 22(a) be amended to permit circuit judges to deny habeas petitions. He argues that it is a waste of time for a circuit judge to review a frivolous habeas petition and then, instead of denying it, transfer it to a district judge, who will have to take the time to review it before denying it.

A member said that this issue is worthy of further study. This issue arises frequently under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which has been interpreted by some courts to bar aliens from filing petitions for judicial review of deportation orders, but to permit aliens to effectively seek judicial review by filing habeas petitions. Another member agreed; she stressed that she did not necessarily agree with Judge Ripple — in fact, she was sympathetic to retaining the requirement in Rule 22(a) that all habeas petitions be ruled upon in the first instance by district courts — but she wanted to give Judge Ripple's argument more thought.

Mr. Letter stated that the government was now involved in litigation over the IIRIRA provisions on this issue and offered to make a formal presentation — and perhaps to present a proposal for amending Rule 22(a) — at the Committee's next meeting. Judge Garwood said that such a presentation would be most welcome.

A member moved to retain Item No. 98-07 on the study agenda. The motion was seconded. The motion carried (unanimously).

18. Item No. 98-08 (permit "54(b)" appeals from Tax Court)

It is not clear whether the courts of appeals have jurisdiction to review orders of the Tax Court that finally resolve some but not all of the disputes between the Internal Revenue Service and a taxpayer. The rules of the Tax Court do not contain the equivalent of FRCP 54(b). Chief Judge Richard A. Posner has suggested that either the rules of the Tax Court or FRAP be amended to permit "54(b)-type" appeals from the Tax Court. *See Shepherd v. Commissioner of Internal Revenue*, 147 F.3d 633 (7th Cir. 1998).

The Reporter introduced this issue and said that, in his opinion, it would be appropriate for such a "54(b)-type" provision to appear in the rules of the Tax Court rather than in FRAP. He suggested referring this issue to the committee responsible for drafting amendments to the Tax Court's procedural rules.

Mr. Letter asked that this matter be retained on the study agenda of this Committee. According to Mr. Letter, there is no final judgment rule for the Tax Court, and thus in theory *every* Tax Court order is immediately appealable. However, in practice, the circuits are split on whether and in what circumstances "partial" decisions of the Tax Court may be appealed. The normal practice of the Tax Court is not to issue a decision until all of the issues in dispute between the IRS and the taxpayer have been resolved. On occasion, though, the Tax Court varies from its normal practice and issues "partial" decisions, and the circuit courts have been inconsistent in their treatment of the appealability of such "partial" decisions. Mr. Letter's impression is that this issue needs to be addressed, but that FRAP is probably not the place to address it. Before this issue is removed from the Committee's study agenda, though, Mr. Letter would like to consult with the IRS and the Chief Judge of the Tax Court.

Several members expressed agreement with the Reporter that this issue is one that should be addressed in the rules of the Tax Court, and that FRAP should not be amended to incorporate a special "54(b)-type" provision applicable only to Tax Court decisions. Mr. Letter reiterated that he did not necessarily disagree, but wanted a chance to consult with the IRS and the Tax Court before this item was removed from the Committee's study agenda. Mr. Letter said that he would report back to the Committee at its next meeting.

A member moved that Item No. 98-08 be retained on the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

19. Item No. 98-09 (FRAP 32(a)(7)(B) — define "word")

Restylized Rule 32(a)(7) (set to take effect on December 1) provides that a party's principal brief may not exceed 30 pages, unless it contains no more than 14,000 words or, if it uses a monospaced typeface, it contains no more than 1,300 lines of text. Rule 32(a)(7) also

provides that a party's reply brief may not exceed 15 pages, unless it contains no more than 7,000 words or, if it uses a monospaced typeface, it contains no more than 650 lines of text. Rule 32(a)(7)(B)(iii) instructs that, in calculating whether a brief meets the word or line limitations, headings, footnotes, and quotations count, but the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, addendum, and certificates of counsel do not count. However, no where in Rule 32 is the word "word" defined.

Mr. Fulbruge said that the Fifth Circuit has for some time been enforcing limitations on briefs similar to those that will be implemented by restylized Rule 32, and that it has recently become clear that the failure of those limitations to define the word "word" has given counsel a loophole. Although Rule 32(a)(7)(C) states that an attorney who prepares her brief on computer *may* rely on the word count of the word processing software used to prepare the brief, it does not *require* use of the word count program. This permits attorneys to choose to count the words manually, and to define for themselves whether, e.g., numbers, symbols, and abbreviations count as words. For example, one attorney may count "*Smith v. Jones*, 150 F.3d 300 (5th Cir. 1998)" as two words, while another might count it as nine. Mr. Fulbruge described a recent Fifth Circuit case involving extraordinarily "creative" word counting by an attorney. Mr. Fulbruge suggests that Rule 32 may have to be rewritten to more specifically define "word."

A member asked whether *requiring* use of the computer's word count program would solve the problem. Mr. Fulbruge said that it would not. First, different word processing programs count words differently. Second, many pro se briefs are handwritten, often using tiny letters and lines cramped closely together. The only effective way of limiting the length of pro se briefs is by limiting the number of words. However, the clerks do not have time to manually count the words in these briefs — and, even if they did, they could not do so until "word" was first defined.

Judge Garwood said that, in his opinion, trying to define "word" in Rule 32 would be an exercise in futility. He said that the Fifth Circuit case described by Mr. Fulbruge was unusual; for the most part, the Fifth Circuit rule has worked well. Moreover, the lengthy handwritten pro se briefs described by Mr. Fulbruge are just an unfortunate reality of appellate judging. The "cheating" done by the pro se litigant — that is, the tiny handwriting and cramped lines — is far more likely to prejudice the litigant than the litigant's opponent.

A member said that the D.C. Circuit has imposed a word limit on briefs for almost 5 years and, to his knowledge, it has not been a problem. He noted, though, that the D.C. Circuit rule differs from restylized Rule 32 in an important respect: Under the D.C. Circuit rule, a party who prepares his brief on a computer must comply with a word count limit, while a party who does not prepare his brief on a computer must comply with a page count limit.

A member asked why the D.C. Circuit approach would not work for FRAP. For example, all principal briefs could be limited to 30 pages *unless* they were prepared on computer, in which case they would be limited to 14,000 words. However, other members expressed reluctance to begin rewriting restylized Rule 32 before it even takes effect.

A member said that trying to define "word" in Rule 32 would be a nightmare. She also pointed out that, even if "word" could be defined successfully, the very act of defining "word" would make it impossible for parties to rely on word count programs, as none of those programs would count words exactly like Rule 32.

Prof. Coquillette asked whether it was possible to draft limitations that would apply only to pro se briefs or prisoner briefs. A couple members responded that, while it might be possible, they would be reluctant to single out specific categories of litigants in this manner. Prof. Coquillette said that he shared those sentiments and suggested that a better means for getting prisoners to comply with limitations on briefs is to create "plain English" forms and instructions. That step would at least help to eliminate abuses that are the result of ignorance of the rules.

A member moved that Item No. 98-09 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

VI. Additional Old Business and New Business (If Any)

Ms. McKenna drew the Committee's attention to the recently released report of the Commission on Structural Alternatives for the Federal Courts of Appeals and said that comments on the report from members of this Committee would be welcomed. She said that none of the Commission's proposals would immediately impact upon FRAP. The Committee briefly discussed some of the Commission's recommendations.

Judge Garwood thanked Mr. Munford for his outstanding service to this Committee and presented him with a certificate of appreciation.

VII. Scheduling of Dates and Location of Spring 1999 Meeting

The Committee agreed that it will meet in Washington, D.C., on April 15 and 16, 1999.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 9:35 a.m.

Respectfully submitted,

Patrick J. Schiltz
Reporter

Reporter's Note: Attached as an appendix to these minutes are copies of all amendments and Committee Notes approved by the Committee at this meeting.

APPENDIX

To the Minutes of the Fall 1998 Meeting of the Advisory Committee on Appellate Rules

Reporter's Note: This appendix contains copies of all amendments to the Federal Rules of Appellate Procedure and Committee Notes approved by the Advisory Committee on Appellate Rules at its October 1998 meeting.

Rule 1. Scope of Rules; Title

(b) ~~**Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.~~ [Abrogated]

Committee Note

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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

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

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

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

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

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

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

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such

remaining motion is entered or when the judgment altered or amended in response to such a motion is entered, whichever comes later.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion or the entry of the judgment altered or amended in response to such a motion, whichever comes later.

(iii) No additional fee is required to file an amended notice.

* * *

(7) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure, but compliance with Rule 58 is not required when an order denies all relief sought by any motion listed in Rule 4(a)(4)(A). The failure to enter an order or judgment under Rule 58 when required does not invalidate an otherwise timely appeal from that order or judgment.

Committee Note

Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii). The Committee intends that when a district court, in ruling upon one of the post-judgment motions listed in Rule 4(a)(4)(A), orders that a judgment be altered or amended, the time to appeal that order and the altered or

amended judgment runs from the date on which the altered or amended judgment is entered. At present, Rule 4(a)(4)(B)(ii) leaves that matter in some doubt by providing that an appeal from an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) should be brought "within the time prescribed by this Rule measured from the *entry of the order*," rather than from the entry of the altered or amended judgment. Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii) have been amended to eliminate that ambiguity.

Subdivision (a)(7). The courts of appeals are divided on the question of whether an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) must be entered on a separate document in compliance with Fed. R. Civ. P. 58 before that order can be appealed and before the time to appeal the original judgment begins to run. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3950.2, at 113 (1996) ("The caselaw is in disarray on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions."). The First and Second Circuits (as well as at least one decision of the Ninth Circuit) hold that Fed. R. Civ. P. 58 applies to all orders disposing of post-judgment motions. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 234 (1st Cir. 1992) (en banc); *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1458 (9th Cir. 1989); *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir. 1987). The Fifth and Seventh Circuits (as well as at least one decision of the Ninth Circuit) hold that Fed. R. Civ. P. 58 applies when post-judgment relief is granted, but not when such relief is denied. *See Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231 (9th Cir. 1989). The Eleventh Circuit holds that Fed. R. Civ. P. 58 never applies to orders granting or denying post-judgment relief. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560-61 (11th Cir. 1991).

Subdivision (a)(7) has been amended to adopt the position of the Fifth and Seventh Circuits. The time to appeal an order *granting* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) does not begin to run until it is entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order usually alters or amends a judgment, the order should be entered with the same formality as a judgment. The time to appeal an order *denying* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) begins to run immediately upon entry of the order, whether or not the order has been entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order does not disturb the original judgment, compliance with the separate document requirement of Fed. R. Civ. P. 58 should be unnecessary.

Subdivision (a)(7) has been further amended to apply the one-way waiver doctrine when any order or judgment — whether or not it disposes of a post-judgment motion — is required to be entered in compliance with Fed. R. Civ. P. 58 but is not. In that situation, the party against whom the order or judgment is entered has two options. First, the party can choose to appeal the order or judgment, and thereby waive its right to have the order or judgment entered in compliance with Fed. R. Civ. P. 58. The appeal will be heard, even if the appellee objects to the

lack of a Fed. R. Civ. P. 58 order or judgment. Second, the party can wait until the order or judgment is entered in compliance with Fed. R. Civ. P. 58 and then appeal. In theory, the party could wait forever to appeal, but, in practice, this is highly unlikely. Nevertheless, "[v]ictorious litigants wishing to write *finis* to the case would do well to ensure that the district court adheres to Rule 58." *Otis v. City of Chicago*, 29 F.3d 1159, 1167 (7th Cir. 1994) (en banc).

The incorporation of the one-way waiver doctrine in subdivision (a)(7) reflects the fact that the separate document requirement is imposed for the benefit of the losing party. If that party wishes to waive that requirement by bringing a premature appeal, it seems pointless to dismiss the appeal, require the district court to enter the order or judgment on a separate document, and force the party to appeal a second time. "Wheels would spin for no practical purpose." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978). At the same time, the right of the losing party to have an order or judgment entered in compliance with Rule 58 should not be lost through the party's silence. Cases to the contrary — in particular, *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229 (1st Cir. 1992) (en banc) — are expressly rejected.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

Committee Note

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought after the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir.1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). What these courts have overlooked is that the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district

court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or after the time prescribed by Rule 4(b) expires.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention

(f) **Petition or Application Filed Before Agency Action Becomes Final.** If a petition for review or application to enforce is filed after an agency announces or enters its order — but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final and non-appealable — the petition or application becomes effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

Committee Note

Subdivision (f). Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-final and hence non-appealable. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g.*, *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f) provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition.

Subdivision (f) is designed to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-final (and hence non-appealable) by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam); *see also Chu v. INS*, 875 F.2d 777, 781 (9th Cir. 1989), *overruled on other grounds by Pablo v. INS*, 72 F.3d 110 (9th Cir. 1995); *West Penn Power Co. v. EPA*, 860 F.2d 581, 588 (3d Cir. 1988); *Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (f) removes this trap.

Rule 26. Computing and Extending Time

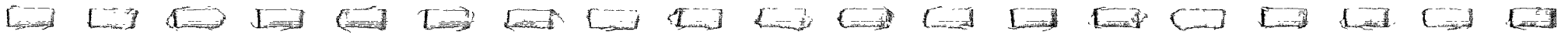
(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than ~~7~~ 11 days, unless stated in calendar days.

Committee Note

Subdivision (a)(2). The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Fed. R. App. P. 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure. This creates a trap for unwary litigants. No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over.



Item 6A

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

TO: Honorable Anthony J. Scirica, Chair
Committee on Rules of Practice
and Procedure

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 3, 1998

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on October 8-9, 1998, in Andover, Massachusetts.

II. Action Items

The Advisory Committee on Bankruptcy Rules will not be presenting any matters for action at the Standing Committee's meeting in Marco Island, Florida, on January 7-8, 1999.

III. Information Items

A. Publication of Proposed Rule Amendments. At its June 1998 meeting, the Standing Committee authorized the publication of a preliminary draft of proposed amendments to the Bankruptcy Rules. The preliminary draft is divided into two parts, the "Litigation Package" consisting of proposed amendments to 27 rules, and "Other Amendments" consisting of miscellaneous proposed amendments to six rules.

The preliminary draft was published in August 1998 for comment by the bench and bar. The deadline for submitting comments is January 1, 1999, and a public hearing is scheduled for January 28, 1999, in Washington, D.C.[1]

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[1]At the time of this report, one request has been received for a personal appearance at the scheduled hearing.

The "Litigation Package" of proposed amendments would substantially revise and make more uniform the procedures governing litigation other than adversary proceedings. The published *Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice*, which summarizes and explains the reasons for these proposed amendments, is attached to this report as Appendix A.

In an effort to inform the bench of these important changes to litigation practice in bankruptcy court, and to solicit comments, the reporter met with the Administrative Office Bankruptcy Judges Advisory Group, consisting of one bankruptcy judge from each circuit, on November 5th in Washington, D.C. The reporter also met with a group of approximately 25 bankruptcy judges, most of whom were from districts in California, at the National Conference of Bankruptcy Judges in Dallas on October 23rd. The reporter also made a presentation on the proposed amendments, and solicited written comments, at the National Bankruptcy Conference (consisting of lawyers, judges, and professors) on October 15th in Washington, D.C.

At the time of this report, 28 written comments have been received. The Advisory Committee will consider all comments at its next meeting to be held on March 18-19, 1999, and it is expected that proposed amendments will be presented for approval by the Standing Committee at its June 1999 meeting.

C. Bankruptcy "Reform" Legislation. Several comprehensive bankruptcy bills were considered by Congress in 1998. Both the Senate and the House of Representatives passed bills dealing with both consumer and business bankruptcy cases. But significant differences between the Senate and House bills required a Congressional conference that produced a compromise bill during the final days of the 105th Congress. The conference bill passed the House, but not the Senate. It is likely that comprehensive bankruptcy bills will be introduced early in the 106th Congress.

The Advisory Committee monitored legislative developments closely during 1998 and will continue to do so in 1999. Both the House and Senate bills in 1998 would have amended the Bankruptcy Code and title 28 of the United States Code in ways that would have required substantial amendments to the Bankruptcy Rules and Official Bankruptcy Forms. Several provisions of these bills were expressly directed to the Advisory Committee. For your information, a list of the provisions of the conference bill that passed the House on October 8, 1998 (H.R.3150), and that were expressly directed to the Advisory Committee, is attached to this report as Appendix B.

D. Rules on Attorney Conduct. At the Advisory Committee's request, the Federal Judicial Center is conducting a survey of bankruptcy judges and lawyers to

identify areas regarding attorney conduct that have caused significant problems in bankruptcy cases and proceedings. The survey results should be useful in determining the need for (and possibly the formulation of) new or amended Bankruptcy Rules governing attorney conduct. The survey should be useful to Professor Coquillette's project on rules governing attorney conduct in federal courts.

Attachments:

Appendix A - Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice

Appendix B - Selected Provisions of H.R. 3150 As Modified By the House/Senate Conference and Passed by the House Of Representatives on October 8, 1998

Draft of minutes of the Advisory Committee meeting of October 8-9, 1998.

Item 6B-C

Appendix A

Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice

At the request of the Advisory Committee on Bankruptcy Rules, in 1995 the Federal Judicial Center conducted an extensive survey of bankruptcy judges, lawyers, trustees, clerks and other participants in the bankruptcy system to determine their satisfaction or dissatisfaction with the Federal Rules of Bankruptcy Procedure. The Advisory Committee requested the survey in connection with the work of its Long-Range Planning Subcommittee and for the purpose of identifying areas that are in need of improvement. The survey results indicated general satisfaction with the Rules, but identified motion practice and litigation as areas of significant dissatisfaction.

The Bankruptcy Rules in Part VII govern an adversary proceeding, which is a form of litigation in bankruptcy court conducted in a manner that is similar to a civil action in district court. For example, an adversary proceeding is commenced by filing a complaint followed by service of a summons. Most Part VII Rules incorporate by reference specific Federal Rules of Civil Procedure. The Advisory Committee believes, and the Federal Judicial Center survey confirms, that the Rules governing adversary proceedings are working well.

But most requests for court orders and litigated disputes in bankruptcy court are not adversary proceedings; they are governed by some form of motion practice unrelated to any adversary proceeding. There has been confusion and criticism regarding procedures that govern these matters, and these are the troublesome areas identified in the Federal Judicial Center survey.

One significant difference between a typical motion filed in a civil action in the district court and a typical motion filed in bankruptcy court is that the motion in district court relates to a pending lawsuit. For example, a defendant may file a motion to dismiss a complaint or for summary judgment. In contrast, a motion filed in bankruptcy court usually commences new litigation that is unrelated to any pending lawsuit. For example, a creditor may file a motion for the appointment of a trustee in a chapter 11 case or for relief from the automatic stay, or a trustee may file a motion to assume or reject an executory contract. Each of these motions commences litigation by or against specified parties who may not be parties in any pending litigation. Although these motions are made within a bankruptcy case, the bankruptcy case is not, in and of itself, litigation involving a legal dispute in the traditional sense. Under section 301 of the Bankruptcy Code, the mere filing of a voluntary bankruptcy petition constitutes an order for relief.

A serious criticism of the Bankruptcy Rules is that there is a lack of national uniformity and insufficient guidance regarding procedures governing the resolution of these important

substantive disputes. Motions relating to a pending adversary proceeding — such as a motion relating to discovery in an adversary proceeding seeking to recover a preferential payment to a creditor — may be subject to minor local variation consistent with the flexibility present in district court motion practice. The local variations in procedure addressed by these proposed amendments are of much greater consequence.

Although such motions that are unrelated to pending litigation may involve millions of dollars to the litigants, the current Rules provide little specificity or uniformity as to the procedure governing them. Current Rule 9014 provides that relief is obtained by motion served in the manner provided for service of a summons, that reasonable notice and opportunity to be heard must be afforded, and that a response is not required unless the court orders otherwise. In the absence of a contrary order, certain listed Part VII rules applicable to adversary proceedings — most relating to discovery or summary judgment — apply to the motion, and the court may order that other Part VII rules shall apply. Rule 9006(d), which applies to motions generally, provides that, unless the court orders otherwise, at least five days' notice of a hearing must be given and, if the motion is supported by affidavit, the affidavit must be served at least one day before the hearing. These general provisions are often varied or supplemented with greater detail by local rule or court order. The result is that practice varies from district to district or from court to court. The Advisory Committee believes that greater specificity and national uniformity, as well as improvements to the current procedures, are desirable for such motions that are unrelated to any pending litigation.

Another criticism addressed by the Advisory Committee is confusion resulting from terminology used in the Bankruptcy Rules. For example, Rule 9014 governs "contested matters," such as a motion to reject an executory contract or a motion to obtain court approval of a sale of assets. In many instances, "contested matters" are, in fact, uncontested. Other proceedings, such as an "application" for approval of professional fees, are not "contested matters" under the Rules, despite the fact that they are often contested by parties in interest.

The Advisory Committee has spent more than two years studying the Rules relating to litigation in bankruptcy courts and formulating proposed amendments designed to improve procedures for obtaining court orders and resolving disputes. As mentioned above, the Advisory Committee is satisfied that the rules governing adversary proceedings under Part VII are working well. But the Advisory Committee is proposing amendments that would substantially revise other procedures for obtaining court orders unrelated to pending litigation, both for routine administrative matters and for more complex disputes that require greater procedural safeguards.

The most important and fundamental changes would be made to Rules 9013 (Motions; Form and Service) and 9014 (Contested Matters), although 25 other Rules will have to be revised to conform to the new procedures. In general, the proposed amendments would increase national uniformity and provide more detailed procedural guidance when a party requests relief unrelated to pending litigation; these amendments should reduce substantially the number of local rules.

The highlights of the preliminary draft of the proposed amendments are as follows:

(1) Rule 9013 would be replaced with a new rule on "applications." This rule would govern specific types of relief in areas that are routine, nonsubstantive, and rarely contested. For example, Rule 9013 would govern the procedure for obtaining a court order to jointly administer two or more cases, or for an order reopening a closed case. The procedures would be streamlined so as to avoid unnecessary costs or delay.

* The application and a proposed order would be served on specified entities at any time before, or even at, the time when the application is filed with the court; advance notice is not required.

* Although service by first class mail is available, the court by local rule may permit the application and accompanying papers to be served by electronic means.

* A response to the application would not be required and the court may order relief without a hearing.

(2) Rule 9014 would govern motions that are related to the administration of the bankruptcy case or the estate, but are usually unrelated to any other pending litigation. These motions are often contested and may affect significant substantive rights of the parties. For example, a motion asking the court to order the appointment of a trustee in a chapter 11 case, requesting relief from the automatic stay, requesting authorization for a debtor in possession to obtain credit, or seeking an order terminating the exclusive period in which only the debtor may file a plan of reorganization, would be an administrative proceeding governed by Rule 9014. Certain types of proceedings, such as a chapter 11 confirmation hearing governed by Rule 3020, would be expressly excluded from the scope of the rule so that more appropriate tailor-made procedures could govern. The title of Rule 9014 would be changed from "Contested Matters" to "Administrative Proceedings."

The significant features of an administrative proceeding under the preliminary draft of the proposed amendments to Rule 9014 include the following:

* The proceeding would be commenced by filing and serving a motion.

* The rule would specify the papers that must accompany the motion. A proposed order and, unless the movant is a consumer debtor, one or more supporting affidavits must be included. In certain situations, a copy of a

valuation report must be included with the motion papers.

* The motion papers, including notice of the hearing, must be served on specified entities at least 20 days before the hearing date. The court by local rule may permit the papers to be served by electronic means.

* Interim relief, if appropriate, may be ordered on an expedited basis.

* A response to the motion may be served and filed, but no later than five days before the scheduled hearing date. If no timely response is filed, the court may rule on the matter without a hearing or may give notice to the movant that a hearing will be held notwithstanding the absence of a response.

* Discovery methods applicable in adversary proceedings would be available, except that mandatory disclosures required under Civil Rule 26(a)(1)-(3) and the discovery meeting required under Rule 26(f) would not apply. Certain 30-day time periods in the Civil Rules relating to discovery would be reduced to ten days consistent with the expedited nature of administrative proceedings.

* If a timely response is filed, the court would hold a hearing to determine whether there is a genuine issue as to any material fact and, if not, whether any party is entitled to relief as a matter of law. Except for certain types of motions or if the parties otherwise consent, no testimony would be taken at the hearing. Therefore, attorneys and unrepresented parties would not have to bring witnesses to the hearing in most situations. If there is no genuine issue as to any material fact, the court may grant the appropriate relief. If the court finds that there is a genuine issue of material fact, the court would conduct a status conference for the purpose of expediting the disposition of the proceeding and scheduling the evidentiary hearing. Alternatively, on reasonable notice to the parties, the court may order that an evidentiary hearing at which witnesses may testify will be held on the originally scheduled hearing date.

* Rule 43(e) of the Federal Rules of Civil Procedure provides that where a motion is based on facts not appearing of record the court may hear the motion on affidavits presented by the parties. The Advisory Committee believes, however, that the assessment of witness credibility is as important at an evidentiary hearing on an administrative motion as it is at a trial in an adversary proceeding. Accordingly, the proposed amendments to Rule 9014 provide that Civil Rule 43(e) does not apply at an evidentiary hearing on an administrative motion. When there is a genuine issue of

material fact, this provision would require that witnesses appear and testify, rather than give testimony by affidavit.

* To provide flexibility where needed, the court for cause may order that any procedural requirement under Rule 9014 will not apply or will be amended in a particular proceeding. But the requirements of Rule 9014 may not be abrogated by local rule or general order. In accordance with Rule 9006, the court also may extend or reduce any time period set forth in Rule 9014.

It would be desirable to divide all proceedings arising in, or related to, a bankruptcy case into only three categories: applications under Rule 9013, administrative proceedings under Rule 9014, and adversary proceedings under Part VII. But there are some proceedings that do not fit well into any of these three categories. These excluded proceedings, which are listed in the proposed amendments to Rule 9014(a), would be governed by other specified rules.

Although the proposed amendments to Rules 9013 and 9014 would provide greater guidance and national uniformity, they would not govern motions that are made within a pending adversary proceeding, pending administrative proceeding, or other pending litigation. For example, Rules 9013 and 9014 would not govern a motion dealing with a discovery dispute in an adversary proceeding. Motions that are related to pending litigation in bankruptcy court — which are similar to typical motions made in a civil action in the district court — would continue to be guided by other national rules, such as Rule 7007 or 9006, and by local rules and practice.

Appendix B

SELECTED PROVISIONS OF H.R. 3150 AS MODIFIED BY THE HOUSE/SENATE CONFERENCE AND AS PASSED BY THE HOUSE OF REPRESENTATIVES ON OCTOBER 8, 1998

Section 403. Standard Form Disclosure Statement and Plan.

The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States shall, within a reasonable period of time after the date of the enactment of this Act, propose for adoption standard form disclosure statements and plans of reorganization for small business debtors (as defined in section 101 of title 11, United States Code, as amended by this Act), designed to achieve a practical balance between--

(1) the reasonable needs of the courts, the United States trustee, creditors, and other parties in interest for reasonably complete information; and

(2) economy and simplicity for debtors.

Section 404. Uniform National Reporting Requirements.

(a) Reporting Requirements.-- (1) Title 11 of the United States Code is amended by inserting after section 307 the following.

Sec. 308. Debtor reporting requirements

"A small business debtor shall file periodic financial and other reports containing information including --

(1) the debtor's profitability, that is, approximately how much money the debtor has been earning or losing during current and recent fiscal periods;

(2) reasonable approximations of the debtor's projected cash receipts and cash disbursements over a reasonable period;

(3) comparisons of actual cash receipts and disbursements with projections in prior years;

(4) whether the debtor is --

(A) in compliance in all material respects with postpetition requirements imposed by this title and the Federal Rules of Bankruptcy Procedure; and

(B) timely filing tax returns and paying taxes and other administrative claims when due, and, if not, what the failures are and how, at what cost, and when the debtor intends to remedy such failures; and

(5) such other matters as are in the best interests of the debtor and creditors, and in the public interest in fair and efficient procedures under chapter 11 of this title."

****

(b) Effective Date.-- The amendments made by subsection (a) shall take effect 60 days after the date on which rules are prescribed pursuant to section 2075, title 28, United States Code to establish forms to be used to comply with section 308 of title 11, United States Code, as added by subsection (a).

Section 405. Uniform Reporting Rules and Forms for Small Business Cases.

(a) Proposed Rules and Forms.-- The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States shall propose for adoption amended Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms to be used by small business debtors to file periodic financial and other reports containing information, including information relating to--

(1) the debtor's profitability;
(2) the debtor's cash receipts and disbursements; and
(3) whether the debtor is timely filing tax returns and paying taxes and other administrative claims when due.

(b) Purpose.-- The rules and forms proposed under subsection (a) shall be designed to achieve a practical balance between--

(1) the reasonable needs of the bankruptcy court, the United States trustee, creditors, and other parties in interest for reasonably complete information;
(2) the small business debtor's interest that required reports be easy and inexpensive to complete; and
(3) the interest of all parties that the required reports help the small business debtor to understand its financial condition and plan its future.

Section 607. Sense of Congress Regarding Expansion of Rule 9011 of the Federal Rules of Bankruptcy Procedure

It is the sense of Congress that rule 9011 of the Federal Rules of Bankruptcy Procedure (11 U.S.C. App) should be modified to include a requirement that all documents (including schedules), signed and unsigned, submitted to the court or to a trustee by debtors who represent themselves and debtors who are represented by an attorney be submitted only after the debtor or the debtor's attorney has made reasonable inquiry to verify that the information contained in such documents is well grounded in fact, and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law.

Section 802. Effective Notice to Government

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(b) Adoption of Rules Providing Notice.-- The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States shall, within a reasonable period of time after the date of the enactment of this Act, proposed for adoption enhanced rules for providing notice to State, Federal, and local government units that have regulatory authority over the debtor or which may be creditors in the debtor's case. Such rules shall be reasonably calculated to ensure that notice will reach the representatives of the

governmental unit, or subdivision thereof, who will be the proper persons authorized to act upon the notice. At a minimum, the rules should require that the debtor--

(1) identify in the schedules and the notice, the subdivision, agency, or entity in respect of which such notice should be received;

(2) provide sufficient information (such as case captions, permit numbers, taxpayer identification numbers, or similar identifying information) to permit the governmental unit or subdivision thereof, entitled to receive such notice, to identify the debtor or the person or entity on behalf of which the debtor is providing notice where the debtor may be a successor in interest or may not be the same as the person or entity which incurred the debt or obligation; and

(3) identify, in appropriate schedules, served together with the notice, the property in respect of which the claim or regulatory obligation may have arisen, if any, the nature of such claim or regulatory obligation and the purpose for which notice is being given.

Item 7A-B

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

To: **Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Paul V. Niemeyer, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

Date: **December 10, 1998**

Re: **Report of the Civil Rules Advisory Committee**

I Introduction

The Civil Rules Advisory Committee met on November 12 and 13, 1998, in Charleston, South Carolina. The three following parts of this Report present: (II) a recommendation to publish for comment changes in the rules governing impoundment of things claimed to infringe a copyright; (III) a report of the Advisory Committee's deliberations on the proposal to establish a uniform effective date for local district-court rules; and (IV) brief summaries of other matters that remain on the Advisory Committee's agenda.

In addition to these matters, the Advisory Committee took action with respect to some of the proposals that have accumulated on the docket. Agenda items have accumulated for a variety of reasons. Some topics, having been studied in some detail, seem to present questions that must be deferred until there is time for another major project. The study of special masters, described below, is one such topic. Other topics seem closely related, and to deserve periodic study as a group. The perennial suggestions to revise the service-of-process provisions of Civil Rule 4 are an example. Part of the accumulation has arisen only because of the time demanded by the major projects to review class-action practices and discovery, and the Advisory Committee's role as leader of the Mass Torts Working Group. The Agenda Subcommittee has been reestablished to undertake a comprehensive review of the docket for the purpose of recommending appropriate courses of action.

The draft minutes of the November meeting are attached.

II Action Item
Copyright Rules Proposals Recommended for Publication

The Advisory Committee recommends publication for comment of three related rules changes: (1) Abrogation of the Copyright Rules of Practice; (2) Amendment of Civil Rule 65 by adding a new subdivision (f) that explicitly brings copyright impoundment procedures within Rule 65 injunction procedures; and (3) Amendment of Civil Rule 81(a)(1), primarily for the purpose of reflecting abrogation of the Copyright Rules of Practice. These proposals seek to establish a firm legal foundation for the practices that have been adopted by several district courts. Confirming these practices will ensure that effective pretrial remedies are in fact available to protect copyrights as a central form of intellectual property. The changes will provide reassurance to other countries that the United States can honor its international obligations in these matters.

Most lawyers, including many copyright lawyers, do not know that an independent set of Copyright Rules of Practice, adopted under the 1909 Copyright Act, seems to persist to this day. The Advisory Committee first proposed abrogation of the Copyright Rules in 1964, but the question was put aside in deference to the copyright reform efforts that eventually led to the 1976 Copyright Act. Nothing has been done since then, despite grave constitutional doubts about the ex parte seizure provisions and about the actual life or accidental death of the rules. Several federal courts have recognized the problems that arise from these anachronistic rules, and have invented apparently successful means to overcome the problems. At least a few anecdotes suggest that some practitioners have continued to invoke the ex parte seizure remedies provided by the Copyright Rules, however, and in any event it is desirable to get our house in order. This proposal renews the 1964 proposals to abrogate the 1909 Copyright Rules and to amend Civil Rule 65 to provide a secure foundation for all appropriate pretrial remedies.

These proposals are designed to ensure that federal courts can continue to do what they are doing now — providing effective remedies and procedures in copyright cases. As matters now stand, there is a plausible technical argument that there are no rules of procedure for copyright actions. Almost universally, federal courts ignore this potential problem and apply the Federal Rules of Civil Procedure. Beyond this general difficulty lies a more pointed problem. The prejudgment seizure provisions in the Copyright Rules of Practice, even if they apply to actions under the 1976 Copyright Act, probably are inconsistent with the Act and quite probably are unconstitutional. Here too the federal courts seem to have adapted by applying the safeguards of Civil Rule 65 procedure in ways that both satisfy constitutional requirements and provide effective protection against copyright infringements. Appropriate rule changes are more than thirty years overdue. It is time to make the rules conform to practice.

Congressional staff members have expressed some concern that the proposed action, although taken for the purpose of establishing a secure foundation for effective copyright remedies, might be misunderstood in other countries. The United States is actively encouraging all countries to provide effective intellectual property schemes. If the Committee decides that

these problems have lingered more than long enough, care must be taken to reassure the world that the purpose and effect are to bolster present effective practice, not to diminish it.

The Problems

No Procedure. Civil Rule 81(a)(1) presents the question whether there are any procedural rules to apply in copyright actions. It states that the Civil Rules "do not apply to * * * proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States." Rule 1 of the Copyright Rules of Practice reads:

> Proceedings in actions under section 25 of the Act of March 4, 1909, entitled "An Act to amend and consolidate the acts respecting copyright", including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, in so far as they are not inconsistent with these rules.

The problem is that all of the 1909 Copyright Act was superseded in 1976. On the face of Civil Rule 81 and Copyright Rule 1, there is no Supreme Court rule that makes the Civil Rules applicable to proceedings in copyright under present Title 17.

Courts have mostly reacted by ignoring this seeming problem. In *Kulik Photography v. Cochran*, E.D.Va.1997, 975 F.Supp. 812, 813, the court noted an unpublished opinion by a magistrate judge that apparently holds the Civil Rules inapplicable in a copyright action. The court observed that many courts continue to apply the Civil Rules, and then concluded that it need not decide whether to follow the Civil Rules because in any event it could grant the defendants' motion to dismiss for lack of personal jurisdiction. Otherwise, federal courts seem to follow the sensible course of applying the Civil Rules without further anguish. The Civil Rules nonetheless should be amended to securely establish this result.

The failure to amend Copyright Rule 1 in 1976 may reflect the obscurity of the Copyright Rules. Although it is embarrassing to have waited so long, it would be easy to adopt a technical amendment that substitutes an appropriate reference to the 1976 Act in Copyright Rule 1.

The reason for inquiring beyond this simple technical correction is revealed on examining the balance of the Copyright Rules. Rule 2, which imposed special pleading requirements, was abrogated in 1966. The remaining Rules 3 through 13 deal with one subject only — the procedure for seizing and holding, before judgment, "alleged infringing copies, records, plates, molds, matrices, etc., or other means of making the copies alleged to infringe the copyright." These rules require a bond approved by the court or commissioner, but do not appear to require any particular showing of probable success. The marshal is to retain the seized items and keep them in a secure place. The defendant has three days to object to the sufficiency of the bond. The defendant also may apply for the return of the articles seized with a supporting "affidavit stating all material facts and circumstances tending to show that the articles seized are not

infringing * * *." Rule 10 provides that "the court in its discretion, after such hearing as it may direct, may order such return" if the defendant files a bond in the sum directed by the court.

Since the Copyright Rules deal only with prejudgment seizure, and have not been reviewed for many years, it seems appropriate to ask whether they continue to reflect evolving concepts and practices that have transformed the due process constraints on prejudgment remedies.

Due Process. In 1964, the Civil Rules Advisory Committee considered the Copyright Rules and published for comment a proposal to abrogate the Copyright Rules. The proposal was driven in part by a belief that all civil actions should be governed by the Civil Rules, and in part by grave doubts about the wisdom of the prejudgment seizure provisions in Rules 3 through 13. The seizure procedure:

> is rigid and virtually eliminates discretion in the court; it does not require the plaintiff to make any showing of irreparable injury as a condition of securing the interlocutory relief; nor does it require the plaintiff to give notice to the defendant of an application for impounding even when an opportunity could feasibly be provided.

Opposition was expressed by the American Bar Association and by the Ninth Circuit Judicial Conference, who apparently relied on the same advisers. The opponents expressed satisfaction with the working of the Copyright Rules. The Reporters were not swayed; they suggested that alleged infringers were not likely to be heard in the rulemaking process. In the end, the Advisory Committee concluded that its proposals were sound, but that the final decision whether to recommend adoption should be made by the Standing Committee in light of the needs of sound relations with Congress while the process of revising the Copyright Act was going on. The Standing Committee recommended that only the special pleading requirements embodied in Rule 2 be abrogated.

For more than thirty years, the Copyright Rules of Practice have been published in U.S.C.A. with the following Advisory Committee Notes appended to each remaining rule:

> * * * The Advisory Committee has serious doubts as to the desirability of retaining Copyright Rules 3-13 for they appear to be out of keeping with the general attitude of the Federal Rules of Civil Procedure * * * toward remedies anticipating decision on the merits, and objectionable for their failure to require notice or a showing of irreparable injury to the same extent as is customarily required for threshold injunctive relief. However, in view of the fact that Congress is considering proposals to revise the Copyright Act, the Advisory Committee has refrained from making any recommendation regarding Copyright Rules 3-13, but will keep the problem under study.

The line of contemporary decisions revising due process requirements for prejudgment remedies began soon after this paragraph was written. See *Sniadach v. Family Fin. Corp.*, 1969, 395 U.S. 337, 89 S.Ct. 1820; *Fuentes v. Shevin*, 1972, 407 U.S. 67, 92 S.Ct. 1983; *Mitchell v. W.T. Grant Co.*, 1974, 416 U.S. 600, 94 S.Ct. 1895; *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 1975, 419 U.S. 601, 95 S.Ct. 719; *Connecticut v. Doehr*, 1991, 501 U.S. 1, 111 S.Ct. 2105. These decisions do not establish a crystal-clear formula for evaluating the process required to support no-notice prejudgment remedies. But they do make it clear that the procedures established by the Copyright Rules would have at best a very low chance of passing constitutional muster. It seems to be accepted that no-notice preliminary relief continues to be available on showing a strong prospect that notice will enable the opposing party to defeat the opportunity for effective relief. But it is almost certainly required that this showing be made in ex parte proceedings before a judge or magistrate judge. A mere affidavit filed with a court clerk will not do. The Copyright Rules do not approach this standard.

Statutory Provision: In addition to the due process problem, the Copyright Rules also seem inconsistent with the interim impoundment remedy established by the 1976 Copyright Act. 17 U.S.C. § 503(a) provides:

> At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

This provision gives the court discretion whether to order impoundment, and discretion to establish reasonable terms. Apart from the terms of the bond posted by the plaintiff, discretion seems to enter the Copyright Rules only at the Rule 10 stage of an order to return the seized items.

An early reaction to these difficulties was provided by Judge Harold Greene in *WPOW, Inc. v. MRLJ Enterprises*, D.D.C.1984, 584 F.Supp. 132, 134-135. Judge Greene concluded that § 503(a) makes prejudgment impoundment discretionary, and that an exercise of discretion requires "procedures which are other than summary in character." Decisions under the pre-1976 Act Copyright Rules no longer control. Instead, the normal injunction requirements of Civil Rule 65 apply. A later decision by Judge Sifton provides a strong statement that the Copyright Rules are inconsistent with § 503(a), and an equally strong suggestion that they probably are unconstitutional. *Paramount Pictures Corp. v. Doe*, E.D.N.Y.1993, 821 F.Supp. 82. The reasoning of these decisions was found persuasive in *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, N.D.Cal.1995, 923 F.Supp. 1231, 1260-1265, where the court adopted Civil Rule 65 procedures. The doubts expressed by the WPOW and Paramount Pictures courts are reflected, without need for resolution, in *First Technology Safety Systems, Inc. v. Depinet*, 6th Cir.1993, 11 F.3d 641, 648 n. 8. *Columbia Pictures Indus. v. Jasso*, N.D.Ill.1996, 927 F.Supp. 1075, 1077, may seem to look the other way by stating that the Copyright Rules

govern impoundment, but the court then proceeds through all of the appropriate steps for a court-determined temporary restraining order under Civil Rule 65. *Century Home Entertainment, Inc. v. Laser Beat, Inc.*, E.D.N.Y.1994, 859 F.Supp. 636, is similar to the Columbia Pictures decision.

If there is room for significant doubt, it is whether even the Civil Rule 65(b) temporary restraining order procedures may support no-notice seizures. The Supreme Court decisions are not as clear as could be wished. There is room to argue that even after an ex parte hearing, free use of a defendant's property can be restrained without notice only if the plaintiff's claim falls into a category that is easily proved and that gives the plaintiff some form of pre-existing interest in the property. A secured creditor can qualify, as with the vendor's lien in *Mitchell v. W.T. Grant*. A tort claimant does not qualify, as in *Connecticut v. Doehr*. A copyright owner is asserting a property interest that might, for this purpose, be found to attach to an infringing item. But the claim of infringement often will be difficult to establish. The Court emphasized the risk of error in *Connecticut v. Doehr*, and there is a genuine risk of error in making many claims of copyright infringement.

These doubts cannot be completely dispelled, but they can be satisfactorily met. There is strong appellate authority justifying no-notice seizure of counterfeit trademarked goods. The consensus classic decision is *Matter of Vuitton et Fils S.A.*, 2d Cir.1979, 606 F.2d 1. *Vuitton* showed that it had initiated 84 counterfeit goods actions, and filed affidavits detailing experience with notices of requested restraints. The defendants regularly arranged to transfer the infringing items. The court found this showing sufficient to establish why notice should not be required in a case such as this one. If notice is required, that notice all too often appears to serve only to render fruitless further prosecution of the action. This is precisely contrary to the normal and intended role of "notice," and is surely not what the authors of the rule [65(b)] either anticipated or intended."

Congress reacted to continuing trademark infringement problems with the Trademark Counterfeiting Act of 1984, which establishes an elaborate temporary-restraining-order-like procedure for no-notice seizure. 15 U.S.C. § 1116(d). This procedure was explored and approved in *Vuitton v. White*, C.A.3d, 1991, 945 F.2d 569.

The analogy to trademark problems is bolstered by the relative frequency of proceedings that combine copyright and trademark claims. The *Time Warner Entertainment* case, for example, involved both copyright and trademark rights in Looney Tunes and Mighty Morphin Power Rangers figures.

The most significant question raised by the trademark analogy is whether it would be better to shape the Enabling Act response to the prospect that Congress may wish to enact a copyright analogue to the trademark statute. A letter from the American Intellectual Property Law Association, which otherwise supports the changes proposed below, reports a division of opinion on the desirability of supplemental legislation. Supplemental legislation indeed should be welcomed if Congress were to conclude that a new statute would usefully give more pointed guidance than a combination of the copyright impoundment statute, § 503(a), and Civil Rule

65(b). But there is little indication that courts have encountered any special difficulties in adapting Rule 65(b) to copyright impoundment. It seems better to supplement repeal of the Copyright Rules and amendment of Rule 81(a)(1) by a revision that expressly applies Civil Rule 65 to copyright impoundment. This revision was first proposed in 1964, and continues to make sense. Additional measures can safely be left to Congress.

International Obligations

The TRIPS provisions of the Uruguay Round of GATT require that effective remedies be provided "against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements." Article 41(1). "Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims." Article 42. "The judicial authorities shall have the authority to order a party to desist from an infringement * * *." Article 44(1). Provisional measures are covered in Article 50:

> 1. The judicial authorities shall have the authority to order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring * * *; (b) to preserve relevant evidence in regard to the alleged infringement.
>
> 2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.
>
> 3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.
>
> 4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed. * * *

These procedures can be implemented fully under Civil Rule 65, and as suggested above the ex parte — *inaudita altera parte* — provisions seem compatible with due process requirements. Abrogating the Copyright Rules and amending Civil Rule 65 to expressly govern impoundment proceedings will help ensure that we are in compliance with TRIPS by removing

the doubts surrounding current practice and provisions. Such room for doubt as might remain goes to the Article 50(1) authority "to preserve relevant evidence in regard to the alleged infringement," and the Article 50(2) authority to act "where there is a demonstrable risk of evidence being destroyed." A combination of Rule 65 with the discovery rules, however, should be relied upon to establish this authority. Only if these tools prove inadequate should consideration be given to a procedural rule governing no-notice, prejudgment seizure of evidence.

