COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Tucson, Arizona
January 10-11-2002

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 10-11, 2002

1. Opening Remarks of the Chair

   - Report on the Judicial Conference session

2. **ACTION** — Approval of Minutes

3. Report of the Administrative Office

   A. Legislative report
   B. Administrative report

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. **ACTION** — Proposed amendments to Rule 1005 and Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19 for approval to be published for public comment
   B. Overview of proposed amendments published for comment

7. Report of the Advisory Committee on Civil Rules

   A. Overview of proposed amendments published for comment
   B. Minutes and other informational items

8. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** — Proposed amendments to Rules 6 and 41 for approval and transmission to the Judicial Conference
   B. Overview of proposed amendments published for comment

9. Report of the Advisory Committee on Evidence Rules

10. Status Report of Subcommittee on Attorney Conduct Rules

    A. Legislative bills introduced requiring Judicial Conference to recommend rules governing attorney conduct

    B. Oral report on ongoing discussions among the American Bar Association, Conference of State Chief Justices, and Department of Justice

11. Report of Technology Subcommittee

12. Status of Local Rules Project

    A. Professor Mary Squier's report
    B. Options paper

13. Discussion by Former Chairs and Other Judges Well-Experienced in Rules on the Present Status and Future of the Rulemaking Process

14. Long-Range Planning

15. Judicial Conference Committee's Self-Evaluation Form

16. Next Committee Meeting (Washington, D.C., June 10-11, 2002)

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November 30, 2001

MEMORANDUM TO ALL: UNITED STATES JUDGES
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SUBJECT: *Amendments to the Rules of Practice and Procedure* **(INFORMATION)**

Congress has taken no action on the amendments to the Federal Rules of Bankruptcy and Civil Procedure, approved by the Supreme Court on April 23, 2001. Accordingly, the amendments to the rules will take effect on December 1, 2001, including:

- Bankruptcy Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022; and
- Civil Rules 5, 6, 65, 77, 81, and 82.

The amendments were mailed to you in May 2000 as part of House Documents 107-60 and 107-61. In accordance with 28 U.S.C. § 2074(a) and the April 23, 2001, orders of the Supreme Court, the pertinent amendments will govern all proceedings commenced on or after December 1, 2001, and "insofar as just and practicable" all proceedings then pending. The text of the amended rules can be found on the judiciary's Federal Rulemaking web site at < http://www.uscourts.gov/rules/ >. In addition, pamphlets containing the rules, as amended, will be sent to you as soon as they become available from the Government Printing Office.

If you have any questions concerning the status of these amendments please call Peter G. McCabe, Assistant Director, Office of Judges Programs at (202) 502-1800, or John K. Rabiej, Chief, Rules Committee Support Office at (202) 502-1820.

Leonidas Ralph Mecham

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September/October 2001

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All of the following matters requiring the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources.

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Shortly after the Judicial Conference session began on September 11, 2001, members were informed of terrorist attacks in New York and Washington, D.C. The Conference adjourned promptly upon notification of the evacuation of the Supreme Court Building, and no Conference business was conducted on that day. The committee recommendations comprising the Conference's consent and discussion calendars were subsequently considered by Conference members in two mail ballots — one concluded on September 19, 2001, and the second concluded on October 1, 2001. (Two discussion items were deferred until the March 2002 Conference session.) Through these mail ballots, the Conference took the following actions:

Executive Committee

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service will end in 2001.

Urged the reappointment to the United States Sentencing Commission of Judges Sterling Johnson, Jr. (Eastern District of New York) and Joe Kendall (Northern District of Texas).

Committee on Automation and Technology

Approved strategic and specific recommendations resulting from a study of the judiciary's lawbooks and library program.

Pending the completion of a review of the system architecture in 2002 that will be completed under the Committee's direction, with a view of possible decentralization of Internet access to individual courts in a manner consistent with the security of the entire judiciary network, agreed to reaffirm (a) that computers connected to the data communications network (DCN) shall access the Internet only through national

Internet gateways; and (b) that operations and security at those gateways are under the administrative, managerial, and logistical control of the Administrative Office, subject to the direction of the Conference or, where appropriate, Conference committees.

Agreed to immediately adopt, on an interim basis, the model use policy developed by the federal Chief Information Officers Council, as later revised by the Committee, or its Subcommittee on IT Architecture and Infrastructure, to tailor it to the judiciary (except for Section F, "Privacy Expectations," which was recommitted to the Committee) as a national minimum standard defining appropriate Internet use, subject to the right of each court unit to impose or maintain more restrictive policies. Further agreed that in carrying out routine administrative, operational, and maintenance responsibilities, should instances of possibly inappropriate use of government resources come to the attention of the management of a court unit or the Administrative Office, established Judicial Conference notification policy will be followed.

Reaffirmed that individual courts have responsibility to enforce appropriate Internet use policies and directed the Administrative Office, as part of its regular audit process, to examine and comment upon the adequacy of the courts' enforcement methods.

Agreed to recommit to the Committee on Automation and Technology a recommendation on providing notice to judiciary employees of Internet use policies, in light of developments in technology and recent concerns raised on privacy.

Having discerned no material business use for Gnutella, Napster, Glacier, and Quake, all of which raise immediate and continuing security vulnerabilities, agreed to (a) direct the Administrative Office to take appropriate steps to block such traffic involving computers connected to the DCN; and (b) delegate to the Committee the authority to block other tunneling protocol that may cause security breaches.

Committee on the Administration of the Bankruptcy System

Rescinded its March 1994 decision to seek amendments to 11 U.S.C. § 327(d) concerning trustee retention of professionals.

Agreed to impose quarterly fees on chapter 11 cases filed in bankruptcy administrator districts in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time.

Committee on the Budget

Approved the Budget Committee's proposed budget request for fiscal year 2003, subject to amendments necessary as a result of new legislation, actions of the Judicial Conference, or any other reason the Executive Committee considers necessary and appropriate.

Amended its September 1998 policy regarding the designation of certifying officers. As amended, the policy authorizes the Director of the Administrative Office to designate certifying officers in appellate, district, and bankruptcy courts with the concurrence of the respective chief judges of those courts. In those courts in which the clerk's office functions of the district and bankruptcy units are consolidated, certifying officer responsibilities also will be consolidated, and concurrence with the certifying officer appointment will rest with the chief district judge. Certifying officers in the bankruptcy administrator and bankruptcy appellate panel programs will be designated with the concurrence of the circuit chief judge. Federal public defenders will be designated without chief judge concurrence.

Committee on Court Administration and Case Management

Adopted the recommendations contained in the Committee's *Report on Privacy and Public Access to Electronic Case Files*.

Approved model local rules for electronic case filing.

Agreed to raise fees in the Judicial Panel on Multidistrict Litigation Miscellaneous Fee Schedule as set forth below:

Fee	Current Amount	Increased Amount
Search of Records	$15	$20
Certification of Documents	5	7
Returned Check	25	35

Amended Items 2 and 4 of the Court of Appeals Miscellaneous Fee Schedule to read as follows (new language in italics):

(2) For every search of the records of the court and certifying the results thereof, $20. *This fee shall apply to services rendered on behalf of the United States if the information requested is available through electronic access.*

* * *

(4) For reproducing any record or paper, 50 cents per page. This fee shall apply to paper copies made from either: (1) original documents; or (2) microfiche or microfilm reproductions of the original records. *This fee shall apply to services rendered on behalf of the United States if the record or paper requested is available through electronic access.*

Amended Items 15 and 21 of the Bankruptcy Court Miscellaneous Fee Schedule, as endorsed by the Committee on the Administration of the Bankruptcy System, to read as follows (new language in italics):

(15) For docketing a proceeding on appeal or review from a final judgment of a bankruptcy judge pursuant to 28 U.S.C. § 158(a) and (b), the fee shall be the same amount as the fee for docketing a case on appeal or review to the appellate court as required by Item 1 of the Court of Appeals Miscellaneous Fee Schedule. A separate fee shall be paid by each party filing a notice of appeal in the bankruptcy court, but parties filing a joint notice of appeal in the bankruptcy court are required to pay only one fee. *If a trustee or debtor in possession is the appellant, the fee should be payable only from the estate and to the extent there is any estate realized.*

* * *

(21) For docketing a cross appeal from a bankruptcy court determination, the fee shall be the same amount as the fee for docketing a case on appeal or review to the appellate court as required by Item 1 of the Court of Appeals Miscellaneous Fee Schedule. *If a trustee or debtor in possession is the appellant, the fee should be payable only from the estate and to the extent there is any estate realized.*

Agreed to seek legislation to amend 28 U.S.C. § 1871(b)(1) to increase from $40 to $50 the attendance fee paid to a juror per day of actual attendance, subject to congressional funding.

With regard to S. 803 and H.R. 2458 (107th Congress), the E-Government Act of 2001:

a. Agreed to recommend that section 205 be stricken and replaced with a provision giving the judiciary six months to study the use of information technology in providing court-related information to the public and provide the Senate Governmental Affairs and the House Government Reform Committees with language more tailored to the objectives and needs of the judiciary and its users; and

b. Should Congress decline to strike section 205, agreed to—

(1) take no position with regard to the meaning of the term "written opinion" as used in the legislation;

(2) take no position on amendment of the fee language in the Judiciary Appropriations Act of 1991;

(3) make Congress aware of the fact that there are significant costs associated with the maintenance of written opinions online for an indefinite period of time;

(4) make Congress aware of any inconsistencies between any privacy and access policy the Conference may adopt and the provisions of the

legislation;

(5) make Congress aware that the "opt out" provision of the bill is contrary to the establishment of a nationwide access policy and should be viewed as merely a short-term solution to initial noncompliance;

(6) seek an amendment to the legislation to allow chief bankruptcy judges to create the websites of bankruptcy courts; and

(7) seek an amendment to the legislation to extend the time requirements for compliance with both the operation of court websites and the availability of electronic documents to five years after the effective date of the Act.

Committee on Defender Services

Approved a proposed revision of paragraph 2.27 of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, *Guide to Judiciary Policies and Procedures*, to add a new subparagraph (D) governing reimbursement to panel attorneys for expenses incurred defending against claims alleging malpractice of counsel in furnishing representational services under the CJA, and to redesignate the current subparagraph (D) as (E).

Committee on Federal-State Jurisdiction

Endorsed enactment of a proposal of the American Law Institute to amend section 1332(c) of title 28, United States Code, to deem a corporation to be a citizen of every state and foreign state by which it has been incorporated and of the state or foreign state in which it has its principal place of business.

Regarding patients' rights legislation, agreed to—

a. Continue to recognize that state courts should be the primary fora for the resolution of personal injury claims arising from the denial of health care benefits;

b. Express concern with any provision in patients' rights legislation that would create a new cause of action in federal court for personal injury claims arising from medically reviewable (*e.g.*, necessity of treatment) benefit decisions; and

c. Encourage Congress, in any such legislation, to provide state courts with jurisdiction (concurrent or otherwise) over any suits to compel insurance plans to provide interim medical benefits on an emergency basis and to bar removal of such suits.

Committee on Financial Disclosure

Authorized the reimbursement of judges and judiciary employees for professional

fees, not to exceed $1,000, for the preparation of annual financial disclosure reports.

Committee on the Judicial Branch

Agreed to seek repeal of section 101 of the Government Management Reform Act of 1994, Pub. L. No. 103-356, as it operates on judges, members of Congress, and Executive Schedule officials.

Approved amendments to the Travel Regulations for United States Justices and Judges to provide that the Director may authorize a judge with a special need (*e.g.*, physical disability) transportation and per diem expenses incurred by a family member or other attendant who must travel with the judge to make the trip possible; that a judge with a special need is authorized services (*e.g.*, renting and/or transporting a wheelchair) to enable the judge to accomplish successfully the purpose of the travel; and that the Director may authorize an actual subsistence expense reimbursement not to exceed 300 percent of the applicable maximum per diem rate, where the daily subsistence allowance for judges who itemize is inadequate to cover the cost of a hotel room that is accessible or otherwise equipped for physically disabled persons.

Committee on Judicial Resources

In reference to court interpreters:

a. Approved ten additional court interpreter positions for fiscal year 2003: six positions for the District of Arizona, one position for the Northern District of California, and three positions for the Southern District of California;

b. Agreed to provide accelerated funding in fiscal year 2002 for three positions in the District of Arizona and one position in the Southern District of California; and

c. Declined to approve additional court interpreter positions for the Districts of Massachusetts, Nebraska, New Jersey, and Puerto Rico.

Granted the Bankruptcy Administrator for the Northern District of Alabama authority to have a second-in-command type II chief deputy bankruptcy administrator position.

Adopted a proposed policy on physical fitness centers.

In reference to bankruptcy appellate panel law clerks:

a. Adopted a national staffing allocation formula for bankruptcy appellate panel law clerks of one law clerk for every 100 bankruptcy appellate panel annual case participations on a circuit-wide basis, not to exceed one law clerk per bankruptcy appellate panel judge;

b. Defined bankruptcy appellate panel case participations for the bankruptcy appellate panel law clerk formula as including (1) case terminations on the merits following oral hearing or submission on the briefs, and (2) case procedural terminations ruled on by a judge;

c. Approved a rounding factor of 75 bankruptcy appellate panel case participations for all filings above the initial base of 100 case participations for receiving a second or subsequent law clerk;

d. Approved a stability factor that would reduce the number of allocated positions only if the bankruptcy appellate panel does not meet the formula standard with the rounding factor for two years in a row; and

e. Authorized the Director of the Administrative Office to approve requests for bankruptcy appellate panel law clerk extensions for compelling reasons.

Approved a request of the District of South Carolina for application of the "robust" staffing factor for clerk's office positions performing duties related to alternative dispute resolution.

In order to provide the staffing needed to perform the judicial support requirements and functions of the United States district clerks' offices, adopted a proposed new automation staffing factor and revised organizational and judge support staffing factors as part of the staffing formula for the district clerks' offices, to be implemented in fiscal year 2002.

Adopted revised qualifications standards for chief probation officers and chief pretrial services officers.

Committee on the Administration of the Magistrate Judges System

Approved technical and clarifying changes to the Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges.

Approved recommendations for changes in specific magistrate judge positions.

Designated the new full-time magistrate judge position at Charleston, South Carolina, for accelerated funding in fiscal year 2002.

Committee on Rules of Practice and Procedure

Approved proposed amendments to Appellate Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 and agreed to 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.

Approved proposed amendments to Bankruptcy Rules 1004, 2004, 2015, 4004, 9014, and 9027, and new Rule 1004.1 and agreed to 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.

Approved proposed revisions to Official Bankruptcy Forms 1 and 15, to take effect on December 1, 2001.

Approved proposed amendments to Civil Rules 54, 58, and 81, and new Rule 7.1, and a proposed amendment to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, and agreed to transmit these changes 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.

Approved proposed "style" amendments to Criminal Rules 1 through 60 and agreed to transmit these changes 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.

Approved separately proposed "substantive" amendments to Criminal Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43, and new Rule 12.4 and agreed to transmit these changes 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.

Agreed to substitute the separately proposed "substantive" amendments to the Criminal Rules as approved by the Conference for the corresponding amendments contained in the comprehensive "style" revision of the Criminal Rules, including new Rule 12.4, and transmit these changes along with the remaining amendments in the "style" revision as a single set of proposals 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.

Committee on Security and Facilities

Agreed to amend the *U.S. Courts Design Guide* by replacing the word "departures" with the words "special requirements" for clarification throughout the *Design Guide* (along with grammatical changes as necessary).

Agreed to seek legislation that would permit the General Services Administration to

delegate construction and alteration authority to the judiciary to the same extent that it may do so to executive branch agencies.

Agreed to oppose H.R. 254 (107th Congress), a bill that would provide for more detailed congressional review of all court alteration and construction projects.

Endorsed voluntary participation by federal courts in the Courtroom Information Project of the National Center for State Courts.

Committees on Criminal Law, Defender Services, and Federal-State Jurisdiction - Consolidated Report

With respect to legislation pending in the 107th Congress to enhance the availability of post-conviction DNA testing in federal and state criminal justice systems and to ensure competent counsel in state capital proceedings (*e.g.,* S. 486 and H.R. 912, "The Innocence Protection Act of 2001," and S. 800, the "Criminal Justice Integrity and Innocence Protection Act of 2001"), and similar legislation that might be introduced in the future:

a. Agreed to support the goal of establishing fair and uniform standards for post-conviction forensic DNA testing in the federal criminal justice system.

b. Agreed to support the goal of affording innocent people wrongly convicted the opportunity to obtain DNA testing relevant to their claim of innocence, but opposed provisions that would entitle a person convicted of a non-capital federal crime the right to apply to the sentencing court for DNA testing in connection with an offense used for sentencing purposes.

c. Agreed to support provisions that would give federal courts discretion to appoint counsel for a financially eligible person who is convicted of a federal crime and is applying to the federal court for DNA testing in connection with that conviction.

d. Agreed to support the goal of ensuring that capital defendants have competent legal representation in both state and federal capital proceedings at every stage of their cases.

e. Agreed to support giving the Judicial Conference the opportunity to provide input to any national commission established to set standards specifying the elements of an effective system for providing adequate representation to indigent persons facing the death penalty, but oppose requiring members of the federal judiciary to serve as members of the commission.

f. Agreed to support the award of grants for the purpose of providing defense services in connection with representation both in state capital trials and appeals and in state and federal post-conviction proceedings, except that, with regard to funds to be used in state court, support the federal judiciary's providing input

into, but oppose the federal judiciary's being responsible for, the administration of such funds.

g. With regard to provisions affecting state criminal justice systems that raise issues of federalism and resources burdens:

(1) Agreed to oppose provisions that would entitle individuals not in custody to seek post-conviction DNA testing to challenge a state criminal conviction;

(2) Agreed to express concerns with provisions that would displace state time limits and procedural default rules as applicable to individuals convicted after DNA testing became a routine feature of the state's criminal justice system;

(3) Agreed to encourage Congress, to the extent it conditions the receipt of federal funds on a state's certification that it will provide DNA testing, to limit such conditions to those grants that relate directly to developing or improving a state's DNA analysis capability or to collecting, analyzing, or indexing DNA material for law enforcement identification purposes;

(4) Agreed to oppose provisions that would permit the routine naming of state judges as defendants in any new federal cause of action to obtain DNA testing or evidence;

(5) Agreed to encourage Congress, in addressing the consequences of a state's failure to provide appropriate post-conviction DNA testing, to consider making any federal judicial remedy available only where the state judicial system fails to provide an adequate and effective remedy;

(6) Agreed to oppose provisions that would require the Attorney General to withhold certain prison funding to a state if that state permits the death penalty but does not meet the national standards specifying the elements of an effective system for providing adequate representation in state capital cases as established by a national commission described above; and

(7) Agreed to oppose provisions that would require states to certify that, as a condition for receiving certain federal grants, juries having a role in determining the sentence in a capital proceeding are instructed as to all statutorily authorized sentencing options, including parole eligibility rules, if a defendant so requests.

h. Agreed to authorize the Director of the Administrative Office of the U.S. Courts to work with chairs of the respective Judicial Conference committees to suggest to Congress modifications of the relevant legislation that address the concerns of the Conference.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 7-8, 2001
Philadelphia, Pennsylvania

Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Philadelphia, Pennsylvania, on Thursday and Friday, June 7-8, 2001. The following members were present:

Judge Anthony J. Scirica, Chair
David M. Bernick
Honorable Michael Boudin
Honorable Frank W. Bullock, Jr.
Charles J. Cooper
Honorable Sidney A. Fitzwater
Dean Mary Kay Kane
Gene W. Lafitte
Patrick F. McCartan
Honorable J. Garvan Murtha
Honorable A. Wallace Tashima
Honorable Thomas W. Thrash, Jr.

The Department of Justice was represented at the meeting by Roger Pauley, Director (Legislation) of the Office of Legislation and Policy in the Criminal Division. Also in attendance was Chief Justice E. Norman Veasey, a former member of the committee.

Chief Justice Charles Talley Wells and Deputy Attorney General Larry D. Thompson were unable to attend the meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the U.S. Courts; Nancy Miller, special counsel in the Office of Judges Programs of the Administrative Office; and Christopher F. Jennings, assistant to Judge Scirica.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Honorable David F. Levi, Chair
Honorable Lee H. Rosenthal, Member
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Special Consultant
Advisory Committee on Criminal Rules —
Honorable W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Honorable Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were: Joseph F. Spaniol, Jr., consultant to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Joe Cecil of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica introduced Dean Michael A. Fitts and Professor Stephen B. Burbank of the University of Pennsylvania Law School and thanked them for making the school's facilities available to the committee for the meeting. Dean Fitts and Professor Burbank welcomed the members and conveyed best wishes from Professor Geoffrey Hazard, a former member of the committee, who was unable to attend the meeting.

Judge Scirica welcomed Dean Mary Kay Kane to the committee and pointed out that she is the dean of the Hastings College of the Law, University of California, president of the American Association of Law Schools, and reporter for the American Law Institute's complex litigation project.

Judge Scirica thanked Chief Justice Veasey for seven years of distinguished service as a member of the Standing Committee, citing, among other things, his leading role in attorney conduct and mass torts issues. He also thanked Judges Garwood and Davis, whose terms as advisory chairs are due to end on October 1, 2001. He praised them especially for their enormous contributions in achieving a complete restyling of the appellate and criminal rules.

Judge Scirica said that there was little to report on the action of the Judicial Conference at its March 2001 meeting. He added, however, that several proposed amendments to the rules will be presented to the Conference at its September 2001 meeting, some of which might prove to be controversial.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 7-8, 2000.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Judicial Conference at its September 2000 meeting had passed a resolution encouraging courts to post their local rules on the Internet. At that time, 54 district courts already had posted local rules on their respective web sites. The courts, he said, have been complying with the resolution, and now 83 out of the 92 district courts have placed their rules on the Internet. He added that Senator Lieberman had introduced legislation that would require all courts to establish web sites and post on them their local rules and orders.

Mr. Rabiej reported that Senator Thurmond had introduced legislation that would allow a district judge to conduct an arraignment by video conferencing, even without the consent of the defendant, and to conduct a sentencing hearing by video conferencing under certain circumstances.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil noted that the agenda book for the meeting contains a status report on the various educational and research projects of the Federal Judicial Center. He pointed out that the Research Division of the Center is updating an earlier study of summary judgments and should have some additional insights to present at the next committee meeting on the impact of summary judgments on civil litigation in the district courts.

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 11, 2001. (Agenda Item 8)

Amendments for Final Approval

Judge Garwood reported that the advisory committee had been working since April 1998 on a variety of amendments to the appellate rules. The proposed amendments had been brought to the Standing Committee's initial attention at its January 2000 and June 2000 meetings. They deal with five general subjects: (1) entry of judgment and time for filing an appeal; (2) electronic service; (3) calculating time limits; (4) corporate disclosure statements; and (5) various "housekeeping" changes in the rules. Judge Garwood pointed out that public comments had been received on the proposed amendments, but no commentator had asked to testify on them in person.

FED. R. APP. P. 1(b)

Professor Schiltz said that the advisory committee recommends abrogating Rule 1(b), which declares that the Federal Rules of Appellate Procedure "do not extend or limit the jurisdiction of the courts of appeals." He noted that the provision is obsolete because Congress enacted legislation in 1990 and 1992 authorizing the Supreme Court through the rules process to affect the jurisdiction of the courts of appeals by: (1) defining when a district court ruling is final for purposes of 28 U.S.C. § 1291; and (2) providing for appeals of interlocutory decisions not already authorized by 28 U.S.C. § 1292.

One of the members expressed concern that extending or limiting the jurisdiction of the courts of appeals through the rules process may not be constitutional. Defining the jurisdiction of the courts, he said, is "ordaining and establishing" courts within the meaning of Article III of the Constitution — a power reserved exclusively to Congress.

Judge Garwood responded that the advisory committee is not taking a position on the constitutional issue. Rather, it is merely seeking to abrogate a rule that is no longer correct in light of the legislation described above.

Mr. Cooper moved to add language to the committee note specifying that the committee takes no position with regard to the constitutional issue. The motion died for lack of a second.

The committee approved the proposed abrogation of Rule 1(b) with one objection.

FED. R. APP. P. 4(a)(1)(C)

Professor Schiltz explained that the proposed addition to Rule 4, governing the time for filing a notice of appeal, would resolve a split among the courts of appeals as to whether an appeal denying an application for a writ of error *coram nobis* is governed by the time limitations applicable to civil cases (Rule 4(a)) or by those applicable to criminal cases (Rule 4(b)). He said that the proposed amendment adopts the civil case time limitations. He added that no changes had been made in the text or note following publication.

The committee approved the proposed amendment without objection.

FED. R. APP. P. 4(a)(5)(A)(ii)

Professor Schiltz said that the proposed amendment to the rule, governing motions for extension of time, would allow a district court to extend the time to file a notice of appeal if the moving party shows either "excusable neglect" or "good cause" — regardless of whether the extension motion is filed within the original 30-day time for appeal or the next 30 days. He added that some courts have held — based on a committee note — that the "good cause" standard applies to motions brought within the 30-day period, and the "excusable neglect" applies after that time.

Professor Schiltz explained that the proposed amendment brings the civil appellate provision into harmony with the criminal appellate provision. He also said that the only change, other than style, made after publication was to add language to the note explaining "good cause" and "excusable neglect."

The committee approved the proposed amendment without objection.

FED. R. APP. P. 4(a)(7)

Professor Schiltz said that the proposed changes would address problems caused by the interaction of: (1) Rule 4(a)(7)'s definition of when a judgment is entered for purposes of appeal; and (2) FED. R. CIV. P. 58's requirement that a judgment be set forth on a separate document. The core problem, he said, is that many district court judgments — despite the requirement of Rule 58 — are not in fact set forth on separate documents. Under the case law of every circuit but one, the time to file an appeal never begins to run if the trial court fails to comply with the separate document requirement.

In addition, he said, the filing of a post-judgment motion tolls the time for appeal until an order denying the motion is entered. In most circuits, the order denying the post-trial motion is itself appealable. So, even if the judge denies the motion, the time to appeal the underlying judgment never begins to run. As a result of all this, there are many cases in which the parties assume that the case has been terminated by the court, but the time for appeal is in fact still open. Professor Schiltz pointed out that there are more than 500 court of appeals decisions addressing the subject.

Professor Schiltz reported that the Advisory Committee on Appellate Rules and the Advisory Committee on Civil Rules had worked together on proposing solutions to the problems caused by the interaction of the two sets of rules. He said that the proposed, companion amendments to FED. R. CIV. P. 58 would maintain the separate document requirement generally, but specify that a judgment is entered for purposes of the civil rules upon the occurrence of the earlier of the following two events: (1) the judgment is entered by the clerk in the civil docket and set forth on a separate document; or (2) 150 days have run from entry in the civil docket by the clerk. The proposed amendments to the civil rule would also specify that a separate document is not required for an order disposing of a post-trial motion.

Professor Schiltz explained that the proposed amendments to FED. R. APP. P. 4(a)(7) tie directly into FED. R. CIV. P. 58. There will be no separate document requirement in the appellate rules. Rather, a judgment will be considered entered for purposes of FED. R. APP. P. 4(a) if it is entered in accordance with FED. R. CIV. P. 58.

Professor Schiltz pointed out that the committee had received some negative comments from the public on the proposal to "cap" the time for filing an appeal. Commentators declared that the separate document requirement protects parties against unknowingly forfeiting their rights by giving them clear, actual notice that the time for appeal has begun to run. They argue that the appeal period should never run until a separate document is entered. Professor Schiltz reported, however, that the two advisory

committees had rejected that argument, believing that the time to appeal should not be allowed to run forever.

As published, the proposed amendments had specified that a judgment is deemed entered 60 days after entry in the civil docket by the clerk. But commentators suggested that 60 days of inactivity in a case is simply too common to provide the parties with adequate notice that the case is over. Accordingly, in light of the public comments, the advisory committees decided after publication to increase the "cap" from 60 days to 150 days. A period of 150 days of inactivity should clearly signal to the parties that the court is done with their case. Professor Schiltz noted, moreover, that a party who receives *no notice at all* has only 180 days to file an appeal under the current rule. It would be inconsistent, he said, to argue that a party who does in fact receive notice of the court's judgment, but not through a separate document, should have an unlimited amount of time to appeal.

Professor Cooper reported that a few changes had been made in FED. R. CIV. P. 58 following publication. He noted that the definition of the time of entering judgment in Rule 58(b) had been extended to apply to all the civil rules, not just the list of specific rules set forth in the published version.

He also noted that the advisory committee had decided to carry forward the separate document requirement in Rule 58(a), even though some commentators had suggested abandoning it. The requirement applies explicitly not only to every judgment, but also to every amended judgment. This provision, he said, is important with respect to orders disposing of post-trial motions. Rule 58(a), as amended, states that a separate document is not required to dispose of certain post-trial motions. But if the order disposing of the motion amends the judgment, a separate document is in fact required.

Professor Cooper pointed out that Rule 58(a)(2) specifies the duty of the clerk to prepare, sign, and enter the judgment. The advisory committee decided after publication to add the words: "unless the court otherwise orders." He noted that subdivision (c) restates the current rule on cost or fee awards. But subdivision (d), he said, is new. It allows a party to request the court to set forth a judgment on a separate document so they may file a notice of appeal. A complementary amendment to FED. R. CIV. P. 54(d) would delete the requirement that a judgment on a motion for attorney fees be set forth in a separate document.

Several of the participants stated that the proposed amendments represented a major accomplishment, achieved as a result of extensive, careful research and close cooperation between the appellate and civil advisory committees.

One of the members pointed out that Supreme Court orders normally specify that amendments to the rules govern all proceedings then pending "insofar as just and practicable." He asked whether the proposed amendments to the FED. R. APP. P. 4(a)(7) and FED. R. CIV. P. 58 will have the effect of ending all pending "time bomb" cases 150 days after the proposed amendments are scheduled to take effect on December 1, 2002. Professors Schiltz and Cooper responded that the Court's orders prescribing the amendments to FED. R. APP. P. 4 and FED. R. CIV. P. 58 should specify that they do in fact apply to all pending cases. Judge Scirica noted that there was a consensus in the committee in support of the recommendation, and he suggested that the matter be brought specifically to the attention of the Court.

The committee approved the proposed amendments to Fed. R. App. P. 4(a)(7) and Fed. R. Civ. P. 54(d)(2) and 58 without objection.

FED. R. APP. P. 4(b)(5)

Professor Schiltz reported that the proposed amendment would resolve a split among the circuits by specifying that the filing of a motion to correct a sentence under FED. R. CRIM. P. 35 does not toll the time to appeal a judgment of conviction.

Judge Garwood added that the rule's reference to FED. R. CRIM. P. 35(c) must be changed to FED. R. CRIM. P. 35(a) because of the recent restyling of the criminal rules.

The committee approved the proposed amendment without objection.

FED. R. APP. P. 5(c)

Professor Schiltz said that the proposed amendment would correct an erroneous cross-reference in the rule and impose a 20-page limit on petitions for permission to appeal, cross-petitions for permission to appeal, and answers to petitions or cross-petitions for permission to appeal. He noted that there had been no public comments on the proposal.

The committee approved the proposed amendment without objection.

FED. R. APP. P. 15(f)

Professor Schiltz reported that the advisory committee had proposed adding a new subdivision (f) to Rule 15 (review or enforcement of an agency order) to provide that when an agency order is rendered non-reviewable by the filing of a petition for rehearing or a similar petition with the agency, any petition for review or application filed with the court to enforce that non-reviewable order will be held in abeyance and become effective

when the agency disposes of the last review-blocking petition. The proposed amendment is modeled on Rule 4(a)(4)(B)(i) and treats premature petitions for review of agency orders in the same manner as premature notices of appeal of judicial decisions.

Professor Schiltz noted that the proposed amendment is being deferred in light of opposition from the Advisory Committee on Procedures for the District of Columbia Circuit. He said that the committee would confer with the chief judge and clerk of the court of appeals about the objections.

FED. R. APP. P. 21(d)

Professor Schiltz reported that the proposed amendment would correct an erroneous cross-reference in Rule 21(d) (writs of mandamus and prohibition and other extraordinary writs). It would also impose a 30-page limit on petitions for extraordinary relief and answers to those petitions.

The committee approved the proposed amendment without objection.

FED. R. APP. P. 24(a)

Professor Schiltz said that the proposed amendments to Rule 24(a) (proceeding *in forma pauperis*) would eliminate apparent conflicts with the Prison Litigation Reform Act of 1995 regarding payment of filing fees and continuance of district court *in forma pauperis* status to the court of appeals.

The committee approved the proposed amendments without objection.

ELECTRONIC SERVICE
FED. R. APP. P. 25(c), 25(d), 26(c), 36(b) AND 45(c)

Professor Schiltz pointed out that the proposed amendments to the appellate rules authorizing the use of electronic service are identical to the companion amendments to the civil rules, except for an additional paragraph in the committee note making it clear that parties have the flexibility to define the terms of their consent.

The committee approved the proposed amendments without objection.

TIME CALCULATION
FED. R. APP. P. 26(a)(2), 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4), AND 41(b)

Professor Schiltz reported that the proposed amendments are designed to conform computation of deadlines under the Federal Rules of Appellate Procedure with usage

under the civil and criminal rules. Thus, under the proposed amendment to Rule 26(a)(2), intermediate weekends and holidays will be excluded in computing any prescribed period less than 11 days, rather than periods less than 7 days.

The proposed amendment to Rule 4(a)(4)(A)(vi) (appeal in a civil case) would delete a parenthetical that will become superfluous in light of the proposed amendment to Rule 26(a)(2).

Professor Schiltz explained that the proposed amendment to Rule 27(a)(3)(A) would change from 10 days to 8 days the time within which a party must file a response to a motion. As a practical matter, he said, the time limit would remain about the same as under the current rule since the proposed amendment to Rule 26(a)(2) specifies that intermediate weekends and holidays are excluded in computing deadlines of less than 11 days.

Professor Schiltz said that the proposed amendment to Rule 27(a)(4) would change from 7 days to 5 days the time within which a party must file a reply to a response to a motion. Because of the parallel amendment to Rule 26(a)(2), intermediate weekends and holidays will be excluded from computation.

Professor Schiltz said that Rule 41 (mandate) would be amended to specify that the court's mandate must issue in exactly seven calendar days.

The committee approved the proposed amendments without objection.

FED. R. APP. P. 26.1

The committee considered the proposed amendments to Rule 26.1 (corporate disclosure statement) later in the meeting together with proposed parallel amendments to the civil, criminal, and bankruptcy rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

COVER COLORS
FED. R. APP. P. 27(d)(1)(B), 32(a)(2), AND 32(c)(2)(A)

Professor Schiltz pointed out that the proposed amendments would specify the color of a cover, if one is used, for a motion (white), a supplemental brief (tan), and a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, or response to a petition for hearing or rehearing en banc (white). He said that all the public comments save one had been favorable.

The committee approved the proposed amendments without objection.

FED. R. APP. P. 28(j)

Professor Schiltz explained Rule 28(j) (citation of supplemental authorities) authorizes a party to notify the clerk by letter if pertinent and significant authorities come to its attention after its brief has been filed. The current rule, he said, specifies that the letter must describe the supplemental authorities "without argument," but there is no size limit on the letter. The proposed amendment would eliminate the prohibition on "argument" because it is just too difficult to enforce. But it would impose a limit on the size of the letter. As published, the proposed limit had been 250 words, but commentators expressed concern about counting citations. In response, the advisory committee decided to increase the proposed limit of the letter to 350 words, without specifying how citations will be counted.

The committee approved the proposed amendment without objection.

FED. R. APP. P. 31(b)

Professor Schiltz said that the proposed amendment to Rule 31 (serving and filing briefs) would specify that briefs must be served on all parties, including those not represented by counsel.

The committee approved the proposed amendment without objection.

FED. R. APP. P. 32(a)(7)(C) AND FORM 6

Professor Schiltz explained that the proposed new Form 6 is a suggested certificate of compliance stating that a brief meets the requirements of Rule 32(a) regarding type-volume limitation, typeface, and type style. The proposed amendment to Rule 32(a)(7)(C) specifies that use of Form 6 is sufficient to meet the certification obligation of the rule.

The committee approved the proposed amendment without objection.

FED. R. APP. P. 32(d)

Professor Schiltz reported that the proposed amendment to Rule 32(d) specifies that every brief, motion, or other paper filed with the court must be signed by the attorney or unrepresented party who files it. He said that one commentator strongly opposed the amendment, and other commentators expressed concern as to whether each copy of a document must be signed. He explained that the advisory committee added a sentence to the committee note following publication specifying that only the original copy of every paper must be signed.

The committee approved the proposed amendment without objection.

FED. R. APP. P. 44(b)

Professor Schiltz explained that the current Rule 44 implements 28 U.S.C. § 2403(a) by requiring the clerk of court to notify the Attorney General of the United States whenever a party challenges the constitutionality of a federal statute and the United States is not a party to the case. Proposed new Rule 44(b) would implement a companion statutory provision, 28 U.S.C. § 2403(b), and require the clerk to notify the attorney general of a state whenever a party challenges the constitutionality of a state statue and the state is not a party to the case.

The committee approved the proposed amendment without objection.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of May 15, 2001. (Agenda Item 7)

Judge Small noted that the Supreme Court on April 23, 2001, had approved amendments to eight bankruptcy rules and submitted them to Congress. (Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022)

He also reported that major bankruptcy reform legislation had passed both houses of the 107th Congress and will likely be enacted into law sometime later in the year. Because the legislation generally will take effect 180 days after enactment, the advisory committee will have a very short period in which to draft appropriate rules and forms to implement the new law. He said that the advisory committee had appointed subcommittees and hired consultants to examine the legislation thoroughly and determine what changes will be needed in the rules and forms.

Amendments for Final Approval

Judge Small reported that the advisory committee in August 2000 had published proposed amendments to seven rules, one proposed new rule, and amendments to one official form. He said that the committee had received many comments on the proposals and had conducted a public hearing on January 26, 2001. The most controversial of the changes, he said, involves the rewriting of Rule 2014, which requires a professional seeking employment in a bankruptcy case to disclose connections with the debtor and others.

FED. R. BANKR. P. 1004

Professor Morris explained that Rule 1004(a), dealing with voluntary petitions filed by partnerships, would be deleted because it addresses a matter of substantive law beyond the scope of the rules. As amended, the rule will apply only to involuntary petitions.

The committee approved the proposed amendment without objection.

FED. R. BANKR. P. 1004.1

Professor Morris reported that proposed new Rule 1004.1 will fill a gap in the rules and allow an infant or incompetent person to file a petition through a representative, next friend, or guardian ad litem. It also will allow the court to appoint a guardian ad litem or issue any other orders necessary to protect an infant or incompetent debtor. Judge Small pointed out that the proposed rule is modeled on FED. R. CIV. P. 17(c).

The committee approved the proposed new rule without objection.

FED. R. BANKR. P. 2004

Professor Morris said that Rule 2004 (examination) would be amended to clarify that an examination may be conducted outside the district in which a case is pending. The amended rule specifies that the subpoena for the examination may be issued and signed by an attorney authorized to practice either in the court where the case is pending or the court where the examination is to be held.

One of the judges questioned whether it is technically correct to state that an attorney, rather than the court, "issues" a subpoena. It was pointed out, though, that the language of the proposed amendment to the bankruptcy rules is consistent with the usage of the civil rules. Specifically, FED. R. CIV. P. 45(a)(2) declares that a subpoena issues from the court, but FED. R. CIV. P. 45(a)(3) provides that an attorney, as an officer of the court, may also issue and sign a subpoena on behalf of the court.

The committee approved the proposed amendment without objection.

FED. R. BANKR. P. 2014

Judge Small explained that Rule 2014 (employment of a professional) has been rewritten to conform more closely to the provisions of the Bankruptcy Code regarding the disclosures that a professional must make when seeking employment in a bankruptcy case. The amended rule will require the professional to disclose, among other things:

(1) any interest in, relationship to, or connection with the debtor; and

(2) any other interest, relationship connection that might cause the court or a party in interest reasonably to question whether the professional is "disinterested" within the meaning of section 101 of the Code.

Judge Small said that the committee had received both favorable and unfavorable comments on the proposed revisions. He explained that the opponents claim that the revised rule will give professionals too much discretion to decide what they must disclose. They express a preference for retaining the current rule, which requires disclosure of "all connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Proponents of the revision, on the other hand, declare strongly that the current rule simply does not work and that it is impossible as a practical matter for professionals to comply with it fully.

Judge Small reported that the advisory committee had spent a great deal of time in addressing the rule, and he noted that members had engaged in a personal dialog with some of the opponents of the revisions. As a result of these discussions, he said, the advisory committee had refined the language of paragraphs (b)(3) and (b)(4) following publication. He and Professor Morris explained that the revisions will continue to require full disclosure of any connection with the debtor, will specify a reasonableness standard with respect to disclosure of connections with creditors and other parties in interest, and will give clear notice to professionals that their disinterestedness is to be judged by others, *i.e.,* the court and parties in interest. Judge Small said that the post-publication refinements had satisfied most, though not all, opponents of the change.

The committee approved the proposed amendment with two negative votes.

FED. R. BANKR. P. 2015

Professor Morris said that Rule 2015 (duty to keep records, make reports and give notice) would be amended to specify that the duty to file quarterly reports in a chapter 11 case continues only as long as there is an obligation to make quarterly payments to the United States trustee.

The committee approved the proposed amendment without objection.

FED. R. BANKR. P. 4004

Professor Morris stated that the proposed amendment to Rule 4004(c) (grant or denial of discharge) would expand the types of motions that prevent a discharge.

The committee approved the proposed amendment without objection.

FED. R. BANKR. P. 9014

Judge Small noted that the advisory committee had considered the proposed amendments to Rule 9014 (contested matters) originally as part of its proposed "litigation package."

He said that some negative comments had been received regarding new subdivision (d). The proposed amendment makes it clear that testimony as to material, disputed factual matters in contested matters must be taken in the same manner as in an adversary proceeding. He said that some commentators had expressed concern that the amendment might eliminate the widespread practice of allowing some direct testimony to be presented by way of affidavit. Judge Small explained that the proposed amendment does not eliminate the practice. But if a factual dispute arises in a contested matter, the court must resolve it through live testimony, just as it would in an adversary proceeding.

Professor Morris reported that new subdivision (e) would require a court to provide a mechanism for notifying attorneys as to whether the presence of witnesses is necessary at a particular hearing. He emphasized that the rule does not specify any particular procedures. Nor does it specify whether the court should notify attorneys by local rule, order, or otherwise. He emphasized that local procedures for hearings and other court appearances in contested matters vary from district to district. The amended rule will simply require a court to provide some sort of mechanism enabling attorneys to know at a reasonable time before a scheduled hearing on a contested matter whether they need to bring their witnesses.

The committee approved the proposed amendments without objection.

FED. R. BANKR. P. 9027

Professor Morris said that the proposed amendment to Rule 9027 (removal) makes it clear that if a claim or cause of action is initiated after a bankruptcy case has been commenced, the time limits for filing a notice of removal of the claim or cause of action apply whether the case is still pending or has been suspended, dismissed, or closed by the court.

The committee approved the proposed amendment without objection.

FORMS 1 AND 15

Professor Morris pointed out that only relatively minor changes are proposed in the forms. He said that Form 1 (voluntary petition) would be amended to require a debtor to disclose ownership or possession of any property that poses, or is alleged to pose, a threat of imminent and identifiable harm to public health or safety. He said that there had been very little public comment on the proposed addition.

Professor Morris reported that Form 15 (order confirming a plan) would be amended to conform to a change in Rule 3020 currently pending in Congress that should take effect on December 1, 2001. The amended rule states that if a chapter 11 plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation must describe in reasonable detail all acts enjoined, be specific in its terms regarding the injunction, and identify the entities subject to the injunction.

Professor Morris recommended that the amendments to the forms be made effective by the Judicial Conference on December 1, 2001, to coincide with the effective date of amendments to the rules.

The committee approved the proposed amendments to the forms without objection and recommended that they become effective on December 1, 2001.

Amendments for Publication

FED. R. BANKR. P. 1007 AND 7007.1

The committee considered the proposed amendment to Rule 1007 and proposed new Rule 7007.1 (corporate ownership statement) later in the meeting together with proposed parallel amendments to the appellate, civil, and criminal rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

FED. R. BANKR. P. 2003 AND 2009

Judge Small said that the proposed amendments to Rule 2003 (meeting of creditors or equity security holders) and Rule 2009 (trustees for estates when joint administration is ordered) reflect the enactment of a new subchapter V of chapter 7 of the Bankruptcy Code governing the liquidation of multilateral clearing organizations.

The committee approved the proposed amendments for publication without objection.

FED. R. BANKR. P. 2016

Professor Morris said that new subdivision (c) would be added to Rule 2016 (compensation for services rendered and reimbursement of expenses) to implement § 110(h)(1) of the Bankruptcy Code. It would require bankruptcy petition preparers to disclose fees they receive from the debtor.

The committee approved the proposed amendment for publication without objection.

FORMS 1, 5, AND 17

Professor Morris said that Form 1 (voluntary petition) would be amended by adding a check box to designate a clearing bank case filed under subchapter V of chapter 7 of the Bankruptcy Code. The proposed changes to Form 5 (involuntary petition) and Form 17 (notice of appeal) are required by an uncodified 1994 amendment to the Bankruptcy Code providing that child support creditors do not have to pay appeal fees.

The committee approved the proposed amendments for publication without objection.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Levi and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachments of May 14, 2001. (Agenda Item 6)

Amendments for Final Approval

FED. R. CIV. P. 7.1

The committee considered proposed new Rule 7.1 (corporate disclosure statement) later in the meeting together with proposed parallel amendments to the appellate, bankruptcy, and criminal rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

FED. R. CIV. P. 54 AND 58

The committee approved proposed amendments to Rule 54 (judgment and costs) and Rule 58 (entry of judgment) as part of its consideration of proposed amendments to FED. R. APP. P. 4(a)(7). (See pages 6-8 of these minutes.)

FED. R. CIV. P. 81

Professor Cooper said that the proposed amendment to Rule 81 (applicability of the rules) would eliminate an inconsistency regarding time provisions between Rule 81(a)(2) and the rules governing § 2254 cases and § 2255 proceedings.

The committee approved the proposed amendment without objection.

ADMIRALTY RULE C

Professor Cooper pointed out that the proposed amendments to the admiralty rules had been described in detail at the January 2001 meeting of the committee. He explained that the proposed changes are minor in nature and designed to eliminate unintentional inconsistencies between the rules and the Civil Asset Forfeiture Act of 2000. He noted that the amendments had been published under an expedited schedule and had attracted no public comments.

The committee approved the proposed amendments without objection.

Amendments for Publication

Judge Levi reported that the advisory committee was seeking authority to publish proposed amendments to Rule 23 (class actions), Rule 51 (jury instructions), and Rule 53 (masters).

FED. R. CIV. P. 23

Background

Judge Levi noted that the advisory committee had been studying the operation of Rule 23 for a number of years. In the 1990s, he said, its efforts had focused largely on the merits of the decision to certify a class. Although several proposed amendments to Rule 23 had been published for comment, the only change actually made in the rule was the addition in 1998 of subdivision (f), authorizing interlocutory appeals of decisions granting or denying class certification. That amendment, he said, appears to be working very well. It has facilitated a healthy development of the law without either overburdening the courts of appeals or delaying cases in the district courts.

Judge Levi said that the focus of the advisory committee's current efforts is on judicial oversight of class actions, including oversight of settlements, appointment and payment of attorneys, and overlapping or competing class actions. He reported that the

advisory committee's class-action work has been directed by Judge Rosenthal, chair of the committee's class action subcommittee, and Professor Marcus, its special consultant.

Judge Levi pointed out that the standing committee in January 2001 had advised the advisory committee to be bold in devising solutions to class action problems and not to be intimidated by the restrictions of the Rules Enabling Act. To that end, he said, some members invited the advisory committee to recommend possible statutory amendments as part of the proposed solutions.

Judge Levi noted that the advisory committee's package of proposed amendments to Rule 23 had been carefully drafted with an eye on the Rules Enabling Act. Nevertheless, he said, some members have questioned whether the committee has authority to proceed under the rules process with three of the amendments in the package. The three deal with competing class actions and may be summarized as follows:

(1) Proposed Rule 23(c)(1)(D) specifies that if a court refuses to certify a class, it may direct that no other court certify a substantially similar class.

(2) Proposed Rule 23(e)(5) specifies that if a court refuses to approve a settlement, other courts are precluded from approving substantially the same settlement.

(3) Proposed Rule 23(g) specifies that a court may enjoin a class member from filing or pursuing a similar class action in any other court.

Judge Levi said that the advisory committee had decided to table further action on these three particular provisions in order to avoid controversy over the Rules Enabling Act that could derail the whole package of proposed class action amendments. He said that the advisory committee will not publish the three provisions, but will distribute them in a less formal way to members of the bench, bar, and academia and invite comments. The committee, moreover, will host a class-action conference at its October 2001 meeting that will consider, among other things, competing and conflicting class actions.

Judge Scirica reported that the decision to defer publication of the three proposed amendments had been reached following considerable discussion among the committee chairs and reporters. He said that it is very important to solicit input on the three "preclusion" amendments and to discuss them with bar groups, judges, and law schools, and also with the Federal-State Jurisdiction Committee of the Judicial Conference.

Several members of the committee extolled the work of the advisory committee, stating that the proposed preclusion provisions are badly needed, whether by way of statute or rule.

Rule 23(c)

Judge Levi pointed out that proposed Rule 23(c)(1)(A) requires a court to make a decision on whether to certify a class "when practicable." The current rule, on the other hand, requires a decision "as soon as practicable." He said that the proposed change is significant because it would give a judge adequate time to decide whether certification of a class is appropriate. The amendment, he said, is not designed to have the judge delve into the merits of the case, but to learn more about the nature of the issues.

Professor Cooper added that the proposal had been recommended by the advisory committee in the past, but had been deferred in part because of concern by some that it might cause delay in some cases. The advisory committee, he said, had looked at the proposal afresh, had considered a Federal Judicial Center study of class actions, and had determined that the proposal strikes a good balance between the need for dispatch and the need to gather sufficient information to support a well-informed determination by the court on whether to certify a class.

One member stated that there is no compelling reason to change the current rule. He said that the bench and bar are comfortable with the present language, which emphasizes prompt court action. Any change in the rule, he said, could lead to mischief and unintended consequences. Another member complained that some judges now defer certification decisions in order to encourage settlement. He said that the amendment may broaden that practice and open the way to additional discovery and delay.

Judge Levi responded that most courts read the current "as soon as practicable" language to mean "when practicable." Thus, the amendment may make no difference in these courts. On the other hand, other courts read the current language to mean "as quickly as is humanly possible," and some even have local rules setting overly-strict time limits for making certification decisions. The advisory committee, he said, wants to emphasize the need for the court to make an informed decision, even if it takes a little time for the judge to explore the key issues, and even to allow some limited discovery.

Judge Rosenthal pointed out that an unintended consequence of the current rule is that many judges and lawyers believe that there is an absolute barrier against inquiring into the nature of the issues on the merits. The amendment, she said, would remove that impediment. At the same time, she said, the advisory committee is very careful in the note to explain the purposes of the pre-certification activities and to emphasize that the amendment does not allow further delay.

One of the participants suggested that the key issue is whether a court may grant a dispositive motion before it makes a certification decision. He suggested that the rule or

note focus on the power of a judge to rule on a dispositive motion before ruling on a class certification motion.

Several participants offered language changes in the proposed amendment and committee note. Judge Scirica noted that there appeared to be a consensus as to the desirability of publishing the proposed rule. But, he said, there were a number of disagreements as to language. Accordingly, he suggested that Professor Cooper work with several of the members to incorporate their suggestions and improve the language of the rule and note before publication. Ultimately, it was decided to require that the court's certification decision be made "at an early practicable time."

Judge Levi noted that the remaining parts of proposed Rule 23(c) are non-controversial. He pointed out that Rule 23(c)(2)(a)(ii) would require that reasonable notice be provided to class members in (b)(1) and (b)(2) class actions.

The committee approved proposed Rule 23(c) — after deleting subparagraph (c)(1)(D), as noted above — for publication without objection. It also authorized the advisory committee to entertain additional changes in the note.

Rule 23(e)

Judge Levi noted that the proposed amendment to Rule 23(e)(1) would for the first time specify standards in the rules for approving a settlement. It would require a settlement to be "fair, reasonable, and adequate."

Professor Cooper stated that the current rule provides that an action may not be dismissed or settled without notice. He explained that the rule, as revised, would distinguish between: (1) voluntary dismissals and settlements occurring before the court certifies a class; and (2) dismissals and settlements that bind a class. In the first case — covered by proposed Rule 23(e)(1)(A) — notice is not needed. But court approval is required because people may have relied on the action being pending. In the second case — covered by proposed Rule 23(e)(1)(B) and (C) — reasonable notice must be provided to all class members, and the court must determine that the dismissal or settlement is "fair, reasonable, and adequate." Professor Cooper added that the term "compromise" has been retained in the rule, as well as "settlement," out of an abundance of caution.

Some participants offered suggested improvements in the language of the rule that Judge Levi agreed to consider.

The committee approved proposed Rule 23(e)(1) for publication with one objection.

Judge Levi stated that proposed Rule 23(e)(2) would authorize the court to direct that settlement proponents file copies of any side agreements made in connection with the settlement.

The committee approved proposed Rule 23(e)(2) for publication with one objection.

Judge Levi said that in many cases a proposed settlement and a class certification are presented to the court at the same time. Class members have the opportunity to opt out with full knowledge of the terms of the settlement.

On the other hand there are many cases where class members are provided a single opportunity to opt out of a class before settlement terms are disclosed. He said that the court should have discretion to give them another chance to opt out when they learn the terms of the settlement. Judge Levi said that most class members will likely not opt out, but fairness dictates that they be allowed to elect exclusion after the settlement terms are announced. He noted that the advisory committee had drafted two alternate versions of the opt-out provision for publication. Judge Rosenthal explained that the first alternate is stronger, containing a presumption in favor of an opt out. The second, she said, is more neutral.

One of the members strongly opposed the proposed amendment, saying that although it appears on its face to be fair to class members, it is normally lawyers, not class members, who make the decisions. The amendment, he said, would allow attorneys to sabotage a class action by threatening to pull out large numbers of clients. It would also make the negotiation process considerably more difficult.

Judge Levi responded that there were points to be made on both sides of the argument, but the arguments in favor of allowing an opt-out are stronger on balance. He added that the advisory committee had considered the alternative of strengthening the objection process, but had come to the conclusion that it was not workable. He emphasized, moreover, that support had been voiced for the opt-out proposal by attorneys from all segments of the bar. Thus, he said, the advisory committee had concluded that giving bound class members a change to opt out — at the discretion of the court — is simply the right thing to do.

Some participants made suggestions for improvements in the language of the rule that Judge Levi said he would try to incorporate.

The committee approved proposed Rule 23(e)(3) for publication without objection.

Judge Levi said that proposed Rule 23(e)(4) is self-explanatory. It confirms the right of class members to object to a proposed settlement or dismissal.

The committee approved proposed Rule 23(e)(4) for publication without objection.

Rule 23(h)

Professor Marcus noted that proposed subdivisions (h) and (i), dealing with appointment of counsel and attorney fees, will be renumbered to account for the decision to table proposed subdivision (g) on overlapping classes.

Professor Marcus stated that proposed paragraph (h)(1) sets forth both the requirement that the court appoint class counsel and the obligation of class counsel to fairly and adequately represent the interests of the class. He noted that the introductory phrase to subparagraph (1)(A), *i.e.*, "unless a statute provides otherwise," is designed to exclude securities litigation. This recognizes explicitly that the rule will not supersede the Private Securities Litigation Act of 1995, which contains specific directives about selecting a lead plaintiff and retaining counsel.

Professor Marcus noted that paragraph (h)(2) sets forth procedures for appointing class counsel. In subparagraph (2)(A), he said, the advisory committee contemplates possible competition for appointment as class counsel. It specifies that the court may allow a reasonable time for attorneys seeking appointment to apply. He added that a Federal Judicial Center study of class actions in the district courts shows that it may take several months before class counsel is actually appointed in many cases.

He explained that subparagraph (2)(B) elaborates on what the court must look for in class counsel, including experience, work undertaken on the case to date, and resources that counsel will devote to representing the class. The court may consider any other factors and require counsel to provide additional information and propose terms for attorney fees and costs. Subparagraph (2)(C) suggests that the court order appointing class counsel may include provisions for attorney fees and costs.

Concern was expressed regarding use of the word "appoint" in Rule 23(h)(1)(A) because counsel is not "appointed" in securities litigation. The court merely approves the parties' designation of counsel. Professor Marcus responded that the narrow purpose of the lead-in language is only to document that the rule does not supersede the securities legislation. Judge Rosenthal suggested that the advisory committee could draft appropriate language to address the concern.

Several language improvements were suggested in the rule and committee note. Judge Levi agreed to work on incorporating the suggestions.

The committee approved proposed Rule 23(h) for publication without objection.

Professor Marcus explained that proposed Rule 23(i), dealing with attorney fees, is new. Under paragraph (i)(1), notice of a motion for award of attorney fees must be served on all parties, and notice of motions by class counsel must also be given to all class members in a reasonable manner. Under paragraph (i)(2), class members or parties from whom payment is sought may object to the motion. Under paragraph (i)(3), the court must give a careful explanation of its decision by holding a hearing and making findings of fact and conclusions of law. Under paragraph (i)(4), the court is authorized to refer fee award issues to a special master or magistrate judge, as provided in FED. R. CIV. P. 54(d)(2)(D).

Several members suggested that the language of paragraph (i)(3) should not specify that the court must hold a hearing. Judge Rosenthal responded that the rule is intended to simply provide an opportunity for a hearing, not a right to a hearing. She suggested, and the members agreed, that the paragraph should be rephrased to specify that "the court may hold a hearing, and must find the facts and state its conclusions."

The committee approved proposed Rule 23(i) for publication without objection.

Judge Thrash moved to delete lines 69 to 145 of the committee note.

He pointed out that the proposed rule itself specifies no criteria for setting attorney fees. Nevertheless, extensive discussion is set forth in the committee note explaining the criteria that courts follow in setting fees. He said that this amounted to placing substantive law in the committee note and questioned the appropriateness of the practice.

Judge Rosenthal responded that the advisory committee had debated the matter at considerable length and had decided in the end not to include a "laundry list" of attorney fee factors in the rule itself. She explained that the committee's goal has been to blend flexibility with standards. To that end, it concluded that it would not be possible to specify all the potentially relevant factors in the rule. Rather, it chose to set forth some examples in the committee note to guide bench and bar and make it clear that the list is not exhaustive or complete. Thus, case law will not be restrained from developing additional factors.

Judge Thrash said that the committee note contains an excellent summary of the current law, but it will be out of date in a few years. He objected on principle to placing substantive law in committee notes. He said that if standards are desired, they belong in the rule, not the note.

He also pointed to the proposed committee note to FED. R. EVID. 804(b)(3), which contains a detailed discussion of the law on corroborating circumstances in support of declarations against penal interest. He recommended elimination of the extensive case law discussion from that note.

Two of the advisory committee chairs responded that committee notes in general serve an important educational purpose for bench and bar. They recognized that the case law is expected to develop and change. Nevertheless, an explanation of the current law and a careful citing of key cases and factors can provide clear guidance and serve as a useful resource for counsel.

The motion died for lack of a second.

FED. R. CIV. P. 51

Judge Levi noted that the current Rule 51 allows a party to file proposed jury instructions at the close of evidence or at "such earlier time during the trial" that the court directs. Many judges, however, request or allow proposed instructions before trial. The rule, he said, does not reflect current practice, and it fails to distinguish clearly among requests, instructions, and objections.

Judge Levi explained that the common model today is for a court to ask the parties to submit proposed instructions before trial. At some point, usually well before argument, the court prepares its own instructions, often including portions of the parties' proposed instructions. At that point, the parties are given a chance to object and be heard on the court's instructions.

He said that the amended rule follows this approach. Subdivision (a) deals with requests of the parties. Paragraph (a)(1) gives the court authority to direct that requests be submitted before trial. Paragraph (a)(2) allows a party to file requests for additional instructions at the close of the evidence, recognizing that evidence emerging during the trial may turn out to be different from that anticipated by the parties before trial.

In subdivision (b), the court must inform the parties of its proposed instructions and its actions on their requests. The court must give the parties a chance to object on the record before instructions and arguments are delivered to the jury.

Subdivision (c) deals with objections. It specifies that a party may object to an instruction by stating the matter objected to and the grounds of the objection. A party must also object to the court's failure to give an instruction. Judge Levi noted that subdivision (d) requires both a timely request and a timely objection. It also incorporates the plain error rule.

Several participants suggested some modifications in the language of the rule, and Judge Levi agreed to incorporate them in a revised draft for publication.

The committee approved the amended rule for publication without objection.

FED. R. CIV. P. 53

Professor Cooper explained that Rule 53 would be revised to reflect the actual use of masters in the district courts. The current rule, he said, focuses on special masters who perform trial functions. But a study conducted for the advisory committee by the Federal Judicial Center has demonstrated that masters are also used extensively to perform pre-trial and post-trial functions.

He emphasized that the revised rule is not designed either to encourage or discourage the use of special masters. Rather, it reflects current reality and addresses the key issues that district courts need to consider in using masters.

Professor Cooper pointed out that subdivision (a) of the revised rule, dealing with appointment of a master, is a central part of the revisions. Under paragraph (a)(1), a court may appoint a master to perform duties consented to by the parties. He said that the rule provides broad discretion for the court to agree to the parties' wishes on the use of a master, as long as their consent is genuine.

If the parties do not consent, the court may appoint a master to hold trial proceedings and make recommended findings of fact, but only if warranted by an "exceptional condition" or if there is a need to perform an accounting or resolve a difficult computation of damages. In this respect, he said, the revised rule retains the current limits on the use of masters in exercising trial functions, as directed by case law such as *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). The rule also eliminates the use of trial masters in a case tried before a jury, unless the parties consent.

Finally, Professor Cooper noted that subparagraph (a)(1)(C) would allow a court to appoint a master to perform pretrial and post-trial duties. The duties, however, would be limited to those that cannot be performed by an available district judge or magistrate judge. He added that an earlier draft of the revised rule had contained a lengthy list of

duties that might be assigned, but the advisory committee decided against detail in the rule in favor of just setting forth examples in the committee note.

Professor Cooper pointed out that it is essential that there be no actual or apparent conflicts of interest involving a master. To that end, paragraph (a)(2) would extend to masters the standard of disqualification for a judge found in 28 U.S.C. § 455. But it would allow the parties to consent to appointment of a particular person as master after disclosure of a potential ground for disqualification.

He added that paragraph (a)(3) would prohibit a master, during the period of appointment, from appearing as an attorney before the judge who made the appointment. Under paragraph (a)(4), the court must consider the fairness of imposing the expenses of a master on the parties and protect against unreasonable expense and delay.

Professor Cooper emphasized the key role played by the order appointing a master under the revised rule. He said that the order must specify the master's duties and compensation and address certain procedural matters. He pointed out that the Federal Judicial Center's study of masters in the district courts had revealed that *ex parte* communications between a master and either the court or the parties may be very beneficial in certain circumstances. Accordingly, the rule requires the order appointing the master to specify the circumstances in which the master may communicate *ex parte* with the court or a party.

One member questioned the advisability of authorizing *ex parte* contact between a master and a party. He said that *ex parte* communications can bring the institution of master into great disrepute and are inherently inconsistent with the concept of an impartial decider. He said that the rule will result in parties questioning the neutrality of the master.

Professor Cooper responded that the rule simply allows the district judge to determine the matter. He pointed out that the Federal Judicial Center study on the use of masters in the district courts had pointed out that this issue is the single most difficult problem cited by interviewees. He noted that *ex parte* contacts normally will not be allowed, but that confidential contacts with the parties may be essential for a settlement master. He said that lines 266-281 of the committee note provide guidance to the courts on the matter.

Professor Cooper stated that subdivision (g) addresses a master's order, report, or recommendations. He pointed out that a party may file objections to a master's findings or recommendations within 20 days, unless the court sets a different time. Professor Cooper noted that the presumptive standard of review for a master's findings of fact will be "clearly erroneous," carried over from the current Rule 53(e)(2). But the court's order

of appointment may specify *de novo* review by the court, or the parties may stipulate with the court's consent that the master's findings will be final.