~~RULES OF PRACTICE AS AMENDED~~

~~Rule 1~~

~~Proceedings in actions brought under section 25 of the Act of March 4, 1909, entitled "An Act to amend and consolidate the acts respecting copyright", including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, in so far as they are not inconsistent with these rules.~~

~~Rule 3~~

~~Upon the institution of any action, suit or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the clerk of any court given jurisdiction under section 34 of the Act of March 4, 1909, an affidavit stating upon the best of his knowledge, information and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the clerk a bond executed by at least two sureties and approved by the court or a commissioner thereof.~~

~~Rule 4~~

~~Such bond shall bind the sureties in a specified sum, to be fixed by the court, but not less than twice the reasonable value of such infringing copies, plates, records, molds, matrices, or other means for making such infringing copies, and be conditioned for the prompt prosecution of the action, suit or proceeding; for the return of said articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant; and for the payment to the defendant of any damages which the court may award to him against the plaintiff or complainant. Upon the filing of said affidavit and bond, and the approval of said bond, the clerk shall issue a writ directed to the marshal of the district where the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be stated in said affidavit to be located, and generally to any marshal of the United States, directing the said marshal to forthwith seize and hold the same subject to the order of the court issuing said writ, or of the court of the district in which the seizure shall be made.~~

~~Rule 5~~

~~The marshal shall thereupon seize said articles or any smaller or larger part thereof he may then or thereafter find, using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ, and bond by delivering the same to him personally, if he can be found within the district, or if he can not be found, to his agent, if any, or to the person from whose possession the articles are taken, or if the owner, agent, or such person can not be found within the district, by leaving said copy at the usual place of abode of such owner or agent, with a person of suitable age and discretion, or at the place where said articles are found, and shall make immediate return of such seizure, or attempted seizure, to the court. He shall also attach to said articles a~~

~~tag or label stating the fact of such seizure and warning all persons from in any manner interfering therewith.~~

~~**Rule 6**~~

~~A marshal who has seized alleged infringing articles, shall retain them in his possession, keeping them in a secure place, subject to the order of the court.~~

~~**Rule 7**~~

~~Within three days after the articles are seized, and a copy of the affidavit, writ and bond are served as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the court sustain the exceptions it may order a new bond to be executed by the plaintiff or complainant, or in default thereof within a time to be named by the court, the property to be returned to the defendant.~~

~~**Rule 8**~~

~~Within ten days after service of such notice, the attorney of the plaintiff or complainant shall serve upon the defendant or his attorney a notice of the justification of the sureties, and said sureties shall justify before the court or a judge thereof at the time therein stated.~~

~~**Rule 9**~~

~~The defendant, if he does not except to the amount of the penalty of the bond or the sufficiency of the sureties of the plaintiff or complainant, may make application to the court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright.~~

~~**Rule 10**~~

~~Thereupon the court in its discretion, and after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum to be fixed in the discretion of the court, and conditioned for the delivery of said specified articles to abide the order of the court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond.~~

~~**Rule 11**~~

~~Upon the granting of such application and the justification of the sureties on the bond, the marshal shall immediately deliver the articles seized to the defendant.~~

~~**Rule 12**~~

~~Any service required to be performed by any marshal may be performed by any deputy of such marshal.~~

~~**Rule 13**~~

~~For services in cases arising under this section the marshal shall be entitled to the same fees as are allowed for similar services in other cases.~~

Rule 65. Injunctions

(f) Copyright impoundment. This rule applies to copyright impoundment proceedings.

Committee Note

New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, 17 U.S.C. § 503(a). Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. See, e.g., *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, 923 F.Supp. 1231, 1260-1265 (N.D.Cal.1995); *Paramount Pictures Corp. v. Doe*, 821 F.Supp. 82 (E.D.N.Y.1993); *WPOW, Inc. v. MRLJ Enterprises*, 584 F.Supp. 132 (D.D.C.1984).

A common question has arisen from the experience that notice of a proposed impoundment may enable an infringer to defeat the court's capacity to grant effective relief. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. Such no-notice procedures are authorized in trademark infringement proceedings, see 15 U.S.C. § 1116(d), and courts have provided clear illustrations of the kinds of showings that support ex parte relief. See *Matter of Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir.1979); *Vuitton v. White*, 945 F.2d 569 (3d Cir.1991). In applying the tests for no-notice relief, the court should ask whether impoundment is necessary, or whether adequate protection can be had by a less intrusive form of no-notice relief shaped as a temporary restraining order.

This new subdivision (f) does not limit use of trademark procedures in cases that combine trademark and copyright claims. Some observers believe that trademark procedures should be adopted for all copyright cases, a proposal better considered by Congressional processes than by rulemaking processes.

Rule 81. Applicability in General

(a) ~~To What~~ Proceedings to which the Rules Applyicable~~.~~

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7561-7681. They do ~~not~~ apply to proceedings in bankruptcy as provided by the Federal Rules of Bankruptcy Procedure ~~or to proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia~~.

**** *

Committee Note

Former Copyright Rule 1 made the Civil Rules applicable to copyright proceedings except to the extent the Civil Rules were inconsistent with Copyright Rules. Abrogation of the Copyright Rules leaves the Civil Rules fully applicable to copyright proceedings. Rule 81(a)(1) is amended to reflect this change.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. 91-358, 84 Stat. 473, transferred mental health proceedings formerly held in the United States District Court for the District of Columbia to local District of Columbia courts. The provision applying the Civil Rules to these proceedings is deleted as superfluous.

The reference to incorporation of the Civil Rules in the Federal Rules of Bankruptcy Procedure has been restyled.

The following model is an example of an order that could be used to abrogate the copyright rules:

ORDER OF _____

1. That the Rules of Practice for proceedings in actions brought under section 25 of the Act of March 4, 1909, entitled "An Act to amend and consolidate the acts respecting copyright," be, and they hereby are, abrogated.

2. That the abrogation of the forementioned Rules of Practice shall take effect on December 1, ____.

3. That the Chief Justice be, and hereby is, authorized to transmit to the Congress the foregoing abrogation in accordance with the provisions of Section 2072 of Title 28, United States Code.

[Explanatory Note]

The Copyright Rules of Practice were adopted under the final, undesignated, paragraph of the Act of March 4, 1909, c. 320, § 25, 35 Stat. at 1081-1082:

§ 25 That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

*** * *

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

*** * *

(e) * * *

Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States.

This final paragraph of § 25 was repealed in 1948, apparently on the theory that it duplicated the general Enabling Act provisions. Act of June 25, 1948, c. 646, § 39, 62 Stat. 992, 996 & n. 31. See Historical Notes, 17 U.S.C.A., following Copyright Rule 1. It seems appropriate to rest abrogation on § 2072, for want of any other likely source of authority.

III Civil Rule 83 — Local Rules — Recommended for Discussion

The Committee discussed two drafts that would amend Civil Rule 83(a), following the request of the Standing Committee that the advisory committees study adoption of a uniform effective date for local rules. The Appellate Rules Committee has approved a draft Appellate Rule 47 that makes two changes. First, the draft sets December 1 as the effective date unless a different effective date is specified when there is "an immediate need for the amendment." Second, the draft prohibits "enforcement" of a local rule before a copy is received by the Administrative Office.

Two versions of Civil Rule 83 are set out below. The first follows the lead of the Appellate Rules Committee, with one change that reflects a statutory difference between local district-court rules and local circuit-court rules. A district-court rule must be "furnished" not only to the Administrative Office, but also to the judicial council of the circuit. This first draft prohibits enforcement before a rule is received by both the Administrative Office and the judicial council.

The second draft Rule 83 goes farther. It sets a 60-day advance notice and comment requirement before a local rule can be adopted or amended, with an exception that reflects the "immediate need" provision in 28 U.S.C. § 2071(e). Moreover, it prohibits enforcement of a local rule until 60 days after notice is given to the judicial council and the Administrative Office and until it is made available to the public. It also requires the Administrative Office both to publish all local rules by electronic means and to report to the district court and the judicial council any rule that does not conform to Rule 83 requirements. Once a rule has been reported by the Administrative Office, enforcement is prohibited until the judicial council has approved.

These drafts are reported to the Standing Committee for discussion, without further recommendation. The Civil Rules Committee determined unanimously that there should be further consideration of the question whether the general Enabling Act authority established by § 2072 should be invoked to supersede the explicit "effective date" provisions of § 2071; it may be wiser to seek § 2071 amendments. The Civil Rules Committee also unanimously recommends adding June 1 as an alternative effective date. Discussion of these issues is reflected in the draft Minutes at pages 25 to 30. The distinction adopted in proposed Appellate Rule 47 between the "effective date" and "enforcement" of a local rule also will be noted briefly.

The problem of statutory authority is easily stated. Section 2071(a) establishes district courts' authority to "prescribe rules for the conduct of their business." Section 2071(b) provides that any "[s]uch rule shall take effect upon the date specified by the prescribing court * * *." Section 2071(c)(1) provides that a district-court rule "shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit." Both forms of proposed Civil Rule 83 are inconsistent with these statutory provisions. Specification of an effective date conflicts with § 2071(b). Provisions barring "enforcement" until specified events occur also seem inconsistent with the effective date provision. This inconsistency is particularly glaring with respect to the proposal that would bar enforcement between the time the Administrative Office reports a local

rule as inconsistent with Rule 83 and the time — if ever — that the judicial council chooses to reinstate the rule.

The obvious response to this difficulty is that the general Enabling Act, § 2072(b), provides that "[a]ll laws in conflict with" a national rule adopted by the Supreme Court "shall be of no further force or effect after such rules have taken effect." Although all rulesmaking committees have been cautious about invoking this supersession power, it might seem appropriate to rely on it for the high purpose of restraining the problems that seem to be created by the proliferation of local rules.

Reliance on the supersession clause, however, may not be a certain thing. There is a powerful argument that §§ 2071 and 2072 should be read in pari materia, as parts of a single scheme for adopting both national and local rules of procedure. Congress considered these matters together a decade ago, and maintained the supersession clause only after careful study. It might come as a surprise to be told that the supersession clause applies not only to statutes outside the seemingly integrated rulemaking provisions, but also to the explicit provisions of § 2071.

There is an additional ground to challenge the draft provision that would suspend a local rule upon report of nonconformance by the Administrative Office to the judicial council. 28 U.S.C. § 332(d)(4) requires that judicial councils review local district-court rules, and empowers the councils to modify or abrogate a local rule that is inconsistent with the national rules. Section 332(d)(4), however, does not expressly authorize a judicial council to suspend a local rule pending review. Giving the Administrative Office authority to effect an automatic suspension may seem to go too far beyond the implicit limits of § 332(d)(4).

The question whether to push ahead with provisions establishing uniform effective dates is not one of power alone. It seems a fair guess that some district court, somewhere, would advance the argument that the supersession clause does not apply to its § 2071 authority. The argument should not be shirked if the stakes are really high. But there may be grounds to question that importance of a uniform effective date for all district-court rules. Several members of the Civil Rules Committee believed that a uniform effective date would be a useful convenience, but that it does not go to the heart of the problems posed by local rules. Easy access to an assuredly complete text of all local rules was thought to be far more important. If the goal, though worthy, is not of the first importance, it may be prudent to forgo the confrontation.

An alternative to amending the various local-rules provisions of the national rules may be to invite renewed consideration of these problems by Congress. Congress could readily adopt each of the proposals made in the more sweeping draft Rule 83, and might find other and more effective means to cabin the continuing excesses of some district-court rules.

Turning to the effective date provision, Advisory Committee members emphasized that substantial time is required to act on a local rule proposal. To defer the effective date for up to a year after the lengthy process grinds to a conclusion is too much. After considering various proposals, it was agreed that two effective dates each year would be sufficient — June 1 and December 1. The June 1 date cannot claim the particular advantages that have been attributed to the December 1 date, but provides effective flexibility without adding undue confusion.

The distinction drawn by draft Appellate Rule 47 between the "effective date" for a local rule and "enforcement" of the rule was accepted by the Civil Rules Committee. This drafting strategy makes it possible to avoid potential confusion about the effective date. Perhaps more importantly, it leaves the way open for voluntary compliance with a local rule by parties who know of it. Voluntary compliance often may be a good thing — a good local rule should be viewed as an aid for lawyers, not an obstacle. Barring "enforcement" both protects those who have not learned of the rule and provides an incentive to comply with requirements for reporting and publication.

The following draft of Civil Rule 83 is submitted to illustrate adaptation of the Appellate Rules model. Whatever substantive changes may be agreed upon, the Standing Committee will be concerned to achieve as much uniformity of style as possible among the several different sets of Rules.

Rule 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1)(A) Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice.

(B) A local rule shall be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(C) A local rule or amendment takes effect on ~~the date specified by the district court~~ the June 1 or December 1 next following adoption unless the [district] court specifies an earlier date to meet an immediate need, and remains in effect unless amended by the court or modified or abrogated by the judicial council of the circuit.

(D) Copies of rules and amendments shall, upon their ~~promulgation~~ adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. A rule or amendment must

[may] not be enforced before it is received by the Administrative Office and [by] the judicial council.

[Subparagraph C could be brought closer to the style of draft Appellate Rule 47 like this:

(C) A local rule or amendment takes effect on December 1 following its adoption, unless a majority of the court's judges in regular active service determines that there is an immediate need for the amendment, and remains in effect * * *.

There are two significant differences. This version repeats the majority of the judges requirement already set out in subparagraph (A), adding the "in regular active service" embellishment that is now stated in Appellate Rule 47 but not in present Civil Rule 83. It might be better to add this requirement to subparagraph (A) if it seems desirable. And this version seems to imply that the choice is between immediate effect and effect on the following December 1. Perhaps it would be inferred that an "immediate need" can be met by specifying an effective date that is not immediate. Subparagraph (C) in the full draft avoids the ambiguity by allowing the court to specify "an earlier date to meet an immediate need."]

Committee Note

A uniform effective date is required for local rules to facilitate the task of lawyers who must become aware of changes as they are adopted. Exceptions should be made to meet immediate needs when special circumstances arise that cannot be accommodated by other means during the period before the next June 1 or December 1.

The present requirements of filing with the Administrative Office and circuit judicial council are bolstered by prohibiting enforcement of a local rule or amendment before a copy is received by the Administrative Office and by the judicial council. This requirement need not entail any significant delay in enforcement. District courts should regulate their local rules activities in a way that allows ample time for transmitting copies before the next June 1 or December 1; receipt well in advance of June 1 or December 1 will be all to the good. If immediate effect is desired, the copies can be transmitted by means — including electronic means — that entail little or no delay.

New technology will help discharge the obligation to make local rules available to the public. Many courts have posted local rules on the Internet. All courts should seek to make local rules available in this form as resources become available. In addition, it is expected that the Administrative Office will place all local rules in a single easily accessible location, preferably the Internet,[1] for the benefit of the bench, bar, and public.

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[1] This reference to "the Internet" is temporizing. A better reference should be found — the reference in the next draft to "means that provide convenient public electronic access" may be a suitable beginning.

A More Controlling Model

The draft based on the Appellate Rules draft will protect against unintended violations of local rules that were not known to the offender. It does not go as far as might be gone, however, toward ensuring any effective review of local rules. Greater control might be established by formalizing the § 2071(b) requirement of "appropriate public notice and an opportunity for comment," and by stimulating judicial council review. Judicial councils are required to undertake "periodic" review of local district rules, but different circuits approach this responsibility with different levels of attention. It would be ideal to find a means to ensure that the local circuit judicial council reviews every local rule. Assuming that this ideal is not practicable, substantial good might flow from requiring the Administrative Office to review new rules or amendments and to notify the judicial council of potential problems. The following draft illustrates this approach:

Rule 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) Each district court, acting by a majority of its district judges, may~~, after giving appropriate public notice and an opportunity for comment,~~ make and amend rules governing its practice only as follows:

(A) A local rule shall be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(B) At least 60 days before adopting or amending a local rule, the court shall give appropriate public notice of the proposed rule and an opportunity for comment. The court may give immediate effect to a rule without satisfying this notice and comment requirement if it determines that there is an immediate need for the rule, but it must promptly afford notice and opportunity for comment after the rule becomes effective.

(C) A local rule or amendment takes effect on ~~the date specified by the district court~~ the June 1 or December 1 next following its adoption unless the court specifies an earlier date to meet an immediate need, and remains in effect unless amended by the court or modified or abrogated by the judicial council of the circuit. ~~Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial~~

~~council and the Administrative Office of the United States Courts and be made available to the public.~~

(D) A court may not enforce a local rule or amendment until:

(1) 60 days after the court gave notice of the rule or amendment to the judicial council of the circuit and to the Administrative Office of The United States Courts; and

(2) the court has made the rule or amendment available to the public by convenient means, including electronic means where feasible.

(2) The Administrative Office of the United States Courts shall promptly publish all local rules by means that provide convenient public electronic access. The Administrative Office also shall review all new local rules or amendments, and shall report to the district court and the judicial council of the circuit if it finds that a rule or amendment does not conform to the requirements of this Rule. A district court may not enforce a local rule provision that has been reported by the Administrative Office until the judicial council of the circuit approves the provision.

~~(23)~~ * * * (Renumber present (2), (3), (4), (5), (6), and note abrogation of former (7).)

Committee Note

Practicing attorneys continue to complain about the difficulty of complying with local rules of practice. The complaints address such matters as a lack of uniformity between districts, the difficulty of learning the meaning and even existence of local rules, and occasional inconsistency with the national rules. A careful examination of local rules by the Ninth Circuit Judicial Council, for example, uncovered several local rules that seem inconsistent with the national rules. Rule 83 already requires consistency with the national rules, and the present requirement that rules be filed with the judicial council is intended to provide some means of enforcement. More effective measures seem called for, but measures that do not create unnecessary roadblocks to effective adoption and enforcement of local rules.

Paragraph (B) implements the present requirements of Rule 83 and 28 U.S.C. § 2071(b) by requiring at least 60-day public notice before adopting or amending a local rule.

A uniform effective date is provided in paragraph (C) to facilitate the task of lawyers who must become aware of changes as they are adopted. Exceptions can be made to meet immediate needs when special circumstances arise that cannot be accommodated by other means during the period before June 1 or December 1. The material in paragraph (C) also is changed to reflect the

provision in 28 U.S.C. § 2071(c)(1) that allows a judicial council to modify, rather than abrogate, a local rule.

Paragraph (D) prohibits enforcement of a local rule or amendment for 60 days after notice is given to the judicial council and the Administrative Office. It also prohibits enforcement until the district court has made the rule or amendment available to the public.

Paragraph (E) imposes new duties on the Administrative Office. It is required to publish local rules on the Internet or whatever future system of readily accessible electronic communication proves convenient. In addition, the Administrative Office is required to review all new local rules or amendments and report to the district court and judicial council if the rule does not conform to Rule 83 requirements. The district court may not enforce a rule reported by the Administrative Office until the judicial council approves the reported provision.

IV Continuing Agenda Items
Civil Rule 51

Consideration of the jury-instruction provisions of Civil Rule 51 came to the Civil Rules Committee as the result of the work of the Ninth Circuit Judicial Council. Finding many local rules that require submission of instruction requests before trial begins, the Judicial Council expressed concern that these desirable rules seem inconsistent with Rule 51. It suggested a Rule 51 amendment that would legitimate the local rules. The Criminal Rules Committee, in addition, has published for comment a proposal that would amend Criminal Rule 30 to authorize the court to direct that requests be made at the close of the evidence "or at any earlier time that the court reasonably directs."

The Civil Rules Committee has concluded that there is no reason to make the timing of instruction requests turn on the choices made by local rules. If it is desirable to authorize a district court to require that requests be made before trial begins, the authority should be provided by a uniform national rule.

Before turning to a simple Rule 51 amendment, however, the question was put whether it might be desirable to revise Rule 51 to state more clearly the practices that have grown up around the present opaque language. A draft has been prepared and briefly considered by the Committee. Understanding that the Criminal Rules Committee is interested in the instructions project, but that it does not feel an urgent need for action, the Civil Rules Committee has carried the proposal forward for further consideration.

Civil Rule 53

In 1994, spurred by suggestions from local Civil Justice Reform Act committees, the Committee briefly considered a revision of the special-master provisions of Civil Rule 53. The underlying motive arose from the perception that Rule 53 speaks directly only to the use of special masters for trial purposes, a use that has fallen into near-disuse. At the same time, special masters have come to be used extensively for pretrial and post-judgment purposes that are not directly regulated by Rule 53. In some situations, moreover, courts seem to be experimenting with the use of court-appointed experts in ways that blur the line between witness and judicial adjunct, and even to be appointing advisers who function entirely outside Evidence Rule 706.

After brief review, the Committee has concluded that it should take up the Rule 53 draft for further study. A Rule 53 Subcommittee has been appointed to study the questions raised by the draft and to report to the Fall, 1999 meeting on the desirability of pursuing the proposal. If a suitable project can be designed, the Federal Judicial Center will be asked to support the Subcommittee in its work.

Corporate Disclosure Statements

The question whether a new Civil Rule should be adopted to require corporate disclosure statements in all civil actions came late to the Advisory Committee agenda. Appellate Rule 26.1 provided a model that was briefly considered. The Advisory Committee expressed doubt about the recent amendment of Appellate Rule 26.1 that deleted the requirement that a corporate party identify "subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." It also wondered whether any disclosure requirement should extend to some noncorporate entities. Uncertainty was expressed whether it would be better to adopt a single uniform rule for Appellate, Bankruptcy, Civil, and Criminal Rules; to adopt different provisions for each of these bodies of rules; to prepare a recommended disclosure form for use by such courts as might like it; or to adopt some other course.

It was recognized that these questions are better pursued through coordinated efforts by each of the Advisory Committees. The Committee concluded that further study should be initiated by the two Committee members to be appointed to the Standing Committee's ad hoc committee on federal rules of attorney conduct. Perhaps these issues could be considered by the ad hoc committee as a separate matter, or perhaps some other means of coordinated study should be developed.

Discovery

Proposals to amend several provisions of the civil discovery rules were published in August, 1998. A review of the proposals is provided in the draft Minutes, pages 4 to 11. A oral summary will be provided at the Standing Committee meeting.

Mass Torts Working Group

Nearly a year ago, Chief Justice Rehnquist authorized formation of a Mass Torts Working Group under the leadership of the Civil Rules Committee. The Civil Rules Committee was chosen to lead the group because its consideration of proposed class-action amendments had given it a useful body of information about mass torts. Time and again, the problems of mass torts seemed to the Committee to call for coordinated legislative and rulemaking responses. The Working Group was chaired by Judge Anthony J. Scirica and assisted by Professor Francis E. McGovern as special consultant. The Civil Rules Committee considered and approved an advanced draft of the Working Group report. The discussion is summarized at pages 11 to 22 of the draft minutes. Final work on the report continues, with presentations to three of the other Judicial Conference committees that contributed liaison members to the Working Group. The report describes the mass-torts phenomena, noting that each mass tort seems to present problems different from any of those that have gone before. The report also summarizes the questions that have been described as problems by some observers, and describes proposals that have been made to address these problems. The only recommendation, however, is that a new ad hoc Judicial Conference committee be created, with authority to report directly to the Judicial Conference, to study the problems further.

It is important to note that nothing in the recommendation for creation of an ad hoc committee would impinge on the Enabling Act process. A new committee would consider possible legislation and court rules, but any recommendations for court rules would be made as suggestions for further study in the regular process of Advisory Committee, Standing Committee, Judicial Conference, Supreme Court, and ultimately Congress.

Mass tort litigation involves so many different problems, and continues to evolve at such a pace, that in the end it may prove better to rely on gradual judicial evolution than to launch more ambitious legislative and rulemaking projects. There is good ground to hope, however, that at least modest improvements can be recommended by a new committee. The work is worth undertaking, even knowing the risk that nothing immediate may come of it.

Item 7C-D

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

November 12 and 13, 1998

Note: This Draft Has Not Been Reviewed by the Committee

The Civil Rules Advisory Committee met on November 12 and 13, 1998, at the Lodge Alley Inn, Charleston, South Carolina. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Judge David F. Levi; Myles V. Lynk, Esq.; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Shira Ann Scheindlin; Andrew M. Scherffius, Esq.; and Chief Judge C. Roger Vinson. Judge David S. Doty, Francis H. Fox, Esq., and Phillip A. Wittmann, Esq., attended as members who had completed their second three-year terms. Edward H. Cooper was present as Reporter, and Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Sol Schreiber, Esq., attended as liaison member from the Standing Committee. Judge A.J. Cristol attended as liaison from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office of the United States Courts. Thomas E. Willging represented the Federal Judicial Center. Observers included Scott J. Atlas (American Bar Association Litigation Section); Alfred Cortese; John S. Nichols; Fred S. Souk; and Jackson Williams.

Chairman's Introduction

Judge Niemeyer introduced the new Committee members Judges Kyle and Scheindlin, and lawyers Lynk and Scherffius. He noted that Judge Carroll had been reappointed to a second term, and that lawyer Kasanin had been appointed for an extension beyond the end of his second term. He read and presented Judicial Conference Resolutions honoring the service of Doty, Fox, and Wittmann. Judge Scirica also has concluded his time as an Advisory Committee member, having become Chair of the Standing Committee. Doty, Fox, and Wittmann each expressed appreciation of the opportunity to serve on the Committee, and expressed confidence that the Committee's work would be carried on to good effect.

Judge Niemeyer noted that Professor Daniel R. Coquillette, Reporter of the Standing Committee, had been prevented by circumstances from attending the meeting.

Judge Niemeyer then offered the new members some information about Advisory Committee practices. The Rules Committees are "sunshine" committees; meetings are open to the public, and on suitable occasions observers have been offered an opportunity to provide information for consideration in Committee discussions. The full extent of the open meetings commitment has never been fully determined — the tendency has been to resolve questions in favor of openness. If a quorum of Committee members wish to discuss committee business, the practice has been to treat

the proposed discussion as an open Committee meeting. But subcommittees have met in nonpublic sessions; no subcommittee has had more than five members, and most have only three. And it seems proper for two Committee members to discuss committee work in private. It also is proper to hold Committee discussions in executive session, but the spirit of openness has been honored — there have been no executive session meetings in the experience of any present Committee member.

Observers at Committee meetings include those who represent clients or identifiable constituencies. It is important that they attend and know how open the Committee is. It is important to the Committee that they be free, to the extent the pace of deliberation allows, to make observations; their input can help improve Committee work, in much the same way as public comments and testimony. But it also is important to remember that however familiar and friendly the regular observers become, Committee members' relationships with them must "withstand front-page scrutiny."

To be complete, it also is necessary to make open recognition of the spirit that continually guides Committee deliberations. Each member aims for the best possible development of civil procedure. "Our own particular interests must be put aside." Each member comes to the meetings with unique knowledge and experience, and with unique perspectives that have been shaped by this knowledge and experience. The combination of these perspectives and values, drawn from a dozen and more lives in the law, is what makes the Committee process so valuable.

Finally, the new remembers were reminded that the work of the Committee is not self-organizing. The Administrative Office provides invaluable support, particularly through Peter McCabe as Secretary of the Standing Committee and John Rabiej as Chief of the Rules Committee Support Office.

Minutes Approved

The minutes for the March 1998 meeting were approved.

Legislation Report

Judge Niemeyer prefaced the Legislation Report by noting that Congress takes an interest in the Civil Rules. Bills that would change the rules directly are introduced with increasing frequency. The Committee has been impelled to become more interested in these bills. The Administrative Office is the chief agency for keeping track of the developments that warrant Committee attention.

John Rabiej began the Legislation Report by noting that nearly forty bills were monitored during the recently concluded session of Congress. Several of them are likely to be introduced early in the first session of the new Congress.

A Senate bill to undo the deposition recording amendments of 1993 got out of subcommittee this time, and is likely to be introduced again.

Several bills were proposed to provide for interlocutory appeals from orders granting or denying class-action certification. The sponsors were persuaded to amend the bills so that the effect would be only to accelerate the effective date of the new Civil Rule 23(f) that the Supreme Court

sent to Congress last spring. Since Rule 23(f) is on track to become effective this December 1, it is not likely that these bills will reappear.

HR 1965, dealing with civil forfeitures, would amend Admiralty Rule C. Although proposed Rule C amendments would address the time provisions of the bill, the bill sweeps across many more forfeiture topics and is likely to be reintroduced.

A bill to subject government attorneys to state attorney-conduct rules passed, but is subject to a 180-day delay that will provide the Department of Justice an opportunity to decide whether it should seek repeal. This topic is closely related to topics that have been considered in the ongoing Standing Committee study of the need for federal rules to regulate the conduct of attorneys who appear in federal court.

An alternate dispute resolution bill was enacted, requiring that every court have some type of ADR system. The choice of ADR systems is left to local rule; the Administrative Office worked with Congress to improve the provisions invoking the local rulemaking power.

Class-action bills have been introduced. They bear directly on class-action practice, removal of class actions from state court, and other matters. Civil Rule 11 would be restructured for class actions by at least one bill. It is likely that many of these bills will reappear.

Offer-of-judgment proposals have been perennial topics of Congressional attention, and seem likely to return.

Report on Standing Committee

Judge Niemeyer reported on the consideration of Civil Rules proposals at the June meeting of the Standing Committee. Discussion of the proposals to publish discovery rules amendments for comment went rather well. There was less enthusiastic support for some of the proposals than for others. It is clear that the vote to approve publication does not represent a commitment by the Standing Committee to recommend adoption of any proposal that emerges unscathed from the public comment process. The Standing Committee did direct a change in proposed Rule 5(d). As proposed by the Advisory Committee, the rule would provide that discovery materials "need not be filed" until used in the action. The Standing Committee directed that the proposal be that the materials "must not be filed" until used in the action. Discussion of the change was rather cursory; it may be that after public comment and testimony, the Advisory Committee should consider whether a strong case can be made for returning to the "need not" formulation.

The proposed one-day, seven-hour limit for depositions was approved for publication by the narrowest margin, a vote of 6 for to 4 against. The reasons for concern are summarized in the draft Standing Committee minutes at pages 27 to 28. There is concern that the limit will not work well, particularly in multiparty cases. There has been favorable experience, however, with an Arizona rule that sets a presumptive 3-hour time limit for depositions. The proposal was made by the Advisory Committee in part because of the complaints of plaintiffs that deposition practice in some courts is being used to impose unwarranted, and at times unbearable, costs. Mr. Schreiber observed that he continues to believe that it would be desirable to supplement the one-day limit with a requirement that documents be exchanged before the deposition. This practice would facilitate the best use of

the limited time. There also is concern about the provision that requires consent of the deponent for a stipulated extension of time; deponent consent may become a problem when the deponent is a party, or a person designated to testify for an organization party under Civil Rule 30(b)(6).

The progress of the Mass Torts Working Group also was reported to the Standing Committee.

The Standing Committee also approved publication of proposed amendments to Civil Rules 4 and 12, dealing with actions brought against United States employees in their individual capacities, and to Admiralty Rules B, C, and E.

Discovery

A number of proposed discovery rule amendments were published for comment last August. Hearings will be held in Baltimore in December, and in San Francisco and Chicago in January. The development of these proposals was reviewed, in part for the benefit of new Committee members and in part to inform all Committee members of the steps that were taken by the Discovery Subcommittee to implement the decisions made at the March Committee meeting.

Judge Niemeyer began the discussion by noting that the discovery effort had been as streamlined as seems possible for a big project. From the beginning, the question has been whether we can get pretty much the same exchange of information at lower cost. After the undertaking was launched by appointing the Discovery Subcommittee, the first step was a January, 1997 meeting with experienced lawyers, judges, and academics. This meeting gave some sense of the areas in which it may be possible to improve on present discovery practice without forcing sacrifice of some recognizable sets of interests for the benefit of other recognizable sets of interests. This small conference was followed by a large-scale conference at Boston College in September, 1997. The conference was designed to provide expression of every point of view, and succeeded in this ambition. In addition to the information gathered at these conferences, empirical work was reviewed. The RAND data on experience under local Civil Justice Reform Act plans were studied, and the Federal Judicial Center undertook a new survey for Committee use. The FJC data proved very interesting. The data, in line with earlier studies, show that discovery is not used at all in a substantial fraction of federal civil actions, and that in more than 80% of federal civil actions discovery is not perceived to be a problem.

The Subcommittee compiled a list of nearly forty discovery proposals for consideration by the Committee. The Committee chose the most promising proposals and asked the Subcommittee to refine these proposals for consideration at the March, 1998 meeting. The refined proposals were further modified at the March meeting, with directions to the Subcommittee to make further changes. The proposals presented to the Standing Committee in June conformed to the Committee's actions and directions. Approval for publication, it must remembered, does not represent unqualified Standing Committee endorsement of the proposals. Even apart from the lessons to be learned from public comments and testimony, the Standing Committee expressed reservations that must be addressed if this Committee recommends adoption of any of the proposals.

Professor Marcus then provided a detailed review of the published proposals and their origins. The Discovery Subcommittee met in San Francisco in April, in conjunction with a conference held by the Judicial Conference Mass Torts Working Group. The revised discovery

proposals were then circulated to the full Committee, and the Committee reactions were incorporated in the set of proposals approved by the Standing Committee.

Some preliminary reactions were provided by an ABA Litigation Section Panel during the August annual meeting. The first small set of written comments are starting to come in, including an analysis by the New York State Bar Association that runs more than forty pages. The topics that most deserve summary reminders and updating at this meeting include uniformity; disclosure; the scope of discovery; cost-sharing; and the duration of depositions. These are the topics that are most likely to provoke extensive public comments.

Uniformity. The local rule opt-out provision built into Rule 26(a)(1) in 1993 was not intended to endure for many years. The published proposal deletes the opt-out provision, and indeed proposes to prohibit local rules variations on discovery topics other than the number of Rule 36 requests to admit and the Rule 26(f) "conference" requirement. The proposed Committee Notes contain strong language invalidating local rules that are inconsistent with present and proposed national rules.

There is likely to be much comment about the need for national uniformity as against the value of local rules. Many district judges are strongly attached to their local rules. Some local rules, indeed, may provide practices that are more effective than present or proposed national practices. The strength of the desire for local autonomy is reflected by local rules that purport to opt out of portions of Rule 26(a) that do not authorize local rule departures.

Local rules, however, undercut the national rules regime. They also complicate the handling of cases that are transferred between districts that adhere to different practices. And local rules even complicate life for judges who are assigned to cases in districts away from home.

Disclosure. The disclosure obligations set out in Rule 26(a)(1)(A) and (B) were discussed extensively during the Subcommittee and Committee deliberations. The eventual recommendation limits the disclosure requirement to "supporting" information, not because of any direct ground for dissatisfaction with the 1993 rule but because of the desire to achieve a uniform national practice. Uniform adherence in all districts to the 1993 rule does not seem achievable now. The question remains whether this retrenchment is appropriate. The proposal proved popular at the August ABA Litigation Section meeting. Disclosure is described as information that supports the disclosing party's claims or defenses, drawing from the phrase used to define the scope of discovery. Some uncertainty was expressed at the Standing Committee meeting as to the reach of this phrase — does it require disclosure of information that will support a party's efforts to controvert a defense? This issue may need to be addressed.

A minority drafting view won significant support in Committee deliberations, and has been pointed out in Judge Niemeyer's memorandum to Judge Stotler inviting public comment, on page 8 of the publication book. This drafting view would require disclosure of information that "may be used to support" the claims or defenses of the disclosing party. This issue should be kept in mind during the comment process and subsequent deliberations.

Proposed Rule 26(a)(1)(E) seeks to address arguments that disclosure is appropriate only in a middle run of litigation. It is too much to ask in "small" cases, and superfluous in complex or hotly contested cases. The approach taken to the complex cases is to allow any party to postpone

disclosure by objecting to the process, forcing determination by the court whether disclosure is appropriate for the case. The alternative of attempting to define complex or contentious cases by rule was thought unattractive. The approach for small cases became known as the "low-end" exclusion. It was readily agreed that disclosure often is unsuitable for cases that would not involve discovery in the ordinary course of litigation. The drafting approach has been to attempt to identify categories of cases in which discovery is unlikely and in which disclosure often would be unnecessary work. Inspiration was sought in local rules that identify categories of cases excluded from Rule 16(b) requirements, but the inspiration was mixed — there are only a few categories of cases that are excluded by many local rules, and there are many categories of cases that are excluded by one local rule or a small number of local rules. After the March meeting, a list of 10 categories was prepared. At the Standing Committee meeting, however, the Bankruptcy Rules Advisory Committee pointed out flaws in two categories aimed at bankruptcy proceedings even before the discussion began. These two categories were withdrawn; the published draft excludes eight categories of cases. These categories are avowedly tentative — advice is sought on whether all of these cases should be excluded, whether other categories of cases should be excluded, and whether the words used to describe the excluded cases are appropriate. A preliminary review by Federal Judicial Center staff suggests that the proposed list would exclude about 30% of federal civil actions. The exemptions carry over, excepting the same cases from the Rule 26(f) party conference requirement and the Rule 26(d) discovery moratorium.

It was pointed out that the published proposals do not revise Rule 16(b), leaving in place the provision that authorizes local rules that exempt categories of cases from Rule 16(b) requirements. It was recognized that Rule 16(b) could be tied in to the same approach, identifying categories of cases to be excluded. But it is too late to graft this approach onto the current proposals — separate publication of a Rule 16(b) proposal would be required. And it also is a question whether there is a need for national uniformity in this area that parallels the perceived need for uniformity in disclosure practice. The wide variation that exists among local exemption rules today also may suggest grounds for going slow. It also was observed that it would be risky to go the other way, adopting local Rule 16(b) exclusions into disclosure practice — districts opposed to disclosure might adopt Rule 16(b) exclusions for the purpose of defeating disclosure.

Returning to the exclusion of "high-end" cases, it was noted that any case can be excluded from disclosure on stipulation of all the parties. It cannot be predicted what fraction of all federal cases may be excluded either by party stipulation or by the process of objection and eventual court order.

Rule 26(a)(1)(E) also would address, for the first time, the problem of late-added parties. An attempt was made to draft detailed provisions for this problem, but the drafting exercise identified too many problems to permit sensible resolution by uniform rule. The published proposal is deliberately open-ended and flexible.

Finally, some early reactions to the broad disclosure proposal were reported. The New York State Bar Association wants a uniform national rule, but a rule of no disclosure at all. A Magistrate Judges group, on the other hand, has urged continuation of the full present disclosure practice, including "heartburn" information that harms the position of the disclosing party.

Rule 26(b)(1) Scope of Discovery. A Committee Note has been written to explain the proposal. The goal is to win involvement of the court when discovery becomes a problem that the lawyers cannot manage on their own. The present full scope of discovery remains available, as all matters relevant to the subject matter of the litigation, either when the parties agree or when a recalcitrant party is overruled by the court. Absent court order, discovery is limited to matters relevant to the claims or defenses of the parties. No one is entirely clear on the breadth of the gap between information relevant to the claims and defenses of the parties and information relevant to the subject matter of the action, but the very juxtaposition makes it clear that there is a reduction in the scope of discovery available as a matter of right. There have been some preliminary responses to this proposal. One is that simply because it is a change, it will generate litigation over the meaning of the change. Another, from the New York State Bar Association, applauds the proposal, but urges that the Committee Note state that it is a clear change. And the concept of "good cause" for resorting to "subject-matter" discovery is thought too vague.

Committee discussion urged that the Note not belittle the nature of the change — this is a significant proposal. But it was urged that the draft Note in fact is strict. Another observation was that any defendant will move that discovery is too broad; the proposal, if adopted, will generate a "huge load of motion practice." Together with the cost-bearing proposal [more accurately called cost-shifting, on this view], thousands of motions will be generated.

Cost-bearing. The published Rule 34(b) language was drafted after the March meeting, in response to deserved dissatisfaction with the proposals offered there. At the Standing Committee meeting, it was asked whether the proposed language adequately describes the intent to apply cost-bearing only as an implementation of Rule 26(b)(2) principles — whether cost-bearing could be ordered as to discovery that would be permitted to proceed under present applications of (b)(2) principles. The problem of drafting Rule 34 language, indeed the general problem of incorporating this provision specifically in Rule 34, joined with policy doubts to suggest reconsideration of the question whether cost-bearing would better be incorporated directly in Rule 26(b)(2). There was extensive debate of this question at the April Subcommittee meeting, leading to a close division of views. The Rule 26(b)(2) approach would have at least two advantages in addition to better drafting. The Reporters believe that Rule 26(b)(2) and Rule 26(c) now authorize cost-bearing orders; incorporation in Rule 26(b)(2) would quash the doubts that might arise by implication from location in Rule 34. In addition, it is important to emphasize that the cost-bearing principle can be applied in favor of plaintiffs as well as in favor of defendants; there is a risk that location in Rule 34 will stir questions whether the proposal is aimed to help defendants in light of the fact that defendants complain of document production, while plaintiffs tend to complain more of deposition practice. This question is raised in Judge Niemeyer's letter to Judge Stotler, at pages 14 to 15 of the publication book.

It was observed that the arguments for relocation of the cost-bearing provision in Rule 26(b)(2) are strong. The Committee should feel free to consider the matter further in light of the views that may emerge from the public comments and testimony.

An important question was raised at the Standing Committee meeting that may deserve a drafting response. After a court allows discovery on condition that the requesting party pay the costs of responding, the response may provide vitally important information that belies the court's initial prediction that the request was so tenuous that the requesting party should bear the response costs.

Should the rule provide a clear answer whether the cost-bearing order can be overturned in light of the value of the information provided in response?

The New York State Bar Association opposes this proposal because it agrees that the intended authority already exists. Adoption of an explicit rule will lead some litigants to contend for — and perhaps win — a broader sweep of cost-sharing than is intended.

Some preference was expressed for leaving the proposed amendment in Rule 34. This view was that "there is too much in Rule 26" now; "no one reads all of Rule 26." The most important source of the most extravagantly expensive over-discovery is document production. The explicit cost-bearing protection should be expressed in Rule 34.

It also was noted that at the Standing Committee meeting, it had been urged that if the target is the complex or "big documents" case, the rule should be drafted expressly in terms of complex cases. It also was feared that the proposal will create a "rich-poor" issue: there will be a marked effect on civil rights and employment cases, where poor plaintiffs will be denied necessary discovery because neither they nor their lawyers can afford to pay for response costs. There have been few cost-bearing orders in the past; no matter what the rule intends, it will be difficult to convince lawyers that they can continue to afford to bring these cases. They will fear that cost-bearing will be ordered in cases where discovery is now allowed.

These concerns were met by responses that Rule 26(b)(2) now says that the court shall deny disproportionate discovery; the cost-bearing provision simply confirms a less drastic alternative that allows access to otherwise prohibited discovery. No one is required to pay for anything; it is only that if you want to force responses to discovery requests that violate Rule 26(b)(2) limits, you can at times obtain discovery by agreeing to pay the costs of responding. All reasonable discovery will be permitted without interference, as it now is under Rule 26(b)(2). Rule 26(b)(2) principles expressly include consideration of the parties' resources; there is no reason to anticipate that poor litigants will be put at an unfair disadvantage. And it has proved not feasible, even after some effort, to define "big," "complex," or "contentious" cases in terms that would make for administrable rules.

Deposition Length. The proposal is to establish a presumptive limit of one business day of seven hours for a deposition. The most frequently expressed concern is that this proposal will prove too rigid, and by its rigidity will promote stalling tactics. The Standing Committee also expressed concern over allocation of the time in multiparty cases; perhaps the Committee Note should be revised to address this concern. The proposal also requires consent of the deponent as well as the parties for an extension by consent without court order. The Committee may well not have thought hard enough about the requirement of deponent consent for cases in which the deponent is a party; perhaps further thought should be given to requiring deponent consent only when the deponent is not a party. It also might be desirable to amend the Note to express general approval of the practice of submitting documents to the deponent before the deposition occurs, so as to save time during the deposition. Among early comments, the New York State Bar Association opposes this proposal for fear that it will promote undesirable behavior at depositions.

Other Matters. Rule 26(f) would be amended to delete the requirement of a face-to-face meeting; recognizing the great values of a face-to-face meeting, however, provision has been made for local

rules that require the meeting. The draft Committee Note emphasizes the success of present practice, but recognizes that some districts may be so geographically extended that face-to-face meetings cannot realistically be required in every case.

This Committee recommended publication of a draft Rule 5(d) that would have provided that discovery materials "need not" be filed until used in the action or ordered by the court. The Standing Committee changed the provision, so that the rule published for comment provides that discovery materials "must not" be filed until used in the action or ordered by the court. The discussion in the Standing Committee did not focus special attention on the public access debate that met a similar proposal in 1980. Depending on the force of public comments and testimony on the published proposal, the Advisory Committee may wish to urge reconsideration of this issue.

It was asked in the Standing Committee whether there had been a "judicial impact study" of the proposed amendments. The amendments are designed to encourage — and perhaps force — greater participation in discovery matters by the substantial minority of federal judges who may not provide as much supervision as required to police the lawyers who appear before them. But it is not clear whether these judges in fact have time to devote to discovery supervision. It also was asked why the rules should be changed for all cases, if fewer than 20% of the cases are causing the problems. In considering this question, it should be remembered that it is difficult to draft rules only for "problem" cases. And it also should be remembered that figures that refer only to percentages of all cases in federal courts are misleading. There is no discovery at all in a significant fraction of cases, and only modest discovery in another substantial number of cases. Rules changes that nominally apply to all cases are not likely to affect these cases in any event. Lawyers perceive significant problems in a large portion of the cases that have active discovery. It is worthwhile to attempt to reach these cases.

It was suggested that if possible, it would be useful to acquire information — including anecdotal information, if as seems likely nothing rigorous is available — about the experiences in Arizona and Illinois with rules that limit the time for depositions. And it was predicted that one effect of deposition time limits will be that documents are exchanged before the litigation, even though there is no express requirement. And even without an express requirement that a deponent read the documents provided, failure to read them will provide a strong justification for an order directing extra time. The potential problems are likely to be sorted out in practice by most lawyers in most cases.

It was noted that discovery is likely to be the central focus of the agenda for the spring meeting.

Mass Tort Working Group

Judge Niemeyer noted that class actions have been on the Advisory Committee agenda since 1991. The Rule 23 proposals published in 1996 generated many enlightening comments that addressed mass torts among other topics. The problems identified by the comments were far-reaching, and often seemed to call for answers that are beyond the reach of the Enabling Act process. The Committee found so many puzzles that it recommended present adoption only for the interlocutory appeal provision that is about to take effect as new Rule 23(f).

The Judicial Conference independently began to consider appointment of a "blue ribbon" committee on mass torts. An entirely independent committee seemed likely to duplicate work already done by the Advisory Committee. It was suggested that the best approach would be to establish a cooperative process among the several Judicial Conference committees that might be interested in the mass torts phenomenon. An initial recommendation was made to establish a formal task-force across committee lines. The Chief Justice reacted to this suggestion by authorizing an informal working group to be led by the Advisory Committee. Other Judicial Conference committees were invited to participate. Four committees, dealing with bankruptcy administration, court administration and case management, federal-state jurisdiction, and magistrate judges accepted the invitation and appointed liaison members. The chair of the Judicial Panel on Multidistrict Litigation also joined the working group. Judge Scirica accepted appointment as chair of the working group, and Advisory Committee members Birnbaum and Rosenthal also were appointed members. Professor Francis McGovern was appointed as special reporter.

With the indispensable help of Professor McGovern, the working group held three impressive conferences to gain the advice of the most experienced and thoughtful participants in the continual evolution of mass torts practice. The process was stimulated by rough sketches of various possible approaches that were prepared for the specific purpose of providing a launching pad for discussion.

The problems presented by mass torts litigation often seem to invite solutions that cannot be provided by the rulesmaking process. Some of the solutions that have proved attractive even seem to test the constitutional limits of permissible legislation. To take a stylized example, how can our judicial system undertake to resolve the claims that arise when a course of action pursued by five defendants inflicts injury on a million people?