After discussion, it was decided to publish an alternate version of subdivision (g) specifying *de novo* review of substantive fact findings and a clearly erroneous standard for non-substantive fact-finding.

Professor Cooper pointed out that subdivision (h) deals with compensation of a master. Among other things, it requires the court to take into account the means of the parties. In subdivision (i), a magistrate judge may be appointed as a master only for duties that cannot be performed in the capacity of a magistrate judge and only in exceptional circumstances.

Several suggestions were made for language improvements, which Professor Cooper and Judge Levi agreed to incorporate in the rule before publication.

One member expressed reservations concerning the proposed revisions in general. He said that masters are not a beneficial institution, and individual masters have engaged in egregious violations of the judicial process. He feared that the revised rule would encourage the use of masters or increase their authority. He voiced particular concern over subdivision (g), which he said gives a master the powers of an Article III judge to make findings of fact. He questioned the constitutional propriety of allowing masters to perform judicial functions.

Judge Levi responded that the advisory committee was very much aware of this issue, and the rule does not attempt to change the current law or expand its exceptional circumstance limitations. Masters, he said, make findings of fact under the current rule, and review of the findings by a district judge is limited to the clear error test. He emphasized that the revised rule will place firm control in the Article III judge's hands. The judge may require *de novo* review in the order appointing the master and may also review any finding on a *de novo* basis, even if the order specifies a less rigid standard. Professor Cooper emphasized that the revised rule gives the judge more power than the current rule in reviewing a master's report. He pointed out that under the revised rule, the master's report is a nullity unless the court acts to adopt it.

The committee approved the revised rule for publication without objection.

Professor Cooper pointed out that conforming amendments are needed in Rule 54(d)(2)(D) (attorneys' fees) and Rule 71A(b) (condemnation of property) to reflect the proposed revisions in Rule 53. The proposed amendments would delete references to specific subdivisions of the current rule.

The committee approved the amendments for publication without objection.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis and Professor Schleuter presented the report of the advisory committee, as set forth in Judge Davis's memorandum and attachments of May 10, 2001. (Agenda Item 5)

Style Package

Judge Davis explained that the project to restyle the body of criminal rules, begun in January 1998, had entailed an enormous amount of effort and thought on the part of the advisory committee, its consultants, and the Administrative Office staff. He expressed special appreciation for the contributions of Judge James A. Parker, former chairman of the style committee; John K. Rabiej, chief of the Rules Committee Support Office; Professor Schlueter, the committee's reporter; and the committee's consultants — Bryan A. Garner, Professor Stephen A. Salzburg, Professor R. Joseph Kimble, and Joseph F. Spaniol, Jr.

Judge Davis distributed to the members a chronology of the project. He noted that he had divided the advisory committee into two subcommittees, assigning blocks of rules to each. In addition, each member was given a number of rules for which he or she was primarily responsible. He explained that all the proposed revisions had been reviewed on several occasions by the individual members, the consultants, a subcommittee, and the full committee. The committee's schedule, he said, had been demanding and intense, with 10 subcommittee meetings and 6 full committee meetings taking place between December 1998 and April 2001.

Judge Davis reported that the proposed revisions had been published in two separate packages — one limited to stylistic changes and the other comprised of those rules containing substantive changes. He said that the committee had made a number of non-controversial changes in the style package after publication, most of them suggested by the style consultants. He also pointed out that two changes had been added to the style package to take account of recent legislation — in Rule 4 (arrest warrant or summons on a complain) to reflect the Military Extraterritorial Jurisdiction Act and in Rule 6 (grand jury) to reflect 18 U.S.C. § 3322.

The committee voted to approve the "style" package of proposed amendments without objection.

Substantive Package

Judge Davis reported that the advisory committee had decided after the public comment period to withdraw or defer three matters in the substantive package.

First, revised Rule 32(h)(3), as published, would have required a sentencing judge to resolve all objections to "material" matters in a presentence report, even matters not affecting the actual sentence. Judge Davis explained that presentence reports are used by the Bureau of Prisons to make operational decisions, such as whether a defendant is eligible for drug treatment. He noted that the proposal had attracted negative comments from a number of judges. Thus, he said, after further consideration of the proposal and consultation with the Bureau of Prisons, the advisory committee had decided to withdraw the amendment.

Second, the advisory committee had published an amendment to Rule 41 prescribing procedures for issuing "covert" warrants, *i.e.*, warrants permitting law enforcement agents to enter premises, not to seize property, but covertly to observe and record information. Judge Davis noted that these warrants, though not mentioned in Rule 41, are authorized by case law and are currently issued by magistrate judges. He said that the advisory committee had decided that the rule itself should give magistrate judges clear, authoritative advice. He said that the advisory committee had received a good deal of opposition to the proposal and had decided to defer the amendment for further study.

Third, the advisory committee had published several amendments to the Rules Governing § 2254 Cases and § 2255 Proceedings. Judge Davis noted that several public comments suggested that more extensive changes were needed in these rules. Therefore, the committee decided to defer the proposed amendments and conduct a broader study of the rules. To that end, it has hired a special consultant to assist with the study.

Judge Davis proceeded to describe the proposed amendments contained in the substantive package.

FED. R. CRIM. P. 5, 10, AND 43 — VIDEO CONFERENCING

Judge Davis noted that the proposed amendments to Rule 5 (initial appearance), Rule 10 (arraignment), and Rule 43 (presence of the defendant) are closely related. They will allow a judge to conduct an initial appearance or arraignment by video conferencing. He reported that originally the advisory committee had decided to propose that video conferencing be allowed only with the consent of the defendant. But after considerable discussion, it voted to seek public comments also on an alternate proposal allowing video conferencing without consent.

Judge Davis said that a number of judges had expressed very strong support for the proposal — especially judges who have conducted criminal proceedings along the Mexican border and judges from districts with large geographical expanses. He added that many of the judges would support a rule authorizing video conferencing without consent.

Judge Davis pointed out that the committee had also received a good deal of opposition to the amended rule, particularly to the alternate proposal dispensing with consent. He focused on a letter just received from the chair of the Defender Services Committee of the Judicial Conference. He said that the advisory committee had assumed that the defender committee would object to the non-consent provision. But the letter expressed broader opposition to the very concept of video conferencing of initial criminal proceedings as a matter of policy, regardless of whether the defendant consents. It also emphasized that video conferencing, if permitted, would shift significant costs from the Department of Justice to the judiciary's defender services budget.

He added that the National Association of Criminal Defense Lawyers and the public defenders' organizations had also voiced opposition to the proposed rule. They argue, he said, that it is essential for an initial appearance be conducted before a judge in a courtroom. The proceedings are seen as a critical opportunity for a lawyer to meet personally with his or her client.

Judge Davis pointed out that he and Judge Scirica had met with members of the Judicial Conference in March 2001 to give them a preliminary briefing them on the two alternative proposals. He said that several of the members had expressed concern about the amendments and had reacted negatively to the non-consent alternative.

Judge Davis reported that the advisory committee — in light of the public comments and the initial reactions of the members of the Judicial Conference — had decided to seek approval of an amendment authorizing video conferencing of initial appearances and arraignments only with the consent of the defendant. He suggested that giving defense counsel an absolute right to opt out of video conferencing should meet the principal objections and provide sufficient protection for the defendant.

He added that the negative public comments to the rule had been directed generally to the initial appearance, not the arraignment. He noted that a separate amendment to Rule 10, allowing a defendant to waive appearance at the arraignment entirely, had attracted no significant objection. He suggested that if a defendant can waive the proceeding itself, he or she should be able to consent to having it conducted by video conferencing.

Judge Davis said that many district courts already use video conferencing to conduct initial appearances or arraignments with the defendant's consent. One of the members added that he had been doing so for several years, largely to accommodate lawyers and defendants. He said that the lawyers request video conferencing, and it makes a great deal of sense to all participants for geographic reasons. He noted that the video proceedings are conducted with the judge in his own courtroom, the defendant in another courtroom, and lawyers in both courtrooms. Another member added that many

state court systems successfully use video conferencing for a number of criminal proceedings.

Mr. Pauley pointed out that the vote in the advisory committee to require consent for video proceedings had been a close one. The Department of Justice, he said, favors a rule giving a court discretion to order video conferencing without the defendant's consent. He pointed out that video proceedings are held already in many courts on consent. Therefore, the proposed amendment would not accomplish anything of substance. He said that the Department is concerned about locking a consent requirement into the rule that will freeze the law for an indeterminate period.

Mr. Pauley added that several potential options exist between the published consent and non-consent alternatives. He suggested a rule allowing a court to order video conferencing without consent for "good cause" or under "exceptional circumstances." He said that the committee could also consider approving the consent proposal, but with the clear understanding that the advisory committee will return shortly with an amendment allowing video conferencing in certain circumstances without consent. Another option, he said, would be to recommit the whole rule to the advisory committee for further consideration.

Judge Scirica said that the proposed consent rule may be just the first step towards greater use of video conferencing. He said that the consent requirement should mitigate the legitimate concerns expressed by the members of the Judicial Conference and the defense bar. Nevertheless, he said, the advisory committee should think about additional alternatives and consider the advisability of a further amendment addressing the concerns of the Department of Justice.

The committee approved the proposed three amended rules without objection.

FED. R. CRIM. P. 5.1

Judge Davis explained that Rule 5.1 (preliminary examination), as amended, would permit a magistrate judge to grant a continuance of a preliminary examination. He noted that the Judicial Conference had approved the amendment at its Spring 1998 meeting. Mr. Rabiej added that Congress needs to be informed that the amendment, though non-controversial, will supersede a statute, 18 U.S.C. § 3060(c).

The committee approved the proposed amended rule without objection.

FED. R. CRIM. P. 12.2

Professor Schlueter said that several substantive changes are included in amended Rule 12.2, addressing notice requirements for presenting an insanity defense or evidence of a mental condition. He noted that the rule had attracted only two comments from the public, and the advisory committee had made some minor language changes following publication.

The committee approved the proposed amended rule without objection.

FED. R. CRIM. P. 12.4

The committee considered proposed new Rule 12.4 (disclosure statement) later in the meeting together with proposed parallel amendments to the civil, bankruptcy, and appellate rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

FED. R. CRIM. P. 26

Professor Schlueter said that amended Rule 26 (taking of testimony) would permit a court to use remote transmission for live testimony. It generally tracks a counterpart provision in the civil rules, FED. R. CIV. P. 43.

He noted that the advisory committee had made some improvements in the rule as a result of the public comments. First, the rule was amended to refer specifically to "two-way" video presentations. Second, a requesting party must establish "exceptional circumstances" for remote transmission, rather than "unusual circumstances." The revised language reflects the FED. R. CRIM. P. 15 standard for taking depositions, as well as the standard courts have applied under the Confrontation Clause of the Constitution. Third, the committee expanded the note to address the Confrontation Clause and provide courts with guidance as to the steps they may take to ensure the accuracy and quality of remote transmissions.

The committee approved the proposed amended rule without objection.

FED. R. CRIM. P. 30

Judge Davis reported that amended Rule 30 (jury instructions) permits a judge to request the parties to submit requested jury instructions before trial. The current rule allows a party to file a request for instructions only after the trial has started.

Judge Davis said that some commentators had raised concerns about permitting a court in a criminal case to require the defense to disclose its theory of the case before trial. Nevertheless, he said, the proposal simply conforms with actual, current practice in the district courts. He pointed out that the advisory committee had added a comment in the note explaining that the amendment does not preclude a party from seeking to supplement during the trial, particularly when the evidence turns out to be different from that contemplated in its requested instructions. The committee also added a sentence to Rule 30(d) specifying that failure of a party to object precludes appellate review, except as permitted under FED. R. CRIM. P. 52(b) (stating that plain errors or defects affecting substantial rights may be noticed although not brought to the court's attention).

Judge Davis noted that the proposed criminal rule differs in several respects from a proposed amendment to its civil rule counterpart, FED. R. CIV. P. 51. Professor Coquillette explained that the proposed revision of FED. R. CRIM. P. 30 had been published, subject to public comments, and is now ready for final approval by the Judicial Conference. On the other hand, the proposed revision of FED. R. CIV. P. 51 had not yet been published. He said that the rules committee reporters work together as a group to keep the rules in tandem, but they have concluded that it is not advisable to defer final approval of the criminal rule — which has been under consideration for several years — until the civil rule is published and subject to public comment. He added that there may be legitimate reasons for some differences between the civil and criminal rules. The criminal rule, moreover, could be amended in the future if additional insights are gained during the public comment period for the civil rule.

The members proceeded to comment on and compare the language of the proposed civil and criminal rules. Several offered suggestions for improving the language of the proposed revision of FED. R. CIV. P. 51. Judge Davis and Judge Levi agreed to confer to harmonize the two proposals as much as possible.

The committee approved the proposed amended rule without objection.

FED. R. CRIM. P. 35

Judge Davis reported that the primary substantive change to Rule 35 (correcting or reducing a sentence) is to broaden the exceptions to the one-year deadline that the government has to seek reduction in a sentence to reward the defendant's substantial assistance. He explained that the amended rule will allow exceptions where the substantial assistance involves:

(1) information not known to the defendant until a year or more after sentencing;

(2) information provided to the government within a year of sentencing, but which did not become useful to the government until a year or more after sentencing; and

(3) information the usefulness of which the defendant could not reasonably have anticipated until more than a year after sentencing, and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

Judge Davis added that the rule, as published, did not specify what event constitutes "sentencing" for purposes of triggering the one-year period for bringing a motion. Accordingly, the advisory committee, at its April 2001 meeting, added a provision to Rule 35(a) defining "sentencing" as the entry of judgment, rather than the oral announcement of sentence from the bench.

Judge Davis said, however, that several members wrote to him after the meeting suggesting that the additional provision was sufficiently substantive to require further publication of the rule. Thus, the committee decided to seek final approval of the rule without the definitional provision and separately seek authority to publish the proposed definition. Mr. Pauley noted that the Department of Justice was opposed to the recommended definition, preferring to define sentencing for purposes of computation as the oral announcement of the court.

The committee voted without objection: (1) to approve the proposed amended rule without the proposed definition of "sentencing" in Rule 35(a); and (2) to authorize for publication the proposed amendment to Rule 35(a).

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur and Professor Capra presented the report of the advisory committee, as set forth in his memorandum and attachments of May 1, 2001. (Agenda Item 9)

Amendments for Final Approval

FED. R. EVID. 608(b)

Professor Capra reported that the proposed amendment to Rule 608 (evidence of character and conduct of witness) deals with extrinsic evidence. He said that the intent of the drafters of the rule was to preclude the use of extrinsic evidence when an attorney asks a witness about specific instances of past conduct to attack or support the witness's character for veracity.

Professor Capra explained that the problem with the current rule is that it uses the broad term "credibility." Thus, many courts apply the ban on extrinsic evidence more widely than was intended and have prohibited the use of evidence for non-character forms of impeachment, such as bias, contradiction, or prior inconsistent statements. The proposed amendment substitutes the term "character for truthfulness" for "credibility." As a result, it brings the text of the rule into line with the original intent of the drafters.

One of the members hailed the change and suggested that the existing rule may be the most misunderstood provision in the Federal Rules of Evidence.

The committee approved the proposed amendment for publication without objection.

FED. R. EVID. 804(b)(3)

Professor Capra explained that Rule 804(b)(3) is designed to assure that a declaration against penal interest is reliable by requiring that it be supported by corroborating circumstances. He pointed out that the current text of the rule imposes the corroborating circumstances requirement on declarations offered by the defendant, but not those offered by the government. Nevertheless, he said, most courts applying the rule have extended its corroboration requirement to prosecution-proffered declarations as a matter of fundamental fairness.

Professor Capra said that the proposed amendment would adopt the case law and provide uniform treatment of all declarations against interest, whether offered by the defendant or the government. It would also apply equally in criminal cases and civil cases. Professor Capra added that the amendment does not reach beyond the current case law, including the Supreme Court's decision in *Williamson v. United States,* 512 U.S. 594 (1994).

Mr. Pauley said that the Department of Justice is very strenuously opposed to the amendment and sees no justification for it. He recommended that the amendment be rejected outright or returned to the advisory committee. He reported that the Department also opposes the rule's application in civil cases, but it is most concerned about its impact on criminal cases.

He argued that — unlike the other sets of federal rules — the evidence rules were enacted by statute. As a result, he said, they are entitled to much greater deference and should be changed only with compelling justification. He said that the Department objects to the proposed amendment on both legal and practical reasons.

Mr. Pauley stated that Rule 804 is in no way unfair simply because it applies on its face in only one direction. He explained that declarations against penal interest offered by the prosecution are subject to greater oversight than those offered by the defendant. Unlike exculpatory statements presented by the defendant, statements offered by the government to inculcate an accused must pass through two additional reliability filters mandated by the Supreme Court. First, the declaration must meet the requirements specified in the *Williamson* case. Second, it must meet all the requirements of the Confrontation Clause. The prosecution, moreover, unlike the defendant, is required to prove its case beyond a reasonable doubt. He emphasized that the reliability filters established by the Supreme Court simply make the amendment unnecessary.

Mr. Pauley added that there are also compelling practical reasons to reject the amendment. First, it deals with an extremely volatile and controversial area affecting the vital interests of law enforcement authorities. Second, he said that Congress had deliberately intended that the corroborating circumstances requirement of Rule 804 apply only to the defendant, clearly rejecting any attempt to apply it to the government. Third, he noted that the Supreme Court in the *Williamson* case had expressly reserved decision on the specific question of extending to the government a requirement that now applies only to the defendant. He posited that if the Court had granted certiorari on that particular issue, the committee would not even be considering amending the rule until after the Court were to address the issue anew. By the same token, he said, when the Court reserves decision on an issue, it is often a sign that it intends later to grant certiorari. Accordingly, he suggested, it is inappropriate for the committee to preempt the Court by resolving an issue that it has expressly reserved for future decision. Finally, he stated that the implications of the proposed change in the rule are simply unpredictable and could prove very harmful to law enforcement efforts.

Judge Shadur responded that the advisory committee had considered and rejected these same arguments. He stated the Supreme Court in no way commits itself to resolution of issues when it reserves them, and no implication or inference should be drawn from the reservation. He emphasized that — despite the literal language of the current rule — many courts interpret Rule 804(b)(3) broadly, applying it as a matter of fundamental fairness equally to the defendant and the government.

Professor Capra noted that the rules committees have in fact considered amendments in areas reserved for further development by the Supreme Court. He pointed out, for example, that the rules committees had recently considered a proposed amendment to FED. R. EVID. 702, dealing with expert testimony, even though the Supreme Court had litigation before it. He said that the proposed amendment to Rule 804(b)(3), essentially, would correct a historical glitch. The two-way provision, he said, was omitted from the 1975 enactment of the evidence rules through oversight.

Some members asked whether the proposed amendment would add anything beyond the current case law requirements of the Confrontation Clause and the *Williamson* case. One member said that he was inclined to vote against the proposal, but would like to be educated further on the matter through the public comment process. Other members pointed out that the committee's discussion of the matter had been largely abstract in nature. They suggested that the advisory committee focus more on specific examples, speak to prosecutors and defense counsel, and examine the actual operation of the rule in state courts that have a two-way corroboration requirement. Judge Scirica reminded the advisory committee that it had the burden of demonstrating a need for the proposed amendment, and it should be ready to respond further to the concerns of the members.

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

Informational Items

Judge Shadur reported that the advisory committee had considered a proposal to amend Rule 1101 (applicability of the rules). He noted that subdivision (d), listing the proceedings to which the evidence rules are not applicable, is not complete. But, he said, it would be difficult, if not impossible, to set forth specifically all the proceedings to which the rules are not, or should not be, applicable. It would be inadvisable to provide a list of excluded proceedings that is not comprehensive. In addition, he pointed out, the courts are having no problem in applying Rule 1101(d).

Judge Shadur noted that the advisory committee is continuing to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. But, he emphasized, the project may never result in proposed amendments. He also reiterated the advisory committee's policy not to make changes in the evidence rule unless it is obvious that there is an important need for them.

CORPORATE DISCLOSURE STATEMENTS

[FED. R. APP. P. 26.1; FED. R. BANKR. P. 1007(a)(1) and 7007.1; FED. R. CIV. P. 7.1; FED. R. CRIM. P. 12.4]

Judge Scirica commented that the advisory committees had not initiated the proposed amendments. Rather, he said, they are in large part a response to recommendations from members of Congress that the Judicial Conference take additional steps to ensure that judges recuse themselves from cases in which they hold stock in a corporate party.

Judge Scirica said that the proposed amendments have resulted from well-coordinated efforts by the standing committee, the advisory committees, and the reporters. He noted that the proposed amendments to the appellate, civil, and criminal rules had been published in August 2000 and are ready for final approval by the Judicial Conference. On the other hand, the standing committee gave the Advisory Committee on Bankruptcy Rules additional time to consider how corporate disclosure requirements could be implemented in bankruptcy cases and proceedings. Accordingly, the proposed amendments to the bankruptcy rules are only ready for public comment.

As to the merits of the proposals, Judge Scirica reported that the Codes of Conduct Committee of the Judicial Conference recommends that the relatively minimal disclosure requirement of the current FED. R. APP. P. 26.1 be extended to the civil, criminal, and bankruptcy rules. Rule 26.1 requires a non-governmental corporate party to file a statement with the court identifying only its parent corporations and any publicly held company owning 10% of more of its stock.

Judge Scirica reported that the proposed amendments, as published, would have both: (1) extended FED. R. APP. P. 26.1 to the other sets of rules; and (2) given the Judicial Conference authority to prescribe additional disclosure requirements from time to time. But, he said, significant objections were raised during the comment period to the second part of the proposal. The objectors cited two potential problems: (1) it is difficult for the bar to know the requirements unless they are set forth in the rule itself; and (2) it would be illegal, or at least unwise, to permit the Judicial Conference to supplement a federal rule without proceeding through the full Rules Enabling Act process. He said that the advisory committees had decided to withdraw the authority for supplementary disclosures in light of the public comments.

Judge Scirica also pointed out that, although FED. R. APP. P. 26.1 imposes only minimum disclosure requirements, the committee note to the rule encourages the courts of appeals by local rule to require additional disclosures. He noted that research conducted for the committee by the Federal Judicial Center shows that virtually every court of appeals, and several district courts, have in fact expanded upon the national rule and require parties to disclose a wide variety of additional financial interests and connections. Thus, he said, it would be very difficult at this juncture to restrict local rulemaking in this area, even though a uniform set of national disclosure requirements should be an ultimate goal.

In addition, he said, the Codes of Conduct Committee, rather than the rules committee, is the body with the pertinent subject matter expertise. It should take the lead for the Judicial Conference in deciding what disclosures are needed. To that end, he added, it would be advisable to have a formal understanding between the two committees that any additional disclosure requirements recommended by the Codes of Conduct

Committee will be published by the rules committee through the Rules Enabling Act process.

Professor Coquillette emphasized that the committee reporters had worked together closely to coordinate the proposed amendments. He reported that the proposed amendments now before the committee for final approval are substantially identical, although there are a few minor differences in language among them.

Professor Schlueter pointed out that three post-publication changes had been made in the criminal version of the amendments: (1) requiring parties to file their disclosure statements at the defendant's first appearance; (2) requiring the government to file a statement identifying a corporate victim, but only to the extent that the information "can be obtained through due diligence"; and (3) deleting some material from the committee note.

Professor Morris explained that the bankruptcy version had several differences in language from the other versions in order to take account of statutory definitions set forth in section 101 of the Bankruptcy Code. Among other things, he noted, the Code defines "corporation" more broadly than in the normal context. Likewise, while the other versions refer to a "non-governmental corporate party," the bankruptcy version speaks of a corporation "other than the debtor or a governmental unit." In addition, FED. R. BANKR. P. 1007 would be amended to require the debtor to file a statement at the beginning of a case, rather than with every adversary proceeding. He noted, also, that the advisory committee had decided not to apply the rule to contested matters, in part because there is no requirement for a response in those proceedings.

Professor Cooper reported that the only difference between the proposed civil rule and the other versions is the inclusion of subdivision (c) in proposed FED. R. CIV. P. 7.1 , specifying that the clerk of court must deliver a copy of the disclosure statement to each judge acting in the action or proceeding.

Judge Tashima said that subdivision (c) does not belong in a national rule because it deals with a purely internal operating matter pertinent only to court personnel. Several members agreed.

Accordingly Judge Tashima moved to eliminate proposed FED. R. CIV. P. 7.1(c). The committee approved his motion without objection.

One member suggested that the rule or committee note should make it clear that the corporate disclosure statement requirement does not apply to every member of a class. Professor Cooper responded that the same issue exists with the current FED. R. APP. P.

26.1. He added that it is not the intention of the advisory committees to require class members to file statements.

Another member pointed out that the rule did not specify procedures for removal situations. It was generally agreed, however, that the subject could be addressed by local rule.

The committee approved the proposed amendments to FED. R. APP. P. 26.1 and proposed new FED. R. CIV. P. 7.1 and FED. R. CRIM. P. 12.4 without objection.

It also authorized publication of the proposed amendment to FED. R. BANKR. P. 1007(a)(1) and proposed new FED. R. BANKR. P. 7007.1 without objection.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Privacy and Public Access to Court Files

Mr. Lafitte presented the report of the Technology Subcommittee, noting that the primary focus of the subcommittee's attention for the past two years has been the judiciary's Electronic Case File (ECF) systems, now being deployed in the courts.

He reported that implementation of ECF has given rise to a number of important policy questions cutting across jurisdictional lines of Judicial Conference committees. He said that the Court Administration and Case Management Committee has formed two subcommittees to address the issues – one to deal with privacy and public access to court records, and the other to draft model local rules for electronic case filing. He noted that he has served as a representative of the rules committee on the two subcommittees. Both subcommittees, he said, have filed draft reports and are seeking input on the products from the rules committee and other committees of the Conference.

Privacy and Public Access

Mr. Lafitte reported that there is a natural tension between two very important, competing public policies — open access to court records and protection of legitimate privacy interests. He said that the privacy and public access subcommittee had conducted considerable research on these issues, listened to experts from different disciplines, and received initial input from the rules committees. It then published a document soliciting public comments and conducted a public hearing in Washington in March 2001.

The subcommittee, he said, has now prepared a draft report and set of recommendations for approval by the Court Administration and Case Management

Committee. That committee, however, has not made the draft report public, and it distributed the draft to the rule committee for comment on a confidential basis.

The members reviewed the report and made suggestions to bring to the subcommittee's attention. There was a consensus that no amendments were needed in the federal rules at this time to address the issues of privacy and public access.

Model Electronic Filing Rules

Mr. Lafitte reported that Professor Capra and Ms. Miller had collected and analyzed the local rules of the ECF pilot courts and had developed a set of model local court rules for the subcommittee. Professor Capra pointed out that no original rule drafting had been involved. Rather, he said, the subcommittee worked from the existing rules of the pilot courts and made a few modifications and language improvements.

Judge Small expressed concern over use of the term "model rules." He pointed out, for example, that they had not been subject to any of the requirements of the rules process. Moreover, he said, the Advisory Committee on Bankruptcy Rules will soon draft model local rules to implement the pending bankruptcy reform legislation. The model rules need to be in place within 180 days of enactment of the legislation. He emphasized that it is important to avoid any confusion between the two sets of model rules.

Professor Capra pointed out that a different title would be advisable. He noted, by way of example, that the term model "procedures" had been used in the past. Judge Scirica agreed with the suggestion and said that Judge Small was free to send any additional comments to the Electronic Filing Rules Subcommittee.

Professor Capra promised to convey orally the committee's suggestions to the chair of the subcommittee. **Judge Scirica noted that it was the consensus of the committee that the proposed model electronic filing rules or procedures will be helpful to the courts and should be distributed to them.**

ATTORNEY CONDUCT

Judge Scirica and Professor Coquillette reported that the committee has deferred further action on proposed attorney conduct rules for a number of reasons. Among other things, they said, a new administration and Congress have just been elected. In addition, negotiations have not yet resumed among the American Bar Association, the Department of Justice, and the Conference of Chief Justices on developing a standard for government attorneys in dealing with represented parties.

LOCAL RULES PROJECT

Professor Squiers stated that she was continuing to work on the comprehensive local court rules report for the committee. She said that the report will follow the same format as her last report, and the bulk of it should be available at the January 2002 committee meeting.

NEXT COMMITTEE MEETING

The next meeting of the committee is scheduled for January 10-11, 2002, in Tucson, Arizona.

Respectfully submitted,

Peter G. McCabe
Secretary

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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 3, 2001

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Twenty-two bills were introduced in the first session of the 107th Congress that affect the Federal Rules of Practice and Procedure.

On October 26, 2001, President Bush signed into law the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001." (Public Law No. 107-56.) The anti-terrorist legislation amends Criminal Rule 6 to allow the government to share grand-jury information pertaining to foreign intelligence or counterintelligence with certain federal officials to assist them in the performance of their official duties. Under the amended rule, the government must notify the court of the disclosure and the identity of the department or agency to which the disclosure was made.

The Act also amends Criminal Rule 41 to authorize a magistrate judge in any district in which activities relating to terrorism have occurred to issue a nationwide search warrant. The Act contains other rules-related provisions, including: (1) authorizing a "sneak and peek" warrant with a delayed notice of the warrant's execution; (2) expanding the use of pen registers and trap and trace devices under the Foreign Intelligence Surveillance Act; and (3) designating specific federal courts to handle judicial review of a habeas corpus decision regarding the detention of a suspected terrorist alien.

The advisory committee has proposed amendments to Criminal Rules 6 and 41 that conform with the Act. It is recommending that the proposed amendments be submitted to the Judicial Conference at its March 2002 session, with the recommendation that they be promptly transmitted to the Supreme Court as an addendum to the criminal rules package that is scheduled to take effect on December 1, 2002, to avoid potential supersession issues.

Senator Leahy introduced the "Professional Standards for Government Attorneys Act of 2001" (S. 1437) on September 19, 2001, which is similar to legislation that he submitted two years ago. The bill modifies and undoes much of the McDade law (28 U.S.C. § 530B) and clarifies the applicable standards of professional responsibility that govern the conduct of government attorneys. It directs the Judicial Conference to propose amendments to the federal rules for a uniform national rule governing communications between government attorneys and

represented parties. The provisions of the bill had been included in the Senate-passed USA PATRIOT ACT, but were deleted from the final legislation.

On June 27, 2001, Representative Goodlatte introduced the "Class Action Fairness Act of 2001" (H.R. 2341). Senator Grassley introduced a similar measure – the "Class Action Fairness Act of 2001" (S. 1712) – in the Senate on November 15, 2001. The bills give the district courts original jurisdiction over class actions involving more than 100 persons in which the amount in controversy exceeds $2 million. The bills also authorize removing a class action case to a federal court based on "minimal diversity." Under the Senate bill, the Judicial Conference is directed to submit a report to the House and Senate Committees on the Judiciary that includes: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that class members are the primary beneficiaries of settlements; and (3) the actions that the Judicial Conference will take to implement its recommendations.

Representative Sensenbrenner, introduced the "Multidistrict, Multiforum Trial Jurisdiction Act of 2001" (H.R. 860), on March 6, 2001. It was passed by the House on March 14, 2001. The bill amends 28 U.S.C. § 1407 to allow a judge with a transferred case to retain that case for trial or to transfer the case to another district. The bill is supported by the Judicial Conference and responds to the Supreme Court's decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), which held that a district court has no statutory authority to transfer a case to itself for trial. The bill also amends the statute to give district courts original jurisdiction over tort actions involving minimal diversity between adverse parties that arise from a single accident, when at least 25 persons have either died or incurred injury and, in the case of injury, when damages exceed $150,000 per person.

On March 1, 2001, the House passed H.R. 333, "Bankruptcy Abuse Prevention and Consumer Protection Act of 2001." The Senate passed S. 420, "Bankruptcy Reform Act of 2001," on March 15, 2001. The bills substantially revise major portions of the Bankruptcy Code and would require extensive amendments to the Bankruptcy Rules and Official Forms. The bills are currently being considered by a House-Senate conference committee, although negotiations have stalled and no resolution appears imminent.

Senator Thurmond introduced the "Video Teleconferencing Improvements Act of 2001" (S. 791) on April 26, 2001. Unlike the proposed amendments to Criminal Rules 5 and 10 that were approved by the Judicial Conference in October 2001, the bill authorizes a court to conduct an initial appearance or arraignment proceeding by videoconference *without* the defendant's consent.

John K. Rabiej

Attachments

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
107th Congress

SENATE BILLS

- S. 16 - *21st Century Law Enforcement, Crime Prevention, and Victims Assistance Act*
  - Introduced by: Daschle.
  - Date Introduced: 1/22/01.
  - Status: Referred to the Committee on the Judiciary (1/22/01).
  - Related Bill: None.
  - Key Provisions:

    — Section 2134(c) amends **Criminal Rule 35(b)** to broaden the types of information eligible for sentence reduction.

    — Section 3113 amends **Criminal Rule 11** to require the Government to make reasonable efforts to notify a victim of (1) the time and date of any hearing where the defendant plans to enter a guilty or nolo contendere plea; and (2) the right to attend and be heard at that hearing. The Judicial Conference must, within 180 days after the Act's enactment, submit to Congress a report recommending the amendment of the **Criminal Rules** to provide "enhanced opportunities" for victims to be heard on whether the court should accept the defendant's guilty or no contest plea. Said report must be submitted no later than 180 days after enactment of the Act.

    — Section 3115 amends **Criminal Rule 32** to require a probation officer to give the victim an opportunity to submit a statement to the court regarding a sentence before the probation officer submits his or her presentence report to the court.

    — Section 3116 amends **Criminal Rule 32.1(a)** to require that the Government make reasonable efforts to notify the victim of the right to notice and opportunity to be heard at any hearing to revoke or modify the defendant's sentence. The Judicial Conference must submit to Congress a report recommending the amendment of the **Criminal Rules** to provide notice of any revocation hearing held pursuant to **Criminal Rule 32.1(a)(2)** to the victim and to afford an opportunity to be heard.

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[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

- S. 34 - *A bill to eliminate a requirement for a unanimous verdict in criminal trials in Federal courts.*
  - Introduced by: Thurmond.
  - Date Introduced: 1/22/01.
  - Status: Referred to the Committee on the Judiciary (1/22/01).
  - Related Bill: None.
  - Key Provisions:
    — The bill amends **Criminal Rule 31(a)** to eliminate the requirement of a unanimous verdict in a criminal trial and would instead require a verdict by 5/6 of the jury.

- S. 420 - *Bankruptcy Reform Act of 2001*
  - Introduced by: Leahy, Kennedy, Feingold, Murray, Johnson, Schumer, Harkin.
  - Date Introduced: 4/26/01.
  - Status: Passed Senate with amendments by 83 - 15 (3/15/01). Senate appointed conferees on July 17, 2001. House appointed conferees on July 31, 2001.
  - Related Bills: S.220, H.R.333.
  - Key Provisions:
    — Section 221 amends **Section 110, Title 11**, Bankruptcy Code, to require a bankruptcy petition preparer to provide to the debtor a notice, the contents of which are specified in the proposed amendment. The provision also states that the notice shall be an official form issued by the Judicial Conference.
    — Section 419 directs the Advisory Committee on Bankruptcy Rules, after considering the views of the Executive Office for the United States Trustees, to propose amendments to the **Bankruptcy Rules** and **Official Bankruptcy Forms** that assist the debtor in a chapter 11 case to disclose the value, operations, and profitability of any closely-held business.
    — Section 433 directs the Advisory Committee to propose amendments to the **Bankruptcy Rules** and **Official Bankruptcy Forms** that contain a standard form disclosure statement and reorganization plan for small business debtors.
    — Section 435 directs the Advisory Committee to propose amendments to the **Bankruptcy Rules** and **Official Bankruptcy Forms** rules and forms to be used by small business debtors to file periodic financial and other reports.
    — Section 716(e) expresses a "sense of Congress" that the Advisory Committee should propose amendments to the **Bankruptcy Rules** and **Official Bankruptcy Forms** that govern the treatment of tax claims in chapter 13 case.

- S. 486 - *Innocence Protection Act of 2001.*
  - Introduced by: Leahy.
  - Date Introduced: 3/7/01.
  - Status: Referred to the Committee on Judiciary (6/27/01).
  - Related Bills: S. 800, H.R. 912.
  - Key Provisions:

— The bill authorizes a person convicted of a federal crime to apply to the appropriate federal court for DNA testing to support a claim that the person did not commit: (1) the federal crime of which the person was convicted; or (2) any other offense that a sentencing authority may have relied upon when it sentenced the person with respect to such crime.
— The bill also prescribes procedures for the court to follow in ordering DNA testing.

- S. 783 - *Crime Victims Assistance Act of 2001*
  - Introduced by: Leahy, Kennedy, Feingold, Murray, Johnson, Schumer, Harkin.
  - Date Introduced: 4/26/01.
  - Status: Referred to the Committee on the Judiciary (4/26/01).
  - Related Bill: None.
  - Key Provisions:

    — Section 103(b) amends **Criminal Rule 11** to require the court, before entering judgment, to ask the Government if the victim has been consulted on the defendant's guilty plea.
    — Section 103(c)(2) directs the Judicial Conference to, within 180 days after the date of the enactment of the Act, submit to Congress a report recommending amending the **Criminal Rules** to provide "enhanced opportunities" for victims to be heard on whether the court should accept the defendant's guilty or no contest plea.
    — Section 105(b) amends **Criminal Rule 32** by striking the phrase "if the [sic] sentence is to be imposed for a crime of violence or sexual abuse."
    — Section 105(b) also amends **Criminal Rule 32(f)** to eliminate the definition of "crime of violence or sexual abuse."

- S. 791 - *Video Teleconferencing Improvements Act of 2001*
  - Introduced by: Thurmond.
  - Date Introduced: 4/26/01.
  - Status: Referred to the Committee on the Judiciary (4/26/01).
  - Related Bill: None.
  - Key Provisions:

    — The bill amends **Criminal Rule 5** to allow an initial appearance by video teleconference. Defendant's consent not required.
    — The bill amends **Criminal Rule 10** to allow arraignment by video teleconference. Defendant's consent is not required.
    — The bill amends **Criminal Rule 43** to conform to amended Rules 5 and 10 and permits sentencing by video conference under certain conditions.

- S. 800 - *Criminal Justice Integrity and Innocence Protection Act of 2001*
  - Introduced by: Feinstein.
  - Date Introduced: 4/30/01.

- Status: Referred to the Committee on the Judiciary (4/30/01).
- Related Bill: S. 486, H.R. 912.
- Key Provisions:

  — Section 101 amends Part II, Title 18, U.S.C., by adding a chapter setting forth procedures for post-conviction DNA testing. Under the Act, if the DNA testing produces exculpatory evidence, the defendant may, during the sixty-day period following notification of the DNA test results, move for a new trial based on newly discovered evidence under **Criminal Rule 33.** The Act specifically allows such a motion "notwithstanding any provision of law that would bar such a motion as untimely."

- S. 803 - *E-Government Act of 2001*
  - Introduced by: Lieberman.
  - Date Introduced: 5/1/01.
  - Status: Referred to the Committee on Governmental Affairs (7/11/01).
  - Related Bill: None.
  - Key Provisions:

    — Section 205 requires each federal court to establish a website that would include information such as the location and contact information for the courthouses, local rules, case docket information, written court opinions, and all documents filed with the court in electronic form.

- S. 986 - *A bill to allow media coverage of court proceedings*
  - Introduced by: Grassley.
  - Date Introduced: 6/5/01.
  - Status: Referred to the Committee on Judiciary (6/5/01).
  - Related Bill: H.R. 2519.
  - Key Provisions:

    — The bill authorizes a presiding district or circuit court judge to permit media coverage of court proceedings over which that judge presides.

    — The bill also authorizes the Judicial Conference to promulgate advisory guidelines in order to implement a media coverage policy.

- S. 1315 - *Judicial Improvement and Integrity Act of 2001*
  - Introduced by: Leahy.
  - Date Introduced: 8/2/01.
  - Status: Referred to the Committee on Judiciary (8/2/01).
  - Related Bill: None.
  - Key Provisions:

    — The bill (1) amends 18 U.S.C. § 1512 to increase the criminal penalty for those who use physical force or threaten the use of physical force against witnesses, victims, or informants; (2) amends Title 18, U.S.C., to authorize the imposition of both a fine and a term of imprisonment; (3) amends Chapter 213 of title 18,

U.S.C., to permit the reinstatement of criminal counts dismissed pursuant to a plea agreement; and (4) clarifies certain sentencing provisions.

- S 1437 - *Professional Standards for Government Attorneys Act of 2001*
  - Introduced by: Leahy.
  - Date Introduced: 9/19/01.
  - Status: Referred to the Committee on Judiciary (9/19/01).
  - Related Bill: None.
  - Key Provisions:

    — The bill amends **28 U.S.C. § 530B** to: (1) clarify the applicable standards of professional conduct that apply to a "government attorney"; (2) provide that a "government attorney" may participate in covert activities, even though such activities may involve the use of deceit or misrepresentation; and (3) direct the Judicial Conference to prepare two reports regarding the regulation of government attorney conduct.

    — The Act also directs the Judicial Conference to come up with recommendations for amending the **federal rules** to (a) provide for a uniform national rule for "government attorneys" with respect to communicating with represented persons and parties, and (b) address any areas of actual or potential conflict between the regulation of "government attorneys" by existing standards of professional responsibility and the duties of "government attorneys" as they relate to the investigation and prosecution of federal law violations.

- S. 1712 - *Class Action Fairness Act of 2001*
  - Introduced by: Grassley
  - Date Introduced: 11/15/01.
  - Status: Referred to the Committee on Judiciary (11/15/01).
  - Related Bill: H.R. 2341.
  - Key Provisions:

    — Section 3 amends **28 U.S.C.** by including an additional chapter on class actions. The Act includes provisions on settlement, notices of settlement information to class members, jurisdiction of federal courts, and removal of class action proceedings to federal court.

    — The Act also directs the Judicial Conference to prepare and submit a report to the House and Senate Committees on the Judiciary within 12 months from the date of the enactment of the Act. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair, (2) recommendations to ensure that class members are the primary beneficiaries of settlements, and (3) the actions that the Judicial Conference will take to implement its recommendations.

- S. 1751 - *Terrorism Risk Insurance Act of 2001*
  - Introduced by: Gramm.

• Date Introduced: 11/30/01.
• Status: Referred to the Senate Committee on Banking, Housing, and Urban Affairs (11/30/01).
• Related Bills: H.R. 3210.
• Key Provisions:

— Under section 9, within 90 days after the occurrence of an act of terrorism the Judicial Panel on Multidistrict Litigation shall assign a single federal district court to conduct pretrial and trial proceedings in all pending and future civil actions for property damage, personal injury, or death arising out of or resulting from that act of terrorism. The district court assigned by the Judicial Panel on Multidistrict Litigation shall have original and exclusive jurisdiction over all such actions. Punitive or exemplary damages are not allowed under the Act.

HOUSE BILLS

- H.R. 333 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2001*
  - Introduced by: Gekas.
  - Date Introduced: 1/31/01.
  - Status: House-Senate conference with S. 420 and S. 220 (7/31/01).
  - Related Bills: H.R. 71, S. 220, S. 420.
  - Key Provisions:

— Section 319 expresses "the sense of the Congress" that **Bankruptcy Rule 9011** be amended to require a debtor, before submitting any documents to the court, to make all reasonable inquiries to ensure that the information contained within the submitted papers are well grounded in law and in fact.

— Section 323 amends the **federal judicial code** to: (1) grant the presiding judge exclusive jurisdiction over the debtor's and the estate's property, as well as over claims relating to employment or disclosure of bankruptcy professionals; and (2) increase bankruptcy fees and monies deposited as offsetting collections to both the U.S. Trustee Systems Fund and a special Treasury fund.

— Section 419 directs the Advisory Committee to propose amendments to the **Bankruptcy Rules** and the **Bankruptcy Forms** to require Chapter 11 debtors to disclose any information relating to the value, operations, and profitability of any closely held corporation, partnership, or entity that the debtor holds a substantial interest in.

— Section 433 directs the Advisory Committee to propose new **Bankruptcy Forms** on standardized disclosure statements and plans of reorganization for small business debtors.

— Section 435 directs the Advisory Committee to propose amendments to the **Bankruptcy Rules** and the **Bankruptcy Forms** to assist small business debtors in complying with new uniform national reporting requirements.

— Section 601 amends **chapter 6 of title 28, U.S.C.**, to direct: (1) the clerk of each district to compile bankruptcy statistics for individual debtors with primarily

consumer debt seeking relief under chapters 7, 11, and 13; (2) the Administrative Office of the U.S. Courts to make such statistics public; and (3) the AO to report the statistics annually to the Congress.

— Section 604 expresses the sense of Congress that: (1) the public record data maintained by bankruptcy clerks in electronic form should be released in electronic form to the public subject to privacy concerns and safeguards as developed by the Congress and the Judicial Conference; and (2) a bankruptcy data system should be established.

— Section 716 expresses the sense of Congress that the Advisory Committee propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** regarding objections to a plan confirmation by a government unit and to tax returns.

— Section 1233 amends **chapter 158 of title 28, U.S.C.**, to give the courts of appeal jurisdiction to authorize immediate interlocutory appeals from the district court and bankruptcy appellate panel.

- H.R. 860 - *Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001*
  - Introduced by: Sensenbrenner
  - Date Introduced: 3/6/01.
  - Status: House suspended rules and passed bill as amended (3/14/01). Received in the Senate and referred to the Committee on the Judiciary (3/15/01).
  - Related Bills: None.
  - Key Provisions:

    — Section 2 amends **section 1407 of title 28, U.S.C.,** to allow a judge with a transferred case to retain that case for trial or to transfer the case to another district.

    — Section 3 amends **section 85 of title 28, U.S.C.,** to give the district courts original jurisdiction over any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed $150,000 per person, exclusive of interest and costs.

- H.R. 912 - *Innocence Protection Act of 2001*
  - Introduced by: Delahunt
  - Date Introduced: 3/7/01.
  - Status: Referred to the House Committee on the Judiciary (3/7/2001). Referred to the Subcommittee on Crime (4/19/01).
  - Related Bills: S. 486, S. 800.
  - Key Provisions:

    — The Act was a companion measure with S. 486. Generally, the Act sets forth procedures for postconviction DNA testing.

- H.R. 1478 - *Personal Information Privacy Act of 2001*

- Introduced by: Kleczka
- Date Introduced: 4/4/01.
- Status: Referred to the House Subcommittee on Social Security (4/24/01) and to the House Subcommittee on Financial Institutions and Consumer Credit (4/24/01).
- Related Bills: None.
- Key Provisions:

  — The Act prohibits the disclosure, acquisition, and distribution of an individual's Social Security number and other personal information.

- H.R. 1737 - *To amend title 18, United States Code, to provide that witnesses at Federal grand jury proceedings have the right to the assistance of counsel*
  - Introduced by: Traficant
  - Date Introduced: 5/3/01.
  - Status: Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (5/9/01).
  - Related Bills: None.
  - Key Provisions:

    — The Act amends **chapter 215 of title 18, U.S.C.**, to provide that witnesses before a federal grand jury have the right to the assistance of counsel.

- H.R. 2137 - *Criminal Law Technical Amendments Act of 2001*
  - Introduced by: Sensenbrenner
  - Date Introduced: 6/12/01.
  - Status: Passed in the House by a vote of 374-0 (7/23/01). Referred to the Senate Committee on the Judiciary (7/24/01).
  - Related Bills: None.
  - Key Provisions:

    — The Act amends various provisions of **titles 18 and 21, U.S.C.,** to make punctuation and technical changes relating to criminal law and procedure.

- H.R. 2341 - *Class Action Fairness Act of 2001*
  - Introduced by: Goodlatte
  - Date Introduced: 6/27/01.
  - Status: Referred to the House Committee on the Judiciary (6/27/01).
  - Related Bills: S. 1712.
  - Key Provisions:

    — Section 4 amends **section 1332 of title 28, U.S.C.,** to give district courts original jurisdiction of any civil action in which the matter in controversy exceeds $2,000,000, exclusive of interest and costs, and is a class action in which: (1) any member of a class of plaintiffs is a citizen of a State different from any defendant; (2) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (3) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen

or subject of a foreign state.

— Section 5 amends **chapter 89 of title 28, U.S.C.,** to set forth when and how a class action case may be removed to federal court.

— Section 6 amends **section 1292(a) of title 28, U.S.C.,** to allow for the interlocutory appeal of class certification orders made pursuant to Civil Rule 23.

- H.R. 2519 - *To allow media coverage of court proceedings*
  - Introduced by: Chabot
  - Date Introduced: 7/17/01.
  - Status: Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (8/6/01).
  - Related Bills: S. 986.
  - Key Provisions:

    — Section 2 authorizes the presiding judge of a federal appellate or district court to allow media coverage of any proceeding in which the judges presides. Section 2 also authorizes the Judicial Conference to promulgate advisory guidelines on the allowance of media coverage in court proceedings.

- H.R. 2734 - *Bail Bond Fairness Act of 2001*
  - Introduced by: Barr
  - Date Introduced: 8/2/01.
  - Status: Referred to the House Committee on the Judiciary (8/2/01); Referred to House Subcommittee on Crime (9/10/01).
  - Related Bills: H.R. 2929.
  - Key Provisions:

    — The Act amends **18 U.S.C. §§ 3146 and 3148** to provide that the forfeiture of a bail bond is limited to those situations in which the defendant actually fails to physically appear before a court as ordered. (The Act specifically provides that a judicial officer may not order a bond forfeited simply because the defendant violated a condition of release, notwithstanding the provisions in Criminal Rule 46(e).)

- H.R. 2843 - *To amend the Federal Rules of Criminal Procedure to allow motions for a new trial at any time where the error alleged is a violation of constitutional rights*
  - Introduced by: Scarborough
  - Date Introduced: 9/5/01.
  - Status: Referred to the House Committee on the Judiciary (9/5/01). Referred to the House Subcommittee on Crime (9/10/01).
  - Related Bills: None.
  - Key Provision:

    — The Act amends **Criminal Rule 33** to allow a defendant to move for a new trial at any time before the final sentence when the defendant alleges a violation of a constitutional right.

- H.R. 2929 - *Bail Bond Fairness Act of 2001*
  - Introduced by: Barr
  - Date Introduced: 9/21/01.
  - Status: Referred to the House Committee on the Judiciary (9/21/01); Referred to House Subcommittee on Crime (9/28/01).
  - Related Bills: H.R. 2734.
  - Key Provisions:

    — The Act amends **18 U.S.C. §§ 3146 and 3148** to provide that the forfeiture of a bail bond is limited to those situations in which the defendant actually fails to physically appear before a court as ordered.

    — The Act also amends **Criminal Rule 46** to provide that judges may declare bail bonds forfeited only when the defendant actually fails to physically appear before a court as ordered.

- H.R. 3162 - *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*
  - Introduced by: Sensenbrenner.
  - Date Introduced: 10/23/01.
  - Status: Referred to the Committee on the Judiciary, and in addition to the Committees on Intelligence (Permanent Select), Financial Services, International Relations, Energy and Commerce, Education and the Workforce, Transportation and Infrastructure, and Armed Services (10/23/01). On motion to suspend the rules and pass the bill agreed to by the Yeas and Nays: 357 - 66 (10/24/01). Received in the Senate (10/24/01). Passed Senate without amendment by yea-nay vote of 98 - 1 (10/25/01). Signed by the President; became Public Law No: 107-56 (10/26/01).
  - Related Bills: S. 1510; H. Res. 264; H.R. 2975, H.R. 3108.
  - Key Provisions:

    — Section 203 amends **Criminal Rule 6** to allow for the sharing of grand jury information in matters pertaining to foreign intelligence or counterintelligence.

    — Section 219 amends **Criminal Rule 41** to authorize a magistrate judge in any district in which activities relating to terrorism has occurred to issue a nationwide search warrant.

    — Section 412 amends **8 U.S.C. § 1101 et seq**. to provide that judicial review of any decision regarding the detention of a suspected terrorist alien is available exclusively in habeas corpus proceedings in the United States Supreme Court, the United States Court of Appeals for the District of Columbia Circuit, or any district court otherwise having jurisdiction to entertain it.

- H.R. 3210 - *Terrorism Risk Protection Act*
  - Introduced by: Oxley.
  - Date Introduced: 11/1/01.
  - Status: Referred to the House Committees on Financial Services, Ways and Means, and the Budget (11/1/01). Passed the House by a yea-nay vote of 227 to 193 (11/29/01).

Received in the Senate (11/30/01).
• Related Bills: S. 1751.
• Key Provisions:

— Under section 15, if the Secretary of the Treasury determines that one or more acts of terrorism have occurred, all lawsuits arising out of those acts of terrorism must be filed in the federal court or courts -- which shall have original and exclusive jurisdiction -- as selected by the Judicial Panel on Multidistrict Litigation. This is the exclusive remedy for damages claimed for insured losses resulting from acts of terrorism. The Act also prohibits the award of punitive damages and limits the award of attorneys' fees. The defendants' liability is also limited to noneconomic damages.

- H.R. 3285 - *Federal-Local Information Sharing Partnership Act of 2001*
  - Introduced by: Weiner.
  - Date Introduced: 11/13/01.
  - Status: Referred to the House Committee on the Judiciary, and in addition to the Committees on Intelligence (Permanent Select), Financial Services, and Education and Workforce (11/13/01).
  - Related Bills: H.R. 3162.
  - Key Provisions:

— Section 2 amends **Criminal Rule 6** to allow for the sharing of grand jury information in matters pertaining to foreign intelligence or counterintelligence with specific federal, state, or local officials.

— Section 4 amends the **Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (P.L. No. 107-56)** to allow for the sharing of grand jury information in matters pertaining to foreign intelligence or counterintelligence with specific federal, state, or local officials.

- H.R. 3309 - *Investigation Enhancement Act of 2001*
  - Introduced by: Walden.
  - Date Introduced: 11/15/01.
  - Status: Referred to the House Committee on the Judiciary (11/15/01).
  - Related Bills: None.
  - Key Provision:

— The Act amends **28 U.S.C. § 530B(a)** to permit a Government attorney, for the purpose of enforcing Federal law, to provide legal advice, authorization, concurrence, direction, or supervision on conducting undercover activities, notwithstanding any provision of state law.

SENATE RESOLUTIONS

HOUSE RESOLUTIONS

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 6, 2001

MEMORANDUM TO THE STANDING 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 to improve its support service to the rules committees.

Automation Project (Documentum)

In early 1999, new document-management software (Documentum) was installed on our computers. Unfortunately, the contractor responsible for installation failed to customize the input screens to meet our needs and did not properly migrate the body of 15,000 rules documents from the old software to the new. As a result, we lost important functionality both in inputting and searching documents. In addition, we began experiencing serious operational problems — including some crashes — because the 1999 version of Documentum did not interface well with WordPerfect or our scanning programs.

We obtained major funding to hire a new contractor to correct all the problems we have encountered, to re-engineer the search criteria for the documents, and to migrate our database to the latest version of Documentum (4i). The new version is based on Internet technology and is much easier to use. The contractor is working closely with the staff to customize Documentum to meet all our specific needs, and also to meet the future needs of the other component offices of the Office of Judges Programs.

The current project is expected to be completed by June 2002. A second phase, if funded, will allow us to make additional enhancements to the system. Among other things, it will allow staff and committee member to access the database from remote locations, direct document collection and creation, publish documents directly to the web, and archive them to the National Archives and Records Administration.

Internet

We continue to update, modify, and expand the Judiciary's "Federal Rulemaking" Internet web site (http://www.uscourts.gov).

We redesigned the site to make it easier to use and access rules-related materials. For example, we grouped the various proposed rule amendments from the different committees together under "rules classes" that are based on their effective date, e.g. "Class of 2001" includes rules taking effect in December 2001. This will make it easier for a user to find, research, and track proposed rules amendments as they proceed through the rulemaking process. We have also included the different versions of the rules in the rules classes; this will enable a user to compare the changes to the proposed rule amendments, if any, as the rules wend their way through the rulemaking process.

Existing materials have been updated and new materials have been added to the web site regarding committee minutes, calendar of upcoming committee meetings and hearings, federal rules and forms in effect, local court rules for the circuit, district, bankruptcy courts, and bankruptcy appellate panels, committee membership lists, state bar contacts, information on the rulemaking process, report on pending congressional legislation affecting the federal rules, and compilation of publications from the Administrative Office and the Federal Judicial Center relating to the rules committees and the rulemaking process.

Because of the past and current problems with our document-management system, we have not been able to post agenda-book materials to the web site. With the installation of the new version of Documentum, we should be able to post such materials on the site, thus allowing a committee member to retrieve an entire agenda book – or a particular excerpt – electronically in advance of receiving a "hard copy" in the mail.

Finally, we continue to receive comments on the proposed rule amendments through the web site. The number of comments submitted via the Internet remains modest.

Committee and Subcommittee Meetings

Because of the tragic events of September 11, most of the fall 2001 advisory committee meetings were canceled. This led to an increase in the number of conference calls involving committee chairs, reporters, and subcommittee members that the office arranged and participated in.

The office staffed a class-action conference held by the Civil Rules committee on October 22-23, 2001, at the University of Chicago Law School. The conference, which included over 90 attendees and participants, involved panel discussions on the proposed amendments to Civil Rule 23. The office also staffed a public hearing in San Francisco on the proposed amendments to the

Civil Rules on November 30, 2001.

The docket sheets of all suggested amendments for Civil, Criminal, and Evidence Rules have been updated to reflect the committees' recent respective actions. Every suggested amendment along with its source and status and disposition is listed. The docket sheets are updated after each committee meeting, and they are included in each agenda book. We will also begin work on a docket sheet for Bankruptcy Rules and hope to have that completed sometime within the near future.

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. 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 . . . [t]hereafter the records may be transferred to a government record center . . . ."

All rules-related records from 1935 through 1996 have been entered on microfiche and indexed. The records from 1997 to the present will eventually also be stored on microfiche. Many of these records are already filed in our automated filing system. Once the newer version of Documentum is implemented, we should be able to scan and store virtually all the records maintained by our office on a timely basis.

Manual Tracking

Our manual system of tracking comments continues to work well. For the current public-comment period, the office has received, acknowledged, forwarded, and followed up on approximately 27 comments and suggestions. Each comment was numbered consecutively, which enabled committee members to determine instantly whether they had received all of them. We will continue to distribute the comments electronically using Adobe PDF. We found that that process allowed us to distribute the comments much faster and more cheaply.

State Bar Points-of-Contact

In August 1994, the president of each state bar association was requested to designate a point-of-contact 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 53 state bars designating a point-of-contact.

The points-of-contact list will again be updated in time to include the new names in *The Request for Comment* pamphlet on proposed amendments published in August 2002. Several state bars updated their designated point-of-contact. The process is being repeated every year to ensure that we have an accurate and up-to-date list.

Mailing List

The Administrative Office's new automated mailing list system – called DIRECT EXPRESS – was recently installed, replacing an outdated system. The rules office maintains a large mailing list exclusively for rules-related mailings. Maintaining the list requires frequent and extensive updating, which in the past has been particularly tedious and time consuming. DIRECT EXPRESS is operated by an AO administrator and allows for immediate changes to the mailing list, which has facilitated our updating. Information on DIRECT EXPRESS can be obtained through the agency's internal AOWEB site.

Miscellaneous

In November 2001, we delivered to the Supreme Court the proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure that were approved by the Judicial Conference following its September 2001 session. The material, including Supreme Court orders, transmittals, text of the rules, and excerpts from reports, consisted of nearly 700 pages that were separately paginated, reformatted, and proofread. The text of the rules underwent exacting scrutiny and had been earlier reviewed by the rules office and other offices within the agency for accuracy. (Earlier drafts, including the versions published for public comment, submitted to the Standing Committee, and submitted to the Judicial Conference, were all separately proofread and vetted by the rules office and other agency offices.)

On December 11, 2001, the office staffed a meeting held in Washington, D.C., involving members from the Standing Committee, the Civil Rules Committee, the Judicial Panel on Multidistrict Litigation, the Committee on Federal-State Jurisdiction, and the Federal Judicial Center. The purpose of the meeting was to discuss ways to resolve issues that arise in class action proceedings.

John K. Rabiej

Attachments

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by 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 1/99 — Stg. Cmte. approves publication for fall 8/99 — Published 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud. Conf approves 4/01— Approved by Sup Ct 12/01–Effective **COMPLETED**
[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 cmte, assigned to Subcmte. 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 4/99 — Cmte approves amendments with revisions 6/99 — Stg approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved 12/00 — Effective **COMPLETED**
[Admiralty Rule C] — conform time deadlines with Forfeiture Act	Civil Asset Forfeiture Act of 2000	10/00 — Comte considered draft 1/01— Stg. Cmte approves publication; comments due 4/2/01 4/01 — Adv Cmte approved amendments 6/01 — Approved by ST Cmte 9/01 — Approved by Jud. Conf **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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 Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/97 — Referred to reporter and chair Supreme Court decision moots issue **COMPLETED**
[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 Sub cmte. 3/99 — Agenda Subcmte rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[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 Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[Simplified Procedures] — federal small claims procedures	Judge Niemeyer 10/00	10/99 — Considered, subcmte appointed 4/00 — Considered 10/00 — Considered **PENDING FURTHER ACTION**
[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 Sub cmte. 3/99 — Agenda Subcmte rec. Accumulate for periodic revision (1) **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**

Proposal	Source, Date, and Doc #	Status
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Sub cmte. 5/97 — Discussed in reporter's memo. 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Standing Cmte approved 9/99 — Judicial Conference approved 4/00 — Supreme Court Approved 12/00 — Effective **COMPLETED**
[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 Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **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 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV5] — Service by electronic means or by commercial carrier; 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); William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	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 Sub cmte. 11/98 — Referred to Tech. Subcommittee 3/99 — Agenda Sub cmte. rec. Refer to other cmte (3) 4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[CV5] — Resolution of dispute between court and carrier as to whether courier or court was at fault for failure to file	Lawrence A. Salibra, II, Senior Counsel, Alcan Aluminum Corp. 6/5/00 (00-CV-C)	6/00 — 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 Sub cmte. 3/98 — Cmte. approved draft 6/98 — Stg Cmte approves with revision 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg. Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved 12/00 — Effective **COMPLETED**
[CV5(d)]— Does non-filing of discovery material affect privilege	St Cmte 6/99	10/99 — Discussed **PENDING FURTHER ACTION**
[CV5] — Modifying mailbox rule	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV6] — Calculate "3" day either before or after service	Roy H. Wepner, Esq. 11/27/00 (00/CV/H)	12/00 — Referred to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97; Rukesh A. Korde 4/22/99 (99-CV-C)	10/97 — Referred to cmte 3/98 — Cmte approved draft with recommendation to forward directly to the Jud Conf w/o publication 6/98 — Stg Cmte approved 9/98 — Jud. Conf approved and transmitted to Sup. Ct. 4/99 — Supreme Court approved 12/99 — Effective **COMPLETED**
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act **COMPLETED**
[CV6(e)] — Amend the rule to treat service by electronic means the same as service by mail	See Rule 5	4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves **PENDING FURTHER ACTION**
[CV7.1] — See Financial Disclosure	Request by Committee on Codes of Conduct 9/23/98	11/98 — Cmte considered 3/99 — Agenda Subcmte rec. Hold until more information available (2) 4/99 — Cmte considered; FJC study initiated 10/99 — Discussed 4/00 — Considered; request for publication 6/00 — Stg Comte approves publication 8/00 — Published **PENDING FURTHER ACTION**
[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 cmte 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Removed under consent calendar **COMPLETED**
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G)	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) **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 Sub cmte. 3/99 — Agenda Sub cmte. rec. Await preliminary review by reporter (6) 8/99 — Reporter recommends removal from the agenda 10/99 — Consent calendar removed from agenda **COMPLETED**
[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 cmte **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, & Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full committee consideration (4) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV12(a)(3)] —Conforming amendment to Rule 4(i)		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup.Ct. 4/00 — Supreme Ct transmits to Congress 12/00 — Effective **COMPLETED**
[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 Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV14(a) & (c)] — Conforming amendment to admiralty changes		6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct. 4/00— Supreme Court approved 12/00 — Effective **COMPLETED**
[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**
[CV15(c)(3)(B)] — Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	9/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV15(c)(3)(B) — To correct unfairness and lack of clarity	Judge Edward Becker; Prof. Martha L. Minow 1/8/01 (01-CV-C)	10/01 — Referred to chair and reporter **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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 cmte 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 cmte deferred pending mass torts working group deliberations 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte Considered 10/00 — Comte Considered **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 Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte considered 10/00 — Comte Considered **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 Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte Considered 10/00 — Comte Considered **PENDING FURTHER ACTION**
[CV23(e)] — Require all "side-settlements," including attorney's fee components, to be disclosed and approved by the district court	Brian Wolfman, for Public Citizen Litigation Group 11/23/99 (99-CV-H)	12/99 — Referred to reporter, chair, and Agenda Sub cmte. 4/00 — Referred to Class Action subcomte 10/00 — Comte Considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23(e)] — Preserve right to appeal for *unnamed* class members who do not file motions to intervene; and class members not named plaintiffs have right to appeal judicial approval of proposed dismissal or compromise without first filing motion to intervene	Bill Lockyer, Attorney General, for State of California DOJ 3/29/00 (00-CV-B) 6/21/00	4/00 — Referred to reporter, chair, Agenda Subcmte,, and Class Action Subcmte 6/00 — Referred to reporter, chair, Agenda Subcmte, and Class Action Subcmte 10/00 — Comte Considered **PENDING FURTHER ACTION**
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves 12/98 — Effective **COMPLETED**
[CV23] — class action attorney fee		10/00 — Comte Considered **PENDING FURTHER ACTION**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV26] —Initial disclosure and 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; Sub cmte. appointed 1/97 — Sub cmte. held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Sub cmte. 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV26] —Does inadvertent disclosure during discovery waive privilege	Discovery Subcmte	10/99 — Discussed **PENDING FURTHER ACTION**
[CV26] — Presumptive time limits on backward reach of discovery	Al Cortese	10/99 — Removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV26] — Electronic discovery		10/99 — Referred to Subcmte 3/00 — Subcmte met 4/00 — Considered 10/00 — Comte Considered 4/01 — Cmte considered **PENDING FURTHER ACTION**
[CV26] — Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	Gregory K. Arenson, Chair, NY State Bar Assn Committee 8/7/00 (00-CV-E)	8/00 — Referred to reporter, chair, incoming chair, and Agenda Subcmte **PENDING FURTHER ACTION**
[CV26(a)] — To clarify and expand the scope of disclosure regarding expert witnesses	Prof. Stephen D. Easton 11/29/00 (00-CV-I)	12/00 — Sent to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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 Sub cmte. and left for consideration by full cmte 3/98 — Cmte 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 Sub cmte. 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[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 cmte **COMPLETED**
[CV30(b)] — Inconsistency within Rule 30 and between Rules 30 and 45	Judge Janice M. Stewart 12/8/99 (99-CV-J)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Discovery Sub cmte. 4/00 — Referred to Disc. Subcomte **PENDING FURTHER ACTION**
[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 Sub cmte. 11/98 — Rejected by cmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV30(d)(2)] — presumptive one day of seven hours for deposition		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV30(e)] — review of transcript by deponent	Dan Wilen 5/14/99 (99-CV-D)	8/99 — Referred to agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[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 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV33 & 34] — require submission of a floppy disc version of document	Jeffrey K. Yencho (7/22/99) 99-CV-E	7/99 — Referred to Agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Sub cmte. (3) **PENDING FURTHER ACTION**
[CV34(b)] — requesting party liable for paying reasonable costs of discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions (moved to Rule 26) 6/99 — Stg Comte approves 9/99 — Rejected by Jud. Conf. **COMPLETED**
[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 Sub cmte. 11/98 — Rejected by cmte **COMPLETED**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV37(c)(1)] — Sanctions for failure to supplement discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[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**
[CV40] — precedence given elderly in trial setting	Michael Schaefer 1/19/00; 00-CV-A	2/00 — Referred to chair, reporter, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[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] — procedures for a "summary bench trial"	Judge Morton Denlow 8/9/00 (00-CV-F)	8/00 — Referred to reporter, chair, and incoming chair 10/00 — Comte considered, declined to take action as unnecessary at this time **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**
[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 Sub cmte. 3/98 — Cmte determined no need to amend **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV45] — Notice in lieu of attendance subpoenas	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Remove from agenda 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV45] — Clarifying status of subpoena after expiration date	K. Dino Kostopoulos, Esq. 1/27/99 (99-CV-B)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **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 Sub cmte., and Discovery Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[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 Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[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 Sub cmte. 11/98 — Cmte declined t take action **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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 — Cmte's post-mortem discussion **COMPLETED**
[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 Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **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 Sub cmte. 3/98 — Cmte considered 11/98 — Cmte considered 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration 4/99 — Cmte considered 10/99 — Discussed 4/00 — Cmte considered 10/00 — Cmte considered 4/01 — Cmte considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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 — Subcmte appointed to study issue 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/99 — Discussed (FJC requested to survey courts) 4/00 — Considered (FJC preliminary report) **PENDING FURTHER ACTION**
[CV54(d)(2)] —attorney fees and interplay with final judgment CV 58	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication 6/00 — Stg Comte approves publicatipon 8/00 — Published **PENDING FURTHER ACTION**
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, & Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends rejection 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[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 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision **PENDING FURTHER ACTION**
[CV58] — 60-day cap on finality judgment	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication 6/00 — Stg Comte approves 8/00 — Published **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV59] — Uniform date for filing 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**
[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 6/99 — Stg Cmte approves 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[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 Sub cmte. 11/98 — Cmte 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 Sub cmte. (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 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to cmte'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 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[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 12/97 — Effective **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. Cmte should handle the issue 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV77(d)] — Electronic noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	9/97 — Mailed to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for consideration by full Cmte (4) 4/99 — request publication 6/99 — Stg Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Sub cmte. **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 Sub cmte. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) 4/00 — Comte considered 6/00 — Stg Comte approves publication 8/00 — Published 4/01 — Cmte approves amendments 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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 10/98 — Cmte. includes it in package submitted to Stg. Cmte. for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Sup Ct approves 12/01 — Effective **COMPLETED**
[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 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved amendments 6/00 — Approved by ST Cmte 9/00 — Approved by Jud Conf 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[CV81(a)(2)] — Time to make a return to a petition for habeas corpus	CR cmte 4/00	4/00 — Request for comment 6/00 — Stg Comte approves 9/00 — Jud Conf approves **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 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) 4/99 — Cmte considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV82] — To delete obsolete citation	Charles D. Cole, Jr., Esq. 11/3/99 (99-CV-G)	12/99 — Referred to reporter, chair, and Agenda Subcommittee 4/00 — Comte approved for transmission without publication 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Sup Ct approves 12/01 — Effective **COMPLETED**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte considers **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**
[CV83(b)] — Authorize Conference to permit local rules inconsistent with national rules on an experimental basis		4/92 — Recommend for publication 6/92 — Withdrawn at Stg. Comte meeting **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 6/00 — CACM assigned issue and makes recommendation for Judicial Conference policy **COMPLETED**
[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 Sub cmte. 3/99 — Agenda Sub cmte. rec. schedule for further study (3) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV Form 1] — Standard form AO 440 should be consistent with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) 4/99 — Cmte deferred for further study **PENDING FURTHER ACTION**
[Adoption of form complaints for prisoner actions]	Iyass Suliman, prisoner 8/3/99 (99-CV-F)	8/99 — Referred to reporter, chair, and Agenda Sub cmte. 8/99 — Subc recommended removal from agenda 10/99 – Cmte approved recommendation **COMPLETED**
[Electronic Filing] — To require clerk's office to date stamp and return papers filed with the court.	John Edward Schomaker, prisoner 11/25/99 (99-CV-I)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Technology Sub cmte. **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C); see also Jeffrey Yencho suggestion re: Rules 3 and 34 (99-CV-E)	5/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **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 Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[To prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes]	Tom Scherer 3/2/00 (00-CV-D)	7/00 — Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
[To add a rule similar to present AP Rule 44: To assist district courts in remembering to make the requiring notification in a case involving a constitutional question when the U.S. is not a party.]	Judge Barbara B. Crabb 10/5/00 (00-CV-G)	10/00 — Referred to reporter and chair **PENDING FURTHER ACTION**
[Specifying page limit for motions in Civil Rules]	Jacques Pierre Ward 1/8/01 (01-CV-A)	4/00 — Referred to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Recommends clarification of Admiralty Rule B]	William R. Dorsey, III, Esq., President, The Maritime Law Association (01-CV-B)	6/00 — Referred to reporter, chair, and Mark Kasanin **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 cmte 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 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by Supreme Court 12/00 — Effective **COMPLETED**

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 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Approved by the Supreme Court 12/00 — Effective **COMPLETED**
[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**

Proposal	Source, Date, and Doc #	Status
[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**
[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, 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 — Subcmte appointed to study the issue **COMPLETED**
[Privileges] — To codify the federal law of privileges	EV Rules Committee (11/96)	11/96 — Denied 10/98 — Cmte. reconsidered and appointed a subcmte to further study the issue 4/99 — Considered pending further study 10/99 — Subcomte established to study 4/00 — Cmte considered subc's drafts 4/01 — Cmte considered **PENDING FURTHER ACTION**
[EV 501] Parent/Child Privilege	Proposed Legislation	4/98 — Considered; draft statement in opposition prepared **COMPLETED**
[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**

Proposal	Source, Date, and Doc #	Status
[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**
[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 608(b)] — Inconsistent rulings on exclusion of extrinsic evidence		10/99 — Considered 4/00 — Cmte directed reporter to prepare draft amendment 4/01 — Cmte recommended publication 6/01 — Approved for publication by ST Cmte 8/01 — Published for public comment **PENDING FURTHER ACTION**
[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 — Cmte 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**

Proposal	Source, Date, and Doc #	Status
[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**
[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 12/98 — Effective **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**

Proposal	Source, Date, and Doc #	Status
[EV 701] — Opinion testimony by lay witnesses		10/97 — Subcmte. formed to study need for amendment 4/98 — Recommend publication 6/98 — Stg. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**
[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. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**

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. Cmte approves request to publish 8/98 — Published for comment 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**
[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 Cmtes 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**

Proposal	Source, Date, and Doc #	Status
[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 **PENDING FURTHER ACTION**
[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 Cmte 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 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved 6/99 — Stg Comte approved 9/99 — Judicial Conference Approved 4/00 — Sup Ct approved 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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**
[EV 803(18)] — Should "learned treatises" be received as exhibits	Judge Grady	4/00— Considered; comte decides not to act **COMPLETED**
[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. 12/97 — 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**

Proposal	Source, Date, and Doc #	Status
[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)(3)] — Degree of corroboration regarding declaration against penal interest		10/99 — Considered by cmte 4/00 — Cmte directed reporter to prepare draft amendment 4/01 — Cmte recommended publication 6/01 — Approved for publication by ST Cmte 8/01 — Published for public comment **PENDING FURTHER ACTION**
[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. 12/97 — Effective **COMPLETED**
[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. 12/97 — Effective **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**

Proposal	Source, Date, and Doc #	Status
[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**
[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 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — ST Comte approved **COMPLETED**
[EV 902] — Use of seals	DOJ Committee member	10/99 — Cmte considered 4/00 — Cmte considered and rejected **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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 4/00 — 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 10/98 — Cmte considered comments and statements from witnesses 4/99 — Cmte approved with revisions 6/99 — ST Cmte Approved 9/99 — Judicial Conference Approved 4/00 — Approved by Supreme Court 12/00 — Effective **COMPLETED**
[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**
[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**

Proposal	Source, Date, and Doc #	Status
[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; cmte declined to act **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**
[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**

Proposal	Source, Date, and Doc #	Status
[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 6/98 — Reporter's Notes published **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 4] — Clarify the ability of judges to issue warrants via facsimile transmission	Magistrate Judge Bernard Zimmerman 1/29/01 (01-CR-A)	1/01 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98; Judge Durwood Edwards 6/98	5/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte 10/99 — Approved for publication by advisory cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Forwarded to ST Cmte; version requires defendant's consent and court approval 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **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 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 5.1(d)] — 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 cmtes to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — ST Cmte concurs with deferral 6/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by cmte 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[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 12/98 — Effective **COMPLETED**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Cmte declined to act on the issue **COMPLETED**
[CR 6] — Allow grand jury witness to be accompanied by counsel (see CR 6(d) below)	Robert D. Evans, ABA, 3/2/01 (01-CR-B)	3/01 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 6] — Allow sharing of grand jury information pertaining to foreign intelligence	USA Patriot Act of 2001 (P.L. 107-56) 10/26/01	11/01 — Adv Cmte considered proposed amendments **PENDING FURTHER ACTION**
[CR 6(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**

Proposal	Source, Date, and Doc #	Status
[CR 6(d)] — Allow witness to be accompanied into grand jury by counsel	Omnibus Approp. Act (P.L.105-277)	10/98 — Considered; Subcomm. Appointed 1/99 — ST Cmte approved subcomm rec. not to allow representation 3/99 — Jud Conf approves report for submission to Congress **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 ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/01— Effective **COMPLETED**
[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 10/99 — Approved for publication by advisory cmte **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 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 — Approved by ST Cmte 9/98 — Approved by Judicial Conference 4/99 — Approved by Sup. Ct. 12/01— Effective **COMPLETED**
[CR7(b)] — Effect of tardy indictment	Congressional constituent 3/21/00 (00-CR-B)	5/00— Referred to chair and reporter **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 ST Cmte 10/98 — revised and resubmitted to ST Cmte for transmission to conference — 1/99— Approved by ST Cmte 3/99— Approved by Jud Conf 4/00— Approved by Supreme Court 12/00 — Effective **COMPLETED**
[CR 10] — Arraignment of detainees through video teleconferencing; Defendant's presence not required	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 4/98 —Draft amendments considered, but subcmte appointed to further study 10/98 — Considered by cmte; reporter to redraft and submit at next meeting 4/99 — Considered 10/99— Approved for publication by advisory cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01— Approved and forwarded to ST Cmte 6/01— Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11] — Advise non-U.S. citizen defendant of potential collateral consequences when accepting guilty plea	Richard J. Douglas, Atty., Senate Committee on Foreign Relations 4/3/01 (01-CR-C)	4/01 — Referred to reporter & chair **PENDING FURTHER ACTION**
[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 ST Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[CR 11(b)(2)] — Examine defendant's prior discussions with a government attorney	Judge Sidney Fitzwater 11/94 & 3/99	4/95 — Discussed and no motion to amend **COMPLETED** 3/99 — Sent to chair and reporter 4/00 — Considered; request to publish 6/00 — ST Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[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 subcmte 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 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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 subcmte in place to monitor/respond to the legislation. **COMPLETED**
[CR 11(e)(6) — Court required to inquire whether the defendant is entitled to an adjustment for acceptance of responsibility	Judge John W. Sedwick 10/98 (98-CR-C)	**PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcmte 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**
[CR 12.2(c)] — 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 — Considered draft amendments, continued for further study 4/99 — Considered 10/99 — Considered by cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 12.4] — Financial disclosure	Stg Comte, 1/00	4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with post-publication changes and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by 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 Cmte 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 10/98 — Incorporated in proposed amendments to Rule 12.2 1/00 — Considered by cmte as part of style package 4/00— Comte decided not to take action **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a) — Permit the same discovery of experts as is permitted under the civil rules	Carl E. Person, Esq. 6/01 (01-CR-D)	6/01— Referred to reporter and chair **PENDING FURTHER ACTION**
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92 5/18/99 (99-CR-D)	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** 5/99— Sent to chair and reporter **PENDING FURTHER ACTION**
[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 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 23(a)] — Address the issue of when a jury trial is authorized	Jeremy A. Bell 11/00 (00-CR-D)	11/00 — Sent to chair and reporter **PENDING FURTHER ACTION**
[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**

Proposal	Source, Date, and Doc #	Status
[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 peremptory challenges at 10 per side. 4/98 — Approved by 6 to 5 vote and will be included in style package 10/99 — Rejected inclusion in style package **COMPLETED**
[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 ST Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99 — Effective **COMPLETED**
[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 — Subcmte will be appointed 10/97—Subcmte recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study 10/98 — Cmte approved, but deferred request to publish until spring meeting or included in style package 4/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved 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 12/98 — Effective **COMPLETED**
[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**
[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 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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 cmte, but deferred pending Civil Rules Cmte action on CV 51 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking process 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 12/98 — Effective **COMPLETED**
[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 Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Court 12/00 — Effective **COMPLETED**

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 subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—findings on controverted matters in presentence report		3/00 — considered by subcomte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte withdrew recommendation **COMPLETED**
[CR 32]—release of presentence and related reports	Request of Criminal Law Committee	10/98 — Reviewed recommendation of subcomm and agreed that no rules necessary **COMPLETED**
[CR 32(c)(5)] — clerk required to file notice of appeal	Clerk, 7th Circuit 4/11/00 (00-CR-A)	3/00 — Sent directly to chair 5/00 — referred to reporter **PENDING FURTHER ACTION**
[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 Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved 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 1/00 — considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved by Advisory Cmte as part of style package and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **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 subcmte 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 Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99 — Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[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 12/98 — Effective **COMPLETED**
[CR 35] — Allow defendants to move for reduction of sentence	Robert D. Evans, ABA, 3/2/01 (01-CR-B)	3/01 — Referred to chair and reporter for consideration **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 12/98 — Effective **COMPLETED**
[CR 35(b)] To permit sentence reduction when defendant assists government before or within 1 year after sentence	Judge Ed Carnes 3/99 (99-CR-A); Asst. Attorney Gen./ Crim. Div. 4/99 (99-CR-C)	3/99— Referred to chair and reporter 1/00 — Considered by comte as part of style package 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with post-publication changes and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **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 **COMPLETED**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules 4/99 — Considered 4/00— Considered and included in request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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 Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00— Approved by Supreme Ct 12/00 — Effective **COMPLETED**
[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] — Allow magistrate judge to issue nationwide search warrant	USA Patriot Act of 2001 (P.L. 107-56) 10/26/01	11/01 — Adv Cmte considered proposed amendments **PENDING FURTHER ACTION**
[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 41(c)(1) and (d) — enlarge time period	Judge B. Waugh Crigler 11/98 (98-CR-D)	6/00 — Stg Comte approves request to publish 8/00 — Published (rejects expansion of time period) **PENDING FURTHER ACTION**
[CR 41(d)] — covert entry for purposes of observation only	DOJ 9/2/99	10/99 — Considered 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte decided to defer further action **PENDING FURTHER ACTION**
[CR42(b)] — magistrate judge contempt power clarification	Magistrate Judge Tommy Miller 12/00 (00-CR-E)	4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 43(b)] —Sentence absent defendant	DOJ 4/92	10/92 — Subcmte 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 — Subcmte appointed 4/99 — Considered 1/00 — Considered by comte as part of style package 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[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 12/98 — Effective **COMPLETED**
[CR 43(a) — Defendant may waive arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I) and Mario Cano 97---	10/97 — Referred to reporter and chair 4/98 —Draft amendments considered, subcmte appointed 10/98 — Cmte considered; reporter to submit draft at next meeting 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **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(d)] — 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 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46 (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**

Proposal	Source, Date, and Doc #	Status
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 49] — Double-sided paper	Environmental Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other cmtes 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 4/99 — Considered 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, 10/20/97 (CR-J)	11/97 — Referred to reporter and chair, pending Technology Subcmte study 4/99 — Considered 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **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 Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[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 Cmte 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] — magistrate judge petty offenses jurisdiction	Magistrate Judge Tommy E. Miller 12/00 (00-CR-E)	12/00 — Sent to chair & reporter 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[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 Cmte and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct 12/97 — Effective **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**

Proposal	Source, Date, and Doc #	Status
[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 — Subcmte appointed 4/98 — Considered; further study 10/98 — Cmte approved some proposals and deferred others for further consideration 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte deferred further action **PENDING FURTHER ACTION**
[Hab Corp R8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter 10/97 — Referred to subcmte 4/98 — Cmte considered 10/98 — Cmte considered 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Advisory Cmte deferred further action **PENDING FURTHER ACTION**
[Modify the model form for motions under 28 U.S.C. § 2255]	Robert L. Byer, Esq. & David R. Fine, Esq. 8/11/00 (00-CR-C)	8/00 — Referred to reporter & chair **PENDING FURTHER ACTION**
[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 subcmte completes its draft 4/99 — Considered Rules 1-9 6/99 — Considered Rules 1-22 4/00— Rules 32-60 approved by comte; request to publish Rules 1-60 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with amendments and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[Restyling Hab. Corp. Rules]		10/00 — Considered 1/01 — ST Cmte authorizes restyling to proceed **PENDING FURTHER ACTION**

Committee on Rules of Practice and Procedure
January 2002
Agenda Item Tab 4
Information Item

Federal Judicial Center Update

At each Committee meeting, the Federal Judicial Center provides an update on projects and activities related to committee interests.

The educational programs listed below make up a small number of the seminars and in-court programs offered in-person or electronically. The Center presents most judicial education through in-person seminars and most staff education through various types of educational technology that is used locally. Center curriculum packages, and more recently, satellite broadcasts, online conferences, and web-based educational services have helped the courts provide court employees locally controlled, structured on-site training using training modules developed for national implementation. For many years, the Center's resources for local court use have allowed the courts to receive training on demand; the courts themselves have initiated the selection and timing of the Center training they receive, rather than depended on the Federal Judicial Center to schedule national programs.

The research projects described below are but a few of the projects undertaken by the Center, most in support of Judicial Conference committees.

I. Educational Programs for Judges and Court Staff

A. Federal Judicial Television Network

The Administrative Office has installed downlink antennas in some 300 court locations. Center staff manage the Federal Judicial Television Network (FJTN) studios and produce the *FJTN Bulletin*, with broadcast calendars and a synopsis of upcoming programs from the Center, the Sentencing Commission, and the Administrative Office. The Center distributes the *Bulletin* to more than 28,000 court personnel and posts an electronic copy on the courts' intranet on the Data Communications Network (DCN).

Currently scheduled Center FJTN programs primarily for judges and court attorneys include an update on bankruptcy law, including any legislative changes, and an overview of employment law (primarily for law clerks) produced with the ABA's Labor & Employment Law Section.

The Center's FJTN staff work with Administrative Office staff to broadcast Administrative Office programs on human resources and other matters, such as live interactive training programs and informational broadcasts on employee benefits, automation, and employment dispute resolution.

B. Other Educational Seminars for Federal Judges

The Center provides a variety of opportunities for new and experienced judges to attend programs that enhance their skills and knowledge through interaction with faculty and other participants. In late 2001 and the first half of 2002, these include:

- a June 24-26, 2002 National Sentencing Policy Institute for district judges, probation chiefs, federal defenders, and prosecutors representing each circuit;

- orientation programs (as necessary) for district, bankruptcy, and magistrate judges and national workshops for district, bankruptcy, and magistrate judges, respectively;

- an April 2002 conference for chief district judges and an October 2002 conference for circuit judges;

- a program for state and federal appellate judges cosponsored with the Judicial Division of the American Bar Association;

- programs on special topics, such as employment law, intellectual property, and interpreting financial statements and in-court seminars on topics such as intellectual property, opinion writing, and genetics.

We hope to present again a leadership seminar we held this past September in Gettysburg for new chief district judges and their unit executives.

C. Other Education for Court Staff

In addition to the training described above, the Center provides a limited number of travel-based workshops and seminars, as well as numerous curriculum resources that court units or individual employees use in developing their own training programs. Examples of some of the educational offerings available in the coming months include:

- an executive institute for senior court managers on April 21-26, 2002(invitations have also been extended to ten Administrative Office senior staff);

- the opportunity to enroll in the Supervisors' Development Program, a three-year, 90-hour curriculum that incorporates participation in a variety of the Center's self-study, FJTN, and curriculum packaged programs;

- in January, an expansion of the Center's Court Operations Exchange on the judiciary's intranet to address probation and pretrial services issues.

- eight national orientation seminars for probation and pretrial services officers will be conducted in 2002 for approximately 463 new officers.

- the next national conference for chief probation and pretrial services officers will take place next August in Salt Lake City, Utah.

- two on-line conferences on effective time management for bankruptcy courtroom deputies.

- three FJTN programs focus on women offender issues. In September, the Center rebroadcast an NIC program, *Female Offenders in the Community.* Associate Justice Ruth Bader Ginsberg introduced our live October Special Needs Offenders series broadcast on women offenders and their children. (An on-line conference and training bulletin complemented the program.) And an interactive Center program on women offenders who are substance abusers will be broadcast in February.

- the next Special Needs Offenders program will revisit cybercrime and explore tools and techniques individual districts are using to supervise offenders and defendants who commit cybercrime.

- upcoming additions to the U.S. Sentencing Commission-Federal Judicial Center collaborative series on sentencing and guidelines include a November broadcast on new amendments and a July 2002 program on technical guidelines applications.

- in March, the Center will convene a new class of the two-and-one-half-year Federal Court Leadership Program for managers and technical specialists in appellate, district, and bankruptcy courts. Class VI of the Leadership Development Program for Probation and Pretrial Services Officers is mid-way through its three-year curriculum.

D. Judicial manuals and monographs

Center publications for judges span a broad range of topics. Works in progress include: monographs on copyright law, international insolvency, recusal, ERISA, securities litigation, and employment law. The Center's *Manual on Recurring Issues in Criminal Trials* and the *Deskbook for Chief Judges of U.S. District Courts* are undergoing revision. We hope to have early next year a special monograph on voting rights, covering both statutory and case law, and statistical evidence used in such litigation.

The recently distributed handbook on courtroom technology that the Center developed with the National Institute of Trial Advocacy describes the various types of technology and outlines questions judges will likely confront from pretrial to trial. The

handbook is part of a larger Center research project on the impact of courtroom technology on the adversary process; the handbook is available on the Center's website at http://jnet.fjc.dcn. Electronic evidence discovery work continues on a related project that has already generated considerable judicial education presentations, including the adequacy of current discovery rules to deal with this phenomenon.

Center staff recently completed a compilation and summary of procedures used in handling federal death penalty cases, including a description of how these procedures differ from those used in more routine criminal litigation and sample jury questionnaires, instructions, verdict forms, scheduling orders, and other materials developed by judges who have handled death penalty cases. These materials are now available in electronic form on the Center's website and will be revised as the courts' experience with federal death penalty litigation expands. A companion project on state capital habeas cases is in progress.

The Center has distributed its *Guide to Judicial Management of Cases in ADR.* Work continues on the fourth edition of the *Manual for Complex Litigation,* a manual for managing capital habeas cases, and a bankruptcy debtor education handbook. At its March 2001 meeting, the Judicial Conference approved the draft of the statutorily mandated civil litigation cost and delay reduction manual prepared by the Center and the Administrative Office. The manual is currently at press; it will be distributed to judges and also posted electronically for internal access within the federal judiciary.

E. History Projects

The Center's history office has begun work on an educational project on illustrative cases in the history of the trial and intermediate appellate courts of the federal judiciary. The first unit will focus on the *Amistad* case and be released in conjunction with broadcast of the Center's educational video on the case. The history office has also completed a bibliographical search for scholarly works about historical judges, and is completing a history of the office of district court clerk.

F. Education for Foreign Judges and Staff

Each year, the Center hosts delegations of judges and judicial personnel from foreign countries. Some groups request information about the federal courts in general. Some groups request briefings about the various ways in which the Center develops education programs for judges and court staff and otherwise supports the work of the federal judiciary. In FY 2001, the Center conducted 69 briefings for over 487 judges and officials from 34 countries. These figures include a number of more specialized meetings on topics such as court-administered alternative dispute resolution, case management strategies, developing training programs for court staff, and judicial professionalism (conduct and discipline) in the federal courts. During this period, the Center also coordinated two weeklong workshops for the Russian Academy of Justice, the first in D.C. and a follow-up program in Moscow. These programs included sessions on teaching judicial ethics, distance learning methodology, and the use of technology in developing court education. The Center also helped arrange the September 2001 judicial exchange with the Mexican federal judiciary, led by the Chief Justice.

II. Research Projects

As noted in past reports, the Class Action Subcommittee of the Advisory Committee on Civil Rules asked the Center to develop plain-language notice forms as examples for attorneys. The project developed four notices, which have been posted on the Center's web site for comment, with attendant publicity (see 70 U.S.L.W. 2192).

As part of our participation with the Administrative Office's task force on federal courts' trial rate, we expect to examine expedited trial procedures in the districts of Minnesota and Middle Alabama and possibly others. We are also undertaking a detailed docket-level analysis of a large sample of cases terminated by dispositive motions, to identify changes in the nature and extent of such motions, the degree to which motions practice has changed, and an identification of types of cases so resolved.

Our work continues on a study of case events as revealed by docket information. The study is based on more than 145,000 civil docket sheets in electronic form, which were obtained for other Center studies. When the work is complete, the study should be able to identify both the incidence and timing of different types of events and dispositions (e.g., in how many cases discovery occurred, how frequently conferences are held and for what purpose, how many cases were terminated by various methods of disposition, and whether there are any differences by case type in the incidence of various events).

For the Advisory Committee on Appellate Rules, we completed a study of the appellate courts' differing positions on Fed. R. App. P. 35(a)'s absolute majority rule covering decisions by *en banc* panels.

In response to a request from the Chief Judge of the Third Circuit, we recently prepared and submitted to the Third Circuit Task Force on the Selection of Class Counsel a report of our analysis of a number of class action cases in which judges used competitive bidding in attempting to select or actually to select class counsel.

As part of the courtroom technology project referenced above in **I. D.**, in July, we conducted a small conference on research issues and topics involving courtroom technology. More than two dozen leading researchers from academia and the private sector, along with court staff and some technology staff of the Administrative Office participated in the day and half conference, conducted in collaboration with the Courtroom 21 Project of University of William and Mary Law School.

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

DATE: November 30, 2001

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

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

The Advisory Committee on Appellate Rules did not meet this fall. As you know, an extensive package of proposed amendments to the Federal Rules of Appellate Procedure was approved by the Standing Committee in June and by the Judicial Conference in September. The "new" items on the Advisory Committee's study agenda were not sufficient in number or urgency to justify a fall meeting.

The Advisory Committee will meet again in April in Washington, D.C. At that meeting, we will consider several of the items on our study agenda, which is attached.

Advisory Committee on Appellate Rules
Table of Agenda Items — Revised December 2001

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 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Held in abeyance pending consultation with D.C. Circuit 04/01
95-04	Amend computation of time to conform to Civil Rules method. (Related to Nos. 97-01 and 98-12.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
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 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to Nos. 95-04 and 98-12.)	Advisory Committee & Los Angeles County Bar Ass'n	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01

FRAP Item	Proposal	Source	Current Status
97-05	Amend FRAP 24(a)(2) in light of Prison Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
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 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01

FRAP Item	Proposal	Source	Current Status
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 09/97 Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
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 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
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 09/97 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
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 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1. (Related to No. 98-01.)	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained on agenda 10/99; will await action by other Advisory Committees on similar proposals

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 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office. (Related to No. 97-31.)	Standing Committee	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained on agenda 10/99; will await action by other Advisory Committees on similar proposals
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).	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 10/98 draft withdrawn; discussed further and retained on agenda 04/99 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Standing Committee deferred action 01/00 Further revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Further minor revisions approved by poll of Committee 05/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01

FRAP Item	Proposal	Source	Current Status
98-06	Amend FRAP 4(b)(5) 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 Discussed and retained on agenda 04/99; awaiting draft amendment and Committee Note Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
98-11	Amend FRAP 5(c) to clarify application of FRAP 32(a) to petitions for permission to appeal.	Christopher A. Goelz (CA9 Circuit Mediator)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
98-12	Amend FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) to account for amendment to FRAP 26(a) regarding calculating time. (Related to Nos. 95-04 and 97-01.)	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 10/98 Draft approved 04/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
99-01	Amend FRAP 24(a)(3) to address potential conflicts with Prison Litigation Reform Act.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00

FRAP Item	Proposal	Source	Current Status
			Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
99-02	Amend FRAP 32 to require that briefs, written motions, rehearing petitions, etc. be signed.	Hon. Will Garwood (CA5)	Awaiting initial discussion Draft approved 04/99 for submission to Standing Committee in 01/00 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Bankruptcy Rules Committee
99-07	Amend FRAP 26.1 to broaden financial disclosure obligations.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 10/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Alternative draft approved by poll of Committee 05/01 Approved by the Standing Committee 06/01

FRAP Item	Proposal	Source	Current Status
			Approved by the Judicial Conference 09/01
99-09	Amend FRAP 22(b) to specify procedure for obtaining certificate of appealability.	Hon. Anthony J. Scirica (CA3)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Department of Justice Discussed and retained on agenda 04/01
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
00-05	Amend FRAP 3 to address notice of appeal filed on behalf of corporation but not signed by attorney.	Hon. Diana Gribbon Motz (CA4)	Awaiting initial discussion Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
00-07	Amend FRAP 4 to specify time for appeal of order granting or denying motion for attorney's fees under Hyde Amendment.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting proposal from Department of Justice
00-08	Amend FRAP 4(a)(6)(A) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting report from Federal Judicial Center
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General Waxman	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice
00-13	Amend FRAP 29 to empower court to preclude the filing of a particular private amicus brief, even if all parties have consented.	Hon. Michael Boudin (CA1)	Awaiting initial discussion Discussed and retained on agenda 04/01
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General Waxman	Awaiting initial discussion Discussed and retained on agenda 04/01
01-02	Amend FRAP 5(c), 21(d), 27(d)(2), 35(b)(2), & 40(b) to replace page limits with word limits.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 04/01

FRAP Item	Proposal	Source	Current Status
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01
01-04	Amend Rule 4(b)(1)(A) to give criminal defendant 30 days to appeal.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 04/01
01-05	Amend Forms 1, 2, 3, and 5 to change references to "19__."	Advisory Committee	Awaiting initial discussion

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

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CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

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

FROM: A. Thomas Small, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 14, 2001

RE: Report of the Advisory Committee on Bankruptcy Rules

I. INTRODUCTION

The Advisory Committee on Bankruptcy Rules was scheduled to meet on September 13-14, 2001, in Plymouth, Massachusetts. The meeting was canceled due to the tragic events of September 11.

Although the Advisory Committee did not meet in September, the Committee did take action to approve a preliminary draft of amendments to Bankruptcy Rule 1005 and Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C and 19. The action was taken in response to the approval of a Privacy and Public Access to Electronic Case Files policy by Judicial Conference of the United States on the recommendation of the Committee on Court Administration and Case Management in September 2001.

II. ACTION ITEMS

Preliminary Draft of Proposed Amendments to Bankruptcy Rule 1005, and Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C and 19.

Synopsis of Proposed Amendments:

Rule 1005 is amended to implement the Judicial Conference policy to limit the disclosure of social security numbers and similar identifiers by requiring only the last four digits of the social security numbers in the title of the case.

Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C and 19 are amended to limit the disclosure of social security numbers and similar identifiers by requiring only the last four digits of the social security numbers and the last four digits of any account numbers that debtors may have with creditors. The Forms also are amended to include a reference to 11 U.S.C. § 110 which requires the full disclosure of the social security number of bankruptcy petition preparers.

Text of proposed amendments to Rule 1005 and Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19 are attached.

III. INFORMATION ITEMS

A. *Publication of Proposed Amendments*

At its June 2001 meeting, the Standing Committee authorized the publication of a preliminary draft of proposed amendments to the Bankruptcy Rules and Official Forms. There is a proposed new rule, and proposed amendments to four rules and three forms. The deadline for submitting written comments on the proposals is February 15, 2002. A public hearing is scheduled for January 4, 2002, in Washington, D.C. To date, no requests for personal appearances has been received. Any comments that are received will be considered by the Advisory Committee at its March 2002 meeting. The Advisory Committee expects to present these amendments to the Standing Committee for approval by the Standing Committee at its June 2002 meeting.

B. *Proposed Bankruptcy Legislation*

Both the House and Senate passed versions of bankruptcy reform legislation. A conference committee has been appointed to reconcile the two bills, and that committee has undertaken the task to a limited degree. The events of September 11, 2001, understandably have caused an adjustment in the legislative agenda, and it does not appear that comprehensive bankruptcy reform will be enacted in the immediate future. Nonetheless, the conference committee is continuing its work, and the Advisory Committee is monitoring these developments to remain prepared to propose any necessary rules and forms amendments and additions. It is also possible that selected provisions of the reform legislation could be enacted on a piecemeal basis, including enactments such as the proposed chapter on cross border insolvency proceedings, that would require rules and forms amendments or additions.

Attachments: Proposed Amendment to Bankruptcy Rule 1005
Proposed Amendments to Official Forms

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1005. Caption of Petition

The caption of a petition commencing a case under the Code shall contain the name of the court, the title of the case, and the docket number. The title of the case shall include the name, last four digits of the social security number and employer's tax identification number of the debtor and all other names used by the debtor within six years before filing the petition. If the petition is not filed by the debtor, it shall include all names used by the debtor which are known to the petitioners.

COMMITTEE NOTE

The rule is amended to implement the Judicial Conference policy to limit the disclosure of a party's social security number and similar identifiers. Under the rule, as amended, only the last four digits of these identifiers need be included in the caption of the petition.

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

(Official Form 1) (DRAFT)

FORM B1	United States Bankruptcy Court District of _____	Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Last fourdigits of Soc. Sec./Tax I.D. No. (if more than one, state all):	Last four digits of Soc. Sec./Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, State & Zip Code):	Street Address of Joint Debtor (No. & Street, City, State & Zip Code):
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):	Mailing Address of Joint Debtor (if different from street address):

Location of Principal Assets of Business Debtor (if different from street address above):

Information Regarding the Debtor (Check the Applicable Boxes)

Venue (Check any applicable box)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Type of Debtor (Check all boxes that apply)

☐ Individual(s)
☐ Corporation
☐ Partnership
☐ Other _____
☐ Railroad
☐ Stockbroker
☐ Commodity Broker
☐ Clearing Bank

Nature of Debts (Check one box)

☐ Consumer/Non-Business
☐ Business

Chapter 11 Small Business (Check all boxes that apply)

☐ Debtor is a small business as defined in 11 U.S.C. § 101
☐ Debtor is and elects to be considered a small business under 11 U.S.C § 1121(e) (Optional)

Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)

☐ Chapter 7
☐ Chapter 9
☐ Chapter 11
☐ Chapter 12
☐ Chapter 13
☐ Sec. 304 - Case ancillary to foreign proceeding

Filing Fee (Check one box)

☐ Full Filing Fee attached
☐ Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

Statistical/Administrative Information (Estimates only)

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.

☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors	1-15	16-49	50-99	100-199	200-999	1000-over
	☐	☐	☐	☐	☐	☐

Estimated Assets	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Debts	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Voluntary Petition
(This page must be completed and filed in every case)

Name of Debtor(s):

Prior Bankruptcy Case Filed Within Last 6 Years (If more than one, attach additional sheet)

Location Where Filed:	Case Number:	Date Filed:

Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)

Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (If not represented by attorney)

_____
Date

Signature of Attorney

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____
Telephone Number

_____
Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

X _____
Signature of Attorney for Debtor(s) Date

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.
☐ No

Signature of Non-Attorney Petition Preparer

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed Name of Bankruptcy Petition Preparer

_____
Social Security Number (Required by 11 U.S.C.§ 110)

_____
Address

_____

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

X _____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. §110; 18 U.S.C. §156.

COMMITTEE NOTE

The form has been amended to require the debtor to disclose only the last four digits of the debtor's Social Security or other Taxpayer Identification number. Those four digits will provide creditors with sufficient information to identify the debtor accurately while affording greater privacy to the debtor. Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer continues to require a petition preparer to provide the full Social Security number of the individual who actually prepares the document.

Official Form 3
(DRAFT)

United States Bankruptcy Court

_____ District Of _____

In re _____,
Debtor

Case No. _____

Chapter _____

APPLICATION TO PAY FILING FEE IN INSTALLMENTS

1. In accordance with Fed. R. Bankr. P. 1006, I apply for permission to pay the Filing Fee amounting to $_____ in installments.

2. I certify that I am unable to pay the Filing Fee except in installments.

3. I further certify that I have not paid any money or transferred any property to an attorney for services in connection with this case and that I will neither make any payment nor transfer any property for services in connection with this case until the filing fee is paid in full.

4. I propose the following terms for the payment of the Filing Fee.*

$ _____ Check one ☐ With the filing of the petition, or
☐ On or before _____

$ _____ on or before _____

$ _____ on or before _____

$ _____ on or before _____

* The number of installments proposed shall not exceed four (4), and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition. Fed. R. Bankr. P. 1006(b)(2).

5. I understand that if I fail to pay any installment when due my bankruptcy case may be dismissed and I may not receive a discharge of my debts.

_____
Signature of Attorney Date

_____
Name of Attorney

_____
Signature of Debtor Date
(In a joint case, both spouses must sign.)

_____
Signature of Joint Debtor (if any) Date

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document. I also certify that I will not accept money or any other property from the debtor before the filing fee is paid in full.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No.
(Required by 11 U.S.C. § 110(c).)

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

x_____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

COMMITTEE NOTE

Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer continues to require a petition preparer to provide the full Social Security number of the individual who actually prepares the document pursuant to § 110(c) of the Code.

FORM B5
(DRAFT)

United States Bankruptcy Court

District of _____

INVOLUNTARY PETITION

IN RE (Name of Debtor - If Individual: Last, First, Middle)	ALL OTHER NAMES used by debtor in the last 6 years (Include married, maiden, and trade names.)
LAST FOUR DIGITS OF SOC. SEC./TAX I.D. NO. (If more than one, state all.)	
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code) COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS	MAILING ADDRESS OF DEBTOR (If different from street address)
LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses)	

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

☐ Chapter 7 ☐ Chapter 11

INFORMATION REGARDING DEBTOR (Check applicable boxes)

Petitioners believe
- ☐ Debts are primarily consumer debts
- ☐ Debts are primarily business debts

TYPE OF DEBTOR
- ☐ Individual
- ☐ Partnership
- ☐ Corporation
- ☐ Other: _____
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Railroad

B BRIEFLY DESCRIBE NATURE OF BUSINESS

VENUE

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.

FILING FEE (Check one box)

☐ Full Filing Fee attached

☐ Petitioner is a child suport creditor or its representative, and the form specified in § 304g) of the Bankruptcy Reform Act of 1994 is attached.

PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)

Name of Debtor	Case Number	Date
Relationship	District	Judge

ALLEGATIONS
(Check applicable boxes)

1. ☐ Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. § 303(b).
2. ☐ The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.

3.a. ☐ The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute;

or

b. ☐ Within 120 days preceding the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

COURT USE ONLY

If a child support creditor or its representative is a petitioner, and if the petitioner files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

FORM 5 Involuntary Petition
(6/92)

Name of Debtor _____

Case No. _____
(court use only)

TRANSFER OF CLAIM

☐ Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents evidencing the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date Signed

Name & Mailing Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney Firm (If any)

_____
Address

_____
Telephone No.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date Signed

Name & Mailing Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney Firm (If any)

_____
Address

_____
Telephone No.

X _____
Signature of Petitioner or Representative (State title)

_____
Name of Petitioner — Date Signed

Name & Mailing Address of Individual Signing in Representative Capacity _____

X _____
Signature of Attorney — Date

_____
Name of Attorney Firm (If any)

_____
Address

_____
Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

_____continuation sheets attached

COMMITTEE NOTE

The form has been amended to require the petitioner to disclose only the last four digits of the debtor's Social Security or other Taxpayer Identification number. Those four digits will provide creditors with sufficient information to identify the debtor accurately while affording greater privacy to the debtor. The form also has been amended to delete the request for information concerning the "Type of Business," as this data no longer is collected for statistical purposes. Checkboxes have been added for a petitioner to indicate whether the filing fee is attached or the petitioner is a child support creditor or representative of a child support creditor from whom no filing fee is due.

Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer continues to require a petition preparer to provide the full Social Security number of the individual who actually prepares the document.

Form B6D
(DRAFT)

In re _____, Debtor

Case No. _____ (If known)

SCHEDULE D - CREDITORS HOLDING SECURED CLAIMS

State the name, mailing address, including zip code, and last four digits of the account number, if any, of all entities holding claims secured by property of the debtor as of the date of filing of the petition. List creditors holding all types of secured interests such as judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests. List creditors in alphabetical order to the extent practicable. If all secured creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding secured claims to report on this Schedule D.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND MARKET VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
Last four digits of ACCOUNT NO.			VALUE $					
Last four digits of ACCOUNT NO.			VALUE $					
Last four digits of ACCOUNT NO.			VALUE $					
Last four digits of ACCOUNT NO.			VALUE $					

_____continuation sheets attached

Subtotal➤ (Total of this page) $

Total➤ (Use only on last page) $

(Report total also on Summary of Schedules)

Form B6D - Cont
(DRAFT)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE D - CREDITORS HOLDING SECURED CLAIMS

(Continuation Sheet)

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND MARKET VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
Last four digits of ACCOUNT NO.			VALUE $					
Last four digits of ACCOUNT NO.			VALUE $					
Last four digits of ACCOUNT NO.			VALUE $					
Last four digits of ACCOUNT NO.			VALUE $					
Last four digits of ACCOUNT NO.			VALUE $					

Sheet no. ___ of ___continuation sheets attached to Schedule of Creditors Holding Secured Claims
Subtotal➤ (Total of this page) $
Total➤ (Use only on last page) $

(Report total also on Summary of Schedules)

Form B6E
(DRAFT)

In re _____, Debtor

Case No._____ (if known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name and mailing address, including zip code, and last four digits of account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H-Codebtors. If a joint petition is filed, state whether husband, wife, both of them or the marital community may be liable on each claim by placing an "H,""W,""J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotal" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Repeat this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ **Extensions of credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(2).

☐ **Wages, salaries, and commissions**

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to $4,650* per person earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(3).

☐ **Contributions to employee benefit plans**

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ **Certain farmers and fishermen**

Claims of certain farmers and fishermen, up to $4,650* per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(5).

☐ **Deposits by individuals**

Claims of individuals up to $2,100* for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(6).

In re _____, Case No._____
Debtor (if known)

☐ **Alimony, Maintenance, or Support**

Claims of a spouse, former spouse, or child of the debtor for alimony, maintenance, or support, to the extent provided in 11 U.S.C. § 507(a)(7).

☐ **Taxes and Certain Other Debts Owed to Governmental Units**

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(8).

☐ **Commitments to Maintain the Capital of an Insured Depository Institution**

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507 (a)(9).

* Amounts are subject to adjustment on April 1, 2004, and every three years thereafter with respect to cases commenced on or after the date of adjustment.

____ continuation sheets attached

Form B6E - Cont
(DRAFT)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS
(Continuation Sheet)

_____
TYPE OF PRIORITY

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND MARKET VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
Last four digits of ACCOUNT NO.								
Last four digits of ACCOUNT NO.								
Last four digits of ACCOUNT NO.								
Last four digits of ACCOUNT NO.								
Last four digits of ACCOUNT NO.								

Sheet no. ___ of ___ sheets attached to Schedule of Creditors Holding Priority Claims

Subtotal➤ (Total of this page) $

Total➤ (Use only on last page of the completed Schedule E.) (Report total also on Summary of Schedules) $

Form B6F (DRAFT)

In re _____, **Case No.** _____

Debtor **(If known)**

SCHEDULE F- CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and last four digits of account number, if any, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community maybe liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured claims to report on this Schedule F.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND MARKET VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL
Last four digits of ACCOUNT NO.							
Last four digits of ACCOUNT NO.							
Last four digits of ACCOUNT NO.							
Last four digits of ACCOUNT NO.							

_____continuation sheets attached

Subtotal ➤ $ _____

Total ➤ $ _____

(Report also on Summary of Schedules)

Form B6F - Cont
(DRAFT)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

(Continuation Sheet)

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND MARKET VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL
Last four digits of ACCOUNT NO.							
Last four digits of ACCOUNT NO.							
Last four digits of ACCOUNT NO.							
Last four digits of ACCOUNT NO.							
Last four digits of ACCOUNT NO.							

Sheet no. ___ of ___sheets attached to Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal ➤ $
(Total of this page)
Total ➤ $

(Use only on last page of the completed Schedule E.)
(Report total also on Summary of Schedules)

Form B6I
(DRAFT)

In re _____ , **Case No.** _____
Debtor **(if known)**

SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

The column labeled "Spouse" must be completed in all cases filed by joint debtors and by a married debtor in a chapter 12 or 13 case whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.

Debtor's Marital Status:	DEPENDENTS OF DEBTOR AND SPOUSE	
	RELATIONSHIP	AGE

Employment:	DEBTOR	SPOUSE
Occupation		
Name of Employer		
How long employed		
Address of Employer		

Income: (Estimate of average monthly income)	DEBTOR	SPOUSE
Current monthly gross wages, salary, and commissions (pro rate if not paid monthly.)	$ _____	$ _____
Estimated monthly overtime	$ _____	$ _____
SUBTOTAL	$ _____	$ _____
LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and social security	$ _____	$ _____
b. Insurance	$ _____	$ _____
c. Union dues	$ _____	$ _____
d. Other (Specify: _____)	$ _____	$ _____
SUBTOTAL OF PAYROLL DEDUCTIONS	$ _____	$ _____
TOTAL NET MONTHLY TAKE HOME PAY	$ _____	$ _____
Regular income from operation of business or profession or farm (attach detailed statement)	$ _____	$ _____
Income from real property	$ _____	$ _____
Interest and dividends	$ _____	$ _____
Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above.	$ _____	$ _____
Social security or other government assistance (Specify) _____	$ _____	$ _____
Pension or retirement income	$ _____	$ _____
Other monthly income	$ _____	$ _____
(Specify) _____	$ _____	$ _____
_____	$ _____	$ _____
TOTAL MONTHLY INCOME	$ _____	$ _____

TOTAL COMBINED MONTHLY INCOME $_____ (Report also on Summary of Schedules)

Describe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document:

Official Form 6-Cont
(DRAFT)

In re _____ , Case No. _____
Debtor (If known)

DECLARATION CONCERNING DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ sheets, and that they are true and correct to the best of my knowledge, information, and belief.
(Total shown on summary page plus 1.)

Date _____ Signature: _____
Debtor

Date _____ Signature: _____
(Joint Debtor, if any)

[If joint case, both spouses must sign.]

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No
(Required by 11 U.S.C § 110(c))

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person

X _____ _____
Signature of Bankruptcy Petition Preparer Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C § 110, 18 U.S.C § 156

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF A CORPORATION OR PARTNERSHIP

I, the _____ [the president or other officer or an authorized agent of the corporation or a member or an authorized agent of the partnership] of the _____ [corporation or partnership] named as debtor in this case, declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ sheets, and that they are true and correct to the best of my knowledge, information, and belief. *(Total shown on summary page plus 1.)*

Date _____ Signature: _____

_____
[Print or type name of individual signing on behalf of debtor.]

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

Penalty for making a false statement or concealing property Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. §§ 152 and 3571

COMMITTEE NOTE

Schedule B (Personal Property), Schedule D (Creditors Holding Secured Claims), Schedule E (Creditors Holding Unsecured Priority Claims), and Schedule F (Creditors Holding Unsecured Nonpriority Claims) have been amended to require disclosure of only the last four digits of the debtor's account number with each listed creditor. The amendments should provide creditors with sufficient information to identify the debtor accurately while affording greater privacy to the debtor. Schedule I (Current Income of Individual Debtor(s)) has been amended to provide greater privacy to minors and other dependents of the debtor by deleting the requirement that the debtor disclose their names. Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition prepare continues to require a petition preparer to provide the full Social Security number of the individual who actually prepares the document.

Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer continues to require a petition preparer to provide the full Social Security number of the individual who actually prepares the document.

Form 7
(DRAFT)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re: _____, (Name) Debtor

Case No. _____ (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

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1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE (if more than one)

11. Closed financial accounts

None ☐ List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE OF ACCOUNT, LAST FOUR DIGITS OF ACCOUNT NUMBER, AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING

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12. Safe deposit boxes

None ☐ List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY

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13. Setoffs

None ☐ List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

---

14. Property held for another person

None ☐ List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

None ☐ c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT	DOCKET NUMBER	STATUS OR DISPOSITION

---

18 . Nature, location and name of business

None ☐ a. If the debtor is an individual, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the **six years** immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within the **six years** immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within the **six years** immediately preceding the commencement of this case.

NAME	LAST FOUR DIGITS OF TAXPAYER I.D. NUMBER	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES

None ☐ b. Identify any business listed in response to subdivision a., above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME	ADDRESS

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within the **six years** immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or otherwise self-employed.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within the six years immediately preceding the commencement of this case. A debtor who has not been in business within those six years should go directly to the signature page.)*

24. Tax Consolidation Group.

None ☐ If the debtor is a corporation, list the name and federal taxpayer identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within the **six-year period** immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION	LAST FOUR DIGITS OF TAXPAYER IDENTIFICATION NUMBER

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25. Pension Funds.

None ☐ If the debtor is not an individual, list the name and federal taxpayer identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within the **six-year period** immediately preceding the commencement of the case.

NAME OF PENSION FUND	LAST FOUR DIGITS OF TAXPAYER IDENTIFICATION NUMBER

---

* * * * * *

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date _____ Signature _____
of Debtor

Date _____ Signature _____
of Joint Debtor
(if any)

[If completed on behalf of a partnership or corporation]

I, declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief

Date _____ Signature _____

_____
Print Name and Title

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor]

____ continuation sheets attached

Penalty for making a false statement Fine of up to $500,000 or imprisonment for up to 5 years, or both 18 U S C § 152 and 3571

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U S C § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No.
(Required by 11 U.S C § 110(c))

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____ _____
Signature of Bankruptcy Petition Preparer Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 18 U.S.C. § 156.

COMMITTEE NOTE

The form has been amended to require the debtor to disclose only the last four digits of the debtor's Social Security or other Taxpayer Identification number. Those four digits will provide creditors with sufficient information to identify the debtor accurately while affording greater privacy to the debtor. In addition, those items that require the listing of any account number have been amended to specify that only the last four digits must be disclosed.

Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer continues to require a petition preparer to provide the full Social Security number of the individual who actually prepares the document.

Official Form 8
(DRAFT)

United States Bankruptcy Court

_____ District Of _____

In re _____,
Debtor

Case No. _____

Chapter 7

CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

1. I have filed a schedule of assets and liabilities which includes consumer debts secured by property of the estate.

2. I intend to do the following with respect to the property of the estate which secures those consumer debts:

   a. *Property to Be Surrendered.*

Description of Property **Creditor's name**

b. Property to Be Retained *[Check any applicable statement.]*

Description of Property	Creditor's Name	Property is claimed as exempt	Property will be redeemed pursuant to 11 U.S.C. § 722	Debt will be reaffirmed pursuant to 11 U S C. § 524(c)

Date: _____

_____
Signature of Debtor

CERTIFICATION OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No.
(Required by 11 U.S.C. § 110(c).)

_____

_____
Address

Names and Social Security Numbers of all other individuals who prepared or assisted in preparing this document.

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X_____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

COMMITTEE NOTE

Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer continues to require a petition preparer to provide the full Social Security number of the individual who actually prepares the document.

FORM B9A (Chapter 7 Individual or Joint Debtor No Asset Case (DRAFT))

UNITED STATES BANKRUPTCY COURT _____ **District of** _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Complaint Objecting to Discharge of the Debtor *or* to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Address of the Bankruptcy Clerk's Office: Telephone number:	For the Court: Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9B (Chapter 7 Corporation/Partnership No Asset Case) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. You may want to consult an attorney to protect your rights.
All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Last four digits of Taxpayer ID Nos.:
Attorney for Debtor (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9C (Chapter 7 Individual or Joint Debtor Asset Case) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit:

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9D (Chapter 7 Corporation/Partnership Asset Case) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____(date).]
or
[A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter ____ on _____ (date) and was converted to a case under chapter 7 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Last four digits of Taxpayer ID Nos.:
Attorney for Debtor (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit):	For a governmental unit:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9E (Chapter 11 Individual or Joint Debtor Case) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]

or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address):	Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

Notice of deadline will be sent at a later time.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan.
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9E (ALT.) (Chapter 11 Individual or Joint Debtor Case) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address):	Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan.
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9F (Chapter 11 Corporation/Partnership Asset Case) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____ (date).] *or* [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Last four digits of Taxpayer ID Nos.:
Attorney for Debtor (name and address):	Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

Notice of deadline will be sent at a later time.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9F (ALT.) (Chapter 11 Corporation/Partnership Case) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____ (date).] *or* [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Last four digits of Taxpayer ID Nos.:
Attorney for Debtor (name and address):	Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit):	For a governmental unit:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9G (Chapter 12 Individual or Joint Debtor Family Farmer) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 12 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 12 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date: _____ Time: _____ Location: _____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9H (Chapter 12 Corporation/Partnership Family Farmer) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor [corporation] *or* [partnership] listed below filed a chapter 12 bankruptcy case on _____(date).]
or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter ____ on _____ (date) and was converted to a case under chapter 12 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):	Case Number: Last four digits of Social Security/Taxpayer ID Nos.:
Attorney for Debtor (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held: Date: _____ Time: _____ Location: _____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

FORM B9I (Chapter 13 Case) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 13 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 13 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date: _____ Time: _____ Location: _____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, debtor's property, and certain codebtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Form 9

COMMITTEE NOTE

The form has been amended to require disclosure of only the last four digits of the debtor's Social Security or other Taxpayer Identification number. Those four digits will provide creditors with sufficient information to identify the debtor accurately while affording greater privacy to the debtor.

FORM B10 (Official Form 10) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____ | **PROOF OF CLAIM**

Name of Debtor	Case Number

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor (The person or other entity to whom the debtor owes money or property):	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
Name and address where notices should be sent: Telephone number:	☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

Account or other number by which creditor identifies debtor:	Check here ☐ replaces if this claim ☐ amends a previously filed claim, dated:_____

1. Basis for Claim

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☐ Other _____

☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (fill out below)
Last four digits of SS #: _____
Unpaid compensation for services performed
from _____ (date) to _____ (date)

2. Date debt was incurred:	**3. If court judgment, date obtained:**

4. Total Amount of Claim at Time Case Filed: $ _____ (unsecured) _____ (secured) _____ (priority) _____ (Total)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 7 below.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.

☐ Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

☐ Real Estate ☐ Motor Vehicle
☐ Other_____

Value of Collateral: $_____

Amount of arrearage and other charges at time case filed included in secured claim, if any: $_____

6. Unsecured Nonpriority Claim $_____

☐ Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or if c) none or only part of your claim is entitled to priority.

7. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority $_____

Specify the priority of the claim:

☐ Wages, salaries, or commissions (up to $4,650),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).
☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).
☐ Up to $2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).
☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).
☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____).

**Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment*

7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. Supporting Documents: *Attach copies of supporting documents,* such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any).

THIS SPACE IS FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In particular types of cases or circumstances, such as bankruptcy cases that are not filed voluntarily by a debtor, there may be exceptions to these general rules.

DEFINITIONS

Debtor

The person, corporation, or other entity that has filed a bankruptcy case is called the debtor.

Creditor

A creditor is any person, corporation, or other entity to whom the debtor owed a debt on the date that the bankruptcy case was filed.

Proof of Claim

A form telling the bankruptcy court how much the debtor owed a creditor at the time the bankruptcy case was filed (the amount of the creditor's claim). This form must be filed with the clerk of the bankruptcy court where the bankruptcy case was filed.

Secured Claim

A claim is a secured claim to the extent that the creditor has a lien on property of the debtor (collateral) that gives the creditor the right to be paid from that property before creditors who do not have liens on the property.

Examples of liens are a mortgage on real estate and a security interest in a car, truck, boat, television set, or other item of property. A lien may have been obtained through a court proceeding before the bankruptcy case began; in some states a court judgment is a lien. In addition, to the extent a creditor also owes money to the debtor (has a right of setoff), the creditor's claim may be a secured claim. (See also *Unsecured Claim*.)

Unsecured Claim

If a claim is not a secured claim it is an unsecured claim. A claim may be partly secured and partly unsecured if the property on which a creditor has a lien is not worth enough to pay the creditor in full.

Unsecured Priority Claim

Certain types of unsecured claims are given priority, so they are to be paid in bankruptcy cases before most other unsecured claims (if there is sufficient money or property available to pay these claims). The most common types of priority claims are listed on the proof of claim form. Unsecured claims that are not specifically given priority status by the bankruptcy laws are classified as *Unsecured Nonpriority Claims.*

Items to be completed in Proof of Claim form (if not already filled in)

Court, Name of Debtor, and Case Number:
Fill in the name of the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the name of the debtor in the bankruptcy case, and the bankruptcy case number. If you received a notice of the case from the court, all of this information is near the top of the notice.

Information about Creditor:
Complete the section giving the name, address, and telephone number of the creditor to whom the debtor owes money or property, and the debtor's account number, if any. If anyone else has already filed a proof of claim relating to this debt, if you never received notices from the bankruptcy court about this case, if your address differs from that to which the court sent notice, or if this proof of claim replaces or changes a proof of claim that was already filed, check the appropriate box on the form.

1. Basis for Claim:
Check the type of debt for which the proof of claim is being filed. If the type of debt is not listed, check "Other" and briefly describe the type of debt. If you were an employee of the debtor, fill in your social security number and the dates of work for which you were not paid.

2. Date Debt Incurred:
Fill in the date when the debt first was owed by the debtor.

3. Court Judgments:
If you have a court judgment for this debt, state the date the court entered the judgment.

4. Total Amount of Claim at Time Case Filed:
Fill in the applicable amounts, including the total amount of the entire claim. If interest or other charges in addition to the principal amount of the claim are included, check the appropriate place on the form and attach an itemization of the interest and charges.

5. Secured Claim:
Check the appropriate place if the claim is a secured claim. You must state the type and value of property that is collateral for the claim, attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed. A claim may be partly secured and partly unsecured. (See DEFINITIONS, above).

6. Unsecured Nonpriority Claim:
Check the appropriate place if you have an unsecured nonpriority claim, sometimes referred to as a "general unsecured claim". (See DEFINITIONS, above.) If your claim is partly secured and partly unsecured, state here the amount that is unsecured. If part of your claim is entitled to priority, state here the amount **not** entitled to priority.

7. Unsecured Priority Claim:
Check the appropriate place if you have an unsecured priority claim, and state the amount entitled to priority. (See DEFINITIONS, above). A claim may be partly priority and partly nonpriority if, for example, the claim is for more than the amount given priority by the law. Check the appropriate place to specify the type of priority claim.

8. Credits:
By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor.

9. Supporting Documents:
You must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If documents are not available, you must attach an explanation of why they are not available.

Form 10

COMMITTEE NOTE

The form has been amended to require a wage, salary, or other compensation creditor to disclose only the last four digits of the creditor's Social Security number to afford greater privacy to the creditor. A trustee can request the full information necessary for tax withholding and reporting at the time the trustee makes a distribution to creditors.

Official Form 16A
(DRAFT)

Form 16A. CAPTION (FULL)

United States Bankruptcy Court

_____ District Of _____

In re _____, *Set forth here all names including married, maiden, and trade names used by debtor within last 6 years.]* Debtor	)	Case No. _____
Address _____ _____	)	Chapter _____
Last four digits of Social Security No(s).:_____ and of all Employer's Tax Identification No(s). [if any]: _____ _____	)	

[Designation of Character of Paper]

Form 16A

COMMITTEE NOTE

The form has been amended to require disclosure of only the last four digits of the debtor's Social Security or other Taxpayer Identification number. Those four digits will provide creditors with sufficient information to identify the debtor accurately while affording greater privacy to the debtor.

Official Form 16C
(DRAFT)

FORM 16C. CAPTION OF COMPLAINT IN ADVERSARY PROCEEDING FILED BY A DEBTOR

United States Bankruptcy Court

_____ District Of _____

In re _____, *Debtor*	Case No. _____
Address _____	Chapter _____
_____	
Social Security No(s).:* _____ or Employer's Tax Identification No(s).* *[if any]:*_____	
_____	
_____, *Plaintiff*	
v.	
_____, *Defendant*	Adv. Proc. No. _____

* (Required by 11 U.S.C. § 342(c).)