The Working Group has pushed its deliberations to the point of producing a draft report. The report is intended to summarize the information that has been gathered by the Working Group, and to make recommendations for the next steps that might be taken in addressing mass torts problems. No immediate action will be taken; instead, it will be recommended that a new Judicial Conference committee be created to formulate specific recommendations for consideration in the rulesmaking process and by Congress. The constitution of a new committee will be a delicate task, seeking to achieve representation and experience that are as broad as possible without producing a body too large to work effectively and expeditiously. The draft report is presented to the Advisory Committee for consideration and, if possible, for approval, but it remains short of final form. Further work will be required in response to reactions from Advisory Committee members and, to the extent that time allows, from the committees whose liaison members have helped constitute the working group. The hope is that in the end, ways will be found to streamline the mass torts process. But it is a complicated task. February 15, 1999, has been set as the date for transmitting the final and formal report.

Judge Scirica began presentation of the draft report by stating that the working group has been very successful. This pattern of cross-committee deliberation may become a model for future problems. The work of the group was greatly assisted by Professor McGovern's aid in organizing the conferences. Professor Geoffrey C. Hazard, Jr., a member of the Standing Committee, became an important adviser. And important help was provided by Thomas Willging and the Federal Judicial Center studies that are still under way.

The Working Group process of inquiry provided an education for all involved. The lawyers who do mass torts regularly, and a few judges, know far more about the problems than do most others. One problem is that the landscape keeps changing. Each successive mass tort is in some important ways different from the one that came before it. The most difficult problems are presented by dispersed personal injury cases.

Despite the differences, there also are common problems that seem to link most mass torts. One is the "elasticity" phenomenon, occurring as improved means of resolving large numbers of claims invite the filing of still larger numbers of claims. As the sheer number of related claims proliferate, there is a danger courts will come to reward "false positives" — claims that would be rejected if presented as individual actions, but that become indistinguishable in the press to resolve more claims than any single tribunal can handle effectively. Another problem is the bewildering array of problems that are described as the problems of "maturity." Each mass tort presents a different range of needs for development of individual cases as a foundation for moving toward aggregated disposition. Premature aggregation can generate pressures that are not easily contained, threatening dispositions that are not fair to anyone involved, not to plaintiffs and not to defendants. Delayed aggregation, on the other hand, can invite waste, unnecessary multiplication of inconsistent results, races for available assets that may overcompensate early claimants while denying any compensation to later claimants. There is a continuing competition between the great traditional value of individual control and the equally important values of efficiency, fairness, and consistency. Reconciliation of the competition is possible only with proper recognition of the point of maturity.

In approaching these problems, it is necessary to understand the incentives to sue or not to sue. Some understanding may be emerging. The difficulty of achieving understanding is underscored, however, by the continuing difference of views among plaintiffs' lawyers. Some believe it best to represent only a small number of individual clients who have strong individual claims. Others believe it best to undertake individual representation of large numbers of individual clients, effectively achieving aggregation through common representation. Still others believe it best to aggregate many claims on other bases, whether by multidistrict proceedings, class actions, or still different devices.

It also is necessary to remember that there are substantive problems that require us to think about the role of the judiciary.

Among the problems that might be addressed are these: (1) Aggregation — by what means? At what time, remembering the dangers of premature or tardy aggregation? How far can we distinguish between aggregation for pretrial purposes, for settlement, or for trial? (2) What, if anything, can be done about claims that depend on uncertain science? (3) Limited fund problems may be addressed by the Supreme Court in the *Ahearn* asbestos litigation — it seems prudent to defer any deep consideration while the decision remains pending, but it would not be prudent to expect that the decision in any single case will resolve all problems. (4) Can means be found to achieve closure for defendants, particularly by settlement — if you want to settle with all claimants, or nearly all, how can this result be accomplished?

The draft report defines the issues and describes the problems that have been perceived from different perspectives. There are so many perspectives that inevitable tensions emerge in the

perceptions — phenomena that seem problems to some seem opportunities to others. Care must be taken to make it clear that the description of problems does not strike the casual reader as inconsistent. The draft report also notes possible approaches to addressing the problems, but does not make any choices among these approaches.

Throughout the process, there has been a substantial body of consistent advice about the important tools of judicial management. More can be done to avoid discovery conflicts. And many observers believe the time has come to expand the treatment of mass tort litigation in the Manual for Complex Litigation.

In considering possible rules changes, the topic of settlement class actions continually recurs. The *Amchem* decision seems to approve of settlement classes, but the terms of the approval remain uncertain.

In considering possible recommendations for legislation, any successor committee must think carefully about the extent to which a Judicial Conference committee can properly or prudently become involved with legislative processes. Close involvement with legislative committees may be important as a means of teaching important lessons about the problems, but it also threatens to belie judicial independence. In another direction, judicial proposals that bear on substantive choices may impugn judicial neutrality, no matter how far removed from direct involvement with the legislative process. Still, the Judicial Conference has already approved legislative proposals to amend 28 U.S.C. § 1407, and has approved "single event" mass-tort proposals. The path to be followed is a difficult one.

Professor McGovern took up the discussion, observing that the strong feeling of most participants has been that the only way to understand mass tort litigation is to become involved. The Working Group conferences were organized to show what is different about this litigation, and to identify the problems that have emerged. The conferences worked very well. As work continues, McGovern will meet with three of the liaison committees to gather their reactions to the draft report. The Court Administration and Case Management, Bankruptcy Administration, and Federal-State Jurisdiction Committees all will be involved.

Later in the discussion, Professor McGovern noted that the intent behind the draft report is to be descriptive, not normative. The Working Group has reached a consensus as to "the nature of the beast," and a rough consensus as to the things that at least some people see as problems. The paradigm of litigation is one plaintiff, facing one, two, or three defendants. The procedure is taken straight from the Federal Rules of Civil Procedure. The Pinto cases were tried like this. "Then something happened." The desire arose to achieve efficiencies that are denied by individual case-by-case disposition of each claim that arises from a mass tort. Aggregation was sought for pretrial, and then for trial. Aggregation enables courts to move the cases, to reduce transaction costs, to get more money to the victims, and so on. So, for example, Maryland adopted transfer legislation for state-wide consolidation, and 8,555 asbestos cases were consolidate in one proceeding. As aggregation developed, people realized that aggregation was spurring the filing of still more cases — the phenomenon referred to as the "elasticity" or "superhighway" (build a superhighway and there will be a traffic jam) problem. And defendants came to hope for closure, to find a procedure that would enable them to resolve all mass tort claims at once and move one. Innovative procedures were

adopted in Amchem and Ahearn. And as innovation proceeded, it came to be recognized that aggregation, class actions, and other devices "are not curing everything."

The Working Group inquiry began against this background. The Working Group asked "what are the problems"? If transaction costs are reduced early in the development of a mass tort, we get more cases; if too late, a high price of inefficiency is paid in processing more individual actions or small aggregations than need be paid. And so the quest was for solutions to specific problems. The Working Group remains open to identification of problems not yet identified. It is interested in proposed solutions, recognizing that there will be disagreement even as to what events constitute problems. A catalogue of possible solutions has been considered. But no attempt will be made to recommend solutions, to suggest the relative importance of the problems, or even to determine which of the perceived problems are problems in fact.

Thomas Willging reported on the work being done by the Federal Judicial Center. A draft-in-progress was provided. The work is highly detailed, but can be summarized in three parts.

The first part of the FJC study looks at the individual characteristics of mass torts. In the end, fifty mass torts will be studied. One characteristic is the number of claims presented. In this regard, and others, asbestos litigation has been "decidedly unique." Dalkon Shield and silicone gel breast implant litigation also has yielded hundreds of thousands of claims, but the claims in these cases were generated mostly by judicial processes for giving notice of the litigation. The next group of numbers is far smaller, involving mass torts with 10,000 or 20,000 claims. The claims rate has been studied as the ratio of claims to persons exposed. Remembering that exposure does not equate to injury, the figures seem to suggest that aggregation goes in company with a claim-filing rate greater than ten percent. No causal inference can be drawn from this conjunction — it is possible that it is aggregation that causes the claim rate to rise, and also possible that it is an independently high claim rate that causes aggregation. Clear proof of causation between the claimed wrong and asserted injuries is another important characteristic that distinguishes mass torts. About two-thirds of the cases studied enjoyed "pretty clear" showings of general causation. The remaining third did not have clear showings, and tended to drop off (Bendectin, repetitive stress injury) or to settle (Agent Orange).

The second part of the study involves three cases with "limited fund" settlements. One of the major themes of this part is that there is great difficulty in determining the size of the "fund." The Civil Rule 23(b)(1) device as used in these cases provided information far inferior to the information that was presented to the bankruptcy court when one of the proposed settlements failed. The difficulty seems to be that information as to the value of the defendant is presented only by parties who have already agreed on a settlement. In each of the three cases, the information dramatically underestimated the value of the company.

Discussion of the size of the fund pointed out that it is not possible to make meaningful comparisons between the value of a company faced with unresolved mass tort liability and the same company that has achieved resolution of the liability. Acromed, involved in one of the case studies, did not have the money to pay off the tort claims and could not borrow the money. Once a settlement was reached, it was possible to borrow the money; without a means of settlement, Acromed was worthless and the claimants would get little or nothing. With the settlement, the

claimants won substantial payments and Acromed was once again a viable company. The problem arises from the difficulty of predicting the value of a company once liability is removed, even if the prediction is made on the basis of the terms offered by a specific settlement. One way of viewing the problem is that a "surplus" is created by the very process of settlement — allocation of the surplus between the claimants and the defendant not only presents a difficult policy problem, but also turns in on itself as adjustment of the settlement terms affects the post-settlement value of the company.

An illustration of the problem is presented by the Eagle-Picher litigation. Eagle-Picher proposed settlement on the basis of a $200 million fund. The settlement was not approved, and bankruptcy ensued. After six years and $47 million of professional fees, a Chapter 11 plan was approved. The company was sold for $700 million, for the benefit of the claimants. Reduced to present value at the time the $200 million settlement was rejected, the reorganization yielded more than $500 million, or more than twice the original proposed settlement. The court in the bankruptcy case took evidence from lots of experts on the value of the claims and the value of the company. The process cost a lot in professional fees, but the determination, when made, set the stage for disposition.

The third part of the FJC study is a literature review. Of necessity, the review is selective — a vast literature is developing on mass torts topics. The review will focus on the recommendations for rules or legislation, rather than on the descriptions of the problems.

The ensuing discussion of the draft report wove around two sets of issues. One set involved changes that might be made to improve the report. The other involved the proper role of the Advisory Committee with respect to the Working Group and its report.

One of the first questions addressed to the draft report was whether it is clear that the focus is on a limited set of the cases that might be characterized as "mass torts." The Working Group has not been concerned with the "small-claims consumer" class actions that aggregate large numbers of claims that reflect individually minor injuries. Neither has the Working Group been concerned with regulatory and business wrongs, such as antitrust and securities law violations, that may inflict substantial economic injuries. It was agreed that the report must clearly exclude these class actions from its reach, and suggested that the scope discussion at pages 12 to 13 might emphasize these limits more clearly. The Advisory Committee has explored these topics in depth, and the Working Group has deliberately put them aside.

A related set of questions asked whether the draft report may be too optimistic about present procedures for handling "single event" mass torts. The draft, on page 25, seems to suggest both that the universe of claimants is clear in single-event torts, and that there is nothing left to the 1966 Advisory Committee Note suggestion that Rule 23 cannot be adapted to mass torts. There may be single-event torts in which the universe of possible claimants is not known. An example was provided by the explosion of a tank car releasing fumes that went for uncertain distances in indeterminate directions. 8,000 claimants have been identified, but it remains unclear how many actually have been affected by the release, and so on.

It was suggested that the discussion at draft pages 15 to 22 could be taken out of context, and misused. It should be made even more clear that this portion — and indeed all of the report — is a reflection of concerns, not findings of fact.

The reference to the *Ahearn* litigation on page 19 might seem to imply some view on the merits of questions now pending before the Supreme Court. The reference should be reworded to make it clear that no view of the merits is implied.

Another concern was that there is not enough clarity in the Part V division between issues that might profitably be addressed by a successor committee and more long-range issues. The discussion of attorney fee issues, for example, is separated from the discussion of professional responsibility issues. Science issues may deserve a different presentation.

It was agreed that the Part V discussion of solutions that might be explored should be reorganized, deleting any ordering by suggested sequences of consideration. At the same time, it is proper to recognize that some proposed solutions require much more further study than others — the "bill of peace" proposal for resolving science issues is an example of a matter that is so innovative that it requires more careful review than more familiar extensions of current practices. So attorney issues may be brought together, as could science issues, aggregation issues, and so on.

One of the many proposals in the appendix materials is expansion of federal-court power to enjoin state-court proceedings by amending 28 U.S.C. § 2283. This suggestion might deserve explicit mention in the report.

Another set of issues identified by the draft report involves professional responsibility problems. When a single lawyer represents many claimants, the settlement process often generates pressure to participate in the allocation of settlement amounts among different clients. The difficulty of responding to these pressures is mentioned in the draft report, and perhaps can be emphasized by presenting in one place the various issues with respect to appointment, compensation, and conduct of attorneys.

It was asked why there should be any recommendation for consideration of "science" issues, now that the Evidence Rules Advisory Committee has published proposals to amend the rules dealing with expert testimony. The response was that there remain real problems in dealing with scientific issues in some mass torts, and that the Evidence Rules proposals do not deal with these distinctive problems. One illustration is the difficulties that may arise when two or more courts each appoint panels of experts to consider the same issues. The "general causation" issue is of critical importance in some mass torts, and it is very difficult to define the proper time to move toward a single determination that will bind all future cases. The Court Administration and Case Management Committee is working on some of these issues, with support from the Federal Judicial Center. The draft report should make it clear that it is addressing only the need for further study of expert evidence in mass-tort cases, not a broader range of topics.

Another illustration of a specific mass-tort evidence problem arises from the question whether there should be one Daubert - Rule 104(a) hearing when there are multiple cases. Some judges are doing this. One issue is what advice the Manual for Complex Litigation should provide. In the breast implant litigation, Judge Jones in Oregon and Judge Weinstein in New York had very

different Rule 104(a) approaches, and Judge Pointer in the MDL cases had still a different approach. It may be that competition of this sort is a good thing, at least up to a point. But the question seems to deserve further study.

Pursuing the "science" issues, it was noted that there is a "tension" between different parts of the draft report. Page 36 refers to the risk of conflicting scientific determinations, but other parts refer to the risk of premature aggregation. Without aggregation, there will be conflicting determinations in the cases that in fact present difficult science issues. Delay is a problem, and moving too fast is a problem. The tension should be recognized more explicitly. And it should be emphasized that there is no ready formula — that each mass tort will present a different sort of uncertainty, and will be best handled by means different from those best adapted to the mass torts that have gone before. It also was urged that page 54 seems to involve issues that are beyond the reach of the Advisory Committee, involving issues better addressed by the Evidence Rules Committee. And the idea of an "issues class" to resolve science issues only, leaving all other issues for disposition in some other form of proceedings, is novel. It was recognized that there is no intent to carry the Civil Rules Committee into the realms of evidence. The recommendation for creation of an ad hoc committee contemplates that the ad hoc committee will identify topics for further consideration by appropriate bodies. Congress will be the appropriate body to study many of the likely solutions to mass-tort problems, while different rules advisory committees are likely to be appropriate for other possible solutions. The multi-committee approach is reflected at pages 56 and 58 of the draft report. It is important to emphasize that the recommendation is for a committee that will commend proposals for further consideration in the channels customarily followed for each type of proposal. "We cannot be too specific" in making this clear.

Pages 44 to 45 of the draft report focus on Rule 23 and settlement classes. It might help to supplement this discussion by referring to the "maturity" factor in the draft Rule 23(b)(3) that remains pending in the Advisory Committee.

Another pending Advisory Committee proposal is to amend Rule 23(c)(1) to provide for class certification "when practicable," not "as soon as practicable." This proposal could have a direct link to the maturity issues, including a direct link to settlement-class issues.

Discussion turned to the portions of the draft report that deal with the relationship between the rate of filing claims and the actual rate of injury. One view is that use of aggregation devices such as class actions leads to a significant increase in the rate of filing claims. In discussing this view, it should be made clear that an increase in rates of filing is not necessarily a bad thing — when the result is to provide compensation to those who have legitimate claims, it seems like a good thing. The problem is a problem only when the confusion and difficulty of resolving individual issues in a large aggregated proceeding facilitates awards to those who do not have legitimate claims. This problem is often referred to as the "false positives." And it is very difficult to know what the real claiming rate is — many settlements reward people who are not at all injured, and many claimants are "signed up" merely to hold their place in case injury does eventually develop. As difficult as it is to measure or compare filing rates, however, it may be important to make the point that we do not generally litigate all of society's wrongs. The possibility that aggregation devices can reduce the transaction costs of resolving individual claims in mass torts, increasing the rate of filing, deserves mention.

It was further observed that the difficulty of measuring claims rates depends in part on the setting. There are studies that have generated reasonably solid figures, particularly in the medical malpractice field. The Federal Judicial Center now being completed looks to claims rates in relation to the number of people exposed to an injury-causing condition or event; this information does not of itself describe the claims rate in relation to the number of people actually injured.

Another suggestion was that the Working Group continually heard the advice that it is common to focus on the last mass tort that was litigated, obscuring the need to approach each new mass tort with a close look for the differences that require different procedures. This advice may deserve greater prominence in the report.

After noting that the Working Group "did a great job of getting its arms around the problem," it was asked what might be the "end game"? If further study does not yield a final solution, where will an ad hoc committee go? How can those involved in further study "let go"? It was responded that the purpose is to address the things that can be seen to be problems and that at least seem susceptible of useful recommendations. One example would be the desire to find a means of facilitating final closure of all — or nearly all — claims in a mass tort. It will not be possible to control all changes in the dispute-resolution process. But, to take another example, Rule 23 is a remarkably powerful tool; it may be that it can be adapted to the needs of mass torts, perhaps in conjunction with reforms of other procedures, jurisdictions, or powers that must be addressed outside the Civil Rules Committee and outside the Enabling Act process. Other rules changes may appear to be profitable subjects for study by the Advisory Committees. A growing body of information can be gathered to support an expanded treatment of mass torts in the Manual for Complex Litigation. "We can do little things. It is worthwhile to attempt more." There is no hope that every problem will be solved, only a judgment that the risk and cost of further work are warranted by the prospect that some useful recommendations will emerge. Some solutions, even if desirable, may not be realistic — a specialized "mass torts" court, for example. "There is no silver bullet." As to grand solutions, "we must be prepared to fail." But even if specific solutions do not emerge, the process itself will yield valuable educational benefits that, indirectly, will contribute to the gradual evolutionary process that will continue to advance our approaches to mass-torts litigation.

The second focus of discussion was identifying the proper role of the Advisory Committee in relation to the Working Group report. The Working Group is a novel entity, created under the leadership of the Advisory Committee. The Advisory Committee meeting was scheduled for mid-November for the special purpose of providing the opportunity to review an advanced draft of the Working Group report. The novelty of the situation, however, leaves room to debate whether the Advisory Committee should decide whether in some way to adopt the report.

One approach is that leadership entails the responsibility to review the report to determine whether it can be endorsed by the Advisory Committee. Another approach would be to approve the recommendation that an ad hoc Judicial Conference committee be appointed to carry on the work begun by the Working Group, and to transmit the report without specifically endorsing the report.

A possible reason for limiting the role of the Advisory Committee is that the Committee has not had much time to review the draft report. The draft report summarizes a great deal of

information that was gathered by the Working Group, and it is difficult for Advisory Committee members who were not part of the Working Group to assimilate all of this information.

A more expansive role for the Advisory Committee was supported on the ground that the report makes only one recommendation — that the problems arising from mass-tort litigation deserve further study by a new committee specifically appointed for this purpose. There is reason to hope that progress can be made toward finding solutions, and there is an even better foundation than before for concluding that the work can be done only by a body that draws from the support of many traditionally separate bodies.

The length and detail of the draft report should not mislead discussion of these issues. The report is drafted to distill the fruits of the working group's efforts into a form that will prove most helpful to a successor committee. This form also will help to educate the important and relevant constituencies about the problems and the need to pursue the problems. The report does not consist of "findings" or "recommendations" for action. The Advisory Committee can do no more than approve the report as a clear description of the mass-torts phenomenon as it has been experienced, along with the problems that have been identified from all perspectives of the phenomenon and the solutions that have been proposed.

It was urged that when he authorized appointment of the Working Group, the Chief Justice asked that it report. The draft report is precisely the kind of report that is most useful to show the need for further work, and to suggest the means of undertaking the task. The need for further work seems clear. The Advisory Committee can ensure that nothing is overstated, and — as demonstrated by the many specific suggestions for revision — improve the product.

Further comments from Advisory Committee members can be worked into the draft report up to November 18, or possibly a few days later. After that, the draft will be circulated in its then-current form to the liaison committees. Further comments on that draft can be received up through the end of December.

After this discussion, a motion was made and seconded to approve the Working Group recommendation that a successor ad hoc committee be appointed, and to transmit the Working Group report. It was observed that this approach seemed timid in light of the nature of the report — that the Advisory Committee had enjoyed sufficient opportunity to review and discuss, and would have sufficient opportunity to suggest further revisions, to warrant more positive action now. It will be clear that the report is not making any proposals or recommendations beyond creation of a new committee. Deferring action for vote by mail ballot seems unnecessary.

Following this discussion, the motion to transmit the report was withdrawn with the consent of the seconder. A motion was then made that the Advisory Committee approve the report, subject to continuing editorial revisions and with changes made to reflect the Advisory Committee discussion at this meeting. There is to be no further vote by the Advisory Committee, although "wordsmithing" contributions from all members will be welcomed. A new draft will be circulated to the Advisory Committee for this purpose. The motion was adopted by 14 votes for and 2 votes against. (The vote total reflected participation by the members whose committee terms have concluded, since the report will reflect their participation in the process throughout the year.)

The vote to approve includes approval of the suggestion that the Chief Justice will be given an opportunity to indicate whether the approach being followed in the draft report reflects the nature of the report that he has expected to receive. Committee members were reminded that suggestions for change in the next draft will be due by the end of December.

Agenda Subcommittee Report

Justice Durham presented the report of the Agenda Subcommittee. The report is the beginning of an undertaking to reinvigorate the program for review and disposition of docket matters. The Committee has pursued several large projects in recent years, and has found it difficult to keep abreast of the more focused matters that regularly come to it. More regular review is planned for the future.

The memorandum presented for this meeting reviews docket items that have no further action listed and that appear to be matters that can either be scheduled for consideration at a 1999 meeting or be removed from the docket. It is not a complete review of all matters still pending.

Some items on the docket are listed as "deferred indefinitely." These items involve matters that the Committee does not want to reject, but that seem better accumulated for consideration as parts of larger packages. Rule 4, for example, regularly draws suggestions for improvements. It would be easy to act on service-of-process issues every year. A comprehensively revised rule took effect in 1993, however, and it has seemed wise to gather suggestions for reform over a period of several years. When it seems possible to undertake a broad review of experience under the new rule, these items can be considered as a package. Rule 81 is another illustration. A number of issues have accumulated around Rule 81, and with the proposal on Copyright Rules on the agenda for this meeting, the time may have come to clean up several Rule 81 matters in one package. Even then, Rule 81 presents questions that involve the relationship of the Civil Rules to the Habeas Corpus - § 2255 Rules that are being considered by the Criminal Rules Committee. Action on Rule 81 now will result in a significant prospect that a later Rule 81 proposal also will be needed. But perhaps the later proposal can catch up with the present proposals for publication in August 1999.

Focusing on specific proposals to amend Rule 4, it was suggested that the Subcommittee could combine two approaches. Some of the proposals might be put into a "cumulative minor changes" category, to be held for action when the rule seems ripe for a general review. Other proposals may deserve to be rejected without further study. The Subcommittee will take a closer look at all of the pending Rule 4 proposals to determine which proposals may fit into which category.

Proposals to amend Rule 5 are accumulating. The proposals generally center on electronic filing, notice-giving, and service. The Standing Committee has a technology subcommittee that is coordinating these issues across all of the advisory committees. The Civil Rules technology subcommittee is working with the Standing Committee subcommittee. Other Judicial Conference committees also are working on these topics. There are ten pilot courts doing electronic filing, and another court doing it on its own. The pilot districts are finding "rules problems" as they implement their programs. Rule 5 and consent of the bar have made the programs possible. But there are problems. The chief problem is service; pending Bankruptcy Rules amendments would allow electronic service. These topics will be reviewed with the advisory committee reporters during the

January Standing Committee meeting. These issues are difficult, and the process of dealing with them will draw out for a long time. The Committee voted to refer these docket items to the Technology Subcommittee.

A proposal has been made to amend Rule 12 to provide that an official immunity defense must be raised by dispositive pretrial motion, and cannot be raised for the first time at trial. This proposal would be inconsistent with the rules that allow amendment of the pleadings, and would defeat the power to grant judgment as a matter of law on an official immunity defense. A motion to reject this proposal was adopted by unanimous vote.

The committee also voted unanimously to reject proposed amendments to Rule 30. One would require that persons be allowed to make audio tapes of courtroom proceedings. The other sought to allow orders that would protect a deponent against harassment, orders that already are authorized by Rule 30(d)(3).

Another proposal suggested amendment of Rule 36 to forbid false denials. The Committee rejected this proposal, noting the adequacy of the present sanctions for false denials.

Rule 47 would be amended by another proposal to eliminate all peremptory challenges in civil actions. Peremptory challenges in civil cases are authorized by 28 U.S.C. § 1870; see also § 1866(b)(3). There may be good reasons to reconsider peremptory challenge practice in light of the difficulties that surround efforts to prevent discriminatory uses. But the questions do not seem so urgent as to undertake a project that would require deliberate use of the power to supersede a statute. The Committee voted to delete this topic from the docket, recognizing that Congress may wish to take it up and that future circumstances might justify further consideration by the Committee.

A question about the role of the district clerks as agents for service of process under Civil Rule 65.1 was removed from the docket in light of the action taken by the Committee at the March meeting.

The Committee agreed that other agenda items should be reviewed by the Subcommittee. It further suggested that the subcommittee should review future items that arise and determine the proper place on the agenda for these items by recommending rejection, scheduling for prompt consideration, deferment, or such other disposition as might seem desirable.

Automation

Automation topics returned for further discussion. The Committee hopes to benefit from monitoring the activities of the Bankruptcy Rules Advisory Committee in this field.

It was suggested that the short-term solution may be to continue to rely on local rules. In the long run, it will be necessary to go through all the rules to make sure that they are compatible with emerging electronic practices. Courts have been successful in reaching sensible adaptations of the rules to meet current needs. But service remains a big current problem. People are continuing to effect service by paper because there is no authority for electronic service.

One of the incidents of electronic storage is that there are complete records. Nothing can ever be erased — if changes are made in an electronic docket, the systems retain both the original version and the revised version. There are many ways to ensure that paper records are the same as electronic records. "The talk is machine-to-machine. It is a different way to do things." The accommodations required to meet these differences will be worked out over a period of several years.

Reliance on experimentation in pilot districts is likely to provide much valuable information. There also is a risk, however, that the advanced districts will become entrenched in different ways of doing things, creating difficulties for future attempts to adopt uniform protocols. The Judicial Conference is working on Guidelines for electronic filing, and has interim standards that all districts seem to follow.

Electronic filing is creating genuine concerns about privacy. Although the records made available electronically are the same as the records that could be examined by visiting the clerk's office, the greatly enhanced ease of access may lead to far greater use. Bankruptcy practice, for example, makes all the records available through the Internet, including tax returns, banking records, and the like. There may be a point at which it is better to limit access to people whose interests are so significant as to prompt a visit to the courthouse.

It seems likely that the Committee will have to focus on these issues in the relatively near-term future.

Rule 83

The topic of Rule 83 amendments was introduced by noting that local rules can undermine national uniformity and national policy. The Judicial Conference has pursued a policy to unify and to monitor local rules developments. But there is still great deference to the circuit judicial councils. 28 U.S.C. § 332(d)(4) requires that each judicial council "periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title." "Each council may modify or abrogate any such rule found inconsistent in the course of such a review." Some judicial councils actively pursue this mandate. Others honor it sporadically if at all. The local rules committees in the 94 different districts generally are active. Each seeks to adopt rules that work in the local district. These 94 local rules sovereignties can, however, adopt rules that impinge on important policies. The 6-person civil jury emerged from local rules, and has taken root with such tenacity that the recent effort to restore the 12-person jury foundered in the Judicial Conference. The practice of limiting the number of Rule 33 interrogatories began in local rules long before it was adopted in the national rule.

The Standing Committee and the Civil Rules Advisory Committee have had ongoing projects to study local rules. The Standing Committee is attempting to encourage hold-out districts to conform to the uniform numbering system, as required by Rule 83. There also is an attempt to clarify the distinction between local rules and "standing orders" that may take on all the characteristics of local rules but that do not emerge from the local rulemaking process.

It was observed that many local rules problems took root in the Civil Justice Reform Act, which encouraged development of local rules. The local CJRA committees took their

responsibilities seriously, and sought to develop better procedure rules that might become patterns for national reform. Now the national rulesmaking bodies are encouraging retrenchment.

It is evident that the questions presented by local rules cannot all be addressed quickly. The topic will remain a long-range agenda item even while individual issues are addressed and resolved. The best approach to many problems is likely to be education aimed at the district courts.

It was noted that the American Bar Association Litigation Section is launching a local-rules project. The scope of the project remains to be finally determined — it is recognized that the whole topic is too big for a single project.

The Standing Committee has asked the several advisory committees to consider adoption of a uniform effective date requirement for local rules, subject to an exception allowing immediate effect to meet special needs. The Appellate Rules Committee has recommended a proposal that sets December 1 as the effective date and allows a different effective date if there is "an immediate need for the amendment." Going beyond the effective date question, the Appellate Rules proposal also would prohibit enforcement of a local rule "before it is received by the Administrative Office of the United States Courts."

In preparing a Rule 83 draft analogous to the Appellate Rules proposal, it seemed wise to expand the range of inquiry. A local circuit rule need be reported only to the Administrative Office; a local district rule must be reported as well to the circuit judicial council. At a minimum, adherence to the Appellate Rules model would prohibit enforcement before a local rule is received by both the Administrative Office and the judicial council. It also may be desirable to consider other constraints, if only as a means of stimulating more consistent patterns of review among the judicial councils. At the same time, it must be recognized that there is a political difficulty in cutting back on established local enterprises and structures. The discussion draft reaches far, and perhaps too far. The expanded draft would require the Administrative Office both to publish local rules by means that provide convenient public electronic access and also to review local rules for conformity to acts of Congress and the national rules of procedure. If the Administrative Office concludes that a local rule does not conform, it is to report its finding to the district court and to the judicial council. A district court could not enforce a rule reported by the Administrative Office until the judicial council had acted to approve the rule.

A question of Enabling Act authority is raised by the proposals to establish a uniform effective date and to suspend enforcement for specified events. 28 U.S.C. § 2071 establishes the power to establish local district-court rules. Section 2071(b) provides that a local rule "shall take effect upon the date specified by the prescribing court." Section 2071(c)(1) provides that the local rule "shall remain in effect unless modified or abrogated by the judicial council of the circuit." A national rule that specifies a uniform effective date would be inconsistent with subsection (b), and a national rule prohibiting enforcement until stated conditions are satisfied apparently would be inconsistent with subsections (b) and (c)(1). The obvious argument to circumvent this problem draws from the supersession clause in § 2072 — after a Federal Rule of Procedure takes effect, "[a]ll laws in conflict with such rule[] shall be of no further force or effect." But there is a cogent argument that §§ 2071 and 2072 should be read *in pari materia*, as part of an integrated set of rulemaking provisions. The statutes accord to district courts a power to adopt rules consistent with

the national rules that is outside the power to supersede except by a national rule that addresses the same topic as the local rule. Of course the statutes also could be read to require that a local rule be consistent with a national rule that prescribes a uniform effective date or otherwise directly regulates local rulemaking. The answer does not seem entirely clear. But without a clear answer, real care must be taken in approaching these issues.

One response to the question of relative authority might be to amend Rule 83 simply to recognize the power of the district court to set the date, but to suggest a uniform date. This device would set a target, perhaps with the effect of a presumption, and avoid the need to decide whether a mandate could be established by national rule.

Another response was that a rule adopted by the Supreme Court and accepted by Congress must trump any local rule.

The immediate rejoinder was that to the contrary, a national rule cannot control the local rulemaking process in defiance of § 2071. More important, the proposal is a bad idea. Local rulemaking takes a long time. It is difficult even to get the judges of a district together, particularly if they sit in different places. The judges must consider, then await reactions from the local advisory committee, and eventually conclude the process. Two or three years may be used up. If the process reaches a conclusion in mid-December, or January, or February, it is too long to have to wait for the following December 1. There is no reason for uniform deadlines.

This view as echoed by the simple question: why do we need a uniform date?

The need for a uniform date was expressed as part of the questions of access. It would be helpful to have a means of ensuring that copies are provided to the Administrative Office and judicial council, and of encouraging judicial-council review. A single uniform date can be helpful as part of that package of reforms.

A variation on this view was expressed with the observation that local rules are most important when they are used in a dispositive way. The most important single thing to ensure is that all litigants can have assured access to all local rules for their district in a single, central place.

A related observation was that many of the bodies of local rules run to great length, and that it can be difficult to find the relevant rules. Not all districts have yet conformed with the uniform numbering requirement.

Similar comments suggested that a single annual effective date is not particularly important, but that it is important that there be clear and ready access to local rules. Some districts do not themselves know what their local rules are, even while other courts reprint their rules on a regular basis.

It was asked whether it would be better to allow a local rule to take effect 60 days after the rule is filed with the Administrative Office. Administrative Office representatives responded that the result would be a lot of calls asking about local rules. As a practical matter, it would be better to require that a rule be posted in a way that makes it "available to the world" — electronic means would be best.

Discussion turned to the "strong form" draft Rule 83(a)(1). This was the draft that prohibits enforcement until 60 days after the district court gave notice of a local rule to the judicial council and the Administrative Office, and until the rule has been made available to the public by convenient means that include electronic means. The draft also requires the Administrative Office to publish all local rules by means that provide convenient public access, and also to review all local rules. The Administrative Office would be required to report to the district court and the judicial council a rule that does not conform to Rule 83 requirements; the report would suspend enforcement of the rule until the judicial council gave approval. The question of power to adopt these requirements in face of § 2071 was renewed. It also was pointed out that there may be an implicit conflict with § 332(d)(4): judicial councils are required to review local rules, but there is no provision for suspending a local rule until the judicial council actually acts.

It was pointed out that several judicial councils have asked for resources and other assistance to help in reviewing local rules.

A suggestion was made that the distinction between an effective date and enforcement may help in addressing the § 2071 question. Rule 83 could be drafted solely in terms of enforcement, recognizing that a local rule is in effect but prohibiting enforcement by penalizing a party for failure to comply. A uniform starting point would be convenient, and might be achieved by barring enforcement until December 1 following the effective date.

Further support for a uniform effective date was expressed by noting that there is a "comfort factor" in knowing when to look for new rules. On the other hand, the need for still more regulation of the local-rule process may not be so great as to justify the intrusion.

A similar opinion was offered that a uniform effective date would be a convenience, but that the genuinely important questions are uniformity, conflict with the Federal Rules, and sound content.

The experience of the discovery proposals was urged as important grounds for caution. Even in the early part of the comment period, complaints are being heard that the local rule option should be preserved. Adoption of something like the Administrative Office report-and-moratorium proposal will be very difficult to sell. The apparent conflict with § 2071 is more important than anything that could be achieved by adopting a uniform December 1 effective date. If the discovery proposals should be adopted, moreover, many districts will be obliged to review their local rules to come into compliance with the new discovery rules — the occasion can be seized to support more thorough review of local rules.

Discussion continued with the observation that this is a delicate subject, best debated in the Standing Committee with all the advisory committees around the table. Or perhaps the course of wisdom would be to ask Congress to look at the problems: Congress has shown strong interest in local rules in the past, and might well be willing to take on these issues.

Support then was voiced for the draft postponing enforcement until a local rule has been sent to the Administrative Office and judicial council, and has been made fully available to the public. But the suggestion that the Administrative Office could force judicial council review by a notice that suspends a local rule was resisted.

One possible method to encourage review both by district courts and by judicial councils would be to require a "sunset" provision for all local rules. It was pointed out, however, that this provision would almost certainly conflict with § 2071(c). Congress would have to be asked to modify the statute.

The uniform effective date question was reopened by a suggestion that it might be more palatable to provide two or more effective dates in each year — as June 1 and December 1, or perhaps at the beginning of each calendar quarter.

Other local rules topics then were raised. It was asked whether it would be useful to create model local rules. It was pointed out that past efforts in this direction have not met great success. But model rules might provide continuity of format, high intrinsic quality, and still other advantages. The Maritime Law Association has drafted model local admiralty rules, and is optimistic that the rules will win widespread adoption.

Another observation was that good judges view their local rules as aids for attorneys, not as obstacles to be overcome. Often they are treated as "suggestions," clues on good procedure that will not turn into traps to be sprung on the unwary.

It was asked why all of these problems might not better be addressed by the Local Rules Project of the Standing Committee. Concern was expressed that the project needs additional financial support before it can do much more.

Brief comments were made on the report that the Standing Committee had rejected a proposal to establish a limit on the number of local rules, but by a very narrow margin. There are several points in the Civil Rules that seem to invite adoption of local rules — indeed, even the discovery proposals create a new local-rule option in Rule 26(f). A number limit could quickly run into real difficulties in complying with the Civil Rules and any similar requirements in the other rules. The limit proposal, however, does suggest a mood of impatience with continuing local rules problems.

Following this discussion, the Committee voted unanimously to present a report to the Standing Committee in these terms: the two drafts of Rule 83 considered at this meeting would be presented for discussion, with stylistic improvements that had been suggested by the Reporter. The question of statutory authority and the possibility of seeking legislation should be presented without any recommendation by this Committee. As to the uniform effective date, June 1 should be added as a second appropriate date.

Copyright Rules: Related Rules 65, 81

Action with respect to the Copyright Rules of Practice has been deferred because of concern that revision or repeal might be misunderstood in other countries. Appropriate congressional staff members have been informed of the continuing need to address the Copyright Rules, and understand that the Advisory Committee, having deferred, will move ahead. This fall, Congress has acted on pending treaties and implementing legislation. The International Intellectual Property Alliance, which had urged delay while these matters were pending in Congress, has now concluded that this

recent action makes it appropriate to go ahead with the Copyright Rules Proposal. The Committee concluded that the time has come to recommend publication of appropriate amendments.

As discussed at earlier meetings, the interplay between the Civil Rules and the Copyright Rules is itself a problem. Civil Rule 81(a)(1) provides that the Civil Rules do not apply to copyright proceedings "except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court * * *." The Copyright Rules of Practice were adopted under now-repealed provisions of the 1909 Copyright Act. Rule 1 of the Copyright Rules adopts the Rules of Civil Procedure to "[p]roceedings under section 25 of the Act of March 4, 1909, entitled 'An Act to amend and consolidate the acts respecting copyright' * * *." On the face of things, there are no procedural rules to apply in proceedings under the 1976 Copyright Act. This problem could be corrected readily by amending Copyright Rule 1 to refer to proceedings under the 1976 Act. The special Copyright Rules enabling statute was repealed as redundant following enactment of the general Enabling Act, 28 U.S.C. § 2072; § 2072 provides ample authority to continue the Copyright Rules if that seems desirable.

The Copyright Rules themselves present problems far deeper than the technical failure to revise Rule 1 following enactment of the current copyright law. Copyright Rule 2, adopting special standards of pleading for copyright cases, was abrogated in 1966. The Civil Rules Advisory Committee also recommended abrogation of the remaining Copyright Rules, which deal with summary seizure of infringing items and the means of producing infringing items. In 1964, the Advisory Committee concluded that the summary seizure provisions were inconsistent with emerging due-process concepts of no-notice seizure. The Advisory Committee also noted, however, that the Standing Committee might wish to postpone action on the remaining Copyright Rules in light of the prospect that Congress might soon revise the 1909 Copyright Act. The Standing Committee voted to defer action. The topic has not been addressed between 1964 and the recent decision to revisit the issue.

The 1964 prediction has been proved out by later Supreme Court decisions. As described in the agenda memorandum, the Copyright Rules provisions for no-notice prejudgment seizure almost certainly violate current due-process standards. The Copyright Rules also seem inconsistent with the statutory impoundment provision enacted in 1976, 17 U.S.C. § 503(a). Section 503(a) gives the court discretion whether to order impoundment, and discretion to establish reasonable terms. The Copyright Rules provisions do not reflect this discretion. At least as measured by published opinions, lower federal courts have recognized the invalidity of the Copyright Rules and have resorted instead to the temporary restraining order provisions of Civil Rule 65. No-notice seizure remains available, but a judge must make a pre-seizure determination that there is good reason for acting without notice to the alleged infringer.

The best means of ensuring strong copyright protection is to repeal the obsolete Copyright Rules and to make explicit in Rule 65 the availability of Rule 65 procedures in copyright impoundment. This action should reassure foreign countries that the United States indeed is honoring its treaty commitments to provide effective protection for the intellectual property rights embraced by copyright.

The American Intellectual Property Law Association has urged that repeal of the Copyright Rules and amendment of Rule 65 might well be accompanied by adoption of seizure provisions that parallel the Trademark Counterfeiting Act of 1984, 15 U.S.C. § 1116(d). The Association recognizes, however, that adoption of such measures as seizure of evidence may be a matter better left to Congress. The Committee concluded that no attempt should be made to include such provisions in the Civil Rules.

The Rule 65 proposal in the agenda materials would add a new subdivision (f): "**(f) Copyright impoundment.** This rule applies to copyright impoundment proceedings under Title 17, U.S.C. § 503(a)." The Reporter suggested that the draft might be amended to delete the explicit reference to the present statute. Two reasons were advanced for this proposal. The first was the ever-present concern that adoption of a specific statutory reference may require amendment of the rule if the statutory scheme is changed. The reference to copyright impoundment proceedings seems clear without adding the statutory provision. The second was a matter of speculation. It is conceivable that a circumstance might arise in which a copyright impoundment is available outside § 503(a). Materials might be prepared in the United States, for example, that do not infringe any United States copyright, but that are intended for infringing use in another country in violation of a copyright in that country. If seizure were attempted in this country, a court should be free to determine whether seizure is appropriate without any concern for negative implications from Rule 65(f). A motion to delete the reference to § 503(a) was adopted by unanimous vote.

A motion to recommend publication of proposed Rule 65(f) as amended passed by unanimous vote.

A motion to recommend repeal of the Copyright Rules was passed by unanimous vote. A draft Supreme Court order will be presented to the Standing Committee for the Standing Committee's determination whether there is any need to recommend a particular form if the Copyright Rules are, in the end, to be abrogated.

Two forms of an amended Rule 81(a)(1) were presented. Both forms delete the provision restricting application of the Civil Rules to copyright proceedings, and also deleted as superfluous the present reference to mental health proceedings in the United States District Court for the District of Columbia. The District of Columbia Court Reform and Criminal Procedure Act of 1970 transferred mental health proceedings formerly held in the United States District Court to local District of Columbia courts. The broader form also modified the reference to proceedings in bankruptcy, making it clear that the Civil Rules apply in bankruptcy proceedings when the Federal Rules of Bankruptcy Procedure make them applicable.

The bankruptcy rules incorporation issue was discussed briefly. It was agreed that when a district judge manages a bankruptcy proceeding outside the bankruptcy court, the bankruptcy rules and civil rules apply as appropriate.

A motion to recommend publication of the broader form of Rule 81(a)(1) passed unanimously. The proposed rule would read:

(a) ~~To What p~~Proceedings to which the Rules Apply~~icable~~.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651-7681; or ~~They do not apply~~ to proceedings in bankruptcy, except as the Federal Rules of Bankruptcy Procedure make them applicable ~~or to proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia~~.

* * * * *

[It should be remembered that in May 1997 the Committee determined that the next "technical amendments package" should include a revision of Rule 81(c) that would conform to changes in statutory language. All present references to the "petition for removal" should be changed to the "notice of removal." See 28 U.S.C. § 1446. The Standing Committee will be advised of this action, for its determination whether to include Rule 81(c) in the publication of Rule 81(a) for comment, or instead to hold this change for action by other means.]

Rule 53

Civil Rule 53 has kept a holding place on the Committee docket since 1994, when a full-scale revision of the rule was briefly considered. The Committee concluded in 1994 that although there may be many ways in which present Rule 53 fails to reflect or regulate the contemporary uses of special masters, there were no indications that pressing problems were caused by the lack of a guiding rule. The court of appeals decision in the recent Microsoft litigation suggests that there may be good reason to undertake further review.

The more general reasons for studying Rule 53 continue unchanged. Special masters are being used for extensive pretrial and post-judgment purposes that simply are not reflected in Rule 53. Court-appointed experts seem at least occasionally to be set to chores outside the apparent scope of Evidence Rule 706, serving as judicial advisers as well as courtroom witnesses. More exotic appointments of advisers also appear from time to time. "Examiners" may be appointed. All of these functions relate closely to duties undertaken by magistrate judges, and there is a need to clarify the relationships between the occasions for relying on magistrate judges and the occasions for appointing private citizens to assist with judicial functions.

These problems are difficult. An initial difficulty will lie in attempting to form a clear picture of the seeming wide variety of present practices. Professor Farrell has explored some of these issues, but much work remains to be done if it is possible to do more.

It was suggested that the general feeling in 1994 seemed to be that lower courts seem to be muddling along pretty well even without any guidance in Rule 53. Unless there is a real problem, there may be no need to undertake a major task that might produce a rule that still fails to capture and regulate all actual and desirable practices.

The need for study was justified on the ground that the use of special masters has changed dramatically since the Supreme Court's LaBuy decision greatly discouraged the use of masters for trial purposes. Masters are discharging many important duties without any real guidance in the rules.

Judge Niemeyer proposed appointment of a Rule 53 Subcommittee. The Subcommittee would be asked to report in the fall of 1999, in sufficient detail to provide a foundation for extensive discussion. Many people are interested in this topic, and the Subcommittee would be free to draw on advice from them. It also will be appropriate to ask the Federal Judicial Center to undertake any study that can be designed in consultation with the Subcommittee. The Subcommittee's task will be to make a recommendation whether Rule 53 reform should be pursued; there is no expectation that it must propose reform. It remains appropriate to conclude that the burdens and risks of amending Rule 53 are greater than the probable benefit of the best amendments that might now be devised. "We cannot attempt to make all rules perfect." The Committee approved this proposal.

Rule 51

Civil Rule 51 came to the docket as a result of the Ninth Circuit's review of local rules for conformity with the national rules. Many districts in the Ninth Circuit have local rules that require submission of requests for jury instructions before trial begins. These rules seem inconsistent with Rule 51, which provides for requests "[a]t the close of the evidence or at such earlier time during trial as the court reasonably directs." The Ninth Circuit recommended consideration of a Rule 51 amendment that would legitimate such local rules. The Committee concluded at the March, 1998 meeting that there is no apparent reason to subject this issue to the vagaries of local rules. If there are good reasons to enable a judge to demand requests before trial, the authority should be added to Rule 51.

This conclusion did not complete consideration of Rule 51. It also was suggested that Rule 51 is not easily read by those who are not fully familiar with the ways in which courts have interpreted its language. The Criminal Rules Committee, moreover, had already published a proposal to amend Criminal Rule 30 to authorize the court to direct that requests be made at the close of the evidence "or at any earlier time that the court reasonably directs." Recognizing that the Civil Rule could not catch up with the Criminal Rule, the Committees exchanged views and the Criminal Rules Committee came to consider the draft Rule 51 that was before the March Civil Rules Committee meeting. The Criminal Rules Committee has expressed interest in considering broader review of the jury-instructions rules.

The draft Rule 51 in the agenda materials was discussed briefly. In addition to authorizing a requirement that requests be filed before trial, the draft recognizes the need to allow later requests in two ways. It provides discretion to permit an untimely request at any time before the jury retires to consider its verdict. And it requires that supplemental requests be permitted "at the close of the evidence on issues raised by evidence that could not reasonably be anticipated at the time initial requests were due." It was urged that this language was too narrow. "Anything is reasonably anticipated," and too few issues would qualify as not reasonably to be anticipated. On this view, the court should be required to treat any supplemental request as timely.

It was asked whether it would be wise to follow the lead of some local rules that limit the number of requests that can be submitted. This suggestion found little approval.

Many judges hold instruction conferences during trial: should the rule formalize this? Or is it better to have the conferences after completion of the evidence? Even in a complex case that

presents many issues, or in a case that may present one or more very difficult issues of law? It was responded that it seems better to preserve flexibility; a judge should be left free to proceed without any instructions conference when that seems appropriate.

It was observed that judges often start working on instructions before trial.

The question of written instructions was raised. Some judges regularly use written instructions. Others do not, for fear that jurors may start to parse the instructions and end up ignoring the evidence.

Pattern instructions also were noted. Many circuits have pattern instructions that are used routinely on common issues. Trial courts rely on them. But they are not "official" in the way that many state pattern instructions are official. And they are not used for the tricky cases. There was no interest in attempting to amend Rule 51 to require use of pattern instructions.

The Committee noted its understanding that the Criminal Rules Committee does not feel an urgent need to act on the jury instructions rules. Rule 51 will be carried forward on the docket, with the request that Committee members communicate their views on reform to the Reporter to support submission of an improved draft for the next meeting.

Corporate Disclosure Statement

The Judicial Conference Committee on Codes of Conduct has asked the Standing Committee to consider whether other sets of procedural rules should adopt provisions similar to Appellate Rule 26.1, which requires corporate disclosure statements. The underlying concern is that a district judge may lack information necessary to determine that the judge is disqualified from a particular case.

This topic came late to the agenda and was presented only in preliminary form. Discussion began by focusing on the deliberate decision to amend Appellate Rule 26.1 to delete the requirement that a corporate party identify "subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." The Committee Note to the amended rule states that "Disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation." It was suggested that information about subsidiaries may be important. The theory that a subsidiary is not injured when a parent corporation is injured does not seem always realistic.

Reliance on filing forms was suggested as an alternative — rather than create a new Civil Rule requiring disclosure statements, a model filing form could be created for use by district courts. The form could be the same for civil, criminal, and bankruptcy cases if that should prove appropriate, or different forms could be adopted to meet such different needs as might emerge. One judge observed that her court requires corporate disclosure information by a form filed with the Rule 26(f) report.

The usefulness of forms was challenged by reflecting on the way in which the Appellate Rules reportedly came to include a disclosure requirement. Counsel for institutional litigants found it inconvenient to have to meet different disclosure practices in different circuits. It is much easier

to adopt a single disclosure statement that can be duplicated and used in every court. A form would meet this need only if a uniform form were adopted by all courts.

In favor of adopting a uniform national rule, it was observed that there is a uniform national disqualification standard. This would make it easier for corporations that are repeatedly caught up in litigation to comply. But there may be more reluctance to disclose in district court filings than in appellate court filings. And there is some cost and aggravation even in complying with a routine requirement, a burden that will be heavier for the first-time or sporadic litigant.

Turning to the substance of a possible disclosure rule, it was asked whether disclosure requirements should extend to partnerships — limited or general, limited liability companies, business trusts, or other organizations not in corporate form.

Two delegates must be appointed to the Standing Committee's ad hoc committee on federal rules of attorney conduct. The Committee concluded that the best way to take up disclosure statements is to ask these delegates to study the topic, perhaps in conjunction with the ad hoc committee's work.

This Committee will report to the Standing Committee that the corporate disclosure requirement deserves further study. It is useful to get the information, but it is not clear what disclosure means should be required. These questions deserve attention. Given the need to coordinate at least the Bankruptcy, Criminal, and Civil Rules Committees — and perhaps to involve the Appellate Rules Committee as well — it may be that initial consideration could be assigned to the attorney conduct committee as a separate issue.

Other Matters

Two agenda items were deferred to the spring meeting. Item VIII opens the question whether the Civil Rules should be amended to reflect the procedure established by 42 U.S.C. § 1997e(g) that allows a defendant to "waive the right to reply" in an action brought by a prisoner under federal law. This item will be considered by the Agenda Subcommittee. Item X invited further discussion of the time required to act in ordinary course under the Rules Enabling Act. The Standing Committee has urged consideration of these timing issues, and they will continue to be part of the agenda.

Next Meeting

The spring meeting was tentatively set for Monday and Tuesday, April 19 and 20, 1999.

Respectfully submitted,

Edward H. Cooper
Reporter

Item 84-B

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

TO: **Hon. Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **December 3, 1998**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on October 19 and 20, 1998 at Cape Elizabeth, Maine and took action on a number of proposed amendments. The draft Minutes of that meeting are included at TAB D. This report addresses matters discussed by the Committee at that meeting.

First, the Committee reconsidered its proposed new to Rule 32.2, dealing with criminal forfeiture procedures. As noted in the following discussion, the Advisory Committee proposes that the revised Rule 32.2 be approved by the Committee and forwarded to the Judicial Conference.

Second, if the Committee approves new Rule 32.2, conforming amendments should also be approved to Rules 7 (The Indictment and Information), Rule 31 (Verdict), Rule 32 (Sentence and Judgment), and Rule 38 (Stay of Execution).

Third, the Committee is considering proposed amendments to the following rules:

- Rule 10. Arraignment & Rule 43, Presence of Defendant.

- Rule 12.2. Notice of Insanity Defense or Expert Testimony of
- Defendant's Mental Condition .
- Rule 26. Taking of Testimony.
- Rule 43. Presence of Defendant.
- Rules Governing Habeas Corpus Proceedings; Report of Subcommittee.

Finally, the Advisory Committee has several information items to bring to the attention of the Standing Committee.

II. Action Items--Recommendations to Forward Amendments to the Judicial Conference

A. Summary and Recommendations

At its June 1997 meeting, the Standing Committee approved the publication of proposed amendments to nine rules for public comment from the bench and bar. One of those Rules 32.2 was a new rule designed to bring together in one rule the procedures associated with criminal forfeitures. That Rule, which generated a number of written comments and testimony, was presented to the Standing Committee at its Santa Fe meeting in June 1998. The Standing Committee discussed the Rule and eventually voted not to approve the Rule for transmission to the Judicial Conference.

The Committee has reconsidered Rule 32.2 and at its meeting in October approved a modified Rule that addresses the concerns raised by members of the Standing Committee. The following discussion briefly summarizes the changes to proposed Rule 32.2 and the conforming amendments to other Rules of Criminal Procedure.

1. ACTION ITEM—Rule 32.2. Forfeiture Procedures.

a. Background of Rule 32.2.

The Committee proposes adoption of Rule 32.2, a new rule dedicated solely to the question of forfeiture proceedings. As noted in the our report to the Standing Committee in June, over the last several years the Committee has discussed the problems associated with criminal forfeiture. Under existing rules provisions, when a verdict of guilty is returned on any substantive count on which the government alleges that property may be forfeited, the jury is asked to decide questions of ownership or property interests vis a vis the defendant(s). As initially published and presented to this Committee, the Rule eliminated that right

to have jury decide those issues. That position was based upon the Advisory Committee's reading of *Libretti v. United States*, 116 S.Ct. 356 (1995), in which the Supreme Court indicated that criminal forfeiture constitutes an aspect of the sentence imposed in the case and that the defendant has no constitutional right to have a jury decide any part of the sentence.

As noted at the Standing Committee's last meeting, the Advisory Committee had received only six written comments and most of those supported the Rule. The NADCL adamantly opposed the proposed rule, and provided two witnesses who testified before the Committee. Their key point was that the new rule abrogated the critical right to a jury trial. Under the draft presented to the Standing Committee in June, the jury's role would have been eliminated and the court would have initially decided whether the defendant had an interest in the property. In a later proceeding the court would resolve any third party claims to the property subject to forfeiture. A witness for the Department of Justice pointed out that after the Supreme Court's decision is *Libretti*, supra, forfeiture proceedings are a part of sentencing, a matter to be decided by the trial judge.

b. Action on Rule 32.2 by Standing Committee in June 1998.

At its June 1998 meeting, the Standing Comment disapproved Rule 32.2. Most of the discussion had focused on two key issues: Abrogation of the jury's role in forfeiture proceedings and the ability of the defendant to present evidence at the post-verdict hearing. There was also some question about making style changes to portions of the Rule.

c. Reconsideration of Rule 32.2 by Advisory Committee.

Following the Standing Committee's action on the Rule, a Rule 32.2 Subcommittee of the Advisory Committee considered proposed changes submitted by the Department of Justice and at its October 1998 meeting, recommended to the Advisory Committee that Rule 32.2 be revised and resubmitted to the Standing Committee. The revisions included restoration of the jury's role in determining nexus in forfeiture proceedings (Rule 32.2(b)(4)) and clarified that both the government and the defense may present evidence at the post-verdict hearing to determine if there is a nexus between the property to be forfeited and the offense for which the defendant has been found guilty (Rule 32.2(b)(2)).

d. Summary of Changes in Rule 32.2 Following Standing Committee Meeting.

Rule 32.2 has been changed to reflect current caselaw interpreting Rule 7(c) which does not require a substantive allegation that certain property is subject to forfeiture. The defendant need only receive notice that the government will be seeking forfeiture under the applicable statute. A comparison chart is at TAB B.

Rule 32.2(b)(1) has been revised to clarify that there are different kinds of forfeiture judgments: forfeiture of specific assets and money judgments. To the extent that the case involves forfeiture of specific assets, the court or jury must find a nexus between the property and the crime for which the defendant has been found guilty.

Under revised Rule 32.2(b)(2), the Rule makes it clear that what is deferred to the ancillary proceeding is the question of whether any third party has a superior interest in the property. Former language regarding what the court should do if no party files a claim has been moved to (c)(2).

Rule 32.2(b)(3) had been changed to make it clear that the Attorney General could designate someone outside the Department to seize the forfeited property.

The major change, rests in Rule 32.2(b)(4) which retains the right of either the defendant or the government to request that the jury make the decision whether there is a nexus between the property and the crime. This provision was designed specifically to address the concerns raised by some members of the Standing Committee.

Rule 32.2(c)(1) has been revised to reflect that no ancillary proceeding is necessary regarding money judgments and (c)(2) had been revised to simplify what had appeared at (b)(2) in the original version. Subdivision (c)(2) preserves two tenets of current law: that criminal forfeiture is an in personem action and that if no third party files a claim to the property, his or her rights are extinguished. Under the revised Rule, if no third party files a claim the court is not required to determine the extent of the defendant's interest. It is only required to decide whether the defendant had an interest in the property.

Rule 32.2(e)(1) has been revised to make it clear that the right to a bifurcated procedure does not apply to forfeiture of substitute assets or to the addition of newly-discovered property to an existing forfeiture order.

e. Style Changes to Revised Rule 32.2

In redrafting Rule 32.2, the Advisory Committee considered the suggested style changes submitted by the Style Subcommittee. Most of those changes have been incorporated into the Rule and Comment. A number of the suggestions, however, would have resulted in what the Department of Justice considered to be substantive changes. The suggested style changes and the Department's response are attached at TAB C, infra, following this Report.

Recommendation--The Committee recommends that Rule 32.2 be approved as amended and forwarded to the Judicial Conference.

2. ACTION ITEM--Rule 7. The Indictment and the Information

The amendment to Rule 7(c)(2), which addresses one aspect of criminal forfeiture, is a conforming amendment reflecting proposed new Rule 32.2. That rule provides comprehensive coverage of forfeiture procedures. The Committee received no comments on the proposed amendment to the rule.

Recommendation--The Committee recommends that the amendment to Rule 7 be approved and forwarded to the Judicial Conference.

3. ACTION ITEM--Rule 31. Verdict.

The proposed amendment to Rule 31 deletes subdivision (e) which related to the requirement that the jury return a special verdict regarding criminal forfeiture. The amendment conforms the rule to proposed new Rule 32.2 which provides comprehensive guidance on criminal forfeitures. The Committee received no comments on this proposed change.

Recommendation--The Committee recommends that the amendment to Rule 31 be approved and forwarded to the Judicial Conference.

4. ACTION ITEM--Rule 32. Sentence and Judgment.

The proposed amendment to Rule 32(d), which deals with criminal forfeiture, conforms that provision to proposed new Rule 32.2 which provides comprehensive guidance on forfeiture procedures. The Committee received no comments on this proposed amendment.

Recommendation--The Committee recommends that the amendment to Rule 32 be approved and forwarded to the Judicial Conference.

5. ACTION ITEM--Rule 38. Stay of Execution.

The amendment to Rule 38 (e) is a technical, conforming, amendment resulting from proposed new Rule 32.2 which provides comprehensive guidance on criminal forfeitures. The Committee received no comments on the proposed change.

Recommendation--The Committee recommends that the amendment to Rule 38 be approved as published and forwarded to the Judicial Conference.

B. Text of Proposed Amendments; Summary of Comments and GAP Reports.

32.2. Criminal Forfeiture

(a) NOTICE TO THE DEFENDANT. A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.

(b) ENTRY OF PRELIMINARY ORDER OF FORFEITURE; POST-VERDICT HEARING.

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in an indictment or information for which criminal forfeiture is sought, the court shall determine what property is subject to forfeiture under the applicable statute. If specific property is sought to be forfeited, the court shall determine whether the government has

established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court shall determine the amount of money that the defendant will be ordered to pay. The court's determination under this subdivision may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilty.

(2) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture. The preliminary order shall set forth the amount of any money judgment, or direct the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred pending the filing of any third party claims in an ancillary proceeding under subdivision (c).

(3) Entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably found necessary to preserve the property's value pending any appeal.

(4) Upon the request of any defendant or the government in a case in which the finding of guilt was rendered by a jury, the determination of whether the government has established the requisite nexus between the property and the offense committed by the defendant shall be made by the jury.

(c) ANCILLARY PROCEEDING; FINAL ORDER OF FORFEITURE.

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court shall conduct an ancillary proceeding, except that no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under subdivision (c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, either party may move the court for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

(2) When the ancillary proceeding ends, the court shall enter a final order of forfeiture, amending the preliminary order as necessary to account for any third party rights. If no third party files a timely claim, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the

property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property.

(3) If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions, unless the court determines that there is no just reason for delay.

(4) An ancillary proceeding is not part of sentencing.

(d) STAY PENDING APPEAL. If the defendant appeals from the conviction or order of forfeiture, the court may stay its order of forfeiture on terms that the court finds appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. But if the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but shall not transfer any property or interest to a third party until the decision on appeal becomes final, unless the defendant so consents in writing or on the record.

(e) SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.

(1) On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

Rule 32.2(b)(4) does not apply to property forfeited under this subdivision.

(2) If the government shows that the property is subject to forfeiture under (e)(1), the court shall:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

ADVISORY COMMITTEE NOTE

Rule 32.2 consolidates a number of procedural rules governing the forfeiture of assets in a criminal case. Existing Rules 7(c)(2), 31(e) and 32(d)(2) are also amended to conform to the new rule. In addition, the forfeiture-related provisions of Rule 38(e) are stricken.

Subdivision (a). Subdivision (a) is derived from Rule 7(c)(2) which provides that notwithstanding statutory authority for the forfeiture of property following a criminal conviction, no forfeiture order may be entered unless the defendant was given notice of the forfeiture in the indictment or information. As courts have held, subdivision (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself. The subdivision reflects the trend in caselaw interpreting present Rule 7(c). Under the most recent cases, Rule 7(c) sets forth a requirement that the government give the defendant notice that it will be seeking forfeiture in accordance with the applicable statute. It does not require a substantive allegation in which the property subject to forfeiture, or the defendant's interest in the property, must be described in detail. *See United States v. DeFries,* 129 F.3d 1293 (D.C.Cir. 1997) (it is not necessary to specify in either the indictment or a bill of particulars that the government is seeking forfeiture of a particular asset, such as the defendant's

salary; to comply with Rule 7(c), the government need only put the defendant on notice that it will seek to forfeit everything subject to forfeiture under the applicable statute, such as all property "acquired or maintained" as a result of a RICO violation). *See also United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996), *aff'g* 846 F. Supp. 463 (E.D. Va. 1994) (*Moffitt* I) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subdivision (b) Subdivision (b) replaces Rule 31(e) which provides that the jury in a criminal case must return a special verdict "as to the extent of the interest or property subject to forfeiture." *See United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995) (Rule 31(e) only applies to jury trials; no special verdict required when defendant waives right to jury on forfeiture issues).

One problem under Rule 31(e) concerns the scope of the determination that must be made prior to entering an order of forfeiture. This issue is the same whether the determination is made by the court or by the jury.

As mentioned, the current Rule requires the jury to return a special verdict "as to the extent of the interest or property subject to forfeiture." Some courts interpret this to mean only that the jury must answer "yes" or "no" when asked if the property named in the indictment is subject to forfeiture under the terms of the forfeiture statute--*e.g.* was the property used to facilitate a drug offense? Other courts also ask the jury if the defendant has a legal interest in the forfeited property. Still other courts, including the Fourth Circuit, require the jury to determine the *extent* of the defendant's interest in the property vis a vis third parties. *See United States v. Ham*, 58 F.3d 78 (4th Cir. 1995) (case remanded to the district court to impanel a jury to determine, in the first instance, the extent of the defendant's forfeitable interest in the subject property).

The notion that the "extent" of the defendant's interest must be established as part of the criminal trial is related to the fact that criminal forfeiture is an *in personam* action in which only the defendant's interest in the property may be forfeited. *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996). When the criminal forfeiture statutes were first enacted in the 1970's, it was clear that a forfeiture of property other than the defendant's could not occur in a criminal case, but there was no mechanism designed to limit the forfeiture to the defendant's interest. Accordingly, Rule 31(e) was drafted to make a determination of the "extent" of the defendant's interest part of the verdict.

The problem is that third parties who might have an interest in the forfeited property are not parties to the criminal case. At the same time, a

defendant who has no interest in property has no incentive, at trial, to dispute the government's forfeiture allegations. Thus, it was apparent by the 1980's that Rule 31(e) was an inadequate safeguard against the inadvertent forfeiture of property in which the defendant held no interest.

In 1984, Congress addressed this problem when it enacted a statutory scheme whereby third party interests in criminally forfeited property are litigated by the court in an ancillary proceeding following the conclusion of the criminal case and the entry of a preliminary order of forfeiture. *See* 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l). Under this scheme, the court orders the forfeiture of the defendant's interest in the property--whatever that interest may be--in the criminal case. At that point, the court conducts a separate proceeding in which all potential third party claimants are given an opportunity to challenge the forfeiture by asserting a superior interest in the property. This proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the forfeited property.

The notice provisions regarding the ancillary proceeding are equivalent to the notice provisions that govern civil forfeitures. *Compare* 21 U.S.C. § 853(n)(1) *with* 19 U.S.C. § 1607(a); *see United States v. Bouler*, 927 F. Supp. 911 (W.D.N.C. 1996) (civil notice rules apply to ancillary criminal proceedings). Notice is published and sent to third parties that have a potential interest. *See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Indosuez Bank)*, 916 F. Supp. 1276 (D.D.C. 1996) (discussing steps taken by government to provide notice of criminal forfeiture to third parties). If no one files a claim, or if all claims are denied following a hearing, the forfeiture becomes final and the United States is deemed to have clear title to the property. 21 U.S.C. § 853(n)(7); *United States v. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under § 853(n)(7) and can market the property notwithstanding third party's name on the deed).

Thus, the ancillary proceeding has become the forum for determining the extent of the defendant's forfeitable interest in the property. This allows the court to conduct a proceeding in which all third party claimants can participate and which ensures that the property forfeited actually belongs to the defendant.

Since the enactment of the ancillary proceeding statutes, the requirement in Rule 31(e) that the court (or jury) determine the extent of the defendant's interest in the property as part of the criminal trial has become an unnecessary anachronism that leads more often than not to duplication and a waste of judicial resources. There is no longer any reason to delay the conclusion of the criminal trial with a lengthy hearing over the extent of the defendant's interest in property when the same issues will have to be litigated a second time in the ancillary

proceeding if someone files a claim challenging the forfeiture. For example, in *United States v. Messino*, 921 F. Supp. 1231 (N.D. Ill. 1996), the court allowed the defendant to call witnesses to attempt to establish that they, not he, were the true owners of the property. After the jury rejected this evidence and the property was forfeited, the court conducted an ancillary proceeding in which the same witnesses litigated their claims to the same property.

A more sensible procedure would be for the court, once it (or a jury) determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding.

This approach would also address confusion that occurs in multi-defendant cases where it is clear that each defendant should forfeit whatever interest he may have in the property used to commit the offense, but it is not at all clear which defendant is the actual owner of the property. For example, suppose A and B are co-defendants in a drug and money laundering case in which the government seeks to forfeit property involved in the scheme that is held in B's name but of which A may be the true owner. It makes no sense to invest the court's time in determining which of the two defendants holds the interest that should be forfeited. Both defendants should forfeit whatever interest they may have. Moreover, if under the current rule the court were to find that A is the true owner of the property, then B would have the right to file a claim in the ancillary proceeding where he may attempt to recover the property despite his criminal conviction. *United States v. Real Property in Waterboro*, 64 F.3d 752 (lst Cir. 1995) (co-defendant in drug/money laundering case who is not alleged to be the owner of the property is considered a third party for the purpose of challenging the forfeiture of the other co-defendant's interest).

The new Rule resolves these difficulties by postponing the determination of the extent of the defendant's interest until the ancillary proceeding. As provided in (b)(1), the court, as soon as practicable after the verdict or finding of guilty in the criminal case, would determine if the property was subject to forfeiture in accordance with the applicable statute, e.g., whether the property represented the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. The determination could be made based on the evidence in the record from the criminal trial or the facts set forth in a written plea agreement submitted to the court at the time of the defendant's guilty plea, or the court could hold a hearing to determine if the requisite relationship existed between the property and the offense. Subdivision (b)(2)

provides that it is not necessary to determine at this stage what interest any defendant might have in the property.

Subdivision (b)(1) recognizes that there are different kinds of forfeiture judgments in criminal cases. One type is a personal judgment for a sum of money; another is a judgment forfeiting a specific asset. *See, e.g., United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996) (government is entitled to a personal money judgment equal to the amount involved in the money laundering offense, as well as order forfeiting specific assets involved in, or traceable to, the offense; in addition, if the statutory requirements are met, the government may be entitled to forfeit substitute assets); *United States v. Cleveland*, 1997 WL 537707 (E.D. La. 1997) (government entitled to a money judgment equal to the amount of money defendant laundered in money laundering case). The finding the court is required to make will depend on the nature of the forfeiture judgment.

To the extent that the government is seeking forfeiture of a particular asset, such as the money on deposit in a particular bank account that is alleged to be the proceeds of a criminal offense, or a parcel of land that is traceable to that offense, the court must find that the government has established the requisite nexus between the property and the offense. To the extent that the government is seeking a money judgment, such as a judgment for the amount of money derived from a drug trafficking offense or the amount involved in a money laundering offense where the actual property subject to forfeiture has not been found or is unavailable, the court must determine the amount of money that the defendant should be ordered to forfeit.

The court may make the determination based on evidence in the record, or on additional evidence submitted by the defendant or evidence submitted by the government in support of the motion for the entry of a judgment of forfeiture. The defendant would have no standing to object to the forfeiture on the ground that the property belonged to someone else.

Under subdivision (b)(2), if the court finds that property is forfeitable, it must enter a preliminary order of forfeiture. It also recognizes that any determination of a third person's interest in the property is deferred until an ancillary proceeding, if any, is held under subdivision (c).

Subdivision (b)(3) replaces Rule 32(d)(2) (effective December 1996). It provides that once the court enters a preliminary order of forfeiture directing the forfeiture of whatever interest each defendant may have in the forfeited property, the government may seize the property and commence an ancillary proceeding to determine the interests of any third party. The subdivision also provides that the Attorney General may designate someone outside of the Department of Justice to seize forfeited property. This is necessary because in cases in which the lead

investigative agency is in the Treasury Department, for example, the seizure of the forfeited property is typically handled by agencies other than the Department of Justice..

If no third party files a claim, the court, at the time of sentencing, will enter a final order forfeiting the property in accordance with subdivision (c)(2), discussed *infra*. If a third party files a claim, the order of forfeiture will become final as to the defendant at the time of sentencing but will be subject to amendment in favor of a third party pending the conclusion of the ancillary proceeding.

Because the order of forfeiture becomes final as to the defendant at the time of sentencing, his right to appeal from that order begins to run at that time. As courts have held, because the ancillary hearing has no bearing on the defendant's right to the property, the defendant has no right to appeal when a final order is, or is not, amended to recognize third party rights. *See, e.g.*, United States v. Christunas, 126 F.3d 765 (6th Cir. 1997) (preliminary order of forfeiture is final as to the defendant and is immediately appealable).

Because it is not uncommon for sentencing to be postponed for an extended period to allow a defendant to cooperate with the government in an ongoing investigation, the Rule would allow the order of forfeiture to become final as to the defendant before sentencing, if the defendant agrees to that procedure. Otherwise, the government would be unable to dispose of the property until the sentencing took place.

Subdivision (b)(4) addresses the right of either party to request that a jury make the determination of whether any property is subject to forfeiture. The provision gives the defendant, in cases where a jury has returned a guilty verdict, the option of asking that the jury be retained to hear additional evidence regarding the forfeitability of the property. This provision only applies to cases where the government is seeking to forfeit a specific asset, and the only issue for the jury in such cases would be whether the government has established the requisite nexus between the property and the offense. For example, if the defendant disputes the government's allegation that a parcel of real property is traceable to the offense, the defendant would have the right to request that the jury hear evidence on that issue, and return a special verdict, in a bifurcated proceeding that would occur after the jury returns the guilty verdict. The government would have the same option of requesting a special jury verdict on this issue, as is the case under current law. *See* Rule 23(a) (trial by jury may be waived only with the consent of the government).

When Rule 31(e) was promulgated, it was assumed that criminal forfeiture was akin to a separate criminal offense on which evidence would be presented

and the jury would have to return a verdict. In *Libretti v. United States*, 116 S. Ct. 356 (1995), however, the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case and that the defendant has no constitutional right to have the jury determine any part of the forfeiture. The special verdict requirement in Rule 31(e), the Court said, is in the nature of a statutory right that can be modified or repealed at any time.

Even before *Libretti*, lower courts had determined that criminal forfeiture is a sentencing matter and concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the government must establish the forfeitability of the property by a preponderance of the evidence. *See United States v. Myers*, 21 F.3d 826 (8th Cir. 1994) (preponderance standard applies because criminal forfeiture is part of the sentence in money laundering cases); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Myers*); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same).

Although an argument could be made under *Libretti*, that a jury trial is no longer appropriate on any aspect of the forfeiture issue, which is a part of sentencing, the Committee decided to retain the right for the parties, in a trial held before a jury, to have the jury determine whether the government has established the requisite statutory nexus between the offense and the property to be forfeited. The jury, however, would not have any role in determining whether a defendant had an interest in the property to be forfeited. This is a matter for the ancillary proceeding which, by statute, is conducted "before the court alone, without a jury." *See* 21 U.S.C. § 853(n)(2).

Subdivision (c). Subdivision (c) sets forth a set of rules governing the conduct of the ancillary proceeding. When the ancillary hearing provisions were added to 18 U.S.C. § 1963 and 21 U.S.C. § 853 in 1984, Congress apparently assumed that the proceedings under the new provisions would involve simple questions of ownership that could, in the ordinary case, be resolved in 30 days. *See* 18 U.S.C. § 1963(l)(4). Presumably for that reason, the statute contains no procedures governing motions practice or discovery such as would be available in an ordinary civil case. Subdivision (c)(1) makes clear that no ancillary proceeding is required to the extent that the order of forfeiture consists of a money judgment. A money judgment is an *in personam* judgment against the defendant and not an order directed at specific assets in which any third party could have any interest.

Experience has shown that ancillary hearings can involve issues of enormous complexity that require years to resolve. *See United States v. BCCI*

Holdings (Luxembourg) S.A., 833 F. Supp. 9 (D.D.C. 1993) (ancillary proceeding involving over 100 claimants and $451 million); *United States v. Porcelli*, CR-85-00756 (CPS), 1992 U.S. Dist. LEXIS 17928 (E.D.N.Y Nov. 5, 1992) (litigation over third party claim continuing 6 years after RICO conviction). In such cases, procedures akin to those available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the claims.

Because an ancillary hearing is connected to a criminal case, it would not be appropriate to make the Civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the Civil Rules may be followed. These include the filing of a motion to dismiss a claim, conducting discovery, disposing of a claim on a motion for summary judgment, and appealing a final disposition of a claim. Where applicable, the amendment follows the prevailing case law on the issue. *See, e.g., United States v. Lavin*, 942 F.2d 177 (3rd Cir. 1991) (ancillary proceeding treated as civil case for purposes of applying Rules of Appellate Procedure); *United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors)*, 919 F. Supp. 31 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); *United States v. BCCI (Holdings) Luxembourg S.A. (In re Petition of Department of Private Affairs)*, 1993 WL 760232 (D.D.C. 1993) (applying court's inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules). The provision governing appeals in cases where there are multiple claims is derived from Fed. R. Civ. P. 54(b). *See also United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez)*, 961 F.Supp. 282 (D.D.C. 1997) (in resolving motion to dismiss court assumes all facts pled by third party petitioner to be true, applying Rule 12(b)(6) and denying government's motion because whether claimant had superior title turned on factual dispute; government acted reasonably in not making any discovery requests in ancillary proceeding until court ruled on its motion to dismiss).

Subdivision (c)(2) provides for the entry of a final order of forfeiture at the conclusion of the ncillary proceeding. Under this provision, if no one files a claim in the ancillary proceeding, the preliminary order would become the final order of forfeiture, but the court would first have to make an independent finding that at least one of the defendants had a legal or possessory interest in the property such that it was proper to order the forfeiture of the property in a criminal case. In making that determination, the court may rely upon reasonable inferences. For example, the fact that the defendant used the property in committing the crime and no third party claimed an interest in the property may give rise to the inference that the defendant had a forfeitable interest in the property.

This subdivision combines and preserves two established tenets of current law. One is that criminal forfeitures are *in personam* actions that are limited to the property interests of the defendant. (This distinguishes criminal forfeiture, which is imposed as part of the defendant's sentence, from civil forfeiture which may be pursued as an action against the property *in rem* without regard to who the owner may be.) The other tenet of current law is that if a third party has notice of the forfeiture but fails to file a timely claim, his or her interests are extinguished, and may not be recognized when the court enters the final order of forfeiture. *See United States v. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under 21 U.S.C. § 853(n)(7) and can market the property notwithstanding third party's name on the deed). In the rare event that a third party claims that he or she was not afforded adequate notice of a criminal forfeiture action, the person may file a motion under Rule 60(b) of the Federal Rules of Civil Procedure to reopen the ancillary proceeding. *See United States v. Bouler*, 927 F. Supp. 911 (W.D.N.C. 1996) (Rule 60(b) is the proper means by which a third party may move to reopen an ancillary proceeding).

If no third parties assert their interests in the ancillary proceeding, the court must nonetheless determine that the defendant, or combination of defendants) had an interest in the property. Criminal defendants may be jointly and severally liable for the forfeiture of the entire proceeds of the criminal offense. *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (government can collect the proceeds only once, but subject to that cap, it can collect from any defendant so much of the proceeds as was foreseeable to that defendant); *United States v. Cleveland*, 1997 WL 602186 (E.D. La. Sept. 29, 1997) (same); *United States v. McCarroll*, 1996 WL 355371 at *9 (N.D. Ill. June 19, 1996) (following *Hurley*), *aff'd sub nom. United States v. Jarrett*, 133 F.3d 519 (7th Cir. 1998); *United States v. DeFries*, 909 F. Supp. 13, 19-20 (D.D.C. 1995) (defendants are jointly and severally liable even where government is able to determine precisely how much each defendant benefited from the scheme), *rev'd on other grounds*, 129 F.3d 1293 (D.C. Cir. 1997). Therefore, the conviction of any of the defendants is sufficient to support the forfeiture of the entire proceeds of the offense, even if the defendants have divided the money among themselves.

As noted in (c)(4), the ancillary proceeding is not considered a part of sentencing. Thus, the Federal Rules of Evidence would apply to the ancillary proceeding, as is the case currently.

Subdivision (d). Subdivision (d) replaces the forfeiture provisions of Rule 38(e) which provide that the court may stay an order of forfeiture pending appeal. The purpose of the provision is to ensure that the property remains intact and unencumbered so that it may be returned to the defendant in the event the appeal is successful. Subdivision (d) makes clear, however, that a district court is

not divested of jurisdiction over an ancillary proceeding even if the defendant appeals his or her conviction. This allows the court to proceed with the resolution of third party claims even as the appellate court considers the appeal. Otherwise, third parties would have to await the conclusion of the appellate process even to *begin* to have their claims heard. *See United States v. Messino*, 907 F. Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending).

Finally, subdivision (d) provides a rule to govern what happens if the court determines that a third-party claim should be granted but the defendant's appeal is still pending. The defendant is barred from filing a claim in the ancillary proceeding. *See* 18 U.S.C. § 1963(l)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the ancillary proceeding, that a third party has an interest in the property superior to that of the defendant cannot be binding on the defendant. So, in the event that the court finds in favor of the third party, that determination is final only with respect to the government's alleged interest. If the defendant prevails on appeal, he or she recovers the property as if no conviction or forfeiture ever took place. But if the order of forfeiture is affirmed, the amendment to the order of forfeiture in favor of the third party becomes effective.

Subdivision (e). Subdivision (e) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture at any time to include subsequently located property which was originally included in the forfeiture order and any substitute property. *See United States v. Hurley*, 63 F.3d 1 (lst Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Hurley*). Third parties, of course, may contest the forfeiture of substitute assets in the ancillary proceeding. *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996).

Subdivision (e)(1) makes clear that the right to a bifurcated jury trial to determine whether the government has established the requisite nexus between the property and the offense, *see* (b)(4), does not apply to the forfeiture of substitute assets or to the addition of newly-discovered property to an existing order of forfeiture. It is well established in the case law that the forfeiture of substitute assets is solely an issue for the court. *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996) (following *Hurley*; court may amend order of forfeiture at any time in include substitute assets); *United States v. Thompson*, 837 F. Supp. 585 (S.D.N.Y. 1993) (court, not jury, orders forfeiture of substitute assets). As a practical matter, courts have also determined that they, not the jury, must determine the forfeitability of assets discovered after the trial is over and the jury has been dismissed. *See United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995)

(government may conduct post-trial discovery to determine location and identity of forfeitable assets; post-trial discovery resulted in discovery of gold bars buried in defendant's mother's backyard several years after the entry of an order directing the defendant to forfeit all property, up to $137 million, involved in his money laundering offense).

Summary of Comments on Rule 32.2

The summary of the comments and testimony on the originally proposed version of Rule 32.2 are located at TAB A, infra, following this Report.

GAP Report--Rule 32.2

The GAP report on the Committee's changes following publication and as presented to the Standing Committee at its June 1998 meeting are located at TAB A, infra, following this Report.

Rule 7. The Indictment and the Information

(c) NATURE AND CONTENTS.

(2) *Criminal Forfeiture*. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information ~~shall allege the extent of the interest or property subject to forfeiture~~ provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

* * * * *

COMMITTEE NOTE

The rule is amended to reflect new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 7.

The Committee received no written comments on the proposed amendment to Rule 7.

GAP Report--Rule 7

The Committee initially made no changes to the published draft of the Rule 7 amendment. However, because of changes to Rule 32.2(a), discussed supra, the proposed language has been changed to reflect that the indictment must provide notice of an intent to seek forfeiture.

Rule 31. Verdict

* * * * *

~~(e) CRIMINAL FORFEITURE. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.~~

COMMITTEE NOTE

The rule is amended to reflect the creation of new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 31

The Committee received no written comments on the proposed change to Rule 31.

GAP Report--Rule 31

The Committee made no changes to the published draft amendment to Rule 31.

Rule 32. Sentence and Judgment

* * * * *

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture*. Forfeiture procedures are governed by Rule 32.2. ~~If a verdict contains a finding that property is subject to criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final~~

~~order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.~~

* * * * *

COMMITTEE NOTE

The rule is amended to reflect the creation of new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 32.

The Committee received no comments on the proposed conforming amendment to Rule 32(d).

GAP Report--Rule 32.

The Committee made no changes to the published draft.

Rule 38. Stay of Execution

* * * * *

(e) ~~CRIMINAL FORFEITURE,~~ NOTICE TO VICTIMS, AND RESTITUTION. A sanction imposed as part of the sentence pursuant to 18 U.S.C. ~~3554,~~ 3555, or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the

sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

COMMITTEE NOTE

The rule is amended to reflect the creation of new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 38.

The Committee received no comments on the proposed change to Rule 38.

GAP Report--Rule 38

The Committee made no changes to the published draft.

III. Information Items--Rules Pending Further Discussion

At its April 1998 meeting the Committee discussed a number of proposed amendments to other Rules of Criminal Procedure. Although several of them are ready for publication and comment, the Committee has decided to defer any further action on those rules. None of the proposed amendments are critical at this point, and as noted, *infra*, the Committee will shortly embark on a restyling project of all of the rules. The Committee believed that the amendments should thus be deferred until the restyled rules are published.

A. Rules 10 (Arraignment) and 43 (Presence of Defendant) (Ability of Defendant to Waive Appearance at Arraignment).

The Committee is actively considering amendments to Rules 10 and 43 which would permit a defendant to waive an appearance at his or her arraignment. The rule would require that the waiver be in writing and with the consent of the court. In conjunction with those amendments, the Committee will also consider the possibility of amending Rules 10 and 43 to permit a defendant to waive an appearance for entering a plea on superseding indictment.

B. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition. (Court-Ordered Examination)

At its April 1999 meeting, the Committee will continue it consideration of amendments to Rule 12.2 which would accomplish two results. First, a defendant who intends to introduce expert testimony on the issue of mental condition at a capital sentencing proceeding would be required to give notice of an intent to do so. And second, the rule would make it clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice. The Committee is considering what provision should be made for releasing the results of that examination to the parties and the possible implications on the defendant's right against self-incrimination.

C. Rule 26. Taking of Testimony (Electronic Transmission)

The Committee has considered an amendment to Rule 26 which would conform that rule to Civil Rule 43 regarding the taking of testimony in court through means other than oral testimony. After discussing the rule, however, the Committee decided to defer further consideration of that amendment until it has had an opportunity to discuss further possible Confrontation Clause concerns and whether such testimony should be preferred over deposition testimony. The Committee will finalize the draft of this amendment at its April 1999 meeting.

D. Rule 30. Submission of Requests for Instructions.

An amendment to Rule 30, which would permit the court to require the parties to submit pretrial requests for instructions was published for public comment last fall. At its April 1998 meeting, the Committee discussed the comments received and decided to defer any further consideration of amendments to the Rule. The Civil Rules Committee is considering similar amendments to Rule 51 and is also considering possible amendments which would clarify issues of preservation of error re instructions errors. The Committee will continue discussions of this item.

E. Rules Governing § 2254 and § 2255 Rules (Habeas Corpus Proceedings)

At its October 1998 meeting, the Advisory Committee adopted a number of proposed changes to the rules governing habeas corpus proceedings which will make the two sets of rules consistent with each other and make any other

conforming amendments resulting from the Antiterrorism and Effective Death Penalty Act of 1996. The Committee will revisit this topic at future meetings.

IV. Information Items--Rules Possibly Affected by Legislative Proposals.

A. Study of Grand Jury Practices; Attorney's Presence in Grand Jury Proceeding

The Advisory Committee is aware that Congress recently enacted legislation that requires the Judicial Conference to review the question of whether defense attorney's should be permitted to attend grand jury proceedings. A subcommittee has been appointed to assist in that project, with a view to presenting its findings to the Advisory Committee and Standing Committee.

B. Status Report on Proposed Restyling of Criminal Rules.

The Style Subcommittee of the Standing Committee has been actively working on draft of the Criminal Rules with a view to presenting that draft to the Advisory Committee by the end of the year. Two subcommittees have been appointed to review the draft. The Committee plans to hold several additional meetings over the next year to address the restyling project.

Attachments:

A. Original Draft of Proposed Rule 32.2 (June 1998 meeting) w/summary of comments.
B. Comparison Chart: Original and Revised Rules 32.2
C. Suggested Style Changes to Original Rule and Department of Justice's Memo regarding those changes.
D. Draft Minutes of October 1998 Meeting

TAB A

32.2. Criminal Forfeiture

(a) *INDICTMENT OR INFORMATION.* No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information alleges that a defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

(b) *HEARING AND ORDER OF FORFEITURE.*

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the indictment or information for which criminal forfeiture is alleged, the court shall determine what property is subject to forfeiture because it is related to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post trial hearing. If the property is subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim.

(2) If no third party petition as provided in (b)(1) is timely filed, the court shall determine whether the property should be forfeited in whole or in part depending on the extent of the

defendant's interest in the property. The determination may be made at any time before the order of forfeiture becomes final under subdivision (c), and may be based on evidence already in the record, including a written plea agreement, or evidence submitted by the government in a motion for entry of a final order of forfeiture. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole, or in part, to a co-defendant or a third party. If the court determines that the defendant, or any combination of co-defendants, were the only persons with a legal interest (or in the case of illegally obtained property, a possessory interest) in the property, the court shall enter a final order forfeiting the property in its entirety. If the court determines that the defendant or combination of co-defendants, had a legal interest (or in the case of illegally obtained property, a possessory interest) in only a portion of the property, the court shall enter a final order forfeiting the property to the extent of the defendant's or defendants' interest.

(3) When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture; conduct any discovery as the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirements pertaining

to third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

(c) *ANCILLARY PROCEEDING.*

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding.

(i) The court may consider a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(ii) If a Rule 32.2(c)(1) motion to dismiss is denied, or not made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve factual issues before conducting an evidentiary hearing. After discovery ends, either party may ask the court to dispose of

the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

(2) After the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary to account for the disposition of any third-party petition.

(3) If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions is not appealable until all petitions are resolved, unless the court determines that there is no just reason for delay and directs the entry of final judgment on one or more but fewer than all of the petitions.

(4) The ancillary proceeding is not considered a part of sentencing.

(d) *STAY OF FORFEITURE PENDING APPEAL.* If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court determines that the order of forfeiture shall be amended to recognize a third party's interest in the

property, the court shall amend the order of forfeiture but shall refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.

(e) *SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.*

(1) The court, on motion by the government, may at any time enter an order of forfeiture—or amend an existing order of forfeiture—to include property which:

(i) is subject to forfeiture under an existing order of forfeiture and was located and identified after that order of forfeiture was entered; or

(ii) is substitute property which qualifies for forfeiture under an applicable statute.

(2) If the government makes the requisite showing that the property is subject to forfeiture under either (e)(1)(i) or (e)(1)(ii), the court shall:

(i) enter an order forfeiting the property, or amend an existing preliminary or final order to include that property;

(ii) if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (c) as to the property; and

(iii) if no third party files a petition, enter an order forfeiting the property under subdivision (b)(2).

COMMITTEE NOTE

Rule 32.2 consolidates a number of procedural rules governing the forfeiture of assets in a criminal case. Existing Rules 7(c)(2), 31(e) and 32(d)(2) are also amended to conform to the new rule. In addition, the forfeiture-related provisions of Rule 38(e) are stricken.

Subsection (a). Subsection (a) is derived from Rule 7(c)(2) which provides that notwithstanding statutory authority for the forfeiture of property following a criminal conviction, no forfeiture order may be entered unless the defendant was given notice of the forfeiture in the indictment or information. As courts have held, subsection (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself; instead, such an itemization may be set forth in one or more bills of particulars. *See United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996), *aff'g* 846 F. Supp. 463 (E.D. Va. 1994) (*Moffitt* I) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars). *See United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subsection (b) Subsection (b) replaces Rule 31(e) which provides that the jury in a criminal case must return a special verdict "as to the extent of the interest or property subject to forfeiture." *See United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995) (Rule 31(e) only applies to jury trials; no special verdict required when defendant waives jury right on forfeiture issues). After the Rule was promulgated in 1972, changes in the law created several problems.

The first problem concerns the role of the jury. When Rule 31(e) was promulgated, it was assumed that criminal forfeiture was akin to a separate criminal offense on which evidence would be presented and the jury would have to return a verdict. In *Libretti v. United States*, 116 S. Ct. 356 (1995), however, the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case and that the defendant has no constitutional right to have the jury determine any part of the forfeiture. The special verdict requirement in Rule 31(e), the

Court said, is in the nature of a statutory right that can be modified or repealed at any time.

Even before *Libretti*, lower courts had determined that criminal forfeiture is a sentencing matter and concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the government must establish the forfeitability of the property by a preponderance of the evidence. *See United States v. Myers*, 21 F.3d 826 (8th Cir. 1994) (preponderance standard applies because criminal forfeiture is part of the sentence in money laundering cases); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Myers*); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same).

Traditionally, juries do not have a role in sentencing other than in capital cases, and elimination of that role in criminal forfeiture cases would streamline criminal trials. Undoubtedly, it may be confusing for a jury to be instructed regarding a different standard of proof in the second phase of the trial, and it is burdensome to have to return to hear additional evidence after what may have been a contentious and exhausting period of deliberation regarding the defendant's guilt or innocence.

For these reasons, the proposal replaces Rule 31(e) with a provision that requires the court alone, as soon as practicable after the verdict in the criminal case, to hold a hearing to determine if the property was subject to forfeiture, and to enter a preliminary order of forfeiture.