COMPLAINT

Form 16C

COMMITTEE NOTE

Section 342(c) of the Code requires a debtor to provide the debtor's Social Security number on any notice furnished to the creditors by the debtor. A complaint, which combined with a summons and served on a defendant, functions as a notice of the commencement of an adversary proceeding. The form is amended to advise the debtor of the statutory basis for requiring disclosure of the Social Security number.

Form 19. CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

[Caption as in Form 16B.]

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No.
(Required by 11 U.S.C. § 110(c).)

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____ _____
Signature of Bankruptcy Petition Preparer Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Pro result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Form 19

COMMITTEE NOTE

Pursuant to § 110(c) of the Bankruptcy Code, the certification by a non-attorney bankruptcy petition preparer continues to require a petition preparer to provide the full Social Security number of the individual who actually prepares the document.

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: David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure

Date: December 15, 2001

Re: Report of the Civil Rules Advisory Committee

Proposed amendments of Civil Rules 23, 51, and 53 were published for comment in August 2001. In September the Advisory Committee Reporter circulated to a broad audience a call for comment on proposals to deal with overlapping and competing class actions. The competing class-action proposals had been considered by the Advisory Committee but were withheld from publication in order to gather more information.

The Advisory Committee devoted all of its October 22 and 23 meeting to a two-day conference at the University of Chicago Law School. The conference focused entirely on class actions, bringing together a large number of judges, lawyers, and academics who are among the most knowledgeable class-action specialists. Many of the panels focused on the proposals published for comment in August, but some of the panels focused on the proposals described in the Reporter's call for comment. The attached draft minutes reflect, although imperfectly, the outstandingly high quality of the conference. Judge Lee H. Rosenthal, a member of the Advisory Committee and Chair of its Rule 23 Subcommittee, took the lead in organizing the conference and deserves our deep appreciation for its success.

The Chicago conference minutes will be distributed throughout the summaries of comments on the published rules. It seems fair, however, to offer a preliminary summary: the published rules were, for the most part, well received. Special attention focused on the "settlement opt-out" provision of proposed Rule 23(e)(3). Comment has been especially invited on this provision, and it will continue to receive special attention as the hearing and comment period unfolds. There were many comments as well on the proper functions of the Committee Notes that accompany amended rules. This topic is on the agenda for the January Standing Committee meeting; discussion may be informed by considering the comments scattered through the draft Minutes.

The first public hearing on the August proposals was held in San Francisco on November 30. Thirteen of the fourteen scheduled witnesses were able to attend. They provided a good beginning for the process. All of the testimony was directed to the Rule 23 proposals; no witness commented on the Rule 51 or 53 proposals.

Discussion of the overlapping class-action drafts at the Chicago conference suggested two important points. First, it is common to find that federal class actions are duplicated by overlapping class actions filed in state courts. Multiple filings generate severe problems — problems that defy sensible management — with sufficient frequency that it is desirable to adopt new provisions to address these problems. Second, however, grave doubt was expressed about the limits that Rules Enabling Act authority may impose on attempts to address these problems through the Civil Rules. The doubts were sufficiently widespread to suggest that it would be unwise to test the possible limits of authority. It seems likely that the Advisory Committee will conclude that the next step should be to explore and then pursue statutory amendments, working with other Judicial Conference committees. Bills pending in Congress provide models for consideration, but other models should be considered as well. One alternative may be to address some aspects of the problems through specific statutory provisions, while amending the Rules Enabling Act to make clear that more detailed implementation is properly accomplished by Civil Rules amendments.

Two public hearings on the August 2001 proposals remain to be held. Written comments are likely to arrive in greater numbers as the comment period comes to a close. The Advisory Committee will meet after the January hearing to consider the testimony and comments received by then, and will have a spring meeting after the comment period has closed.

The agenda for the spring meeting likely will be dominated by consideration of the August 2001 proposals in light of the public testimony and comments. If time permits, consideration will be given to some of the proposals that have accumulated since last spring.

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 22-23, 2001

The Civil Rules Advisory Committee met on October 22 and 23, 2001, at the University of Chicago Law School. The meeting was attended by Judge David F. Levi, Chair; Judge John L. Carroll; Justice Nathan L. Hecht; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D. McCallum, Jr.; Judge H. Brent McKnight; Judge Lee H. Rosenthal; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and Andrew M Scherffius, Esq. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge Anthony J. Scirica, Chair; Charles J. Cooper, Esq.; Dean Mary Kay Kane; Judge J. Garvan Murtha; Judge Thomas W. Thrash, Jr.; and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker attended as liaison member from the Bankruptcy Rules Committee. Members of the Judicial Conference Federal-State Jurisdiction Committee who attended included Judge Frederick P. Stamp, chair; Judge Loretta A. Preska; Judge Jack B. Schmetterer; and Chief Justice Linda Copple Trout. Judge Jed S. Rakoff, a member of the Committee on Administration of the Bankruptcy System, also attended. Peter G. McCabe, John K. Rabiej, and James Ishida represented the Administrative Office. Mark Braswell and Karen Kremer were additional Administrative Office participants. Thomas E. Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Observers included Lorna G. Schofield (ABA); Francis Fox (American College of Trial Lawyers); Thomas Moreland (ABCNY); Marcia Rabiteau, Esq.; Alfred W. Cortese, Jr.; Jonathan W. Cuneo (NASCAT); and Christopher F. Jennings. The moderators and participants in the several panel discussions are listed separately with each panel.

The agenda of the meeting included a memorandum from Judge Levi summarizing actions by the Standing Committee in June 2001, and a memorandum describing new subjects that are being carried forward on the agenda for consideration at future meetings. The discussion agenda of the meeting was devoted entirely to a conference arranged by the Committee to provide advice about proposals to amend Civil Rule 23 that were published in August 2001 and also about proposals that were held back from publication.

Judge Levi opened the conference by expressing the thanks of the Advisory Committee to all who were attending and participating in the conference, and to the University of Chicago Law School for hosting the conference.

Judge Levi noted that consideration of Rule 23 has been an important task for the Committee, commanding serious attention on a sustained basis for more than a decade. If improvements are indicated, there is an opportunity to contribute to the public weal. The conference brings together a group of lawyers, judges, and scholars representing diverse views to offer their best thinking on the current state of practice and the current proposals. In addition to the conference participants, the representatives of bar groups carry forward the valued tradition of participating in Committee work. Finally, it must be noted that Judge Rosenthal put in much hard work to assemble the conference with a good balance of experts who bring the perspectives of a wide variety of experiences.

Dean Saul Levmore welcomed the conference to the Law School.

Professor Marcus presented a brief summary of the historic development of Rule 23. If adopted, the published proposals will be the second time that Rule 23 has been modified in a significant way. Rule 23 "was not a big deal" when it was adopted in 1938; Judge Clark's explanations of the new rules to the bar were devoted much more to other topics — Rule 12(b) practice commanded fifteen times as much attention, and Rule 14 impleader practice commanded twice as much attention. All that changed with the 1966 amendments. Professor Kaplan said that the revision was designed to correct some artificial artifacts in the original rule, and to look to the mechanics of its operation. It is not clear what they expected, but within ten years a holy war was being fought over Rule 23(b)(3). The war abated somewhat, and for a time some observers thought the day of class actions was disappearing. Class actions have proved resurgent.

As compared to the continual work that regularly revised the discovery rules, the Advisory Committee deliberately refrained from considering Rule 23, adhering to a Judicial Conference policy that regarded Rule 23 revision as a topic for legislation. In 1991, however, the Judicial Conference — acting in response to a report by the ad hoc committee on asbestos litigation — suggested that consideration would be proper. Proposals addressed to class certification issues were published in 1996, but only the interlocutory appeal provisions of Rule 23(f) emerged from that round of the process. Today's proposals carry forward one thrust from 1963 because they address not the criteria for certification but the mechanics of the class-action process.

Judge Rosenthal added her welcome to the conference. She noted that her visits to the Law School always invoke memories of the uncertainty and inadequacy that students feel as they begin to study the law. Similar feelings may be appropriate as we approach Rule 23. The several successive panels will aid consideration of these many proposals.

Panel 1: Precertification Case Management

The moderator for the first panel was Judge Frank H. Easterbrook. Panel members included John H. Beisner, Esq.; Allen Black, Esq.; Robert Heim, Esq.; Edward Labaton, Esq.; Diane M. Nast, Esq.; and Judge Sam. C. Pointer, Jr.

The proposals to amend Rule 23(c)(1) begin with a proposal to change the demand for certification as "[a]s soon as practicable" to "at an early practicable time." An earlier version of this proposal, which would have demanded certification "when practicable," was rejected by the Standing Committee in 1997. The Standing Committee was concerned that delay in certification could lead to one-way intervention. The parties, moreover, need to know the stakes of the litigation. But the recent Seventh Circuit decision in the Szabo case reflects the fact that to be able to apply the Rule 23 certification criteria a judge needs to know what is the substance of the dispute. The pleadings alone do not do it — a plaintiff cannot establish the conditions for certification by mere assertion. The current proposal is based on the premise that it is sound to take the needed time to uncover the substance of the dispute, but not to indulge discovery on the merits or decision on the merits.

It was noted that the proper time for the certification decision has been a question. The Manual for Complex Litigation Second observed long ago that time is needed to explore how the case will be presented; that means discovery into the merits. Some judges were allowing this discovery even in the 1970s. Since the Second Edition was published in the early 1980s, there has been a steady progression in this direction. If this change of language were to be the only change in Rule 23, it would not be worth the effort; it conforms to better present practice, and the gradual

evolution will continue with continuing education. But if Rule 23 is to be changed, this change is probably a good one.

This observation was tied to the observation that the amendment proposals fail to address the question of settlement classes, or Rule 23 alternatives for mass torts.

Another panel member spoke from the plaintiff's view. The change to certification "at an early practicable time" likely will have no effect. "As soon as" practicable gives more than ample latitude. The *Szabo* opinion makes this abundantly clear. There are no situations where district courts have been constrained by the present language. The Committee Note, indeed, says that the intent is to preserve current practice. And there is a risk of unintended consequences: more pre-certification activity will be encouraged. Courts should not allow more discovery than needed for the certification decision. More important still, it is a mistake to codify the Federal Rules of Civil Procedure, to fine-tune the Rules in a fruitless effort to make them more perfect. The Rules are not a Code. Rule 23(c)(1) works; why add new words?

The same panel member stated that notice in (b)(1) and (b)(2) classes can be given now. The proposal calling for notice to a "reasonable number" of class members is odd.

The requirement of plain notice language also adds nothing; plain language is sought now.

More generally, the Rules should be written in broad terms, leaving much flexibility to district judges. The Rules should deal with the large issues. The 1966 changes got rid of "spurious" class actions; the changes have worked. We should not hamstring judges with more detailed rules now. The Advisory Committee should look to the philosophy of the 1938 rules: avoid details such as those that would be established by the plain-language requirement, the requirement of notice in (b)(1) and (b)(2) classes, or certification "at an early practicable time." Simple rules are best. Explanation can go into the Manual for Complex Litigation.

There is a real problem with fitting mass torts into Rule 23; perhaps they deserve a separate rule.

The next panel member spoke from a defense view. The change to certification "at an early practicable time" "is a close call, though I favor it." There has been a substantial change in district-court practice in the last five or six years, prompted by appellate demands that a record be established on the certification decision. The FJC study documents the change. One reason to revise the rule is to support publication of the Committee Note, which does an excellent job of alerting district courts to "the tensions," although it could be improved in some ways. At least some discovery is needed in most cases to support the certification decision. The question is how much discovery — there should be an adequate record, but no more discovery than needed for that. The Note encourages trial courts to play an active role in determining how much discovery is needed for the certification decision. That is good.

A rule change also may drive out some lingering vestiges of practice that allow certification on the pleadings with minimal or no discovery. Some local rules still require a certification determination within a defined and short period such as 90 days — a period that expires before disclosures need be made or discovery can even begin. And some courts still want to decide on certification before entertaining motions under Rule 12(b)(6) or Rule 56. The change also will serve as a good example to state courts: if there is no big problem in federal courts, there is in some state

courts. Just a few years ago, some courts in Alabama were certifying classes on a "drive-by" basis; Alabama has dealt with this practice, but other states are doing strange and unwise things.

But the proposal carries forward the present rule statement that certification is "conditional." The word should be deleted. Certification is supposed to be "for keeps."

Another lawyer observed that the "at an early practicable time" provision reflects the practice today. Practice has changed. In 1976, there was de minimis discovery to support the certification decision, or none at all. There has been a progressive movement; it may have carried too far into discovery on the merits in some cases. The Committee Note helps this. The Seventh Circuit Szabo decision is a clear statement. Class-action discovery does relate to the merits, most obviously when it seeks to identify the issues that actually will be tried, but it may be carried too far. The Committee Note may help; the proposed language is, as it is characterized, "fastidious."

The same lawyer identified other issues. (1) Rule 23 should address discovery from "absentee" class members. This problem is not much addressed in reported decisions. But experience as a plaintiffs' lawyer shows that such requests are presented. Courts do have the power to address the issue, but a Rule would help. There is a concern with relationships between the class attorney and class members as clients. (2) There may be a problem with discovery of the notice plan. It would be better to provide for automatic review of the notice plan in a nonadversarial setting as part of the case-management plan. (3) "Trial plans" have been requested by courts in the last few years. This can be a good idea if it is kept down to a brief, four- or five-page outline. But it is too much when, as in one recent case, it extends to fifty pages. The Note refers to trial plans; that is a good thing.

A defense lawyer said that the "at an early practicable time" change "is more than angels dancing on pins." The underlying principle is salutary; the rule change may be important. The Note carefully lays out what is, and what is not, intended. The Note deals adequately with the risk of unintended consequences. It tells the judge not to delay too long. The change says that courts now generally take the time required to make a well-informed decision. The trial plan is a good idea. The trial plan should look carefully at what issues are assertedly common, and how they will be proved. More importantly, it should look at what individual issues will be left at the end of the class trial, and at how they will be proved. The early 5th Circuit Bluebird case is good: you have to look down the road to what proofs will be used to prove what. If there is a lot of proof to be taken after the class trial, we need to ask whether the class trial is worthwhile.

The idea of submitting draft class notice with the trial plan is a good one. The notice often shows issues not reflected in the plan, including problems with choice of law and jury trial, and is important simply by identifying the persons to whom notice is to be directed.

There is a real question whether any notice can be effective unless it is directed individually to class members as a letter from the court.

Important questions that will be reserved for other discussions include settlement classes and overlapping classes.

Another plaintiffs' lawyer thought there is no need to change to certification at an early practicable time. The change is not advisable. Courts have plenty of flexibility under the "as soon as practicable" formulation, and have been using it wisely. At times the certification decision is

postponed "to the very back end." In one recent litigation the FTC wanted to finish its discovery on the merits before certification was addressed in parallel private litigation; that worked out well. The Note will not deflect wrangling over what the change means. Publishing the Note without changing the language of the Rule might be helpful.

The same lawyer observed that appointing class counsel at the time of class certification "is way too late." Class counsel is needed to undertake pre-certification discovery, and to argue for certification. Someone has to be in charge. This helps the court: you only have to deal with one person.

The "plain language" requirement is one that no one will argue with. This is a far more real and difficult problem than the timing of the certification decision. Almost every notice is unintelligible to the ordinary person. Ten, twelve, or fifteen pages of single-spaced fine-type print are simply not going to be read. You need a way to get people to look at it. Lawyer-drafted notices are far too dense, far too complete; the lawyer needs "to cover his rear end." In one recent case the notice was completely incomprehensible; an attempt to draft a summary ballooned from a couple of reasonably clear paragraphs to six pages. Plain language has been achieved only when the judge writes the notice. The rule might focus on asking the judge to write the notice, or else on appointment of someone — preferably not a lawyer — to write it.

It was observed that the emphasis on the Committee Note is interesting. In some ways the Note is longer and more interesting than the Rule, and at times it even contradicts the Rule. But is this a sound way to revise a Rule? The response was that it depends on whether there is a need to amend the Rule. As to the time of certification, there is no need — the operative word in both present and proposed versions is "practicable." The risk of unintended consequences should prevail. A different response was that it is indeed wise to write the Rules in general terms, but that generality reduces the level of guidance. The Note does give guidance. There is real value in the Notes and the function they serve. A still different response was that the Advisory Committee should contribute its good ideas to the Manual for Complex Litigation, rather than propound elaborate Committee Notes. The Manual provides the details, and works pretty well. And a judge suggested that judges generally do not seem much persuaded by Committee Notes. Another judge (not on the panel) observed that the Manual does not seem to be mentioned in the Committee Notes. The Notes are sprinkled with observations that a judge may do this, or a judge may do that. Rather than explain what the Rules mean, these Notes are written like the Manual. Some consideration should be given to relying on the Manual as the "real bible"; the Notes could be shortened by incorporating references to the Manual. (It was pointed out by a panel member that the Notes do indeed refer to several sections of the Manual at one point.) A lawyer said that he has lots of experience with judges who are not familiar with the Manual, but that at least some judges do look to the Committee Notes for guidance. Without the Notes, it will be hard for judges to follow the change from "as soon as practicable" to "at an early practicable time." A professor not on the panel added the observation that a recent study of the 2000 discovery amendments shows that judges are using the Committee Notes extensively.

A judge in the audience observed that the Seventh Circuit *Szabo* decision allows the court to treat a certification motion in the same way as a 12(b)(1) motion, allowing the parties to gather fact information necessary to determine whether to certify. The Second Circuit, however, has

rejected a similar approach. The rule change and Note will allow more leeway in what can be considered in making the certification decision. The Note, however, is somewhat Janus-faced.

The panel was asked whether it is possible to do what the Note advises — permit enough discovery to inform the certification decision without full discovery on the merits? Some attorneys believe that the final event will be either trial or else a certification decision that is immediately followed by settlement. There are a lot of cases where this is true now under the "as soon as practicable" direction. One defense lawyer said that it can be done, and has been done. It may not be universally possible, but it works. The extent of discovery needed to decide on certification will vary from case to case. A plaintiff lawyer agreed that it can be done, although it is a difficult thing. The court does need a sense of what the proof will be at trial: was there a conspiracy? Is it to be proved by providing evidence of each class member's transactions and inference, or is it to be proved by documents? If the parties can sit down with a judge who is informed, this can be worked out at an early Rule 16 conference. A judge said that certification-merits discovery cannot be done in all cases. When it can be done, it is not fruitful to battle over the issues whether discovery is for certification or only for the merits: often it is both. It is better to move on; the fighting is wasted when no class is certified. Another defense lawyer said that especially in (b)(3) classes, the certification dispute comes down to typicality; to adequate representation; and then to predominance and manageability. Common issues can always be found; the real question is what are the individual issues, how will they be proved, and how important are they. Discovery can focus on that, and can be a lot simpler than mammoth document discovery on the merits. A plaintiff lawyer disagreed: the defense lawyer is very good at defeating certification by shifting the focus to individual issues, and by imposing the burden of discovery on the merits. Another plaintiff lawyer disagreed with that observation: it is proper to separate discovery to support an early certification decision so you know whether to do the mammoth merits discovery. Generally you can tell the difference.

A judge in the audience observed that the FJC study explored the use of 12(b)(6) and summary-judgment motions before the certification decision, and found a full spectrum of practice. Some courts were doing it. Others seemed to feel that the "as soon as" direction prohibited the practice. The "early time" change may not address the issue. The Note says that the court may not decide the merits first and then certify: does that mean that it cannot act on a 12(b)(6) or summary-judgment motion? There is an ambivalence here.

Another member of the audience asked whether the change will support another delaying tactic that lets defendants go after the representatives, and help defendants get merits discovery? A judge responded that the change in the Rule will not change practice.

Another audience member, speaking from a defense orientation, asked how many times must we go through consideration of certification in the same case: today there are multiple considerations of certification in each case, prompted by ongoing discovery. A judge responded that multiple considerations in the same case had not been his experience. A plaintiff lawyer on the panel said that in federal courts, there is one decision on certification in the case; multiple consideration may become a problem when there are parallel federal and state filings. A defense lawyer on the panel stated that MDL practice waits for federal court filings to accumulate, then provides on decision on certification for all. But there has been an uptick in trying to get certification by filing another case after certification is denied in the first case. And state cases are a bigger problem.

A different audience member suggested that given the proposed rule on attorney appointment, we might want to expedite the certification decision. We are hearing different voices from experience because different types of classes are different and are treated differently.

A panel member repeated the view that the certification decision should be final, not conditional.

Another audience member applauded the provision that would require some form of notice in (b)(1) and (b)(2) classes. But it is troubling to suggest that individual notice is not required for every identifiable class member; we should demand that. Still, we need not require as extensive notice as in (b)(3) classes. And we should make it clear that the defendant can be made to pay for the notice, or to include it in regular mailings to class members. And we should consider imposing notice costs on defendants in (b)(3) class actions. A panel member agreed that notice in (b)(1) and (b)(2) classes should be meaningful.

The same audience member suggested that the Committee should consider a softening of the requirement of notice to every identifiable member of a (b)(3) class. In some small-claims cases representative notice is enough. A panel member noted that the Committee in fact had considered sampling notice, but abandoned the project in face of the difficulty of deciding in each case which members would not get notice.

A panel member observed that the Note, p. 49, says that notice in (b)(1) and (b)(2) classes supports an opportunity for class members to challenge the certification decision. This should not be what you have in mind. Change it.

A judge in the audience suggested that the proposed rules on attorney appointment and fees belong at an earlier point in the rule, in part because appointment is tied to certification. Rather than new subdivisions (g)and (h), they might be inserted before (e). A judge immediately responded that redesignating current Rule 23 subdivisions would complicate computer research inquiries for all future time. It was suggested that the appointment provisions might be included in the certification provisions of subdivision (c). A related suggestion was that "lead" counsel could be appointed before certification, to be presumptively class counsel. A panel member observed that under the PSLRA, the lead plaintiff is designated first, lead counsel is selected, and then the certification decision is made. Another panel member observed that courts now are handling appointment of class counsel as part of general pretrial management. Still another noted that the party opposing the class needs to know who can discuss discovery. An audience member stated that lead counsel has fiduciary responsibilities to the class from the moment of filing.

A panel member noted that the rules, including the discovery rules, emphasize the federal-state dichotomy: state cases proceed with alacrity into full merits discovery while the federal courts languish in limited certification discovery. That makes coordination of state and federal proceedings more difficult.

A committee member picked up the earlier references to the possibility of adopting a separate mass-torts rule, observing that the references had included a hint that an opt-in rule might be developed, and asked what such a rule might be? A panel member suggested that a mass-torts rule that does not involve a class might be useful, but could not describe what the rule might look like. During the early Committee consideration of Rule 23, a thorough revision was prepared that collapsed the 23(b) categories, provided an opportunity to limit the class to opt-ins, allowed a court

to condition exclusion from a class on submission to claim preclusion or surrender of possible nonmutual issue preclusion, and supported sampling notice. This revision was withdrawn from consideration by the Standing Committee for fear of colliding with the contemporaneous debates over discovery reform. That model might be considered again.

A panel member noted that mass torts are very different from securities, antitrust, or consumer class actions. Different rules are needed. We are trying too hard to fit disparate forms of litigation into a single procedural bottle. There are sufficient needs of judicial economy to justify work on a mass-torts rule.

Another panel member suggested that perhaps the Committee — or Congress — should work toward a procedure that facilitates "judicial management of individual settlements." The procedure would not be a class action, but a process to try to establish a method for settlement or resolution that does not depend on counsel alone in the way that class settlements do.

Panel 2: Attorney Selection

The moderator for the second panel was Chief Judge Edward R. Becker. The panel included Stanley M. Chesley, Esq.; Professor Jill E. Fisch; Sol Schreiber, Esq.; and Judge Vaughn R. Walker.

The panel discussion opened with the observation that the conference is being held for the benefit of the Rules Committees, to inform their judgment about the issues that have been raised surrounding revision of Rule 23.

The first question asked the panel to address the provisions of draft Rule 23(g)(1)(A) and (2)(A), requiring appointment of class counsel when a class is certified and permitting the court to allow a reasonable time to apply for appointment. Do these provisions belong in Rule 23? Are they helpful?

The first panelist said that generally the appointment provision is very important. It underscores the fiduciary obligation of counsel to the class, and the fiduciary obligation of the court to make sure that counsel discharges the duty to the class. But it is not necessary to qualify the appointment rule by the preface: "unless a statute provides otherwise." There is no conflict between the PSLRA and Rule 23(g): lead plaintiffs nominate class counsel, who does not become class counsel until approved by the court. If there is a difference between draft rule and statute, it is that the PSLRA provides a specific time line for appointing counsel — this is where the exception for statutory directions should be made.

The next question asked the panel observed that the Note, p. 72, refers to "lead" and "liaison" counsel. These references involve the time for appointing counsel. Should the Rule define these terms?

The panelist who first responded to this question thought it important to be careful about language. "Class counsel" often is used to refer to "lead counsel": the Note seems to refer to temporary class counsel. Liaison counsel is different still. The concept of lead counsel needs definition. In mass torts, lead counsel may represent individuals, and get individual fees at the end.

It was agreed that the Advisory Committee should not misuse terms that have accepted meanings. Insights into general usage are helpful.

Another panelist observed that the Manual for Complex litigation is not law. There is no statute defining "lead" or "liaison" counsel. You have to define the term if you use it. In response to a question, he stated that "lead" counsel has a fiduciary duty, just as does class counsel.

Another panel member suggested there is no problem. You can have class counsel before certification, from the moment the class claim is filed. You can have a court appoint, or the attorneys agree on, lead counsel before the class is certified. But if you are going to address this topic in the Rule, you must recognize that someone has to do the job before certification. The attorneys should get the court to appoint lead or liaison counsel as soon as possible; the court has to address the question only if the attorneys cannot agree.

An audience member added that counsel also may organize by an "executive committee." Courts accept a lot of leeway in describing leadership arrangements. This leeway is important. The politics of the class-action bar are involved.

Another audience member observed that lead and liaison counsel are just subsets of class counsel, perhaps with different responsibilities.

Another member of the audience suggested that there is a difference if only one case is filed. The one who filed the case is it. If there are multiple filings, coordination is needed, which may take the form of lead or liaison counsel. In MDL proceedings you have to have lead or liaison counsel. All of these settings differ from one another. The Manual speaks to this. A related observation suggested that perhaps the Rule or Note should recognize the "common-benefit" lawyer.

The panel then was asked to consider draft Rule 23(g)(2)(B), which mandates that the court consider three factors in appointing class counsel, grants permission to consider other factors, and recognizes authority to direct applicants to propose terms for fees and costs. Subparagraph (C) further provides that the order appointing class counsel may include provisions for the fee award. Should any criteria for selecting counsel be listed?

The first answer was that there is nothing wrong with these criteria. They provide guidance. But the list may be too confining. Other matters that might be included are the absence of conflicts; side agreements; relationships with some class members; and — in the securities area — "pay to play." Such matters must be considered in the appointment decision. It is not clear that any list can include all the relevant factors. It would be better to frame the rule in more general terms: class counsel should be one who will fairly and adequately represent the class. The terms of appointment can reinforce the representation.

Another panel member opposed specificity in the rule. Courts need to have discretion. The class is the ward of the court. The judge should pick counsel as someone the judge can work with. Sound discretion is what we need.

Agreement was expressed by yet another panelist. The attempt to identify specific factors in the rule will cause courts to give those factors undue emphasis. Freedom for precedent to develop in subject-matter specific ways is better. Fee arrangements and experience are more important in some areas than others. "Client empowerment" also is important. The perspective should not be entirely judge-centered.

A caution was voiced by a fourth panel member. Not all judges have lots of class-action experience. It would be better to add more factors: the absence of conflict and side agreements are

good examples. The list of factors also provides guidance to lawyers. Getting to know the judge is not how it should work.

The panel then was asked whether the fee terms should be separate from appointment, as may be implied by the provision that simply grants permission to include fee provisions in the order of appointment?

The first panel response was that fee terms are important, especially in (b)(3) common-fund cases, and should not be separated from the appointment. In most damages cases the total recovery is split between class and counsel. Fee terms are central.

A second panel member noted that contention has surrounded the question whether fees should be made part of the selection process, or otherwise considered ex ante. The Third Circuit Task Force draft report reflects the contentions. There is room for continuing development. It is too early to bind judges by a rule. Problems arise from putting the judge into the position of weighing and comparing fee arrangements. But in some cases fee arrangements can properly play a role in selecting class counsel. This can be discussed in the Note without putting it into the rule as a selection criterion.

The first panel member rejoined that fees should be considered as part of the appointment in every case. It should be mandatory for all cases, including those in which there is no competition for appointment as class counsel.

A third panel member stated that "fees should depend on results, not auction." Many foolish bids will be made. Lawyers need to make in camera presentations to the judge in a bidding process; this is unfair to the defendant.

The fourth panel member said that appointment should not go to the low bidder. The lodestar approach should be discussed with class counsel, but "making it a nexus" is a mistake. Beauty contest presentations can be impressive even when counsel lacks the ability to carry out the impressive representations. An auction may precede quick settlement, yielding fees that are too high; or it may precede proceedings that drag on interminably, yielding fees that are too low. "May" will be read as mandatory. "We should not put the deal out front."

An audience member — who is a federal judge — expressed "less confidence in the omniscience of federal judges." It is a mistake to debate bidding now. The draft rule is supposed to be universal, applying to class actions that are quite dissimilar one to another. Many of the considerations expressed in the Note apply equally to securities actions; the Note should make it clear that the same factors weigh in approving the lead plaintiff's choice of counsel under the PSLRA. We avoid particulars in the text of the Federal Rules of Evidence; they belong better in the Committee Notes. The Notes are helpful to both judges and lawyers. We should not particularize in the text of the rules.

Another audience member asked what consideration has been given to the problem that arises when a judge has an "investment" in counsel — having chosen counsel, the judge develops an interest in ensuring that counsel achieves a good result for the class because the judge has selected counsel to do that. One panelist responded that even under present practice, counsel must be identified and approved. The language of the Rule does not aggravate the "investment" problem.

An audience member suggested that it would be good to have counsel appointed by a judge who is not going to be responsible for managing the case. The bidding process typically goes in stages: first many contestants make preliminary presentations, then a few finalists are selected and make serious presentations.

Another audience member asked how far the draft rule is written to be enforced by appellate courts. A response was that it is written for district judges. But it also requires creation of a record that will support review. It is not clear whether the connection between appointment and class certification would support a stand-alone Rule 23(f) appeal, but it does not seem likely that courts of appeals will be eager to permit appeals from counsel-appointment orders. The question was then pursued: why have a rule if it is not going to be enforced?

A different audience member suggested that draft Rule 23(g)(2)(C) should be made mandatory. In ordinary practice an agreement on fees at the beginning of the representation is deemed essential as a matter of professional responsibility. If the fee basis is not resolved until the case is finished, there is a fight between the class and class lawyers to divide the pie.

Still another audience member voiced approval of the ex ante approach. But the role of the criteria for appointment listed in draft Rule 23(g)(2)(B) is unclear: is this a manual for the district judge? A direction to counsel on how to conduct the beauty contest? A source of Rule 23(f) appeals? Why provide a check list?

Another question from the audience asked how the rule would work when there is only a single class action, with only one set of lawyers and no competing applicants: would the court be responsible for going out to find competing applicants? A panel member suggested that the rule only requires lawyers to provide the information.

A related question observed that the court might deny certification because the only interested counsel could not provide adequate representation. But this can be done now under Rule 23(a): is Rule 23(g) calculated to divide the adequate representation inquiry, focusing on the representative party through 23(a) and on class counsel through 23(g)?

The next question put to the panel was whether it is proper to appoint a consortium of attorneys as class counsel.

One panel member found this question similar to the question whether the court's task is to select an adequate attorney or instead is to somehow select the attorney best able to represent the class. Should the designated class counsel have authority to make all decisions about conduct of the action? Does that include authority to farm out some of the work? However described, a de facto consortium may emerge as lead counsel brings in help from others. Some cases rule out appointment of a group of firms as lead counsel, but that approach may simply push the formation of the consortium out of sight, as lead counsel "makes deals" with others. The Note should recognize the reality of the need or desire for multiple fees; it is better not to drive underground the arrangements that are made.

A second panel member suggested that if there is not a consortium, the result will be "chaos on the plaintiffs' side" that harms the class and benefits the defendant. But the plaintiffs' bar has become much more sophisticated at working out these issues. Judges also have become more sophisticated. There never is a problem of involving too many lawyers; judges can control how

much is paid in attorney fees. And this system does not exclude the novices and "little guys" from participation: they can be, and are, admitted to the consortiums.

Still another panel member said that in the real world, there is no problem. He further observed that the Manual for Complex Litigation is being revised even now.

The panel then was asked whether restrictions should be imposed on "side agreements" by class counsel outside the terms of appointment.

A panel member observed that one factor in deciding whom to appoint should be willingness to submit to regulation of side agreements. But there is no need to state this approach in the Rule or the Note. "Judges will develop good answers over time."

Discussion returned to Committee Notes in general terms. A panel member asked whether a Committee Note serves any purpose. Most lawyers do not know how to find them after a rule takes effect. Is a Note as binding as a rule? An audience member responded that commercial publishers produce annual rules books that include all the Committee Notes. The effect of a Note depends on which Supreme Court Justice you ask. Some, who do not believe in legislative history as an interpretive guide in any setting, would reject reliance on a Committee Note. But not all judges feel that way. And in any event a Note serves an educational function. A judge on the panel stated that he looks at Committee Notes all the time, but also observed that the draft Notes to the several Rule 23 proposals are too discursive. Much of what is in the drafts should be transferred to the Manual.

A judge in the audience added that the Enabling Act authorizes adoption of rules, not committee notes. The notes are Committee Notes, not notes of the Judicial Conference, the Supreme Court, or Congress. A Note cannot be adopted, or amended, without simultaneously amending the underlying rule through the full process. Any attempt to change a Note independently would be an invalid attempt to amend the rule without going through the full process.

A panel member observed that people seem to want guidance to the courts on the factors that may be considered in applying open-ended rules. One alternative would be to direct the courts to make findings in each case as to the factors that actually prompted a particular decision. The Notes could then describe things that courts might want to consider, without attempting to confine courts to the list.

Another audience member observed that "Notes are not Rules." The present package has rule-like statements in the Notes that belong, if anywhere, in the rules.

The panel then was asked whether the "empowered plaintiff" notion of the PSLRA should inform the designation of counsel under proposed Rule 23(g) in other cases?

The first panel response was "yes and no." The Rules Committees can learn from institutional investors who do take a lead role (as in Cendant): they have interest and expertise, although limited to securities cases. They are learned in the criteria for selection of class counsel. Mass-tort victims, on the other hand, are not likely to provide sophisticated insights into the selection of class counsel.

Another panel member suggested that the "Unless a statute provides otherwise" preface to draft Rule 23(g)(1)(A) has been put in the wrong place. There are different models of the "empowered lead plaintiff." The PSLRA requires the court to appoint a lead plaintiff, who in turn

is primarily responsible for making decisions for the class, including selection of class counsel. Although some courts view it differently, the lead plaintiff's selection is dominant, even though subject to court approval. This same model could work in antitrust and intellectual property litigation. It is not likely to work in other areas, such as consumer classes. But Rule 23(g) could be drafted in terms that leave room for client input into selection of class counsel. It seems better, however, to leave such matters for the Note. The same may be true for such questions as the court's authority to modify fee arrangements between a class representative and class counsel, or to second-guess the very selection of counsel.

Another panel member suggested that the PSLRA responded to specific real-world concerns. Much of the motivation may have been to "stop" securities litigation. Another part was concern that a "100-share plaintiff" not be responsible for cooperating in the self-selection of class counsel. But lawyers have got around the purpose. Sophisticated firms now "hustle state attorneys general and pension funds." If the "lead plaintiff" model is followed more generally, firms will arrange to "round up thousands of consumers" as clients to win the counsel-appointment race. One injured plaintiff should not have more voice than any other; the court should designate lead counsel.

The panel was then asked what should be the professional responsibility perspective on the proposition that the client has no role to play in selecting counsel?

A member of the audience observed that there are state rules on fees, fiduciary duties to clients, and selection of counsel. The Rule 23(g) draft may depart from these rules.

Another member of the audience suggested that in the real world what often happens is that a newspaper publishes a report that raises questions about the safety of a product. Dozens of product-liability class actions are then filed. Clients are accumulated by advertising on television and in national-circulation newspapers. Class counsel have an interest in appointment on terms that set fees in advance. There are beauty contests on the defense side as well: clients assume attorney competence, and compare or negotiate financial terms.

A different audience member suggested that there will be "collusion among plaintiffs' counsel to avoid contests." When there is a fee negotiation for a contingent fee, events may require renegotiation. But it is not clear how this can be done. Consider the auction house pricefixing litigation. The auction for counsel appointment was won by a bid that measured fees as a share of the recovery above $400,000,000. Suppose it turned out that, after much hard work, the award was only $350,000,000: should the original terms be renegotiated?

Yet another audience member urged that there is a need to encourage lawyers who have clients to take them to lawyers who are better able to represent them. It is important to ensure that the class is represented by lawyers who are good, and who can bear the risk of investing heavily in developing a case that may fizzle out. It is adequate to set the fee terms as the amount that the court will award. A front-end agreement is an unattractive thing. Consider the Exxon-Valdez litigation, in which victorious plaintiff counsel have yet to receive anything after waiting eleven years.

The panel was then asked to consider the Note statements at pages 79-80, suggesting guidelines for fees or costs and suggesting that the court may want to monitor the performance of class counsel as the case develops. The Rule does not talk about monitoring. Should the Rule say something? Should the Note be expanded, or should these comments be deleted?

A panel member thought that the monitoring comment is fine. A court will consider monitoring requirements as part of the selection of counsel and as part of the terms of engaging counsel. Greater specificity would be futile.

Another panel member suggested a distinction between the ongoing conduct of litigation and the time spent and costs expended. The PSLRA should discourage monitoring of counsel's performance in the conduct of the litigation. An attempt by the court to monitor progress in developing the case against time expended would involve the court too deeply in counsel's work.

The first panel member added that lawyers have shown no interest in appointment of a master to provide monitoring during the progress of the case.

Another panel member asked who monitors defense counsel? What the defense does "drives what plaintiffs do." Judges in important class actions "keep tabs on things." They monitor the case, and can tell who is wasting time. Plaintiffs have no incentive to waste time; their efforts are to respond to the defense. When an action is brought against five, or ten, or fifteen companies the defendants retain national, regional, and local counsel. Local counsel look for things to do, contributing to waste work.

An audience member observed that Rule 23 is not the sole source of judicial monitoring authority in a class action. Excessive discovery efforts, for example, can be monitored through the discovery rules as a matter of discovery management. Separately, she also observed that the Note says at page 80 that the court should ensure an adequate record of the basis for selecting class counsel; this statement should be put in the Rule.

A different audience member said that the rule used to be that the trial judge should not settle the case. Monitoring counsel's ongoing work for the class creates the same risk of involving the judge with the merits. The MDL process provides for monitoring. Why not put monitoring in the rule?

Yet another audience member suggested that "monitoring" has a variety of meanings. One meaning may refer to the need to limit discovery demands because the demanding party is able to impose externalities — this is good monitoring. In a class action, the concern is that the class cannot monitor its own lawyer. The lawyer's freedom from any engaged client can help or hurt the class. It is difficult to know how to provide monitoring that helps the class.

The panel's attention was directed to the draft Rule 23(g)(1)(B) statement that counsel must fairly and adequately represent the class. Should this be included in the rule? If it properly belongs, is this bare statement sufficient?

The first response was that the provision is a bit confusing, but is adequate to draw attention to the need to consider the arrangement between counsel and the individual class representative. A second panel member agreed. In mass torts, the Victims Compensation Act signed this September 22 provides a model that could be considered, with changes, for mass torts. The same panel member added the observation that a pre-certification order granting dismissal for failure to state a claim or granting summary judgment is not a ruling on the merits that binds the class; a second action may be brought, and is likely to be brought in state court.

The panel was asked to comment on the statement on page 73 of the draft Note that the rules on conflicts of interest may need to be adapted to the class-action setting.

A panel member responded that the draft Rule does not address conflicts of interest. The Note comment is a bit troubling. The meaning is not clear. The Committee should figure out whether they mean to tolerate conflicts that would not be accepted in other areas, or whether instead they mean to narrow conflicts rules by prohibiting conflicts that would be accepted outside a class-action setting.

An audience member urged that the Note statement should be retained. The Note provides a good discussion; the cases cited show why analysis of conflicts cannot be the same in class actions.

Another panel member said that it is dangerous to say that class members cannot insist on "complete fealty" of class counsel. The Note should say that the duty is owed to the whole class, not to individual class members.

Another audience member urged that rule should include the statement on page 74 of the Note that counsel appointed as lead counsel before class certification has preliminary authority to act for the class, even if not to bind the class.

Yet another audience member asked who monitors the defense? The client does. The Note suggests that it may be desirable to have class counsel report to the court under seal on the progress of the action. That is undesirable. It provides a one-sided source of information that may distort the court's understanding and approach to the case.

Panel 3: Attorney Fee Awards

The moderator for the third panel was Professor Thomas D. Rowe, Jr. Panel members included Judge Louis C. Bechtle; Lew Goldfarb, Esq.; Alan B. Morrison, Esq.; Professor Judith Resnik; Judge Milton I. Shadur; and Melvyn Weiss, Esq.

The discussion was opened with the observation that several questions can be addressed to draft Rule 23(h) on attorney fees. Consideration of fees is not completely separate from the draft Rule 23(g) provisions for appointing class counsel. First, do we need any rule at all? The Note says a lot of interesting things, but nothing on why the Committee feels there is a need for a rule. Second, if it is useful to have a rule, does the draft do anything more than to codify practice? Third, are there things that should be added to the draft rule? Fourth, the text of the draft rule is structural and procedural, and says nothing about criteria for determining the amount of an award. The Note, however, provides extensive comments on such criteria. Should these criteria be included in the Rule text? The Committee considered drafts that included criteria in the rule, but concluded that criteria should be relegated to the Note. A Note, however, persists until the Rule is changed: if the subject is in flux, should we run the risk that a list of criteria in the Note will become outmoded before it is possible to change the Rule? The discussion may be advanced by the fact that two panel members are also members of the Third Circuit Task Force on the Selection of Class Counsel.

The first panel member thought there is good reason to adopt a fee rule. The Note says that the rule addresses fee awards to lawyers other than class counsel. An unsuccessful rival for appointment as class counsel, "common benefit counsel," or objectors may be included. The Note also says that the choice between calculation by lodestar, percentage of recovery, or a blend of these approaches is left open. There is an emphasis on the tradition of equity. And a big list of factors is provided — actual outcome, risk factors, terms of appointment, fee agreements, and so on. We do need a rule, but in simplistic form. The simple rule will allow the Note material to become part of

the federal jurisprudence. All judges will have the Note; it will bring uniformity. (But some of the Notes are too long, and there is a danger in citing cases.) The Note is a great resource. There are tons and tons of Rule 23 cases. A Rule saying that fees should be reasonable is not new; saying that class members can object is not new; and so on.

Another panel member thought the draft rule "a great step forward." It is important to have a Rule. For new practitioners, and even for established practitioners, the Rules should reflect where we are now in practice, and provide a foundation for the next few years of growth. The Rule 23(g) notion that the judge picks the class lawyer reflects what many judges do; it is important to say it in the rule. The actors who are not much regulated are the judges. The premise of Rule 23(g) is that there is not much client control. Rule 23(g), however, does not require the judge to hold a hearing or make findings in designating class counsel; Rule 23(h) requires findings on fee awards, but not a hearing. Rule 23(f) is an illustration of courts of appeals waiting to provide supervision in class actions. We should use the Rule to impose more regulation on district judges as they shop for, and as they pay, class counsel. Fee setting after the fact is very difficult; it takes a lot of time. We should regulate it in advance to reduce the amount of time required later.

The same panel member continued by observing that we do not want an impression of judges fixing fees. For better or worse, "judges are not identified with money." We need the insulation of a rule that gives more guidance: (1) Class action appointment and compensation should be in one rule. (2) The rule should cover class-action counsel, and also common-benefit attorneys, lead counsel, and any attorney who confers benefits on the class. (3) Some information about fees should be included in the appointment process to make the after-the-fact chore easier. The judge could require counsel to use computer data-basing whenever fees will be calculated by using a lodestar or by using a lodestar as a cross-check. (4) A schedule for expenses could be set, perhaps by the Administrative Office as a general matter, regulating such things as fees for copying, nightly hotel charges, and the like. (5) The text of the rule should take account of client concerns: the judge should be described as a fiduciary for the class — the class has a role, but the judge also is responsible for taking account of client concerns.

A third panel member suggested that it is appropriate to address fee awards in the rule because the fee decision is the most important decision the judge makes in most class actions. Federal courts in general are moving toward appropriate resolutions, but state courts are not. The federal rules can help state courts, and slow the present rush of counsel to file in state courts "for clear sailing on fees." The principal problem is that there is no adequate basis for objectors to know the basis of the fee application in time to object; the time periods for disclosure and objecting often make informed objections impossible. The net recovery by the class is important. The amount requested should be in the notice to the class. The application should be available to class members for at least 30 days; a lot of money is involved, and the application may present complex issues. Often an objector has to fight counsel to get the documents. Any side deals should be disclosed in the fee application. There should be an opportunity for discovery. The Rule has evolved from a draft that required a hearing on a fee application to the present draft that simply permits a hearing — it would be better to say something to the effect that the court "shall ordinarily" have a hearing. It is too easy to shovel these issues under the table without a hearing. And the draft Rule 23(h)(4) provision for reference to a special master is too broad: it refers to issues related to the amount of the award. It would be better to refer to the need for an accounting or a difficult computation, as the proposed Rule 53 revision at page 120 of the publication book.

A fourth panel member found "no objection to having a rule like this in general." Indeed, it was a surprise to discover that Rule 23 does not already include such provisions. Courts generally know what to do, but "codification is OK." The abuses that have been seen, particularly in state courts, are being addressed. But the rule should not include language that will interfere with victims' access to the courts. Free access to court remedies "is one of the things that make our country great." Class-action accountability is an important deterrent, a valuable law-enforcement tool. We need to enable people to take risks to bring victims into court. So Wall Street firms have partners whose function is to woo clients. The business-getter shares firm profits, even if doing no significant legal work. The equivalent happens in the plaintiff litigation bar. The plaintiff client lawyer who cannot take on a litigation for one client alone takes the client to a class-action firm. It cannot be determined at the outset how much time the class-action firm will have to devote to the litigation, what risks it will have to take. Some matters are quite independent of the rational disposition of the litigation: a defendant, for example, may feel compelled to reject a present settlement that otherwise makes sense simply because the firm bottom line cannot absorb the cost, even though it is recognized that a much more expensive settlement three or four years later makes no sense apart from such bottom-line concerns. This phenomenon cannot be predicted. And the substantive law may change, making a case more difficult or impossible to win. Or everything may go according to reasonable predictions, but be followed by a great delay in getting paid. Draft Rule 23(h) does not take account of these realities.

This panel member continued by observing that the Note says at page 88 that the risks borne by class counsel are "often considered": why not "always"? There is an implication that it may be proper to refuse to consider this factor. And why does the draft Rule 23(h) say that a court "may" award a reasonable fee, rather than "must"? Of course a zero fee is reasonable if counsel is not successful. And the concern about a "windfall" can work both ways. The windfall may benefit client rather than counsel. The standard contingent fee is 1/3 of the recovery; anything less than that is to the client's advantage. Certainly anything less than 15% is a windfall to the client. Every case won by class counsel has to support many that "go nowhere" — thirty to forty percent of security actions are dismissed.

A fifth panel member began by observing that experience with more than 200 class actions in the last two years alone has failed to show even one in which a client sought out class-action counsel. There are two worlds of class actions. One involves interesting claims with real clients who actually oversee the litigation. But matters are different in the other world. Of the 200-plus actions in this two-year sample, only one had a fee dispute. These cases were put together by syndicates of class-action lawyers. They have a syndicate agreement; one of those agreements designated two lawyers to be responsible for hiring clients. And no one goes to federal court any longer; they go to state court. One recent client was the target of 30 similar class actions filed in different states, each claiming damages of $74,999 to defeat removal. Abuse of the class-action mechanism is a real problem.

Part of the problem is that there is no real client. Rule 23(h) serves a need. The defendant does not care what the class lawyer gets; they want a package that achieves maximum res judicata, and are concerned about the cost of the entire package. The judge should be given maximum autonomy to consider what the result is worth to the class and to society. High risk exists only because the lawyers make up the claims out of whole cloth. But the risk is reduced — by filing 20 or 30 actions, the risk of losing all of them is reduced greatly.

It is proper to say that the court "may," not "must," award a reasonable fee.

The sixth panel member, introduced as the clean-up hitter, observed that "Batting 6 is not clean-up hitter." The task is enormous. "One size does not fit all." Each perspective is legitimate from one perspective at least. The Rule 23(h) draft "is unexceptionable." It does a necessary job in straight-forward form. The requirement of making findings and conclusions should apply both in Rule 23(g) and Rule 23(h). But the reference to origins in equity are troubling; the length of the chancellor's foot should not make a difference.

The Rule and Note do not say anything about the idea that the fiduciary obligation extends to the class representative as well as class counsel.

It is "just not possible" for a judge in retrospect to determine the adequacy of a fee application. That has driven the recent use of bidding. Knowledgeable lawyers know more about the case than the judge when they come in; the judge, indeed, knows little about the case. In camera submissions of one side's view of the case are troubling. Application of lodestar analysis is difficult because it relies on hindsight, and also because it creates incentives to pad the bill.

Even when the ultimate decision is vested in the class representative — see the PSLRA — it is useful to have up-front presentations by counsel as part of the determination of who is the most adequate plaintiff.

Rule 23(h) is well-crafted, although the Note might be shortened a bit. One difficulty arises from the suggestion at pages 83 to 84 that an award may be made for benefits conferred on the class by an unsuccessful rival for appointment as class counsel. The unsuccessful applicant knowingly ran a risk, and it is rare for the unsuccessful rival to contribute to the result.

Finally, it is fiction to think that a one-third percentage fee is the norm. That share is drawn from long-ago origins in representation of individual plaintiffs in personal-injury litigation. There is no reason to suppose that it should apply to the quite different setting of contemporary class actions.

An earlier panel member then urged that the Rule should be forward looking. Multidisciplinary practice is upon us. "Counsel" fees include payments for banks, accountants, escrow agents, and others. "Lawyer entourage" expenses can be used to make money. The judge is paying money to a lot of entities and different professions. They may be providing necessary and high quality service, but the judge should seek to ensure that the least expensive means are followed.

Another panel member reiterated that side agreements to pay for promising not to object, or for withdrawing objections, should be made known. But we should recognize that there are real class actions to redress real wrongs.

A panel member responded that there is no problem with making side agreements known. Usually payment is for improving on the class settlement; we seek to have the court order payment to the objector.

An audience member suggested that it is difficult to know what percentage is appropriate when a percentage fee is set. It is particularly difficult to use a percentage fee when there is important equitable relief. A lodestar analysis may not suffice where there is risk, risk should be

compensated. Lodestar relief, on the other hand, may be too much if it encourages elaborate structural relief that is in fact worth little to the class.

A panel member observed that the Supreme Court has ruled in the civil-rights statutory fee setting that a reasonable attorney fee may exceed the dollar amount of the judgment. "You should not commodify all value": there is a social utility in enforcing the law. One alternative worth considering is establishing authority for the Department of Justice to pursue important "consumer" actions; such a proposal, framed by Dan Meador, was in fact developed more than twenty years ago.

Another panel member suggested that in class actions that do not generate a common-fund recovery, defendants have a greater interest in the amount of any fee award and are much more likely to provide effective adversary contest of the amount. Draft Rule 23(h) applies in both the common-fund setting and other settings.

An audience member noted that the recent RAND study found cases where injunctive relief was assigned a dollar value after a presentation. In one case fees were based in large part on the injunction; the defendants negotiated with the plaintiff and joined in presenting the award proposal to the court. Objectors appeared; the eventual settlement directed much more of the benefits for the class, away from the class attorneys who negotiated the original deal. The financial incentives should be constrained without deterring useful class actions.

A panel member observed that there is another setting in which judges supply lawyers with clients. Lawyers are appointed for criminal defendants. Federal judges lobbied for creation of a panel system for private lawyers, a system that moves appointments away from focus on the individual lawyer and the attendant risk of patronage appointments. This model provides support at least for the proposal that the Administrative Office should establish guidelines for nontaxable costs.

Another panel member responded that Criminal Justice Act lawyers are paid inadequately. They accept appointments only for the trial experience. It would be a mistake to get the government into this.

An audience member suggested that in injunction cases, the defendant does not provide adversariness on attorney fees. The incentives are the same as in damages actions: the defendant trades off agreement on fees for a less effective and less costly injunction. Of course there are cases where the defendant promises to obey the law and a fee is appropriate. But the defendant is not making an adversary job of it on the fee application.

The panel member who offered the analogy to Criminal Justice Act attorneys agreed that the court faces a problem when the defendant agrees not to oppose a fee application up to a stated amount. A judge who tries to cut below the stated amount may get — indeed has been — reversed on appeal.

A panel member returned to the percentage-fee amount: If not one-third, what? The case law developed out of the fee arrangements made for representing an individual plaintiff. There is at least a semblance of a market for representing individuals. There is no market in the class-action setting: the judges have created it. They need to do a lot of work in determining what are the real investments and the real risks.

An audience member asked what is the trial court's responsibility as to class counsel or the class representative? It is not a "fiduciary" duty to the class: the judge who manages a class action cannot be a fiduciary to the class. The Committee Notes do not suggest the fiduciary role, and it is properly avoided. The judge's duty is to be a judge — to try to assure that counsel fulfills the fiduciary role. Fees create a conflict between counsel and the class; the judge has a judicial responsibility, not a fiduciary responsibility, to determine whether there has been an abuse.

The same audience member continued by observing that side agreements are a problem. If the total fee to a consortium is reasonable and fair, perhaps the court need not be concerned with the division within the group. There may be some "hard stuff" going on within the consortium, but the judge would be well advised to stay out of it.

A panel member agreed that it is not right to describe the judge as "fiduciary." But the judge does have an obligation to see that the fee is fair. And if the fee basis is to be the lodestar, or if a lodestar calculation is used as a cross-check, the judge needs to know about side agreements.

An audience member asked two questions. First, what is the nature of the notice of the fee motion to class members? How expensive will it be? At times it is the defendant who provides notice. We need more information on who is to provide notice and what the notice is to be. Second, the draft provides for objections to a fee application by a class member or by a party who has been asked to pay. Why should a class member be allowed to object if the fee is not coming out of a common fund?

A different panel member observed that most lawyers who negotiate settlements "are decent"; "judges do their jobs. Do not take away our weapons by requiring disclosure of side agreements." In the process of settling fifteen billion dollars of life insurance fraud cases, all of the lawyers were made happy in every case but one.

A panel member offered the view that it is important to equip clients and insulate judges. The judge is hiring and paying lawyers: if the judge is not a fiduciary, what is the judge? Still we can recognize that the judge is not to be more favorable to the plaintiff or defendant. A judge in the audience responded "then I have to be a judge.

At the conclusion of the panel discussion, Judge Levi described the first panel discussion for the next day. The 1996 Rule 23 proposals included a provision for settlement classes; fierce resistance appeared, including a strong objection by a large consortium of law professors. Part of the opposition arose from concern that abuses occur in the settlement process. The Committee turned its attention away from settlement classes toward strengthening the settlement process. Judge Schwarzer's article provided a solid foundation. One problem in judicial review of settlements often arises from a lack of adversariness. Another issue arises in (b)(3) classes as to the opportunity to opt out. When a proposed settlement and certification are considered at the same time, (b)(3) class members have an opportunity to opt out that is informed by knowledge of actual settlement terms. Even then, there is an inertia. But the class may be certified, and the opt-out period may expire, before there is a settlement agreement. The incentive to opt out is reduced when the decision must be made in a state of ignorance as to the consequences of remaining in the class or exiting. The Rule 23(e) proposal contains two versions of a second, or "settlement" opt-out for these cases. This settlement opt-out opportunity will be one of the important issues for discussion.

Professor Cooper summarized the issues to be addressed by three subsequent panels. The Committee has developed, but has not yet formally published for comment, proposals addressed to overlapping, duplicating, and competing class actions. The problems seem to be well managed as among federal courts, in large part thanks to the multidistrict litigation statute. When parallel class actions are filed in federal and state courts, coordination through the Judicial Panel on Multidistrict Litigation is not now possible. The panels will be asked to provide information on the nature and importance of such problems as may arise from multiple parallel findings. They also will be asked to discuss the question whether any problems that may deserve new solutions should be addressed by making new rules of procedure. The questions involved raise sensitive issues of federal-state relations, and might be better addressed by Congress. Even if rules solutions seem desirable, it must be decided whether effective rules are within the scope of the Rules Enabling Act and can be made consistent with the Anti-Injunction Act, 28 U.S.C. § 2283.

Panel Four: Settlement Review

The moderator for the fourth panel was Professor Jay Tidmarsh. The panel included John D. Aldock, Esq.; Professor John C. Coffee, Jr.; Kenneth R. Feinberg, Esq.; Gene Locks, Esq; Judge William W Schwarzer; and Brian S. Wolfman, Esq.

Discussion opened with the observation that present Rule 23(e) is quite short. The proposal is longer, but largely codifies existing practice. Draft Rule 23(e)(1)(A) makes explicit a requirement that the court approve voluntary dismissal even before certification. Draft Rule 23(e)(1)(B) requires notice to the class if a voluntary dismissal or settlement is to bind the class. Draft Rule 23(e)(1)(C) requires a hearing and findings of fact, and also states a standard for approval. It may help to begin with these assumptions: Amchem and Ortiz are satisfied by the settlement; no more can be done; the Notes are fine; and the settlement-opt out will be confronted later. On those assumptions, is the proposal — that is, paragraphs (1), (2) [disclosure of side agreements], and (4) [objections] an improvement?

The first panel member observed that the proposal largely incorporates present practice. There are no major problems in it. The notice provision in (1)(B) is an improvement. It is proper to spell out a standard for approval. It is an improvement to require findings. But there are some problems with the Notes.

A second panel member agreed that what the proposal attempts is sensible. The stronger version of the settlement opt-out is better. But the proposal "does not address the current crisis." As so often happens, a proposed revision seeks to fight the wars of the past. The crisis is reflected in the hip-implant litigation. Clever attorneys are trying to create the functional equivalent of a mandatory, non-opt-out class. We need to address this in settlement review. "Fairness and adequacy" require non-discrimination. A matrix settlement will create disadvantages for some, who should be free to opt out. The fact that a majority of class members want a settlement does not justify giving the class an impregnable first lien, but only for all who remain class members by refusing to opt out. This creates a discrimination against those who opt out.

A third panel member suggested that the hip-implant ploy is brand new. "We should not fight a war before it starts." Generally the proposal "is a nice job in doing what the Committee is allowed to do: codify best practices." It would be desirable to be more daring. Express provision should be made for settlement classes; they are useful for the end game. Asbestos will go on for

another 20 years "thanks to the fine work of the judiciary." The problem of reform efforts now is that defense counsel went too far in their efforts effectively to kill class actions by seeking such things as opt-in classes.

A fourth panel member thought the rule "a step forward, as a codification of practice with some additions." The proposal will help courts that do not see many classes, and that tend to see settlements in bipolar terms drawn from simpler litigation. It is difficult to believe that the lien ploy adopted in the hip-implant litigation will be approved; there is no need yet to think about shaping a rule to reject it. It would be better, however, to expand proposed (e)(3) so that a (b)(3) class member can always opt out of a settlement.

A fifth panel member suggested that if the proposal largely tracks and formalizes existing practice, it would be better to "leave it alone." Tinkering affects the mind-set of lawyers and judges; they look for reasons for the change apart from confirming present practice. The judges he works with do these things anyway. The changes will inhibit settlement. Judges will think there must be a reason for these changes, and will "put the brakes on." But if the proposal really promotes substantive change, it should be considered on the merits. But "merely to clarify and formalize" is not worth it. Requiring disclosure of side agreements is a mistake. Side deals often fuel settlement; they will not remain secret. Judges will look into the deals. But you need empirical evidence that these deals are promoting unjust settlements.

The sixth panel member responded that side agreements should be disclosed, and should be disclosed early. Disclosure is particularly important when side agreements deal with fees, or effect settlements outside the class settlement. But there are some problems with the rest of the proposal. Why require approval of dismissal or withdrawal before certification? And why require notice in that setting — if a class is never certified, who is it that gets notice? And an attempt to list factors is a problem; the listed factors tend to become treated as the only factors, but the list may miss something. The requirement of approval to withdraw objections is new, and it is good; some objections are made "for not meritorious reasons."

The first panel member observed that the argument against expressing present good practice in an expanded rule assumes that all judges are experienced in handling class actions. It is in fact very useful to have a rule that reflects good practices as a guide to judges and lawyers.

The panel then was asked expressly to discuss the settlement opt-out.

The first response was that generally knowledge of a settlement provides a better basis for deciding whether to opt out. But we should not require a second opt-out opportunity in all (b)(3) classes. The first alternative, expressing a presumption in favor of the second opt-out, "will become required." The second alternative, which seeks to address the opportunity in neutral terms, is better. But it would be still better to address this question only in the Note. Notice is expensive, especially if it is to be delivered by newspapers or TV; the cost of notice in Amchem was between ten and twelve million dollars. The class action is an attorney vehicle; the idea that people worry about it is a dream. Notice to lawyers is important — the case is over, you need to decide whether to file an individual action. Opt-out campaigns "are political wars"; propaganda is unfurled by both plaintiff and defense lawyers. The second alternative is better. Remember that the fen-phen settlement had opt-out opportunities "every time you turned around," but it is a rare client who can afford "this lack of peace."

Another response was that in an ordinary case, "it's a pig in a poke before settlement." The ordinary class member does not have enough information at that point. A reasonable opt-out judgment can be made only when the terms of settlement are known. It would be better to allow the opportunity in all cases.

A third response was that the first alternative is better. It does include an escape clause. The class may have had notice of settlement terms during the first opt-out period, even though there was no formal agreement ready to be submitted for court approval. The first alternative, however, "maximizes consumer choice" of class members in the more general cases. Notice could be more modest. But it is better that this be in the text of the rule; we need it for judges who are new to class actions.

A fourth view was that the first alternative, strongly favoring settlement opt-outs, "is dangerously close to one-way intervention." The "good cause" standard for refusing a second opt-out is very vague; if it turns on the fairness of the settlement, that should be addressed in every case as a matter of settlement review anyway. The Note has it right: if the settlement terms themselves provide an opt-out opportunity, that is a factor favoring the fairness of the settlement. Informative notice is far more important at settlement than at the beginning; the Notes at least should speak to this point.

Another panelist favored the settlement opt-out. In the diet drugs litigation there were four opt-outs: (1) from the settlement; (2) when a class member tests positive in the medical monitoring program, opt-out is again possible even though there is no present injury; (3) if a class member develops a clinical condition, there is an opt-out; and finally, (4) there is an opt-out "if the company cannot pay at the end." At least one informed opt-out should be allowed; usually it is sufficient to provide this at the time of settlement.

The final panelist observed that in mass torts, the aggregate terms of a class settlement are made known; opt-out then is one thing. Or attention could be focused on opting out when each class member knows his personal award — it probably is wrong to permit deferral of the opt-out opportunity that long. Or attention could focus on the latent-claim class member who will not know "for 23 years" whether a presently known exposure in fact will result in injury; an opt-out then "would destroy most of these settlements." Opting out at the time the "aggregate deal" is announced is not so much of a problem.

One of the earlier panelists observed that he might disagree about the back-end opt-out, but that is not what is proposed here. Nor are we talking about all mass-torts problems. The diet drug settlement was done under pressure that improved the settlement because higher legal standards were imposed post-Amchem. It may be that a class is certifiable only if there is a back-end opt-out.

It was rejoined that it is dangerous to think of the opt-out only in terms of mass torts.

An audience member noted that the settlement opt-out would apply to antitrust and securities classes. There is a history of successful settlements without opt-outs in these areas. It is a mistake to write a general rule that applies to all types of class actions. Indeed it might make sense to treat classes that deal with small claims that cannot sustain individual litigation as mandatory classes.