The second problem with Rule 31(e) concerns the scope of the determination that must be made prior to entering an order of forfeiture. This issue is the same whether the determination is made by the court or by the jury.

As mentioned, the current Rule requires the jury to return a special verdict "as to the extent of the interest or property subject to forfeiture." Some courts interpret this to mean only that the jury must answer "yes" or "no" when asked if the property named in the indictment is subject to forfeiture under the terms of the forfeiture statute--*e.g.* was the property used to facilitate a drug offense? Other courts also ask the jury if the defendant has a legal interest in the forfeited property. Still other courts, including the Fourth Circuit, require the jury to determine the *extent* of the defendant's interest in the property vis a vis third parties. *See United States v. Ham*, 58 F.3d 78 (4th Cir. 1995) (case remanded to the district court to empanel a jury to determine, in the first instance, the extent of the defendant's forfeitable interest in the subject property).

The notion that the "extent" of the defendant's interest must be established as part of the criminal trial is related to the fact that criminal forfeiture is an *in personam* action in which only the defendant's interest

in the property may be forfeited. *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996). When the criminal forfeiture statutes were first enacted in the 1970's, it was clear that a forfeiture of property other than the defendant's could not occur in a criminal case, but there was no mechanism designed to limit the forfeiture to the defendant's interest. Accordingly, Rule 31(e) was drafted to make a determination of the "extent" of the defendant's interest part of the verdict.

The problem, of course, is that third parties who might have an interest in the forfeited property are not parties to the criminal case. At the same time, a defendant who has no interest in property has no incentive, at trial, to dispute the government's forfeiture allegations. Thus, it was apparent by the 1980's that Rule 31(e) was an inadequate safeguard against the inadvertent forfeiture of property in which the defendant held no interest.

In 1984, Congress addressed this problem when it enacted a statutory scheme whereby third party interests in criminally forfeited property are litigated by the court in an ancillary proceeding following the conclusion of the criminal case and the entry of a preliminary order of forfeiture. *See* 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l). Under this scheme, the court orders the forfeiture of the defendant's interest in the property--whatever that interest may be--in the criminal case. At that point, the court conducts a separate proceeding in which all potential third party claimants are given an opportunity to challenge the forfeiture by asserting a superior interest in the property. This proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the property such that the forfeiture of the property from the defendant would be invalid.

The notice provisions regarding the ancillary proceeding are equivalent to the notice provisions that govern civil forfeitures. *Compare* 21 U.S.C. § 853(n)(1) *with* 19 U.S.C. § 1607(a); *see United States v. Bouler*, 927 F. Supp. 911 (W.D.N.C. 1996) (civil notice rules apply to ancillary criminal proceedings). Notice is published and sent to third parties who have a potential interest. *See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Indosuez Bank)*, 916 F. Supp. 1276 (D.D.C. 1996) (discussing steps taken by government to provide notice of criminal forfeiture to third parties). If no one files a claim, or if all claims are denied following a hearing, the forfeiture becomes final and the United States is deemed to have clear title to the property. 21 U.S.C. § 853(n)(7); *United States v. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under § 853(n)(7) and can market the property notwithstanding third party's name on the deed).

Thus, the ancillary proceeding has become the forum for determining the extent of the defendant's forfeitable interest in the property. It allows the court to conduct a proceeding in which all third

party claimants can participate and which ensures that the property forfeited actually belongs to the defendant.

Since the enactment of the ancillary proceeding statutes, the requirement in Rule 31(e) that the court (or jury) determine the extent of the defendant's interest in the property as part of the criminal trial has become an unnecessary anachronism that leads more often than not to duplication and a waste of judicial resources. There is no longer any reason to delay the conclusion of the criminal trial with a lengthy hearing over the extent of the defendant's interest in property when the same issues will have to be litigated a second time in the ancillary proceeding if someone files a claim challenging the forfeiture. For example, in *United States v. Messino*, 921 F. Supp. 1231 (N.D. Ill. 1996), the court allowed the defendant to call witnesses to attempt to establish that they, not he, were the true owners of the property. After the jury rejected this evidence and the property was forfeited, the court conducted an ancillary proceeding in which the same witnesses litigated their claims to the same property.

A more sensible procedure would be for the court, once it determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding.

This approach would also address confusion that occurs in multi-defendant cases where it is clear that each defendant should forfeit whatever interest he may have in the property used to commit the offense, but it is not at all clear which defendant is the actual owner of the property. For example, suppose A and B are co-defendants in a drug and money laundering case in which the government seeks to forfeit property involved in the scheme that is held in B's name but of which A may be the true owner. It makes no sense to invest the court's time in determining which of the two defendants holds the interest that should be forfeited. Both defendants should forfeit whatever interest they may have. Moreover, to the extent that the current rule forces the court to find that A is the true owner of the property, it gives B the right to file a claim in the ancillary proceeding where he may attempt to recover the property despite his criminal conviction. *United States v. Real Property in Waterboro*, 64 F.3d 752 (lst Cir. 1995) (co-defendant in drug/money laundering case who is not alleged to be the owner of the property is considered a third party for the purpose of challenging the forfeiture of the other co-defendant's interest).

The new Rule resolves these difficulties by postponing the determination of the extent of the defendant's interest until the ancillary proceeding. As provided in (b)(1), the court, as soon as practicable after the verdict in the criminal case, would determine if the property was

subject to forfeiture in accordance with the applicable statute, e.g., whether the property represented the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. The determination could be made by the court alone based on the evidence in the record from the criminal trial or the facts set forth in a written plea agreement submitted to the court at the time of the defendant's guilty plea, or the court could hold a hearing to determine if the requisite relationship existed between the property and the offense. It would not be necessary to determine at this stage what interest any defendant might have in the property. Instead, the court would order the forfeiture of whatever interest each defendant might have in the property and conduct the ancillary proceeding.

If someone files a claim, the court would determine the respective interests of the defendants versus the third party claimants and amend the order of forfeiture accordingly. On the other hand, as recognized in (b)(2), if no one files a claim in the ancillary proceeding, the court would make a finding as to the extent of the defendant's interest in the property. If the court finds that the defendant (or any combination of defendants) were the only persons with an interest in the property, then it would enter an order forfeiting the property in its entirety. Otherwise, the final order may forfeit only the defendant's interest in the property. This corresponds to the requirement under current law, at least as it is interpreted in some courts, in instances where Rule 31(e) applies.

The court may make the determination of the defendant's interest based on evidence in the record, or on additional evidence submitted by the government in support of the motion for the entry of a final judgment of forfeiture. The defendant would have no standing to object to the forfeiture on the ground that the property belonged to someone who could have filed a petition in the ancillary proceeding but failed to do so.

Subsection (b)(3) replaces Rule 32(d)(2) (effective December 1996). It provides that once the court enters a preliminary order of forfeiture directing the forfeiture of whatever interest each defendant may have in the forfeited property, the government may seize the property and commence an ancillary proceeding to determine the interests of any third party. Again, if no third party files a claim, the court, at the time of sentencing, will enter a final order forfeiting the property to the extent of the defendant's interest. If a third party files a claim, the order of forfeiture will become final as to the defendant at the time of sentencing but will be subject to amendment in favor of a third party pending the conclusion of the ancillary proceeding.

Because it is not uncommon for sentencing to be postponed for an extended period to allow a defendant to cooperate with the government in an ongoing investigation, the Rule would allow the order of forfeiture to become final as to the defendant before sentencing, if the defendant agrees to that procedure. Otherwise, the government would be unable to dispose of the property until the sentencing took place.

Subsection (c). Subsection (c) sets forth a set of rules governing the conduct of the ancillary proceeding. When the ancillary hearing provisions were added to 18 U.S.C. § 1963 and 21 U.S.C. § 853 in 1984, Congress apparently assumed that the proceedings under the new provisions would involve simple questions of ownership that could, in the ordinary case, be resolved in 30 days. *See* 18 U.S.C. § 1963(l)(4). Presumably for that reason, the statute contains no procedures governing motions practice or discovery such as would be available in an ordinary civil case.

Experience has shown, however, that ancillary hearings can involve issues of enormous complexity that require years to resolve. *See United States v. BCCI Holdings (Luxembourg) S.A.*, 833 F. Supp. 9 (D.D.C. 1993) (ancillary proceeding involving over 100 claimants and $451 million); *United States v. Porcelli*, CR85-00756 (CPS), 1992 U.S. Dist. LEXIS 17928 (E.D.N.Y Nov. 5, 1992) (litigation over third party claim continuing 6 years after RICO conviction). In such cases, procedures akin to those available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the claims.

Because an ancillary hearing is part of a criminal case, it would not be appropriate to make the Civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the Civil Rules may be followed. These include the filing of a motion to dismiss a claim, conducting discovery, disposing of a claim on a motion for summary judgment, and appealing a final disposition of a claim. Where applicable, the amendment follows the prevailing case law on the issue. *See, e.g., United States v. Lavin*, 942 F.2d 177 (3rd Cir. 1991) (ancillary proceeding treated as civil case for purposes of applying Rules of Appellate Procedure); *United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors)*, 919 F. Supp. 31 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); *United States v. BCCI (Holdings) Luxembourg S.A. (In re Petition of Department of Private Affairs)*, 1993 WL 760232 (D.D.C. 1993) (applying court's inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules). The provision governing appeals in cases where there are multiple claims is derived from Fed. R. Civ. P. 54(b).

As noted in (c)(5), the ancillary proceeding is not considered a part of sentencing. Thus, the Federal Rules of Evidence would apply to the ancillary proceeding, as is the case currently.

Subsection (d). Subsection (d) replaces the forfeiture provisions of Rule 38(e) which provide that the court may stay an order of forfeiture pending appeal. The purpose of the provision is to ensure that the

property remains intact and unencumbered so that it may be returned to the defendant in the event the appeal is successful. Subsection (d) makes clear, however, that a district court is not divested of jurisdiction over an ancillary proceeding even if the defendant appeals his or her conviction. This allows the court to proceed with the resolution of third party claims even as the appeal is considered by the appellate court. Otherwise, third parties would have to await the conclusion of the appellate process even to *begin* to have their claims heard. *See United States v. Messino*, 907 F. Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending).

Finally, subsection (d) provides a rule to govern what happens if the court determines that a third-party claim should be granted but the defendant's appeal is still pending. The defendant, of course, is barred from filing a claim in the ancillary proceeding. *See* 18 U.S.C. § 1963(l)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the ancillary proceeding, that a third party has an interest in the property superior to that of the defendant cannot be binding on the defendant. So, in the event that the court finds in favor of the third party, that determination is final only with respect to the government's alleged interest. If the defendant prevails on appeal, he or she recovers the property as if no conviction or forfeiture ever took place. But if the order of forfeiture is affirmed, the amendment to the order of forfeiture in favor of the third party becomes effective.

Subsection (e). Subsection (e) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture at any time to include subsequently located property which was originally included in the forfeiture order and any substitute property. *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Hurley*). Third parties, of course, may contest the forfeiture of substitute assets in the ancillary proceeding. *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996).

Summary of Comments to Rule 32.2--Original Rule 32.2

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Matoon, Illinois
September 23, 1997

Mr. Horsley favors all of the proposed changes.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans supports the proposed amendment.

Ms. Leslie Hagin (CR-013)
National Association of Criminal Defense Lawyers
Legislative Director and Counsel
December 12, 1997

Ms. Hagin states that his organization is submitting several significant proposed rule changes being considered by the committee. She requests permission to testify about the proposed changes to Rule 32.2.

Mr. Ronald F. Waterman (CR-014)
Gough, Shanahan, Johnons, & Waterman
Helena, Montana
December 16, 1997

Mr. Waterman writes that lenders and third parties have concerns about the procedures followed in forfeiture of a criminal defendant's interest in property, whether justified or not. He says that there exists a concern that a third party can lose legal interest in property without a meaningful opportunity to appear and defend title to the property. He adds that the adoption on Rule 32.2 is good because it resolves concerns raided by lenders and others immersing people in ancillary proceedings unless there is a finding that a criminal defendant has an interest in the property.

Peter Goldberger (CR-021b)
Ardmore, Pennsylvania
Co-Chair, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL is adamantly opposed to the continuing efforts to abolish the right to jury trial on government claims for criminal forfeiture, and to undermine procedural rights associated with such claims. The NACDL states that the proposed amendment is "undemocratic, disrespectful of our legal culture and history, and flawed in numerous particulars." The NACDL contends that the proposal appears to breach the Rules Enabling Act wall between procedural reform and substantive rights. It recommends that the Advisory Committee reject the proposed rule changes almost completely. The NACDL states that there is no good reason to abolish the historically-grounded right to a jury trial in criminal forfeiture allegations and that such practice is unconstitutional, despite the Supreme Court's decision in *Libretti v. United States*, 516 U.S. 29 (1995). The NACDL notes that the right to jury trial in criminal forfeiture cases was not the formal question presented to the court in that case and it maintains that eliminating juries will not streamline the process. It also suggests that juries will not be confused by varying standards of proof if

the standard "beyond a reasonable doubt" is carried over into forfeiture proceedings. The organization contends that the jury's collective conscience should be preserved, allowing it to protect the citizens from overreaching prosecutors. It states that it believes the proposed reform has nothing to do with procedural reform, but everything to do with the desire to punish and the desire to win.

The NACDL also maintains that the proposed amendment to Rule 32.2(b) would eliminate the requirement of 31(e) requiring a fact-finder to determine the extent of the interest or property subject to forfeiture. The NACDL states that the proposed changes to 32.2(a) would "further devastate the fairness of the criminal forfeiture process by destroying" the grand jury's and trial jury's respective functions. The NACDL urges the Committee to clarify, despite contrary judicial decisions, that "only property or interests in property specifically named in the indictment may be forfeited criminally." The NACDL writes that Proposed Rule 32.2(f) should safeguard the defendant's and interested third parties' rights to be heard on the issue.

The NACDL states that the creation of rules to ensure fairness in ancillary forfeiture proceedings is an excellent idea. It notes that the rights of "third parties" should not be less than the rights of anyone making a claim in a civil forfeiture proceeding. The NACDL attached a copy of Petitioner's Brief in *Libretti v. United States*.

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the adoption of new Rule 32.2. It notes that adoption of Rule 32.2 would effectively repeal the "statutory" right in Rule 31(e) to a jury trial for forfeitures but that the rule is a sensible and cost-effective procedure to resolve criminal forfeiture procedures.

Summary of Testimony--Original Rule 32.2

Mr. Bo Edwards
Mr. David Smith
National Association of Criminal Defense Lawyers

The witnesses expressed strong opposition to the proposed new Rule. Their chief objection centered on the fact that the new rule removes the right of jury to decide whether the defendant should forfeit any

property. That right, they said, was not abrogated by the Supreme Court's decision in *Libretti*; the issue of whether a jury trial was not available in a forfeiture proceeding was not even briefed by the parties in that case. Even assuming that the right to jury is not constitutionally required, they urged the Committee to nonetheless retain that right under the Rules of Procedure. Doing so, they argued, would recognize the value that Americans place on property rights. They also objected to the summary procedures for making forfeiture proceedings and the possibility that the property rights of innocent third parties would not be adequately protected.

Mr. Steff Casella
Department of Justice

Mr. Casella responded to the testimony of the witnesses representing the NADCL and pointed out that the Supreme Court in Libretti did clearly say that forfeiture proceedings are a part of sentencing. Based upon that view, the Department of Justice believed that the rule was consistent with existing practice and the constitution. He noted that the rights of third parties would be as protected as they currently are under statutory schemes for determining their interests in "ancillary proceedings."

GAP Report--Original Rule 32.2

The Committee amended the rule to clarify several key points. First, subdivision (b) was redrafted to make it clear that if no third party files a petition to assert property rights, the trial court must determine whether the defendant has an interest in the property to be forfeited and the extent of that interest. As published, the rule would have permitted the trial judge to order the defendant to forfeit the property in its entirety if no third party filed a claim.

Second, Rule 32.2(c)(4) was added to make it clear that the ancilllar, proceeding is not a part of sentencing.

Third, the Committee clarified the procedures to be used if the government (1) discovers property subject to forfeiture after the court has entered an order of forfeiture and (2) seeks the forfeiture of "substitute" property under a statute authorizing such substitution.

TAB B

COMARISON CHART — RULE 32.2

Original Draft of Rule 32.2 Presented to Standing Committee at its June 1998 Meeting	Revised Draft of Rule 32.2	Summary of Change from Original Draft
(a) *INDICTMENT OR INFORMATION.* No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information alleges that a defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.	(a) NOTICE TO THE DEFENDANT. A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.	Original draft required substantive allegation in indictment. Under the most recent cases, Rule 7(c) sets forth a requirement that the government give the defendant notice that it will be seeking forfeiture in accordance with the applicable statute. It does not require a substantive allegation in which the property subject to forfeiture, or the defendant's interest in the property, must be described in detail.
(b) *HEARING AND ORDER OF FORFEITURE.* (1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the indictment or information for which criminal forfeiture is alleged, the court shall determine what property is subject to forfeiture because it is related to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post trial hearing. If the prop- ty is subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim.	(b) ENTRY OF PRELIMINARY ORDER OF FORFEITURE; POST-VERDICT HEARING. (1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in an indictment or information for which criminal forfeiture is sought, the court shall determine what property is subject to forfeiture under the applicable statute. If specific property is sought to be forfeited, the court shall determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court shall determine the amount of money that the defendant will be ordered to pay. The court's determination under this subdivision may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a	Title has been changed to include reference to post-verdict hearing. Subdivision (b)(1) has been revised to reflect different types of forfeiture—specific assets and money judgments.

	hearing after the verdict or finding of guilty.	
(2) If no third party petition as provided in (b)(1) is timely filed, the court shall determine whether the property should be forfeited in whole or in part depending on the extent of the defendant's interest in the property. The determination may be made at any time before the order of forfeiture becomes final under subdivision (c), and may be based on evidence already in the record, including a written plea agreement, or evidence submitted by the government in a motion for entry of a final order of forfeiture. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole, or in part, to a co-defendant or a third party. If the court determines that the defendant, or any combination of co-defendants, were the only persons with a legal interest (or in the case of illegally obtained property, a possessory interest) in the property, the court shall enter a final order forfeiting the property in its entirety. If the court determines that the defendant or combination of co-defendants, had a legal interest (or in the case of illegally obtained property, a possessory interest) in only a portion of the property, the court shall enter a final order forfeiting the property to the extent of the defendant's or defendants' interest.	(2) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture. The preliminary order shall set forth the amount of any money judgment, or direct the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred pending the filing of any third party claims in an ancillary proceeding under subdivision (c).	Subdivision (b)(2) has been revised to make clear that resolution of any third party's interest in property is deferred until ancillary hearing. See (c), infra. Some material in original (b)(2) has been simplified and moved to new (c)(2)
(3) When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture; conduct any discovery as the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and	(3) Entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and	Subdivision (b)(3) has been revised to permit the Attorney General to designate someone outside the Department of Justice to seize the forfeited property.

shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.	shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably found necessary to preserve the property's value pending any appeal. (4) Upon the request of any defendant or the government in a case in which the finding of guilt was rendered by a jury, the determination of whether the government has established the requisite nexus between the property and the offense committed by the defendant shall be made by the jury.	Subdivision (b)(4) is major change from original draft and permits defendant or government to request that jury decide whether nexus exists between the property and the crime.
(d) *STAY OF FORFEITURE PENDING APPEAL.* If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court determines that the order of forfeiture shall be amended to recognize a third party's interest in the property, the court shall amend the order of forfeiture but shall refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.	(d) STAY PENDING APPEAL. If the defendant appeals from the conviction or order of forfeiture, the court may stay its order of forfeiture on terms that the court finds appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. But if the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but shall not transfer any property or interest to a third party until the decision on appeal becomes final, unless the defendant so consents in writing or on the record.	

(e) *SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.* (1) The court, on motion by the government, may at any time enter an order of forfeiture—or amend an existing order of forfeiture—to include property which: (i) is subject to forfeiture under an existing order of forfeiture and was located and identified after that order of forfeiture was entered; or (ii) is substitute property which qualifies for forfeiture under an applicable statute. (2) If the government makes the requisite showing that the property is subject to forfeiture under either (e)(1)(i) or (e)(1)(ii), the court shall: (i) enter an order forfeiting the property, or amend an existing preliminary or final order to include that property; (ii) if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (c) as to the property; and (iii) if no third party files a petition, enter an order forfeiting the property under subdivision (b)(2)	(e) SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY. (1) On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that: (A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or (B) is substitute property that qualifies for forfeiture under an applicable statute. Rule 32.2(b)(4) does not apply to property forfeited under this subdivision. (2) If the government shows that the property is subject to forfeiture under (e)(1), the court shall: (A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and (B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).	

TAB C

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

October 28, 1998

Professor David A. Schlueter
St. Mary's University School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602

Dear Dave:

Enclosed please find a redraft of Rule 32.2 that incorporates the changes made by the Advisory Committee last week, and endeavors to include as many of the changes suggested by the Style Subcommittee as possible. For example, we have included all the "musts" notwithstanding our preference for "may" and "shall" and despite our doubts whether the Supreme Court will countenance the use of "must" on an other than comprehensive basis throughout the Federal Rules of Criminal Procedure.

We rejected many of the style changes as inconsistent with actions taken by the Advisory Committee, or because they would inadvertently make substantive changes to the Rule adopted by the Committee. Indeed, the changes made by the Style Subcommittee version are so extensive that, if included in the proposed Rule, we could no longer support it. You and the Chairman may wish to communicate with the Style Subcommittee before the Standing Committee meeting. If further restyling is required, we would be available to meet with the Style Subcommittee to make sure that no inadvertent substantive changes result from the restyling --- unfortunately a probable outcome otherwise given the complexity and highly specialized nature of the subject matter.

For example, the Style Subcommittee uniformly omitted the language "under the applicable statute" or "in accordance with the applicable statute," apparently because it thought the language mere surplusage. It is not. In subdivision (a), for instance, the quoted words are needed to avoid allowing the government, without tracking the statute, to state merely "the government plans to seek forfeiture in this case." Later on, in subdivision (b), the quoted words are crucial because they embody

an important concept — namely that the standard contained in the applicable statute will control the government's burden in establishing that the property is the defendant's. You may recall that this addition was crucial to Professor Stith's support of the Rule.

The following summarizes the reasoning underlying our rejection of certain proposed Style changes, and may be useful in persuading members of the Style Subcommittee not to pursue the changes further without consultation with our Committee.

1. In (a), the Advisory Committee approved the language "contains notice." "Adequately informs" — the Style Subcommittee's alternative formulation — is arguably different so was not included.

2. In (b)(1), in an apparent effort to condense the Rule, the Style Subcommittee proposed to lump into the nexus determination both money judgment and specific property forfeiture cases. This makes a substantive change in the proposal. The nexus determination doesn't apply to money judgment cases. A money judgment is available whether or not the government can establish a nexus between the offense and any particular property.

3. Likewise in (b)(1), the re-styled version would have made two other substantive changes. First, it would have dropped the language "or, if forfeiture is contested," which we had included directly in response to a comment from a member of the Standing Committee who thought the former Rule was not clear on when the court could hold a hearing to take additional evidence. The Advisory Committee approved the quoted phrase as a useful clarification. Consequently we retained it. Second, the re-styled version would have authorized a post-verdict hearing to adduce additional information only "[i]n the case of specific property." The possibility of a hearing is, however, appropriate both for specific property and money judgment cases, as provided in the Rule approved by the Advisory Committee.

4. Also in (b)(1), the re-styled version would have stricken the phrase "including any written plea agreement," presumably because it was thought to be clear that the plea agreement was part of the "record." While one would hope this is so, our forfeiture attorneys emphasized the practical importance of having the Rule recognize that the plea agreement often includes acknowledgment of the facts that establish the forfeitability of the property. On this matter, we are willing to compromise and thus have bracketed the language "including any written plea agreement." We would be amenable to its deletion, provided the Note is amended to include a sentence using a written plea agreement as an illustration of evidence that is

part of the record supporting a determination by the court under (b)(1).

5. In (b)(2), the Style Subcommittee proposes to delete the sentence beginning with "Deciding" and to insert the phrase "subject to a third party's later claim." In our view, while this may have no substantive effect, a separate sentence is appropriate here to emphasize the critical point that the resolution of third party claims – unlike the situation under present law – must be deferred until the ancillary proceeding. Accordingly, we have kept a separate sentence to this effect in the Rule.

6. In (b)(3), the re-styled version would have deleted the adjective "reasonably" before "necessary to preserve". This too would make a substantive change, since without "reasonably" an appellate court could conclude that, if it disagreed as a matter of law as to what was "necessary" it must reverse, whereas the "reasonably necessary" standard requires affirmance if the appellate court concludes that a reasonable person could find (even if the appellate court judges did not), that the condition imposed by the trial court to preserve the property was necessary.

7. In (b)(4), the Advisory Committee determined to begin the paragraph with "Upon request" and to add at the appropriate place the phrase "committed by the defendant" as an important clarification (see below). The enclosed draft therefore embodies those changes, rather than the formulation suggested by the Style Subcommittee.

8. In (c)(1)(B), the Style Subcommittee revision would not capture the important concept that discovery should take place only after the court has denied any motion to dismiss. Otherwise, defendants may assert a right to discovery while the government's motion to dismiss for lack of standing is pending.

9. In (c)(2), the re-styled version would strike "(or any combination of defendants)." This would make a substantive change. The quoted phrase is needed to assure that the court does not have to determine which of multiple defendants convicted in the case has an interest in the property (e.g. if each claims it is the other's). Because the Advisory Committee determined that the proposal should be clear that the "defendants" referred to must have been convicted in that case, our enclosed re-draft includes that clarification.

10. Also in (c)(2), the proposed revision of the Style Subcommittee would make a substantive change that is inconsistent with the underlying statute. The re-styled version would permit

the court to enter a wholly new "final order of forfeiture." But the underlying statute, 21 U.S.C. 853(n)(6), requires the court to "amend the order of forfeiture [to account for third party rights]." Thus, we have retained the language in the draft approved by the Advisory Committee about "amending the preliminary order as necessary."

11. Finally, in (e)(1)(b), the restyled version would make a substantive change. The right to a jury trial is inapplicable under current law not only to cases involving "substitute" property but also to cases involving after-located property originally ordered to be forfeited. Therefore, our draft retains the scope of (b)(4) approved by the Advisory Committee.

Sincerely,

Mary Harkenrider
Roger Pauley

cc: Honorable W. Eugene Davis
David D. Dowd, Jr.

~~and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.~~

* * * * *

COMMITTEE NOTE

The rule is amended to reflect the creation of new rule 32.2 which now governs criminal forfeiture procedures.

Summary of Comments on Rule 32.

The Committee received no comments on the proposed conforming amendment to Rule 32(d).

GAP Report--Rule 32.

The Committee made no changes to the published draft.

32.2. Criminal Forfeiture

(a) *INDICTMENT OR INFORMATION.* No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information alleges that a defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

(b) *HEARING AND ORDER OF FORFEITURE.*

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the

indictment or information for which criminal forfeiture is alleged, the court shall determine what property is subject to forfeiture because it is related to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post trial hearing. If the property is subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim.

(2) If no third-party petition as provided in (b)(1) is timely filed, the court shall determine whether the property should be forfeited in whole or in part depending on the extent of the defendant's interest in the property. The determination may be made at any time before the order of forfeitur becomes final under subdivision (c), and may be based on evidence already in the record, including a written plea agreement, or evidence submitted by the government in a motion for entry of a final order of forfeiture. ~~The~~ defendant may not object to ~~the entry of the~~ final order of forfeiture on the ground that the property belongs, in whole or in part, to a

co-defendant or a third party. If the court determines that ~~the~~ a defendant or ~~any combination of~~ co-defendants ~~were~~ are the only persons with a legal interest (or in the case of illegally obtained property, a possessory interest) in the property, the court shall enter a final order forfeiting the property in its entirety. If the court determines that ~~the~~ a defendant or ~~combination of~~ co-defendants had a legal interest (or in the case of illegally obtained property, a possessory interest) in only a portion of the property, the court shall enter a final order forfeiting the property to the extent of ~~the~~ that defendant's ~~or defendants'~~ interest.

(3) When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture; conduct any discovery ~~as~~ that the court considers proper in identifying, locating or disposing of the property; and commence proceedings consistent with any statutory requirements pertaining to third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably necessary to preserve the property's value pending any appeal.

(c) *ANCILLARY PROCEEDING.*

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the forfeited property, the court shall conduct an ancillary proceeding.

(A) The court may consider a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief can be granted, or for any other ground. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) If a Rule 32.2(c)(1)(A) motion to dismiss is ~~denied, or~~ not made, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable ~~to resolve~~ in resolving factual issues before ~~conducting~~ an evidentiary hearing. After discovery ends, either party may ~~ask the court to dispose of the petition on a motion for summary judgment in the manner described in~~ move for summary judgment as provided in Rule 56 of the Federal Rules of Civil Procedure.

or is made and denied

(2) After the ancillary proceeding, the court shall enter a final order of forfeiture amending the preliminary order as necessary

to account for the disposition of any third-party petition.

(3) If multiple petitions are filed in the same case, an order dismissing or granting fewer than all of the petitions is not appealable until all petitions are resolved, unless the court determines that there is no just reason for delay and directs the entry of final judgment on one or more but fewer than all of the petitions.

(4) The ancillary proceeding is not considered a part of sentencing.

(d) *STAY OF FORFEITURE PENDING APPEAL.* If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court ~~determines that~~ decides to amend the order of forfeiture ~~shall be amended~~ to recognize a third party's interest in the property, the court shall amend the order of forfeiture but shall refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.

(e) *SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.*

(1) ~~The court~~ (on motion by the government) may at any time enter an order of forfeiture ~~or~~ amend an existing order of forfeiture ~~to~~ include property ~~which~~:

~~(i)~~ A. is subject to forfeiture under an existing order of forfeiture and was located and identified after that order of forfeiture was entered; or

~~(ii)~~ B. is substitute property ~~which~~ qualifies for forfeiture under an applicable statute.

(2) If the government ~~makes the requisite showing~~ shows that the property is subject to forfeiture under ~~either~~ (e)(1) ~~(i) or (e)(1)(ii),~~ Rule 32.2, the court shall:

~~(i)~~ A. enter an order forfeiting the property, or amend an existing preliminary or final order to include that property;

~~(ii)~~ B. if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (c) ~~as to the property,~~ and

~~(iii)~~ C. if no third party files a petition, enter an order forfeiting the property under subdivision (b)(2).

Item 8C

MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 19-20, 1998
Cape Elizabeth, Maine

The Advisory Committee on the Federal Rules of Criminal Procedure met at Cape Elizabeth, Maine on October 19th and 20th, 1998. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, October 19, 1998. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure; Hon. William Wilson, member of the Standing Committee and liaison to the Advisory Committee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Mr. Daniel Cunningham of the Legislative Affairs Office of the Administrative Office; Ms. Laurel Hooper from the Federal Judicial Center; Ms. Nancy Miller, Judicial Fellow at the Administrative Office; and Ms. Mary Harkenrider and Stephan Cassella from the Department of Justice. Judge Davis, the Chair, welcomed the

attendees and thanked Judge Marovich for his years of service to the Committee. He also welcomed the new member, Judge Bucklew. Later in the meeting, Judge Davis presented a certificate of appreciation to Judge Marovich.

II. APPROVAL OF MINUTES OF OCTOBER 1997 MEETING*

Mr. Josefsberg moved that the Minutes of the Committee's April 1998 meeting in Washington, D.C., be approved. Following a second by Judge Miller, the motion carried by a unanimous vote.

III. RULES APPROVED BY SUPREME COURT AND PENDING BEFORE CONGRESS

The Reporter informed the Committee that the Supreme Court had approved the following amendments and that absent any action from Congress, they would become effective on December 1, 1998:

1. Rule 5.1 (Preliminary Examination; Production of Witness Statements);
2. Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings);
3. Rule 31 (Verdict; Individual Polling of Jurors);
4. Rule 33 (New Trial; Time for Filing Motion);
5. Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and
6. Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence).

IV. RULES APPROVED BY STANDING COMMITTEE AND JUDICIAL CONFERENCE AND PENDING BEFORE THE SUPREME COURT

The Reporter informed the Committee that both the Standing Committee and Judicial Conference had approved and forwarded to the Supreme Court the amendments to the following rules:

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment);
2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.);
3. Rule 24(c). Alternate Jurors (Retention During Deliberations);
4. Rule 30. Instructions (Submission of Requests for Instructions);
5. Rule 54. Application and Exception.

The Standing Committee, however, rejected proposed Rule 32.2, Criminal Forfeitures. As a result, Judge Davis had withdrawn the following proposed amendments that would have been conforming changes required by Rule 32.2: Rule 7. The Indictment and Information (Conforming Amendment); Rule 31. Verdict (Conforming Amendment); Rule 32. Sentence and Judgment (Conforming Amendment); and Rule 38. Stay of Execution (Conforming Amendment).

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE*

A. Rule 10. Arraignment & Rule 43. Presence of Defendant.

Judge Miller briefly explained the background of proposed changes to Rules 10 and 43 that would permit the defendant to waive his or her appearance at the arraignment. He noted that he and Mr. Martin had agreed on some proposed language in a new (c)(i) that would make it clear that the defendant's ability to waive an appearance is available only where he or she is entering a plea of not guilty and that a waiver may not be used where the defendant, under Rule 7(b), must appear in open court to waive an indictment where he has been charged with a criminal information in a felony case.

There was general agreement among the Committee members to the proposed changes. The Reporter was asked to draft up the proposed language and conforming amendments for the Committee's April 1999 meeting.

B. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

The Reporter provided a brief background on the proposed changes to Rule 12.2, which would make three changes. First, the amendment would require the defendant to provide notice of an intent to introduce expert testimony in a capital case sentencing proceeding. Second, the amendment would authorize the defendant, who had provided such notice, to undergo a mental examination. And third, the proposed change would place some limits on the ability of the government to see the results of that examination before the penalty phase had begun. The Reporter noted that as a result of the Committee's discussion at the October 1997 meeting, he had conducted some additional research into the questions of the impact of the Rule on the defendant's privilege against self-incrimination and whether early disclosure should be permitted.

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* The material is presented here in the order it appeared on the Committee's agenda and not necessarily in the order it was discussed at the meeting.

With regard to the self-incrimination issue, the Reporter indicated that the law seems clear that requiring the defendant to provide notice of an intent to present evidence of his mental condition does not amount to a waiver of the privilege. And, requiring a defendant to undergo mental testing as a condition for introducing such evidence does not violate the privilege. Regarding the issue of disclosure of the report to the government, the Reporter informed the Committee that the routine practice seems to be that the trial court will seal the results of the compelled examination until the penalty phase of the trial. He observed, however, that there was support for the position that sealing was not constitutionally required. Finally, there is support for the proposition that the court need not wait until the defendant actually introduces evidence of his mental condition before disclosing the results of the examination to the government.

Judge Davis commented that in framing the issues, it should be noted that if the trial judge orders early disclosure, time will be taken for the government to show that no taint has resulted from that early disclosure. On the other hand, he noted, if the government must wait until sentencing to see the report for the first time, there will be delays while the defense and government review the report.

Professor Stith observed that the defendant could always waive holding the report, and Judge Bucklew observed that timing is important in these issues, especially if a jury is involved. Chief Justice Wathen noted that there are really no good choices in this situation; the issues must be decided in a short time frame. Judge Roll commented that mental examination reports include all sorts of information and that the opportunity to investigate those matters is usually not available.

Mr. Martin stated that federal capital cases are usually high profile cases with a great deal of psychiatric testing. He noted, however, that during compelled examinations the defense counsel is not permitted to be present and that that can lead to abuse. He noted that in many cases the results of the examination are sealed because it is believed that there is no reason to disclose it earlier to the defense. He also observed that when the defense sees possible rebuttal evidence in the report, it may withdraw the mental health defense. Finally, he stated that early release to the government could pose dangers and that there is a risk that the government's knowledge of the results might be used against the defendant on the merits portion of the case.

Mr. Josefsberg observed the defendants are already suspicious of the government and the early release of the report simply fuels that belief and undermines trust in the system. He noted that in his experience in State courts, both sides get the results before sentencing begins and that it does take time to review the report. Ms. Harkenrider responded that the typical delay in a federal trial is five days. Other Committee members raised questions about the issue of delay and Judge Marovich urged the Committee to support changes that speeded up the discovery process. Judge Roll commented that he

would be concerned about the impact of such delays on the jurors, especially in high profile cases.

The Committee ultimately voted 9 to 2 to amend the Rule to require the trial court to seal the results of the mental examination until the penalty phase.

On the issue of when the results should be disclosed earlier to the defense, Mr. Josefsberg observed that the report might be very beneficial to the defense and in that instance the defense might wish for the government to see it as well. Where the defendant is facing the death penalty, he observed, more time should be given to the defense. Judge Dowd questioned what the States have done on this issue and whether any States provide for earlier release. Following additional brief discussion the Committee voted 7 to 4 to amend the Rule to provide that if the trial court provides the report to the defense earlier than at the penalty phase, the government is entitled to disclosure as well.

C. Rule 26. Taking of Testimony.

The Reporter provided background information on the proposed changes to Rule 26, which had originally been proposed by Judge Stotler as a means of conforming the Rule to Civil Rule 43. The proposed amendment would permit the court to hear testimony being transmitted from a remote location. The Reporter indicated that in response to the Committee's questions at the last meeting, he had done some additional research on the question of whether such an amendment would implicate Confrontation Clause concerns. He noted that of the few cases dealing with the issue, it seemed clear that reception of testimony from a remote location does not per se violate the defendant's right to confrontation. In particular, he noted that a recent decision by Judge Weinstein in United States v. Gigante, 971 F.3d 755 (E.D.N.Y. 1997) had addressed the issue in some detail, and had cited Civil Rule 43 and the accompanying Committee Note.

He further explained that the most recent draft of the proposed amendment stated no preference for remote transmission over deposition testimony and that the requesting party must establish compelling reasons for that transmission.

The Committee approved the draft by a unanimous vote. The Reporter was asked to make style changes to the Rule.

D. Rule 30. Instructions.

Judge Davis provided background information on the proposed amendments to Rule 30. He noted that as published for public comment in 1997, the Rule only addressed

the question of the timing of providing requested instructions. However, after the comment period ended, the Committee learned that the Civil Rules Committee was considering broader amendments to the Civil Rule counterpart, Rule 51. At the suggestion of the Committee, the Reporter had discussed with the Reporter for the Civil Rules Committee the possibility of coordinating a common rule on the issue. Judge Dowd added that perhaps the Rule should include a specific provision authorizing or requiring that the instructions be given before arguments are made. Following additional brief discussion, the Committee decided to wait with any further amendments to Rule 30 pending action by the Civil Rules Committee.

E. Rule 32. Sentence and Judgment.

Judge Davis reminded the Committee of the request from the Criminal Law Committee that the Committee consider whether any provision should be made in either a national rule or local rules concerning release of presentence and related reports. He also indicated that he had appointed a subcommittee consisting of Judge Smith (Chair), Chief Justice Wathen, Mr. Pauley, Ms. Harkenrider, and Mr. Martin. Judge Smith reported that the subcommittee had conferred on the issue and had concluded that no rule changes should be made—either in a national or local rule. He added that they believed that the fact that individuals or organizations might seek access to the reports was not reason enough to make them readily available. He also noted that Judge Kazen, Chair of the Criminal Law Committee, tended to agree with that position. On the motion of Judge Dowd, seconded by Judge Miller, the Committee unanimously approved the Subcommittee's report that no amendments be made.

F. Rule 32.2. Criminal Forfeiture.

Judge Davis provided a brief overview of the questions that had been raised by the Standing Committee in rejecting the Committee's proposed Rule 32.2. He noted that one of the chief concerns focused on the proposed removal of the jury from any forfeiture decisions at trial. Another concern, he stated, was whether the defendant would be permitted to offer any evidence at the forfeiture hearing conducted by the judge. Beyond that, no member of the Standing Committee had voiced any strong concerns about the remainder of the Rule. Judge Wilson added brief comments which echoed Judge Davis' assessment.

Judge Dowd (Chair of Subcommittee on Rule 32.2) explained that since the Standing Committee's meeting in June, the Department of Justice had proposed a number of revisions to Rule 32.2, with a view toward possibly presenting it to the Standing Committee at its January meeting. He briefly noted the changes proposed by the

Department and observed that although he personally favored removing the jury from the forfeiture decision, he recognized that there were important reasons for retaining that role.

Mr. Pauley offered reasons for adopting the revised Rule. First, he noted that it was important to recognize that the forfeiture issue was a sentencing matter and that the Rule reflected that point. Second, current procedures provide for redundant forfeiture decisions and can be very time-consuming and may involve complicated decisions under property law. He noted that under the proposed Rule, the ancillary proceeding would become the primary locus for determining the rights of any third parties to the property to be forfeited.

Mr. Stephen Cassella, an Attorney with the Department of Justice, added to Mr. Pauley's comments and briefly reviewed the current procedures for deciding forfeiture issues. He noted that the ancillary proceeding is governed by statute and gave a brief historical overview of how that proceeding had developed. He added that the proposed Rule would bifurcate the forfeiture proceeding—the first proceeding following the verdict would determine whether any nexus existed between the property and the offense. In that proceeding, the parties would be entitled to request that a jury make that determination. If a third party asserts an interest in that property, the court would conduct an ancillary proceeding.

Mr. Pauley raised the question of whether the Rule should be republished and noted that the Standing Committee's concerns had caused the Department of Justice to rethink its proposal and address the concerns raised by that body. He added that the Department was still very interested in pursuing the adoption of a clear, single, Rule to address forfeiture procedures.

Judge Dowd moved that the Committee approve the Department's most recent draft of Rule 32.2. Mr. Pauley seconded the motion.

In the discussion which followed, Mr. Pauley explained the differences in the original (the one presented to the Standing Committee) and the revised draft of Rule 32.2 (dated October 13, 1998). He noted that one for the changes was in Subdivision (a) where the Department proposed that the language being changed to reflect current caselaw interpreting Rule 7(c) which does not require a substantive allegation that certain property is subject to forfeiture. The defendant need only receive notice that the government will be seeking forfeiture under the applicable statute.

He noted that (b)(1) had been revised to clarify that there are different kinds of forfeiture judgments: forfeiture of specific assets and money judgments. To the extent that the case involves forfeiture of specific assets, the court or jury must find a nexus between the property and the crime for which the defendant has been found guilty.

Under the revised (b)(2), the Rule makes it clear that what is deferred to the ancillary proceeding is the question of whether any third party has a superior interest in the property. Former language regarding what the court should do if no party files a claim has been moved to (c)(2).

Mr. Pauley noted that (b)(3) had been changed to make it clear that the Attorney General could designate someone outside the Department to seize the forfeited property.

The major change, he observed, rested in (b)(4) which retains the right of either the defendant or the government to request that the jury make the decision whether there is a nexus between the property and the crime. This provision, he noted, was designed specifically to address the concerns raised by some members of the Standing Committee.

Next, Mr. Pauley informed the Committee that (c)(1) had been revised to reflect that no ancillary proceeding is necessary regarding money judgments and that (c)(2) had been revised to simplify what had appeared at (b)(2) in the original version. That provision, he observed, preserves two tenets of current law: that criminal forfeiture is an in personem action and that if no third party files a claim to the property, his or her rights are extinguished. Under the revised language, if no third party files a claim the court is not required to determine the extent of the defendant's interest. It is only required to decide whether the defendant had an interest in the property.

Finally, Mr. Pauley noted that (e)(1) had been revised to make it clear that the right to a bifurcated procedure does not apply to forfeiture of substitute assets or to the addition of newly-discovered property to an existing forfeiture order.

Judge Wilson indicated that the right to jury trial is a broad concern but that other members of the Standing Committee might approve of the Department's changes.

The ensuing discussion focused first on the issue of procedures for forfeiting "specific assets" in (b)(2) and its relationship to (c)(2). Mr. Cassella noted that forfeiture procedures can create complicated issues and that the Rule is intended to simplify the process by recognizing a presumption that if no third party comes forward, the defendant is presumed to have an interest in the property. Following additional discussion, the Committee agreed that any language about presumptive interests should go in the Note and not in the Rule itself.

Judge Roll raised a question about the proposed change to (a) that would permit the government to simply provide notice to the defendant in the indictment. Following brief discussion concerning clarification of the "notice" provision, the Committee voted 6 to 3 to adopt the Department's suggested change in subdivision (a).

In (b)(4), with regard to the issue of distinguishing money judgments from forfeiture of specific assets, the Committee voted 7 to 4 to use the term property instead of "specific assets." And by a vote of 4 to 3, the Committee approved the jury provision in (b)(4).

The Committee generally discussed the issue of whether to recommend that the Rule be republished for public comment on the proposed changes. A consensus emerged that the changes were in effect largely conforming changes resulting from comments from the Standing Committee and that the Chair should present the Rule to the Standing Committee for its determination on whether the changes required additional publication.

Thereafter, the Committee voted unanimously to present the revised Rule to the Standing Committee at its January 1999 meeting.

G. Rule 43. Presence of Defendant.

The Reporter provided a brief overview of the proposed changes to Rule 43 that would permit the defendant to appear before an initial appearance and arraignment through teleconferencing. The proposal had been raised in a letter from Judge Fred Biery (W.D. Tex.) recommending that Rule 5 be amended to permit such appearances. The Reporter stated that the Committee had published a proposed amendment in 1993 and 1994 that would have accomplished the same result. But the matter was tabled pending the outcome of an FJC pilot program involving teleconferencing. Judge Roll noted that although the proposal focused on Rule 5, amendments to Rules 10 and 43 would also be required. Following further discussion, Judge Davis appointed a subcommittee to study that matter and report back to the Committee: Judge Roll (Chair), Judge Bucklew, Judge Miller, and Mr. Pauley.

H. Rules Governing Habeas Corpus Proceedings.

Judge Davis indicated that as a result of its study of the Rules Governing Habeas Corpus, the Subcommittee consisting of Judge Carnes (Chair), Judge Miller, Mr. Jackson, Mr. Pauley and Ms. Harkenrider was prepared to recommend changes to those Rules. Judge Miller, speaking on behalf of the Subcommittee in the absence of Judge Carnes, explained the need for a number of changes to the Rules.

First, it was necessary, he said, that the reference in Rule 6(c), Rules Governing § 2254 cases and Rule 8(c), Rules Governing § 2255 cases contain an outdated reference to 18 U.S.C. § 3006A(g). The Committee voted unanimously to change the reference to § 3006A.

Judge Miller also noted that the Subcommittee believed that potential conflicts created between the time requirements in Civil Rule 81 and the Rules Governing Habeas Corpus might be best resolved by recommending that the time provisions in Rule 81 be deleted. Following brief discussion the Committee voted unanimously to so recommend.

With regard to Rule 2(e) in the Rules Governing § 2254 Proceedings and in Rule 2(d) for the Rules Governing § 2255 Proceedings, the Subcommittee recommended that the word "receives" should be changed to "filed" to bring those rules into conformity with Civil Rule 5(e). The Committee voted unanimously to make the change.

Judge Miller next noted that language in Rules 3(b) in the Rules Governing § 2254 Proceedings and § 2255 Proceedings, contains language that conflicts with Rule of Civil Procedure 5(e) and current practice. As written, Rule 3(b) refers to the clerk filing the papers when in fact the practice is for the clerk to file the petition and refer it to a judge for consideration of any defects in the petition. Proposed language to resolve the problem was presented to the Committee and approved by a unanimous vote.

Regarding Rule 2(c) in the Rules Governing § 2254 Proceedings and in Rule 2(b) for the Rules Governing § 2255 Proceedings, Judge Miller noted that the Subcommittee had considered proposing an amendment that would require that a petitioner indicate in his or her petition whether a previous petition has been filed. He noted that several magistrate judges had opposed this change and that upon further consideration, the Subcommittee was withdrawing its proposal.

Turning to Rule 5 in the Rules Governing § 2254 Proceedings and Rule 5(a) for the Rules Governing § 2255 Proceedings, Judge Miller informed the Committee that the magistrate judges who had responded to the proposed amendments disfavored the proposal which would require the government to state in its answer whether other petitions had been filed and whether or not the petition complied with the statute of limitations. During the ensuing discussion, several Committee members observed that the proposed changed appeared to be substantive in nature. Others noted that the judge is capable of reviewing the petition to determine if it complies with the statute. Judge Miller noted that the proposed amendment was a reaction to provisions in the Antiterrorism Act. The Committee rejected the proposed amendment by a vote of 4 to 7.

Judge Miller explained the Subcommittee's proposal that Rule 9(b) in the Rules Governing § 2254 Proceedings and Rule 9(b) for the Rules Governing § 2255 Proceedings be deleted. The subcommittee believed that those provisions, which address second or successive petitions, have been superseded by provisions in the Antiterrorism and Effective Death Penalty Act of 1996. The Committee voted 9 to 0 (1 abstention) to adopt that recommendation.

Judge Miller noted that the Reporter had suggested that some consideration be given to consolidating the Rules Governing § 2254 Proceedings and the Rules Governing § 2255 Proceedings. He believed that that was possible and following brief discussion by the Committee received approval to attempt a consolidation

Finally, he stated that the Subcommittee had recommended that Rule 1 of both sets of Rules should be amended to reflect that habeas cases filed under § 2241 should be governed by those Rules. The Committee approved the proposal by a vote of 8 to 0, with 1 abstention.

VI RULES AND PROJECTS PENDING BEFORE STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Rules Governing Attorney Conduct.

Dean Coquillette provided background information on the Standing Committee's attempt to bring some guidance on what, if any, rules could be adopted regarding attorney conduct in federal courts. He informed the Committee that a bill was pending before Congress that would make attorneys for the government subject to State disciplinary rules and that as a result of that legislation, matters were temporarily on hold to see if any further action would be required by the Standing Committee.

B. Electronic Filing of Comments on Proposed Rules Changes.

Mr. Rabiej reported that the Rules Committee Support Office was prepared to receive the public's comments on proposed changes to the Rules through electronic mail. Because the Committee has no pending amendments out for comment, it will be some time before that process is used for Criminal Rules.

C. Status Report of Proposed Restyling of Criminal Rules.

Judge Davis informed the Committee of the pending project to "restyle" the Criminal Rules. The current plan, he noted, was for the Style Subcommittee of the Standing Committee to complete its draft of the Rules and present them to the Advisory Committee at the first of the year. He noted it might be more efficient to divide the Rules among two subcommittees and that it would probably be necessary to hold several extra meetings to finish the project. He also noted that the Reporter had suggested a breakdown of the assignment of the Rules and that Professor Saltzburg had been retained by the Rules Committee Support Office to assist the Style Subcommittee in its work. He expressed concern that the Committee might make unintentional substantive changes to

the Rules in the process and reminded the Committee that special attention should be paid to this potential problem.

Judge Davis appointed the following subcommittees to review the style changes: Subcommittee A: Judge Smith (Chair), Judge Bucklew, Judge Miller, Professor Stith, Mr. Jackson, Mr. Pauley, and Ms. Harkenrider. Subcommittee B: Judge Dowd (Chair), Judge Roll, Chief Justice Wathen, Mr. Josefsberg, Mr. Martin, Mr. Pauley, and Ms. Harkenrider.

D. Status Report on Legislation Affecting Criminal Rules; Pending Amendments Affecting Grand Jury Proceedings.

Mr. Dan Cunningham, from the Office of Legislative Affairs, briefed the Committee on pending legislation that would require action by the Judicial Conference and possibly the Advisory Committee. The pending legislation would permit defense counsel to attend grand jury proceedings. Following a brief discussion on the issue, Judge Davis appointed a subcommittee to review the legislation and prepare any necessary response from the Committee. The Subcommittee consists of Judge Dowd (Chair), Judge Smith, Mr. Jackson, and Mr. Pauley.

Mr. Cunningham also gave an overview of the function and duties of that office and noted that Congress' increased interest in the Rules of Criminal Procedure had resulted in changes to the Rules. He noted that Congress may affect the Rules by first, directly amending the Rules themselves, second, enacting legislation that affects the Rules, or directing that a study be conducted on a possible amendment to the Rules, as is the case with the pending Grand Jury issues. He indicated that the Office has attempted to persuade Congress to simply send a letter to the Advisory Committees requesting consideration of possible amendments. Finally, he reviewed a number of recent examples of where Congress has shown an interest in amending the Rules of Procedure or Rules of Evidence.

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING.

The next meeting of the Committee will be on April 22 and 23, 1999 in Washington, D.C.

Respectfully Submitted,

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee

Item 9A

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

TO: Honorable Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Fern M. Smith, Chair
Advisory Committee on Evidence Rules

DATE: December 1, 1998

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules met on October 22nd in Washington, D.C. The Committee held a public hearing on the proposed amendments that are currently released for public comment--proposals to amend Evidence Rules 103, 404(a), 701, 702, 703, 803(6) and 902. After the public hearing, the Committee convened to consider the comments received at the hearing as well as other written comments submitted. The Committee reached tentative agreement on some minor revisions to the text and notes of some of the proposed amendments. The Committee also considered, and decided not to act on, some proposals to amend other Evidence Rules. The discussion of these and other matters is summarized in Part III of this Report, and is more fully set forth in the draft minutes of the October meeting, which are attached to this Report.

Given the fact that a package of proposed amendments to the Evidence Rules is currently in the public comment period, the Evidence Rules Committee will present no action items at the January, 1999 Standing Committee meeting.

II. Action Items

No Action Items

III. Information Items

A. Consideration of Possible Changes to Proposed Amendments Released for Public Comment.

1. Rule 103

The proposed amendment to Evidence Rule 103 provides: 1) that a party who loses an advance ruling on evidence need not renew an objection or offer of proof at trial, if the advance ruling is definitive; and 2) that if there is a condition precedent to the advance ruling, such as the pursuit of a certain claim or defense or the testimony of a certain witness, then an appeal cannot be taken on the ruling unless the condition precedent actually occurs at trial.

In light of the public comment received, the Committee tentatively agreed to change a citation in the Committee Note to one that more completely described the need to excuse a party from renewing objections to definitive rulings. The Committee also tentatively agreed with a public comment suggesting that the Committee Note should be amended to emphasize that an advance ruling cannot be relied on if the facts and assumptions underlying the trial court's advance ruling are materially changed at trial.

The second sentence in the proposed amendment, set forth above, would codify the Supreme Court's ruling in *Luce v. United States,* and the cases that have extended the logic of *Luce.* Academics have submitted comment that has been critical of *Luce*; they have suggested that the second sentence of the proposed amendment should be dropped, and the Committee Note changed to state that the Committee was taking no position on whether *Luce* should be applied or extended. After discussion, the Evidence Rules Committee remained in general agreement that the *Luce* principle should remain in the text of the Rule, though some members expressed concern that extending the *Luce* principle to all analogous situations might result in some unintended consequences. The Committee resolved to revisit the question of whether the *Luce* language should be retained at its April, 1999 meeting, after the end of the public comment period.

2. Rule 404(a)

The proposed amendment to Evidence Rule 404(a) provides that if an accused attacks the victim's character, this opens the door to an attack on a "pertinent" character trait of the accused. Public comment has raised the concern that the term "pertinent" may be too broad. In a multiple

count prosecution, the chosen language might permit the prosecution to attack a character trait of the defendant that is pertinent to a count different from the one on which the defendant attacked the character of the victim.

In light of the public comment, the Evidence Rules Committee has tentatively agreed that the word "pertinent" should be replaced with the word "same." Under this proposal, the prosecution could rebut an attack on the victim's character only with evidence of the same bad character trait of the defendant. The Committee has also tentatively agreed to add to the Committee Note a reference to the fact that an accused might introduce a negative character trait of the victim for a purpose other than to prove that the victim acted in accordance with the character trait; this would not open the door to a character attack on the accused.

3. Rule 701

The proposed amendment to Evidence Rule 701 would prohibit lay witness testimony where the witness is testifying on the basis of specialized knowledge. The goal of the amendment is to prohibit lay witnesses from testifying on matters that should be governed by the reliability requirements of Evidence Rule 702. While most public comment on the proposal has been favorable, some commentators have expressed concern that the amendment might prohibit testimony from lay witnesses who testify on the basis of ordinary experience, e.g., that a certain substance was cocaine. The Committee's position is that testimony based on particularized knowledge that any member of the public could obtain without training or expertise should be covered by Rule 701, while testimony based on specialized knowledge that is dependent on special skill or training should be covered by Rule 702. The Committee will consider whether a stylistic change to the proposal is necessary to clarify this distinction.

4. Rule 702

The proposed amendment to Evidence Rule 702 provides three reliability-based requirements that all expert testimony must meet: (1) the testimony must be sufficiently based upon reliable facts or data; (2) the testimony must be the product of reliable principles and methods; and (3) the principles and methods used by the witness must be applied reliably to the facts of the case. The public comment received so far is, not surprisingly, divided on the merits of the proposal to amend Rule 702, though most commentary has been quite favorable. A major intervening development is that the Supreme Court will hear argument on December 7 in *Kumho Tire v. Carmichael*, where the issue is whether the *Daubert* gatekeeping standards apply to the testimony of a tire failure expert who testified largely on the basis of experience. The Evidence Rules Committee will continue to monitor the *Kumho* case and its effect, if any, on the proposed amendment to Rule 702. The Committee has also tentatively agreed to make two minor changes to the Committee Note to Rule 702, in order to cite some recent case law and academic commentary.

5. Rule 703

The proposed amendment to Rule 703 would limit the disclosure to the jury of information relied on by an expert, where that information is otherwise inadmissible. The amendment provides that this information cannot be disclosed unless its probative value (in assisting the jury to weigh the expert's opinion) substantially outweighs the risk of prejudice (from the jury's misusing the evidence). The goal of the amendment is to prevent a party from evading exclusionary rules of evidence through the simple expedient of having an expert rely on the inadmissible information.

The public comments on Rule 703 have been almost uniformly positive. The Evidence Rules Committee has tentatively decided to reject suggestions that the text of the Rule be made more elaborate to specify the probative value and prejudicial effect that the trial judge must consider. The Evidence Rules generally refer to probative value and prejudicial effect without elaboration, leaving the balancing of these factors to the discretion of the trial court. Moreover, the Committee Note to the Rule makes clear what the probative value and prejudicial effect are when the expert relies on information not in evidence. The Committee has also decided to reject more radical proposals that would prohibit the expert from relying on information not in evidence, and that would add a new hearsay exception to permit reliable information used by an expert to be admitted for its truth.

The Committee considered and approved the changes to the text of Evidence Rule 703 suggested by the Style Subcommittee of the Standing Committee. These changes would make the language of the Rule more direct and concise. The Committee also tentatively agreed to a stylistic change that would clarify that the Rule presumptively prohibits disclosure of all information not in evidence that is relied upon by an expert. Finally, the Committee tentatively agreed to add language to the Committee Note that would indicate that the proponent of the expert might be permitted to disclose the information not in evidence relied on by the expert, if the opponent opens the door by attacking the expert's basis.

6. Rules 803(6) and 902

The proposed amendments to Rules 803(6) and 902 are interrelated. The amendment to Rule 803(6) would permit business records to satisfy the hearsay exception without the requirement of in-court testimony by a custodian or other qualified witness; such a person would be permitted to certify that the admissibility requirements of the exception are met. The amendment to Rule 902 would provide that a business record accompanied by such a certification can be self-authenticating. The goal of these amendments is to provide consistency in the proving up of business records. Current federal law permits proof of foreign business records in criminal cases by way of certification; but business records in civil cases and domestic business records in criminal cases must still be proven by the testimony of a qualified witness.

The Evidence Rules Committee has tentatively agreed to a stylistic change to proposed Rules 902(11) and 902(12) that would provide for a more consistent use of the terms "certification" and "declaration." Under this stylistic revision, each new subdivision would require that the qualified witness make a "written declaration of the custodian thereof or another qualified person certifying that the record" meets the requirements of the Rule. The Committee also tentatively agreed to a stylistic change that would replace a pronoun with a more definite term. Finally, the Committee tentatively agreed to add to the Committee Note a reference to the statute governing declarations filed in a federal court.

B. Other Matters Considered

1. Rule 609

Evidence Rule 609 provides that certain convictions are admissible to impeach the character of a witness if a balancing test is met (subdivision (a)(1)), and that other convictions are automatically admissible (subdivision (a)(2)). A public comment was received suggesting that the use of the word "and" between these subdivisions was misleading; the argument was that the use of the word "and" implies that a conviction must meet the requirements of both subdivisions to be admissible, when in fact the subdivisions provide independent paths to admissibility.

The Evidence Rules Committee considered this comment and determined that it was not necessary to amend Rule 609. The use of the word "and" clearly indicates that the provisions are independent rather than related. That is, both subdivisions provide for admissibility of convictions if their requirements are met.

2. Rule 1101

Evidence Rule 1101 sets forth the actions and proceedings to which the Federal Rules of Evidence are applicable, and also excludes certain proceedings from the applicability of those Rules. The Evidence Rules Committee considered whether Evidence Rule 1101 should be amended to either exclude certain actions from or include certain actions within the rubric of the Evidence Rules.

The Committee determined that there are several types of actions in which the courts have found the Evidence Rules inapplicable, even though the actions are not specifically excluded under Rule 1101. The Committee also considered whether some of the proceedings currently excluded from the Rules by Rule 1101 should remain so.

Ultimately, the Committee concluded that there is no critical need to amend Rule 1101 at this time. First, the courts have had no problem in exempting certain actions from the Evidence Rules where the nature of the action warrants it, even if there is no explicit exclusion in Rule 1101. Second, the Committee found that it would not be appropriate to apply the Evidence Rules to any proceedings that are currently exempted by Rule 1101.

3. Privileges

The Evidence Rules Committee once again discussed whether it should attempt to propose a codification of the privileges, in light of substantial recent Congressional activity in this area. Committee members are divided on whether the project would be productive. The Chair designated a subcommittee to consider whether a proposed codification of the privileges would be a worthwhile project. The subcommittee will report back to the Evidence Rules Committee at the April, 1999 meeting.

4. Rule 902(6)

Evidence Rule 902(6) provides that "[p]rinted materials purporting to be newspapers or periodicals" are self-authenticating. The Evidence Rules Committee has determined that the Rule may not cover news wire reports that do not subsequently appear in print articles, such as electronic stock market reports. The Committee resolved to consider this matter in the future, should another package of amendments to the Evidence Rules be deemed necessary.

C. Outmoded or Misleading Advisory Committee Notes

The Evidence Rules Committee has engaged in a two-year long project to identify those original Advisory Committee Notes that may be misleading because they comment on a version of the Rule that was either rejected or substantially changed by Congress. The culmination of the project was a report by the Committee's Reporter, setting forth the problematic Notes and providing editorial comment that can be used by publishers to alert the reader that the Note is commenting on a Rule different from that actually enacted.

The Reporter's report has been published as a pamphlet by the Federal Judicial Center. The pamphlet has been distributed to all Federal judges, all publishers of the Federal Rules of Evidence, and other interested parties. The report has also been published in the supplement to Wright and Miller's treatise on federal courts, and will soon be published in Federal Rules Decisions.

IV. Minutes of the October 1998 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's October 1998 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachment:

Draft Minutes

Item 9B

Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of October 22, 1998

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on October 22, 1998, in the Judicial Conference Center of the Thurgood Marshall Building in Washington, D.C.

The following members of the Committee were present:

Hon. Fern M. Smith, Chair
Hon. David C. Norton
Hon. Milton I. Shadur
Hon. Jerry E. Smith
Hon. James T. Turner
Hon. Jeffrey L. Amestoy
Professor Kenneth S. Broun
Mary F. Harkenrider, Esq.
Gregory P. Joseph, Esq.
Frederic F. Kay, Esq.
David S. Maring, Esq.
Professor Daniel J. Capra, Reporter

Also present were:

Hon. Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. David S. Doty, Liaison to the Civil Rules Committee
Hon. David D. Dowd, Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee
Hon. James K. Robinson, Justice Department
Roger Pauley, Esq., Justice Department
Professor Stephen A. Saltzburg, American Bar Association Representative
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Joe Cecil, Esq., Federal Judicial Center
Joseph Spaniol, Esq.

Opening Business

The Chair opened the meeting by welcoming two new members, Chief Justice Jeffrey Amestoy and David Maring. The Chair then asked for approval of the minutes of the April 1998 meeting. These minutes were unanimously approved.

The Chair reported on actions taken at the June 1998 Standing Committee meeting. The Standing Committee approved the Evidence Rules Committee's proposed amendments to Rules 701, 702, and 703 to be released for public comment. The proposed amendments to Evidence Rules 103, 404(a), 803(6), and 902 had been approved for release for public comment at a previous meeting of the Standing Committee. The Chair recommended that Committee members read the minutes of the Standing Committee meeting, as the minutes give a comprehensive account of all of the cutting edge issues that the Standing Committee is considering.

Public Hearing on Rules Released for Public Comment

The first part of the Evidence Rules Committee meeting was devoted to a public hearing on the Rules that have been released for public comment. The following members of the public gave testimony and engaged in dialogue with the Committee members.

1. *Professor James Duane*, Regent Law School (Rule 103)—Suggesting changes to the Committee Note to Rule 103, and deletion of the Rule's codification of *Luce v. United States* and its progeny.

2. *Roy Katriel, Esq.*, American University Evidence Project (Rule 702)—Suggesting separation of qualification and reliability standards, and articulation of the standard of proof in the text of the Rule.

3. *Libretta Porta, Esq.,* American University Evidence Project (Rule 703)—Suggesting that the Rule be amended to prohibit an expert from relying on inadmissible information, and that a new hearsay exception be added for reliable information used by an expert.

4. *Gerson Smoger, Esq.*, American Trial Lawyers Association (Rule 702)—Opposing the proposed amendment.

5. *Professor Laird Kirkpatrick,* University of Oregon Law School (Rules 103, 404, 701, 702, 703, 902)—Supporting Rule 103 but suggesting deletion of Rule 103's codification of *Luce* and its progeny; suggesting narrowing of character evidence that can be offered as rebuttal under the proposed amendment to Rule 404 and a change to the Committee Note; opposing proposed Rule 701; opposing proposed Rule 702; supporting but suggesting clarifying language for proposed Rule 703; generally supporting the proposed amendments to Rules 803(6) and 902.

6. *Professor Richard Friedman,* University of Michigan Law School (Rules 103, 404, 701, 702, 703, 902)—Suggesting deletion of Rule 103's codification of *Luce* and its progeny; suggesting narrowing of character evidence that can be offered as rebuttal under the proposed amendment to Rule 404; opposing proposed Rule 701; opposing proposed Rule 702; suggesting clarifying language for proposed Rule 703; generally supporting the proposed amendment to Rules 803(6) and 902.

7. *Stephen Morrison, Esq.*, Lawyers for Civil Justice (Rules 701, 702, 703)—Strongly supporting the proposed amendments to Rules 701, 702, and 703.

Committee Meeting

After the public hearing was concluded, the Committee met to discuss the public comments received both at the hearing and in writing. The Committee also discussed a public comment received concerning the need to amend another Evidence Rule. The discussion of the public comments and the specific rules was not intended to lead to definitive conclusions, because the public comment period is continuing and the Committee looks forward to receiving further suggestions and comments from members of the public. The Committee decided on a tentative basis, however, that certain changes to the proposals might be made in light of some of the public comments.

Rule 103

The Committee considered the public comments received to date on the proposed amendment to Rule 103. One comment suggested that a citation in the Committee Note might be misleading and that a different citation might be more illustrative of why objections to definitive advance rulings need not be renewed. The Committee tentatively agreed to replace the current citation with the suggested one. Another comment suggested that the Committee Note should be amended to emphasize that an advance ruling cannot be relied on if the facts and assumptions underlying the trial court's advance ruling are materially changed at trial. The Committee tentatively agreed to address this matter in the Committee Note.

Each of the three public comments received on the proposed amendment (all from law professors) recommend that the language in the proposal codifying *Luce v. United States* and its progeny should be dropped. None of the commentators seriously suggest that the Rule should be amended to overrule *Luce*—thereby allowing a party to appeal from an adverse advance ruling even if the ruling is dependent on a trial event that never actually occurs. Rather, the commentators suggest that the second sentence of the proposed amendment should be dropped, and the Committee Note changed to state that the Committee was taking no position on whether *Luce* should be applied or extended.

The Committee engaged in an extensive discussion on whether the *Luce* rule should be dropped from the text of the proposed amendment. Some members thought, as they had when the

issue was previously discussed, that failing to include any reference to *Luce* in the text of the Rule might lead to the misconception that the *Luce* rule had been abrogated. Others noted that the *Luce* rule has never been questioned by the federal courts and indeed has been extended to comparable situations, e.g., prohibiting a criminal defendant from appealing a ruling that would admit evidence if the defendant pursued a certain defense, where the defendant never pursued that defense at trial.

The Committee agreed to revisit the question of whether the *Luce* language should be retained at its April 1999 meeting, after the end of the public comment period. No motion was made to tentatively change the proposal at this point.

Rule 404(a)

The proposed amendment to Rule 404(a) provides that if an accused attacks the victim's character, this opens the door to an attack on a "pertinent" character trait of the accused. Two members of the public, both law professors, commented that the term "pertinent" is too broad. For example, in a criminal prosecution with multiple counts, a defendant who chose to attack the victim's character in a defense of one count would open himself up to an attack on a character trait that would be pertinent to a completely unrelated count.

After discussion, the Committee agreed in principle and on a tentative basis that the term "pertinent" was too broad. The Committee tentatively agreed that the word "pertinent" should be replaced with the word "same." Under this proposal, the prosecution could rebut an attack on the victim's character only with evidence of the same bad character trait of the defendant. Some concern was expressed that the use of the word "same" might unduly narrow the prosecution's ability to rebut an attack on the victim's character. The Committee agreed to consider any cases or hypotheticals brought to its attention that might indicate that the prosecution's rebuttal power would have to be broader.

Another public comment suggested that the Committee Note add a reference to the fact that an accused might introduce a negative character trait of the victim for a purpose other than to prove that the victim acted in accordance with the character trait. For example, an accused in a self-defense case might introduce the victim's reputation for violence to show that the accused was aware of that reputation and acted accordingly. In such a case, the door would not be opened to a character attack on the defendant. The Committee tentatively agreed that the Committee Note should be amended in accordance with the suggested comment.

Rule 701

Two public comments expressed concern that the proposed Rule's prohibition of lay testimony based on specialized knowledge would result in a change of practice. The

commentators contended, for example, that under the proposal a witness who would testify that a certain substance was drugs would have to be qualified and disclosed as an expert.

The Committee considered whether the proposed amendment might have to be changed in light of these public comments. Some members believed that there are two different kinds of specialized knowledge that a witness might use. One type of knowledge is specialized in the sense that not everyone has it, but it is nonetheless something that one needs no training or expertise to attain. Examples include testimony that certain activity occurs on a corner, or that a certain substance is a drug. Another kind of specialized knowledge is that which is beyond common experience, and which requires experience and training to obtain. Examples are testimony that a product failed due to metal fatigue, or that coconspirators were speaking in code.

Several Committee members expressed the opinion that testimony based on particularized knowledge that any member of the public could obtain without training or expertise should be covered by Rule 701, while testimony based on specialized knowledge that is dependent on special skill or training should be covered by Rule 702. Many members thought that this distinction was already made by the proposed amendment to Rule 701, while others thought that a stylistic change might be made to the text to make it more clear that testimony based on common but particularized knowledge is covered by Rule 701 rather than Rule 702. One possibility considered was to state specifically in the Rule that if testimony is expert testimony within the meaning of Rule 702, then it cannot be admitted under Rule 701. The Committee agreed to revisit the possibility of a stylistic change to Rule 701 at the April 1999 meeting, and to consider new proposals in light of any intervening public comment.

Finally, the Committee considered the suggestion of the Style Subcommittee of the Standing Committee to change the title of Rule 701 so as to refer to witnesses in the singular rather than the plural. It was pointed out, however, that someone searching for the rule would probably be considering the question of witnesses in the plural sense rather than the singular. Moreover, if the title is to be changed, it should be changed in such a way as to indicate that the Rule governs not witnesses but testimony. For these reasons, the Committee decided not to adopt the Style Subcommittee's suggestion at this time.

Rule 702

The public comment received so far is, not surprisingly, divided on the merits of the proposal to amend Rule 702. A major intervening development is that the Supreme Court has granted certiorari in *Kumho Tire v. Carmichael*, where the issue is whether the *Daubert* gatekeeping standards apply to the testimony of a tire failure expert who testified largely on the basis of experience. The Committee agreed that the result in *Kumho* could affect the viability of the proposed amendment to Rule 702. But it also agreed that it was premature to reconsider the Rule at this point, since the Supreme Court will not hear argument on the case until December. Several Committee members expressed the hope that the Supreme Court would decide *Kumho* before the April 1999 meeting, so that the Committee would have the opportunity to incorporate

the case into the proposed amendment to Rule 702, before that proposal is submitted to the Standing Committee.

The Committee considered the suggestion of the Style Subcommittee to amend the title of Rule 702 in the same manner as the proposed amendment to Rule 701. For the same reasons, the Committee decided not to adopt the Style Subcommittee's suggestion at this time.

One public comment suggested that the proposed amendment to Rule 702 might end up excluding the testimony of experts who purport to educate the factfinder on general background principles only, and who make no attempt to apply their expertise to the facts of the case. The proposed amendment requires that "the witness has applied the principles and methods reliably to the facts of the case." The Committee concluded that this language would not require exclusion of an expert who educates the jury on general principles. Such an expert will have applied the principles and methods reliably to the facts of the case if the testimony fits the facts. The Committee tentatively agreed, however, to amend the Advisory Committee Note to address this question.

The Committee considered and rejected a suggestion from a member of the public that the Rule focus only on the "case-specific" facts or data that are relied upon by the expert. The Committee unanimously concluded that the expert's reliance on *any* fact, whether or not case-specific, is a matter for scrutiny by the trial court. The Committee also considered and rejected a suggestion from a member of the public that the Committee Note be amended to provide more elaboration of the distinction between Rules 702 and 703. The Committee concluded that the distinction was already well set forth in the Committee Note.

Finally, the Committee tentatively agreed to make two minor changes to the Committee Note to Rule 702, in order to cite some recent case law and academic commentary.

Rule 703

The public comments on Rule 703 have been almost uniformly positive. Two commentators agreed with the Rule but suggested that language might be added to elaborate on why information relied on by an expert might be probative even though it is not in evidence, and why it might be prejudicial. The Committee considered these comments, and tentatively concluded that it was unnecessary to provide this elaboration in the text of the Rule. The Evidence Rules generally refer to probative value and prejudicial effect without elaboration, leaving the balancing of these factors to the discretion of the trial court. Moreover, the Committee Note to the Rule makes clear what the probative value and prejudicial effect are when the expert relies on information not in evidence.

One public commentator proposed that Rule 703 should be amended to prohibit the expert from relying on information not in evidence, and that a new hearsay exception be added to permit reliable information used by an expert to be admitted for its truth. The Committee

considered and rejected these suggestions. Committee members noted that the proposal was in one sense too narrow, because it only dealt with hearsay information relied on by an expert, when in reality an expert might use a wide variety of information not in evidence, e.g., character evidence and subsequent remedial measures. On the other hand, the proposal was too broad, because it could permit dubious hearsay to be considered for its truth.

The Committee considered and tentatively approved the changes to the text of the Rule suggested by the Style Subcommittee of the Standing Committee. These changes would make the language of the Rule more direct and concise. The Committee also tentatively agreed to a stylistic change that would clarify that the Rule covers all information not in evidence that is relied upon by an expert.

The Committee tentatively agreed to add language to the Committee Note that would indicate that the proponent of the expert might be permitted to disclose the information not in evidence relied on by the expert, if the opponent opens the door by attacking the expert's basis.

Finally, the Committee considered and rejected a proposal that the Committee Note be amended to add a laundry list of factors that a trial court might use in assessing the probative value and prejudicial effect of information not in evidence that is relied upon by an expert. The Committee agreed that these matters should be left to the discretion of the trial judge.

Rule 902

The Chair suggested that a stylistic change to proposed Rules 902(11) and 902(12) might be considered in order to provide for a more consistent use of the terms "certification" and "declaration." The Committee tentatively agreed to a stylistic change in each subdivision requiring that the qualified witness make a "written declaration of the custodian thereof or another qualified person certifying that the record" meets the requirements of the Rule. The Committee also tentatively agreed to a stylistic change that would replace a pronoun with a more definite term. Finally, the Committee tentatively agreed to add to the Committee Note a reference to the statute governing declarations filed in a federal court.

The Committee rejected a suggestion from a member of the public that the reference to admissibility under Rule 803(6) be deleted from the proposed amendment to Rule 902. The sense of the Committee was that records offered as self-authenticating under proposed Rules 902(11) and (12) would have to meet the admissibility requirements of Rule 803(6).

Rule 609

Evidence Rule 609 provides that certain convictions are admissible to impeach the character of a witness if a balancing test is met (subdivision (a)(1)), and that other convictions are automatically admissible (subdivision (a)(2)). A public comment was received suggesting that the use of the word "and" between these subdivisions was misleading; the argument was that the

use of the word "and" implies that a conviction must meet the requirements of both subdivisions to be admissible, when in fact the subdivisions provide independent paths to admissibility.

The Committee considered this comment and determined that it was not necessary to amend Rule 609. The use of the word "and" clearly indicates that the provisions are independent rather than related—i.e., that both subdivisions provide for admissibility of convictions if their requirements are met.

Rule 1101

At the April 1998 meeting, the Reporter was directed to prepare a memorandum describing the types of actions in which the Federal Rules do not apply. Then the Committee would consider whether it would be appropriate to amend Rule 1101 to either exclude certain actions from or include certain actions within the rubric of the Evidence Rules.

The Reporter submitted a memorandum indicating that there are several types of actions in which the courts have found the Evidence Rules inapplicable, even though the actions are not specifically excluded under Rule 1101. For example, the Evidence Rules are not applicable in suppression hearings, even though Rule 1101 does not specifically exempt them.

After considering the Reporter's memorandum, the Committee concluded that while Rule 1101 is not comprehensive, there is no need to amend it; the courts have had no problem in exempting certain actions from the Evidence Rules where the nature of the action warrants it. The Committee also concluded that it would not be appropriate to amend the Rule to apply the Evidence Rules to any actions that are currently exempted by Rule 1101. For example, it makes no sense to extend the Evidence Rules to grand jury proceedings, which are *ex parte* and necessarily less rigid than a trial court proceeding.

Privileges

The Committee once again discussed whether it should attempt to propose a codification of the privileges. The issue was considered again in light of Congressional activity. Congress recently passed a tax preparer privilege, and there are bills pending in Congress that would establish a parent-child privilege, a secret service privilege, and others.

Some Committee members expressed concern that recommending a set of privilege rules to Congress might spur even further piecemeal Congressional activity. Unlike other Evidence Rules, rules of privilege are not self-executing; they have to be passed by Congress. Other Committee members thought that the Committee might do a useful service in attempting to set forth rules embracing the current common law of privilege, even if those rules are never even submitted to Congress.

The Chair designated Greg Joseph and the Reporter to consider whether a proposed codification of the privileges would be a worthwhile project. They will report back to the Committee at the April 1999 meeting.

Rule 902(6)

Evidence Rule 902(6) provides that "[p]rinted materials purporting to be newspapers or periodicals" are self-authenticating. A Committee member pointed out that the Rule may not cover news wire reports that do not subsequently appear in print articles, such as electronic stock market reports. After discussion, the Committee resolved to consider this matter in the future, should another package of amendments to the Evidence Rules be deemed necessary.

Attorney Conduct Rules

Professor Coquillette informed the Committee that an ad hoc committee will soon meet to consider the draft of the attorney conduct rules. The ad hoc committee is composed of members of each of the Advisory Committees, two members of the Standing Committee, Professor Coquillette, and liaisons from the Committees on Federal/State Jurisdiction and Court Administration and Case Management. The ad hoc committee will proceed slowly so as not to get ahead of several developments that will affect the viability of any proposed attorney conduct rules for the federal courts. Among these developments are: the legislation recently passed in Congress that requires federal prosecutors to abide by state ethics rules; the ABA Ethics 2000 project; and the negotiations between the Justice Department and the Conference of Chief Justices concerning the proposed Rule 4.2.

Professor Coquillette expressed his thanks to the Evidence Rules Committee for the substantial work that it has already done on the Attorney Conduct Rules. The Evidence Rules Committee has provided a detailed list of suggestions as to how the proposed Attorney Conduct Rules and commentary can be improved, and these suggestions have been incorporated into the latest working draft of the Rules.

Uniform Rules

Professor Whinery, the Reporter for the Uniform Rules of Evidence Drafting Committee, reported on developments in the Uniform Rules project. The first reading of the working draft occurred this summer at the national meeting of the Uniform Laws Commissioners. The Uniform Rules Committee has generally followed the Federal Rules of Evidence, but Professor Whinery noted that there are some marked differences. For example, Proposed Uniform Rule 702 establishes a presumption of admissibility for expert testimony that passes the *Frye* test, and a presumption of inadmissibility for expert testimony that does not. Then the Rule provides a number of factors that would be relevant to overcoming the presumption one way or another.

Professor Whinery noted that the working relationship that has been established between the Uniform Rules Drafting Committee and the Evidence Rules Committee has been most salutary and will continue in the future.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for April 12th and 13th, 1999, in New York City.

The meeting was adjourned at 5 p.m., Thursday, October 22nd.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

Item 10

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
U.S. COURTHOUSE, ROOM 3108
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, D.C. 20001-2866

JUDGE CAROL BAGLEY AMON
JUDGE PETER W. BOWIE
JUDGE JERRY L. BUCHMEYER
JUDGE GERALD B. COHN
JUDGE JOSEPH A. DiCLERICO
JUDGE DAVID M. EBEL
JUDGE J.L. EDMONDSON
JUDGE DANIEL M. FRIEDMAN
JUDGE JAMES H. JARVIS
JUDGE STEPHEN N. LIMBAUGH
JUDGE DANIEL A. MANION
JUDGE THOMAS N. O'NEILL, JR.
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JUDGE A. RAYMOND RANDOLPH
CHAIRMAN

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September 23, 1998

The Honorable Alicemarie H. Stotler
Chair, Committee on Rules of
Practice and Procedure
United States District Court
United States Courthouse
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Dear Judge Stotler:

I am writing to request the assistance of the Committee on Rules of Practice and Procedure in a project initiated by the Committee on Codes of Conduct to improve the judiciary's system of recusal. The Codes Committee plans to undertake a number of initiatives in this area. One particular initiative is to consider appropriate revisions to the federal rules in order to ensure that judges receive timely and, where necessary, updated information about the corporate interconnections of parties before them. We hope to enlist your assistance in this latter effort.

By way of background, I am enclosing a copy of the Codes Committee's September 1998 report to the Judicial Conference. As the report describes, a series of news articles published in April of this year focused our attention on judges' recusal obligations. The articles addressed two main issues: (1) alleged participation by some judges in cases involving parties in which the judges (or close family members) owned a financial interest; and (2) asserted difficulties in gaining access to judges' financial disclosure reports, which might reveal judges' financial interests in parties

before them. This Committee has significant authority in the first of these areas and has been examining steps that can be taken by the Committee and the judiciary to assist judges in meeting their recusal obligations.

Under Canon 3C(1)(c) of the Code of Conduct for United States Judges and 28 U.S.C. § 455, judges are required to disqualify themselves when they (or certain close relatives) have a financial interest in a party. To meet this obligation, judges must have accurate and complete financial information about the parties before them. The Committee is examining various methods to assist judges in identifying financial interests that necessitate recusal. One important element is ensuring that judges are aware of any corporate interconnections in their financial holdings.

As you know, Rule 26.1 of the Federal Rules of Appellate Procedure requires non-governmental corporate parties to identify their parents and affiliates. There are no corresponding provisions in the federal rules governing civil, criminal, and bankruptcy proceedings at the trial level. Our Committee has concluded that provisions of this nature could be of great benefit to judges. We also believe that disclosures made at both the appellate and trial levels may need to be updated periodically, so that judges receive notice of acquisitions or mergers that may present new conflicts of interest concerns.

In our recent report to the Judicial Conference, this Committee proposed to pursue a number of efforts relating to recusal, including revisions to the federal rules that would require corporate parties to disclose their parents and affiliates and also to update their affiliations periodically. The Committee further proposed to coordinate with the Rules Committee in this effort. We are seeking the assistance of your Committee to this end. We ask that you review Appellate Rule 26.1 and consider extending its applicability to federal civil, criminal, and bankruptcy proceedings. We also ask that you consider whether and how to require corporate parties to file updated statements reflecting any changes in corporate relationships that may result in new conflicts of interest.

Should you have any questions about these issues, please don't hesitate to call me or my successor as chairman of the Committee (effective October 1, 1998), the Honorable Carol Bagley Amon of the Eastern District of New York. Also, Marilyn Holmes, Counsel to the Codes Committee, has discussed these issues with Peter McCabe, Secretary to the Rules Committee, and I expect they will continue

to work together on this project. Thank you for your assistance in this important area.

Sincerely yours,

A. Raymond Randolph
Chairman

Enclosure

cc: Honorable Carol Bagley Amon
Peter G. McCabe
Marilyn J. Holmes

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE

ON CODES OF CONDUCT

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

The Committee on Codes of Conduct met from July 9 to 11, 1998. All members were present except Judge Daniel M. Friedman, who could not attend for personal reasons. The Administrative Office was represented by Marilyn J. Holmes, Associate General Counsel, and Jeffrey N. Barr, Assistant General Counsel.

REVISIONS TO FEDERAL PUBLIC DEFENDER EMPLOYEES CODE

Earlier this year, the Committee received an inquiry from a federal public defender seeking advice about the permissibility of accepting the voluntary services of an attorney on paid sabbatical from a law firm in the defender's district. The Committee responded that Canon 6 of the Code of Conduct for Federal Public Defender Employees did not allow this arrangement. Canon 6 provides:

> [a] defender 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.

While considering this inquiry, the Committee learned that similar volunteer arrangements are permitted in U.S. attorneys' offices. The executive branch provisions corresponding to

The Chairman asked Committee Counsel to review all of the advisory opinions in order to identify and revise the citations of any opinions that have been withdrawn or modified. After this final review, the Committee expects the revised opinions to be published in the Guide this fall.

JUDGES' RECUSAL OBLIGATIONS

A series of news articles published this spring focused the attention of the judiciary on judges' recusal obligations. The articles addressed two main issues: (1) alleged participation by some judges in cases involving parties in which the judges (or close family members) owned a financial interest; and (2) asserted difficulties in gaining access to judges' financial disclosure reports, which might reveal judges' financial interests in parties before them. The Committee on Codes of Conduct has significant authority in the first of these areas and has been examining steps that can be taken by the Committee and the judiciary to assist judges in meeting their recusal obligations. Judge Wm. Terrell Hodges, Chair of the Judicial Conference Executive Committee, asked that this subject be placed on the agenda for the Codes Committee's July 1998 meeting. The Committee on Financial Disclosure plans to focus on the second issue at its August 1998 meeting.

Canon 3C(1)(c) of the Code of Conduct for United States Judges requires judges to disqualify themselves when "the judge knows that . . . the judge or the judge's spouse or minor child residing in the household, has a financial interest in the subject matter in controversy or in a party to the proceeding." Nearly identical language appears in the federal recusal statute, 28 U.S.C. § 455(b)(4). Each judge bears the responsibility of ensuring his or her compliance with these financial conflict of interest rules. In order to fulfill their recusal obligations, judges must be knowledgeable about their ethical responsibilities and they must

have accurate and complete financial information. During the last two years, the judiciary has intensified its efforts to provide judges with ethics education, including training that focuses on recusal and conflicts of interest considerations. The following informational materials have been disseminated:

- the Code of Conduct for United States Judges, published in pamphlet form and distributed to all judges (March 1997);
- a memorandum from the Administrative Office alerting judges about critical news articles on the subject of recusal and recommending that all judges review their screening mechanisms for financial conflicts of interest, sent to all judges (February 27, 1998);
- an urgent memorandum from the chairs of the Committees on Codes of Conduct and Financial Disclosure advising judges to develop recusal lists and offering suggestions about managing financial interests and avoiding conflicts, sent to all judges (May 7, 1998); and
- a series of articles focusing on recusal, including an article suggesting that judges review their recusal obligations when preparing their annual financial disclosure reports, published in the Federal Judges Association In Camera newsletter and distributed to all judges (August 1997, January 1998, May 1998).

The Codes of Conduct Committee has also undertaken the following educational efforts:

- the Chairman delivered speeches and answered questions at the 7th Circuit Judicial Conference (October 1997); the Federal Judicial Center-sponsored 4th Circuit Judges Workshop (March 1998); and the 11th Circuit Judges Workshop (April 1998), regarding the ethical responsibilities of federal judges, including their recusal obligations;
- representatives of the Codes of Conduct Committee appeared at the Chief District Judges Conference (May 1998) to review judges' recusal obligations and to answer questions about financial interests;
- a segment on ethics was added to the FJC's Washington, D.C., orientation seminars for new district judges, beginning with the June 1998 session; this supplements the ethics videotapes used at regional video orientations, which were updated in 1997;

- a segment on ethics was added to the FJC's three national workshops for bankruptcy judges (April, August, and November 1998);

- representatives from the Codes Committee made ethics presentations at various judicial meetings and conferences (1997 to 1998); and

- judicial nominees continue to be briefed by Committee Counsel, following their confirmation hearings in Washington, D.C., about their recusal obligations and any questions pertaining to their financial interests.

At its July 1998 meeting, the Committee reviewed the foregoing activities and determined to continue and intensify the Committee's efforts to help judges understand their ethical duties, especially regarding financial conflicts of interest. Recent experience suggests that the distinctions between mandatory and waivable recusal situations have not been consistently applied by all judges; some judges may not regularly update the financial information they use for recusal purposes; and the size, complexity, and fluidity of modern dockets makes it difficult for judges to identify all conflicts on their own.

The Committee examined various methods of addressing these problems. First, the Committee considered whether it could assist judges in identifying financial and other interests that necessitate recusal and in keeping this information current. Second, the Committee sought to determine whether there were more effective ways in which recusal lists could be used to flag cases presenting potential conflicts of interest. Third, the Committee examined ways of enlisting the technical and administrative assistance of others to enable judges to avoid conflicts. The following options were reviewed:

- amending the Federal Rules of Civil Procedure to require corporate parties to disclose all parent companies, subsidiaries and affiliates that have issued shares to the public, as they now must do in the courts of appeals pursuant to Fed. R. App. P. 26.1;

- developing a model or standardized checklist for judges to use in drawing up recusal lists;
- distributing judges' recusal lists to parties or the public;
- using the information in judges' financial disclosure reports to develop judges' recusal lists;
- developing automated systems to compare judges' recusal lists to their court dockets;
- providing judges with better access to lists of attorneys and parties to assist in recusal determinations; and
- modifying the system for new case assignments in some districts to better facilitate recusal determinations.

The Committee discussed the potential benefits and drawbacks of the foregoing options. It was agreed that the Committee should focus its efforts on assisting judges in meeting their recusal responsibilities. The Committee did not believe that any ethical principles required judges to make their recusal lists available to the public at their courthouse. The Committee also believed that the public financial disclosure reports of judges are of limited utility in making recusal determinations. The reports were not designed for recusal purposes and the information they contain does not correspond well with the financial interests that trigger recusal (the reports are both over- and under-inclusive in this regard). Still, the nature of the recusal problems reported in recent news accounts suggests to the Committee that the following efforts would be beneficial:

(1) revising the Federal Rules of Civil Procedure or local district court rules to require corporate parties to disclose their parents and subsidiaries (along the lines of Fed. R. App. P. 26.1) and possibly also to require periodic updating of such affiliations;

(2) continuing efforts to inform and educate judges about their recusal responsibilities, including periodic reminders encouraging judges to create and

update recusal lists (*see* the section on Ethics Training Initiatives, set later in this report);

(3) developing a model or standardized checklist to be distributed to all judges for use in drawing up recusal lists, including advice about integrating relevant information from the judges' financial disclosure reports;

(4) developing automated systems, including software programs, budget and staff permitting, for use in chambers and/or clerks' offices to compare judges' recusal lists to their court dockets; and

(5) adjusting the system for new case assignments in some districts to better facilitate recusal determinations by ensuring that judges are not asked to enter even routine scheduling orders before recusal comparisons are completed.

The Committee agreed to take responsibility for the educational efforts and the model checklist described in items (2) and (3) above. In addition, the Codes Committee agreed to coordinate with other interested Judicial Conference Committees in pursuit of the efforts described in items (1), (4), and (5). Specifically, the Committee proposes to coordinate with the Rules Committee on possible inclusion of a corporate disclosure requirement in the federal rules (item (1)); with the Committees on Automation and Technology and Court Administration and Case Management on development of automated comparison systems (item (4)); and with the Committee on Court Administration and Case Management on any necessary alteration of case assignment systems in some districts (item (5)).

JUDGES' PARTICIPATION IN PRIVATE SEMINARS

At recent oversight hearings before the Subcommittee on Courts and Intellectual Property of the Judiciary Committee of the House of Representatives some questions were asked about judges attending seminars funded by private entities. This subject had been raised in a Washington Post article, picked up by other papers, and in oral and written congressional inquiries. The Post article focused in particular on judges attending private seminars run by

BACKGROUND INFORMATION
REGARDING
PROMULGATION OF ORIGINAL APPELLATE RULE 26.1

Rule 26.1. Corporate Disclosure Statement	Rule 26.1. Corporate Disclosure Statement
Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.	(a) **Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock. (b) **Time for Filing.** A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. (c) **Number of Copies.** If the statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

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

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

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

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation,

the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

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

Subdivision (b). The language requiring inclusion of the disclosure statement in a party's principal brief is moved to this subdivision because it deals with the time for filing the statement.