A panel member said that these considerations support the second alternative as the better option. Settlement opt-outs make sense only in some cases. One difficulty is that money spent on

notice comes out of the actual class relief. The "levels of notice" should be described in the Committee Note. Some should be in newsprint in the general fashion used for legal notices; and there should be notice to attorneys. The "mass buy" of television or newspapers of general nationwide circulation is not appropriate in many classes. And simple notice, if any, is most appropriate on the occasion of pre-certification dismissal.

An audience member asked what are we trying to fix? The problem of early notice arises when a class is certified for litigation. Mass-tort settlement classes negotiate opt-outs; it is proper for the Note to treat this as a factor in evaluating fairness. There is an issue in a small fraction of classes where there was early notice; the suggestion that there might be no notice is troubling. A response was that this suggestion is only that if settlement is anticipated, one notice will do it if the first opt-out period and notice are deferred until the settlement terms are known, or settlement efforts fall through.

Another panel member responded that fairness is protected by judicial review.

A different panel member observed that when class members are heterogeneously situated, you cannot have a settlement that is fair to everyone. Notice at the time of certification will be used to lock everyone in. There is no problem in securities litigation, because for years the parties have come in with settlement and certification at the same time. If certification and settlement are separated, the expensive notice should be deferred to the time of settlement.

A panel member urged that the Note should refer to the need to consider subclasses at the time of settlement review.

A further suggestion from a different panel member was that people should not be asked to decide on opting out before knowing what they will get, at least in personal injury cases. Notice at the time of the "aggregate agreement" is not good enough. The total available in Agent Orange sounded like a lot, but an intelligent opt-out choice could not be made on the basis of knowing that alone.

An audience member thought that the problems of notice and opting out should be put in the larger context of notice problems. The Eisen decision should be confronted directly. Notice and opt-out exist because unscrupulous class and defense counsel sell valid claims down the river. Small claimants do not need individual notice.

Another audience member observed that the parties can and often do negotiate multiple opt-outs; this approach may be required in mass torts. There is, however, no need for a rule to accomplish this. For securities and antitrust litigation, the first notice tells class members that they will be bound if they do not opt out. If you mandate opt-out after settlement, would you also mandate it after summary judgment is granted? After trial? The second opt-out proposal "turns the rule on its head"; it is like one-way intervention. This can be dealt with adequately in the way counsel negotiate. The settlement opt-out interferes with negotiating settlements.

Still another audience member urged that we remember history. Earlier Committee deliberations included a proposal to encourage objectors. The settlement opt-out, particularly in the weaker second alternative, is a lot better than fueling objections to every settlement. The Note, however, should be revised to make it clear that settlements are favored. The Note now does not say

that, and indeed seems to have a hostile tone. We should begin the discussion by stating that settlement is favored.

A further comment from the audience was that from the defendant's view, finality is an important goal of settlement. There is a tension between the need for class members to base an opt-out decision on meaningful information and the defendant's ability to settle. Of course a "walk-away" can be negotiated for the defendant. But even then, the defendant knows that there will be some opt-outs, and that they will have to be paid; the first settlement is not complete, and provides a floor for negotiations with the opt-outs. The cost of notice is "an overlay." The more flexible version of the second alternative is a lot more sensible. Even then, settlement will be more difficult.

A different audience member suggested that notice cost is a red herring. Current law requires notice of settlement. This proposal simply requires that the notice include one more item, the right to opt out of the settlement. The first alternative for settlement opt-out is better, and perhaps the right to opt out should be even more strongly framed. Although the opt-out reduces the defendant's opportunity for global peace, it should be provided to support informed choice by class members.

A panel member responded that the quality of the notice is affected by including opt-out information; notice will be more expensive.

A different panel member rejoined that if we are precluding substantial damage claims, we should have good notice.

A Committee member observed that over the years, both plaintiffs and defendants have thought that this is an area where we can do some good. Fairness is a concern; we also need assurance of fairness for the court in the nonadversary setting of settlement review. One possibility is to appoint an objector; at least one participant in the discussions has favored that approach. Consideration of the court-appointed objector, however, generated much consternation. Trial and summary judgment are different from settlement; they were presented by adversaries and decided by the court.

A panel member responded that settlement classes are always adversarial — objectors, a co-defendant, or someone from the plaintiff's bar, does appear. The day-to-day problem is not the sweetheart settlement that no one objects to.

A different panel member objected that this observation applies only in the highly specialized mass-torts subfield. The FJC study found that 90% of the settlements reviewed were approved without objection and without change. Class settlements are fundamentally different from individual actions, where settlement is favored.

A panel member suggested that the "pig-in-a-poke" problem is most significant with small-claims classes. Class members have no stake at the beginning. The opt-out could lead to better recovery in another class, and even apart from that a 20% or 40% opt-out rate would tell the court something. The settlement opt-out is useful.

An audience member asked why we need the first opt-out, if the limitations period is extended to the second opt-out? And also asked why notice should be given of a pre-certification dismissal that does not bind the class? A defendant who wants notice in such circumstances should pay for it.

A different audience member responded that the second notice might be more effective. The IOLTA cases say that clients have a property interest in pennies; class members have a property interest in small claims. Those who want global peace have an interest in the quality of the second notice. The problem is to ensure that settlement is adequate for the absentees. The first alternative, favoring settlement opt-out, "is a big improvement."

A panel member stated that the idea of a court-appointed objector "is horrible." "Any alternative is better." The best approach is to list an opt-out opportunity provided by the terms of settlement as a factor supporting the fairness of the settlement. The second, more flexible settlement opt-out in the rule is the next-best alternative. And there is no authority to do anything before certification: a defendant should not be forced to pay for notice because the plaintiff brought a bad case.

Another panel member stated that the only real choice is between the first and second alternative versions of the settlement opt-out. The court-appointed objector system would degenerate into a civil-service bureaucracy or a buddy system, a nightmare. Market forces are better. The language of the first alternative might be softened a bit: a settlement opt-out is required "unless the court finds that a second opportunity is not required on the facts of the case." This would be stronger, and better, than the second alternative.

A different panel-member view was that the parties should be fully informed in connection with settlement, but opt-out does not follow. We want defendants to be able to achieve global peace. There is a need to choose the lesser evil: is unfairness to class members so great? "I do not know the answer."

The panel was asked to identify any concerns they might have with the Committee Notes.

The first response found "some strange things" in the Notes. (1) The Note assumes the certification of settlement classes. They cannot be done any longer. (2) There is confusion about dismissal of individual claims without notice. (3) Individual premiums incident to settlement "are a real problem." (4) Notice in connection with involuntary dismissal is mentioned: why? (5) The Note can be greatly condensed. But the factors "are a good start"; it is better to have them in the Note than in a Rule.

The second response began by observing that we do not want the judge to be a fiduciary for the class, to be part of the strategy that causes the defendant to pay money. So page 54 refers to seeking out other class representatives when the original representative seeks to settle before certification; the present lawyers, or other lawyers, may seek out other representatives — the judge should not be involved. Page 68 is similar in suggesting that the court might seek some means to replace a defaulting objector; the court should not do that, but should instead provide a defined period — perhaps 30 days — for other objectors to appear. Generally, the Notes should be shorter. The factors for reviewing a settlement are good and well stated. And citing cases helps.

A third response began by noting that proposed Rule 23(e)(1)(C) speaks only of "finding" that settlement is fair, reasonable, and adequate; the Note, page 55, requires detailed findings. The detailed findings requirement should be stated in the Rule. The settlement-review factors properly belong in the Note. Factor (I) needs "some tweaking": it should say explicitly that it looks to results for other claimants who press similar claims. The Note observes, page 65, that an objector should seek intervention in order to support the opportunity to appeal. Earlier, the Committee considered

an explicit rule provision that would establish appeal standing without requiring intervention. It would be better to restore this provision; class-action practice is the one area of significant litigation where notice often goes to pro se parties who cannot be expected to reflect on such refinements as the opportunity to seek formal intervention in addition to the opportunity to present objections without intervening. Finally, page 67 refers to Rule 11 sanctions against objectors; it "comes across as a threat." "We should be creating a hospitable reception for objectors."

A fourth response began by referring to the draft Rule 23(e)(2) authority to direct that "side agreements" be filed. Some lead plaintiffs now ask attorneys to indemnify them against liability for costs. There may be a simple money buy-out of an objector. The Note should make it clear that these are examples of side agreements. Another shortcoming is that the "fairness" of a settlement is not defined. Is it the greatest good for the greatest number of class members, even though the settlement may be ruinous for some? The Note, if not indeed the text of the rule, should incorporate a notion of nondiscrimination. So the trick of imposing a lien on a defendant's assets only for the benefit of those who remain in the class, without opting out — this is subordination of one group to another, and unfair.

A fifth response suggested that the list of settlement factors should be expanded to refer to the effect of the settlement on pending litigation.

A member of the Standing Committee observed that a "back-end opt-out" is not likely to be provided in antitrust or securities litigation, and asked whether future mass-torts settlements will be approved if there is no back-end opt-out? A panel member responded that in personal injury cases, the risk of latent injury is a real problem. But if injury is apparent at the time of settlement, an informed initial opportunity to opt out after settlement terms are known is enough. Another panel member suggested that we should not use asbestos as an example for all cases. In many cases, the biological clock ticks faster — there is a predictable, and finite, number of downstream claims, with a latency period of two years, or four years, not twenty. Defendants can deal with this kind of "extended global peace." The back-end opt-out can be worked out. A third panel member said that in a large heterogenous mass-tort class, back-end opt-out can address the constitutional needs. But if the class is more cohesive, the Telectronics decision in the Sixth Circuit accepted the idea of settlement without back-end opt-out; it reversed only because the class rested on an unsupported limited-fund theory. A fourth response was that it would be a mistake to make a back-end opt out a mandatory condition of settlement. A back-end opt-out was negotiated in Amchem pending appeal, anticipating a remand for further proceedings in the class action; the arrangement was defeated by the Supreme Court's actual disposition. The opt-out may not be needed if you know of the progression of the disease within a finite population.

An audience member said that the first sentence on Note page 55 says that notice may be given to the class of a disposition made before certification; it is not possible to give notice to a class that does not exist.

Panel 5: Overlapping and Duplicative Classes: The Extent and Nature of the Problems

Panel 5 was moderated by Professor James E. Pfander. Jeffrey J. Greenbaum, Esq., and Professor Deborah Hensler were presenters. Panel members included Fred Baron, Esq.; Elizabeth

Cabraser, Esq.; William R. Jentes, Esq.; John M. Newman, Jr., Esq.; David W. Ogden, Esq.; and Lee A. Schutzman, Esq.

The panel was presented a set of questions: How often are overlapping and duplicating class actions filed? What function do they serve? Are they filed by the same lawyers, or do they result from races of competing lawyers? Can we identify subject-matters that typically account for this phenomenon? What eventually happens — do most of the actions simply fade away?

Professor Hensler began by suggesting that only a subjective answer can be given to the question whether there is a problem, and if so what is the problem. It is hard to agree. The RAND study began by interviewing some 70 lawyers on plaintiff and defense sides, including house counsel. What defendants call duplicating class actions, plaintiffs call competing class actions. Defendants complain of costs; plaintiffs talk of the race to the bottom as defendants settle with the greediest attorneys. Defendants offered lists of cases demonstrating duplication; plaintiffs described the deals made by competing attorneys. One plaintiff, for example, described being told by a defendant: "you don't understand how the game is played; I'll make the same deal with someone else."

Professor Hensler then described the in-depth study of ten cases, including six consumer classes and four mass-tort classes involving personal and property damages. Cases were selected from these areas because they seemed to be the areas generating problems; securities actions were in a state of flux at the time of the study, and were excluded for that reason. In four of these ten cases, the plaintiff attorneys who resolved the case filed in other courts, at times many other courts. In five, other attorneys filed in other courts. In only two were there no competing class actions; each of these two were cases involving localized harm and restricted classes. In at least one case, the judges got drawn into a competition to win the race to judgment: it became necessary to mediate between the judges. This is not close to being a scientific sample, but the course of these cases was consistent with what the lawyers said in interviews. The lawyers who filed in other courts did it to preserve the chance to win certification if certification should be denied by the preferred court, or else to block others from filing parallel actions.

When other groups of attorneys filed parallel actions, operating independently, they often asked for compensation to withdraw their actions. The payments did not become part of the public record. The attorneys who took payment often asked for changes that improved class results, but this was not true in all cases. The presence of these csaes, often at different stages of development, affected the strategies of plaintiff counsel, and especially affected defendants who sought to negotiate in the most favorable case.

From the judicial perspective, competing actions increase public costs. But the costs are a "tiny fraction" of the total costs. From the defendant's perspective there are additional costs, but the defendants interviewed were not willing to say how much.

When settlement followed the joining of forces by plaintiffs, the plaintiff fee award was driven up because there were more attorneys claiming fees. This may be in part a cost imposed on defendants. But in reality, plaintiffs and defendants negotiate the total to be paid by the defendant; the fees come out of the plaintiff pot. It is not clear whether the total payment offsets this.

The more important consequences of parallel filings are these: First, there are increased opportunities for collusion between plaintiff and defendant attorneys. This is a particular risk in

"consumer" classes where there is no client monitoring the attorneys. Many state judges have never seen a class action, and their instinct is to cheer, not to review, a settlement. Second, parallel findings provide a means for plaintiffs and defendants whose deal does not pass scrutiny to take the deal to another judge for approval. These consequences support the efforts to provide closer scrutiny of settlements and of fee deals.

Attorney Greenbaum began his presentation by observing that the "current crisis" is overlapping and competing classes. "The multi-headed hydra is with us; cut off one head and two more grow back." Yes, there is a problem; it is described, among other places, in a recent article by Wasserman in the Boston University Law Review. Courts also recognize the problem. And practitioners face it every day. Why has it developed?

Class actions are lawyer driven. They can be very lucrative. It is easier to copy an idea than to invent a new one. Lawyers who file an independent and parallel action may hope to wrest control of the litigation from those who filed first.

In a different phenomenon, the same lawyers may file in several courts, looking for certification, more rapid discovery, or other advantages deriving from the ability to choose among actions as one or another seems to develop more favorably. The Matsushita decision, by empowering state courts to dispose by settlement of exclusively federal claims, encourages such behavior.

There are three types of parallel filings: (1) Plaintiffs bring separate actions against each company in an industry — the plaintiffs and courts duplicate, but not the defendants. (2) The same lawyers sue in multiple courts for the same plaintiffs against the same defendants. (3) Different groups of lawyers bring multiple actions. These suits may be successive as well as simultaneous.

One problem is the tremendous cost of duplicating effort. Coordination of discovery is often worked out, but not always; the more actions that are filed by different attorneys, the more likely it is that at least one will involve an unreasonable attorney.

Another problem is that there is a lack of preclusion. Dismissal of one action for failure to state a claim, for example, does not preclude pursuit of a similar action. A denial of certification by one court does not preclude certification by another.

And of course there is a great pressure to settle, augmented by the burdens and risks of parallel actions.

An illustration is provided by litigation growing out of tax anticipation loans. The litigation generated twenty-two class actions, in the state and federal courts of eleven different states. For a period of ten years, the defendants had "great success"; none of the actions went to judgment. But finally a Texas court certified a class, and the case settled.

It is important to establish preclusion on the certification issue. One refusal to certify simply leads to another effort in a different court. And differences among state certification standards confuse the matter. Further confusion arises from "different levels of scholarship" among different judges. The plaintiffs eventually will find the most lenient forum. Even if you settle or win, preclusion questions remain — who is in the class? Was there adequate representation?

A plaintiff may find it easier to wreck the class by farming opt-outs when there are parallel actions pending.

The presence of competing actions forces a defendant to hold back money from any settlement, harming the plaintiff class.

And plaintiff lawyers complain that other plaintiff lawyers steal their cases.

The reverse auction is often discussed. "I have not seen it in practice, but there is an odor when the newest case is the one that settles."

From the court's perspective there is a burden, and they suffer from the perception that lawyers escape judicial supervision by going from one court to another. The result undermines the very purpose of class actions.

Panel discussion began with the observation that there was no apparent tension between the perspectives of academic Hensler and lawyer Greenbaum. They present a joint perception: they give an unqualified "yes" to answer the question whether overlapping class actions in state and federal courts are a sufficiently serious problem to justify Rule 23 amendments. In addition to the cases they describe, Judge Rosenthal's memorandum to the Advisory Committee last April described another seven disputes that gave rise to parallel class actions, only two of which involved mass torts. A survey of litigation partners in this panel member's large firm turned up six more examples, only one of which involved a mass tort. "You will hear other examples."

The Manhattan Institute released a study in September 2001 that concentrated on Madison County, Illinois. The county population is some 250,000 people. Yet it is second only to Los Angeles County and Cook County in class-action filings in the last three years. Eighty-one percent of them were for putative national classes on claims that had no real nexus to Madison County. Why should this be? Madison County has a long history as a hotbed for plaintiffs. It began years ago as a favorable forum for FELA plaintiffs. Now they have found a much more fruitful project. One illustration is a class action involving Sears tire balancing, in an attempt to use the Illinois statute for consumers in all states.

The next panel member identified himself as an expert who litigates mass torts. By definition mass torts involve much duplication; victims file individual claims, as they have a right to do. That is his perspective on Rule 23. From that perspective, the question is whether there is a need to revise Rule 23. What are the perceived abuses? The principal abuse is collusion — when a mass tort occurs, the defendant wants global peace. There would be no problem if it were not for this propensity of defendants. They do not like Rule 23, except when they want to use it. Class actions should not be certified for mass torts. It is consumer cases that drive the problems. The proposals on overlapping classes must be dramatically offensive to state-court judges. We cannot by rulemaking solve the problems that arise from plaintiffs' quest for favorable courts. These proposals are not within the ambit of the Enabling Act; they cannot be done. Accordingly there is no need to worry about how they should be done.

A third panel member, speaking from a defense perspective, agreed that the desire to change Rule 23 is substantially driven by consumer claims. The 1998 Securities legislation is a model that deserves consideration. Some state claims have been excluded or federalized. State courts have been told this is a national problem to be addressed on a national basis. The 1995 PSLRA caused

a migration to state courts; the 1998 SLUSA responded by limiting the role of state courts. The problem of overlapping class actions is real. In the most recent experience, the evils were demonstrated by a network of lawyers who undertook to file coordinated actions in each state, framing the actions in an effort to defeat removal. If successful, this tactic would eliminate any overlap between federal and state actions. The problem is fairness, not duplication. You have to win every point in every jurisdiction. Discovery, confidentiality, privilege are all at risk every time a state court rules: disclosure in any one action effects disclosure in all. Any focus on certification or settlement comes too late; fairness problems arise before that. And voluntary judicial cooperation is not a sufficient answer. Even as among federal courts, voluntary cooperation is no substitute for MDL processes. Under present procedures, appointment of a master to facilitate coordination is essential; the master's task, however, requires colossal effort.

The fourth panel member spoke from a plaintiff's perspective, based on experience in federal and state courts and in many different subject-matter fields. Unless we abolish state laws, we will have class actions in state courts. The Federal Rules cannot prevent that. Result-oriented rulemaking is a weak approach. The judge in federal court who does not wish to manage a class should not be able to prevent an able and willing judge from managing the same class. Nationwide business enterprise, moreover, generates nationwide classes. It would be futile to tell the manufacturer of a defective product that it should be sold only in the state where it is made. Overlapping classes arise in other fields for similar reasons. Antitrust actions may be filed in several states, for example, because state laws — unlike federal law — often permit suit by indirect purchasers. Plaintiffs, further, often seek statewide classes in state courts as an alternative to the national class that federal courts now discourage. To have the first court — a federal court — direct that there should be no class action in any court "will lead to no litigation, or to many chaotic individual actions." The concept of adding to Rule 23(b)(3) a factor to consider denial of class certification by another court as illuminating the predominance and superiority inquiry is fine; courts do this now, as they should, but a reminder does no harm. Another good idea is an express reminder to judges that it is proper to talk together across court lines; when this happens, coordination works out. But this works only if lawyers tell the judges that there are multiple actions. Defendants know of overlapping actions more often than plaintiffs do, but often do not raise the subject because they fear that plaintiff lawyers will coordinate their work and develop a stronger case. Many problems would be solved if defendants provided this information, and this duty should be recognized as a matter of professional responsibility. Finally, "preclusion is not the answer to collusion," but rather will exacerbate it.

The fifth panel member spoke from a defense perspective. Corporate counsel see a lot of consumer-type actions. And there are hybrids that involve products that have gone wrong, or that might go wrong. For the most part, mass torts are not certifiable. Overlapping classes have been around for at least 25 years. In 1975, the engine-interchange litigation generated many parallel actions, but these actions were "brought incidentally as a result of publicity." There was a different attitude — people believed such actions should be in federal court. This view continued through the 1980s. In the 1990s the phenomenon changed. It is a problem for the system. Rule 23 is a powerful tool. One class now pending against his client involves 40,000,000 people. Beginning with the GM pickup trial, lawyers have brought multiple actions as a weapon to coerce settlement. They often pick state courts in remote rural counties, hundreds of miles from the nearest airport. Legislation will be an important part of any package approaching these problems.

The final panel member spoke both from government experience defending class actions and from experience in private practice. The problem is a consequence of federalism. The United States as litigant has an advantage because actions against it come to federal court. Rule 23 is something that government litigants find valuable to resolve problems, to get a fair result. Typical actions are brought on behalf of federal employees. Rule 23 avoids a proliferation of litigation. This result should not be cut back. When cases can proceed in any of 50 state-court systems, "you lose a judge vested with control of the situation." The incentives seem to be to gain advantage: the plaintiffs get multiple bites at the apple, and can impose high costs in order to encourage settlement. Defendants have an opportunity to look for a lawyer with whom they can make a "reasonable" deal. The slide of benefits from class to the plaintiff attorney can escape the judge's review and understanding. There is a risk of losing fairness to class members and deterrence.

An audience member asked about parallel litigation as a problem apart from class actions: should we have legislation for all forms of litigation, as perhaps a federal lis pendens statute written in general terms?

One of the presenters observed that "duplicative" litigation is a term used in many senses. The simple fact that events producing hundreds of victims may generate hundreds of individual actions has not been viewed as a problem by the Advisory Committee. So there are families of cases: plaintiffs win against one defendant, and then bring a similar action against another defendant. Again, the Advisory Committee has not viewed this as a problem. The nationwide class, commandeering the strength of the class action, is a distinctive problem: (1) Plaintiff attorneys can coordinate campaigns to press for settlement. (2) Competing classes generate a potential for collusion — this problem is recognized by lawyers, and is not a mere abstract concern of academics. Class actions generate "very powerful financial incentives." We must rely on judges to curb those incentives.

A panel member thought it a lot easier to justify a regimented approach in representative litigation, where the named representative's interest is submerged to the lawyer. But any solution cannot be framed narrowly in terms of "class actions" alone; Mississippi does not have a class-action rule, but achieves substantially similar results by other devices.

Another panel member observed that a plaintiff-perspective panel member had recognized that overlapping classes are a fact of life. The history of responses to multiple overlapping actions began with the electrical equipment pricefixing litigation forty years ago. The lawyers were told there was nothing that could be done about the overlap. But the federal judges created a coordinating committee that dealt with the problems. Discovery and trials were coordinated. The present proposals recognize the similar problems that exist today. State-court actions will remain.

The plaintiff-perspective panel member noted by the prior panel member suggested that there is an elegant solution. Judicial regulation is a need. More judges are involved. Rule 23, § 1407, and § 1651 can all be used. Judges can employ these tools cooperatively. A strict preclusion rule is far too restrictive of substantive and procedural rights. A good test of any solution is whether it makes all lawyers uncomfortable with the process: a fair and balanced solution should do that.

An audience member noted that the electrical equipment experience inspired the federal judges to go to Congress for a statute. There is a real question whether the Enabling Act can be used to preempt state law, or whether legislation is needed.

A judge asked from the audience what was the final outcome of the migration of the GM pickup litigation from federal court to the state courts of Louisiana. Panel members responded that the litigation was still pending. The parties agreed to a settlement that substantially enhanced the terms that had been rejected in the Third Circuit. The settlement was supported by the parties who had objected to the federal settlement. "Amchem findings" were made on remand in the state court. "There was no quick deal." But as soon as the settlement was signed, a dispute arose over its meaning; the question whether it requires the opportunity to develop a secondary market for sale of class members' rebate coupons has become a stumbling block. It was further noted that the litigation wound up in a small parish in Louisiana because there were more than 40 cases. Some state judges like class actions. The defendant view is that this was a power-play by plaintiffs. After some protest, the certification hearing was extended, but even then was held only three weeks after filing. The hearing was perfunctory, and followed by immediate certification.

Panel 6: Federal/State Issues

The moderator for Panel 6 was Professor Francis McGovern. Panel members included John H. Beisner, Esq.; Judge Marina Corodemus; Paul D. Rheingold, Esq.; Joseph P. Rice, Esq.; Professor Thomas D. Rowe, Jr.; and Chief Justice Randall T. Shepard. The subject was the "unpublished" proposals that would address overlapping, duplicating, competitive class actions.

The moderator observed that this is the "real world" panel. Discussion might begin by starting with "the bottom line," in the manner of reverse trifurcation. The strongest form of the unpublished proposals addressing parallel class actions, a potential "Rule 23(g)," would allow federal courts to seize control, excluding state litigation. This proposal might, as a practical matter, move mass torts to federal court. It could eliminate state class actions that do not conform to federal practice. Using a scale on which extreme approval is a 1 and extreme disapproval is a 10, how would each panel member vote?

The first panel member, representing a defense perspective, voted 1 with respect to the need for action. All of the proposals together rate a 3; there is a concern whether they are "doable." The need is to clarify which court deals with which class action.

A plaintiff-perspective lawyer voted 10. The next panel member abstained. Two more voted 4. The final member, again taking a plaintiff perspective, voted "10 twice": this cannot be done by rule, and should not be done by any means.

The panel was then asked to consider what is "unique": personal injury actions, medical monitoring, consumer fraud, antitrust, securities, in these terms: (1) It could be argued that we have federalism in all cases; class actions simply involve amplification of the amounts at stake. (2) An arguable concern of many people is that class members are not truly represented by the named representatives: class members lack knowledge, the process is not democratic, class members have no control. (3) We are not any longer talking about personal injury cases involving significant present injury: the actions are for consumer fraud, medical monitoring, and the like, based on state law. A state national class works because opt-outs will not defeat it.

The first panel response was that what is unique about competing class actions is that they are "universal venue" cases: they can be filed in any state or federal court, nationwide. So this is different from individual plaintiff personal-injury cases. Second, the federalism issues are quite different: "This is reverse federalism." The Roto-Rooter case is an example: venue is set in Madison

County, Illinois, for a nationwide class claiming a violation because the defendant's house-call employees are not all licensed plumbers. Venue was established on the basis of a set-up by plaintiffs who arranged for one visit to a customer in Madison County by an employee sent from Missouri. The attempt is to enable an Illinois judge to export the Illinois statute to govern events in all states.

Another panel member observed that this may not, does not, apply to mass torts. There are no dueling federal classes; they are swept together under § 1407. Nor has there even been a state class for actual injury; perhaps there have been for medical monitoring. The Advisory Committee has thought about developing an independent mass-tort rule. "One size Rule 23 does not fit all." A "Rule 23A" for mass torts would help.

The next panel member spoke to experience in New Jersey. The state courts have had centralized handling from the time of the early asbestos cases. The tendency has been to select the same county for coordinated proceedings. Judges in that county have built up expertise, and have two special masters for assistance. At present tobacco cases are pending there. Certification has been turned down in seven cases; they have been handled as individual actions. State courts can handle these cases. There are many manufacturers in New Jersey. The documents and individuals with knowledge are there. State courts can and do cooperate with federal courts. There have been some great experiences with particular federal judges, as Pointer and Bechtle. Not as much experience has developed with consumer-fraud actions, but when they arise there is an attempt to cooperate. One reason why plaintiffs go to state courts is because the Lexecon decision prevents trial in an MDL court.

The following panel member asked what is different about overlapping classes? First, the relationship between the lawyer and client is different from the relationship that courts normally rely on. This has serious consequences — ordinarily the lawyer in a class action has a greater financial stake than the client does. There is a much greater need for judicial oversight, even of settlements. (It may be noted that state courts often have to review and approve settlements of actions involving minors — there is a danger that even parents as representatives may not do the right thing.) Second, class actions are "different in the rules of engagement." A judge's first experience with a class action is quite different from the same judge's second experience. In my state, there is a special assignment system, and intensive training for the specialized judges who handle these cases. The difference between these specialized judges and federal judges "is not troubling."

Yet another panel member observed that the constitutional authorization for nationwide classes in state courts is part of the uniqueness. The Lexecon decision can be overruled by statute, although not by rule. The Advisory Committee has been reluctant to take up the suggestion to develop a specialized mass torts rule because that seems to address a particular substantive area, rubbing against Enabling Act sensitivities. Special mass tort rules, however, are readily within the reach of Congress; the PSLRA is an illustration of a parallel effort. Finally, bringing state actions into federal MDL proceedings for pretrial handling would address the problem of continually relitigating the same issues, such as privilege, in many state courts. One useful approach is to think about creating new procedural rules within the framework of legislation.

The next panel member observed that he generally does not resort to class actions in mass torts. Rule 23 is a tool to resolve existing mass torts; problems arise when it is used to create mass torts. We are trying to make too much of Rule 23. One rule cannot be asked to cover consumer fraud, human rights, securities, and other fields. The overlapping class proposals are "biting off

much more than § 2072 permits." To be sure, there are problems with duplicating class actions in mass torts. The MDL process does not fix the problems; it creates them. Many state actions are filed because the lawyers know a consortium will file a number of federal actions to provoke MDL proceedings that will be controlled by the federal attorney consortium. "MDL is a defense tactic." In one current set of actions, there is an MDL order that stops discovery in state actions, even though discovery has not even begun in the MDL proceeding.

An audience member asked about the seeming sensitivity to substance-specific rules: Rule 9(b) requires special pleading for fraud and mistake, so why not others? A panel member responded that we should be troubled by Rule 9(b).

The panel was then asked to consider the hypothesis that voluntary cooperation can work: the obstacles are "communication, education, and turkeys [referring to those who refuse to cooperate in sensible working arrangements]." Assume a personal injury drug case that involves present injuries, "known future injuries," and medical monitoring. MDL proceedings take more time than many state actions; how does a state judge deal with this?

One panel member stated that a state judge has developed a standard "MDL letter." The letter tells the MDL judge "who I am, what experience I have." It is supported by a web page with all the judge's opinions and orders, and also a hyperlink to the MDL judge. After that the state judge tries to contact the MDL judge to find whether committees have been formed, and whether this will be a cooperative venture. "As communication improves, liaison will get better."

The panel was asked what should happen if the MDL judge asks other courts to defer for a while?

A panelist, speaking from the plaintiff perspective, stated that he tries to persuade the state judge to proceed. Cooperation with the MDL judge takes time, and forces state attorneys to pay a tax for work by MDL counsel that the state attorneys do not want.

A second panelist, also speaking from the plaintiff perspective, said that communication among judges is proper if the purpose is to move the case along. It is not proper if the purpose is to delay proceedings and then to settle all claims.

A third panelist, speaking from a defense perspective, said that coordination has worked well on pure discovery issues in mass torts. These cases will not all be before one court.

The panel then was asked to suppose that there is "an outlier court consistently misbehaving": how do you deal with it on a voluntary basis? (Identification of these courts now proceeds not by states, but by specific counties in different states.)

The first panel response was that the outlier judge is the big risk to the role of state courts as viable contributors to resolving these large-scale actions. A variety of tools can be used by state appellate courts to deal with an outlier judge. Writs can be used "to rein in the judge who goes beyond the pale. Some of our law has been generated in this way. State supreme courts should not be oblivious to these risks." Such extraordinary intervention seems difficult to accomplish under standard precedent, but "new day makes new law." So one state case involved a judge on the brink of retirement "who got taken to the cleaners"; it took three appellate opinions, but eventually the problems were worked out with a better judge. In this field, a more managerial attitude is in order for state courts.

It was observed that an on-line education program is being developed to help state judges.

An audience member asked what is done about "outlier judges on the defense side"? A panel member suggested: "Change venue. Go someplace else." The audience member agreed: there are not that many judges who are favorable to plaintiffs, or even that many who take a balanced approach.

Another panel member suggested that the preclusion approach "will exacerbate forum shopping." Plaintiffs will try harder to get certification from a favorable court before it is denied by a hostile court.

The panel was asked to consider funding and appointment of counsel: should there be an override to compensate lead counsel for their work? Should lead counsel be permitted to sell the fruits of discovery?

The first panel response was that this is a big problem between state and federal courts. Following the Manual for Complex Litigation, interim appointments are properly made in a state action. For the most part, lawyer committees come to the state court already formed. New Jersey discovery is open: you can see it on paying the costs of copies. Assessments are not good. In a recent case that overlapped with a federal action, the question was worked out by permitting discovery to go on in the state action, on terms that avoided assessing lawyers for discovery work they do not use.

Another panel member asserted that multiple state filings are not used to defeat MDL proceedings. A different panel member responded that he has handled a number of cases where this has happened, but the MDL can invite cooperation and discovery. The first panel member observed that in the fen-phen litigation he had been forced to pay an assessment of 9% of the recovery — nearly 30% of his fee — for discovery he did not want.

The panel was asked whether this problem can be solved by the composition of the plaintiffs' committee. A panel member responded yes, but added that the problem is that MDL committees include lawyers who have no individual clients. They should not be on the committee. (But if all MDL cases are different, it's different.) This response was met by the observation that the problem with MDL proceedings is that there is no way to pay anyone. A solution is needed.

The panel was then asked to consider state certification of national classes.

A defense perspective was offered: in a pure class action, someone has to decide who is in charge of deciding whether it is to be a class action. If it is to be a class action, someone has to be in charge of managing it. There is no way to cooperate in managing two parallel classes. We need to eliminate competing classes. It is not persuasive to argue that different states may have different certification standards. When denial rests, for example, on the lack of predominating common issues, "it is close to a due process ruling. This should not be reconsidered" in another court.

The question was reframed: a state judge has to decide the cases presented. If a national class is filed, what do you do? talk to a federal judge?

A panel member replied that there is no one answer for all cases. Lawyers are very creative. "I have not been presented a national class" in state court. When there is overlap, "I pick up the phone." Coordinated discovery is possible, more so as communication is improved. In one recent

case, a single Daubert hearing was held with one presentation that several courts could then use as the basis for each making their own particular rulings.

Another panel member said that in mass torts there is no problem of state courts certifying nationwide classes.

The final advice was that it helps to disaggregate the problem. The Advisory Committee should do this. It is important to understand what kinds of class actions present problems. Securities actions, for example, do not.

Panel 7: Rule-Based Approaches to the Problems and Issues

The moderator for Panel 7 was Professor Steven B. Burbank. The panelists included Professors Daniel J. Meltzer, Linda S. Mullenix, Martin H. Redish, and David L. Shapiro, and Judge Diane P. Wood.

The discussion was opened with the question whether amending the Federal Rules is a feasible approach to duplicating actions. Discussion should assume that the case has been made for change by some vehicle; the question is what vehicle is appropriate.

The first statement was that the conclusions advanced by the Reporter "do not warrant confidence." The legislative history of 1934 and 1988 shows that Congress intended to protect the allocation of power between the Supreme Court and Congress; protection of state interests was not a concern. The Supreme Court has labored under its own mistaken view that Congress meant to protect state interests. "The politics have changed since 1965" when Hanna v. Plumer was decided, as shown in the legislative history of Enabling Act amendments in 1988. These problems should be acknowledged. The memorandum supporting the nonpublished amendments suggests that the Enabling Act delegates to the Supreme Court all the power that Congress has to make procedural rules for federal courts. This is a "tendentious reading" of Supreme Court opinions, and the legislative record is clear that Congress did not want this. In like fashion, the memoranda seek to narrowly confine more recent decisions. The most important of these recent decisions is the Semtek case. The Semtek decision is not distinctive in the way the Reporter suggests; the Court was aware that "rules of preclusion are out of bounds." The original advisory committee refused to write preclusion into Rule 23; in 1946 a later advisory committee took preclusion out of Rule 14; the transcript of the oral argument in the Semtek decision shows that Justice Scalia believes that preclusion is outside § 2072. Attention also should be paid to the Grupo Mexicano case. Neither can a court rule define injunctive powers; the Committee Note to Rule 65 says that § 2283 is not superseded. Supersession of § 2283 is a bad idea.

A panel member asked about the broad interpretation of § 2072 repeated in the Burlington Northern decision? And what of Rule 13(a), which has preclusion consequences, or Rule 15(c) which affects limitations defenses by allowing relation back?

The response was that Rule 15(c) relation back "is a state-law problem"; Rule 15(c) is invalid for federal law purposes as well as state law. And Rule 13(a) does not itself state a rule of preclusion; preclusion arises from federal common law.

The question was pressed: if we think that Rule 15(c) is valid, should we reject the argued approach to § 2072? The response was no.

The first member began the formal panel presentations by observing that he had written an article urging the view that the class itself should be seen as the party and the client. Many of the nonpublished proposals are consistent with these views. Given enthusiasm with Rule 23, and the need for more supervision, it is distressing to be concerned with the certification-preclusion and settlement-preclusion drafts and the Enabling Act, etc. The certification-preclusion draft does not refer directly to preclusion, but the direction not to certify may exceed the Enabling Act even if the Supreme Court has all the power of Congress. Some rights may be enforceable only through a class action. A federal court can refuse to enforce rights this way; it should not be able to tell state courts not to enforce state rights this way. In any event, the policy and politics issues should be addressed by Congress. There is, further, a constitutional problem: binding a class by preclusion is accepted. Refusal to certify may not include a finding that there is adequate representation — and the finding should be subject to attack. Besides, if the federal court says there is not a class, does not the bottom fall out of any foundation for preclusion? The member of the nonclass is a stranger to the litigation. The settlement-preclusion draft does not present a constitutional problem, but the Enabling Act problem is magnified: a state court may have a very different standard of what is fair and adequate.

The second panel member addressed the "lawyer preclusion" alternative draft that would bar a lawyer who had failed to win class certification from seeking certification in any other court, without barring an independent lawyer from seeking certification of the same class. Some background was offered first. First, overlapping classes present a problem that should be addressed by federal courts. They generate inefficiency, waste, and burdens of the sort we seek to avoid by other procedural devices such as supplemental jurisdiction, compulsory counterclaims, and nonmutual preclusion. They also encourage forum shopping, not the accepted choice for a single preferred forum but an invidious sequential forum shopping. And they magnify the in terrorem impact of litigation procedure by the impact of endless class actions; a defendant may win twenty class actions, but then lose everything in the twenty-first action pursuing the same claims. Competing classes also create a reverse-auction problem when they are filed by competing groups of lawyers rather than a coordinated group of friendly lawyers. Second is the question whether rules of procedure should be used to address these problems. The Enabling Act "is plenty broad enough." Burlington Northern gave a thinking person's version of the Sibbach test; a regulation of procedure can have an incidental impact on substantive rights. This is no strait-jacket on the rules process. Within this framework, the lawyer preclusion draft is paradoxically both the most revolutionary and the most narrow of the several alternatives. It is narrow because it recognizes the lawyer as the real party in interest, avoiding any need for concern about precluding the interests of the class itself. But it is a dramatic departure from private rights theory. And it may not be the most effective device.

Another panel member asked the lawyer-preclusion presenter about the effects of the Semtek decision on the understanding of Enabling Act power. The response was that the Semtek opinion "has some troubling off-hand dictum, introduced by 'arguably.'" The opinion should be read as it is presented — it is a construction of Rule 41(b).

The third panel member addressed the nonpublished Rule 23(g), which in various alternatives would authorize a federal court to enjoin a member of a proposed or certified federal class from proceeding in state court. One alternative would allow an injunction against individual state-court actions; the more restricted alternative would allow an injunction only against state-court class actions, and even then might exempt actions limited to a statewide class. Rather to her surprise, she concluded that the Enabling Act does not permit this approach. Over the years, it has seemed that

the Advisory Committee has authority to do pretty much whatever it thinks wise. But this runs up against Enabling Act limits. Why? There is a problem with overlapping classes; there is a problem with reverse-auction settlements; and there are even duplicating mass-tort class actions. But the attempt to codify an exception to the Anti-Injunction Act by court rule transgresses the Enabling Act; this point was made in the Committee Note to the original Rule 65. Congress will not like this attempted supersession. No case supports this approach either directly or by analogy. It is a stretch to suggest that because Rule 23 is procedural, we can do this to support the procedural goals of Rule 23. Nor is the idea of creating a procedural construct — the class — enough. There is a need to do this, but it cannot be done by rulemaking. That is so even though courts have made inroads on the Anti-Injunction Act by issuing injunctions designed to protect settlements. The argument that an Enabling Act rule fits within the Anti-Injunction Act exception for injunctions authorized by act of congress "is intriguing but too arcane." The better approach is to amend the Anti-Injunction Act to authorize these injunctions; the alternative of amending the Enabling Act to authorize the Rules Committees to do this also might work. Potentially workable legislative solutions include expanding the MDL process or removal. The chief impediment to legislation is political. A lawyer panel member this morning said he would oppose such legislation. Why borrow trouble?

The next panel member said that Professor McGovern is right: we should disaggregate in an effort to define which overlapping classes cause problems. For federal courts, the MDL process works. If a federal-question case is filed in state court, it can be removed. So the problem arises when some plaintiffs go to state court on state-law claims, while other plaintiffs take parallel claims to federal court, or — perhaps — when all plaintiffs go to state courts, but file duplicating and overlapping actions. "The state-law claims are the problem." The fact that the problem arises from state-law claims "should be a red flag." How far should a court rule, or a statute, tell state courts not to enforce state law as they wish? Another problem is the scope of state law: commonly the problem is stretching the law of one state out to the rest of the country. The choice-of-law aspects of the Shutts decision "may deserve more development." One part of the overlapping-class drafts suggests deference: the federal court can decide not to certify a class because another court has refused. There is no problem with that approach. And it would happen, although the federal court would need to know why certification was refused. If denial rested on a lack of adequate representation, further consideration in another action is proper. That of itself would be a significant change: as Rule 23 stands, a representative who satisfies its criteria is entitled to certification. A different proposal would adopt a "quasi-Rule 54(b) approach." This is surprising; it sweeps the new Rule 23(f) appeal procedure off the table for these cases. Allowing immediate appeal only from a denial of certification is unbalanced, and would lead to many interlocutory appeals. We should give the Rule 23(f) process a chance to develop. Finally, these approaches are "tinkering at the edges." The more fundamental proposals "are stopped by the Enabling Act and federalism."

This panel member was asked to respond to the observation that the Rule 54(b) analogy is relied on to establish preclusion, not to support appeal. The response was that "this is not clear." Nor can the judgment court determine the preclusion effect of its own judgment.

Another panel member asked about the risk of sweetheart settlement in state court for a national class: the defendant in such a case does not want to remove. Would it be desirable to adopt minimum-diversity removal, including removal by any class member? The response was "I am not in favor of bringing more state-law cases into federal court by minimum diversity."

A different panel member observed that the decision of the judgment court to describe its dismissal as "with" or "without" prejudice has an enormous impact on preclusion. The response was that a second court may well say that the representative plaintiff before it seeking class certification was not a plaintiff in the first court, so there is nothing to support preclusion.

The final panel member addressed the legislative proposals advanced as alternatives to the "adventuresome" proposals for rule amendments. The alternatives include amendment of the Enabling Act, of the Anti-Injunction Act, and of the full faith and credit act. Of the three, the Enabling Act approach should be preferred. "It is hard to be confident of the quality of Congress's work." Nor can drafting a statute anticipate all problems; it will be easier to change a rule of procedure to accommodate unanticipated problems than to change a statute. Should Congress amend the Enabling Act to authorize rulemaking in this area, moreover, political concerns would be reduced. Congress can take an open-ended approach in the Enabling Act. The Enabling Act proposal sketched here would be improved, however, if it incorporated the language set out in the alternative Anti-Injunction Act proposal: it should refer not simply to the ability of a federal court to proceed with a class action, but instead to the ability of a federal court to proceed effectively with a class action. Another possibility would be to combine the two approaches, amending the Anti-Injunction Act to authorize injunctions subject to refinements to be provided by the rules of procedure. Apart from these possibilities, "minimal diversity removal may not happen." If such a removal statute were adopted, it would concentrate suits in federal court and reduce the problems of different state class-action standards. But this approach still does not address collusive settlements, since neither plaintiff nor defendant will remove when they like the deal; only the broad proposal to permit removal by any member of a plaintiff class, or by any defendant, would address that weakness. Even then, removal by individual class members faces limits of knowledge and incentive. "Exclusive federal jurisdiction is a bit much." So if a federal court denies certification, there still could be a second action; as an earlier panel member observed, it may be that due process requires a second chance.

Panel 8: Reflections on the Conference

The moderator for Panel 8 was Professor Arthur R. Miller. The panel members included Professor Paul D. Carrington; Chief Judge Edward R. Becker; Judge Paul V. Niemeyer; Judge Sam C. Pointer, Jr.; and Judge Wiliam W Schwarzer.

The panel was introduced as the "greybeards" of federal civil procedure. "Our job is to help the Committee." Discussion should begin with the proposals actually published for comment; the nonpublished proposals should be deferred for later.

The first panel member thought "there is a lot of sensible stuff here." But caution is indicated for a variety of reasons. Rule 23 should be amended only if there is a real need. There are many cross-fires, and there can be important effects on substantive interests. The rulemaking process is too fragile to bring to bear. The package does not have any "hot button" issues, but caution is indicated. In 1941, Harry Kalven wrote an article about small claims that do not get litigated. That article was the inspiration for the eventual adoption of Rule 23(b)(3), and "that's why we're here." Perhaps the time has come to delete Rule 23(b)(3). (Another panel member interjected: "I can't believe you said that.")

The next panel member recommended that the Committee go forward, "with a couple of exceptions." The proposals have been attacked in ways that "I would not have been anticipated." But they are good. Codifying present good practice is a good thing; not all judges are as adept in managing class actions as the best. But the settlement opt-out may create more problems than it is worth. And the Notes are too long. The Rule 23(h) Note includes material that should be in the Manual. A Note should explain the reason for the rule. The Note can be shortened by cross-referring to the Manual. Lists of "factors" should not be put into the rules; they should be set out in the Note, or not at all. In response to a question about the "destabilizing effects" of rules amendments, this panel member responded: "I don't see them." Evidence Rule 702 was amended to codify the Daubert approach to expert-witness testimony, and it has worked.

The third panel member began by observing that "it is deja vu all over again." The history of the Advisory Committee's efforts deserves review. "History is history. Rule 23 is here." There is little reason to believe that the group that created Rule 23(b)(3) nearly forty years ago understood the power they were unleashing. "It has become a de facto political institution." Attorneys appoint themselves heads of their own little principalities. Some are good, and some bring abuses. How can we control or manage this? The proposals are not remarkable. But to get through the full rulemaking process, "you cannot be remarkable." There are many interests; that makes it difficult to change rules, and even makes it difficult to get disinterested advice. An approach that codifies existing practice leads to a choice for the Advisory Committee: is it to be a leader or a follower? As with the Daubert approach to expert testimony, it is wise to be cautious about engraving current practices in a Rule. Rule 23 has a very sophisticated set of followers. That should be taken into account. As to more specific proposals, the Rule 23(c) proposal leaves some confusion about pre-certification discovery; that should be clarified. The attorney appointment and fee proposals should be collapsed into Rule 23(c). And there should be something that speaks to pre-certification appointment of counsel. The settlement-review proposal seems about right, apart from the settlement opt-out. The settlement opt-out might be reduced to one of the factors considered in reviewing fairness, or perhaps a compromise version could be retained in the rule. Finally, the Notes are "intelligent, complete, but longer than you need after the present process is worked through." There is some substance in them. The list of factors seems to work pretty well. But there are some inconsistencies. The Notes probably "are a little fulsome."

It was observed that "there has been an organic shift in Notes. The Rules also have grown longer." The earlier attitude was to be sparse, to give direction and describe intent. A panel member suggested that it is important to describe the Committee's purpose. Probably it is better to leave out advice on how to exercise the power. It was suggested that the Notes are now attempting to fill a new legislative history role. Another suggestion was that the proposed attorney-fee rule "has a quasi-public aspect." There is good reason to have something in the Rule; the question is how far to get involved in it.

Another panel member thought that the biggest problem is what will happen to the proposals on competing and overlapping classes. If they are going forward to publication, there will be trouble with the already published proposals if kept on a parallel track. The published proposals would not change much. The settlement opt-out would be a change; under present practice, settlement opt-outs are negotiated when appropriate. This proposal fails to distinguish between different forms of class actions. It will "generate a lot of heat. It is a problem." The other proposals are "largely instructive" to lawyers, trial judges, and appellate judges. If the nonpublished proposals are not going forward,

it makes sense to go forward with the published proposals apart from the settlement opt-out. And the three criteria for selecting class counsel should not be in the text of the rule. Focusing on the amount of work an attorney has done will become a reward for racing to do a lot of up-front activity to win the appointment. The Notes are too long, and at times are self-contradictory or contradict something in the Rule That needs attention. Finally, the biggest problem arises from settlement classes. It is "amazing" that the overlapping class materials should have been disseminated, even for discussion in this conference, without also including a settlement-class proposal.

Another panel member agreed that there should be a settlement-class proposal.

One of the earlier panel members observed that some in Congress view Rule 23 as "an end-run around Congress." The settlement class "is an entire agency. Amchem was dead on." This observation met the response that Amchem is consistent with smaller, cohesive settlement classes. "They're here, they exist. They're tough to draft." It remains difficult to figure out what the Amchem opinion means by saying that settlement can be taken into account. The rejoinder to this observation was that the problem with a settlement class is that it cannot be tried, so there is no constraint arising from the alternative prospect of litigation.

An academic panel member suggested that the problem with the current discussion is that it involves too many federal judges. The problems cannot all be solved by judges. Settlement classes "overstrain" the Enabling Act. We used to take seriously the ideas of self-government and jury trial in civil cases. Settlement classes disregard these ideas.

The next panel member expressed general agreement that the proposals make sense. But the Rule 23(e) notes imply that there is such a thing as a settlement class; "not everyone agrees." There is no need to cover everything in Rule 23. There is plenty of law on attorney fees; you do not need a rule. The rest of it is useful in guiding the district judge. The factors in the Notes will help judges. Case management will be improved. The Notes to the 1993 amendments of Rule 26 are a good model; they are not short, but are a good source of guidance. These Notes are too much text, and resource about the law. The law may change. And the Notes also focus on the need for findings; that should be in the Rule, not the Notes. The mandatory settlement opt-out is a bad idea; it almost gets into the substance of the settlement.

An earlier panel member responded that the settlement opt-out is a good idea. Its virtues have been fully stated. It legitimates the decision. Rule 23(b)(3) was written for small-stakes cases. If it is used for cases that involve significant individual claims, class members should know what is at stake before being asked to decide whether to opt out. There should not be an absolute right to opt out. "But a willing seller is needed."

The panel then was asked to address the overlapping class proposals.

The first response was that "This is not doable." It sparks too much reaction, and divides so deeply, that it is "dead from the beginning." The problem, to be sure, is serious: "universal venue" means unlimited repeats, and eventually the plaintiffs will win. One fair day in court should be enough. A rough and quick response may be appropriate; that is what Congress can do. The question of Enabling Act authority is academic; the lawyers who are interested in class actions will fight and defeat the proposals no matter whether they are within Enabling Act authority.

The next response was that these proposals "have put the cooper over the barrel." The statutory approach is proper. But the statutes will not be enacted. But different statutory approaches may be feasible. A choice-of-law statute, federalizing choice of law, is doable. In terms of overlapping classes, we are now down to the "outlier judge, not outlier jurisdictions." A choice-of-law statute would enable more federal classes, reducing these problems.

Professor Miller observed that he had devoted five years to developing the proposals in The American Law Institute Complex Litigation project. It deals with all of these questions, including choice of law.

A panel member noted that the various overlapping class proposals had been created as illustrations to provoke exactly the conversations that have been occurring. They have served the purpose of uncovering the arguments of authority and usefulness that have been made at this conference.

A different panel member noted that a multiparty-multiforum bill has languished in Congress for ten years because agreement on precise terms has proved impossible.

Still another panel member suggested that it might be desirable to have more class actions in state courts if they could be limited to state-wide classes. The nasty problems emerge from nationwide classes in state courts; the Kamilowicz action is a particularly noisome example. A member of the audience was asked to respond to this suggestion. She thought it would interfere with a "universal choice-of-law system." Chapter 6 of the ALI study is good. If we had a uniform choice of law we would be much better off. Often it would limit state courts to state-wide classes. But the state that is the heart of where a product is made should be able to entertain a nationwide class. The difficulty that stands in the way is that "academics defeat reform."

It was observed that we are in a situation in which many people distrust state courts, but will not say it. The Shutts litigation in effect involved a national class action. Part of the opinion addresses choice of law. It was sent back to Kansas courts for guidance, and the state courts decided that all states have the same law as Kansas. Such results inspire cynicism.

A member of the audience responded that a federal court is obliged to look to state law. How can you not let a state court decide what state law is? You have to. And you may be able to extrapolate that to other jurisdictions. Why assume the federal court has the ultimate wisdom to decide the state law that should control? It is overreaching for an MDL judge to assume control over state cases for the purpose of implementing an eventual class settlement. So a state judge acting in a case involving in-state defendants and in-state activities should not be preempted by federal courts for the purpose of implementing a national solution.

A panel member agreed that a state court should be able to apply state law to "state situations," but should not be able to apply its own state law to the entire country. The audience member responded that a state court is better able than a federal court to determine whether its own state law is the same as the state law of twenty other states.

The moderator concluded that the panel had offered no support for the nonpublished rules on overlapping classes. He went on to note that the 1963-1966 period of the Advisory Committee was also the period when state long-arm statutes were emerging. The Committee debated at length the possible adoption of long-arm provisions in Rule 4, focusing on the Enabling Act. One

Committee member had direct back-channel advice from at least two Justices that a rule-based long-arm provision might exceed Enabling Act limits, and that it would be ill-advised overreaching to attempt the task. Later, the Committee again backed off a long-arm provision, adopting only a "100-mile bulge" that was "put in as a sort of test." "The debate today is fascinating."

The Conference concluded with one final expression of thanks to all the panelists and all others who attended.

Respectfully submitted,

Edward H. Cooper, Reporter

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

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

FROM: **Ed Carnes, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **December 3, 2001**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure was originally scheduled to meet on October 29-30, 2001, in Santa Fe, New Mexico. Because of the events of September 11, 2001, the meeting was cancelled.

Nonetheless, the Committee has considered amendments to Rule 6, Grand Jury, and Rule 41, Search Warrants, as a result of Congressional amendments to those rules as a part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (Pub. L. No. 107-56). As noted in the following discussion, the Committee recommends amendments to those two rules in order to avoid problems with the Supesession Clause of the Rules Enabling Act.

The proposed amendments closely conform to the statutory language and no substantive changes are intended. The Committee decided to retain the language of the statutory amendments throughout the draft, unless the format or definitional terms adopted in the comprehensively restyled rules dictated otherwise. The Committee concluded that a deviation from the statutory language, particularly without the benefit of public comment, would be unwise.

II. Action Items.

A. In General

On October 26, 2001, President Bush signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The Act amended two rules of Criminal Procedure:

- Section 203 of the Act amended Rule 6 to permit sharing grand-jury information associated with terrorism with specific law enforcement entities. The government must notify the court of any disclosures and the identity of the department or agency to which the disclosure was made.

- Section 219 amended Rule 41 to permit a magistrate judge to issue a search warrant for property outside the district in cases involving terrorism.

Those amendments took effect immediately and are not affected by the Sunset Provisions in Section 224 of the Act. The pertinent portions of the Act are attached to this report.

B. The Need to "Restyle" the Congressional Amendments; Avoiding the Supersession Problem.

Under the Rules Enabling Act, 28 U.S.C. § 2072(b), the pending "style" changes to the Criminal Rules—which have been approved by the Judicial Conference and will presumably be approved by the Supreme Court next Spring—could create supersession problems when the restyled rules take effect on December 1, 2002, because they will have a later effective date than the Act. The Committee believes that it needs to incorporate the changes the recent legislation mandates for Rules 6 and 41, before the Supreme Court adopts the restylized rules, in order to avoid any confusion and possible supersession problems.

To implement these changes in a timely manner and avoid supersession problems, the Chair asked the Rule 6 Subcommittee and Rule 41 Subcommittee to consider style changes to the Congressional language that would conform that language to the global "style" changes to the Criminal Rules. Those subcommittees considered a draft prepared by the Reporter and the Chair. In addition, the Standing Committee's Style Subcommittee provided suggested changes. A revised draft was then submitted to the full Committee for its consideration.

In accordance with established procedures, the Committee recommends that the Standing Committee not publish the proposed changes for publication and comment by the public, because the changes will simply conform the rules to recent legislation. Instead, the Committee recommends that the Standing Committee forward the proposed changes to Rules 6 and 41 to the Judicial Conference, which in turn can forward them to the Supreme Court with a recommendation that they be approved and included in the May 2002 package of the restyled rules. Hopefully, the revised Rules 6 and 41 and accompanying Committee Notes can be blended in with the existing "style" package.

The proposed drafts, *infra*, include some restructuring and renumbering of the legislative amendments to fit within the approved style package versions of Rules 6 and 41, already approved by the Judicial Conference.

C. Amendments to Rule 6—Grand Jury.

The amendments to Rule 6 permit the government to share certain grand jury information involving intelligence information with other federal officials. *See* Section 203 of the Act.

Although the Act itself does not say so explicitly, the Committee has assumed that Congress meant that an attorney for the government would do the disclosing that Rule 6 authorizes to other officials. For that reason, the new provision adopted by Congress was inserted as a new paragraph (D) to follow the existing paragraph (C) that relates to attorneys for the government disclosing information to other grand juries.

It is not clear in the legislative amendment to Rule 6 whether the attorney for the government is to provide notice of such disclosures to the court that convened the grand jury or to some other court. In the end, the Committee believed that it is better to include language that explicitly indicates that the report is to be made to the court in the district where the grand jury was convened. That tracks language already approved in Rule 6.

The Rule 6 Subcommittee generally proposed that the Committee follow the legislative language as closely as possible, even if it was not entirely clear what Congress meant by a particular term or phrase. Thus, the Committee did not adopt all of the style changes recommended by the Style Subcommittee.

The proposed amendments are at Appendix A to this memo.

Recommendation: The Advisory Committee recommends that the Standing Committee approve the proposed amendments to Rule 6 and forward them, without public comment, to the Judicial Conference for approval.

D. Rule 41—Search Warrant.

The amendment to Rule 41 permits magistrate judges to issue search warrants for property or persons outside their districts if the investigation involves terrorist activities within that district. *See* Section 219 of the Act, attached.

Although it is not explicitly stated in the legislative amendment, the Committee has assumed that the amendment to Rule 41 does not permit magistrate judges to issue warrants to be executed outside the United States. It simply extends the magistrate's authority to other districts.

To be consistent with other provisions in Rule 41, the Committee has recommended that the amendment include reference to the fact that magistrate judges must otherwise have the authority to issue search warrants in their district, and thus be consistent with the restyled version of Rule 41.

Finally, to be consistent with the recently restyled version of Rule 41, the Committee dropped the word "search" from the amendment because the only type of warrant covered in that rule is a search warrant.

Recommendation: The Advisory Committee recommends that the Standing Committee approve the proposed amendments to Rule 41 and forward them, without public comment, to the Judicial Conference for approval.

The proposed amendments to Rule 41 are at Appendix A of this memo.

III. Information Items

A. Other Criminal Rules That May be Affected by the USA PATRIOT ACT.

Other rules-related sections in the Act also need to be studied and may require conforming amendments. But these provisions do not raise supersession problems and will be considered by the Committee in the regular course of the rulemaking process.

- Section 213 of the Act amends 18 U.S.C. § 3103a authorizing the delay of giving notice of an executed search in all criminal cases ("sneak and peek").

- Section 216 amends chapter 206 of title 18, Pen Registers and Trap and Trace Devices, and expands the use of these devices in all criminal cases. (Section

214 amends title 50 involving the use of these devices in foreign intelligence surveillance.)

- Section 412 amends title 8 dealing with the Immigration and Nationality Act and sets out special provisions governing habeas corpus petitions of aliens suspected of terrorism.

These sections make extensive changes to substantive law, which will require careful study by the Committee.

B. Restyling of "Habeas Corpus" Rules.

In the process of proposing global amendments to the Criminal Rules, the Committee for the last couple of years has also considered amendments to selected rules in the Rules Governing §§ 2254 and 2255 Proceedings (the habeas corpus rules). As noted in previous reports to the Standing Committee, those proposed changes resulted from a review to determine if changes were required as a result of the passage of the Antiterrorism and Effective Death Penalty Act, which amended a number of applicable federal statutes.

In the process of reviewing those rules, the Committee concluded that it would be beneficial to consider global style changes to the habeas rules. For example, as observed at the June Standing Committee meeting, the current habeas rules are not gender neutral. At its October 2000, meeting the Committee discussed the possibility of planning and implementing a restyling of the habeas rules. At its January 2001 meeting, the Standing Committee approved the restyling project for those rules. A subcommittee is currently considering proposed drafts from the Style Subcommittee. Any restyled rules would not be presented to the Standing Committee until at least June 2002.

Attachments

Appendix A: Proposed Amendments to Rules 6 and 41, and Committee Notes
Appendix B: Pertinent Sections of Restyled Rules 6 and 41, forwarded to Supreme Court
Appendix C: Pertinent Sections of USA PATRIOT ACT

APPENDIX A

Rule 6. The Grand Jury[1]

* * * * *

(e) Recording and Disclosing the Proceedings.

* * * * *

(3) Exceptions.

* * * * *

(D) An attorney for the government may disclose any grand jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties.

(i) Any federal official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened

stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent;
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to —

[1] New material is underlined. Material to be deleted is lined through.

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

~~(D)~~(E) The court may authorize disclosure —at a time, in a manner, and subject to any other conditions that it directs —of a grand-jury matter:

(i) preliminary to or in connection with a judicial proceeding;

* * * * *

~~(E)~~(F) A petition to disclose a grand jury-matter under Rule ~~6(e)(3)(D)(i)~~ 6(e)(3)(E)(i) must be filed in the district where the grand jury convened....

* * * * *

~~(F)~~(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those

persons identified in Rule ~~6(e)(3)(E)~~ 6(e)(3)(F) a reasonable opportunity to appear and be heard.

* * * * *

COMMITTEE NOTE

To be inserted in the existing Note for Rule 6:

Rule 6(e)(3)(D) is new and reflects changes made to Rule 6 in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The new provision permits an attorney for the government to disclose grand jury matters involving foreign intelligence or counterintelligence to other Federal officials, in order to assist those officials in performing their duties. Under Rule 6(e)(3)(D)(i), the federal official receiving the information may only use the information as necessary and may be otherwise limited in making further disclosures. Any disclosures made under this provision must be reported under seal, within a reasonable time, to the court. The term "foreign intelligence information" is defined in Rule 6(e)(3)(D)(iii).

[The Committee Notes for all subsequent sections in Rule 6 will have to be redesignated]

Rule 41. Search and Seizure

* * * * *

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331)—having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

* * * * *

COMMITTEE NOTE

To be inserted in the existing Note to Rule 41:

Rule 41(b)(3) is a new provision that incorporates a congressional amendment to Rule 41 as a part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The provision explicitly addresses the authority of a magistrate judge to issue a search warrant in an investigation of domestic or international terrorism. As long as the magistrate judge has authority in a district where activities related to terrorism may have occurred, the magistrate judge may issue a warrant for persons or property not only within the district, but outside the district as well.

APPENDIX B

III. INDICTMENT AND INFORMATION	TITLE III. THE GRAND JURY, THE INDICTMENT, AND THE INFORMATION
Rule 6. The Grand Jury	**Rule 6. The Grand Jury**
(a) Summoning Grand Juries. **(1) Generally.** The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement. **(2) Alternate Jurors.** The court may direct that alternate jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.	**(a) Summoning a Grand Jury.** (1) ***In General.*** When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement. (2) ***Alternate Jurors.*** When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.
(b) Objections to Grand Jury and to Grand Jurors. **(1) Challenges.** The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court. **(2) Motion to Dismiss.** A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.	**(b) Objection to the Grand Jury or to a Grand Juror.** (1) ***Challenges.*** Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified. (2) ***Motion to Dismiss an Indictment.*** A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(3) Exceptions. (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to— (i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law. (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.	(3) *Exceptions.* (A) Disclosure of a grand-jury matter — other than the grand jury's deliberations or any grand juror's vote — may be made to: (i) an attorney for the government for use in performing that attorney's duty; (ii) any government personnel — including those of a state or state subdivision or of an Indian tribe — that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or (iii) a person authorized by 18 U.S.C. § 3322. (B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made— (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.	(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury. (D) The court may authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding; (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; (iii) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law; or (iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.	(E) A petition to disclose a grand-jury matter under Rule 6(e)(3)(D)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte — as it may be when the government is the petitioner — the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to: (i) an attorney for the government; (ii) the parties to the judicial proceeding; and (iii) any other person whom the court may designate.
(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.	(F) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(E) a reasonable opportunity to appear and be heard.

Rule 41. Search and Seizure	Rule 41. Search and Seizure
(a) Authority to Issue Warrant. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.	**(a) Scope and Definitions.** **(1)** ***Scope.*** This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.
	(2) ***Definitions.*** The following definitions apply under this rule: (A) "Property" includes documents, books, papers, any other tangible objects, and information. (B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time. (C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

	(b) **Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government: **(1)** a magistrate judge with authority in the district — or if none is reasonably available, a judge of a state court of record in the district — has authority to issue a warrant to search for and seize a person or property located within the district; and **(2)** a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed.
(b) Property or Persons Which May be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of the crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.	(c) **Persons or Property Subject to Search or Seizure.** A warrant may be issued for any of the following: **(1)** evidence of a crime; **(2)** contraband, fruits of crime, or other items illegally possessed; **(3)** property designed for use, intended for use, or used in committing a crime; or **(4)** a person to be arrested or a person who is unlawfully restrained.

APPENDIX C

H. R. 3162

One Hundred Seventh Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Wednesday, the third day of January, two thousand and one

An Act

To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

"(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes."; and

(2) by inserting at the end the following:

"(c) CLASSIFIED INFORMATION.—In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex parte and in camera. This subsection does not confer or imply any right to judicial review.".

TITLE II—ENHANCED SURVEILLANCE PROCEDURES

SEC. 201. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO TERRORISM.

Section 2516(1) of title 18, United States Code, is amended—

(1) by redesignating paragraph (p), as so redesignated by section 434(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104–132; 110 Stat. 1274), as paragraph (r); and

(2) by inserting after paragraph (p), as so redesignated by section 201(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104–208; 110 Stat. 3009–565), the following new paragraph:

"(q) any criminal violation of section 229 (relating to chemical weapons); or sections 2332, 2332a, 2332b, 2332d, 2339A, or 2339B of this title (relating to terrorism); or".

SEC. 202. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO COMPUTER FRAUD AND ABUSE OFFENSES.

Section 2516(1)(c) of title 18, United States Code, is amended by striking "and section 1341 (relating to mail fraud)," and inserting "section 1341 (relating to mail fraud), a felony violation of section 1030 (relating to computer fraud and abuse),".

SEC. 203. AUTHORITY TO SHARE CRIMINAL INVESTIGATIVE INFORMATION.

(a) AUTHORITY TO SHARE GRAND JURY INFORMATION.—

(1) IN GENERAL.—Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure is amended to read as follows:

"(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(I) when so directed by a court preliminarily to or in connection with a judicial proceeding;

"(II) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

"(III) when the disclosure is made by an attorney for the government to another Federal grand jury;

"(IV) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such law; or

"(V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.

"(ii) If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

"(iii) Any Federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

"(iv) In clause (i)(V) of this subparagraph, the term 'foreign intelligence information' means—

"(I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

"(aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

"(cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of foreign power; or

"(II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

"(aa) the national defense or the security of the United States; or

"(bb) the conduct of the foreign affairs of the United States.".

(2) CONFORMING AMENDMENT.—Rule 6(e)(3)(D) of the Federal Rules of Criminal Procedure is amended by striking "(e)(3)(C)(i)" and inserting "(e)(3)(C)(i)(I)".

(b) AUTHORITY TO SHARE ELECTRONIC, WIRE, AND ORAL INTERCEPTION INFORMATION.—

(1) LAW ENFORCEMENT.—Section 2517 of title 18, United States Code, is amended by inserting at the end the following:

"(6) Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that such contents include foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in subsection (19) of section 2510 of this title), to assist the official who is to receive that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.".

(2) DEFINITION.—Section 2510 of title 18, United States Code, is amended by—

(A) in paragraph (17), by striking "and" after the semicolon;

(B) in paragraph (18), by striking the period and inserting "; and"; and

(C) by inserting at the end the following:

"(19) 'foreign intelligence information' means—

"(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

"(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

"(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

"(B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

"(i) the national defense or the security of the United States; or

"(ii) the conduct of the foreign affairs of the United States.".

(c) PROCEDURES.—The Attorney General shall establish procedures for the disclosure of information pursuant to section 2517(6)

and Rule 6(e)(3)(C)(i)(V) of the Federal Rules of Criminal Procedure that identifies a United States person, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801)).

(d) FOREIGN INTELLIGENCE INFORMATION.—

(1) IN GENERAL.—Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

(2) DEFINITION.—In this subsection, the term "foreign intelligence information" means—

(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

(i) the national defense or the security of the United States; or

(ii) the conduct of the foreign affairs of the United States.

SEC. 204. CLARIFICATION OF INTELLIGENCE EXCEPTIONS FROM LIMITATIONS ON INTERCEPTION AND DISCLOSURE OF WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS.

Section 2511(2)(f) of title 18, United States Code, is amended—

(1) by striking "this chapter or chapter 121" and inserting "this chapter or chapter 121 or 206 of this title"; and

(2) by striking "wire and oral" and inserting "wire, oral, and electronic".

SEC. 205. EMPLOYMENT OF TRANSLATORS BY THE FEDERAL BUREAU OF INVESTIGATION.

(a) AUTHORITY.—The Director of the Federal Bureau of Investigation is authorized to expedite the employment of personnel as translators to support counterterrorism investigations and operations without regard to applicable Federal personnel requirements and limitations.

(b) SECURITY REQUIREMENTS.—The Director of the Federal Bureau of Investigation shall establish such security requirements as are necessary for the personnel employed as translators under subsection (a).

(1) in section 2510—

(A) in paragraph (18), by striking "and" at the end;

(B) in paragraph (19), by striking the period and inserting a semicolon; and

(C) by inserting after paragraph (19) the following:

"(20) 'protected computer' has the meaning set forth in section 1030; and

"(21) 'computer trespasser'—

"(A) means a person who accesses a protected computer without authorization and thus has no reasonable expectation of privacy in any communication transmitted to, through, or from the protected computer; and

"(B) does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer."; and

(2) in section 2511(2), by inserting at the end the following:

"(i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if—

"(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;

"(II) the person acting under color of law is lawfully engaged in an investigation;

"(III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and

"(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.".

SEC. 218. FOREIGN INTELLIGENCE INFORMATION.

Sections 104(a)(7)(B) and section 303(a)(7)(B) (50 U.S.C. 1804(a)(7)(B) and 1823(a)(7)(B)) of the Foreign Intelligence Surveillance Act of 1978 are each amended by striking "the purpose" and inserting "a significant purpose".

SEC. 219. SINGLE-JURISDICTION SEARCH WARRANTS FOR TERRORISM.

Rule 41(a) of the Federal Rules of Criminal Procedure is amended by inserting after "executed" the following: "and (3) in an investigation of domestic terrorism or international terrorism (as defined in section 2331 of title 18, United States Code), by a Federal magistrate judge in any district in which activities related to the terrorism may have occurred, for a search of property or for a person within or outside the district".

SEC. 220. NATIONWIDE SERVICE OF SEARCH WARRANTS FOR ELECTRONIC EVIDENCE.

(a) IN GENERAL.—Chapter 121 of title 18, United States Code, is amended—

(1) in section 2703, by striking "under the Federal Rules of Criminal Procedure" every place it appears and inserting "using the procedures described in the Federal Rules of

"(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes."; and

(2) by inserting at the end the following:

"(c) CLASSIFIED INFORMATION.—In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex parte and in camera. This subsection does not confer or imply any right to judicial review.".

TITLE II—ENHANCED SURVEILLANCE PROCEDURES

SEC. 201. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO TERRORISM.

Section 2516(1) of title 18, United States Code, is amended—

(1) by redesignating paragraph (p), as so redesignated by section 434(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104–132; 110 Stat. 1274), as paragraph (r); and

(2) by inserting after paragraph (p), as so redesignated by section 201(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104–208; 110 Stat. 3009–565), the following new paragraph:

"(q) any criminal violation of section 229 (relating to chemical weapons); or sections 2332, 2332a, 2332b, 2332d, 2339A, or 2339B of this title (relating to terrorism); or".

SEC. 202. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO COMPUTER FRAUD AND ABUSE OFFENSES.

Section 2516(1)(c) of title 18, United States Code, is amended by striking "and section 1341 (relating to mail fraud)," and inserting "section 1341 (relating to mail fraud), a felony violation of section 1030 (relating to computer fraud and abuse),".

SEC. 203. AUTHORITY TO SHARE CRIMINAL INVESTIGATIVE INFORMATION.

(a) AUTHORITY TO SHARE GRAND JURY INFORMATION.—

(1) IN GENERAL.—Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure is amended to read as follows:

"(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(I) when so directed by a court preliminarily to or in connection with a judicial proceeding;

"(II) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

"(III) when the disclosure is made by an attorney for the government to another Federal grand jury;

"(IV) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such law; or

"(V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.

"(ii) If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

"(iii) Any Federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

"(iv) In clause (i)(V) of this subparagraph, the term 'foreign intelligence information' means—

"(I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

"(aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

"(cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of foreign power; or

"(II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

"(aa) the national defense or the security of the United States; or

"(bb) the conduct of the foreign affairs of the United States.".

(2) CONFORMING AMENDMENT.—Rule 6(e)(3)(D) of the Federal Rules of Criminal Procedure is amended by striking "(e)(3)(C)(i)" and inserting "(e)(3)(C)(i)(I)".

(b) AUTHORITY TO SHARE ELECTRONIC, WIRE, AND ORAL INTERCEPTION INFORMATION.—

(1) LAW ENFORCEMENT.—Section 2517 of title 18, United States Code, is amended by inserting at the end the following:

"(6) Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that such contents include foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in subsection (19) of section 2510 of this title), to assist the official who is to receive that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.".

(2) DEFINITION.—Section 2510 of title 18, United States Code, is amended by—

(A) in paragraph (17), by striking "and" after the semicolon;

(B) in paragraph (18), by striking the period and inserting "; and"; and

(C) by inserting at the end the following:

"(19) 'foreign intelligence information' means—

"(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

"(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

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(c) PROCEDURES.—The Attorney General shall establish procedures for the disclosure of information pursuant to section 2517(6)

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SEC. 220. NATIONWIDE SERVICE OF SEARCH WARRANTS FOR ELECTRONIC EVIDENCE.

(a) IN GENERAL.—Chapter 121 of title 18, United States Code, is amended—

(1) in section 2703, by striking "under the Federal Rules of Criminal Procedure" every place it appears and inserting "using the procedures described in the Federal Rules of

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

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CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

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

FROM: Honorable Milton I. Shadur, Chair
Advisory Committee on Evidence Rules

DATE: December 1, 2001

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules did not hold a Fall 2001 meeting. The Advisory Committee has proposed amendments to Evidence Rules 608(b) and 804(b)(3), and these proposals have been released for public comment. The Advisory Committee is also working on two long-term projects, but those did not require immediate consideration by the Committee at a Fall meeting. This memorandum reports on the status of the proposed amendments and the long-term projects.

II. Action Items

No Action Items

III. Information Items

A. Proposed Amendments Released for Public Comment

At its June 2001 meeting the Standing Committee authorized the proposed amendments to two Evidence Rules–Rules 608(b) and 804(b)(3)–to be released for public comment.

The proposed amendment to Rule 608(b) would clarify that the Rule's preclusion of extrinsic evidence applies only if it is offered to prove the witness' character for truthfulness. Extrinsic proof when offered for any other form of impeachment, such as for bias or prior inconsistent statement, would remain governed by the balancing test of Rule 403. The proposed amendment refines the overbroad language of the existing rule, thereby clarifying the original intent of the drafters.

The proposed amendment to Rule 804(b)(3) would provide that a declaration against penal interest is admissible only if corroborating circumstances clearly indicate the trustworthiness of the statement. Currently the Rule requires a showing of corroborating circumstances if the statement is offered by a criminal defendant, but the Rule does not impose that requirement on statements proffered by the government in criminal cases or by any party in civil cases. The proposed amendment to Rule 804(b)(3) extends the corroborating circumstances requirement to all proffering parties, rendering it consistent with the vast majority of case law that reads an across-the-board corroborating circumstances requirement into the Rule. The Advisory Committee has concluded that the current one-way corroboration requirement has never been justified and that it resulted from an oversight during the legislative process. A unitary approach to the admissibility of declarations against penal interest would result in both fairness and efficiency in the administration of the Rule.

At its last meeting, the Standing Committee approved the release of both proposed amendments for public comments, but several members of the Committee expressed some concern about the proposed amendment to Rule 804(b)(3). These members suggested that the Advisory Committee consider, and seek input on, some specific questions with regard to the operation of the existing Rule and the impact of the proposed amendment. Some of the questions raised were:

1. the practical effect that a corroborating circumstances requirement would have on the government's ability to admit declarations against penal interest;

2. whether declarations against penal interest that exculpate the accused are sufficiently distinguishable from inculpatory statements so as to justify the application of a corroborating circumstances requirement to the former and not to the latter; and

3. the interaction between a corroborating circumstances requirement and the accused's right to confrontation.

The Advisory Committee is currently considering these questions and others. The request for public comment on the proposed Rule change was specifically designed to obtain information that would address the Standing Committee's questions and possible concerns about the amendment. Specific questions on which the Advisory Committee sought public comment are these:

1. In terms of trustworthiness, is there a difference between statements against penal interest when offered to exculpate an accused and such statements when offered to inculpate the accused? Are the circumstances under which exculpatory statements are or may be made different from those surrounding inculpatory statements in such a way as to justify, as a

bright-line rule of law, the asymmetry of the corroborating circumstances requirement in the current Rule?

2. Are there other examples of rules, evidentiary or otherwise, that are asymmetrical in the government's favor? If so, what is their justification?

3. Are there examples of government-proffered statements that have satisfied or would satisfy the against-penal-interest requirement of Rule 804(b)(3) but have not satisfied or would not satisfy a corroborating circumstances requirement?

4. Would the corroborating circumstances requirement add anything to the Rule that is not already required by the Confrontation Clause?

5. Several states, e.g., Kentucky and Texas, have written a two-way corroborating circumstances requirement into the state version of Rule 804(b)(3). How has the Rule operated in practice in those states? Have prosecutors been unduly burdened by the Rule?

The Advisory Committee is currently collecting public comments on both proposed amendments. Comments received to this point are highly supportive of both proposals. A public hearing on the proposed amendments is scheduled for January 23 in Washington, D.C.

B. Privileges

The Evidence Rules Committee continues to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. This project will not necessarily result in proposed amendments, however. The Subcommittee on Privileges is working on draft rules for consideration by the Advisory Committee at the April, 2002 meeting. Those rules would codify: 1) the lawyer-client privilege; 2) an interspousal privilege for confidential communications; 3) rules on waiver; and 4) a catch-all provision similar to current Rule 501, that would permit further development of privileges. The subcommittee on privileges is also working on proposals that would codify the psychotherapist-patient privilege and the governmental privileges.

C. Long-Term Issues

At its April 2002 meeting, the Evidence Rules Committee intends to consider three sources of information in order to determine whether there are any serious problems with the current Evidence Rules that might warrant a proposed amendment. Those sources are: 1. Rule changes proposed in legal scholarship; 2. federal case law that substantially diverges from the text of an Evidence Rule; and 3. significant circuit splits on the meaning of an Evidence Rule.

While considering these sources for suggested amendments, the Evidence Rules Committee retains its long-held view that amendments to the Evidence Rules are costly and should not be proffered simply for the sake of change. The Committee has always taken and will continue to take

a conservative approach on the question of Rule amendments. Amendments to an Evidence Rule will not be proposed unless the existing Rule is causing significant confusion, substantial dispute or unfair results.

BOSTON COLLEGE

THE J. DONALD MONAN, S.J. UNIVERSITY PROFESSOR
LAW SCHOOL

Memorandum

To: Committee on Rules of Practice and Procedure (Standing Committee)

From: Daniel R. Coquillette, Reporter

Date: December 11, 2001

Re: Attorney Conduct Sub-Committee

Attorney Conduct

Behind this tab you will find an excellent report by John K. Rabiej and key examples of the fairly intense Congressional activity in this area during the fall. This activity included proposed exemptions for federal government attorneys from certain federal local rules or state standards. These exemptions were included in the various incarnations of the Anti-terrorist legislation, such as Senate § 1510, section 501 (2001), the "USA Act," or Senate Amendment 1968 to House H.R. 2506, section 530 B(a), the "Federal Investigation Enhancement Act of 2001." So far, none of these measures have survived Senate-House negotiations. Some would call for prompt action by the Judicial Conference.

Given the uncertainty, and the turnover in the Department of Justice, the Sub-Committee on Attorney Conduct has not met. It will doubtless be activated at an appropriate time in the future.

As usual, we are most grateful to John K. Rabiej for his careful monitoring of the legislative situation.

Daniel R. Coquillette
Reporter

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JOHN K. RABIEJ
Chief
Rules Committee Support Office

December 10, 2001

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: *Attorney Conduct Rules*

The American Bar Association's Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000") published for comment in November 2000 a comprehensive revision of the rules governing professional conduct, including Rule 4.2 (Communication with Person Represented by Counsel). The full ABA began its deliberations on the report in August 2001. Meanwhile in October 2001 Congress considered, but ultimately rejected, including in the recently enacted USA PATRIOT ACT a provision proposed by Senators Leahy and Hatch requiring the Judicial Conference to recommend rule changes addressing the Rule 4.2 issue. These developments are briefly discussed and pertinent materials are attached.

American Bar Association

At its August 2001 meeting, the American Bar Association began taking action on the "Ethics 2000" report, and it approved with some revision the report's Preamble through Rule 1.10. The entire report, including all recommendations, will be voted on only after all the rules have been considered.

A copy of the report's proposed Rule 4.2 with commentary is attached. (The attached material identifies changes made to the proposal after the November 2000 publication in light of comment received by the Ethics 2000 Commission.) Also attached are amendments to Rule 4.2 proposed by Commissioner Lawrence J. Fox. He recommends that the provision permitting contact with persons represented by counsel on a "court order" be deleted. He also suggests two revisions to the rule's commentary. The ABA will consider proposed Rule 4.2, together with Larry Fox's recommendations, at its upcoming midyear or annual meeting.

Congress

On September 19, 2001, Senator Patrick Leahy along with Senator Orrin Hatch introduced the "Professional Standards for Government Attorneys Act of 2001" (S. 1437). Similar to bills introduced in earlier congressional sessions by Senator Leahy, S. 1437 contains

several provisions requiring the Judicial Conference to report and recommend rule changes governing the conduct of government attorneys. It also contains a choice-of-law section governing the standards of professional responsibility that apply to a government attorney. Moreover, it also permits a government attorney to provide legal advice in conducting covert activities "even though such activities may require the use of deceit or misrepresentation."

On October 11, 2001, the Senate passed an anti-terrorist bill (Uniting and Strengthening America Act — S. 1510). Section 501 of the bill contained the provisions of Senator Leahy's S. 1437, with the exception that the choice-of-law provisions were omitted and the covert activities provision was modified to allow a government lawyer to participate in undercover activities "even though such activities may require the use of deceit or misrepresentation, *where such activities are consistent with Federal law*." (italics added)

On October 12, 2001, the House passed its anti-terrorism bill (H.R. 2975), which excluded altogether the attorney-conduct rule provision. Prior to the House-Senate conference to reconcile the differences between the two bills, Congressmen Hyde, Delahunt, and Murtha wrote to the Senate leadership expressing their serious concerns with the attorney-conduct rules provision. Congressmen Murtha and Delahunt wrote separately to Senator Leahy expressing their concerns. Both letters are attached.

On October 26, 2001, the President signed the USA PATRIOT ACT. (Pub. Law No. 107-56.) The enacted legislation does not contain the attorney-conduct rules provisions, which was deleted during the House-Senate conference. In explaining the final conference agreement, Congressman Sensenbrenner, chair of the House Judiciary Committee, acknowledged that it did not include the Senate's attorney-conduct rules provision. But Congressman Sensenbrenner "agreed to review this subject in a different context." (Congressional Record H7196 (October 23, 2001).)

John K. Rabiej

Attachments

get this done tomorrow or the next day, still probably a week.

So I urge my colleagues on both sides, let us work together. An example has been set, and I am proud of what the Senate has done. I am proud of what the committee has done and is willing to do. I hope the rest of us will take advantage of the opportunity to follow that leadership.

I wanted to get that on the record. I will not object, Madam President.

The PRESIDING OFFICER. Is there objection?

Mr. FEINGOLD. Madam President, reserving the right to object.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. We can certainly continue these discussions, but I want to say it is certainly not the case that I have not shared the concerns I have, I would say, concerning the amendments we have talked about, the actual areas, and shared them with the leadership. We certainly could have the text of all of these amendments by 10 tomorrow morning. In other words, the language would be available before the bill even comes up. That strikes me as sufficient notice usually in the Senate.

I do not think it is a fair complaint to say we cannot agree to these reasonable requests simply because of the extra language written out at this point.

Madam President, at this point, unless other Members wish to address this issue, I will object.

The PRESIDING OFFICER. Objection is heard.

Mr. DASCHLE. I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Madam President, if the Senator from Mississippi seeks recognition, obviously I yield to the distinguished Senator.

Mr. LOTT. Madam President, I was hoping to have a brief opportunity to speak about the magnificent leadership of Senator Mike Mansfield, but I will be glad to withhold on that.

Mr. LEAHY. I will say to the minority leader, Mike Mansfield is a man who was my mentor and I will be speaking about him tomorrow after the memorial service. But I say to the distinguished leader, he was my leader when I came to the Senate, and I think he probably had as much involvement in teaching me how to be a Senator as anybody. I will speak further on that at another time.

I hope Senators would work with the distinguished majority leader and the distinguished Republican leader to help us schedule this legislation. I have tried to be accommodating, getting up at 3 o'clock this morning in Vermont to try to get back.

Do I love this bill? Of course I don't love this bill, Madam President. But neither does the distinguished Republican leader. Neither does the distinguished ranking member. There is nobody in here who does. It is impossible to craft a bill of this nature that everybody is going to like.

Does it protect us for all time from terrorism? Of course it does not. As I said earlier, I suspect we had information prior to September 11 in our files at the Justice Department that might have led to the apprehension and the stopping of the terrorists. That was information and intelligence that was acquired properly under the current laws. Will this protect us by itself? No. Will it give us some tools we don't have? Yes. This can be done in such a way that we ask ourselves, are we willing to try some of this for a while? Put constitutional limitations.

I think the distinguished Senator from Mississippi knows I am very truthful when I say I will have some very serious and, I would hope, bipartisan oversight hearings of abuse of the law as we go along. This is not a liberal or conservative piece of legislation. We have liberals and conservatives and moderates who have areas of concerns. We all do because we protect and respect our privacy. I come from a State where privacy is paramount to everybody. It is one thing that unites every one of us, no matter our political background.

But we cannot tell what is going to be the final bill until we consider it. We have to pass something out of the Senate. The House has to pass something. They have been working extraordinarily hard, Madam President, both Chairman SENSENBRENNER and Ranking Member CONYERS. Why not see what we can come up with? The committee of conference will be the final package. If I don't like the final package, I will be the first to vote against it. But I suspect we will come up with something. We will probably have some very late nights that will be worthwhile.

I thank my friend from Mississippi and my friend from South Dakota for trying to bring this bill up. I will stand ready. I don't have to leave at 3 o'clock anymore this week to be here. I am here. Although I might say, if anybody could know how absolutely beautiful it is in Vermont at this time of year, with the best foliage we have had in 25 years, maybe we should move the Senate up there. It depends on the good graces of my friend from Mississippi.

I yield the floor.

Mr. LOTT. I thank Senator LEAHY for his work. We have clearly come up with a superior bill to the one being moved in the House, but the House is also moving forward. I know Senator SMITH of New Hampshire has an amendment he wanted to offer, too. Every Senator has the right to object. We should not be critical of a Senator exercising that right.

But I think there is urgency on this legislation. I hope, I say to Senator LEAHY, we will continue to work to see if we can clear this bill and get it considered tomorrow. If we don't, there is a danger that the aviation security bill will tangle up the rest of the week and we might not be able to get to this bill until next week.

I think the American people have appreciated the way we have worked together, shoulder to shoulder, regardless of party. We are all feeling a great need to pull together with patriotism while protecting fundamental rights. I hope we can continue to do that. We will be glad to work with Senators LEAHY and DASCHLE to see that happens.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. I thank the Chair.

(The remarks of Mr. BROWNBACK pertaining to the introduction of S. 1521 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. BROWNBACK. I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant bill clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Ms. CANTWELL). Without objection, it is so ordered.

MORNING BUSINESS

Mr. REID. Madam President, I ask unanimous consent that there be a period of morning business with Senators permitted to speak for up to 5 minutes each.

The PRESIDING OFFICER Without objection, it is so ordered.

THE UNITING AND STRENGTHENING AMERICA ACT OF 2001

Mr. LEAHY. Madam President, last Thursday, October 4, I was pleased to introduce with the Majority Leader, Senator DASCHLE, and the Chairmen of the Banking and Intelligence Committees, as well as the Minority Leader, Senator LOTT, and Senator HATCH and Senator SHELBY, the United and Strengthening America, or USA Act. This is not the bill that I, or any of the sponsors, would have written if compromise was unnecessary. Nor is the bill the administration initially proposed and the Attorney General delivered to us on September 19, at a meeting in the Capitol.

We were able to refine and supplement the administration's original proposal in a number of ways. The administration accepted a number of the practical steps I had originally proposed on September 19 to improve our security on the Northern Border, assist our Federal, State and local law enforcement officers and provide compensation to the victims of terrorist acts and to the public safety officers who gave their lives to protect ours. This USA Act also provides important checks on the proposed expansion of government powers that were not contained in the Attorney General's initial proposal.

In negotiations with the administration, I have done my best to strike a

reasonable balance between the need to address the threat of terrorism, which we all keenly feel at the present time, and the need to protect our constitutional freedoms. Despite my misgivings, I have acquiesced in some of the administration's proposals because it is important to preserve national unity in this time of crisis and to move the legislative process forward.

The result of our labors still leaves room for improvement. Even after the Senate passes judgment on this bill, the debate will not be finished. We will have to consider the important judgments made by the House Judiciary Committee in the version of the legislation making its way through the House. Moreover, I predict that some of these provisions will face difficult tests in the courts and that we in Congress will have to revisit these issues at some time in the future when, as we all devoutly hope, the present crisis has passed. I also intend as Chairman of the Judiciary Committee to exercise careful oversight of how the Department of Justice, the FBI and other executive branch agencies are using the newly-expanded powers that this bill will give them.

The negotiations on this bill have not been easy. Within days of the September 11 attacks, I instructed my staff to begin work on legislation to address security needs on the Northern Border, the needs of victims and State and local law enforcement, and criminal law improvements. A week after the attack, on September 19, the Attorney General and I exchanged the outlines of the legislative proposals and pledged to work together towards our shared goal of putting tools in the hands of law enforcement that would help prevent another terrorist attack.

Let me be clear: No one can guarantee that Americans will be free from the threat of future terrorist attacks, and to suggest that this legislation—or any legislation—would or could provide such a guarantee would be a false promise. I will not engage in such false promises, and those in the administration who make such assertions do a disservice to the American people.

I have also heard claims that if certain powers had been previously authorized by the Congress, we could somehow have prevented the September 11 attacks. Given this rhetoric it may be instructive to review efforts that were made a few years ago in the Senate to provide law enforcement with greater tools to conduct surveillance of terrorists and terrorist organizations. In May 1995, Senator LIEBERMAN offered an amendment to the bill that became the Antiterrorism and Effective Death Penalty Act of 1996 that would have expanded the Government's authority to conduct emergency wiretaps to cases of domestic or international terrorism and added a definition of domestic terrorism to include violent or illegal acts apparently intended to "intimidate, or coerce the civilian population." The consensus, bipartisan bill that we consider today contains a very similar definition of domestic terrorism.

In 1995, however, a motion to table Senator LIEBERMAN's amendment was agreed to in a largely party-line vote, with Republicans voting against the measure. In fact, then Senator Ashcroft voted to table that amendment, and my good friend from Utah, Senator HATCH, spoke against it and opined, "I do not think we should expand the wiretap laws any further." I recall Senator HATCH's concern then that "We must ensure that in our response to recent terrorist acts, we do not destroy the freedoms that we cherish." I have worked very hard to maintain that balance in negotiations concerning the current legislation.

Following the exchange on September 19 of our legislative proposals, we have worked over the last two weeks around the clock with the administration to put together the best legislative package we could. I share the administration's goal of providing promptly the legal tools necessary to deal with the current terrorist threat. While some have complained publicly that the negotiations have gone on for too long, the issues involved are of great importance, and we will have to live with the laws we enact for a long time to come. Demands for action are irresponsible when the road-map is pointed in the wrong direction. As Ben Franklin once noted, "if we surrender our liberty in the name of security, we shall have neither."

Moreover, our ability to make rapid progress was impeded because the negotiations with the administration did not progress in a straight line. On several key issues that are of particular concern to me, we had reached an agreement with the administration on Sunday, September 30. Unfortunately, within two days, the administration announced that it was reneging on the deal. I appreciate the complex task of considering the concerns and missions of multiple federal agencies, and that sometimes agreements must be modified as their implications are scrutinized by affected agencies. When agreements made by the administration must be withdrawn and negotiations on resolved issues reopened, those in the administration who blame the Congress for delay with what the New York Times described last week as "scurrilous remarks," do not help the process move forward.

We have expedited the legislative process in the Judiciary Committee to consider the administration's proposals. In daily news conferences, the Attorney General has referred to the need for such prompt consideration. I commend him for making the time to appear before the Judiciary Committee at a hearing September 25 to respond to questions that Members from both parties have about the administration's initial legislative proposals. I also thank the Attorney General for extending the hour and a half he was able to make in his schedule for the hearing for another fifteen minutes so that Senator FEINSTEIN and Senator SPECTER were able to ask questions before his departure. I regret that the Attorney General did not have the time to respond to questions from all the Members of the Committee either on September 25 or last week, but again thank him for the attention he promised to give to the written questions Members submitted about the legislation. We have not received answers to those written questions yet, but I will make them a part of the hearing record whenever they are sent.

The Chairman of the Constitution Subcommittee, Senator FEINGOLD, also held an important hearing on October 3 on the civil liberties ramifications of the expanded surveillance powers requested by the administration. I thank him for his assistance in illuminating these critical issues for the Senate.

Rule 14: To accede to the administration's request for prompt consideration of this legislation, the leaders decided to hold the USA Act at the desk rather than refer the bill to the committee for markup, as is regular practice. Senator HATCH specifically urged that this occur, and I support this decision. Indeed, when the Senate considered the anti-terrorism act in 1995 after the Oklahoma City bombing, we bypassed committee in order to deal with the legislation more promptly on the floor.

Given the expedited process that we have used to move this bill, I will take more time than usual to detail its provisions.

The heart of every American aches for those who died or have been injured because of the tragic terrorist attacks in New York, Virginia, and Pennsylvania on September 11. Even now, we cannot assess the full measure of this attack in terms of human lives, but we know that the number of casualties is extraordinarily high.

Congress acted swiftly to help the victims of September 11. Within 10 days, we passed legislation to establish a Victims Compensations Program, which will provide fair compensation to those most affected by this national tragedy. I am proud of our work on that legislation, which will expedite payments to thousands of Americans whose lives were so suddenly shattered.

But now more than ever, we should remember the tens of thousands of Americans whose needs are not being met—the victims of crimes that have not made the national headlines. Just one day before the events that have so transformed our nation, I came before this body to express my concern that we were not doing more for crime victims. I noted that the pace of victims legislation had slowed, and that many opportunities for progress had been squandered. I suggested that this year, we had a golden opportunity to make significant progress in this area by passing S.783, the Leahy-Kennedy Crime Victims Assistance Act of 2001.

I am pleased, therefore, that the antiterrorism package now before the

offense resulted in death. We have also added, in section 812, conspiracy provisions to a few criminal statutes where appropriate, with penalties equal to the penalties for the object offense, up to life imprisonment.

Finally, we have more carefully defined the new crime of harboring terrorists in section 804, so that it applies only to those harboring people who have committed, or are about to commit, the most serious of Federal terrorism-related crimes, such as the use of weapons of mass destruction. Moreover, it is not enough that the defendant had "reasonable grounds to suspect" that the person he was harboring had committed, or was about to commit, such a crime; the Government must prove that the defendant knew or had "reasonable grounds to believe" that this was so.

McDade Fix: The massive investigation underway into who was responsible for and assisted in carrying out the September 11 attacks stretches across State and national boundaries. While the scope of the tragedy is unsurpassed, the disregard for State and national borders of this criminal conspiracy is not unusual. Federal investigative officers and prosecutors often must follow leads and conduct investigations outside their assigned jurisdictions. At the end of the 105th Congress, a legal impediment to such multi-jurisdiction investigations was slipped into the omnibus appropriations bill, over the objection at the time of every member of the Senate Judiciary Committee.

I have spoken many times over the past two years of the problems caused by the so-called McDade law, 28 U.S.C. §530B. According to the Justice Department, the McDade law has delayed important criminal investigations, prevented the use of effective and traditionally-accepted investigative techniques, and served as the basis of litigation to interfere with legitimate federal prosecutions. At a time when we need Federal law enforcement authorities to move quickly to catch those responsible for the September 11 attacks, and to prevent further attacks on our country, we can no longer tolerate the drag on Federal investigations and prosecutions caused by this ill-considered legislation.

On September 19, I introduced S. 1437, the Professional Standards for Government Attorneys Act of 2001, along with Senators HATCH and WYDEN. This bill proposes to modify the McDade law by establishing a set of rules that clarify the professional standards applicable to government attorneys. I am delighted that the administration recognized the importance of S. 1437 for improving Federal law enforcement and combating terrorism, and agreed to its inclusion as section 501 of the USA Act.

The first part of section 501 embodies the traditional understanding that when lawyers handle cases before a Federal court, they should be subject to the Federal court's standards of professional responsibility, and not to the possibly inconsistent standards of other jurisdictions. By incorporating this ordinary choice-of-law principle, the bill preserves the Federal courts' traditional authority to oversee the professional conduct of Federal trial lawyers, including Federal prosecutors. It thus avoids the uncertainties presented by the McDade law, which potentially subjects Federal prosecutors to State laws, rules of criminal procedure, and judicial decisions which differ from existing Federal law.

Another part of section 501 specifically addresses the situation in Oregon, where a State court ruling has seriously impeded the ability of Federal agents to engage in undercover operations and other covert activities. See In re Gatti, 330 Or. 517 (2000). Such activities are legitimate and essential crime-fighting tools. The Professional Standards for Government Attorneys Act ensures that these tools will be available to combat terrorism.

Finally, section 501 addresses the most pressing contemporary question of government attorney ethics—namely, the question of which rule should govern government attorneys' communications with represented persons. It asks the Judicial Conference of the United States to submit to the Supreme Court a proposed uniform national rule to govern this area of professional conduct, and to study the need for additional national rules to govern other areas in which the proliferation of local rules may interfere with effective Federal law enforcement. The Rules Enabling Act process is the ideal one for developing such rules, both because the Federal judiciary traditionally is responsible for overseeing the conduct of lawyers in Federal court proceedings, and because this process would best provide the Supreme Court an opportunity fully to consider and objectively to weigh all relevant considerations.

The problems posed to Federal law enforcement investigations and prosecutions by the McDade law are real and urgent. The Professional Standards for Government Attorneys Act provides a reasonable and measured alternative: It preserves the traditional role of the State courts in regulating the conduct of attorneys licensed to practice before them, while ensuring that Federal prosecutors and law enforcement agents will be able to use traditional Federal investigative techniques. We need to pass this corrective legislation before more cases are compromised.

Terrorist Attacks Against Mass Transportation Systems. Another provision of the USA Act that was not included in the administration's initial proposal is section 801, which targets acts of terrorism and other violence against mass transportation systems. Just last week, a Greyhound bus crashed in Tennessee after a deranged passenger slit the driver's throat and then grabbed the steering wheel, forcing the bus into the oncoming traffic. Six people were killed in the crash. Because there are currently no Federal laws addressing terrorism of mass transportation systems, however, there may be no Federal jurisdiction over such a case, even if it were committed by suspected terrorists. Clearly, there is an urgent need for strong criminal legislation to deter attacks against mass transportation systems. Section 801 will fill this gap.

Cybercrime: The Computer Fraud and Abuse Act, 18 U.S.C. section 1030, is the primary Federal criminal statute prohibiting computer frauds and hacking. I worked with Senator HATCH in the last Congress to make improvements to this law in the Internet Security Act, which passed the Senate as part of another bill. Our work is included in section 815 of the USA Act. This section would amend the statute to clarify the appropriate scope of federal jurisdiction. First, the bill adds a definition of "loss" to cover any reasonable cost to the victim in responding to a computer hacker. Calculation of loss is important both in determining whether the $5,000 jurisdictional hurdle in the statute is met, and, at sentencing, in calculating the appropriate guideline range and restitution amount.

Second, the bill amends the definition of "protected computer," to include qualified computers even when they are physically located outside of the United States. This clarification will preserve the ability of the United States to assist in international hacking cases.

Finally, this section eliminates the current directive to the Sentencing Commission requiring that all violations, including misdemeanor violations, of certain provisions of the Computer Fraud and Abuse Act be punished with a term of imprisonment of at least 6 months.

Biological Weapons: Borrowing from a bill introduced in the last Congress by Senator BIDEN, the USA Act contains a provision in section 802 to strengthen our Federal laws relating to the threat of biological weapons. Current law prohibits the possession, development, or acquisition of biological agents or toxins "for use as a weapon." This section amends the definition of "for use as a weapon" to include all situations in which it can be proven that the defendant had any purpose other than a peaceful purpose. This will enhance the Government's ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U S.C. section 175 more closely to the related forfeiture provision in 18 U.S.C. section 176. This section also contains a new statute, 18 U.S.C. section 175b, which generally makes it an offense for certain restricted persons, including non-resident aliens from countries that support international terrorism, to possess a listed biological agent or toxin.

"(B) is engaged in any other activity that endangers the national security of the United States.

"(4) NONDELEGATION.—The Attorney General may delegate the authority provided under paragraph (3) only to the Commissioner. The Commissioner may not delegate such authority.

"(5) COMMENCEMENT OF PROCEEDINGS.—The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.

"(b) HABEAS CORPUS AND JUDICIAL REVIEW.—Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3)) is available exclusively in habeas corpus proceedings in the United States District Court for the District of Columbia. Notwithstanding any other provision of law, including section 2241 of title 28, United States Code, except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.

"(c) STATUTORY CONSTRUCTION.—The provisions of this section shall not be applicable to any other provisions of the Immigration and Nationality Act.".

(b) CLERICAL AMENDMENT.—The table of contents of the Immigration and Nationality Act is amended by inserting after the item relating to section 236 the following:

"Sec. 236A. Mandatory detention of suspected terrorist; habeas corpus, judicial review.".

(c) REPORTS.—Not later than 6 months after the date of the enactment of this Act, and every 6 months thereafter, the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, with respect to the reporting period, on—

(1) the number of aliens certified under section 236A(a)(3) of the Immigration and Nationality Act, as added by subsection (a);

(2) the grounds for such certifications;

(3) the nationalities of the aliens so certified;

(4) the length of the detention for each alien so certified; and

(5) the number of aliens so certified who—

(A) were granted any form of relief from removal;

(B) were removed;

(C) the Attorney General has determined are no longer aliens who may be so certified; or

(D) were released from detention.

SEC. 413. MULTILATERAL COOPERATION AGAINST TERRORISTS.

Section 222(f) of the Immigration and Nationality Act (8 U S.C. 1202(f)) is amended—

(1) by striking "except that in the discretion of" and inserting the following: "except that—

"(1) in the discretion of"; and

(2) by adding at the end the following:

"(2) the Secretary of State, in the Secretary's discretion and on the basis of reciprocity, may provide to a foreign government information in the Department of State's computerized visa lookout database and, when necessary and appropriate, other records covered by this section related to information in the database—

"(A) with regard to individual aliens, at any time on a case-by-case basis for the purpose of preventing, investigating, or punishing acts that would constitute a crime in the United States, including, but not limited to, terrorism or trafficking in controlled substances, persons, or illicit weapons; or

"(B) with regard to any or all aliens in the database, pursuant to such conditions as the Secretary of State shall establish in an agreement with the foreign government in which that government agrees to use such information and records for the purposes described in subparagraph (A) or to deny visas to persons who would be inadmissible to the United States.".

TITLE V—REMOVING OBSTACLES TO INVESTIGATING TERRORISM

SEC. 501. PROFESSIONAL STANDARDS FOR GOVERNMENT ATTORNEYS ACT OF 2001.

(a) SHORT TITLE.—This title may be cited as the "Professional Standards for Government Attorneys Act of 2001".

(b) PROFESSIONAL STANDARDS FOR GOVERNMENT ATTORNEYS.—Section 530B of title 28, United States Code, is amended to read as follows:

"§ 530B. Professional Standards for Government Attorneys

"(a) DEFINITIONS.—In this section:

"(1) GOVERNMENT ATTORNEY.—The term 'Government attorney'—

"(A) means the Attorney General; the Deputy Attorney General; the Solicitor General; the Associate Attorney General; the head of, and any attorney employed in, any division, office, board, bureau, component, or agency of the Department of Justice; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney appointed under section 515; any Special Assistant United States Attorney appointed under section 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States; any independent counsel, or employee of such counsel, appointed under chapter 40; and any outside special counsel, or employee of such counsel, as may be duly appointed by the Attorney General; and

"(B) does not include any attorney employed as an investigator or other law enforcement agent by the Department of Justice who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.

"(2) STATE.—The term 'State' includes a Territory and the District of Columbia.

"(b) CHOICE OF LAW.—Subject to any uniform national rule prescribed by the Supreme Court under chapter 131, the standards of professional responsibility that apply to a Government attorney with respect to the attorney's work for the Government shall be—

"(1) for conduct in connection with a proceeding in or before a court, or conduct reasonably intended to lead to a proceeding in or before a court, the standards of professional responsibility established by the rules and decisions of the court in or before which the proceeding is brought or is intended to be brought;

"(2) for conduct in connection with a grand jury proceeding, or conduct reasonably intended to lead to a grand jury proceeding, the standards of professional responsibility established by the rules and decisions of the court under whose authority the grand jury was or will be impaneled; and

"(3) for all other conduct, the standards of professional responsibility established by the rules and decisions of the Federal district court for the judicial district in which the attorney principally performs his or her official duties.

"(c) LICENSURE.—A Government attorney (except foreign counsel employed in special cases)—

"(1) shall be duly licensed and authorized to practice as an attorney under the laws of a State; and

"(2) shall not be required to be a member of the bar of any particular State.

"(d) UNDERCOVER ACTIVITIES.—Notwithstanding any provision of State law, including disciplinary rules, statutes, regulations, constitutional provisions, or case law, a Government attorney may, for the purpose of enforcing Federal law, provide legal advice, authorization, concurrence, direction, or supervision on conducting undercover activities, and any attorney employed as an investigator or other law enforcement agent by the Department of Justice who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings may participate in such activities, even though such activities may require the use of deceit or misrepresentation, where such activities are consistent with Federal law.

"(e) ADMISSIBILITY OF EVIDENCE.—No violation of any disciplinary, ethical, or professional conduct rule shall be construed to permit the exclusion of otherwise admissible evidence in any Federal criminal proceedings.

"(f) RULEMAKING AUTHORITY.—The Attorney General shall make and amend rules of the Department of Justice to ensure compliance with this section.".

(c) TECHNICAL AND CONFORMING AMENDMENT.—The analysis for chapter 31 of title 28, United States Code, is amended, in the item relating to section 530B, by striking "Ethical standards for attorneys for the Government" and inserting "Professional standards for Government attorneys".

(d) REPORTS.—

(1) UNIFORM RULE —In order to encourage the Supreme Court to prescribe, under chapter 131 of title 28, United States Code, a uniform national rule for Government attorneys with respect to communications with represented persons and parties, not later than 1 year after the date of enactment of this Act, the Judicial Conference of the United States shall submit to the Chief Justice of the United States a report, which shall include recommendations with respect to amending the Federal Rules of Practice and Procedure to provide for such a uniform national rule.

(2) ACTUAL OR POTENTIAL CONFLICTS.—Not later than 2 years after the date of enactment of this Act, the Judicial Conference of the United States shall submit to the Chairmen and Ranking Members of the Committees on the Judiciary of the House of Representatives and the Senate a report, which shall include—

(A) a review of any areas of actual or potential conflict between specific Federal duties related to the investigation and prosecution of violations of Federal law and the regulation of Government attorneys (as that term is defined in section 530B of title 28, United States Code, as amended by this Act) by existing standards of professional responsibility; and

(B) recommendations with respect to amending the Federal Rules of Practice and Procedure to provide for additional rules governing attorney conduct to address any areas of actual or potential conflict identified pursuant to the review under subparagraph (A)

(3) REPORT CONSIDERATIONS —In carrying out paragraphs (1) and (2), the Judicial Conference of the United States shall take into consideration—

(A) the needs and circumstances of multiforum and multijurisdictional litigation;

(B) the special needs and interests of the United States in investigating and prosecuting violations of Federal criminal and civil law; and

(C) practices that are approved under Federal statutory or case law or that are otherwise consistent with traditional Federal law enforcement techniques.

SEC. 502. ATTORNEY GENERAL'S AUTHORITY TO PAY REWARDS TO COMBAT TERRORISM.

(a) PAYMENT OF REWARDS TO COMBAT TERRORISM.—Funds available to the Attorney General may be used for the payment of rewards pursuant to public advertisements for assistance to the Department of Justice to combat terrorism and defend the Nation against terrorist acts, in accordance with procedures and regulations established or issued by the Attorney General.

(b) CONDITIONS.—In making rewards under this section—

(1) no such reward of $250,000 or more may be made or offered without the personal approval of either the Attorney General or the President;

(2) the Attorney General shall give written notice to the Chairmen and ranking minority members of the Committees on Appropriations and the Judiciary of the Senate and of the House of Representatives not later than 30 days after the approval of a reward under paragraph (1);

(3) any executive agency or military department (as defined, respectively, in sections 105 and 102 of title 5, United States Code) may provide the Attorney General with funds for the payment of rewards;

(4) neither the failure of the Attorney General to authorize a payment nor the amount authorized shall be subject to judicial review; and

(5) no such reward shall be subject to any per- or aggregate reward spending limitation established by law, unless that law expressly refers to this section, and no reward paid pursuant to any such offer shall count toward any such aggregate reward spending limitation

SEC. 503. SECRETARY OF STATE'S AUTHORITY TO PAY REWARDS.

Section 36 of the State Department Basic Authorities Act of 1956 (Public Law 885, August 1, 1956; 22 U.S.C. 2708) is amended—

(1) in subsection (b)—

(A) in paragraph (4), by striking "or" at the end;

(B) in paragraph (5), by striking the period at the end and inserting ", including by dismantling an organization in whole or significant part; or"; and

(C) by adding at the end the following:

"(6) the identification or location of an individual who holds a key leadership position in a terrorist organization.";

(2) in subsection (d), by striking paragraphs (2) and (3) and redesignating paragraph (4) as paragraph (2); and

(3) in subsection (e)(1), by inserting ", except as personally authorized by the Secretary of State if he determines that offer or payment of an award of a larger amount is necessary to combat terrorism or defend the Nation against terrorist acts." after "$5,000,000"

SEC. 504. DNA IDENTIFICATION OF TERRORISTS AND OTHER VIOLENT OFFENDERS.

Section 3(d)(2) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a(d)(2)) is amended to read as follows:

"(2) In additional to the offenses described in paragraph (1), the following offenses shall be treated for purposes of this section as qualifying Federal offenses, as determined by the Attorney General:

"(A) Any offense listed in section 2332b(g)(5)(B) of title 18, United States Code.

"(B) Any crime of violence (as defined in section 16 of title 18, United States Code).

"(C) Any attempt or conspiracy to commit any of the above offenses.".

SEC. 505. COORDINATION WITH LAW ENFORCEMENT.

(a) INFORMATION ACQUIRED FROM AN ELECTRONIC SURVEILLANCE.—Section 106 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1806), is amended by adding at the end the following:

"(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against—

"(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

"(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

"(2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.".

(b) INFORMATION ACQUIRED FROM A PHYSICAL SEARCH.—Section 305 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C 1825) is amended by adding at the end the following:

"(k)(1) Federal officers who conduct physical searches to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against—

"(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

"(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

"(2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 303(a)(7) or the entry of an order under section 304."

SEC. 506. MISCELLANEOUS NATIONAL SECURITY AUTHORITIES.

(a) TELEPHONE TOLL AND TRANSACTIONAL RECORDS.—Section 2709(b) of title 18, United States Code, is amended—

(1) in the matter preceding paragraph (1), by inserting "at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director" after "Assistant Director";

(2) in paragraph (1)—

(A) by striking "in a position not lower than Deputy Assistant Director"; and

(B) by striking "made that" and all that follows and inserting the following: "made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and"; and

(3) in paragraph (2)—

(A) by striking "in a position not lower than Deputy Assistant Director"; and

(B) by striking "made that" and all that follows and inserting the following: "made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.".

(b) FINANCIAL RECORDS.—Section 1114(a)(5)(A) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414(a)(5)(A)) is amended—

(1) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director" after "designee"; and

(2) by striking "sought" and all that follows and inserting "sought for foreign counter intelligence purposes to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.".

(c) CONSUMER REPORTS.—Section 624 of the Fair Credit Reporting Act (15 U.S.C 1681u) is amended—

(1) in subsection (a)—

(A) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director" after "designee" the first place it appears; and

(B) by striking "in writing that" and all that follows through the end and inserting the following: "in writing, that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.";

(2) in subsection (b)—

(A) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director" after "designee" the first place it appears; and

(B) by striking "in writing that" and all that follows through the end and inserting the following: "in writing that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States "; and

(3) in subsection (c)—

(A) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director" after "designee of the Director"; and

(B) by striking "in camera that" and all that follows through "States." and inserting the following: "in camera that the consumer report is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.".

SEC. 507. EXTENSION OF SECRET SERVICE JURISDICTION.

(a) CONCURRENT JURISDICTION UNDER 18 U.S.C. 1030.—Section 1030(d) of title 18, United States Code, is amended to read as follows:

"(d)(1) The United States Secret Service shall, in addition to any other agency having

107TH CONGRESS
1ST SESSION

S. 1437

To clarify the applicable standards of professional conduct for attorneys for the Government, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 19, 2001

Mr. LEAHY (for himself, Mr. HATCH, and Mr. WYDEN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To clarify the applicable standards of professional conduct for attorneys for the Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Professional Standards for Government Attorneys Act of 2001".

SEC. 2. PROFESSIONAL STANDARDS FOR GOVERNMENT ATTORNEYS.

(a) Section 530B of title 28, United States Code, is amended to read as follows:

"SEC. 530B. PROFESSIONAL STANDARDS FOR GOVERNMENT ATTORNEYS.

"(a) DEFINITIONS.—In this section:

"(1) GOVERNMENT ATTORNEY.—The term 'Government attorney'—

"(A) means the Attorney General; the Deputy Attorney General; the Solicitor General; the Associate Attorney General; the head of, and any attorney employed in, any division, office, board, bureau, component, or agency of the Department of Justice; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney appointed under section 515; any Special Assistant United States Attorney appointed under section 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States; any independent counsel, or employee of such counsel, appointed under chapter 40; and any outside special counsel, or employee of such coun-

sel, as may be duly appointed by the Attorney General; and

"(B) does not include any attorney employed as an investigator or other law enforcement agent by the Department of Justice who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.

"(2) STATE.—The term 'State' includes a Territory and the District of Columbia.

"(b) CHOICE OF LAW.—Subject to any uniform national rule prescribed by the Supreme Court under chapter 131, the standards of professional responsibility that apply to a Government attorney with respect to the attorney's work for the Government shall be—

"(1) for conduct in connection with a proceeding in or before a court, the standards of professional responsibility established by the rules and decisions of that court;

"(2) for conduct reasonably intended to lead to a proceeding in or before a court, the standards of professional responsibility established by the rules and decisions of the court in or before which the proceeding is intended to be brought; and

"(3) for all other conduct, the standards of professional responsibility established by the rules and decisions of the Federal district court for the judicial district in which the attorney principally performs his or her official duties.

"(c) LICENSURE.—A Government attorney (except foreign counsel employed in special cases)—

"(1) shall be duly licensed and authorized to practice as an attorney under the laws of a State; and

"(2) shall not be required to be a member of the bar of any particular State.

"(d) COVERT ACTIVITIES.—Notwithstanding any provision of State law, including disciplinary rules, statutes, regulations, constitutional provisions, or case law, a Government attorney may, for the purpose of enforcing Federal law, provide legal advice, authorization, concurrence, direction, or supervision on conducting covert activities, and participate in such activities, even though such activities may require the use of deceit or misrepresentation.

"(e) ADMISSIBILITY OF EVIDENCE.—No violation of any disciplinary, ethical, or professional conduct rule shall be construed to permit the exclusion of otherwise admissible evidence in any Federal criminal proceeding.

"(f) RULEMAKING AUTHORITY.—The Attorney General shall make and amend rules of the Department of Justice to ensure compliance with this section.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The analysis for chapter 31 of title 28, United States Code, is amended, in the item relating to section 530B, by striking "Ethical standards for attorneys for the Government" and inserting "Professional standards for Government attorneys".

(c) REPORTS.—

(1) UNIFORM RULE.—In order to encourage the Supreme Court to prescribe, under chapter 131 of title 28, United States Code, a uniform national rule for Government attorneys with respect to communications with represented persons and parties, not later than 1 year after the date of enactment of this Act, the Judicial Conference of the United States shall submit to the Chief Justice of the United States a report, which shall include recommendations with respect to amending the Federal Rules of Practice and Procedure to provide for such a uniform national rule.

(2) ACTUAL OR POTENTIAL CONFLICTS.—Not later than 2 years after the date of enactment of this Act, the Judicial Conference of the United

States shall submit to the Chairmen and Ranking Members of the Committees on the Judiciary of the House of Representatives and the Senate a report, which shall include—

(A) a review of any areas of actual or potential conflict between specific Federal duties related to the investigation and prosecution of violations of Federal law and the regulation of Government attorneys (as that term is defined in section 530B of title 28, United States Code, as amended by this Act) by existing standards of professional responsibility; and

(B) recommendations with respect to amending the Federal Rules of Practice and Procedure to provide for additional rules governing attorney conduct to address any areas of actual or potential conflict identified pursuant to the review under subparagraph (A).

(3) REPORT CONSIDERATIONS.—In carrying out paragraphs (1) and (2), the Judicial Conference of the United States shall take into consideration—

(A) the needs and circumstances of multiforum and multijurisdictional litigation;

(B) the special needs and interests of the United States in investigating and prosecuting violations of Federal criminal and civil law; and

(C) practices that are approved under Federal statutory or case law or that are otherwise consistent with traditional Federal law enforcement techniques.

○

Congress of the United States
Washington, DC 20515

October 17, 2001

The Honorable J. Dennis Hastert
Speaker of the House
U.S. House of Representatives
Room H-232, The Capitol
Washington, DC 20515

The Honorable Richard A. Gephardt
Minority Leader
U.S. House of Representatives
Room H-204, The Capitol
Washington, DC 20515

Dear Mr. Speaker and Mr. Leader:

The anti-terrorism legislation approved last week by the House would grant extraordinary new powers to the Justice Department and other Federal law enforcement agencies to respond to the present emergency.

While we hope and expect that these new authorities will be exercised with due restraint, we believe that this is not the time to weaken the legal and ethical safeguards which protect our citizens from law enforcement abuses. We are very concerned that section 501 of the Senate bill (S. 1510) would have that effect.

That section seeks to modify the McDade-Murtha law, 28 U.S.C. § 530B, enacted in 1998 with overwhelming support in the House. That law sought to discourage prosecutorial misconduct, by codifying the previously well-established principle that the Department of Justice may not unilaterally exempt its lawyers from State and Federal ethics rules that apply to all members of the bar.

The Department opposed the enactment of that law, and has sought to overturn it ever since, claiming that enforcement of the ethics rules promulgated by the courts of each State would hamper criminal prosecutions.

In support of its claims, the Department has offered a series of hypothetical scenarios and unsubstantiated anecdotes. Noticeably lacking is a single instance in which the McDade-Murtha law has actually been applied against a prosecutor in a manner that adversely affects legitimate law enforcement activities. Nor has any prosecution ever been overturned because a prosecutor followed applicable ethics rules.

A number of the Department's anecdotes are repeated in the letter of October 11 which you have received from Senators Leahy and Hatch (hereinafter "the Leahy-Hatch letter"). That letter alleges not only that the McDade-Murtha law hampers regular law

enforcement but that it "threatens to hamstring the investigation into the terrorist attacks of September 11, 2001." *Leahy-Hatch Letter at 2.*

That is a serious charge, and it must not go unanswered. It rests on the erroneous assertion that "In this widespread, international investigation, the McDade-Murtha law will subject Justice Department attorneys to multiple and different attorney conduct rules." *Id.*

This oft-repeated claim has nothing to do with the ongoing anti-terrorism investigation. It is simply a variation on the Department's familiar argument that McDade-Murtha will hamper law enforcement investigations. Three years after the law went into effect, this problem has yet to materialize.

There are several reasons for this. *First,* notwithstanding minor stylistic and interpretive differences, the rules are remarkably consistent from State to State. According to the nation's foremost expert on legal ethics, "There are no significant discrepancies among the ethics rules of various states, certainly none to warrant a federal supercession." Letter from Professor Geoffrey Z. Hazard to the Honorable Strom Thurmond, Chairman, Subcommittee on Criminal Justice Oversight, Senate Judiciary Committee, March 19, 1999, at 1.

Second, as Larry D. Thompson, a United States Attorney in the Reagan Administration and now the Deputy Attorney General of the United States, has written, "Across the country, courts have almost always interpreted State ethics provisions so as to permit DOJ lawyers to do their important work, such as conducting and supervising preindictment undercover operations." *The McDade Law is Good for the Profession,* THE FEDERAL LAWYER, Jan. 2001, at 20.

Third, the rules in every State accommodate the special needs of law enforcement by permitting prosecutors to seek a court ordered exception for sensitive investigative purposes. Under the pending anti-terrorism bill, such an order could presumably be obtained in any of the multiplicity of jurisdictions in which the investigation is taking place.

The one case which critics of the McDade-Murtha law routinely cite to illustrate their concern is the decision of the Oregon Supreme Court in *In re Gatti,* 330 Or. 517 (2000) (*see* Leahy-Hatch Letter, p.1). That case did not involve a law enforcement attorney, let alone a Federal attorney. However, the court stated in *dicta* that its ethical rule against deceptive practices by attorneys does not recognize the "law enforcement exception" which enjoys virtually universal acceptance in other jurisdictions.

While we appreciate the concerns this case has prompted, it remains an isolated instance, and one which the Oregon legislature has addressed (through a new statute) and the Supreme Court is working on an expedited basis to remedy (through a new ethical rule). It does not require congressional intervention, nor does it justify the attempt to carve out a special exception for prosecutors that would override the ethics rules in all 50 States.

For these and other reasons, attempts to repeal or dilute the McDade-Murtha provision have been consistently opposed by the Conference of Chief Justices, the American Bar Association, the National Organization of Bar Counsel, the American Corporate Counsel Association, the U.S. Chamber of Commerce, the National Association of Manufacturers, and other entities and organizations.

The original Senate language would have expressly authorized government lawyers to engage in deceit and misrepresentation in violation of the ethical rules prohibiting such conduct. While the revised Senate proposal wisely deleted this provision, it still contains a number of problematic and confusing provisions that would significantly undercut traditional ethics rules that are safeguarded by the McDade-Murtha law.

We believe that the inclusion of this measure in the anti-terrorism bill would do nothing to enhance legitimate anti-terrorism efforts. Indeed, it could frustrate them by undermining public confidence in the justice system in the midst of this emergency.

Congress should consider carefully before taking any action that would replace the effective mechanism of State regulation of the conduct of attorneys with a Federal system whose results are unpredictable and whose structure is presently undefined.

We appreciate your consideration of our views, and look forward to continuing to work with you to enhance our nation's security.

Sincerely,

William D. Delahunt
Member of Congress

Henry J. Hyde
Member of Congress

John P. Murtha
Member of Congress

Conference of Chief Justices

October 17, 2001

The Honorable J. Dennis Hastert
Speaker of the House
House of Representatives
Capitol Building, Room H-232
Washington, D.C. 20515

The Honorable Richard A. Gephardt
Minority Leader
House of Representatives
Capitol Building, Room H-204
Washington, D.C. 20515

Dear Speaker Hastert and Minority Leader Gephardt:

I write as President of the Conference of Chief Justices. As you may know, the Conference is an organization comprised of the chief justice or chief judge of the highest court of each state, the District of Columbia and several federal territories, working for improving the administration of justice in the United States. We know that the Congress is working currently, under the most difficult circumstances, to develop anti-terrorism legislation critical to our country. As you proceed with this awesome responsibility, I urge your consideration of the views previously expressed by the Conference on one proposed provision, which the House prudently excluded from its bill, but which is included in the Senate version. That provision, now known as the "Professional Standards for Government Attorneys Act" (Sec. 501 of S. 1510), would repeal the McDade-Murtha law, 28 U.S.C. § 530B (1998), and replace it with a system which preempts the historical state regulation of the ethical conduct of the lawyers licensed to practice law by the state.

Traditionally, each state, under the authority of its highest court, usually has had exclusive responsibility for regulating the professional conduct of the members of the bar and establishing appropriate ethical standards and enforcement mechanisms. The Conference has been concerned for some time with efforts to erode the primacy of the states in regulating the conduct of lawyers and attempts to depart from the long-standing principle that all lawyers licensed by a state should be subject to its ethics rules. Recognizing, however, the concerns of the Department of Justice, which prompted its efforts to exempt unilaterally lawyers employed by the Department from a rule involving contact with represented parties and state ethics rules in general, the Conference entered a series of discussions with the former Attorney General and the American Bar

Association (ABA), which traditionally initiates proposed changes in state ethical rules. Eventually these discussions evolved into a dialogue between the ABA and the Attorney General, and they almost reached a consensus for addressing the issue in 1999. What became apparent from the discussions is that this is a very complex area which requires careful consideration before a satisfactory resolution can be found, and certainly before federal legislation is enacted to address the issue. Therefore, on behalf of the Conference, I urge you to adhere to your initial position and defer for separate consideration any national federal rule governing attorney conduct, and first provide an opportunity for the Conference and other interested parties to resume their discussions on this matter and to express their views on this complex subject.

Thank you for your careful consideration of this important matter.

Sincerely,

Annide M. Wagner
President, Conference of Chief Justices

Transmitted by facsimile

Congress of the United States

Washington, DC 20515

October 4, 2001

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The terrorist attack on America has prompted calls from Federal law enforcement agencies for extraordinary new powers. We applaud your efforts to craft a balanced legislative response that gives these agencies the tools they need to deal with this national emergency without sacrificing our freedoms in the process.

We also hope you will agree that now is not the time to weaken the legal and ethical safeguards that protect our citizens from law enforcement abuses.