Minutes of the Advisory Committee
Federal Rules of Appellate Procedure
April 27, 1988

Present were the Honorable Jon O. Newman, Chairman, and members Honorable Myron H. Bright, Honorable Peter T. Fay and Honorable E. Grady Jolly. James M. Spears, Esquire, Deputy Assistant Attorney General, attended on behalf of Solicitor General Charles Fried. Honorable Pierce Lively and Professor Charles A. Wright attended as liaisons from the Judicial Conference Standing Committee on Rules of Practice and Procedure. Professor Carol Mooney, Reporter, and Mr. William Eldrige of the Federal Judicial Center, were also in attendance.

Chairman Newman called the meeting to order at 9:00 a.m.

Organizational matters

Judge Newman began the meeting by addressing the following questions concerning organization and composition of the Committee:

1. Professor Rex Lee's term expires in October. Although the Chief Justice appoints members of the Committee, the Committee may suggest names of persons who might serve as practitioner representatives on the Committee. Judge Newman thinks it may be appropriate to have two members of the private bar rather than only one.

2. Clerks Thomas F. Strubbe of the Seventh Circuit and Robert D. St. Vrain of the Eighth Circuit wrote to Judge Newman concerning the clerks' opportunity to have input into the work of the Committee. Although both Judge Ripple, when he was Reporter to the Committee, and Carol Mooney, in her capacity as Reporter, have attended the clerks' meetings and have served as liaisons between the clerks and the Committee, Judge Newman suggested having the chairman of the clerk's Committee on the Federal Rules of Appellate Procedure attend the Advisory Committee meeting as an observer but not as a voting member. He observed that the presence of the clerks is at least as compelling as that of Congressional staff members. The Committee was in agreement.

3. With regard to the location of the next meeting, Judge Newman suggested that the Committee avoid esoteric locations and stated that given the convenience of the office space and support available in Washington the next meeting probably would be in Washington. The Committee was in agreement.

4. Judge Newman also expressed the opinion that a certain amount of the Committee's work could be conducted by mail; for example, tying up loose ends on an item might be handled by mail rather than waiting until the next meeting. The Committee concurred and also agreed that it might not be necessary to meet every six months.

Bankruptcy Rule

The first substantive matter addressed was the new bankruptcy rule - F.R.A.P. 6 - docket number 86-12. The reporter stated that the committee had approved the new rule at its last meeting and had sent the rule to the Bankruptcy Advisory Committee for its approval. The reporter also stated that the Bankruptcy Committee was scheduled to consider the rule at its May, 1988, meeting. Once the rule is approved by the Bankruptcy Committee, we will send it on to the Standing Committee.

Certificate of Interest

The next item considered was docket number 86-9 concerning a party's disclosure of its corporate affiliates so a judge can ascertain whether he or she has any interests in any of the party's related entities which would disqualify the judge from hearing the appeal. The Committee approved a rule at the last meeting but following the meeting Chief Justice McKusick offered suggestions for further amendment. Therefore, the Committee had before it Justice McKusick's suggestions.

Before discussing Justice McKusick's suggestions however, the Committee reviewed the development of this rule and the reason for proposing a national rule. The original request for development of a national rule came from Otis M. Smith, General Counsel of the General Motors Corporation. Mr. Smith cited two reasons for his request: first, the fact that the local rules in the circuits vary significantly causes inconvenience for those involved in a national practice; second, Mr. Smith stated that some of the rules are unnecessarily broad, for example some rules require disclosure of all of a corporation's subsidiaries which includes wholly-owned subsidiaries. Prior to its last meeting the Committee approved and circulated a draft rule to the circuits. Ten circuits responded to the draft rule. Five circuits approved of the draft, although three circuits suggested amendments. Five circuits disapproved. The principal objection to the circulated draft was the breadth of disclosure required. In light of the response to the circulated draft, the rule approved by the Committee at its last meeting was more narrowly drawn. The Committee decided that the rule it approved represented a minimum requirement which all circuits should meet, and if the circuits want to require additional information they may do so.

Since the composition of the Committee changed significantly between the last meeting and this one, Judge Newman first asked the Committee whether it was in agreement with the predecessor Committee that a national rule is desirable even though some of the circuits may continue to have local rules which require more disclosure than the FRAP rule. The Committee generally agreed that a uniform rule would be desirable. A uniform rule would allow corporations to develop a standard disclosure statement.

Although corporations would still need to check local rules to ascertain if additional information is needed, at least there would be a standard baseline procedure. Also, the Committee thought that the promulgation by the Supreme Court of a streamlined rule might prompt the circuits to winnow their own rules.

The Committee then turned to the precise language of the rule. The rule approved at the last meeting and as further amended by Chief Justice McKusick reads as follows:

Any corporate party to a civil or bankruptcy case or agency review proceeding and any corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of such corporation.

The Committee generally approved Justice McKusick's suggestions but had some questions concerning the content of the disclosure. Judge Newman questioned the need to disclose subsidiaries. He noted that if U.S. Steel is a party and owns 10% of a corporation and a judge owns two shares of that subsidiary, the judge does not have a financial interest that would be substantially affected by the outcome of the appeal. However, Judge Newman noted that most circuits require disclosure of subsidiaries, other than wholly owned subsidiaries, and that it is probably better for the Committee to go along with the approach adopted by most circuits.

Mr. Spear inquired whether government entities should be excluded from the rule. Mr. Spear noted that in earlier versions of the draft rule governmental parties were excluded and that the local rules in a number of circuits exclude governmental entities. The Committee concluded that there could not be any private shareholders of subsidiaries of a governmental body and thus the conflict of interest problem could not arise. Therefore, the Committee decided to insert the words "non-governmental" before the word "corporate" in both lines one and two.

Judge Bright was concerned that the rule does not require disclosure of partnership interests and of other non-corporate disqualifying interests under §455. Although §455 clearly states that a variety of non-corporate interests may require a judge to recuse himself or herself, the Committee noted that the Circuits opposed the originally circulated rule because of the breadth of disclosure required. The Committee felt that a narrower rule would be needed in order for the rule to gain acceptance. Of course some circuits may require additional disclosure and the uniformity hoped to be gained from a national rule could be eroded. However, the Committee felt it unwise to allow the most elaborate local rule to set the pattern. The Committee also concluded that the FRAP rule should set the minimum standard for disclosure.

Justice McKusick had suggested adding one more sentence stating: "A negative report is also due." The Committee decided not to include that sentence. The Committee felt that people should not be required to file papers that say nothing.

Professor Wright also urged the insertion of a comma in line 5 after the close of the parentheses. The Committee agreed.

The Committee then considered the timing of the disclosure statement. The suggested language, appearing in the memorandum at page eight, was as follows:

> The statement shall be filed with a party's main brief or upon filing a motion in the court of appeals, whichever first occurs. The statement shall be included in front of the table of contents in a party's main brief even if the statement was previously filed with a motion.

Judge Newman noted that some circuits may wish to have the information come sooner. He suggested inserting the following language on line 9 after the word occurs: "unless required by local rule to be filed earlier". Judge Newman pointed out that in general a FRAP rule can in effect be amended by a local rule which imposes greater requirements, and he did not want to suggest that a circuit cannot require more absent an express statement of authorization to do so. However, the draft language says a statement shall be filed upon the occurrence of A or B whichever first occurs. That language could support an argument that a circuit is not free to say that a statement must be filed earlier. Judge Newman compared the timing language with the language in the first part of the rule which says a party shall file a statement; that language does not imply that the party shall file only a statement. In contrast, the timing language says the statement shall be filed upon the first of two occurrences and may imply that a circuit cannot require the statement to be filed earlier. The Committee discussed the desirability of establishing a uniform time for filing the statement and the desirability of setting that time as early as possible. The Committee considered various options but ultimately decided that because of variation in local practice it would be difficult to set an earlier uniform time for the filing of the appellee's statement. The Committee decided to use the first sentence of the draft language with the amendment suggested by Judge Newman. The Committee also decided to strike the last three words of the last sentence. The Committee considered striking the last sentence entirely because some circuits may require the statement prior to the filing of the brief. However, the Committee decided that inclusion of the statement in the briefs acts as a fail safe. The judges related that upon occasion they have caught a conflict at the last minute and that inclusion of the statement in a party's main brief may prove useful.

The rule as approved by the Committee reads as follows:

> Any non-governmental party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of such corporation. The statement shall be filed with a party's main brief or upon filing a motion in the court of appeals, whichever first occurs, unless required by local rule to be filed earlier. The statement shall be included in front of the table of contents in a party's main brief even if the statement was previously filed.

Jurisdictional Statement and Standard of Review

The Committee then turned its attention to docket item 86-20. Item 86-20 involves the suggestion that briefs include a jurisdictional statement and a statement of the standard of review. At its previous meeting the Committee decided that such statements were desirable and requested that the Reporter prepare language for consideration at this meeting. The Reporter drafted the following rules:

A. The Reporter suggested that the jurisdictional statement be treated as a separate requirement under F.R.A.P. 28(a) and be included as sub-paragraph 28(a)(2) and that the current sub-paragraphs (2) through (5) be renumbered as (3) through (6).

DRAFT RULE 28(A)(2)

> (2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency whose action is the subject of review; (ii) a statement of the basis for jurisdiction in the Court of Appeals with citation to applicable statutory provisions and with reference to relevant filing dates establishing the timeliness of the appeal, (iii) a statement that the judgment or decree appealed from finally disposes of all claims with respect to all parties or, if it does not, a statement that the judgment or decree is properly reviewable on some other basis.

B. The Reporter also suggested that F.R.A.P. 28(b) should be amended. If the jurisdictional statement in the appellant's brief is complete and correct, there would be no need for the appellee to repeat the statement. On the assumption that the F.R.A.P. 28(a) sub-paragraphs would be renumbered as suggested in

Memorandum to the Advisory Committee
on the Federal Appellate Rules

Subj: FRAP Item #86-9

Report: Responses to the Work Draft of a Disclosure of Affiliates Rule and Additional Discussion Drafts

Section 455 of Title 28 of the United States Code defines the circumstances which require a federal judge to disqualify himself or herself from hearing a case. Possession of a financial interest that could be substantially affected by the outcome of the proceeding is such a circumstance. It is not always possible for a judge to determine from the names of the parties to an action whether the judge has such a financial interest. The names of the parties do not always reveal the identities of affiliated organizations which would be affected by the judgment in the case. For example, if a named party is a wholly owned subsidiary, the parent corporation is affected by outcome of the case. Unless the parties are required to disclose the identities of affiliates, a judge who owns stock in the parent corporation may be unaware of the relationship of the named party to the parent corporation and thus unaware of his disqualifying interest. Twelve of the thirteen circuits have local rules requiring parties to disclose the identity of interested persons. (The First Circuit has no rule on point.) The local rules differ in two primary areas: (1) which parties must comply with the rule, and (2) which types of affiliates or interested parties must be

disclosed. Copies of the local rules are attached to this memorandum.

For several years the FRAP Committee has been working to develop a national rule on divulging the identity of persons who are interested in the outcome of an appeal. At its April 1985 meeting, the committee considered and amended a draft rule which represented a distillation of the local rules then in force in the various circuits. The committee voted to circulate the amended draft to all of the courts of appeals and to ask each court for its reaction. The draft was circulated in December, 1985. A copy of the draft rule is attached to this memorandum.

Ten circuits responded to the draft rule; copies of the responses are also attached. Realizing that it is always dangerous to summarize another's statement, but believing that an overview of the reactions would be helpful, I have grouped the responses in four categories as follows:

1. Approve -- both the Eighth and the Eleventh Circuits approve the draft rule.

2. Approve with suggested amendments -- the Fifth, Sixth and Federal Circuits generally approve of the rule but suggest certain amendments:

(a) The Fifth Circuit would

-- not require a certificate in pro se cases where the identity of the parties is obvious from the briefs

-- not require governmental parties to file a certificate

-- apply the rule in agency review proceedings

-- require a certificate to be included in a party's principal brief and with all motions.

(b) The Sixth Circuit suggests

-- a stylistic change reconciling the language of lines three and four of the draft where reference is made to "disclosure statement" and "the certificate"

-- the certificate should be filed at the inception of the case on a form provided by the clerk.

(c) The Federal Circuit has neither bankruptcy nor criminal jurisdiction and thus for its internal purposes it would amend the draft rule to require a certificate of all parties to "an appeal" (rather than of all parties to "a civil or bankruptcy case and all corporate defendants in a criminal case").

3. Disapprove but see need for a national rule -- both the Fourth and the Seventh Circuits believe the draft rule is overly broad and would cause needless burdens for both litigants and courts, yet both are favorably disposed to having a national rule.

4. Disapprove -- the First, Second and Third Circuits all oppose adoption of the draft rule. The First Circuit believes there is no need for a rule which requires judges to go looking for conflicting interests. The Second Circuit believes the draft rule is too broad and the Third Circuit expressesa preference for its own rule.

In short, the responding circuits are equally divided; five of them approve the draft and five disapprove. Yet, two of the circuits which oppose adoption of this particular rule expressly endorse the notion of national rule.

The principal objection to the draft is the breadth of disclosure required. Not surprisingly, all of the circuits which oppose the draft rule have more narrowly drawn local rules, except the First Circuit which has no rule. With some narrowing of the rule, there may develop a consensus upon which to build a national rule. To that end, I have prepared two alternative drafts for discussion.

ALTERNATIVE A

DISCLOSURE OF INTERESTED PERSONS

(a) All parties to a civil or bankruptcy case or agency review proceeding and all corporate defendants in a criminal case shall file a certificate of interest. A negative report is also required.

(b) Whenever a corporation which is a party to an appeal or to a motion or other proceeding relating to an appeal, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation which is a party shall advise the Clerk in writing of the identity of the parent corporation or affiliate and the relationship between it and the corporation which is a party to the appeal.

(c) Whenever, by reason of franchise, lease, other profit sharing agreement, insurance or indemnity agreement, a publicly owned corporation, not a party to the appeal, has a financial interest in the outcome of litigation in which another person is a party to an appeal, or to a motion or other proceedings relating to an appeal, counsel for the person who is a party shall advise the Clerk in writing of the identity of the publicly owned corporation and the nature of its financial interest in the outcome of the litigation.

(d) Whenever a trade association is a party to an appeal, or an intervenor, it shall be the responsibility of counsel for the trade association to advise the Clerk in writing of the identity of each publicly owned member of the association.

(e) In addition, the names of all law firms whose partners or associates have appeared for the party in the lower tribunal or are expected to appear for the party in the court of appeals shall be identified in writing delivered to the Clerk.

The first three subdivisions of this rule draw heavily from the local rules in the third, fourth and sixth circuits. To increase the breadth of the rule subdivision (d), dealing with trade associations, was drawn from the fourth circuit rule and subdivision (e), regarding law firms, was drawn from the seventh, tenth, eleventh and federal circuit rules. In short, using the

existing circuit rules as a model, this draft is as broad as it can be, with certain exceptions noted below, without being as broad as the circulated draft.

The trade association provision in subdivision (d), however, is narrower than the parallel provision in the fourth circuit's rule 47. The fourth circuit rule requires counsel for a trade association "to identify each publicly owned member of the association in conformity with Section (a) through (c)." The apparent meaning of the rule is that the certificate must name not only the members of the trade association, but it must also name each member's parent corporation, if any, and other affiliates. Since the membership lists of some trade associations are quite lengthy, such a requirement could be a heavy burden and the interests of corporations affiliated with a member could be quite attenuated. In contrast to the fourth circuit's approach, D.C. Cir. R. 8(c) states that individual members of a trade association need not be listed. Although a list of an association's members can be lengthy, it should not be burdensome to compile and thus subdivision (d) of Alternative A takes a middle of the road approach requiring disclosure of members but not of their affiliates.

The draft rule is also narrower than the seventh and federal circuit's rules in one respect. Both circuits require an amicus curiae to file a disclosure statement. Alternative A does not require an amicus to file a statement since the circulated draft did not include such a requirement and none of the commentators

on the circulated draft were troubled by its absence.

Should the committee believe it appropriate, Alternative A could be narrowed in a variety of ways without departing from its basic approach.

1. Governmental parties could be exempted from compliance with the rule. Most circuits exclude at least some governmental parties from the coverage of their rules. (See local rules for the 2nd, 5th, 6th, 7th, 8th, 9th, 11th and D.C. Circuits.)
2. Subdivision (c) could be limited to require (like 6th Cir. R. 25(c)) disclosure only of corporations having a "substantial" interest in the outcome of the case. Unless the corporation has a substantial interest in the outcome, it is unlikely that the judge's investment in the corporation could be substantially affected, which is the standard for disqualification under §455(b)(4), (5).

ALTERNATIVE B

DISCLOSURE OF AFFILIATES

All corporate parties to a civil or bankruptcy case or agency review proceeding and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. The statement shall certify a complete list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation.

This alternative is the narrowest of the three drafts, yet still not as narrow as the 2nd Cir. R. §0.15 (requiring disclosure only of parent corporations) or 7th Cir. R. 5(b) (requiring disclosure of parent corporations, publicly held companies which own 10% or more of the stock in the party and law firms which have represented the party in the litigation). Alternative B is substantially the same as the disclosure statement required in Sup. Ct. R. 28.1 and similar to D.C. Cir. R. 8(c) and Fed. Cir. R. 8(c).

Alternative Drafts A and B basically require disclosure only of publicly owned corporations which, through an affiliation with a party, have an interest in the outcome of a case on appeal. Section 455 is much broader in scope. For example, if a judge's uncle owns a leasehold interest in property at issue in the litigation, §455 requires the judge to disqualify himself from the case. Yet under either Alternative A or B, the relative's name would not appear on the disclosure statement. When considering either of these alternatives, the committee must balance the burden imposed on a party to an appeal against the need to assist a judge in his efforts to comply with §455. It may be that a judge can realistically be expected to be familiar enough with family holdings to at least recognize those instances in which he should make further inquiry, whereas a judge cannot be expected to know of the interrelationships of corporations.

GUIDE TO JUDICIARY POLICIES AND PROCEDURES

VOLUME II

CODES OF CONDUCT FOR JUDGES AND JUDICIAL EMPLOYEES

November 1993

CHAPTER V.

COMPENDIUM OF SELECTED OPINIONS

Introduction

In 1979, the Committee on Codes of Conduct published Advisory Opinion No. 62, summarizing in a single document the published and unpublished opinions of the Committee as of that date. That opinion provides important guidance, but it should be read with caution because some of the advice contained therein has been superseded or qualified by changes in the Codes of Conduct, the Ethics Reform Act of 1989, and the subsequent published advisory opinions of the Committee. This Compendium contains a summary of selected published and unpublished opinions issued primarily subsequent to Advisory Opinion No. 62. Thus, in addressing an ethical issue, the reader should consult the current Codes of Conduct, the Ethics Reform Act of 1989, and the regulations promulgated thereunder, other relevant statutes such as 28 U.S.C. § 455, the published advisory opinions of this Committee, and this Compendium.

This Compendium contains summaries of the advice given in response to confidential fact-specific inquiries. While these summaries are intended to provide general guidance, the reader is encouraged to consult the Committee or one of its members with respect to any specific factual situation he or she is confronting. Each member of the Committee has a set of the Committee's unpublished opinions and can answer any questions the reader may have regarding a particular one, without, of course, disclosing the identity of the person who solicited the advice. The procedures for obtaining an advisory opinion from the Committee are set forth in the "Introduction" section of each code of conduct in Chapters I and II of this volume.

The Compendium has three Parts. Part One contains opinions interpreting the Code of Conduct for United States Judges, including some opinions interpreting the Codes that cover various judicial employees. Sections 1 through 7 of Part One correspond to Canons 1 through 7 of the Code of Conduct for United States Judges. It should be remembered that an activity which is permissible under a particular section may be subject to one of the more general caveats of the Canons (e.g., appearance of impropriety). Similarly, the Ethics Reform Act of 1989 and the regulations promulgated thereunder by the Judicial Conference impose additional restrictions, in particular with respect to the receipt of gifts or compensation.

Part Two contains opinions interpreting the Ethics Reform Act of 1989 concerning gifts, 5 U.S.C. §§ 7351 and 7353 and the regulations thereunder promulgated by the Judicial Conference. The headings and the chronology of Part Two follow generally that of the gift regulations. Activities that are said to be permissible in Part Two may nevertheless be subject to restriction under the Codes of Conduct.

Part Three contains opinions interpreting the Ethics Reform Act of 1989 concerning outside earned income, honoraria, and outside employment, 5 U.S.C. app., §§ 501-505, and the regulations thereunder promulgated by the Judicial Conference. The headings and chronology of Part Three follow generally that of the outside employment regulations. Activities that are said to be permissible in Part Three may nevertheless be subject to restriction under the Codes of Conduct.

This Compendium may be cited as follows: Compendium § ____ (1997).

at a fixed future date, or earlier at the issuing corporation's option but only upon paying a price which represents a significant capital appreciation.

§ 3.1-5 Convertible Securities

(a) Convertible securities are treated as stock for recusal purposes.

(b) Because depositary shares will automatically convert to common stock on a date certain, they are considered to be convertible debt securities. Therefore, a judge who owns depositary shares issued by a given corporation has a financial interest pursuant to Canon 3C(1)(c), and must recuse in any matter involving that corporation as a real party in interest. Depositary shares are a hybrid type of instrument. They are similar to debt securities since they contain a fixed rate of return until converted, and are automatically converted into common stock at a fixed future date, or earlier at the issuing corporation's option but only upon paying a price which represents a significant capital appreciation.

§ 3.1-6 Financial Interest in Party: Defining "Party"

§ 3.1-6[1] Amicus Curiae

(a) For purposes of recusal decisions on a financial interest, an amicus curiae is not regarded as a party to the litigation. Recusal is required if the interest of the judge could be substantially affected by the outcome of the proceedings or if the judge's impartiality might otherwise reasonably be questioned. Advisory Opinion No. 63.

(b) A judge should recuse from a case when judge's spouse is the executive director of an advocacy organization that has filed an amicus curiae brief before the court, unless the judge can obtain remittal of disqualification.

§ 3.1-6[2] Fiduciary Capacity

(a) A judge who owns stock in a bank is disqualified in litigation in which the bank is a party, even though the bank is acting in a fiduciary capacity in that litigation. Recusal is under Canon 3C(1)(c) and therefore the remittal provisions of Canon 3D are not available.

§ 3.1-6[3] Official Capacity Suits

(a) In some circumstances, an interest or personal relationship which would ordinarily be disqualifying is of no moment when a party is suing or being sued in his or her official capacity only.

(b) Where a judge's spouse is an associate and a partner in the law firm is sued in an official capacity unrelated to the law firm, recusal is not required.

§ 3.1-6[4] Class Actions

➢ Advisory Opinion No. 90 (judges' duty to inquire when relatives may be members of class action).

(a) All members of the class are parties, whether named or unnamed, so long as they have not opted out of the class. Advisory Opinion No. 68.

(b) A judge who is a member of the plaintiff class challenging the applicability of FICA to federal judges need not recuse from other cases to which the United States government or an agency thereof (including the Social Security Administration) is a party.

(c) If a judge or any person within the third degree of relationship remains a member of a class entitled to receive damages as a customer of a public utility, the judge should recuse. However, if the judge and such persons within the third degree of relationship opt out of the class, the judge is not required to recuse merely because of the judge's status as a utility customer, notwithstanding the possible beneficial effect on future utility bills, unless the savings as a customer might reasonably be considered to be substantial. In this case, 60 cents per month as of 1984 plus normal increases is not considered substantial. See Advisory Opinion Nos. 62, 78.

(d) A judge's inclusion as a class member in a Rule 23(b)(2) class action seeking only injunctive and declaratory relief, in which a substantial segment of the general public are also members, does not require recusal, unless the judge has an interest in the action unique from that of members of the general public included in the class.

(e) A judge who opts out of the class need not recuse from a class action. Nor must the judge recuse where the court is a member of the class but any recovery will go to the general treasury and not the court.

§ 3.1-6[5] Bankruptcy Proceedings

(a) For purposes of recusal decisions in bankruptcy proceedings, the following are deemed to be parties: the debtor, all members of a creditors committee, and all active participants in the proceeding; but merely being a scheduled creditor, or voting on a reorganization plan, does not suffice to constitute an entity a "party." Bankruptcy judges are expected to keep informed as to their investments in firms which are active participants in the proceeding, but ordinarily need not familiarize themselves with the scheduled creditors.

(b) In advice to rules committee of circuit court with respect to disclosure of interested parties, in context of bankruptcy appeals, appellate judges should know the identity of (1) the debtor; (2) the members of the creditor's committee; and (3) any entity which is an active participant in the proceeding before the judge. In addition, it was suggested that the rules

committee might consider requiring a fourth disclosure, any other entity known to declarant whose stock or equity value could be substantially affected by the outcome of the proceeding.

(c) Assistant United States Trustee appointed to bankruptcy judgeship required to recuse in all cases in which the Trustee's Office made an appearance or filed a disputed motion. Recusal not required for perfunctory administrative matters.

(d) Judge need recuse only in cases in which U. S. Trustee spouse or spouse's subordinates are actually litigating an appeal; judge need not recuse in cases in which the spouse has exercised supervisory control in a clerical manner, such as sending out pre-printed guidelines for debtors, but may need to recuse in cases in which the spouse has exercised supervisory discretionary control.

§ 3.1-6[6] Trade Associations

(a) The fact that a judge owns stock in or is doing business with a member of a trade association does not disqualify the judge from hearing a case in which the trade association is a party. Advisory Opinion No. 49.

(a-1) A judge is not required to recuse in a case involving the American Bar Association or some other open-membership bar association of which the judge is a member. Advisory Opinion No. 52.

(b) A union pension fund is not to be considered as a party to litigation merely because one of the constituent unions is a party.

§ 3.1-6[7] Criminal Victims

(a) If the sentencing judge owns stock or has any financial interest in a corporation which would be entitled to restitution from the defendant, the judge must recuse.

(b) Judge should recuse from bank robbery case where judge's spouse owns (or is beneficiary of trust that owns) stock in bank that may be entitled to restitution.

§ 3.1-7 Other Interests Which May Be Substantially Affected by the Outcome of Litigation

(a) A judge owning stock in a corporation named as a co-conspirator but which is not a party in the pending anti-trust case should recuse if the judge's interest could be substantially affected by the decision.

(a-1) A judge owning stock in a company that is not a party but produces the product that is the subject of litigation should recuse where the judge's award could

influence the initiation of subsequent claims against the company or otherwise affect the value of the company's stock; judge has "a financial interest in the subject matter in controversy . . . or any other interest that could be affected substantially by the outcome of the proceeding." Canon 3C(1)(c).

(b) A judge whose spouse owns shares of stock in a corporation is not disqualified in litigation in which the political action committee of that corporation is one of 11 such PACs whose election activities are being challenged.

(c) A judge who is a member of the American Bar Association but who is not insured under the American Bar Association endowment policy is not disqualified in litigation brought by the endowment to obtain a tax refund.

(d) A judge whose investment portfolio consists mainly of tax-free municipal bonds should recuse from litigation concerning the tax-exempt status of such bonds.

(e) The fact that a judge or a judge's spouse has an account with or owes money to a bank does not necessitate recusal in cases in which the bank is a party, absent some special circumstances (e.g., a pending, dubious, loan application; unusually favorable terms, loan in default, etc.).

(f) A judge who is a guarantor of the notes of a corporation should recuse in any case in which the corporation is a party.

(g) [deleted]

(h) A judge owning stock in a financial corporation which is not itself a party to bankruptcy proceedings need not recuse merely because it is owed money by the debtor or has other interests in the proceeding, unless the outcome of the proceeding could substantially affect the value of the judge's investment.

(i), (i-1) and (i-2) [deleted]

(j) A judge whose son is employed by a union pension fund need not recuse from a case in which one of the constituent unions, but not the pension fund, is a party.

(k) A judge who is a member of the plaintiff class challenging the applicability of FICA to federal judges need not recuse from other cases to which the United States government or an agency thereof (including the Social Security Administration) is a party.

(l) A judge has no financial interest in stock owned by judge's parent and should recuse only if judge knows that the parent's stock could be substantially affected by the outcome. Canon 3C(1)(d)(iii).

(l-1) Judge should recuse if he or she knows that a parent's interest in a trust owning stock in companies involved in a proceeding before the judge could be substantially affected by the outcome of the proceeding. Canon 3C(1)(d)(iii).

(m) A judge whose spouse owns AT&T stock need not recuse in cases involving AT&T ERISA plans where neither AT&T nor AT&T Information Systems is a named party or real party in interest (e.g., responsible for relief requested).

(n) A judge who owns a fractional mineral royalty interest does not have a "financial interest" in the purchaser of those minerals, and need not recuse when the purchaser is a party, as long as the case could not "substantially affect" the value of the judge's interest. Where the royalty interest is small, the judge's impartiality cannot reasonably be questioned. However, a judge who holds the executory rights to lease minerals for production must recuse subject to remittal when the lessee is a party, because the judge's impartiality could reasonably be questioned.

§ 3.1-7[1] Policyholder of Insurance; Utility Ratepayer; Taxpayer

(a) A judge who holds a life insurance policy need not recuse when the mutual insurance company appears unless the policy could be substantially affected by the outcome.

(b) A judge to whom an insurance policy has been issued by a mutual insurance company or other insurance company need not, for that reason alone, recuse in cases to which the insurance company is a party.

(b-1) A judge holding a Blue Cross policy need not for that reason alone recuse in an antitrust case in which a local Blue Cross organization is a party. Advisory Opinion Nos. 26 and 45.

(b-2) A judge insured under a Government-Wide Indemnity Plan written by Aetna Company need not for that reason alone recuse in a case in which Aetna is a party. Advisory Opinion No. 45.

(c) If a judge or any person within the third degree of relationship remains a member of a class entitled to receive damages as a customer of a public utility, the judge should recuse. However, if the judge and such persons within the third degree of relationship opt out of the class, the judge is not required to recuse merely because of the judge's status as a utility customer, notwithstanding the possible beneficial effect on future utility bills, unless the savings as a customer might reasonably be considered to be substantial. In this case, 60 cents per month as of 1984 plus normal increases is not considered substantial. See Advisory Opinion No. 78.

(d) A judge who holds a VA life insurance policy is not thereby disqualified from cases involving the VA or other federal agencies or instrumentalities.

Item 11

BOSTON COLLEGE

J. DONALD MONAN, S.J. PROFESSOR
LAW SCHOOL

TO: Committee on Rules of Practice and Procedure

FROM: Professor Daniel R. Coquillette, Reporter

DATE: December 6, 1998

RE: Special Committee on Rules Governing Attorney Conduct

After a very useful discussion at the Advisory Committee level, and some excellent suggestions from the other Reporters, the Special Committee has been designated. The Advisory Committee members are:

1. Appellate Rules Committee— The Honorable Samuel A. Alito and the Honorable John Charles Thomas

2. Bankruptcy Rules Committee— Neal Batson, Esq. and Gerald K. Smith, Esq.

3. Civil Rules Committee— The Honorable Lee H. Rosenthal and Myles V. Lynk, Esq.

4. Criminal Rules Committee— The Honorable John M. Roll and Darryl W. Jackson, Esq.

5. Evidence Rules Committee— The Honorable Jerry E. Smith and Professor Daniel J. Capra

The Honorable E. Norman Veasey and Professor Geoffrey C. Hazard, Jr. were nominated by Judge Stotler to represent the Standing Committee. The Department of Justice, the Federal-State Committee, and the Committee on Court Administration and Case Management are being invited to name representatives.

At the strong suggestion of all the Advisory Committees, the timetable of meetings has been delayed until Spring of 1999, with a tentative meeting set for late April or early May 1999 in Washington, D.C. This for two reasons. First, it is strongly believed that the Special Committee should build on the work of the

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ABA "Ethics 2000 Project," and should certainly not pre-empt that project. Second, the Bankruptcy Advisory Committee has requested the Federal Judicial Center to conduct an extensive empirical study of attorney conduct rules and procedures in the bankruptcy courts. Both projects should at least be well under way by April, 1999.

As Reporter, I have been closely following the ABA "Ethics 2000" Project and the Federal Judicial Center Bankruptcy Study. I have also been invited to speak to a number of interested groups, including the ABA 24th National Conference on Professional Responsibility, the Harvard Law School Faculty Workshop, and the Association Bar of the City of New York. See, for example, R.A. Shepherd, "Lawyer Ethics— One Size Fits All?", *A.B.A. Journal* (July, 1998), 28-29. Needless to say, I have adopted careful neutrality as to the various options and am continuing to gather important information and perspectives. Additional information and materials will be circulated to the members of the Special Committee well in advance of the April 26-27, 1999 meeting.

Item 12-15

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JUDGE WM. TERRELL HODGES
Chairman, Executive Committee

TELEPHONE:
(904) 232-1852

February 25, 1998

Honorable Alicemarie H. Stotler
United States District Court
United States Courthouse
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Dear Judge Stotler:

From time to time the Committee on Rules of Practice and Procedure has recommended that the terms of its members be extended because the Rules Enabling Act process is such a lengthy one. The Executive Committee is sympathetic to that concern and has recommended that the Chief Justice consider longer terms for members of the Standing and Advisory Rules Committees.

In discussions at the Executive Committee's February 1998 meeting, the question was raised whether the Rules Enabling Act time frames could be shortened without doing violence to the rulemaking process. The Executive Committee would appreciate the Rules Committee's consideration of this issue. If appropriate, a legislative proposal could then be made to the Judicial Conference.

I look forward to seeing you at the Judicial Conference session in March.

Sincerely,

Jerry

Wm. Terrell Hodges

bc: Mr. Peter McCabe
Mr. John Rabiej

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

June 4, 1998

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Shortening the Rulemaking Process*

At their respective spring meetings the advisory committees considered the request of Judge Wm. Terrell Hodges, chair of the Executive Committee, to explore shortening the rulemaking process. A general consensus developed that supported shortening the process, but only if the present vetting procedures would not be significantly undercut. No specific suggestions were made. The advisory committees considered the question only on a preliminary basis, and the full benefits of the present vetting procedures were not debated at length. Nonetheless, several members commented that the process contained some "dead time" that should be eliminated.

There are many conceivable ways to shorten the rulemaking process. I have attached time charts illustrating the operation of the suggestions that have been mentioned most often in the past. The charts show how each scenario would operate and how much time each would take. These charts may be useful to the committee as a starting point for further discussions.

The time charts are relatively rough. For example, sufficient time must be reserved for the meeting of five advisory committees within a short time period and adequate time might not have been set aside in the charts in each instance. Particular charts might need to be refined once the committee begins to focus its considerations on one or several of the scenarios sketched out in this memorandum.

Charts "A" through "H" are based on the present December 1 statutory effective date. To make some of these options work, however, amendments would have to be forwarded by the Judicial Conference at its March, instead of its September, session. Transmitting amendments at the March session, however, would impose a workload burden on the Supreme Court. One way to alleviate such problems might be to delay the statutory effective date of the amendments. Although a statutory change could be sought to delay the Supreme Court's transmission to Congress, for example, from May 1 to June 1, the Supreme Court clerk anticipated problems with the suggestion because of the Court's heavy workload burden during these months. For scheduling purposes, the fall of a year is much better for the Court. Accordingly, Charts "I" and "J" include some of the options contained in the earlier scenarios but use an effective date of August 15. Under these circumstances, the Court would transmit the rules to Congress in

January after receiving them from the Conference after its September session. Statutory changes would be necessary.

The ten charts include the following:

1. Scenario A: Present Practice (32 to 38 Months)

2. Scenario B: Two 6-Month Publication Periods (26 to 32 Months)

3. Scenario C: No Formal Standing Committee Approval for Publication[1]/One Publication Period (26 to 32 Months)

4. Scenario D: No Formal Standing Committee Approval for Publication/Two Publication Periods (21 to 26 Months)

5. Scenario E: Eliminate Supreme Court Approval/Two Publication Periods (26 to 32 Months)

6. Scenario F: Eliminate Supreme Court Approval/No Formal Standing Committee Approval for Publication/Two Publication Periods (21 to 24 Months)

7. Scenario G: 3-Month Publication Periods/Two Publication Periods (21 to 26 Months)

8. Scenario H: 3-Month Publication Periods/No Formal Standing Committee Approval for Publication/Two Publication Periods (21 to 27 Months)

9. Scenario I: Effective Date Scheduled for August 15/No Formal Standing Committee Approval for Publication/Two 5-Month Publication Periods (24 to 29 Months)

10. Scenario J: Effective Date Scheduled for August 15/Two 5-Month Publication Periods (29 to 35 Months)

For your information, I have also attached a copy of the current "Procedures Governing the Rulemaking Process" and an excerpt from the Standing Committee's "Self-Study Report" dealing with the duration of the rulemaking process.

John K. Rabiej

Attachments

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[1] Alternatively, the Standing Committee could be polled electronically or by fax immediately after the advisory committee meets. The committee could exercise a veto power.

RECENT EXAMPLE OF CONGRESSIONAL ACTION AIMED AT ACCELERATING RULEMAKING PROCESS

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Congressional Record article 41 of 50 *Full Display* - 1,362 bytes.[Help]

BUMPERS (AND HATCH) AMENDMENT NO. 3262 (Senate - July 22, 1998)

[Page: S8800]

Mr. BUMPERS (for himself and Mr. **Hatch**) proposed an amendment to the bill, S. 2260, supra; as follows:

At the appropriate place add the following:

`SEC. . REPORT BY THE JUDICIAL CONFERENCE.

`(a) Not later than September 1, 1999, the Judicial Conference of the United States shall prepare and submit to the Committees on Appropriations of the Senate and of the House of Representatives, and to the Committees on the Judiciary of the Senate and the House of Representatives, a report evaluating whether an amendment to Rule 6 of the Federal Rules of Criminal Procedure permitting the presence in the grand jury room of counsel for a witness who is testifying before the grand jury would further the interests of justice and law enforcement.

(b) In preparing the report referred to in paragraph (a) of this section the Judicial Conference shall consider the views of the Department of Justice, the organized Bar, the academic legal community, and other interested parties.

(c) Nothing in this section shall require the Judicial Conference to submit recommendations to the Congress in accordance with the Rules Enabling Act, nor prohibit the Conference from doing so.

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

October 2, 1998
Via Facsimile

MEMORANDUM TO JUDGE W. EUGENE DAVIS

SUBJECT: *Grand Jury Legislation*

AO staff has been working with Hill Staff to remove the provision in the Judiciary's Appropriations Act that would require the Judicial Conference to conduct a study on permitting counsel to accompany a witness and attend a grand jury session. The staff was working on compromise language in the congressional conference report. The original draft provided that:

> The conference agreement does not include a provision included in the Senate bill that would require the Judicial Conference to study whether Criminal Rule 6 should be amended to allow a witness appearing before a grand jury to have counsel present. The conferees understand that the Judicial Conference plans to address this specific issue at the October 1998 meeting of its Advisory Committee on Criminal Rules. *The conferees further understand that the Advisory Committee will consider the views of the organized bar, the Department of Justice, and leading academics and will proceed in accordance with established procedure consistent with the Rules Enabling Act.* (italics added)

After some heated debate, I succeeded in changing the last sentence to read: "The conferees further understand that the Advisory Committee has received the views of the American Bar Association, the National Association of Criminal Defense Lawyers, and the Department of Justice on this issue, and will proceed in accordance with established procedure consistent with the Rules Enabling Act." The proposed conference report language is now being discussed with Hill staff.

Proponents of the amendment want to ensure that the Criminal Rules Committee fully study this issue before taking action. I was concerned that the original language for the conference report would box-in the committee and compel it to solicit the views of others at an early stage outside the rulemaking process. Moreover, if the original language were retained, Congress could easily argue that after receiving the committee's report further processing as envisioned under the Rules Enabling Act would be unnecessary.

It appears as if the committee's actions on this issue will be carefully followed. If the committee decides that further study is unnecessary and rejects the amendment outright, an appropriate and detailed record should be compiled of the committee's reasoning. Of course, if the committee decides that the issue merits further study, either by the reporter or a subcommittee, then any potential problem evaporates.

John K. Rabiej

cc: Honorable Anthony J. Scirica
Professor David A. Schlueter
Professor Daniel R. Coquillette
Peter G. McCabe, Secretary

Item 16-17

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

Memorandum

TO: Honorable Anthony J. Scirica, Chair,
Committee on Rules of Practice and Procedure,
Chairs and Reporters of Advisory Committees

FROM: Mary P. Squiers MS

RE: Annotated Bibliography

DATE: December 7, 1998

Attached please find an annotated bibliography of articles and other writings discussing court cost and delay in the federal courts. The document covers material published during the time from September 1, 1997 through the summer of 1998. As you may recall, I have provided you with several earlier annotations in anticipation of each January meeting of the Standing Committee. This is the seventh bibliography. This document is the result of long work from my research assistant, Jessica Petrini, who is now a second-year law student at Boston College. Jessica'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 seventh 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 from September 1, 1997 through the summer of 1998.[1] It contains articles, mostly 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 (for example):

> ((COST TIME RESOURC! DELAY CONGESTION) /5 (SAVE REDUCE DECREAS! MINIMIZ! PREVENT CURTAIL)) /30 ((TRIAL LITIGATION JUSTICE PROCEDURE COURT) /10 (REFORM IMPROVE CHANGE)) & DATE (AFTER SEPTEMBER 01, 1997)

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 SEPTEMBER 01, 1997)

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[1] Included in this annotated bibliography is the *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990*, by the Federal Judicial Center, dated January 24, 1997, because it was not included in last year's report. Otherwise, all articles are within the above-stated time frame.

To find articles by some of the leading writers in the field (for example):

AU (ROBEL DUNWORTH STIENSTRA SUBRIN TOBIAS KAKALIK) & DATE (AFTER SEPTEMBER 01, 1997)

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?

Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 Am. J. Comp. L. 675, 1997.

This article analyses the various influences that have prompted civil procedure reform in the Untied States. Specifically, the article discusses the following influential themes: reducing expense and delay; ensuring access to justice; and the pursuit of power. The article presents an interesting analysis of the evolution of these influences and their effect on civil procedure reform. Regarding expense and delay, the article discusses the amendments made to Rules 11, 16 and 26, the Civil Justice Reform Act's Delay and Reduction Plans, and the controversy surrounding mandatory disclosure. Regarding access to justice, the article discusses methods of diverting some of the courthouse "traffic" into other spaces through claim aggregation, ADR, and litigation finance reform. And lastly the article discusses how the most important developments in civil justice in the United States in the last two decades have concerned power: who has it and who should have it, both in litigation and in making the rules for litigation.

Lawrence A. Salibra, II, *Debunking the Civil Justice Reform Myth: If No Litigation Crisis Exists, How Can We Fix It?*, 37 No. 3 Judges' J. 18, 1998.

The author of this article criticizes the civil justice reform debate for the conspicuous absence of a body of comprehensive and scientifically valid data supporting the proposition that a crisis even existed and that any of the proposed solutions to "the litigation crisis" were effective. He commends the RAND study as one of the few studies that placed the Brookings Task Force's characterization of the problem and many of its proposed solutions in serious doubt. The author details the research efforts of a small but persistent group of practitioners and scholars who doubted the existence of a systemic crisis. They believed, to the extent that there appeared to be excessive costs, that those costs were relatively localized and related to factors that may not even

be connected with effective judicial resolution of disputes. Specifically, a study in Ohio's Northern District measured the effect of the new rules and procedures implemented under the CJRA in an effort to isolate how CJRA directly affected the way time was spent in the litigation process in a district where the judiciary and its Advisory Committee were dedicated to making the reforms work. The data of the study demonstrated no impact on costs from any of the CJRA reforms. Most interesting to the author was the realization that restraints on formal discovery imposed by the CJRA resulted in a shift of time into informal discovery efforts just as ADR shifted time away from the informal settlement activities. Questions were raised by the study whether ADR programs actually substituted more expensive methods into the process, without a real reduction in time. The most significant finding according to the author was that neither this study nor that of RAND supported the underlying assumption that a litigation crisis existed. Further research should focus on the cost structures of legal services provided to large corporations, economic structures in the profession, etc.

Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reforms*, 39 B.C.L.R. 597, 1998.

This article divides the world of civil discovery into two parts: one part consists of the ordinary cases which represent the overwhelming number and pass through the courts relatively cheaply with few discovery problems; the other part consists of the high-stakes, high-conflict, elitist cases that raise many more problems and involve much higher stakes. The article explains how it is important, when considering discovery reform, that researchers get beyond the complaints of the elitists and focus on a reform research strategy that can address both "worlds". Reforms designed for relatively few cases will impose burdens on the more ordinary cases. The author believes there is a need for research to move beyond the federal rules and issues of cost and delay to research about more fundamental issues in the evolving market for legal services and legal reform. First, the article highlights and compares the RAND and FJC studies. Next, the author offers a theoretically derived hypothesis that the two general kinds of cases can best be explained as the result of two different legal services products. Depending on the clients and the cases, the product that is purchased will be either a variety of routine litigation or a product associated with litigation as warfare. The author believes this market hypothesis explains a number of the otherwise puzzling findings of the two studies. The suggested means for investigating this hypothesis is a more institutional focus than the approaches of the RAND and FJC studies -- one that requires a combination of social science theory and aggressive journalism -- in order to help us understand much better the systems of incentives that lead to particular investments in civil discovery.

Richard L. Marcus, *Discovery Containment Redux*, 39 B.C.L.R. 747, 1998.

This article first extensively chronicles the history of discovery containment. The author details the various "rounds" of discovery containment that came in the wake of the 1976 Pound Conference, highlighting the 1980, 1983, and 1993 Amendments. Following this, the article delves into an evaluation of the lessons from the discovery containment experience to consider as we enter what may be a new round of attempts to contain discovery. The first lesson is that the Advisory Committee needs to be a leader even if it is toward a controversial direction. Regarding the success and failure of the 1993 Amendments, the author suggests that it is somewhat early to try to pass judgment on them. Instead, it is suggested that one who focuses on the 1980 and 1983 packages finds that the modest overall effect of those discovery amendments justifies considerable modesty about the prospective effects of further changes. Another lesson is that persistence is key -- although adopted provisions may not accomplish as much as their proponents hope, rejected ones do often find favor on another day. And although the goal of segregating the relatively few problem cases for treatment not visited on other cases continues to be attractive as a way of properly focusing discovery reform, it may prove a chimera. Absent a way to distinguish, the Advisory Committee is left to decide whether measures designed to cure the ills of the problem cases will cause problems in the others. The article concludes with recommendations for increased judicial activism, more empirical research, and less "petty tinkering."

Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C.L.R. 785, 1998.