In 1998, Congress enacted the McDade-Murtha law, 28 U.S.C. § 530B, to codify the previously well-established principle that the Department of Justice may not unilaterally exempt its lawyers from State and Federal ethics rules that apply to all members of the bar.

Since that time, the department has sought to repeal or modify section 530B, claiming that enforcement of the ethics rules promulgated by the courts of each State would hamper criminal prosecutions. However, the department has been unable to cite any instance in which the McDade-Murtha law has actually been applied against a prosecutor in a manner that adversely affects legitimate law enforcement.

We understand that you have filed legislation (S. 1437) which would substantially vitiate this law, and may incorporate that legislation into the Senate anti-terrorism bill. We have serious concerns about this proposal, and respectfully urge that it not be included.

S. 1437 contains several troubling provisions, including language that would authorize government lawyers to engage in deceit and misrepresentation in violation of the ethical rules prohibiting such conduct. We believe this double-standard would do nothing to enhance legitimate anti-terrorism efforts, and indeed could hamper them by undermining public confidence in the justice system in the midst of this emergency.

This complex and controversial proposal has had no hearings, and there has been no opportunity for interested parties—including the bar and the State judiciary—to present their views. We believe that the inclusion of this measure in the anti-terrorism bill would only delay the enactment of that vital and urgent legislation.

We appreciate your consideration of our views, and look forward to continuing to work with you to enhance our nation's security.

Sincerely,

John P. Murtha
Member of Congress

William D. Delahunt
Member of Congress

"Campbell, Susan" <SueCampbell@staff.abanet.org>
Sent by: Ethics 2000 Advisory Council <E2000COUNCIL@MAIL.ABANET.ORG>

To: E2000COUNCIL@MAIL.ABANET.ORG
cc:
Subject: Ethics 2000

08/09/2001 12:25 PM
Please respond to "Campbell, Susan"

During the August 6 - 7, 2001 meeting of the American Bar Association House of Delegates in Chicago, the House considered the changes to the Model Rules of Professional Conduct proposed by the Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000"). The House voted on the Rules from the Preamble through Rule 1.10 and approved all of the Commission's recommendations with the following exceptions:

Rule 1.5: approved an amendment to delete the requirement of a writing in Rule 1.5(b).

Rule 1.6: approved an amendment to delete proposed Rules 1.6(b)(2) and 1.6(b)(3); approved an amendment from the Commission to modify Rule 1.6, Comment [13].

Rule 1.10: approved an amendment to delete proposed Rule 1.10(c).

Please note that according to the Special Rules for Consideration of Report 401, the entire Report will be voted up or down at the conclusion of consideration of all proposed amendments. Thus, the actions taken in Chicago will not become Association policy until the House completes consideration of Report 401 at the Midyear Meeting in Philadelphia or the Annual Meeting in Washington, D.C.

The complete text of the amendments is attached.

<<Amend801.doc>>

Amend801.doc

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law ~~to do so~~ or a court order.

Commentary

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

~~[1]~~ [2] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. ~~Also, parties~~ Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. ~~Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.~~

[3] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with ~~a governmental official~~ the government. ~~For example, the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decisionmakers, may permit a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter.~~ [2] Communications authorized by law may also include ~~constitutionally permissible~~ investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings; ~~when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions~~. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[4] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

~~[3]~~ [5] This Rule ~~also~~ applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

~~[4]~~ [6] In the case of ~~an~~ a represented organization, this Rule prohibits communications ~~by a lawyer for another person or entity concerning the matter in representation~~ with ~~persons having a managerial responsibility on behalf~~ a constituent of the organization~~, and with any other person~~ who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with ~~that~~ the matter may be imputed to the organization for purposes of civil or criminal liability ~~or whose statement may constitute an admission on the part of the organization~~. Consent of the organization's lawyer is not required for communication with a former constituent. If ~~an agent or employee~~ a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

~~[5]~~ [7] The prohibition on communications with a represented person only applies~~;~~ ~~however,~~ in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See ~~Terminology~~ Rule 1.0(f). ~~Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed.~~ Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

~~[6]~~ [8] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Model Rule 4.2
Reporter's Observations

TEXT:

Add reference to "court order"

Although a communication with a represented person pursuant to a court order will ordinarily fall within the "authorized by law" exception, the specific reference to a court order is intended to alert lawyers to the availability of judicial relief in the rare situations in which it is needed. These situations are described generally in Comment [4].

After consideration of concerns aired by prosecutors about the effect of Rule 4.2 on their ability to carry out their investigative responsibilities, the Commission decided against recommending adoption of special rules governing communications with represented persons by government lawyers engaged in law enforcement. The Commission concluded that Rule 4.2 strikes the proper balance between effective law enforcement and the need to protect the client-lawyer relationships that are essential to the proper functioning of the justice system.

COMMENTARY:

[1] This new Comment states the purposes served by Rule 4.2 and, in particular, emphasizes that the Rule is designed not merely to protect individual clients but also to enhance the proper functioning of the legal system.

[2] This contains the substance of current Comment [1]. The last sentence has been deleted and its subject addressed in Comment [3]. A new sentence clarifies that Rule 4.2 does not preclude communication with a represented person who is seeking a second opinion from a lawyer who is not representing a party in the matter. Also, material has been added from the commentary to Rule 8.4(a) emphasizing that a lawyer may not make a communication prohibited by this Rule through the acts of another. At the same time, parties are not precluded from communicating with one another, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

[3] This Comment addresses when communications to or by the government may be within the Rule's "authorized by law" exception. The first sentence revises the final sentence of current Comment [1] and alerts lawyers to the possibility that a citizen's constitutional right to petition and the public policy of ensuring a citizen's right of access to government decisionmakers may create an exception to this Rule. The remainder of the Comment substantially revises current Comment [2] on the applicability of the "authorized by law" exception to communications by government lawyers, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. The reference in current Comment [2] to judicial precedent has been deleted, and the relationship between the Rule and applicable constitutional limits on government conduct has been reformulated. In place of the statement that the Rule imposes ethical restrictions that "go beyond" those imposed by constitutional provisions, the Comment explains that the fact that a communication does not

violate the constitution "is insufficient to establish" that the communication is permissible under the Rule. For example, the fact that an individual has waived the constitutional right to consult the individual's lawyer at the time of arrest "is insufficient to establish" the ethical propriety of an ex parte communication by the government with that individual if the individual's lawyer has not agreed to the communication. In reformulating the relationship between the Rule and applicable legal or constitutional requirements, the Commission intends no substantive change in the applicable standard.

[4] This new Comment explains the two circumstances in which a lawyer may seek a court order authorizing a communication: 1) where a lawyer is uncertain whether or not the communication is permitted by Rule 4.2; and 2) where a communication is prohibited by the Rule but "exceptional circumstances" nonetheless justify it. The example given is where ex parte communication with a represented person is necessary to avoid reasonably certain injury.

[5] This Comment revises current Comment [3] by adding two new sentences. The first makes clear that the protections accorded by Rule 4.2 may not be waived by the client. The second addition addresses situations in which a lawyer does not know at the initiation of a communication that a person is represented by counsel but finds out later. It reminds lawyers that they must terminate communication once they learn that the person is represented by counsel in the matter to which the communication relates. No change in substance is intended.

[6] This Comment modifies current Comment [4] identifying the constituents of a represented organization with whom a lawyer may not communicate without the consent of the organization's lawyer. The current Comment's inclusion of all "persons having a managerial responsibility on behalf of the organization" has been criticized as vague and overly broad. As reformulated, the Comment contains the more specific reference to "a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter." In focusing on the constituent's authority in the matter at issue and relationship with the organization's lawyer, the Comment provides clearer guidance than the broad general reference to "managerial responsibility."

In addition, the reference in the current Comment to a constituent whose act or omission in the matter may be imputed to the organization for purposes of civil or criminal liability has been retained. However, the Commission deleted the broad and potentially open-ended reference to "any other person ... whose statement may constitute an admission on the part of the organization." This reference has been read by some as prohibiting communication with any person whose testimony would be admissible against the organization as an exception to the hearsay rule.

A new sentence has been added to clarify that consent of the organization's lawyer is not required for communications with former constituents. The Commission, however, has added a warning to lawyers that Rule 4.4 precludes the use of methods of obtaining evidence that violate the legal rights of the organization.

[7] The penultimate sentence of current Comment [5] has been deleted because it suggests incorrectly that the required element of knowledge can be established by proof that the lawyer had "substantial reason to believe" that the person was represented in the matter. This is inconsistent with the definition of "knows" in Rule 1.0(f), which requires actual knowledge and involves no duty to inquire.

Commission on Evaluation of the Rules of Professional Conduct
Changes from the November 2000 Report to the May 2001 Report

This document shows the changes the Commission made to its initial report, issued in November 2000, before submitting its final report to the House of Delegates in May 2001. These changes were made after consideration of the comments submitted on the November report.

Only paragraphs that have been changed since the November report are included in this document. The changes made after November are indicated by italics. The text of the changes for each Rule is followed by an explanation of the reasons for the changes.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

COMMENTARY:

[3] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with ~~*a governmental official*~~ *the government.* ~~*For example, the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decisionmakers, may permit a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter.*~~ ~~[2]~~ *[4]* Communications authorized by law may also include ~~constitutionally permissible~~ investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings~~, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions~~. When communicating with ~~*a represented criminal defendant*~~ *the accused in a criminal matter*, a government lawyer must comply with this Rule in addition to honoring the ~~*defendant's*~~ constitutional rights *of the accused.* The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

Model Rule 4.2
Reporter's Explanation of Changes from the November Report

COMMENTARY:

[3] The Commission deleted all parts of this comment that suggested a substantive view of what "authorized by law" might mean in the context of communications with government officials, on grounds that 1) the law is too unclear to express a view; and 2) the view expressed in the November report is inconsistent with ABA Opinion 97-408 and most authorities. The Commission also combined what was left of the proposed comment on this "authorized by law" issue with the language in Comment [4] of the November report that dealt with another "authorized by law" issue (contacts by government investigators). In this way, Comment [3] addresses both of the government-related contexts in which the "authorized by law" exception is most likely to come into play. Finally, the Commission substituted the phrase "the accused in a criminal matter" for "a represented criminal defendant." This change is intended to make clear that the rule applies in a criminal matter even before charges are filed. No substantive change is intended.

"Campbell, Susan" <SueCampbell@staff.abanet.org>
Sent by: Ethics 2000 Advisory Council <E2000COUNCIL@MAIL.ABANET.ORG>

11/01/2001 04:14 PM
Please respond to "Campbell, Susan"

To: E2000COUNCIL@MAIL.ABANET.ORG
cc:
Subject: Fox amendments

Attached are the amendments proposed by Larry Fox at the Annual Meeting.

> <<ABA Proposed Amendments to Report 401 offered by LJFox.DOC>>

ABA Proposed Amendments to Report 401 offered by LJF

Proposed Amendment to Report 401
offered by Commissioner Lawrence J. Fox

Rule 4.2

The Proposed Amendment: Delete "or court order."

Basis for the Amendment: This rule has been the source of great controversy particularly vis-a-vis the Department of Justice. Out of that turmoil has arisen a compromise, "or court order," that would invite nothing but trouble. Nowhere in the rule are we told whether a court order might be sought to get an interpretation of the rule or an exemption from its protections. Nor are the courts informed when it is appropriate for them to intervene. Just a standardless escape from the protections of Rule 4.2 is provided, one that the ABA should reject as compromising one of our most important rules, one that should, without exception, protect clients who choose to be represented by lawyers.

Proposed Amendment to Report 401
offered by Commissioner Lawrence J. Fox

Rule 4.2, Comment [2]

The Proposed Amendment: Delete from comment [2] "is not prohibited from advising a client concerning a communication that the client is legally entitled to make."

Basis for the Amendment: This comment, in the sentence preceding this one, provides "A lawyer may not make a communication prohibited by this Rule through the acts of another." That proposition is at the heart of Rule 4.2 and so many of our other rules. If a lawyer could violate the rules through agents, then the rules would have no meaning. But this new provision, hiding behind what sounds like benign advice to a client, in fact sanctions violations of Rule 4.2 by having the lawyer turn the lawyer's client into the lawyer's agent to violate Rule 4.2. Lawyers should no more be permitted to script a client contact with a represented person than the lawyer could script the lawyer's paralegal to do the same thing. This invitation to circumvent Rule 4.2's protections should be deleted.

Proposed Amendment to Report 401
offered by Commissioner Lawrence J. Fox

Rule 4.2, Comment [6]

The Proposed Amendment: In comment [6] add back in the language "or whose statement may constitute an admission on the part of the organization."

Basis for the Amendment: The Commission originally dropped this third category of employees of a represented organization who may not be contacted by other lawyers because it was felt that the category was redundant of the category of constituents whose conduct could be imputed to the organization. However, Professor Andrew Kaufman of Harvard Law School has demonstrated the error of this conclusion and the protection that a represented organization will lose if this change were adopted. Rule 4.2's protections are too critical and sensitive to justify this deletion from the present rule.

11

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

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MILTON I. SHADUR
EVIDENCE RULES

June 20, 2001

Honorable John W. Lungstrum
Chair, Committee on Court Administration
and Case Management
517 Robert J. Dole United States
Courthouse
500 State Avenue
Kansas City, KS 66101-2436

Subject: Report on Privacy and Public Access to Case Files and Model Local Rules Governing Electronic Case Filings

Dear Judge Lungstrum:

Thank you for the opportunity to comment on the "Report of the Judicial Conference Committee on Court Administration and Case Management's Subcommittee on Privacy and Public Access to Case Files" and proposed model local rules governing electronic case filing. The Committee on Rules of Practice and Procedure (Committee) considered both items at its June 7-8, 2001, meeting. The issues addressed by the report and model local rules are important. The Committee recognizes the need to take swift actions on both items and is in general agreement with the report's conclusions and the model rules.

Report on Privacy and Public Access to Case Files

The Committee agreed with the Privacy and Public Access to Case Files report's conclusion that there is no need, at this time, to amend the Federal Rules of Practice and Procedure to accommodate the privacy concerns raised by remote electronic access to case files. The current language of the Federal Rules of Civil Procedure and the court's inherent power are sufficient to address these concerns. The Committee also agreed that it is essential for practicing lawyers to be advised that all information filed with the court becomes available to the public over the Internet, including sensitive information that may adversely affect their client's privacy interests. Armed with this knowledge, lawyers can protect privacy concerns through seeking protective or sealing orders in appropriate circumstances.

Committee members expressed some concern, however, with the proposal limiting personal, identifying information (e.g., listing only last four digits of a social security number) contained in papers filed with a court in both electronic and hard copy. The committee's representative from the Department of Justice was particularly concerned that limiting the Government's access only to "partial" identification information might unduly impair its efforts in tracking debtors, enforcing orders, and seeking criminal sanctions. In addition, the proposal arguably conflicts with the Bankruptcy Code (§ 342(c)) and may be inconsistent with Bankruptcy Rules and Official Forms that are intended to provide creditors with adequate information to track a debtor's possessions. Creditors may mistakenly act on inadequate personal identification numbers, resulting in unintended adverse consequences for debtors and creditors. The Committee therefore suggests that the report contain some provision clarifying the right of certain parties, including most significantly the Government, to obtain access to a party's full social security number in a case filed with the court.

Model Local Rules Governing Electronic Case Filing

The Committee also discussed the "Model Local District Court Rules for Electronic Case Filing" and the "Model Local Bankruptcy Court Rules for Electronic Case Filing" prepared by the Committee on Court Administration and Case Management's Subcommittee on Electronic Filing Rules. The Committee agreed that the models would be helpful to courts preparing to use electronic filing.

The Advisory Committee on Bankruptcy Rules is preparing "interim rules" for adoption as local rules to implement provisions in comprehensive bankruptcy reform legislation (H.R. 333 and S. 420) that is likely to be enacted during this congressional session. It is essential that these "interim rules" be adopted by all bankruptcy courts virtually unchanged to ensure uniformity during the transitional period, while the promulgation of "permanent federal rules" proceeds in the regular course of the rulemaking process. The advisory committee is concerned that issuing two sets of "model local bankruptcy rules" within relatively short times of each other might generate confusion that might lead to non-uniform "interim rules."

The Committee recommends some minor clarifying suggestions that highlight the distinction between the "model local rules" and "interim rules." First, we will transmit the "interim bankruptcy rules" in a letter urging courts to adopt the interim rules unchanged. Second, we suggest that a few clarifying sentences be included in the preface to the "Model Local Bankruptcy Rules for Electronic Case Filing," signifying that these rules are separate from the "interim bankruptcy rules" and have been developed from a study of existing local rules and procedures. (See enclosure.)

The Advisory Committee on Bankruptcy Rules suggests a few modest additions that would revise or clarify the "Model Local Bankruptcy Court Rules for Electronic Case Filing" or

its commentary. Several of the suggestions were submitted to Judge John G. Koeltl soon after the June 7-8 Committee meeting. A copy of all suggestions proposed by the advisory committee is enclosed for your consideration.

Thank you for allowing the rules committees to participate in the work of the subcommittee under the effective leadership of Judge Koeltl, and to offer comments on the model documents.

Sincerely,

Anthony J. Scirica

Enclosures

cc: Chairs and Reporters, Advisory Rules Committees
Honorable John G. Koeltl

Enclosure 1

Advisory Committee on Bankruptcy Rules Recommendations on
Model Local Bankruptcy Court Rules for Electronic Case Filing

Rule 1. It is recommended that the commentary make clear that the requirement in the second paragraph that a party must provide electronic copies of all documents previously filed in paper form should not apply when the court has previously scanned documents filed in paper form.

Rule 3. It is recommended that the rule specify that the midnight deadline be based on the time of midnight at the court's location.

Rule 5. It is recommended that a party filing excerpts from an exhibit-document should be required to have a paper copy of the entire exhibit-document available at any hearing. If the committee determines that the rule should not so be revised, it is recommended that the commentary include a reference to this alternative as an option for the court's consideration.

Rule 7. It is recommended that a debtor's original signature be filed with the court because the signature is so important on bankruptcy schedules. The bankruptcy system depends on accurate schedules and false schedules can lead to criminal prosecution and the loss of the debtor's discharge. If the objective is to eliminate all paper, the clerk's office could scan the original signature when it is filed and then discard the paper.

The commentary to Rule 7 already suggests that a court may consider adopting an alternative procedure that requires filing all original signatures with the court. The advisory committee recommends that the rule itself require that original signatures be filed with the court, while the commentary refer to the procedure contained in the draft rule as an option. If your committee decides to retain the present form of the rule, it may nonetheless wish to consider adding a sentence or two to the commentary underscoring the advisory committee's concern.

Enclosure 2

Suggested Additions to the Preface of the
"Model Local Bankruptcy Court Rules for Electronic Case Filing"

1. Delete the word "existing" in the second line of the first sentence in the third paragraph of the Introduction.

2. Insert the following sentence after the first sentence in the third paragraph: "The language is largely derivative from existing provisions."

3. Insert the following after the last sentence in the third paragraph: "Courts are free to adapt the provisions of these model local rules as they choose. (Please note that "Interim Bankruptcy Rules" will be promulgated and recommended for adoption as local rules to implement pending comprehensive bankruptcy reform legislation upon enactment. Unlike model local rules, including model local rules governing electronic case filing, courts will be urged to adopt the "interim bankruptcy rules" as local rules without change.)"

Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files

Approved by the Judicial Conference
September 2001

The Judicial Conference of the United States requested that its Committee on Court Administration and Case Management examine issues related to privacy and public access to electronic case files. The Committee on Court Administration and Case Management formed a special subcommittee for this purpose. This subcommittee, known as the Subcommittee on Privacy and Public Access to Electronic Case Files, consisted of four members of the Committee on Court Administration and Case Management: Judge John W. Lungstrum, District of Kansas, Chair; Judge Samuel Grayson Wilson, Western District of Virginia; Judge Jerry A. Davis, Magistrate Judge, Northern District of Mississippi; and Judge J. Rich Leonard, Bankruptcy Judge, Eastern District of North Carolina, and one member from each of four other Judicial Conference Committees (liaison Committees): Judge Emmet Sullivan, District of Columbia, liaison from the Committee on Criminal Law; Judge James Robertson, District of Columbia, liaison from the Committee on Automation and Technology; Judge Sarah S. Vance, Eastern District of Louisiana, liaison from the Committee on the Administration of the Bankruptcy System; and Gene W. Lafitte, Esq., Liskow and Lewis, New Orleans, Louisiana, liaison from the Committee on the Rules of Practice and Procedure. After a lengthy process described below, the Subcommittee on Privacy and Public Access to Electronic Case Files, drafted a report containing recommendations for a judiciary-wide privacy and access policy.

The four liaison Committees reviewed the report and provided comments on it to the full Committee on Court Administration and Case Management. After carefully considering these comments, as well as comments of its own members, the Committee on Court Administration and Case Management made several changes to the subcommittee report, and adopted the amended report as its own.

Brief History of the Committee's Study of Privacy Issues

The Committee on Court Administration and Case Management, through its Subcommittee on Privacy and Public Access to Electronic Case Files (the Subcommittee), began its study of privacy and security concerns regarding public electronic access to case file information in June 1999. It has held numerous meetings and conference calls and received information from experts and academics in the privacy arena, as well as from court users, including judges, court clerks, and government agencies. As a result, in May 2000, the Subcommittee developed several policy options and alternatives for the creation of a judiciary-wide electronic access privacy policy which were presented to the full Committee on Court Administration and Case Management and the liaison committees at their Summer 2000

meetings. The Subcommittee used the opinions and feedback from these committees to further refine the policy options.

In November 2000, the Subcommittee produced a document entitled "Request for Comment on Privacy and Public Access to Electronic Case Files." This document contains the alternatives the Subcommittee perceived as viable following the committees' feedback. The Subcommittee published this document for public comment from November 13, 2000 through January 26, 2001. A website at www.privacy.uscourts.gov was established to publicize the comment document and to collect the comments. Two hundred forty-two comments were received from a very wide range of interested persons including private citizens, privacy rights groups, journalists, private investigators, attorneys, data re-sellers and representatives of the financial services industry. Those comments, in summary and full text format, are available at that website.

On March 16, 2001, the Subcommittee held a public hearing to gain further insight into the issues surrounding privacy and access. Fifteen individuals who had submitted written comments made oral presentations to and answered the questions of Subcommittee members. Following the hearing, the Subcommittee met, considered the comments received, and reached agreement on the policy recommendations contained in this document.

Background

Federal court case files, unless sealed or otherwise subject to restricted access by statute, federal rule, or Judicial Conference policy, are presumed to be available for public inspection and copying. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (holding that there is a common law right "to inspect and copy public records and documents, including judicial records and documents"). The tradition of public access to federal court case files is also rooted in constitutional principles. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 575-78 (1980). However, public access rights are not absolute, and courts balance access and privacy interests in making decisions about the public disclosure and dissemination of case files. The authority to protect personal privacy and other legitimate interests in nondisclosure is based, like public access rights, in common law and constitutional principles. *See Nixon*, 435 U.S. at 596 ("[E]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes").

The term "case file" (whether electronic or paper) means the collection of documents officially filed by the litigants or the court in the context of litigation, the docket entries that catalog such filings, and transcripts of judicial proceedings. The case file generally does not include several other types of information, including non-filed discovery material, trial exhibits that have not been admitted into evidence, drafts or notes by judges or court staff, and various documents that are sometimes known as "left-side" file material. Sealed material, although part of the case file, is accessible only by court order.

Certain types of cases, categories of information, and specific documents may require special protection from unlimited public access, as further specified in the sections on civil, criminal, bankruptcy and appellate case files below. *See United States Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989) (noting that technology may affect the balance between access rights and privacy and security interests). To a great extent, these recommendations rely upon counsel and litigants to act to protect the interests of their clients and themselves. This may necessitate an effort by the courts to educate the bar and the public about the fact that documents filed in federal court cases may be available on the Internet.

It is also important to note that the federal courts are not required to provide electronic access to case files (assuming that a paper file is maintained), and these recommendations do not create any entitlement to such access. As a practical matter, during this time of transition when courts are implementing new practices, there may be disparity in access among courts because of varying technology. Nonetheless, the federal courts recognize that the public should share in the benefits of information technology, including more efficient access to court case files.

These recommendations propose privacy policy options which the Committee on Court Administration and Case Management (the Committee) believes can provide solutions to issues of privacy and access as those issues are now presented. To the extent that courts are currently experimenting with procedures which differ from those articulated in this document, those courts should reexamine those procedures in light of the policies outlined herein. The Committee recognizes that technology is ever changing and these recommendations may require frequent re-examination and revision.

Recommendations

The policy recommended for adoption by the Judicial Conference is as follows:

General Principles

1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.

2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.

3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.

4. Except where otherwise noted, the policies apply to both paper and electronic files.

5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.

6. The availability of case files at the courthouse will not be affected or limited by these policies.

7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Case Types

Civil Case Files

Recommendation: That documents in civil case files should be made available electronically to the same extent that they are available at the courthouse with one exception (Social Security cases should be excluded from electronic access) and one change in policy (the requirement that certain "personal data identifiers" be modified or partially redacted by the litigants). These identifiers are Social Security numbers, dates of birth, financial account numbers and names of minor children.

The recommendation provides for liberal remote electronic access to civil case files while also adopting some means to protect individual privacy. Remote electronic access will be available only through the PACERNet system which requires registration with the PACER service center and the use of a log in and password. This creates an electronic trail which can be retraced in order to determine who accessed certain information if a problem arises. Further, this recommendation contemplates that certain personal, identifying information will not be included in its full and complete form in case documents, whether electronic or hard copy. For example, if the Social Security number of an individual must be included in a document, only the last four digits of that number will be used whether that document is to be filed electronically or at the courthouse. If the involvement of a minor child must be mentioned, only that child's initials should be used; if an individual's date of birth is necessary, only the year should be used; and, if financial account numbers are relevant, only the last four digits should be recited in the document. It is anticipated that as courts develop local rules and instructions for the use and implementation of Electronic Case Filing (ECF), such rules and instructions will include direction on the truncation by the litigants of personal identifying information. Similar rule changes would apply to courts which are imaging documents.

Providing remote electronic access equal to courthouse access will require counsel and pro se litigants to protect their interests through a careful review of whether it is essential to their case to file certain documents containing private sensitive information or by the use of motions to

seal and for protective orders. It will also depend upon the discretion of judges to protect privacy and security interests as they arise in individual cases. However, it is the experience of the ECF prototype courts and courts which have been imaging documents and making them electronically available that reliance on judicial discretion has not been problematic and has not dramatically increased or altered the amount and nature of motions to seal. It is also the experience of those courts that have been making their case file information available through PACERNet that there have been virtually no reported privacy problems as a result.

This recommended "public is public" policy is simple and can be easily and consistently applied nationwide. The recommended policy will "level the geographic playing field" in civil cases in federal court by allowing attorneys not located in geographic proximity to the courthouse easy access. Having both remote electronic access and courthouse access to the same information will also utilize more fully the technology available to the courts and will allow clerks' offices to better and more easily serve the needs of the bar and the public. In addition, it might also discourage the possible development of a "cottage industry" headed by data re-sellers who, if remote electronic access were restricted, could go to the courthouse, copy the files, download the information to a private website, and charge for access to that website, thus profiting from the sale of public information and undermining restrictions intended to protect privacy.

Each of the other policy options articulated in the document for comment presented its own problems. The idea of defining what documents should be included in the public file was rejected because it would require the courts to restrict access at the courthouse to information that has traditionally been available from courthouse files. This would have the net effect of allowing less overall access in a technological age where greater access is easy to achieve. It would also require making the very difficult determination of what information should be included in the public file.

The Committee seriously considered and debated at length the idea of creating levels of access to electronic documents (i.e., access to certain documents for specific users would be based upon the user's status in the case). The Committee ultimately decided that levels of access restrictions were too complicated in relation to the privacy benefits which could be derived therefrom. It would be difficult, for example, to prohibit a user with full access to all case information, such as a party to the case, from downloading and disseminating the restricted information. Also, the levels of access would only exist in relation to the remote electronic file and not in relation to the courthouse file. This would result in unequal remote and physical access to the same information and could foster a cottage industry of courthouse data collection as described above.

Seeking an amendment to the Federal Rules of Civil Procedure was not recommended for several reasons. First, any such rules amendment would take several years to effectuate, and the Committee concluded that privacy issues need immediate attention. There was some discussion about the need for a provision in Fed. R. Civ. P. 11 providing for sanctions against counsel or

litigants who, as a litigation tactic, intentionally include scurrilous or embarrassing, irrelevant information in a document so that this information will be available on the Internet. The Committee ultimately determined that, at least for now, the current language of Fed. R. Civ. P. 11 and the inherent power of the court are sufficient to deter such actions and to enforce any privacy policy.

As noted above, this recommendation treats Social Security cases differently from other civil case files. It would limit remote electronic access. It does contemplate, however, the existence of a skeletal electronic file in Social Security cases which would contain documents such as the complaint, answer and dispositive cross motions or petitions for review as applicable but **not** the administrative record and would be available to the court for statistical and case management purposes. This recommendation would also allow litigants to electronically file documents, except for the administrative record, in Social Security cases and would permit electronic access to these documents by litigants only.

After much debate, the consensus of the Committee was that Social Security cases warrant such treatment because they are of an inherently different nature from other civil cases. They are the continuation of an administrative proceeding, the files of which are confidential until the jurisdiction of the district court is invoked, by an individual to enforce his or her rights under a government program. Further, all Social Security disability claims, which are the majority of Social Security cases filed in district court, contain extremely detailed medical records and other personal information which an applicant must submit in an effort to establish disability. Such medical and personal information is critical to the court and is of little or no legitimate use to anyone not a party to the case. Thus, making such information available on the Internet would be of little public benefit and would present a substantial intrusion into the privacy of the claimant. Social Security files would still be available in their entirety at the courthouse.

Criminal Case Files

Recommendation: That public remote electronic access to documents in criminal cases should not be available at this time, with the understanding that the policy will be reexamined within two years of adoption by the Judicial Conference.

The Committee determined that any benefits of public remote electronic access to criminal files were outweighed by the safety and law enforcement risks such access would create. Routine public remote electronic access to documents in criminal case files would allow defendants and others easy access to information regarding the cooperation and other activities of defendants. Specifically, an individual could access documents filed in conjunction with a motion by the government for downward departure for substantial assistance and learn details of a defendant's involvement in the government's case. Such information could then be very easily used to intimidate, harass and possibly harm victims, defendants and their families.

Likewise, routine public remote electronic access to criminal files may inadvertently increase the risk of unauthorized public access to preindictment information, such as unexecuted arrest and search warrants. The public availability of this information could severely hamper and compromise investigative and law enforcement efforts and pose a significant safety risk to law enforcement officials engaged in their official duties. Sealing documents containing this and other types of sensitive information in criminal cases will not adequately address the problem, since the mere fact that a document is sealed signals probable defendant cooperation and covert law enforcement initiatives.

The benefit to the public of easier access to criminal case file information was not discounted by the Committee and, it should be noted that, opinions and orders, as determined by the court, and criminal docket sheets will still be available through court websites and PACER and PACERNet. However, in view of the concerns described above, the Committee concluded that individual safety and the risk to law enforcement personnel significantly outweigh the need for unfettered public remote access to the content of criminal case files. This recommendation should be reconsidered if it becomes evident that the benefits of public remote electronic access significantly outweigh the dangers to victims, defendants and their families, and law enforcement personnel.

Bankruptcy Case Files

Recommendation: That documents in bankruptcy case files should be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers as in civil cases; that § 107(b)(2) of the Bankruptcy Code should be amended to establish privacy and security concerns as a basis for the sealing of a document; and that the Bankruptcy Code and Rules should be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits.

The Committee recognized the unique nature of bankruptcy case files and the particularly sensitive nature of the information, largely financial, which is contained in these files; while this recommendation does provide open remote electronic access to this information, it also accommodates the privacy concerns of individuals. This recommendation contemplates that a debtor's personal, identifying information and financial account numbers will not be included in their complete forms on any document, whether electronic or hard copy (i.e., only the last four digits of Social Security and financial account numbers will be used). As the recommendation recognizes, there may be a need to amend the Bankruptcy Code to allow only the last four digits of an individual debtor's Social Security number to be used. The bankruptcy court will collect the full Social Security number of debtors for internal use, as this number appears to provide the best way to identify multiple bankruptcy filings. The recommendation proposes a minor amendment to § 107(a) to allow the court to collect the full number, but only display the last four digits. The names of minor children will not be included in electronic or hard copies of documents.

As with civil cases, the effectiveness of this recommendation relies upon motions to seal filed by litigants and other parties in interest. To accomplish this result, an amendment of 11 U.S.C. § 107(b), which now narrowly circumscribes the ability of the bankruptcy courts to seal documents, will be needed to establish privacy and security concerns as a basis for sealing a document. Once again, the experiences of the ECF prototype and imaging courts do not indicate that this reliance will cause a large influx of motions to seal. In addition, as with all remote electronic access, the information can only be reached through the log-in and password-controlled PACERNet system.

The Committee rejected the other alternatives suggested in the comment document for various reasons. Any attempt to create levels of access in bankruptcy cases would meet with the same problems discussed with respect to the use of levels of access for civil cases. Bankruptcy cases present even more issues with respect to levels of access because there are numerous interests which would have a legitimate need to access file information and specific access levels would need to be established for them. Further, many entities could qualify as a "party in interest" in a bankruptcy filing and would need access to case file information to determine if they in fact have an interest. It would be difficult to create an electronic access system which would allow sufficient access for that determination to be made without giving full access to that entity.

The idea of collecting less information or segregating certain information and restricting access to it was rejected because the Committee determined that there is a need for and a value in allowing the public access to this information. Further, creating two separate files, one totally open to the public and one with restricted access, would place a burden on clerks' offices by requiring the management of two sets of files in each case.

Appellate Case Files

Recommendation: That appellate case files be treated at the appellate level the same way in which they are treated at the lower level.

This recommendation acknowledges the varying treatment of the different case types at the lower level and carries that treatment through to the appellate level. For cases appealed to the district court or the court of appeals from administrative agencies, the documents in the appeal will be treated, for the purposes of remote electronic access, in the same manner in which they were treated by the agency. For cases appealed from the district court, the case file will be treated in the manner in which it was treated by the district court with respect to remote electronic access.

CASE MANAGEMENT/ELECTRONIC CASE FILES (CM/ECF) FACT SHEET
DECEMBER 2001

The federal judiciary's Case Management/Electronic Case Files (CM/ECF) project is designed to replace aging electronic docketing and case management systems in more than 200 bankruptcy, district and appellate courts by 2005. CM/ECF will also provide courts the capability to have case file documents in electronic format, and to accept filings over the Internet if they choose to do so.

CM/ECF systems are now in use in seven district courts, fifteen bankruptcy courts, and the Court of International Trade. Additional bankruptcy and district courts are scheduled to implement CM/ECF over the next several months. So far in these courts, more than 5 million documents in more than a million cases are on CM/ECF systems. Close to 15,000 attorneys and others have filed documents over the Internet.

Attorneys practicing in courts offering the electronic filing capability are able to file documents directly with the court over the Internet. The CM/ECF system uses standard computer hardware, an Internet connection and a browser, and accepts documents in Portable Document Format (PDF). The system is easy to use – filers prepare a document using conventional word processing software, then save it as a PDF file. After logging onto the court's web site with a court-issued password, the filer fills out several screens with basic information relating to the case, party and document being filed, attaches the document, and submits it to the court. A notice verifying court receipt of the filing is generated automatically. Other parties in the case then automatically receive e-mail notification of the filing.

CM/ECF also provides courts the ability to make their documents available to the public over the Internet. The Judicial Conference has recently adopted a set of recommendations relating to privacy and public access to electronic case files. As part of the process to develop these recommendations, public comment was sought on a number of possible approaches. The Judicial Conference's Committee on Court Administration and Case Management is now beginning to address the schedule for implementing the recommendations.

There are no added fees for filing documents over the Internet using CM/ECF; existing document filing fees do apply. Electronic access to court data is available through the Public Access to Court Electronic Records (PACER) program. Litigants receive one free copy of documents filed electronically in their cases, which they can save or print for their files. Additional copies are available to attorneys and the general public for viewing or downloading at seven cents per page. Directed by Congress to fund electronic access through user fees, the judiciary has set the fee at the lowest possible level sufficient to recoup program costs.

The national roll-out of the CM/ECF system for bankruptcy courts started in March 2001, and is scheduled to take two to three years. The CM/ECF system for district courts is scheduled to roll out nationally starting mid-2002. The CM/ECF system for appellate courts is expected to be ready for use during the late summer of 2003.

December 10, 2001

CM/ECF
Court Implementation

District Prototype Courts
Missouri Western**
New York Eastern**
Ohio Northern**
Oregon*

Bankruptcy Prototype Courts
Arizona **
California Southern**
Georgia Northern**
New York Southern**
Virginia Eastern**

District Alpha Courts
California Northern**
District of Columbia**
Michigan Western**

Bankruptcy Alpha Courts
North Carolina Western**
Texas Western**
Wyoming

Bankruptcy Wave Test Courts (Implementation began 10/00)
Georgia Middle
Louisiana Middle**
Missouri Western**
New York Eastern
Tennessee Middle
Washington Western**

Wave 1 – Bankruptcy (Implementation began 1/01)
Delaware**
Iowa Southern
New Jersey
South Carolina
Utah*
Vermont

Wave 2 – Bankruptcy (Implementation began 3/01)
Alaska**
Colorado
Montana
New Hampshire
Ohio Northern*
Oregon

Wave 3 – Bankruptcy (Implementation began 5/01)
Arkansas Eastern
Arkansas Western
Louisiana Eastern*
Maine
Nevada
South Dakota*
Wisconsin Eastern
Wisconsin Western
West Virginia Northern

Wave 4 – Bankruptcy (Implementation began 7/01)
Alabama Middle
Alabama Southern
Iowa Northern
Illinois Southern
Kentucky Eastern
Kentucky Western
Pennsylvania Western
Texas Eastern
Texas Southern

Wave 5 - District Court Wave Test (Implementation began 7/01)
Indiana Southern
Nebraska
New York Southern
Pennsylvania Eastern
Texas Northern
Wisconsin Eastern

Wave 6 – Bankruptcy (Implementation began 11/01)
District of Columbia
Indiana Northern
Louisiana Western
Maryland
Mississippi Northern
New York Northern
Ohio Southern
Pennsylvania Eastern
Pennsylvania Middle

Wave 7 – Bankruptcy (Implementation begins 1/02)
California Northern
Connecticut
Florida Middle
Hawaii
Illinois Northern
Massachusetts
Michigan Western
Missouri Eastern
Texas Northern

Wave 8 – Bankruptcy (Implementation begins 3/02)
Kansas
New Mexico
New York Western
North Carolina Eastern
North Carolina Middle
Oklahoma Eastern
Rhode Island
Tennessee Western
West Virginia Southern

* Operational on CM/ECF within the court
**Accepting court filings electronically

Model Local District Court Rules for Electronic Case Filing

Approved by the Judicial Conference of the United States

September 2001

Introduction

Because most existing court rules and procedures have been designed with paper court documents in mind, some modifications are needed to address issues arising when court documents are filed in electronic form. This set of model local rules has been developed for federal district and bankruptcy courts implementing the electronic case filing capabilities of the federal judiciary's Case Management/Electronic Case Files (CM/ECF) Project, and can be adapted by courts that offer some other method of electronic filing of court documents.

The model was compiled by a subcommittee of the Court Administration and Case Management Committee that included as members representatives from the Committee on Automation and Technology and the Committee on Rules of Practice and Procedure. The subcommittee reviewed the rules and procedures for electronic filing developed in the CM/ECF prototype district and bankruptcy courts. It also undertook an informal survey of those courts to find out how well those procedures operated. The information indicated general satisfaction with courts' existing procedures. There was also general agreement that it was essential to include the bar in the process of developing and modifying the local procedures governing electronic filing.

This set of model local rules for electronic case filing is based to a significant extent on the procedures used in courts that served as prototype courts for the federal judiciary's CM/ECF Project. There are separate sets of model local rules for district courts and bankruptcy courts. They use the same terminology and are identical to the extent possible and appropriate. Courts are free to adapt the provisions of these model local rules as they choose.

The Federal Rules of Procedure (Civil Rule 5(e), Bankruptcy Rules 5005, 7005 and 8008) provide that a court may "by local rule" permit filing, signing and verification of documents by electronic means. Thus, each court that intends to allow electronic filing should have at least a general authorizing provision in its local rules.[1] The model rules developed here may be used either as a set of local rules, or as the contents for a general order or other administrative procedures. The use of local rules promotes the requirements of the Rules Enabling Act, provides better public notice of applicable procedures, and allows for input from the bar. On the other hand, use of general orders gives courts more flexibility to modify requirements and rules in response to changing circumstances. If local rules are used, it should be noted that Fed.R.Civ.P. 83, Fed.R.Bankr.P. 9029 and related Judicial Conference policy require that rule numbering conform to the numbering system of the Federal Rules. The model rules could be added as a group to local rules corresponding to Fed.R.Civ.P. 5 or 83.

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[1] An example of a local rule authorizing electronic filing is as follows:

The court will accept for filing documents submitted, signed or verified by electronic means that comply with procedures established by the court.

Note: These model procedures use the term "Electronic Filing System" to refer to the court's system that receives documents filed in electronic form. The term "Filing User" is used to refer to those who have a court-issued log-in and password to file documents electronically.

Rule 1– Scope of Electronic Filing

The court will designate which cases will be assigned to the Electronic Filing System. Except as expressly provided and in exceptional circumstances preventing a Filing User from filing electronically, all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the court in connection with a case assigned to the Electronic Filing System must be electronically filed.

The filing of the initial papers, including the complaint and the issuance and service of the summons, will be accomplished in the traditional manner on paper rather than electronically. In a case assigned to the Electronic Filing System after it has been opened, parties must promptly provide the clerk with electronic copies of all documents previously provided in paper form. All subsequent documents must be filed electronically except as provided in these rules or as ordered by the court.

Notwithstanding the foregoing, attorneys and others who are not Filing Users in the Electronic Filing System are not required to electronically file pleadings and other papers in a case assigned to the System. Once registered, a Filing User may withdraw from participation in the Electronic Filing System by providing the clerk's office with written notice of the withdrawal.

Derivation

The first and third paragraphs of the Model Rule are derived from the Southern District of California Bankruptcy procedures, with the exception of the last sentence of the third paragraph, which is derived from the Eastern District of Virginia Bankruptcy procedures. The second paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides that the court will designate which cases will be assigned to the electronic filing system. It also establishes a presumption that all documents filed in cases assigned to the electronic filing system should be electronically filed. Some courts have designated certain types of cases for electronic filing, while some have determined that all cases are appropriate for electronic filing. However, the Rule does not make electronic filing mandatory. Mandatory electronic filing appears to be inconsistent with Fed.R.Civ.P. 5, which states that a court "may permit" papers to be filed electronically, and provides that the clerk "shall not refuse to accept for filing any paper presented . . . solely because it is not presented in proper form." However, the Federal Rules clearly permit a court to strongly encourage lawyers to participate in electronic case filing, and the Model Rule is written to provide such

encouragement.

2. For cases assigned to the electronic filing system after documents have already been filed conventionally, the Model Rule states that the parties must provide electronic copies of all previously filed documents. This will include the summons and complaint. In cases removed to the federal court, parties in cases assigned to the electronic filing system are required to provide electronic copies of all previous filings in the state court. Where documents filed in paper form were previously scanned by the court, electronic filing would not be necessary.

3. Some courts offering electronic filing require fees to be paid in the traditional manner, while others permit or require electronic payment of fees. Nothing in the rule would constrain the court in providing for a desired method of payment of fees.

4. Electronic case filing raises privacy concerns. Electronic case files can be more easily accessible than traditional paper case files, so there is a greater risk of public dissemination of sensitive information found in case files. See Model Rule 12. The Judicial Conference is investigating and evaluating the privacy concerns attendant to electronic case files, and is working to develop a policy.

Rule 2– Eligibility, Registration, Passwords

Attorneys admitted to the bar of this court, including those admitted pro hac vice, may register as Filing Users of the court's Electronic Filing System. Registration is in a form prescribed by the clerk and requires the Filing User's name, address, telephone number, Internet e-mail address, and a declaration that the attorney is admitted to the bar of this court.

If the court permits, a party to a pending civil action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action. Registration is in a form prescribed by the clerk and requires identification of the action as well as the name, address, telephone number and Internet e-mail address of the party. If, during the course of the action, the party retains an attorney who appears on the party's behalf, the attorney must advise the clerk to terminate the party's registration as a Filing User upon the attorney's appearance.

Provided that a Filing User has an Internet e-mail address, registration as a Filing User constitutes consent to electronic service of all documents as provided in these rules in accordance with the Federal Rules of Civil Procedure.

Once registration is completed, the Filing User will receive notification of the user log-in and password. Filing Users agree to protect the security of their passwords and

immediately notify the clerk if they learn that their password has been compromised. Users may be subject to sanctions for failure to comply with this provision.

Derivation

The first three paragraphs of Model Rule 2 are derived from the Eastern District of New York procedures. The last paragraph is derived from the Northern District of Ohio procedures.

Commentary

1. The Model Rule specifically provides that attorneys admitted pro hac vice can be filing users in electronic filing systems. The Model Rule also recognizes that a court may wish under certain circumstances to permit pro se filers to take part in electronic case filing. Such participation is left to the discretion of the court.

2. The Model Rule provides that a person who registers with the System (a Filing User) thereby consents to electronic service of documents subject to the electronic filing system. Pending amendments to the Federal Rules of Civil Procedure permit electronic service on a person who consents "in writing." The Committee Notes indicate that the consent may be provided by electronic means. A court may "establish a registry or other facility that allows advance consent to service by specified means for future action." Thus, a court might use CM/ECF registration as a means to have parties consent to receive service electronically.

3. Several districts currently have provisions addressing the possibility of compromised passwords. Such a provision may be useful in a User Manual for the electronic filing system. The provision might read as follows:

> Attorneys may find it desirable to change their court assigned passwords periodically. In the event that an attorney believes that the security of an existing password has been compromised and that a threat to the System exists, the attorney must give immediate notice by telephone to the clerk, chief deputy clerk or systems department manager and confirm by facsimile in order to prevent access to the System by use of that password.

Rule 3–Consequences of Electronic Filing

Electronic transmission of a document to the Electronic Filing System consistent with these rules, together with the transmission of a Notice of Electronic Filing from the court, constitutes filing of the document for all purposes of the Federal Rules of Civil Procedure and the local rules of this court, and constitutes entry of the document on the docket kept by the clerk under Fed.R.Civ.P. 58 and 79.

When a document has been filed electronically, the official record is the electronic recording of the document as stored by the court, and the filing party is bound by the document as filed. Except in the case of documents first filed in paper form and subsequently submitted electronically under Rule 1, a document filed electronically is deemed filed at the date and time stated on the Notice of Electronic Filing from the court.

Filing a document electronically does not alter the filing deadline for that document. Filing must be completed before midnight local time where the court is located in order to be considered timely filed that day.

Derivation

The first two paragraphs of Model Rule 3 are adapted from the Eastern District of New York procedures. The third paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides a "time of filing" rule that is analogous to the traditional system of file stamping by the Clerk's office. A filing is deemed made when it is acknowledged by the Clerk's office through the CM/ECF system's automatically generated Notice of Electronic Filing.

2. The Model Rule makes clear that the electronically filed documents are considered to be entries on the official docket.

Rule 4– Entry of Court Orders

All orders, decrees, judgments, and proceedings of the court will be filed in accordance with these rules which will constitute entry on the docket kept by the clerk under Fed.R.Civ.P. 58 and 79. All signed orders will be filed electronically by the court or court personnel. Any order filed electronically without the original signature of a judge has the same force and effect as if the judge had affixed the judge's signature to a paper copy of the order and it had been entered on the docket in a conventional manner.

A Filing User submitting a document electronically that requires a judge's signature must promptly deliver the document in such form as the court requires.

Derivation

The first two sentences of the first paragraph of the Model Rule are adapted from the Eastern District of New York procedures. The last sentence is derived from the Northern District of Georgia Bankruptcy Court. The second paragraph is adapted from Eastern District of New York procedures.

Commentary

1. Not all courts have a provision in their electronic filing procedures addressing the electronic entry of court orders. In at least one court without such a provision, a question arose about the validity of electronically filed court orders. The Model Rule specifically states that an electronically filed court order has the same force and effect as an order conventionally filed.

2. The Model Rule contemplates that a judge can authorize personnel, such as a law clerk or judicial assistant, to electronically enter an order on the judge's behalf.

3. The Model Rule leaves the method for submitting proposed orders to the discretion of the court.

Rule 5– Attachments and Exhibits

Filing Users must submit in electronic form all documents referenced as exhibits or attachments, unless the court permits conventional filing. A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. Filing Users who file excerpts of documents as exhibits or attachments under this rule do so without prejudice to their right to timely file additional excerpts or the complete document. Responding parties may timely file additional excerpts or the complete document that they believe are directly germane.

Derivation

The Model Rule is adapted from the Southern District of New York Bankruptcy procedures.

Commentary

1. One issue that has arisen in most courts using electronic filing relates to attachments or exhibits not originally available to the filer in electronic form, and that must be scanned (or imaged) into Portable Document Format before filing. Examples include leases, contracts, proxy statements, charts and graphs. A scanned document creates a much larger electronic file than one prepared directly on the computer (*e.g.*, through word processing). The large documents can take considerable time to file and retrieve. The Model Rule provides that if the case is assigned to the electronic filing system, the party must file this type of material electronically, unless the court specifically permits conventional filing.

2. It is often the case that only a small portion of a much larger document is relevant to the matter before the court. In such cases, scanning the entire document imposes an inappropriate burden on both the litigants and the courts. To alleviate some of this inconvenience, the Model Rule provides that a Filing User must submit as the exhibit only the relevant excerpts of a larger document. The opposing party then has a right to submit other excerpts of the same document under the principle of completeness.

3. This rule is not intended to alter traditional rules with respect to materials that are before the court for decision. Thus, any material on which the court is asked to rely must be specifically provided to the court.

Rule 6–Sealed Documents

Documents ordered to be placed under seal must be filed conventionally and not electronically unless specifically authorized by the court. A motion to file documents under seal may be filed electronically unless prohibited by law. The order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. A paper copy of the order must be attached to the documents under seal and be delivered to the clerk.

Derivation

The Model Rule is adapted from the Western District of Missouri procedures.

Commentary

1. The Model Rule recognizes that other laws may affect whether a motion to file documents under seal, or an order authorizing the filing of such documents, can or should be electronically filed. It is possible that electronic access to the motion or order may raise the same privacy concerns that gave rise to the need to file a document conventionally in the first place. For similar reasons, the actual documents to be filed under seal should ordinarily be filed conventionally.

2. See Model Rule 12 for another provision addressing privacy concerns arising from electronic filing.

Rule 7– Retention Requirements

Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until [number] years after all time periods for appeals expire. On request of the court, the Filing User must provide original documents for review.

Derivation

Model Rule 7 is adapted from the Eastern District of Virginia Bankruptcy procedures.

Commentary

1. Because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future. The Model Rule requires retention only of those documents containing original signatures of persons other than the person who files the document electronically. The filer's use of a log-in and password to file the document is itself a signature under the terms of Model Rule 8.

2. The Model Rule places the retention requirement on the person who files the document. Another possible solution is to require the filer to submit the signed original to the court, so that the court can retain it. Some government officials have expressed a preference to have such documents retained by the court, in order to make it easier to retrieve the documents for purposes such as a subsequent prosecution for fraud.

3. Courts have varied considerably on the required retention period. Some have limited it to the end of the litigation (plus the time for appeals). Others have required longer retention periods (four or five years). Assuming that the purpose of document retention is to preserve relevant evidence for a subsequent proceeding, the appropriate retention period might relate to relevant statutes of limitations.

4. Some districts require the filer to retain a paper copy of *all* electronically filed documents. Such a requirement seems unnecessary, and it tends to defeat one of the purposes of using electronic filing. Other courts have required retention of "verified documents," i.e., documents in which a person verifies, certifies, affirms, or swears under oath or penalty of perjury. See, *e.g.*, 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury).

Rule 8– Signatures

> The user log-in and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of Fed.R.Civ.P. 11, the Federal Rules of Civil Procedure, the local rules of this court, and any other purpose for which a signature is required in connection with proceedings before the court. Each document filed electronically must, if possible, indicate that it has been electronically filed. Electronically filed documents must include a signature block [in compliance with local rule number [ ] if applicable] and must set forth the name, address, telephone number and the attorney's [name of state] bar registration number, if applicable. In addition, the name of the Filing User under whose log-in and password the document is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear.

No Filing User or other person may knowingly permit or cause to permit a Filing User's password to be used by anyone other than an authorized agent of the Filing User.

Documents requiring signatures of more than one party must be electronically filed either by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; (3) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (4) in any other manner approved by the court.

Derivation

The first and third paragraphs of the Model Rule are adapted from the Northern District of Ohio procedures. The second paragraph is derived from the Southern District of New York Bankruptcy procedures.

Commentary

1. Signature issues are a subject of considerable interest and concern. The CM/ECF system is designed to require a log-in and password to file a document. The Model Rule provides that use of the log-in and password constitutes a signature, and assures that such a signature has the same force and effect as a written signature for purposes of the Federal Rules of Civil Procedure, including Fed.R.Civ.P. 11, and any other purpose for which a signature is required on a document in connection with proceedings before the court.

2. At the present time, other forms of digital or other electronic signature have received only limited acceptance. It is possible that over time and with further technological development a system of digital signatures may replace the current password system.

3. Some users of electronic filing systems have questioned whether an s-slash requirement is worth retaining. The better view is that an s-slash is necessary; otherwise there is no indication that documents printed out from the website were ever signed. The s-slash provides some indication when the filed document is viewed or printed that the original was in fact signed.

4. The second paragraph of the Model Rule does not require an attorney or other Filing User to personally file his or her own documents. The task of electronic filing can be delegated to an authorized agent, who may use the log-in and password to make the filing. However, use of the log-in and password to make the filing constitutes a signature by the Filing User under the Rule, even though the Filing User does not do the physical act of filing.

5. Issues arise when documents being electronically filed have been signed by persons other than the filer, *e.g.*, stipulations and affidavits. The Model Rule provides for a substantial amount of flexibility in the filing of these documents. Courts may wish to modify or narrow the options if, for example, they believe that administering the three-day period for endorsements would be burdensome.

6. Courts may wish to underscore the fact that a Filing User's log-in and password constitutes the Filing User's signature, by including a statement to that effect on the registration form.

Rule 9– Service of Documents by Electronic Means

Each person electronically filing a pleading or other document must serve a "Notice of Electronic Filing" to parties entitled to service under the Federal Rules of Civil Procedure and the local rules. The "Notice of Electronic Filing" must be served by e-mail, hand, facsimile, or by first-class mail postage prepaid. Electronic service of the "Notice of Electronic Filing" constitutes service of the filed document. Parties not deemed to have consented to electronic service are entitled to receive a paper copy of any electronically filed pleading or other document. Service of such paper copy must be made according to the Federal Rules of Civil Procedure and the local rules.

Derivation

Model Rule 9 is derived from the Western District of Missouri procedures.

Commentary

1. The pending amendments to the Federal Rules (Fed.R.Civ.P. 5(b)) authorizing service of documents by electronic means do not permit electronic service of process for purposes of obtaining personal jurisdiction (i.e., Rule 4 service). The Model Rule covers only service of documents after the initial service of the summons and complaint.

2. The CM/ECF system automatically generates a Notice of Electronic Filing at the time a document is filed with the system. The Notice indicates the time of filing, the name of the party and attorney filing the document, the type of document, and the text of the docket entry. It also contains an electronic link (hyperlink) to the filed document, allowing anyone receiving the Notice by e-mail to retrieve the document automatically. The CM/ECF system automatically sends this Notice to all case participants registered to use the electronic filing system. If the court is willing to have this Notice itself constitute service, it may, under pending amendments to the

Federal Rules, do so through a local rule. The pending amendments require a local rule if a court wants to authorize parties to use its transmission facilities to make electronic service. The Model Rule does not include such a provision, but could be easily modified to provide that the court's automatically generated notice of electronic filing constitutes service.

3. A pending amendment to Fed.R.Civ.P. 6(e) provides that the three additional days to respond to service by mail will apply to electronic service as well. The Committee Note states:

> Electronic transmission is not always instantaneous, and may fail for any number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that make electronic service ever more attractive.

The Model Rule does not specifically provide for the added three days, but such a provision would not be necessary if the proposed amendment to Fed.R.Civ.P. 6(e) takes effect.

4. The CM/ECF system is designed so that a person may request electronic notice of all filings in a matter even though that person has not obtained a password and registered as a Filing User. Such electronic notice would not constitute service under the Model Rule, because the effectiveness of electronic service is dependent on registration with the system. The court should be aware of this possibility and should encourage all those who request electronic notice to register for a system password.

Rule 10– Notice of Court Orders and Judgments

> Immediately upon the entry of an order or judgment in an action assigned to the Electronic Filing System, the clerk will transmit to Filing Users in the case, in electronic form, a Notice of Electronic Filing. Electronic transmission of the Notice of Electronic Filing constitutes the notice required by Fed.R.Civ.P. 77(d). The clerk must give notice to a person who has not consented to electronic service in paper form in accordance with the Federal Rules of Civil Procedure.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures

Commentary

1. Pending amendments to Fed.R.Civ.P 77(d) authorize electronic notice of court orders where the parties consent. The Model Rule provides that for all Filing Users in the electronic filing system, electronic notice of the entry of an order or judgment has the same force and effect as traditional notice. The CM/ECF system automatically generates and sends a Notice of Electronic Filing upon entry of the order or judgment. The Notice contains a hyperlink to the document.

Rule 11– Technical Failures

A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures.

Commentary

1. CM/ECF is designed so that filers access the court through its Internet website. The Model Rule addresses the possibility that a party may not meet a filing deadline because the court's website is not accessible for some reason. Cf. Fed.R.Civ.P. 6 (permitting extension of time when "weather or other conditions have made the office of the clerk of the district court inaccessible"). The Model Rule also addresses the possibility that the filer's own unanticipated system failure might make the filer unable to meet a filing deadline.

2. The Model Rule does not require the court to excuse the filing deadline allegedly caused by a system failure. The court has discretion to grant or deny relief in light of the circumstances.

Rule 12– Public Access

Any person or organization, other than one registered as a Filing User under Rule 2 of these rules, may access the Electronic Filing System at the court's Internet site [Internet address] by obtaining a PACER log-in and password. Those who have PACER access but who are not Filing Users may retrieve docket sheets and documents, but they may not file documents.

In connection with the filing of any material in an action assigned to the Electronic Filing System, any person may apply by motion for an order limiting electronic access to or prohibiting the electronic filing of certain specifically-identified materials on the grounds that such material is subject to privacy interests and that electronic access or electronic filing in the action is likely to prejudice those privacy interests.

Information posted on the System must not be downloaded for uses inconsistent with the privacy concerns of any person.

Derivation

The first paragraph of the Model Rule is adapted from the District of Arizona Bankruptcy procedures. The second paragraph is adapted from the Eastern District of New York procedures. The third paragraph is adapted from the Southern District of New York Bankruptcy procedures.

Commentary

1. A subcommittee of the Judicial Conference Committee on Court Administration and Case Management is currently assessing the privacy concerns arising from electronic case filing. The Judicial Conference may at some point develop policies to address these concerns. The rule can be adapted to reflect any future specific policies or suggestions adopted by the Judicial Conference.

2. The Model Rule is consistent with Judicial Conference policy to limit remote public access to electronic case files to those who have obtained a PACER password.

3. The second paragraph of the Model Rule is not intended to create substantive rights. It simply highlights the fact that a person may apply for a protective order when Internet access to a case file or document is likely to result in the loss of that person's legitimate interest in privacy.

Model Local Bankruptcy Court Rules for Electronic Case Filing

Approved by the Judicial Conference of the United States

September 2001

Introduction

Because most existing court rules and procedures have been designed with paper court documents in mind, some modifications are needed to address issues arising when court documents are filed in electronic form. This set of model local rules has been developed for federal district and bankruptcy courts implementing the electronic case filing capabilities of the federal judiciary's Case Management/Electronic Case Files (CM/ECF) Project, and can be adapted by courts that offer some other method of electronic filing of court documents.

The model was compiled by a subcommittee of the Court Administration and Case Management Committee that included as members representatives from the Committee on Automation and Technology and the Committee on Rules of Practice and Procedure. The subcommittee reviewed the rules and procedures for electronic filing developed in the CM/ECF prototype district and bankruptcy courts. It also undertook an informal survey of those courts to find out how well those procedures operated. The information indicated general satisfaction with courts' existing procedures. There was also general agreement that it was essential to include the bar in the process of developing and modifying the local procedures governing electronic filing.

This set of model local rules for electronic case filing is based to a significant extent on the procedures used in courts that served as prototype courts for the federal judiciary's CM/ECF Project. There are separate sets of model local rules for district courts and bankruptcy courts. They use the same terminology and are identical to the extent possible and appropriate. Courts are free to adapt the provisions of these model local rules as they choose. (Please note that "Interim Bankruptcy Rules" will be promulgated and recommended for adoption as local rules to implement pending comprehensive bankruptcy reform legislation upon enactment. Unlike model local rules, including these model local rules governing electronic case filing, courts will be urged to adopt the "interim bankruptcy rules" as local rules without change.)

The Federal Rules of Procedure (Civil Rule 5(e), Bankruptcy Rules 5005, 7005 and 8008) provide that a court may "by local rule" permit filing, signing and verification of documents by electronic means. Thus, each court that intends to allow electronic filing should have at least a general authorizing provision in its local rules.[1] The model rules developed here may be used either as a set of local rules, or as the contents for a general order or other administrative procedures. The use of local rules promotes the requirements of the Rules Enabling Act, provides better public notice of applicable procedures, and allows for input from the bar. On the other hand, use of general orders gives courts more flexibility to modify requirements and rules

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[1]An example of a local rule authorizing electronic filing is as follows:

The court will accept for filing documents submitted, signed or verified by electronic means that comply with procedures established by the court.

in response to changing circumstances. If local rules are used, it should be noted that Fed.R.Civ.P. 83, Fed.R.Bankr.P. 9029 and related Judicial Conference policy require that rule numbering conform to the numbering system of the Federal Rules. The model rules could be added as a group to local rules corresponding to Fed.R.Bankr.P. 5005 or 9029.

Note: These model procedures use the term "Electronic Filing System" to refer to the court's system that receives documents filed in electronic form. The term "Filing User" is used to refer to those who have a court-issued log-in and password to file documents electronically.

Rule 1– Scope of Electronic Filing

The court will designate which cases will be assigned to the Electronic Filing System. Except as expressly provided and in exceptional circumstances preventing a Filing User from filing electronically, all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the court in connection with a case assigned to the Electronic Filing System must be electronically filed.

In a case assigned to the Electronic Filing System after it has been opened, parties must promptly provide the clerk with electronic copies of all documents previously provided in paper form. All subsequent documents must be filed electronically except as provided in these rules or as ordered by the court.

Notwithstanding the foregoing, attorneys and others who are not Filing Users in the Electronic Filing System are not required to electronically file pleadings and other papers in a case assigned to the System. Once registered, a FilingUser may withdraw from participation in the Electronic Filing System by providing the clerk's office with written notice of the withdrawal.

Derivation

The first and third paragraphs of the Model Rule are derived from the Southern District of California Bankruptcy procedures, with the exception of the last sentence of the third paragraph, which is derived from the Eastern District of Virginia Bankruptcy procedures. The second paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides that the court will designate which cases will be assigned to the electronic filing system. It also establishes a presumption that all documents filed in cases assigned to the electronic filing system should be electronically filed. Some courts have designated certain types of cases for electronic filing, while some have determined that all cases are appropriate for electronic filing. However, the Rule does not make electronic filing mandatory. Mandatory electronic filing appears to be inconsistent with Fed.R.Bankr.P. 5005, which states that a court "may permit" papers to be filed electronically, and provides that the clerk "shall not refuse to accept for filing any paper presented . . . solely because it is not presented in proper form." However, the Federal Rules clearly permit a court to strongly encourage lawyers to participate in electronic case filing, and the Model Rule is written to provide such encouragement.