This paper summarizes the state of the legal system's knowledge and beliefs about how the federal civil discovery system works, while it also notes what is not known but may be important to an informed decision about changes to discovery rules. The paper summarizes the findings of the major empirical studies of federal civil discovery that have examined the incidence and volume of civil discovery, its problems and abuses, the costs and benefits of discovery, and proposed changes to the discovery system. Regarding incidence and volume of civil discovery, the article discusses the amount of discovery and the relationship of discovery to case characteristics. As for the benefits of discovery, the author highlights studies that discuss the level of discovery activity as compared to the stakes of the case, how discovery needs relate to discovery actually had and how the amount of discovery relates to case outcome. Next, the paper summarizes studies of the costs of discovery for litigants and the judicial system itself as well as studies of the incidence and nature of discovery problems and abuse as they relate to case and/or participant characteristics. The paper concludes with an evaluation of changes and proposed changes to discovery practice.

3.2 The Civil Justice Reform Act of 1990 (CJRA)

James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C.L.R. 613, 1998.

This is the report of the RAND institute for Civil Justice's further analyses of the CJRA evaluation data since the completed main 1996 CJRA evaluation. After the completion of the main evaluation, the Advisory committee on Civil Rules of the Judicial Conference of the United States asked the RAND institute to conduct additional analysis of the evaluation data to see if additional light could be shed on discovery management to assist the Committee in its consideration of possible changes in the Federal Rules of Civil Procedure related to discovery. This evaluation focuses exclusively on the post-CJRA portion of the data, i.e., those cases filed in 1992-93, because the CJRA made substantial changes in how discovery was managed in some districts. There was also a focus on cases that took longer than nine months to disposition. In this evaluation, the methods of statistical analysis are the same as in the main evaluation report with three major exceptions: (1) there is explicit evaluation of combinations of various management policies; (2) there is explicit, separate analysis of the data for various categories of cases or lawyers; and (3) in addition to the analysis of total lawyer work hours, there is also explicit analysis of lawyer work hours on discovery. After providing a background and framework for the discovery discussion, the article provides descriptive information about discovery and other aspects of categories of cases defined by level of complexity, level of discovery difficulty, plaintiff or defendant side of the case, contingent or hourly fee lawyer, size of the law organization in which the lawyer worked, case stakes, tort or contract or other nature of suit categories, or the top 25% most costly cases among general civil litigation that has time to disposition over 270 days after filing. Following this is an evaluation of five types of discovery management policies (early case management and discovery planning; early disclosure; good-faith efforts in resolving discovery disputes; limiting interrogatories; and shortening discovery cutoff time) and a summary of the effects of these discovery management policies on lawyer work hours, time to disposition, attorney satisfaction and attorney views of fairness. The article concludes with the authors' findings on the five types of discovery management policies, their effects and their implications.

James S. Kakalik, Analyzing Discovery Management Policies: RAND Sheds New Light on the Civil Justice Reform Act Evaluation Data, 37 No. 2 Judges' J. 22, 1998.

This article summarizes the study featured in the above article, *Discovery Management: Further Analysis of the Civil Justice Reform Act*

Evaluation Data, specifically focusing on the efficacy of various types of discovery management policies (early case management and discovery planning; early disclosure; good faith efforts in resolving discovery disputes; limiting interrogatories; shortening discovery cutoff time) in reducing lawyer work hours and time to disposition, and the effects of these management policies on lawyer satisfaction and views on fairness. Overall the author finds that discovery is not a pervasive litigation cost problem for most cases, with empirical data showing that any problems that may exist with discovery are concentrated in a minority of cases.

Thomas E. Willging, John Shapard, Donna Stienstra & Dean Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National survey of Counsel in Closed Federal Civil Cases*, Federal Judicial Center, 1997.

This report was prepared at the request of the Advisory Committee on Civil Rules to provide an empirical context for the Committee's consideration of the need for change in the discovery rules. Based on responses from nearly 1,200 attorneys nationwide, the report provides a timely assessment of the effects of the 1993 amendments to the discovery rules, including initial disclosure. It also provides information about discovery costs in the context of the overall costs of civil litigation, about problems experienced by attorneys in a sample of recently terminated cases, and about attorneys' preferences for rule revisions and other changes that might improve discovery. The report provides information in response to twelve specific questions derived from the following four general topic area: (1) How much discovery is there and how much dies it cost? (2) What kinds of problems occur in discovery and what is their cost? (3) What has been the effect of the 1993 amendments to the federal rules governing discovery? (4) Is there a need for further rule changes and if so what direction should they take? The report provides detailed results of the questionnaire responses and analyzes these research findings. In the addendum to the original report are the results of an additional study by the authors of variables expected to be correlated with the total cost of litigation or with disposition time.

Donna Stienstra, *Investigating Discovery: Findings from an FJC Study*, 37 No. 2 Judges' J. 10, 1998.

This is a very brief article summarizing the results of the study featured in the above article, *Discovery and Disclosure Practice, Problems, and Proposals for Change*. In particular, the author highlights the discussion of discovery frequency and cost, discovery problems and their costs, the effects of initial disclosure, and attorney views of further rule changes.

David F. Levi & Richard L. Marcus, *Once More into the Breach: More Reforms for the Federal Discovery Rules?*, 37 No. 2 Judges' J. 8, 1998.

After providing a review of the past three decades of reform efforts and sketching the Advisory Committee's efforts to date to identify and evaluate possible further changes to the rules, the article describes areas in which those changes are presently being contemplated and forecasts on the timing and course of this latest reform effort. The key part of this article is the section discussing the consideration of possible amendments in the future. Specifically, the Subcommittee, armed with the Advisory Committee's empirical information that the most often told problems centered in the area of document discovery and unduly long depositions, gave more detailed attention to a narrower list of possible amendments with an eye to presenting specific language to the Advisory Committee in the Spring of 1998. The list of possible amendments contains possible efforts toward obtaining national uniformity in the rules, establishing a "middle ground" on disclosure, expanding the Rule 26(f) meet-and-confer session, removing the subject-matter language from Rule 26(b)(1) or modifying its wording, encouraging the linking of discovery cutoffs with trial dates, authorizing the courts to guard against privilege waiver to facilitate document discovery, cost shifting, developing standardized or pattern discovery tools, and others. In closing, though, the author emphasizes that by and large, the advice the Advisory Committee has received indicates that discovery is functioning well in most cases.

Carl Tobias, *The Judicial Conference Report and the Conclusion of Federal Civil Justice Reform*, 175 F.R.D. 351, 1998.

The author gives a descriptive analysis of the Judicial Conference Report on civil justice reform. The article describes the alternative program recommended by the Judicial Conference detailing the eight measures that the judiciary is to implement, the three measures requiring congressional and executive branch cooperation, the recommendations regarding the CJRA principles and guidelines, and the recommendations regarding the CJRA techniques. The Judicial Conference pledged that the judiciary would maintain efforts to increase the delivery of justice in civil litigation but admonished that the courts will face numerous challenges relating to civil justice reform, such as increasing speed of disposition while preserving the quality of justice, striking an appropriate balance between national uniformity and local option in the development of litigation procedures, and confronting the practical limits to which general rules and procedures can be used to manage litigation. Some criticisms involved the confusion over the life expectancy of the actual act, the under-ambitious nature of the alternative program, and the Conference's being overly protective of the federal judiciary's prerogatives generally and of its role in the national rule revision process specifically as well as being too concerned about restoring the procedural status quo that existed when Congress passed the CJRA. Suggestions for the future include recommendations to attempt to identify measures receiving experimentation in addition to those that the Judicial

Conference delineated which reduced expense and delay in civil litigation, to expeditiously incorporate in the Federal Rules of Civil Procedure the requirements that were extremely effective and would be workable nationwide, and to decide which statutory features, apart from those that the Conference included in its alternative program, warrant continuing application.

The Civil Justice Reform Act Advisory Group for the District of North Dakota, *Third Annual Assessment of the Civil Justice Reform Act Advisory Group For the Plan Period July 1, 1996 Through September 30, 1997*, 73 N.D.L.R. 805, 1997.

This article details the Advisory Group's third annual assessment of the Civil Justice Expense Delay and Reduction Plan for the federal district of North Dakota. While concluding that the court has done well on the whole in processing civil cases, the Advisory Group's assessment targets for more extensive discussion two of the Plan's provisions (concerning Rule 26 disclosures and ADR) as well as two new issues relating to civil case processing -- professional civility and the feasibility of a random case assignment system. Also, the article explores the effects of the CJRA's expiration on the District's Plan and on the Advisory Group's existence. Regarding Rule 26 disclosure and conference provisions, the Group recommends continued application of the current initial disclosure provisions with renewed emphasis on both proper use of the Rule 26(f) conference and on the Rule's express flexibility for tailoring discovery to specific case needs. Regarding professional civility, the group stresses that incivility is a serious problem that can affect litigation cost and delay, and regarding random case assignment, the Group recommends against it. As for CJRA, the Group urges the court to reconfirm the Plan's authority beyond the Act's expiration and to give its provisions greater visibility in this district, and provides the court with a summary of what action the court might take to re-establish the eleven basic Plan provisions. The article ends with a recommendation that the district courts continue to use advisory groups to assess their dockets and propose recommendations for reducing cost and delay.

Douglas K. Somerlot & Barry Mahoney, *What are the Lessons of Civil Justice Reform? Rethinking Brookings, The CJRA, RAND and State Initiatives*, 37 No. 2 Judges' J 4, 1998.

This article gauges the significance of the CJRA relative to other delay initiatives by comparing provisions of the act against the elements of the delay reduction programs contained in Caseflow Management in the Trial Court and Changing Times in Trial Courts, two publications which catalog the characteristics common to successful cost and delay reduction programs, and by comparing the implementation of the CJRA with a similar initiative

that occurred in California in 1986. After a brief discussion on the creation of the CJRA and RAND's principle conclusions from its study, the California legislature's Trial Court Delay Reduction Act of 1986 is highlighted as a program strikingly more successful than the federal initiative. Commenting on what made the California initiative work, the authors detail how the California Judicial Council retained the National Center for State Courts to assist in the development and implementation of the plans and their evaluation and took advantage of the experience and written materials of those who had studied delay reduction at the state court level throughout the process. Also mentioned are some additional characteristics that were very significant in their presence in California and in their apparent absence from the implementation of the CJRA: a very strong component of judicial leadership; strong staff involvement and camaraderie with judges; clear standards and goals; significant use of education and training during program design and implementation; continuing communication among and between the advisory groups, the court and staff, and the California Judicial Counsel; and the adoption of specific programs designed to deal with the accumulated backlogs of pending cases. Possible themes for future cost and delay reforms are also listed.

Donna Stienstra, *Judicial Perceptions of DCM and ADR in Five Court Demonstration Programs under the CJRA*, 37 No. 2 Judges' J. 16, 1998.

This article discusses the five districts Congress designated as demonstration districts pursuant to the CJRA and the Judicial Conference's report on the experience of these demonstration projects. Two districts were instructed to experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracts that operate under distinct and explicit rules, procedures, and time-frames for the completion on discovery and for trial. The other three districts were instructed to experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution. This article discusses the two programs' individual goals, structures, requirements, and the results of their implementation. Furthermore, the judicial assessments for the two programs are detailed and analyzed, focusing on the overall judicial support for the program and its many successful benefits, a desire of the judges to maintain the DCM and ADR programs, and their drive toward the implementation of more such programs in other districts.

Donna Stienstra, Molly Johnson & Patricia Lombard, *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990*, Federal Judicial Center, 1997.

The Civil Justice Reform Act of 1990 designated five federal district courts as demonstration districts. Two of these districts, the Western District

of Michigan and the Northern District of Ohio, were instructed to experiment with systems of differentiated case management and the three other districts, the Northern District of California, the Western District of Missouri and the Northern District of West Virginia, were instructed to experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution. This report presents the Judicial Conference's findings on the experience of the courts under the demonstration program. The report provides sufficient detail about each court to permit other districts to consider whether the procedures illustrated by these courts would be appropriate for them. The report describes the issues considered by each district in designing their programs and the steps taken, such as staffing changes and budget adjustments, to implement them. It also discuses the benefits the courts say they have realized from these programs. The report also provides a synthesis that summarizes, across the districts, the findings on the effectiveness of specific practices as implemented in these districts, since courts' experiences converge in certain ways. The questions the report addresses -- after first describing briefly the programs the courts adopted, relevant conditions in the districts, and the extent to which the courts have implemented their programs -- are the following: have these programs reduced litigation time and cost; what other benefits have the courts realized from these programs; what do these courts' experiences tell us about the effectiveness of specific case management and ADR practices; does the effectiveness of the court's procedures vary by type of case; how is a case management tracking system different from individualized case management; how many cases are referred to ADR; do ADR programs promote settlement; what factors contribute to the effectiveness of ADR; what are the effects of giving parties a choice of ADR options; and are any special conditions necessary for implementing these programs.

D. Brock Hornby, *Recent Judicial Conference Recommendations for Achieving Cost and Delay Reduction in the Federal Courts*, 37 No. 2 Judges' J. 12, 1998.

Among the CJRA's closing requirements was a stipulation for a final report from the Judicial Conference to Congress that would assess the CJRA's effectiveness in attaining its goals and to identify any alternative proposals that the Conference might endorse. This article examines the alternatives offered by the Judicial Conference in its May 1997 final report. Although the Judicial Conference approved almost all the CJRA's principles and techniques, it was not persuaded that they, as a package, should be mandated throughout the district courts, therefore it proposed continuation of a number of the CJRA initiatives while also proffering a set of alternative measures for reducing cost and delay. The alternatives addressed and explained in the article are as follows: to continue the advisory group process because such groups can still serve a valuable resource for the courts; to maintain statistical reporting of caseflow management because there was an

apparent correlation with lowering the number of cases pending more that three years; to set early and firm trial dates and shorten discovery periods in complex civil cases because it can reduce delay without increasing costs; to use magistrate judges where practical because they can provide great assistance in reducing cost and delay; to expand the role of the chief justice in case management since leadership is important to promoting efficient case management; to promote intercircuit and intracircuit judicial assignments through the use of visiting judges thereby enabling courts to set early and firm trial dates; to extend education efforts regarding efficient case management to the entire legal community; and to use electronic technologies in district courts as a method of saving a significant amount of time and cost. Furthermore, the Judicial Conference's report also included three recommendations for consideration by Congress and the executive branch in order to create an even greater impact on case management: to recognize the impact of judicial vacancies on litigation delay and to fill them promptly; to consider the impact of new criminal and civil statutes on a court's civil docket and resource requirements; and to make available sufficient courtroom space to manage cases.

Edward D. Cavanagh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565, 1997.

This article discusses the lessons to be learned from the CJRA and the RAND report. Calling the CJRA an unfortunate rush to judgment on the problems afflicting the federal judicial system and how to solve it, the author suggests better ways to address the problems with the civil justice system. While feeling that the federal civil justice system is far from being on the brink of imminent collapse, the author states that the experience with the CJRA has underscored the fact that true procedural reform proceeds at a glacial pace. Attempts to reform a national court system through local initiatives are costly, confusing and, on balance, these drawbacks outweigh the benefits that might be derived from local experimentation. The CJRA has taught that what is needed are fewer local rules, and that the real causes of unnecessary expense and delay in the federal courts are the Speedy Trial Act, the federalization of crime, the failure to allocate adequate resources to the federal courts and the failure to fill judicial vacancies promptly. After providing some background into the CJRA and an analysis of the RAND report findings, the author addresses these "real causes of unnecessary expense and delay" and offers solutions to those problems. As for recommendations for what to do with the sunsetting of the CJRA, the author makes the following suggestions: to consider retaining two CJRA concepts - court-annexed ADR programs and communication between bench and bar; that the courts and Congress work to restore the peace that existed prior to the CJRA; that future reform efforts be incremental, with rule changes that have a clear rationale and address a specifically identified problem; and that the discovery abuse conversation be no longer viewed as a priority on the court

reform agenda. The better topics to be put on the court reform agenda are the civil class action megacase, proliferation of local rules, mandatory automatic disclosure, and ADR. Suggestions for addressing this new court reform agenda are detailed in the article with an emphasis on the caveat that any reform efforts should be narrowly focused on specific issues where there is empirical evidence that a problem exists.

Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background on the 1938 Federal Discovery Rules*, 39 B.C.L.R. 691, 1998.

This article, as the title suggests, is a large historical piece, analyzing the background behind the birth of discovery, starting with the Rules Enabling Act debate and ending with the 1946 Supreme Court's promulgation of a number of amendments, upon the advice of the Advisory Committee, as an effort to complete the discovery revolution. Though absent of specific numerical data, the article does discuss the genesis of cost and delay concerns in the federal civil justice system, and the growth of that concern along with the growth of discovery in civil procedure. Special insights are given into the Advisory Committee's rules drafting process and the efficiency concerns that went along with it, other contemporaneous misgivings about expanded discovery, the judicial reaction to the discovery reform, the 1946 liberalizing amendments, and what future reformers can learn from the historic discovery experience.

3.3 Other Legislative Activity

Carl Tobias, *Nearing the end of Federal Civil Justice Reform in Montana*, 59 Mont. L. Rev. 95, 1998.

After describing the CJRA and the programs the act generated, the author discusses the Judicial Conference's report on the RAND Corporation's findings and the Conference's proposed alternatives to the extension of the pilot program. This alternative program is described by the author as including eight measures that the judiciary is to effectuate, three approaches which require congressional and executive branch cooperation, six recommendations regarding the CJRA principles and guidelines, and six suggestions respecting the CJRA techniques. After detailing the alternative program, the author offers some constructive criticisms of the Judicial Conference Report, specifically stating that the alternative program could have been more ambitious by calling for the application of new means of saving expense and time, that the Conference might have improved its report by attempting to delineate other procedures that were effective in limiting cost and delay, and that the Conference might also have attempted to clarify whether the CJRA and procedures proscribed under the legislation actually expired on 12/01/97. The article also discusses the Ninth Circuit District Local Rules Review Committee's (LRRC) recent review of local district procedures

adopted by the fifteen districts in the Ninth Circuit to determine whether the measures contravene, or duplicate, the Federal Rules or Acts of Congress, and the results of the Montana District inquiry (concluding that the Montana District's opt-out provision for securing consent to magistrate judge jurisdiction in civil cases contravened a federal statute). These are the author's conclusions and suggestions: that someone must promptly resolve the doubt about the CJRA's expiration because lingering uncertainty as to its continuing applicability and local measures adopted under it may be complicating federal civil practice; that courts in the numerous districts could attempt to clarify uncertainty by abolishing local measures prescribed under the CJRA which contravene the Federal Rules or statutes; that the Montana District should change its procedure for securing consent to magistrate judge jurisdiction in civil cases to conform with the recent Ninth Circuit opinion which invalidated the Montana provision; and that the court should assess the efficacy of its automatic disclosure strictures and consider preparing a final evaluation of the CJRA experiment.

Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 Conn. L. Rev. 537, 1998.

This paper analyses various legal reform measures introduced at the outset of the 105th Congress and their possible adverse impacts on federal civil litigation and the civil justice system. The reforms discussed are the Private Securities Litigation Reform Act (PSLRA), the products liability reform bills, and the Attorney Accountability Act (AAA). After exploring the origins and development of legal reforms, the article provides a critical analysis of the new legal reform proposals. It criticizes the PSLRA for its imposition of special pleading, sanctions, and class action requirements. The AAA would seriously modify FRCPs 11 and 68 as well as FRE 702. And products liability reform, by significantly changing substantive law, could restrict federal court access and impose other disadvantages such as reducing the number of lawsuits in which plaintiffs act as private attorneys-general and interfering with section 402a of the Restatement (Third) of Torts. The author stresses how the CJRA's enactment exemplifies both the need to be cautious and the dangers of legislating without accounting for prior reform initiatives. The adoption of new and often conflicting procedural strictures and the interference with ongoing reform initiatives will impose greater complexity, cost, and delay on the civil justice process and in civil lawsuits. In other words, the imposition of new strictures and the interference with continuing reforms, which can be attributed to the PSLRA and which could result from the AAA and the products liability measure, may well have effects that are diametrically opposed to those which Congress intended in passing the Judicial Improvements Act (JIA) and the CJRA. They may further erode the primacy of the national revision process that the JIA was meant to restore, while increasing the cost and delay the CJRA was supposed to reduce. As a conclusion to the article the author notes that the only legal reform

which in fact became law was the PSLRA and it has had a number of detrimental impacts on continuing reform efforts, specific lawsuits, and the civil justice process. He urges Congress to discontinue implementing the PSLRA's provisions which conflict, and he strongly advises against any reintroduction of the AAA and products liability bills since they, too, can have a detrimental impact with continuing reforms.

Sheila M. Murphy, Bernard E. Drew & Ron Spears, *The "New" Discovery Rules: Measuring Predictions with Reality*, 86 Ill. B. J. 368, 1998.

This article is a "judge's-eye view" of the 1996 Illinois discovery rule amendments two years after their implementation. The judges conclude that fears that the amendments would be unworkable and cause a litigation boom have proven unfounded. These 1996 amendments were consistent with a nationwide trend in state and federal courts to put judges in charge of the discovery process to reduce delay and costs of litigation. Litigators feared that this combination of changes would lead to a floodgate of litigation seeking good cause exceptions, additional discovery, or sanctions. However, there have been very few court contests over the new rules, and few appellate cases thus far have addressed them. A review of the statistics over the past few years show a steady reduction of time for case disposition in much of the state, but it is still difficult to say whether discovery reform has reduced the cost of litigation. According to the judges, some changes, such as form interrogatories (Rule 213(j)), can save time and money to litigants, however, overall cost savings for discovery may not result unless the court actively manages the process. The article goes on to discuss some of the recent cases that have surfaced regarding the amendments and also discusses the realities of judicial case management and concludes that judges must be leaders in requiring compliance and exercise the options for sanctions for the process to truly work at saving time and money.

John Heaps & Kathryn Taylor, *The Abuser pays: The Control of Unwarranted Discovery*, 41 N.Y.L.Sch.L.Rev. 615, 1997.

This article looks at the crisis in the English civil justice system, with particular regard to the problems associated with discovery. Highlighting the key differences in discovery procedure between England and the United States and the contemporary problems in the discovery process in England, it looks at the proposals for reform made in July 1996 as a result of the Review of Civil Justice by Lord Woolf. The authors state that by recognizing and using the potential which sophisticated costs orders have for influencing the conduct of litigants, courts in both England and the U.S. can make substantial in-roads to curbing discovery abuse. After giving introductory background information on the differences between civil litigation in the U.S. and England, the authors examine Lord Woolf's recommendations which most closely relate to the curbing of the substantial

problems associated with discovery. Woolf's principled approach to civil justice reform discusses changes to the pleadings process and methods of case management which together will help aid in reforming the discovery process. The general scope of documentary discovery, both in terms of what may be sought and what must be disclosed, will also be curtailed by new rules. Holding the whole Woolf-Inquiry-system together, though, seems to be costs orders as sanctions. The court's power to make appropriate orders as to costs can deter litigants from behaving improperly or unreasonably, can encourage them to behave responsibly, and can discourage excess in the litigation process.

4. Federal Rules of Civil Procedure

Donna Stienstra, *Implementation of Disclosure in United States District Courts, with Specific Attention to Courts; Responses to Selected Amendments to Federal Rule of Civil Procedure 26,* Federal Judicial Center, March 30, 1998.

This report is an update to the March 28, 1997 report on the federal district courts' responses to the 1993 amendment to FRCP 26. The heart of this report, as in last year's report, is an attached table, which is based on the courts' local rules, general orders, and CJRA plans and which describes for each court which of five key provisions of Rule 26 are in effect -- FRCP 26(a)(1) initial disclosure; 26(a)(2) expert disclosure; 26(a)(3) pretrial disclosure; 26(d) timing and sequence of discovery; and 26(f) meeting of counsel and written discovery plan. In using the attached table, it will be clear which subsections of Rule 26 are in effect in each district and which are not. For courts opting out of one or more of the federal rule requirements covered by this table, it is indicated whether a similar requirement exists in local rules or CJRA plans. The table is best used as an overview of the courts' responses to amended Rule 26 and their disclosure requirements. Users who need to know specific requirements - for example, attorneys handling cases in federal courts - should not rely on the table or cite it as legal authority. In addition to the major district-by-district table, Table 1 provides a numerical summary detailing the number of courts in which specified subsections of FRCP 26 are and are not in effect, and Table 2 highlights the implementation of FRCP 26(a)(1) in the fourteen largest district courts.

Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C.L.R. 525, 1998.

This article presents finding from a national survey of attorneys based on questions covering four broad areas of inquiry: (1) How much discovery is there and how much does it cost? (2) What kinds of problems occur in discovery and what are their costs? (3) What has been the effect of the

1993 amendments to the federal rules governing discovery? (4) Is there a need for further rule changes and if so, what direction should they take? The data for these areas of inquiry were collected by asking 12 specific questions derived from these four general topics. A summary and a detailed analysis of the answers to these questions are provided in the article, and detailed tables help readers understand the empirical data. In particular, the article makes the following relevant conclusions: for most cases discovery costs are modest and perceived as proportional to parties' needs and the stakes of the case; monetary stakes in the case had the strongest relationship to the total litigation costs and duration; 4% of litigation expenses are attributable to discovery problems; disposition time was shorter in cases in which attorneys reported that initial disclosure had taken place pursuant to a local or national rule or a judge's order; altering discovery cutoffs may not reduce litigation disposition time; initial disclosure seldom replaces discovery entirely; initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes; initial disclosure increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement; there is an increase in litigation expenses for 27% of the attorneys who used expert disclosure, but slightly more attorneys (31%) reported decreased litigation expenses; depositions accounted for by far the greatest amount of discovery expense, followed by expert disclosure and discovery, document production, interrogatories, initial disclosure and discovery planning or meeting, in that order; as the percentage of total costs attributable to depositions increased so did case duration, while when initial disclosure was used, case duration was shorter; the size and billing method of a law practice were associated with increased costs or disposition time; and nonuniformity of the disclosure rules creates serious or moderate problems. Additional data is presented and critiqued, and suggestions for further reform are offered.

Paul v. Niemeyer, Here *We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C.L.R. 517, 1998.

Paul Niemeyer, the chair of the Civil Rules Advisory Committee, states the results of his 1996-1997 reexamination of the discovery rules in this article. The Committee engaged the Federal Judicial Center to study the expense of discovery and related questions, and the results of that study are detailed in the article. This data from the Federal Judicial Center along with additional data the Committee collected from the RAND Institute for Civil Justice which analyzed the effect on discovery costs of early case management, early disclosure, good faith efforts in resolving discovery disputes, limiting interrogatories, and shortening discovery cutoff time, was presented and analyzed by experienced lawyers at the Boston Conference which took place at Boston College Law School on September 4-5, 1997. Attorney opinions, ideas and proposals about the data are also detailed in this article. The Boston Conference provided the Civil Rules Advisory Committee and the larger

legal community with an unprecedented single source of data, historical information, ideas and proposals for discovery reform. In an effort to distill a Conference consensus about the data, opinions and ideas, the following conclusions, as well as a few others, were made: the desire for information in connection with the resolution of civil disputes was nearly universal; discovery is now working effectively and efficiently in a majority of the cases; in cases where discovery was actively used, it was thought to be unnecessarily expensive and burdensome, with the most concern being for the length, number and cost of depositions and the cost and effort involved with document productions; where mandatory disclosure has been practiced, it is generally liked and found to lessen the cost of litigation; and overwhelming support is found for national uniformity of the discovery rules. The author suggests that the Committee consider a three-level discovery process to address the concerns expressed at the Boston Conference.

Robert E. Oliphant, *Four Years of Experience with Rule 26(A)(1): The Rule is Alive and Well*, 24 Wm. Mitchell L. Rev. 323, 1998.

This article first describes the background, nature and scope of FRCP 24(a)(1) and then provides an analysis regarding the controversy surrounding the mandatory disclosure provision. The remaining parts of the article focuses on the District of Minnesota, and attempts to assess the impact of the rule on that district. In an effort to further its assessment of the rule's impact on the District of Minnesota and to address the many claims made by critics of the rule, the article offers the results of two surveys - one is an attorney and litigant survey commissioned by the Civil Justice Reform Act Advisory Group for the District of Minnesota in 1996, and the other is a survey of federal judges and judicial magistrates in the district conducted by the author during November and December 1997. As for the issues of cost and delay, survey results are gathered in the attorney survey, but the author notes that he is puzzled by the results and that further exploration is needed. Another problem with the survey's cost/delay analysis is that it fails to collect data on how much the rule may have increased costs among those lawyers reporting an increase. The judicial survey reported that the district judges responding to the survey found the rule to have a positive impact on litigation, improving the overall quality of justice, and enabling lawyers to evaluate their cases faster and avoid wasteful activity.

Marie Cordisco Leary & Thomas E. Willging, *Numerical and Durational Limitations on Discovery Events as Adopted in Federal Local Rules and State Practices*, Federal Judicial Center, 1998.

This report details the research the authors conducted on numerical and durational limitations on interrogatories and depositions as adopted in federal local rules and state practices. A memorandum summarizes the results and two tables follow which display in detail the results of that

research. For each of the 94 federal districts, Table 1 describes the district's local rule or practice regarding numerical limitations on interrogatories, numerical limitations on depositions, and durational limits on depositions. Table 2 uses the same format to provide examples of state rules or practices limiting interrogatories and depositions as located on Westlaw. The summary provides a numerical breakdown with percentages of all the variations analyzed and highlights particular noteworthy provisions in various districts or states. The study also contains empirical data on the application of durational limits on depositions. The data was gathered from a national survey of attorneys about depositions and problems with depositions in a recently terminated federal case. The data gave some systematic information about the operation of durational limits on depositions, but the researchers were unable to find evidence that such limits have achieved their intended effects -- the data indicate that durational limits on depositions have not reduced the length of depositions or the number of problems with long depositions to levels experienced by courts without such limits. Furthermore, to give the Discovery Subcommittee a closer look at one district's experience, the authors gathered anecdotal information about the Southern District of Florida's pilot program that imposed a six-hour limitation on depositions absent court order or agreement of the parties and non-party witness. Based on the input from parties and attorney on their experience with the pilot program, the advisory committee voted to extend the pilot program beyond its scheduled expiration and to recommend adoption of the six-hour limitation on depositions as a local rule. Comments from objectors and proponents of the program are also contained in the report.

5. Alternative Dispute Resolution

5.1 In General

Supreme Judicial Court / Trial Court Standing Committee on Dispute Resolution for the Chief Justice for Administration and Management of the Trial Court, *Report to the Legislature on the Impact of Alternative Dispute Resolution on the Massachusetts Trial Court*, published by the Supreme Judicial Court / Trial Court Standing Committee on Dispute Resolution, 1998.

This is a comprehensive report answering the legislature of Massachusetts' request for information about the value of ADR to the Massachusetts Trial Court. The report summarizes the current and pending policies of the Supreme Judicial Court and the Trial Court with respect to ADR, describes the trial court's current ADR programs and their impact, and reports the key findings of empirical studies evaluating court connected ADR in Massachusetts and elsewhere. The report shows the Massachusetts courts are making use of ADR, and ADR makes an increasingly important contribution to court operations. The report contains a comprehensive

review of numerous ADR programs and reveals that thousands of cases involving civil actions are resolved or simplified every year by the use of court-connected ADR. The report goes to show how judges and other court personnel have come to depend on ADR services as a necessary ingredient in a healthy and efficient public justice system. The report presents evidence of how, as part of an integrated case management system, ADR can and does save time and money for the public and can help the courts to operate more efficiently. Results of studies and surveys conducted and reported on in this paper demonstrate that the greatest benefit of using ADR is user satisfaction, but there is also strong evidence that ADR improves the pace of litigation, produces high settlement rates, and produces more durable agreements. Some studies also show that ADR reduces court workload, court costs and litigant costs. This report measures the impact of ADR services on the Massachusetts court through evaluation studies and surveys. It provides an overview of the ADR research, produces summaries of the research on the impact of ADR, lists ADR programs in the Superior and District Courts and provides a list of articles regarding the use of ADR by the legal profession and in business.

Edwin J. Wesely, *Reflections on Court-Annexed ADR in the Eastern and Southern Districts of New York*, 37 No. 2 Judges' J. 33, 1998.

This article discusses the benefits and weaknesses of ADR as demonstrated by the history of its use, specifically in two districts of New York. Commending ADR as a good way for litigants to serve their own interests by resolving litigations consentually and usually in less time and at less cost than by trial and appeal, he feels that court-annexed mediation should be voluntary, mandatory when ordered by a judicial officer, and not mandatory across the board in all cases or particular classes of cases. He elaborates on this idea in the article. The article details the successes of the Eastern District's Civil Justice Reform Act Plan's authorized volunteer and mandatory referral of specific types of cases to early neutral evaluation (volunteers for the party are accepted into the program if both parties consent). It also highlights the successes of the District's voluntary mediation and mandatory, nonbinding, court-annexed arbitration programs under its CJRA plan. Likewise, the article discusses the success of the Southern District's mandatory mediation program for civil cases involving money damages only, which led to the settlement of all the issues in 982 of the 1229 mediated cases since August 1992 (an 80% success rate). Other issues discussed are the importance of availing voluntary mediation to those who want it, how judicial officers should order mandatory mediation when they feel the case should mediate, and the usefulness of special masters referrals. The author also lists helpful factors to consider when referring cases to mediation or some other form of ADR.

David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. Pa. J. Lab. & Employment L. 133, 1998.

This article discusses the results of a survey conducted of general counsel of the Fortune 1000 corporations. The objective of the survey was to obtain comprehensive information about each corporation's use of ADR. The article discusses the survey's results regarding respondents' experiences with 8 forms of ADR and the reasons for the use of those forms of ADR. Two of the more significant forces that appear to be driving corporations to use ADR are the cost of litigation and the length of time needed to reach resolution of the dispute. Almost all of the survey respondents believed it was cheaper and more time-efficient to use ADR rather than rely on the courts. The most often cited reason for using mediation was that the process allows parties to resolve the dispute themselves. Parties have greater control over the dispute resolution process, find it to be more satisfactory than litigation, and feel that it preserves good relationships. In general, however, the support for arbitration is not as strong as the support for mediation. Also, there are several key reasons why corporations choose not to use ADR: some respondents find ADR too difficult to initiate; some are discouraged because the ADR processes are not usually confined to legal rules; some fear the inability to appeal a decision made by arbitrators because federal courts have been inclined to defer to such decisions; some feel that the arbitration process is beginning to match litigation in costliness and complexity; and a surprising number of respondents lacked trust and confidence in ADR neutrals, especially arbitrators. The article also discusses the likelihood the companies will use ADR to resolve specific types of disputes in the future. It is predicted by the respondents that the use of both mediation and arbitration will grow substantially in only employment and commercial/contract disputes, and will be used less frequently in corporate finance and financial reorganization disputes.

Matthew A. Tenerowicz, *"Case Dismisses"-Or Is It? Sanctions for Failure to Participate in Court-Mandated ADR*, 13 Ohio St. J. Disp. Resol. 975, 1998.

The goal of this article was to answer the question 'what are the appropriate sanctions when a party fails to participate in court-ordered ADR?'. In order to answer this question, the article first examines and explains a court's authority to mandate such participation, since mandated participation is seen by some as an infringement of the constitutional right to trial by jury. Specifically, the article discusses Rule 16 authority, statutory authority, as well as inherent authority in the courts. Next, the article attempts to shed some light on the good faith standard -- what type of participation is, or even should be, required of parties when ordered by the court to participate in good faith. Finally, the article closes with an examination of the goals and policies behind imposing sanctions. The article

also proposes an objective standard under which appropriate sanctions may be determined.

Geoffrey P. Miller, The Legal-Economic Analysis of Comparative Civil Procedure, 45 Am. J. Comp. L. 905, 1997.

This article uses a comparative analysis of civil procedure to examine dispute-resolution systems from different jurisdictions in an effort to identify similarities and differences of the particular systems. It is the author's opinion that such a process can encourage law reform. With the goal of creating an efficient system that minimizes the sum of the costs of erroneous results and the costs of the applicable procedures, the article commences to perform various cost-benefit analyses for different measures to reduce delay and increase settlement, methods of streamlining the procedures, and harmonization.

5.2 Summary Jury Trial

Ann E. Woodley, *Strengthening the Summary Jury Trial: A Proposal to Increase its Effectiveness and Encourage Uniformity in its Use*, 12 Ohio St. J. Disp. Resol. 541, 1997.

This is the second article of a two-part series designed to first save, and then strengthen, the summary jury trial device. This article discusses four categories of issues that affect the willingness of courts and lawyers to use this device, as well as its likely success: (1) the lack of uniformity in the applicable rules and the use of the process; (2) the lack of necessary limitations on time and expense, the inequality of participation by the parties and other factors affecting the reliability of the SJT verdict; (3) the lack of guidance for the courts, including the lack of guidance in choosing appropriate cases for SJTs; uncertainty about the types of available sanctions and under what circumstances they should be imposed; uncertainty about whether SJT verdicts should ever be binding, and if so, under what circumstances; uncertainty about whether the judge or magistrate who conducted the SJT should preside over the actual trial when the SJT dies not result in settlement; and uncertainty about whether SJT jurors should be excluded from serving at subsequent trials; (4) the other barriers to the use and effectiveness of SJTs. It is the conclusion of the article that all of these issues, if left unresolved, will result in the SJT's failure to achieve the result intended by its creation: reduction of the time and cost involved in litigation by fostering settlement. Therefore, to enhance this settlement device and encourage uniform treatment of it, this article analyzes these issues and proposes solutions in the form of a model local court rule.

5.3 Mediation

Robert J. Niemic, *Mediation in Bankruptcy: The Federal Judicial Center Survey of Mediation Participants. Report to the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States,* Federal Judicial Center, 1998.

This article details the results of a survey questionnaire developed by the Federal Judicial Center to gather empirical information for the Advisory Committee to help them determine whether to consider rules changes that would govern mediation of bankruptcy matters. The goal of the survey was to determine the extent and severity of any problems regarding mediation conducted after judicial referral. Counsel and mediators who had participated in the mediation of one or more bankruptcy matters after judicial referral pursuant to local bankruptcy rules or procedures during the three-year period before May 1997 were mailed the survey. The survey results identified substantial problems with the following issues: mediator disclosure of confidential information; confidentiality requirements preventing bankruptcy judges from learning facts or issues needed for proper judicial approval of settlements; ex parte contacts between the mediator and judge; mediator's failure to timely disclose conflicts of interest; mediator's bias or prejudice; mediator not being a "disinterested person"; connections between the mediator and judge; and connections between the mediator and the U.S. Trustee. The survey also inquired about several other issues of interest to the committee: sua sponte referrals to mediators; referrals over the objection of a party; mediator's fees being paid by the bankruptcy estate; and mediator's role in formulating reorganization. This section of the article discusses the incidence of these problems with the mediation process as observed or perceived by mediation participants who responded to the questionnaire. The discussion and tables provided in the article describe the extent of these problems as identified by counsel and mediators separately.

Elizabeth R. Kosier, *Mediation in Nebraska: An Innovative Past, A Spirited Present, and a Provocative Future,* 31 Creighton L. Rev. 183, 1997.

This article reviews the development, growth, and aspirations of Nebraska's dispute resolution system. The article also outlines present and future challenges in Nebraska, as well as some issues that are emerging as a natural consequence of system development. This dispute resolution system is viewed nationally as an innovative public-private partnership. According to the author, its hybrid decentralized, collaborative-but-independent structure is a remarkably efficient model for statewide integration and program development. Nebraska's model is based on a theoretical premise derived from a principled, interest-based negotiation approach. The system assures quality through proper mediation training, maintenance of high standards, layers of evaluation and performance gauging. The article goes on

to describe program implementation of statutory principles and details the statewide program results regarding how the program is working. As for emerging issues and challenges, the most pervasive issue in the state, according to the author, resides in the arena of mediator competency and standards of conduct. Also of concern is the need to dispel myths compelling people to decline opportunities to mediate. Cultural competency is also an on-going challenge both for mediators and for programs. The article concludes with a discussion of future trends in the field of dispute resolution.

6. Differentiated Case Management

Gail Carter, *Is Differentiated Case Management Working in the U.S. District Courts?*, 37 No. 2 Judges' J. 38, 1998.

This current study presents one of the few comparative analyses of DCM systems in the federal district courts with a purpose of assessing the impact of DCM on civil case management. It investigates whether courts that implemented comprehensive DCM systems to meet the requirements of the CJRA managed their civil caseloads more effectively than did courts that did not have DCM programs. The findings indicate that courts that instituted DCM systems showed reductions in the average age of the pending civil caseload and the median time from filing to disposition of civil cases. However, no improvement occurred in the number of pending civil cases and the median time from issue to trial. The author comments, though, that the likely impact of DCM is better measured by the average age and disposition time of the civil caseload. The improvement in average age and disposition time suggests that DCM can be an effective case management tool in federal district courts. The study employed a quasi-experimental impact research design with a statistically constructed control group to determine the impact of DCM on civil case processing, whereby district courts with DCM programs were compared to district courts without DCM. The civil case management of these two groups was compared before and after implementation of DCM, with the difference in the results for the two groups representing the impact of DCM.

Edward D. Cavanagh, *A Model for Using Magistrate Judges to Help Mitigate Delay in Federal District Courts*, 37 No. 2 Judges' J. 68, 1998.

This article offers the Eastern District of New York's approach to case management as a model for reduction of litigation costs and delays. Specifically, it is the district's use of magistrate judges to lessen court costs and delays. The District has had great success with the use of magistrate judges in discovery disputes. By referring or mandating discovery disputes to magistrate judges, litigants get prompt access to a judicial officer and prompt resolution of discovery disputes. Provisions for informal presentation of issues and prompt decisions have achieved significant cost savings and

reduced delay. Greater utilization of magistrate judges has also produced significant side benefits by opening the lines of communication between bench and bar and by creating greater uniformity in discovery practice and in decisions on discovery disputes. In the District, magistrate judges routinely hold status conferences, supervise settlement discussions, and entertain a myriad of pretrial motions involving joinder, transfer, extensions of time, and Daubert issues, among others. Also, according to the author, magistrate judges may be especially useful in settlement discussions in nonjury cases where the judge is the trier of fact and for that reason is uncomfortable with any involvement in settlement negotiations.

7. Bankruptcy Procedure

Stephen R. Wirth & Joseph P. Mitchell, *A Uniform Structural Basis for Nationwide Authorization of Bankruptcy Court-Annexed Mediation*, 6 Am. Bankr. Inst. L. Rev. 213, 1998.

This article analyzes the emerging use of bankruptcy mediation programs and discusses the legal and practical bases for such use in an effort to encourage the enactment of the National Bankruptcy Review Commission's proposal to create a uniform structural basis for mediation in bankruptcy courts. Part I considers the basic characteristics of mediation and bankruptcy mediation programs. Part II reviews how some bankruptcy courts interpret statutory language to glean authority for the use of the mediation process and reviews the Commission's proposal to create a uniform structural basis for mediation in bankruptcy courts. Due to the ill-defined statutory language regarding a bankruptcy court's authority for the use of mediation and the lack of specific guidelines, there has been serious reluctance to implement mediation programs. However, the Commission's proposal is a first step in moving many bankruptcy courts into the mainstream trend of using mediation as a method of dispute resolution and will cure them of this phobia. Part III discusses the benefits mediation techniques would have on chapter 11 as a cost and delay minimizer. And part IV suggests additional changes to the proposed system that will facilitate bankruptcy mediation programs, in an effort to illustrate how these revisions can improve chapter 11's effectiveness by markedly reducing the typical duration of its cases. In this section, some of the characteristics of the more documented and established existing case management programs regarding chapter 11 cases which have been adopted by bankruptcy courts pursuant to local bankruptcy rule, general order or informal programs, are highlighted.

Anne M. Burr, *Building Reform From the Bottom Up: Formulating Local Rules for Bankruptcy Court-Annexed Mediation*, 12 Ohio St. J. Disp. Resol. 311, 1997.

This article proposes guidelines for developing local rules for bankruptcy court-annexed ADR programs, particularly court-annexed mediation, that would help make bankruptcy proceedings more time and cost efficient. First, the article examines ADR as it has evolved in the federal district courts. It reviews legislation encouraging the development of mediation and arbitration and the problems encountered by the district courts in implementing ADR. Next, the article examines ADR as applied in the bankruptcy courts. It reviews bankruptcy legislation supporting ADR, mediation and arbitration as they are practiced in bankruptcy court and special problems encountered by the use of ADR in bankruptcy. Then the article examines types of bankruptcy disputes successfully resolved by ADR programs. Following this, the article focuses on bankruptcy court-annexed mediation, examining the advantages of court-annexed mediation over arbitration and litigation as well as the common characteristics of bankruptcy court-annexed mediation programs. Finally, the article closes with proposed guidelines for developing local rules on bankruptcy court-annexed mediation.

8. **Other Publications, Sources, and Articles.** (The following articles, while not focusing on court cost and delay in the United States federal civil justice system, may be of interest because of their broader policy arguments on civil justice reform and related issues):

Honorable Peter W. Agnes, Jr., *Some Observations and Suggestions Regarding the Settlement Activities of Massachusetts Trial Judges*, 31 Suffolk U. L. Rev. 263, 1997.

Carl West Anderson, *An Appeal for Practical Appellate Reform*, 37 No. 2 Judges' J. 28, 1998.

Mark C. Cawley, *The Right Result for the Wrong Reasons: Permitting Aggregation of Claims Under 28 U.S.C. § 1367 in Multi-Plaintiff Diversity Litigation*, 73 Notre Dame L. Rev. 1045, 1998.

Robert W. Clore, *Texas Rule of Civil Procedure 166a(i): A New Weapon for Texas Defendants*, 29 St. Mary's L. J. 813, 1998.

Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations From Forum Shopping Plaintiffs*, 19 U. Pa. J. Int'l Econ. L. 141, 1998.

Peter Gottwald, *Civil Procedure Reform in Germany*, 45 Am. J. Comp. L. 753, 1997.

Samuel R. Gross, *We Could Pass a Law . . . What Might Happen if Contingent Legal Fees Were Banned*, 47 DePaul L. Rev. 321, 1998.

Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 Ohio St. J. Disp. Resol. 629, 1997.

John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 Harv. Neg. L. Rev. 1, 1998.

Daniel Soulez Lariviere, *Overview of the Problems of French Civil Procedure*, 45 Am. J. Comp. L. 737, 1997.

Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificate of Merit?*, 1997 B.Y.U.L.R. 537, 1997.

National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years, National Bankruptcy Review Commission Final Report*, Oct. 20, 1997.

Carl Tobias, *Judicial Selection in a Time of Divided Government*, 47 Emory L. J. 527, 1998.

Carl Tobias, *The Judicial Vacancy Conundrum in the Ninth Circuit*, 63 Brook L.Rev. 1283, 1997.

Vincenzo Varano, *Civil Procedure Reform in Italy*, 45 Am. J. Comp. L. 657, 1997.