2. For cases assigned to the electronic filing system after documents have already been filed conventionally, the Model Rule states that the parties must provide electronic copies of all previously filed documents. In cases removed to the federal court, parties in cases assigned to the electronic filing system are required to provide electronic copies of all previous filings in the state court. Where documents filed in paper form were previously scanned by the court, electronic filing would not be necessary.

3. Some courts offering electronic filing require fees to be paid in the traditional manner, while others permit or require electronic payment of fees. Nothing in the rule would constrain the court in providing for a desired method of payment of fees.

4. Electronic case filing raises privacy concerns. Electronic case files can be more easily accessible than traditional paper case files, so there is a greater risk of public dissemination of sensitive information found in case files. See Model Rule 12. The Judicial Conference is investigating and evaluating the privacy concerns attendant to electronic case files, and is working to develop a policy.

Rule 2– Eligibility, Registration, Passwords

> Attorneys admitted to the bar of this court (including those admitted pro hac vice), United States trustees and their assistants, bankruptcy administrators and their assistants, private trustees, and others as the court deems appropriate, may register as Filing Users of the court's Electronic Filing System. Registration is in a form prescribed by the clerk and requires the Filing User's name, address, telephone number, Internet e-mail address, and, in the case of an attorney, a declaration that the attorney is admitted to the bar of this court.
>
> If the court permits, a party to a pending action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action. Registration is in a form prescribed by the clerk and requires identification of the action as well as the name, address, telephone number and Internet e-mail address of the party. If, during the course of the action, the party retains an attorney who appears on the party's behalf, the attorney must advise the clerk to terminate the party's registration as a Filing User upon the attorney's appearance.
>
> Provided that a Filing User has an Internet e-mail address, registration as a Filing User constitutes: (1) waiver of the right to receive notice by first class mail and consent to receive notice electronically; and (2) waiver of the right to service by personal service or first class mail and consent to electronic service, except with regard to service of a summons and complaint under Fed.R.Bankr.P. 7004. Waiver of service and notice by first class mail applies to notice of the entry of an order or judgment under Fed.R.Bankr.P. 9022.

Once registration is completed, the Filing User will receive notification of the user log-in and password. Filing Users agree to protect the security of their passwords and immediately notify the clerk if they learn that their password has been compromised. Users may be subject to sanctions for failure to comply with this provision.

Derivation

The first two paragraphs of Model Rule 2 are adapted from the Eastern District of New York procedures. The last paragraph is derived from the Northern District of Ohio procedures.

Commentary

1. The Model Rule specifically provides that attorneys admitted pro hac vice, U.S. trustees and their assistants, bankruptcy administrators and their assistants, and private trustees can be Filing Users in electronic filing systems. It also recognizes that the court may wish to permit others, e.g., claims filers, to participate. These additional filers could at the court's option be provided with limited filing privileges. The Model Rule also recognizes that a court may wish under certain circumstances to permit pro se filers to take part in electronic case filing. Such participation is left to the discretion of the court.

2. The Model Rule provides that a person who registers with the System (a Filing User) thereby consents to electronic service and notice of documents subject to the electronic case filing system. Pending amendments to Fed.R.Civ.P. 5, which is incorporated by reference into Fed.R.Bankr.P 7005, permit electronic service on a person who consents "in writing." The Committee Notes indicate that the consent may be provided by electronic means. A court may "establish a registry or other facility that allows advance consent to service by specified means for future action." Thus, a court might use CM/ECF registration as a means to have parties consent to receive service electronically.

3. The consent to receive electronic notice and service is intended to cover the full range of notice and service except those documents to which the service requirements of Fed.R.Bankr.P. 7004 apply. These provisions operate independently from the notices sent by the Bankruptcy Noticing Center under Fed.R.Bankr.P. 9036.

4. Several districts currently have provisions addressing the possibility of compromised passwords. Such a provision may be useful in a User Manual for the electronic filing system. The provision might read as follows:

> Attorneys may find it desirable to change their court assigned passwords periodically. In the event that a Filing User believes that the security of an existing

password has been compromised and that a threat to the System exists, the Filing User must give immediate notice by telephone to the clerk, chief deputy clerk or systems department manager and confirm by facsimile in order to prevent access to the System by use of that password.

Rule 3–Consequences of Electronic Filing

Electronic transmission of a document to the Electronic Filing System consistent with these rules, together with the transmission of a Notice of Electronic Filing from the court, constitutes filing of the document for all purposes of the Federal Rules of Bankruptcy Procedure and the local rules of this court, and constitutes entry of the document on the docket kept by the clerk under Fed.R.Bankr.P. 5003.

When a document has been filed electronically, the official record is the electronic recording of the document as stored by the court, and the filing party is bound by the document as filed. Except in the case of documents first filed in paper form and subsequently submitted electronically under Rule 1, a document filed electronically is deemed filed at the date and time stated on the Notice of Electronic Filing from the court.

Filing a document electronically does not alter the filing deadline for that document. Filing must be completed before midnight local time where the court is located in order to be considered timely filed that day.

Derivation

The first two paragraphs of Model Rule 3 are adapted from the Eastern District of New York procedures. The third paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides a "time of filing" rule that is analogous to the traditional system of file stamping by the Clerk's office. A filing is deemed made when it is acknowledged by the Clerk's office through the CM/ECF system's automatically generated Notice of Electronic Filing.

2. The Model Rule makes clear that the electronically filed documents are considered to be entries on the official docket.

Rule 4– Entry of Court Orders

All orders, decrees, judgments, and proceedings of the court will be filed in accordance with these rules, which will constitute entry on the docket kept by the clerk under Fed.R.Bankr.P. 5003 and 9021. All signed orders will be filed electronically by the court or court personnel. Any order filed electronically without the original signature of a judge has the same force and effect as if the judge had affixed the judge's signature to a paper copy of the order and it had been entered on the docket in a conventional manner.

A Filing User submitting a document electronically that requires a judge's signature must promptly deliver the document in such form as the court requires.

Derivation

The first two sentences of the first paragraph of the Model Rule are adapted from the Eastern District of New York procedures. The last sentence is derived from the Northern District of Georgia Bankruptcy Court. The second paragraph is adapted from Eastern District of New York procedures.

Commentary

1. Not all courts have a provision in their electronic filing procedures addressing the electronic entry of court orders. In at least one court without such a provision, a question arose about the validity of electronically filed court orders. The Model Rule specifically states that an electronically filed court order has the same force and effect as an order conventionally filed.

2. The Model Rule contemplates that a judge can authorize personnel, such as a law clerk or judicial assistant, to electronically enter an order on the judge's behalf.

3. The Model Rule leaves the method for submitting proposed orders to the discretion of the court.

Rule 5– Attachments and Exhibits

Filing Users must submit in electronic form all documents referenced as exhibits or attachments, unless the court permits conventional filing. A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must

be clearly and prominently identified as such. Filing Users who file excerpts of documents as exhibits or attachments under this rule do so without prejudice to their right to timely file additional excerpts or the complete document. Responding parties may timely file additional excerpts or the complete document that they believe are directly germane.

Derivation

The Model Rule is adapted from the Southern District of New York Bankruptcy procedures.

Commentary

1. One issue that has arisen in most courts using electronic filing relates to attachments or exhibits not originally available to the filer in electronic form, and that must be scanned (or imaged) into Portable Document Format before filing. Examples include leases, contracts, proxy statements, charts and graphs. A scanned document creates a much larger electronic file than one prepared directly on the computer (*e.g.*, through word processing). The large documents can take considerable time to file and retrieve. The Model Rule provides that if the case is assigned to the electronic filing system, the party must file this type of material electronically, unless the court specifically permits conventional filing.

2. It is often the case that only a small portion of a much larger document is relevant to the matter before the court. In such cases, scanning the entire document imposes an inappropriate burden on both the litigants and the courts. To alleviate some of this inconvenience, the Model Rule provides that a Filing User must submit as the exhibit only the relevant excerpts of a larger document. The responding party then has a right to submit other excerpts of the same document under the principle of completeness.

3. This rule is not intended to alter traditional rules with respect to materials that are before the court for decision. Thus, any material on which the court is asked to rely must be specifically provided to the court.

4. For courts permitting claims to be filed electronically, this rule also governs proofs of claim. Official Form 10, the Proof of Claim, already permits creditors to file a summary if the documentation for the claim is voluminous.

Rule 6–Sealed Documents

Documents ordered to be placed under seal must be filed conventionally, and not electronically, unless specifically authorized by the court. A motion to file documents under seal may be filed electronically unless prohibited by law. The order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. A paper copy of the order must be attached to the documents under seal and be delivered to the clerk.

Derivation

The Model Rule is adapted from the Western District of Missouri procedures.

Commentary

1. The Model Rule recognizes that other laws may affect whether a motion to file documents under seal, or an order authorizing the filing of such documents, can or should be electronically filed. It is possible that electronic access to the motion or order may raise the same privacy concerns that gave rise to the need to file a document conventionally in the first place. For similar reasons, the actual documents to be filed under seal should ordinarily be filed conventionally.

2. See Model Rule 12 for another provision addressing privacy concerns arising from electronic filing.

Rule 7– Retention Requirements

Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until [number] years after all time periods for appeals expire. On request of the court, the Filing User must provide original documents for review.

Derivation

Model Rule 7 is adapted from the Eastern District of Virginia Bankruptcy procedures.

Commentary

1. Because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future. The Model Rule requires retention only of those documents containing original signatures of persons other than the person who files the document electronically. The filer's use of a log-in and password to file the document is itself a signature under the terms of Model Rule 8.

2. The Model Rule places the retention requirement on the person who files the document. Another possible solution is to require the filer to submit the signed original to the court, so that the court can retain it. Some government officials have expressed a preference to have such documents retained by the court, in order to make it easier to retrieve the documents for purposes such as a subsequent prosecution for fraud. Some have suggested that a debtor's original signature be filed with the court because the signature is so important on bankruptcy petitions and schedules.

3. Courts have varied considerably on the required retention period. Some have limited it to the end of the litigation (plus the time for appeals). Others have required longer retention periods (four or five years). Assuming that the purpose of document retention is to preserve relevant evidence for a subsequent proceeding, the appropriate retention period might relate to relevant statutes of limitations.

4. Some districts require the filer to retain a paper copy of *all* electronically filed documents. Such a requirement seems unnecessary, and it tends to defeat one of the purposes of using electronic filing. Other courts have required retention of "verified documents," i.e., documents required to be verified under Fed.R.Bankr.P. 1008 or documents in which a person verifies, certifies, affirms, or swears under oath or penalty of perjury. See, *e.g.*, 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury).

Rule 8– Signatures

The user log-in and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of Fed.R.Bankr. P. 9011, the Federal Rules of Bankruptcy Procedure, the local rules of this court, and any other purpose for which a signature is required in connection with proceedings before the court. Each document filed electronically must, if possible, indicate that it has been electronically filed. Electronically filed documents must include a signature block [in compliance with local rule number [ ] if applicable] and must set forth the name, address, telephone number and the attorney's [name of state] bar registration number, if

applicable. In addition, the name of the Filing User under whose log-in and password the document is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear.

No Filing User or other person may knowingly permit or cause to permit a Filing User's password to be used by anyone other than an authorized agent of the Filing User.

Documents requiring signatures of more than one party must be electronically filed either by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; (3) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (4) in any other manner approved by the court.

Derivation

The first and third paragraphs of the Model Rule are adapted from the Northern District of Ohio procedures. The second paragraph is derived from the Southern District of New York Bankruptcy procedures.

Commentary

1. Signature issues are a subject of considerable interest and concern. The CM/ECF system is designed to require a log-in and password to file a document. The Model Rule provides that use of the log-in and password constitutes a signature, and assures that such a signature has the same force and effect as a written signature for purposes of the Federal Rules of Bankruptcy Procedure, including Fed.R.Bankr. P. 9011, and any other purpose for which a signature is required on a document in connection with proceedings before the court.

2. At the present time, other forms of digital or other electronic signature have received only limited acceptance. It is possible that over time and with further technological development, a system of digital signatures may replace the current password system.

3. Some users of electronic filing systems have questioned whether an s-slash requirement is worth retaining. The better view is that an s-slash is necessary; otherwise there is no indication that documents printed out from the website were ever signed. The s-slash provides some indication when the filed document is viewed or printed that the original was in fact signed.

4. The second paragraph of the Model Rule does not require an attorney or other Filing User to personally file his or her own documents. The task of electronic filing can be delegated

to an authorized agent, who may use the log-in and password to make the filing. However, use of the log-in and password to make the filing constitutes a signature by the Filing User under the Rule, even though the Filing User does not do the physical act of filing.

5. Issues arise when documents being electronically filed have been signed by persons other than the filer, *e.g.*, stipulations and affidavits. The Model Rule provides for a substantial amount of flexibility in the filing of these documents. Courts may wish to modify or narrow the options if, for example, they believe that administering the three-day period for endorsements would be burdensome.

6. Courts may wish to underscore the fact that a Filing User's log-in and password constitutes the Filing User's signature, by including a statement to that effect on the registration form.

Rule 9– Service of Documents by Electronic Means

Each entity electronically filing a pleading or other document must transmit a "Notice of Electronic Filing" to parties entitled to service or notice under the Federal Rules of Bankruptcy Procedure and the local rules. The "Notice of Electronic Filing" must be transmitted by e-mail, hand, facsimile, or by first-class mail postage prepaid. Electronic transmission of the "Notice of Electronic Filing"constitutes service or notice of the filed document. Parties not deemed to have consented to electronic notice or service are entitled to receive a paper copy of any electronically filed pleading or other document. Service or notice must be made according to the Federal Rules of Bankruptcy Procedure and the local rules.

Derivation

Model Rule 9 is adapted from the Western District of Missouri procedures.

Commentary

1. The pending amendments to the Federal Rules (Fed.R.Bankr.P. 7005, Fed.R.Civ.P. 5(b)) authorizing service of documents by electronic means do not permit electronic service of process for purposes of obtaining personal jurisdiction (i.e., Rule 7004 service).

2. The CM/ECF system automatically generates a Notice of Electronic Filing at the time a document is filed with the system. The Notice indicates the time of filing, the name of the party and attorney filing the document, the type of document, and the text of the docket entry. It also

contains an electronic link (hyperlink) to the filed document, allowing anyone receiving the Notice by e-mail to retrieve the document automatically. The CM/ECF system automatically sends this Notice to all case participants registered to use the electronic filing system. If the court is willing to have this Notice itself constitute service, it may, under pending amendments to the Federal Rules, do so through a local rule. The pending amendments require a local rule if a court wants to authorize parties to use its transmission facilities to make electronic service. The Model Rule does not include such a provision, but could be easily modified to provide that the court's automatically generated notice of electronic filing constitutes service.

3. A pending amendment to Fed.R.Bankr. P. 9006(f) provides that the three additional days to respond to service by mail will apply to electronic service as well. The Committee Note on the parallel amendment to Fed.R.Civ.P. 6(e) states:

> Electronic transmission is not always instantaneous, and may fail for any number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that make electronic service ever more attractive.

The Model Rule does not specifically provide for the added three days, but such a provision would not be necessary if the proposed amendment to Fed.R.Bankr. P. 9006(f) takes effect.

4. The CM/ECF system is designed so that a person may request electronic notice of all filings in a matter even though that person has not obtained a password and registered as a Filing User. Such electronic notice would not constitute service under the Model Rule, because the effectiveness of electronic service is dependent on registration with the system. The court should be aware of this possibility and should encourage all those who request electronic notice to register for a system password.

Rule 10– Notice of Court Orders and Judgments

> Immediately upon the entry of an order or judgment in an action assigned to the Electronic Filing System, the clerk will transmit to Filing Users in the case, in electronic form, a Notice of Electronic Filing. Electronic transmission of the Notice of Electronic Filing constitutes the notice required by Fed.R.Bankr.P. 9022. The clerk must give notice to a person who has not consented to electronic service in paper form in accordance with the Federal Rules of Bankruptcy Procedure.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures.

Commentary

1. Pending amendments to Fed.R.Bankr.P 9022 authorize electronic notice of court orders where the parties consent. The Model Rule provides that for all Filing Users in the electronic filing system, electronic notice of the entry of an order or judgment has the same force and effect as traditional notice. The CM/ECF system automatically generates and sends a Notice of Electronic Filing upon entry of the order or judgment. The Notice contains a hyperlink to the document.

Rule 11– Technical Failures

A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures.

Commentary

1. CM/ECF is designed so that filers access the court through its Internet website. The Model Rule addresses the possibility that a party may not meet a filing deadline because the court's website is not accessible for some reason. Cf. Fed.R.Bankr.P. 9006(a) (permitting extension of time when "weather or other conditions have made the clerk's office inaccessible"). The Model Rule also addresses the possibility that the filer's own unanticipated system failure might make the filer unable to meet a filing deadline.

2. The Model Rule does not require the court to excuse the filing deadline allegedly caused by a system failure. The court has discretion to grant or deny relief in light of the circumstances.

Rule 12– Public Access

Any person or organization, other than one registered as a Filing User under Rule 2 of these rules, may access the Electronic Filing System at the court's Internet site [Internet address] by obtaining a PACER log-in and password. Those who have PACER access but who are not Filing Users may retrieve docket sheets and documents, but they may not file documents.

In connection with the filing of any material in an action assigned to the Electronic Filing System, any person may apply by motion for an order limiting electronic access to or prohibiting the electronic filing of certain specifically-identified materials on the grounds that such material is subject to privacy interests and that electronic access or electronic filing in the action is likely to prejudice those privacy interests.

Information posted on the System must not be downloaded for uses inconsistent with the privacy concerns of any person.

Derivation

The first paragraph of the Model Rule is adapted from the District of Arizona Bankruptcy procedures. The second paragraph is adapted from the Eastern District of New York procedures. The third paragraph is adapted from the Southern District of New York Bankruptcy procedures.

Commentary

1. A subcommittee of the Judicial Conference Committee on Court Administration and Case Management is currently assessing the privacy concerns arising from electronic case filing. The Judicial Conference may at some point develop policies to address these concerns. The rule can be adapted to reflect any future specific policies or suggestions adopted by the Judicial Conference.

2. The Model Rule is consistent with Judicial Conference policy to limit remote public access to electronic case files to those who have obtained a PACER password.

3. The second paragraph of the Model Rule is not intended to create substantive rights. It simply highlights the fact that a person may apply for a protective order when Internet access to a case file or document is likely to result in the loss of that person's legitimate interest in privacy.

12A

BOSTON COLLEGE

THE J. DONALD MONAN, S.J. UNIVERSITY PROFESSOR
LAW SCHOOL

Memorandum

To: Committee on Rules of Practice and Procedure (Standing Committee)

From: Daniel R. Coquillette, Reporter

Date: December 8, 2001

Introduction: The Local Rules Project

Not long before his death, the great Charles Alan Wright identified the relentless increase in federal local rules as the primary threat to the long term success of a unified federal rules system, repeating his famous warning that local rules are "the 'soft underbelly' of federal procedure."[1] That judgment has been seconded by experts from Duke's Paul Carrington to Texas' Linda Mullenix.[2] By 1983, the count had exceeded 4,000 local rules, and the House Committee on the Judiciary began a four year review that resulted in additional controls in the new Rules Enabling Act of 1988.[3] The Congress also directed the Committee on Rules of Practice and Procedure (hereafter "Standing Committee") to meet its statutory mandate "to maintain consistency and otherwise promote the interest of justice" within the system of federal rules, with particular attention to the proliferation of local rules.[4] This led to major revisions in F.R. Civ. P. 83 that regulated local rulemaking, effective August 1, 1985, and to further changes effective December 1, 1995.[5] Finally, in 1986, the Judicial Conference authorized the Standing Committee to launch the Local Rules Project, the first major study of local rules since the Knox Committee Report of 1940.[6]

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[1] Charles A. Wright, "The Malaise of Federal Rulemaking," 14 *Rev. Litig.* 1, 10-11 (1994). See also Carl Tobias, "Charles Alan Wright and the Fragmentation of Federal Practice and Procedure," 19 *Yale Law & Policy Review* 463 (2001).

[2] See Paul Carrington, "A New Confederacy? Disunionism in the Federal Courts," 45 *Duke L. J.* 929 (1996); Linda S. Mullenix, "The Counter Reformation in Procedural Justice," 77 *Minn. L. Rev.* 375 (1992); "Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers," 77 *Minn. L. Rev.*1283 (1993). See also Gregory C. Sisk, "The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits," 68 *U. Colo. L. Rev.* 1 (1997).

[3] See H.R. 4144, 98th Cong., 1st Sess. (1983), H.R. 3550, 99th Cong. 2nd Sess. (1985), H.R. 2182, 100th Cong., 1st Sess., 133 Cong. Rec. H5331 (1987). The final statute was Pub. L. No. 100-702, §§ 401-407, 102 Stat. 4642, 4648-4652 (1988) which revised 28 U.S.C. §§ 2072-2076.

[4] See 28 U.S.C. § 2073 (b). See also the discussion at Judith A. McMorrow, Daniel R. Coquillette, *The Federal Law of Attorney Conduct* (2001), § 801.05 [1] – [9], 801-43 – 801-60.

[5] For an excellent general discussion, see Peter G. McCabe, "Renewal of the Federal Rulemaking Process," 44 *Am. U. L. Rev.* 1655, 1665-1669 (1995).

[6] See Daniel R. Coquillette, Mary P. Squiers, Stephen N. Subrin, "The Role of Local Rules," 75 *A.B.A. Journal* 62, 62-65 (1989).

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Under the direction of Professor Mary P. Squiers, the first Local Rules Project achieved remarkable success, establishing: 1) a uniform system of local rule numbering; 2) a remarkable reduction in local rules inconsistent with or duplicative of other federal law; 3) adoption by the uniform rule systems of useful local rules; 4) and increased activity by Circuit Councils to supervise local rulemaking, as directed by Congress.[7]

In 1990, Congress passed the Civil Justice Reform Act (hereafter "CJRA").[8] An unintended result was a resumption in the proliferation of local rules.[9] Indeed, many federal district courts have adopted rules pursuant to the CJRA that have never been properly adopted under 28 U.S.C. § 2072 or F.R. Civ. P. 83, and are technically invalid following the "sunset" of the CJRA.[10] By the year 2000, the number of local rules had once again skyrocketed, to a total of 5,575. Even this figure understates the magnitude of the increase. The Central District of California technically has 32 local rules, but these contain 254 "sub rules." The Eastern District of Wisconsin has only 22 local rules, but these contain 91 "sub rules." There are many other examples in the Squiers Report, attached.[11]

This acceleration of local rulemaking has attracted the concerned attention of Congress, the Judicial Conference and the practicing bar. In 1998, the ABA Federal Practice Task Force began a special study of local rules in five districts. The study concluded that many local rules were simply not justified. In 1999, at the motion of the Task Force, the ABA House of Delegates adopted urgent Recommendations seeking better controls.[12] In response, the Standing Committee has authorized a new Local Rules Project, once again under the able direction of Mary P. Squiers. The first part of her *Report* is now ready for discussion, and is attached to this memorandum.

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[7] See McMorrow, Coquillette, note 4, *supra*, 801-47 – 801-48, and McCabe, note 5, *supra*, 1688-1689.

[8] See 28 U.S.C. §§ 47-472.

[9] See McCabe, note 5, *supra*, 1689-1691. For differing perspectives on the Civil Justice Reform Act of 1990, see Joseph R. Biden, Jr., "Congress and the Courts: Our Mutual Obligation," 46 *Stan. L. Rev.* 1285 (1994); Lauren Robel, "Fractured Procedure: The Civil Justice Reform Act of 1990," 46 *Stan. L. Rev.* 1925 (1994), and Linda S. Mullenix, "The Counter Reformation in Procedural Justice," *supra* note 2, 378-380.

[10] See Carl Tobias, "Civil Justice Reform Sunset," 1998 *U. Ill. L. Rev.* 547, 588-628 (1998).

[11] I am indebted to Mary P. Squiers for these examples.

[12] See Mary P. Squiers, "History and Methodology of the Local Rules Project," attached, 26-27; Report to the House of Delegates from the ABA Section on Litigation (December, 1999), discussed at Litigation Docket Online (Spring, 2000), vol. 5, no. 3.

Today's Discussion

Included in these Agenda *Materials* are four important documents:

1) An "Executive Summary" by Mary P. Squiers, dated December 10, 2001

2) *History and Methodology of the Local Rules Project*, by Mary P. Squiers, dated December 10, 2001

3) *Local Rules Report*, by Mary P. Squiers, dated December 10, 2001

4) *Discussion Paper*, by Daniel J. Capra, dated December 14, 2001

Mary Squiers's tireless and highly intelligent work is self-evident in the first three documents. It has been a labor of nearly two years. The Standing Committee is surely in her debt.

We are also very grateful to Dan Capra for agreeing to do a "Discussion Paper" based on Mary Squiers's *Report*. It is both deliberately provocative and highly insightful. This is typical of the brilliant and original work for which Dan Capra is known.

Mary Squiers will commence our discussion by summarizing her three papers. Dan Capra will then briefly introduce his *Discussion Paper*. I will then lead a discussion focusing on the three major categories of the Capra *Discussion Paper*: 1) Are we using the right categories to analyze local rules? (*Discussion Paper*, pages 3-7); 2) What should be done to implement the Squiers *Report* on its final completion? (*Discussion Paper*, pages 8-9); and 3) What other remedies to local rule proliferation should be considered? (*Discussion Paper*, pages 9-17.)

Daniel R. Coquillette
Reporter

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

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EVIDENCE RULES

Memorandum

TO: Honorable Anthony J. Scirica, and
Members of the Committee on Rules of Practice and Procedure

FROM: Mary P. Squiers

RE: Executive Summary
Local Rules Project

DATE: December 10, 2001

This document and its attachments are intended to explain to you my progress with the Local Rules Project. This Executive Summary provides a brief explanation of what is contained in the packet. It also sets forth some issues deserving of further discussion that the Standing Committee may want to address at the Tucson meeting. Please feel free to contact me with any questions or comments you may have (781.444.2876; marysquiers@mediaone.net).

Attached to this Memorandum are two documents. The first of these is the *History and Methodology of the Local Rules Project.* The other document consists of the actual Report of the Local Rules Project, which discusses local rules and is arranged by topic. A brief explanation of these two items follows.

History and Methodology of the Local Rules Project

The ninety-four federal district courts currently have an aggregate of approximately 5,575 local rules, not including many "sub-rules," appendices, and other local directives. This number, although large, is unrepresentative of the actual number of rules in some courts. For example, there are only nineteen rules in the District of Montana yet, when sub-rules, which are each discrete directives, are counted, there are eighty-six of them. There are only twenty-two local rules in the Eastern District of Wisconsin but, when the discrete sub-parts are counted, there are ninety-one rules. The Central District of California has only thirty-two local rules, but there are actually 254 discrete sub-rules. There are only thirteen

rules in the District of Maryland but those directives comprise thirty-eight pages of text in the commonly used paper compilation of local rules.[1] There are only four rules in the Western District of Wisconsin but, as stated in the preliminary statement to its rules in electronic format, there are other directives that control.

> This court prepared a number of guides to assist you while your case is pending in this court. The court will provide printed copies of these guides when they are appropriate. The copies provided here are provided for your convenience.
>
> These guides will not cover all issues relating to cases in this court. If you are looking for information about issues that are not covered in these guides then you might try our local rules or the Federal Rules of Civil Procedure.[2]

There are only seven local rules in the Western District of Virginia but the paper compilation of the local rules also sets forth thirty-four standing orders that regulate conduct.

In approximately 1988, the Local Rules Project estimated that there were 5,000 local rules, not including other local directives. There has clearly been an increase in the actual number of local rules since that time.

Although the precise number of pages of local rules was not counted or even estimated in 1988, the volume of local rules seems to have increased significantly over the past thirteen years. Regardless of whether there has been an increase, the volume of local rules is staggering. Some examples of the volume of these rules may be illustrative.[3] The rules in the District of Kansas comprise sixty-two pages of text. The rules in the Northern District of Mississippi comprise 107 pages. The rules in the District of Massachusetts comprise 122 pages. The Northern District of California has ninety pages of text devoted to civil local rules. All of the local rules of the district courts fill five 3" wide binders almost completely.

These rules are extraordinarily diverse. They cover the entire spectrum of federal practice, from attorney admission and attorney discipline, through the various stages of trial, including pleading and filing requirements, pre-trial discovery procedures, and taxation of costs.

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[1] *See* Federal Local Court Rules (Lawyers Cooperative Publishing) (2d ed. 1995).

[2] Western District of Wisconsin, electronic discussion entitled: "Guides and Procedures."

[3] All of these numbers are determined from the Federal Local Court Rules (Lawyers Cooperative Publishing) (2d ed. 1995).

I. History

As you are aware, the issue of local rulemaking has been a subject of concern for many years for practitioners throughout the country, the judiciary, and the Congress. The "History" section of this document briefly explains the following expressions of that interest.

1. The Rules Enabling Act. Congress passed the new Rules Enabling Act November 19, 1988 as Title IV of the Judicial Improvements and Access to Justice Act, effective December 1, 1988.[4] It sought to provide "greater participation by all segments of the bench and bar" in the rulemaking process.[5]

2. 1985 Amendments to Rule 83 of the Federal Rules of Civil Procedure. While Congress was working to pass the Rules Enabling Act, the Judicial Conference, through the federal rulemaking process, was amending Rule 83 of the Federal Rules of Civil Procedure, effective August 1, 1985 to provide more public awareness of local rules and the rulemaking process.[6]

3. The First Local Rules Project. In 1985, the Judicial Conference also authorized the Committee on Rules of Practice and Procedure to undertake a study of federal district court local rules. The Local Rules Project was fully operational beginning in the fall of 1986. One year later, the Project sponsored the Conference on Local Rules in the Federal District Courts, an invitational workshop intended to examine and fully discuss the tentative proposals and findings of the Local Rules Project. Among other issues, the conferees favored a uniform numbering system and structure to help make the local rules available to the public. Much of the conference discussion focused on eventual implementation of the Project's suggestions. The conferees agreed that voluntary implementation would be the most successful way to proceed, at least initially. While the Project was completing its analysis of the civil local rules, the Committee on Rules of Practice and Procedure was promoting a uniform numbering system, which was approved by the Judicial Conference at its September 1988 meeting.[7] The Conference urged the district courts to adopt such a uniform system. The *Report of the Local Rules Project: Local Rules on Civil Practice* was distributed to the chief judges of the district courts in April of 1989. The *Report of the Local Rules Project: Local Rules on Appellate Practice* was distributed in the following year to the chief judges of the courts of appeals. The *Report on the Local Rules of Criminal Practice* was distributed to the chief judges of the district courts in April of 1996. These documents were provided to the courts as suggestions for the courts to use when reviewing and renumbering their local rules.

4. Uniform Numbering of Local Rules. When the Local Rules Project began, there was no uniform numbering system for federal district court local rules. The Local

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4 Pub. L. No. 100-702, §§401-407, 102 Stat. 4642, 4648-4652 (1988).

5 H.R.Rep. 422, 99th Cong. 2d Sess. 4 (1985).

6 Fed.R.Civ.P. 83. Rule 57 of the Federal Rules of Criminal Procedure was amended at the same time to correspond to the changes made in Rule 83. See Fed.R.Crim.P. 57.

7 Report of the Judicial Conference (September, 1988) 103.

Rules Project proposed a uniform numbering system that was endorsed by the Standing Committee and Judicial Conference in 1988.[8] The system was explained to the district courts in the original *Report*. During this time, the Advisory Committees were working through the rulemaking process to amend the Federal Rules to require uniform numbering of local rules. Amendments to the Federal Rules of Civil Procedure took effect December 1, 1995. The Judicial Conference set April 15, 1997 as the date of compliance with this numbering system.[9]

5. Activities of the Advisory Committee on Civil Rules. The first report of the Local Rules Project determined that some areas of local rulemaking may be more appropriately areas of federal rulemaking. The Advisory Committee examined these areas and amended the Civil Rules as appropriate.[10]

6. The Civil Justice Reform Act. The Civil Justice Reform Act of 1990[11] was enacted to investigate the causes of expense and delay in litigation in the federal courts. The courts had an opportunity to review and evaluate many pretrial and trial activities, resulting in changes and additions to the local rules and eventual amendments to the Federal Rules.

7. The Long Range Plan for the Federal Courts. The Judicial Conference of the United States presented *The Long Range Plan for the Federal Courts* by cover letter dated December 15, 1995 from L. Ralph Mecham, the Secretary of the Judicial Conference. There is a Recommendation in the *Long Range Plan* that Federal Rules be adopted as needed "to promote simplicity in procedure, fairness in administration, and a just, speedy, and inexpensive determination of litigation."[12] One of the Implementation Strategies for the Recommendation stresses that the "national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures."[13]

8. Activities of the Judicial Councils. Rules promulgated pursuant to the Rules Enabling Act "shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit."[14] While the method used by the judicial councils to review local rules for possible modification or abrogation is not determined by this statute, each circuit council has developed its own procedure for reviewing new and amended local rules. There is discussion and accommodation during the review process between the judicial council and the court. Actual abrogation of a problematic local rule is quite rare.

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8 *Id.*

9 Report of the Judicial Conference (March, 1996) 34-35.

10 *See, e.g.,* Fed.R.Civ.P. 4, 5, 24, 38, 53, and the discovery rules.

11 Pub. L. No. 101-650, Title I, 104 Stat. 5089-98 (codified in part at 28 U.S.C. § 471-482 (1994)).

12 Long Range Plan for the Federal Courts, Recommendation 28, p. 58.

13 *Id.* at Implementation Strategy 28c, p. 58.

14 28 U.S.C. §2071(c)(1).

9. The American Bar Association. The American Bar Association has also demonstrated concern about the proliferation of local rules. The Litigation Section of the American Bar Association created a Federal Practice Task Force, which developed the "Report and Recommendation on Local Rules." The House of Delegates of the American Bar Association adopted the Section's Report at its winter 2000 meeting.[15] The recommendations in that Report essentially sought more easily accessible local rules, uniformly numbered local rules, and case-specific orders rather than local rules.[16]

II. Methodology

The first step in the Project was to organize the local rules in a format that could be analyzed. That step has been a lengthy one. The rules were then sorted by topic and examined. Specifically, the Project analyzed the local rules using five broad questions: (1) Do the local rules repeat existing law? (2) Do the local rules conflict with existing law? (3) Should the local rules form the basis of a Model Local Rule for all of the jurisdictions to consider adopting? (4) Should the local rules remain subject to local variation? And, (5) Should the subject addressed by the local rules be considered by the Advisory Committee to become part of the Federal Rules of Civil Procedure?

A brief discussion of each of the five questions listed above, with examples of local rules illustrating them, follows.

The Local Rules Project intended to highlight local rules that repeat existing law since Rule 83 of the Federal Rules of Civil Procedure forbids such repetition.[17] In addition, such repetition is superfluous and may be counterproductive. It is unnecessary since the bench and bar already have access to existing federal rules and statutes through the published United States code services, electronic media, and handbooks of selected rules and portions of Title 28. In addition, attorneys have had courses in law school on some of these subjects. The bar is accountable, of course, for knowledge of existing law. Documentation that restates existing law simply results in more paper with its concomitant production costs. Further, if the law is restated only partially or is restated incorrectly, attorneys may be confused about what law actually applies. Lastly, repetition may cause serious problems if the statute or Rule is amended and the local rule is not. Local rules covering many topics have been found to repeat existing law.[18]

The Local Rules Project noted local rules that are inconsistent with existing law since Rule 83 of the Federal Rules of Civil Procedure and Section 2071 of Title 28 mandate that there be no inconsistency in the local rules with existing law. The determination of whether a particular local rule is inconsistent depends, in the first instance, on the definition

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15 Litigation Docket Online, (Spring 2000) Vol. 5, No. 3.

16 *Id.*

17 Fed.R.Civ.P. 83.

18 *See, e.g.,* local rules relating to Rule 3—Filing Fee; Rule 3—In Forma Pauperis; Rule 36—Requests for Admission; Rule 17—Minors and Incompetent Persons; Rule 15—Amended and Supplemental Pleadings; Rule 9—Social Security and Other Administrative Appeals.

of "inconsistency" used. One using a narrow definition of "inconsistency" may conclude that only those local rules that flatly contradict actual statements or requirements in other law are inconsistent.[19]

If one uses a broader definition of "inconsistency," there is more opportunity for disagreement over whether a particular local rule is, in fact, inconsistent. For example, one can argue that a local rule may be inconsistent with the intent or spirit of the Federal Rules.[20] One can also argue that local rules that take away the court's discretion in an individual case are inconsistent with the intent and spirit of the Federal Rules that case management, generally, be addressed on an individual basis.[21] One can also argue that local rules that add further requirements than those set forth in the Federal Rules conflict with the intent and spirit of the Federal Rules.[22]

One can argue that a local rule that is inconsistent with existing case law should be rescinded even though neither Rule 83 nor Section 2071 of Title 28 prohibit such repetition.[23] Case law will surely impact on counsel's activities and the court's decisions in much the same way as the Federal Rules and statutes.

The Local Rules Project found many local rules that seem useful in delineating certain procedures and practices in the individual district courts, in answering the third and fourth questions set forth above.[24]

Lastly, there are local rules that may more appropriate be incorporated in the Federal Rules of Civil Procedure rather than remain as local rules. Such topics should be brought to the attention of the Advisory Committee. It should be noted that the Federal Rules of Civil Procedure have undergone extensive examination and amendment recently so that significant amendments may not be helpful.

Issues for Possible Discussion

Each of the above questions, of course, leads to other questions, particularly when specific rules are discussed. What follows are some of the issues that may require a broader, more global, discussion. I have provided specific examples where appropriate.

Rules that Repeat: It can be easy to determine whether a rule repeats a portion of a Federal Rule or statute. But, what about repetition of existing case law?[25] On the one

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19 *See, e.g.*, Rule 5—Filing of Discovery Documents; Rule 81—Naturalization.

20 *See, e.g.*, Rule 3—In Forma Pauperis.

21 *Id.*

22 *See, e.g.*, Rule 81—Jury Demand in Removed Cases.

23 *See, e.g.*, Rule 3—Filing Fees.

24 *See, e.g.*, Rule 17—Minors and Incompetent Persons; Rule 9—Three-Judge Court; Rule 9—Social Security Numbers; Rule 24—Claim of Unconstitutionality; Rule 5—Certificate of Service.

hand, such repetition suffers from the same difficulties as other types of repetition. But, one can argue that explaining clearly in a rule what is in case law can help practitioners who may not research some of these issues with the specificity required to actually find the relevant case law.

Rules that Conflict: The issue here concerns the definition of "inconsistency". If one decides that only those local rules that flatly contradict actual statements or requirements in other law are inconsistent, then there are few inconsistent local rules.[26] If one uses a broader definition of "inconsistency," there is more opportunity for disagreement over whether a particular local rule is, in fact, inconsistent. One can argue that a local rule may be inconsistent with the intent or spirit of the Federal Rules.[27] One can argue that a local rule that is inconsistent with existing case law should be rescinded even though such an inconsistency is not prohibited by either Rule 83 or Section 2071 of Title 28.[28]

Rules that Should Become a Model Local Rule: There are local rules that may be advisable for other jurisdictions to consider adopting.[29] Arguably, it is sufficient to suggest that, if a court is interested, for example, in a rule on three-judge courts, it should use the Model Local Rule. Does that mean and should it mean that there can be no other regulation of that topic by local rule? And, if it is good for one court to have this rule, why not all courts? Should some or all of these Model Local Rules be national rather than local? For example, if the Model Local Rule on social security numbers is preferable to the rules that exist, then shouldn't that rule be available or required for all district courts since the issue arises routinely in all courts? Or, are there really two kinds of Model Local Rules, those that courts can consider, if they opt to regulate in the area at all, and those that courts must adopt?

Rules that Should Remain Subject to Local Variation: Again, the standards here are a bit murky. One may decide that local rules can exist only when allowed by the Federal Rules or statutes.[30] In this situation, the number of local rules would be quite small. One may decide that local rules can exist only when the court would have inherent authority to do the act regardless of the existence of the local rule. The local rule, then, simply provides consistency among the judges in the district and codifies, thereby making public, existing practice.[31] In this situation, there would be a larger number of local rules. One may decide that local rulemaking is appropriate when there is no other controlling law, assuming

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25 *See, e.g.*, Rule 34—Requests for Production of Documents and Things.

26 *See, e.g.*, Rule 5—Filing of Discovery Documents; Rule 81—Naturalization.

27 *See, e.g.*, Rule 3—In Forma Pauperis; Rule 36—Requests for Admissions.

28 *See, e.g.*, Rule 3—Filing Fees.

29 *See, e.g.*, Rule 9—Three-Judge Court; Rule 9—Social Security Numbers; Rule 24—Claim of Unconstitutionality; Rule 38—Jury Demand; Rule 15—Amended and Supplemental Pleadings; and Rules 34 and 36—Form of Discovery Documents.

30 *See, e.g.*, Rule 3—Filing Fees.

31 *See, e.g.*, Rule 17—Minors and Incompetent Persons.

there is no inconsistency with the intent or spirit of the Federal Rules. In this situation, there can be many more local rules.[32]

Rules that Should be Considered by the Advisory Committee for Incorporation into the Federal Rules of Civil Procedure: There are local rules that may more appropriately be incorporated into the Federal Rules of Civil Procedure rather than remaining as local rules.[33] The broad question concerns the extent to which experimentation is encouraged in the district courts.

The Advisability of Reducing the Sheer Number of Local Rules. If one assumes that unfettered local rulemaking is appropriate as long as there is no express directive forbidding it, there can be many, many local rules. This seems to be the situation that exists at present. It is unclear whether this is a good situation or not.

At least arguably, the Federal Rules were created when judges and clerks had time to maintain active control over all cases. Then, it could be assumed that there would be extensive judicial management. The Federal Rules could be broad and expansive and serve as general guidelines while judges addressed the details through individual case management. Now, as caseloads increase and judges become busier, it is reasonable to expect that local rules will be promulgated that intend to streamline some of these procedures so judicial involvement is unnecessary. It may very well be that the Federal Rules are simply too vague for the type of case management that occurs now. Reducing the number of local rules may not be feasible given the constraints on court time. Forbidding local rules, in these circumstances, may simply mean that judges will provide lengthy pretrial orders to individual litigants that explain the pretrial and trial activities that were previously set out in the local rules. Over time, these orders could become more characteristic of the particular judge, so there would be even more variation among practice than there is now.

Many of the local rules intend to streamline administrative activities. The jury demand, for example, must be in a certain place on the pleading so the court and clerk do not have to search for it; failure to put it where required may result in serious consequences. Persons seeking to proceed *in forma pauperis* must use a form so the information provided is predictable, easy to read, and easy to interpret; failure to use a particular form also results in serious consequences. These types of procedures often seem to be inconsistent with the spirit or intent of the Federal Rules, so they are determined to be inappropriate, but they may actually be quite salutary.

Implementation of the Results of the Local Rules Project Report. Another issue for possible discussion is what will happen to this Report when it is completed. It may be that doing what was done previously is sufficient; it may be advisable to try something different.

The first *Report* was circulated to the chief judges of the district courts for their information and education by the Chairman of the Standing Committee in that capacity in the

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32 *See, e.g.*, Rule 5—Certificate of Service; Rule 3—Civil Cover Sheet.

33 *See, e.g.*, Rule 36—Requests for Admission.

spring of 1989. Additional material was sent to the courts to help them renumber according to the guidelines proposed by the Local Rules Project and approved by the Judicial Conference. When renumbering was still not occurring, the Standing Committee and the Advisory Committee on Civil Rules amended Rule 83 to require uniform numbering. Other than uniform numbering, the material in the Report was suggestive only.

The Chairwoman of the Standing Committee gave the *Report on Criminal Rules* to the chief judges of the district courts as a suggestion as well.

The *Report on Appellate Rules* was given to the chief judges of the courts of appeals by the Chairman of the Advisory Committee on Appellate Rules with the suggestion that each court respond in writing about the relevant analyses. The Project then submitted memoranda to the Advisory Committee on Appellate Rules explaining areas of dispute between each of the appeals courts and the Project so that the Advisory Committee could decide what, if any, action to take. The difference in treatment of the local rules of the district and appellate courts can be explained by the enabling legislation. Local appellate court rules can be "modified or abrogated by the Judicial Conference" while district court rules are "modified or abrogated by the judicial council of the relevant circuit."[34]

34 28 U.S.C. §2071(c).

History and Methodology of the Local Rules Project

The ninety-four federal district courts currently have an aggregate of approximately 5,575 local rules, not including many "sub-rules," appendices, and other local directives. This number, although large, is unrepresentative of the actual number of rules in some courts. For example, there are only nineteen rules in the District of Montana yet, when sub-rules, which are each discrete directives, are counted, there are eighty-six of them. There are only twenty-two local rules in the Eastern District of Wisconsin but, when the discrete sub-parts are counted, there are ninety-one rules. The Central District of California has only thirty-two local rules, but there are actually 254 discrete sub-rules. There are only thirteen rules in the District of Maryland but those directives comprise thirty-eight pages of text in the commonly used paper compilation of local rules.[1] There are only four rules in the Western District of Wisconsin but, as stated in the preliminary statement to its rules in electronic format, there are other directives that control.

> This court prepared a number of guides to assist you while your case is pending in this court. The court will provide printed copies of these guides when they are appropriate. The copies provided here are provided for your convenience.
>
> These guides will not cover all issues relating to cases in this court. If you are looking for information about issues that are not covered in these guides then you might try our local rules or the Federal Rules of Civil Procedure.[2]

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[1] *See* Federal Local Court Rules (Lawyers Cooperative Publishing) (2d ed. 1995).

[2] Western District of Wisconsin, electronic discussion entitled: "Guides and Procedures."

There are only seven local rules in the Western District of Virginia but the paper compilation of the local rules also sets forth thirty-four standing orders.

In approximately 1988, the Local Rules Project estimated that there were 5,000 local rules, not including other local directives. There has clearly been an increase in the actual number of local rules since that time.

Although the actual number of pages of local rules was not counted or even estimated in 1988, the volume of local rules seems to have increased significantly over the past thirteen years. Regardless of whether there has been an increase, the volume of local rules is staggering. Some examples of the volume of these rules may be illustrative.[3] The rules in the District of Kansas comprise sixty-two pages of text. The rules in the Northern District of Mississippi comprise 107 pages. The rules in the District of Massachusetts comprise 122 pages. The Northern District of California has ninety pages of text devoted to civil local rules. The rules, themselves, fill five 3" wide binders almost completely.

These rules are extraordinarily diverse. They cover the entire spectrum of federal practice, from attorney admission and attorney discipline, through the various stages of trial, including pleading and filing requirements, pre-trial discovery procedures, and taxation of costs.

Some of these local rules materially supplement or expand the existing uniform Federal Rules. For example, there are rules that explain the requirements of the

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[3] All of these numbers are determined from the Federal Local Court Rules (Lawyers Cooperative Publishing) (2d ed. 1995).

form for a motion to amend.[4] There are local rules that provide a procedure for the parties to notify the court of the presence of a constitutional question.[5] Other rules may add to the pleading requirements for a jury demand. Some rules appear to expand upon what is mandated by federal statutes in such areas, for example, as the payment of fees[6] and the procedure used to obtain a three-judge court.[7]

I. History

Local rulemaking has been the subject of many judicial, legislative and bar activities. Congress has been involved in legislation relating to the local rulemaking process. The Judicial Conference, along with its rulemaking committees, has been instrumental in studying the proliferation of local rules, their actual content, and their numbering. The Judicial Conference, through its same committees, has sought to incorporate the ideas behind particular local into the national rules. The American Bar Association has also focused attention on local rules. A brief discussion of these various activities follows.

Rules Enabling Act

In 1983, the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary began an examination of the promulgation of local rules during its examination of rulemaking by the judiciary, generally. The Subcommittee proposed amendments in 1983 and 1985 to Sections 2072

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[4] Rule 15—Amended and Supplemental Pleadings.

[5] Rule 24—Claim of Unconstitutionality.

[6] Rule 3—Filing Fee.

[7] Rule 9—Three-Judge Courts.

through 2076 of Title 28, which amendments are referred to as the Rules Enabling Act of 1983 and 1985, respectively.[8] The 1985 Rules Enabling Act sought

> to revise the process by which rules of procedure used in federal judicial proceedings, and the Federal Rules of Evidence, become effective, to the end that the rulemaking process provides for greater participation by all segments of the bench and bar.[9]

The Subcommittee's 1985 bill was recommended favorably by the Committee on the Judiciary,[10] and passed the House unanimously, only to die before vote by the Senate due to the adjournment of the ninety-ninth Congress. On June 22, 1987, the House passed a bill, which contained, as Title II, the Rules Enabling Act of 1987.[11] This Rules Enabling Act, with only minor changes, was identical to the 1985 bill.[12] It was referred to the Judiciary Committee of the Senate June 23, 1987. Just a few weeks later, Representative Kastenmeier introduced the Court Reform and Access to Justice Act of 1987 in the House of Representatives.[13] Title II of this Act was the new Rules Enabling Act.[14] This new Rules Enabling Act was identical to the earlier bills except that its effective date was December 1, 1988.[15] This Rules Enabling Act was passed November 19, 1988 as Title IV of the Judicial Improvements and Access to Justice Act, effective December 1, 1988.[16]

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[8] *See* H.R. 4144, 98th Cong., 1st Sess. (1983) and H.R. 3550, 99th Cong., 2d Sess. (1985).

[9] H.R. Rep. 422, 99th Cong., 2d Sess. 4 (1985).

[10] *Id.*; 131 Cong. Rec. E-177 (daily ed. Feb. 3, 1986).

[11] H.R. 2182, 100th Cong., 1st Sess. 133 Cong. Rec. H5331 (1987).

[12] 133 Cong. Rec. H5336 (daily ed. June 22, 1987) (statement of Rep. Glickman).

[13] H.R. 3152, 100th Cong., 1st Sess. (August 6, 1987).

[14] Id. at §§201-206.

[15] *Id.* at §206.

[16] Pub. L. No. 100-702, §§401-407, 102 Stat. 4642, 4648-4652 (1988).

The portions of the Act that are relevant to local rulemaking are found in Section 2071 and read as follows:

> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.
>
> (b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.
>
> (c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.
>
> (2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.
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> ....
>
> (f) No rule may be prescribed by a district court other than under this section.[17]

The Subcommittee noted in its 1985 report that local rules may have some obvious benefits: they can accommodate to local conditions; they can offer predictability to the bar by communicating the required procedure or practice; and, they can efficiently rid the court of certain routine tasks which lend themselves to a uniform result.[18] The Subcommittee further noted, however, that local rules had been severely criticized by commentators for several reasons: because they could be promulgated without notice or an opportunity for comment; because there was a tremendous number of such rules, and

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[17] 28 U.S.C. §2071.

[18] H.R. Rep. No. 422, 99th Cong., 2d Sess. 14 (1985).

because these rules frequently conflicted with the letter and spirit of national rules and federal statutes.[19]

Some of these criticisms were addressed in the 1985 changes in Rules 83 and 57 of the Federal Rules of Civil and Criminal Procedure, respectively.[20] The 1985 amendments to these Rules require that, before rules are promulgated or amended, there be "appropriate public notice and an opportunity to comment."[21] The amendments also authorize the circuit councils to amend and abrogate local rules of district courts within the circuits.[22] The Rules Enabling Act was proposed, in part, to regulate aspects of the local rulemaking process, which were not addressed by these 1985 amendments.[23]

1985 Amendments to Rule 83 of the Federal Rules of Civil Procedure

While Congress was working to pass the Rules Enabling Act,[24] the Judicial Conference, through the federal rulemaking process, was also dealing with local rules. Rule 83 of the Federal Rules of Civil Procedure was amended April 29 1985, effective August 1, 1985, in several significant respects that were designed to provide more public awareness of local rules and the rulemaking process.[25] Specifically, the Rule was amended to require that local rules be promulgated only "after giving appropriate public

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[19] *Id.* at 14-17.

[20] *See* Fed.R.Civ.P. 83; Fed.R.Crim.P. 57 and discussion, *infra.*

[21] *Id.*

[22] *Id.*

[23] H.R. Rep. No. 422, 99th Cong., 2d Sess. 15 (1985).

[24] *See* 28 U.S.C. §§2071 *et al.*

[25] Rule 57 of the Federal Rules of Criminal Procedure were amended at the same time to correspond to the changes made in Rule 83. *See* Fed.R.Crim.P. 57 (1985).

notice and an opportunity to comment".[26] The Advisory Committee Note recognized that, while some district courts solicited outside input before promulgating local rules, many did not.[27] The Advisory Committee explained:

> The new language subjects local rulemaking to scrutiny similar to that accompanying the Federal Rules, administrative rulemaking, and legislation. It attempts to assure that the expert advice of practitioners and scholars is made available to the district court before local rules are promulgated.[28]

The Rule was also amended to allow a local rule to take effect on the date specified by the district court and to remain in effect "unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located."[29] The Advisory Committee explained its rationale:

> The effectiveness of a local rule should not be deferred until approved by the judicial council because that might unduly delay promulgation of a local rule that should become effective immediately, especially since some councils do not meet frequently. Similarly, it was thought that to delay a local rule's effectiveness for a fixed period of time would be arbitrary and that to require the judicial council to abrogate a local rule within a specified time would be inconsistent with its power under 28 U.S.C. §332 (1976) to nullify a local rule at any time. The expectation is that the judicial council will examine all local rules, including those currently in effect, with an eye toward determining whether they are valid and consistent with the Federal Rules, promote inter-district uniformity and efficiency, and do not undermine the basic objections of the Federal Rules.[30]

Lastly, the Rule was amended to require that other local regulation, such as standing orders and other local directives, also be consistent with the Federal Rules and

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[26] *See* Fed.R.Civ.P. 83 (1985).

[27] Fed.R.Civ.P. 83 Note to 1985 Amendments.

[28] *Id.*

[29] *Id.*, *see also* Fed.R.Civ.P. 83 (1985).

[30] *Id.*

the local rules of the respective district.[31] The Advisory Committee explained briefly its concern with standing orders and their functional equivalents:

> The practice pursued by some judges of issuing standing orders has been controversial, particularly among members of the practicing bar. The last sentence in Rule 83 has been amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules. Beyond that, it is hoped that each district will adopt procedures, perhaps by local rule for promulgating and reviewing single-judge standing orders.[32]

The First Local Rules Project

The United States Judicial Conference authorized the Committee on Rules of Practice and Procedure to undertake a study of federal district court local rules in 1985. Daniel R. Coquillette, Report to the Committee, submitted a proposal to the Committee for a Study of these local rules in January 1986. No committee since the Knox Committee[33] in 1940 had attempted: (1) A complete review of local rules for legal errors or internal inconsistencies; (2) A study of the rules and rulemaking procedures to see how they work in practice; or, (3) An examination of the relationship of local rules to the overall scheme of uniform federal rules. The Local Rules Project was fully operational at Boston College Law School beginning in the fall of 1986.

The Local Rules Project submitted a Preliminary Project Report to the Committee on Rules of Practice and Procedure at its January 29, 1987, meeting. At that meeting, the Committee suggested that, in the fall of 1987, a small number of leading

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[31] *See* Fed.R.Civ.P. 83 (1985). It should be noted that an additional change was made to Rule 83 in 1985 to require that copies of the local rules "be furnished to the judicial council and the Administrative Office of the United States Courts and be made public." *Id.* Prior to this amendment, copies of local rules were required to be given to the Supreme Court of the United States.

[32] Fed.R.Civ.P. 83 Note to 1985 Amendments.

[33] Report to the Judicial Conference of the Committee on Local District Court Rules (Sept. 3, 1940).

experts on federal rulemaking be invited to a workshop for the purpose of examining and fully discussing the tentative proposals and findings of the Local Rules Project to date. Accordingly, the Conference on Local Rules in the Federal District Courts was held at Boston College Law School November 12 and 13, 1987, and the results of the Conference were subsequently discussed at a meeting of the Committee held February 4, 1988, in Washington, D.C.

The format of the Conference was dictated by the initial research of the Local Rules Project. The Project broke down the conference discussions into four discrete subject matters covered by the local rules. The discussion of these four topics comprised most of the work of the conferees during their two days at Boston College. These discussions were preceded, however, by some introductory remarks and an important discussion of the practical and theoretical overview of the Project, an explanation of the Project's analysis and choices, and the methodology for examining and testing local rules. Of course, the theoretical and practical aspects of rulemaking and of the Project's decision-making were discussed throughout the Conference.

The results of the Conference were quite enlightening to the Local Rules Project. The discussions helped focus the Local Rules Project on several areas: (1) workable solutions to perceived problems; (2) areas which may be outside the scope of the Project or otherwise inappropriate for Project study; and, (3) methods of implementation.

The conferees favored a uniform numbering system and structure to help make the local rules available to the public. The conferees were also supportive of efforts to help the district courts draft better, more effective rules and to rid the districts of out-

dated and useless rules. The conferees agreed that rules that merely repeat existing federal law should be rescinded. The attendees also favored rescission of local rules that are inconsistent with each other or other supervening federal law. The conferees were concerned that some local rules address major policy concerns that should be outside the Project's mandate, most notably bar admission and bar discipline; it was thought that changes with these local rules should more aptly come from a policy-making body rather than from the Local Rules Project. The conferees agreed that the Local Rules Project should seek to identify those local rules that may more appropriately be promulgated as amendments to the Federal Rules of Civil Procedure. The conferees were in agreement that the Project should not create new handbooks or pamphlets for pro se litigants, such as prisoners. The conferees did not believe that the Project should prepare a handbook for practitioners that states federal law and rules that have been frequently repeated by local rules.

Much of the conference discussion focused on eventual implementation of the Project's suggestions. This included discussion of how diverse the individual federal districts can or should be, consistent with the concept of a national judicial system. For example, some conferees argued that the federal judiciary is decentralized and that such decentralization is desirable. The best implementation method, therefore, would be to encourage jurisdictions to voluntarily "weed out" obviously inconsistent or unnecessary rules and just to provide a national uniform numbering system. On the other hand, others concluded that the federal system should strive to be as uniform as possible. These conferees tended to favor standardization of local rules. For example, some conferees suggested that the Project complete a set of model uniform administrative rules, based on

the existing local rules, and then go through the national rulemaking process to incorporate such rules into the Federal Rules of Civil Procedure as an appendix.

There seemed agreement, however, that voluntary implementation would be the most successful way to proceed, at least initially. For example, each district court could receive from the Judicial Conference, the Committee on Rules of Practice and Procedure, or the Local Rules Project, a list of questionable rules in that district, together with supporting documentation. The district court could then voluntarily rescind obviously repetitive or inappropriate local rules. In addition, circuit councils are empowered by Rule 83 of the Federal Rules of Civil Procedure to abrogate inconsistent local rules regardless of voluntary district court compliance.

Another suggestion that met with wide approval was to provide a manual for federal court administration to district court judges and to the circuit councils. Such a manual could serve several purposes, including: (1) to explain or justify the Judicial Conference's conclusions with respect to those rules that are repetitive or inconsistent; (2) to provide guidance to the districts as to the types of problems commonly encountered in local rulemaking; (3) to offer sample local rules for districts to consider; and, (4) to further assist judges by providing sample orders for use in commonly recurring cases.

With these comments in mind, the Project completed its analysis of the civil local rules. The analysis focused on an examination of the existing local rules covering each particular topic on the outline.[34] The local rules on a topic were studied singly and

[34] The Local Rules Project originally examined the local rules on bar admission and bar discipline. The Project's preliminary findings were presented at the Conference. Some of the conference participants expressed concern that these subjects may be better addressed by a policy-making body rather than the Local Rules Project. In fact, the Project was instructed to refrain from a further analysis of these subjects. Accordingly, they were not discussed by the Project in its Report.

in the aggregate to determine if they were appropriate subjects for local district court rulemaking. Specifically, the Project analyzed the local rules using five broad questions:

(1) Do the local rules repeat existing?

(2) Do the local rules conflict with existing law?

(3) Should the local rules form the basis of a Model Local Rule for all of the jurisdictions to consider adopting?

(4) Should the local rules remain subject to local variation? And

(5) Should the subject addressed by the local rules be considered by the Advisory Committee to become part of the Federal Rules of Civil Procedure?

While these activities were proceeding, the Committee on Rules of Practice and Procedure was promoting a uniform number system. The Judicial Conference, at its September 1988 meeting, approved and urged the district courts to adopt such a uniform number system.[35]

The Committee on Rules of Practice and Procedure approved the circulation of the *Report of the Local Rules Project: Local Rules on Civil Practice* to the chief judges of the district courts at its winter 1989 meeting. The material was actually distributed to the judges by Joseph F. Weis, Jr., the Chairman of the Committee on Rules of Practice and Procedure in April of 1989. It consisted, among other materials, of several documents discussing the existing local rules and evaluating them according to the five questions set out above. The materials also contained the suggested uniform numbering system that had been recommended by the Judicial Conference for adoption by all district courts. The cover memorandum from Judge Weis explained the intent of

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[35] *See* Report of the Judicial Conference (September, 1988) 103.

providing this material to the courts: "The Committee hopes that this material will be helpful to you as you renumber and consider amending your local rules."[36] The material was provided as a helpful suggestion to the district courts if they chose to review their local rules.

The *Report of the Local Rules Project: Local Rules on Appellate Practice* was approved for distribution in the summer of 1990 and provided to the chief judges of the courts of appeals by Kenneth F. Ripple, Chairman of the Advisory Committee on Appellate Rules in the fall of that year. It was suggested by Judge Ripple that each court respond in writing to explain whether they agreed with the findings of the Local Rules Project. The Local Rules Project Director was asked to evaluate those responses, also in writing. These memoranda, then, identified areas of dispute between each of the courts of appeals and the Local Rules Project. They were submitted to the Advisory Committee on Appellate Rules so that the Advisory Committee could decide what action to take given its responsibility under the Rules Enabling Act: "Any other rules prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference."[37]

The Committee on Rules of Practice and Procedure approved for distribution the *Report on the Local Rules of Criminal Practice* at its winter 1996 meeting. It was circulated to the chief judges of the district courts shortly thereafter by Alicemarie Stotler, Chairwoman of the Committee on Rules of Practice and Procedure, by cover

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[36] Cover Memorandum of Report of the Local Rules Project: Local Rules on Civil Practice, to Chief Judges of the District Courts from Joseph F. Weis., Jr., Chairman of the Committee on Rules of Practice and Procedure, dated April 1989, p.4.

[37] 28 U.S.C. §2071(c).

memorandum dated April 21, 1996. A proposed uniform numbering system was also attached. These documents were also provided to the courts as suggestions for the courts to use when reviewing and renumbering their respective local rules:

> The Project's report ought to be considered as the empirical research of scholars. Neither the Committee on Rules of Practice and Procedure nor the Advisory Committee on Criminal Rules has evaluated or approved the Report. The committees hope that the report will be helpful to you as you examine and renumber your local criminal rules.[38]

Uniform Numbering of Local Rules

When the Local Rules Project began, there was no uniform numbering system for federal district court local rules. The Committee on Rules of Practice and Procedure recognized that a uniform system would have advantages. Most importantly, it would be helpful to the bar in locating rules applicable to a particular subject. In September of 1988, the United States Judicial Conference, based on a recommendation from the Committee on Rules of Practice and Procedure "urged each district court to adopt a Uniform Numbering System for its local rules, patterned upon the Federal Rules of Civil Procedure."[39]

The system, as proposed by the Local Rules Project and endorsed by the Standing Committee and Judicial Conference, focused on the numbering system already used for the Federal Rules of Civil Procedure. This system is already familiar to the bar. Under this system, each local rule number corresponds to the number of the related

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[38] Cover memorandum of Alicemarie Stotler to chief judges and clerks of the district and bankruptcy courts, dated April 21, 1996, and entitled: "Uniform Numbering System for Local Rules of Courts and a Report on the Local Rules of Criminal Practice".

[39] Report of the Judicial Conference (September, 1988) 103.

Federal Rule. For example, the designation "LR15.1" refers to the local rule entitled: "Form of a Motion to Amend and Its Supporting Documentation." The designation "LR" indicates it is a local rule; the number "15" indicates that the local rule is related to Rule 15 of the Federal Rules of Civil Procedure; and the number "1" indicates that it is the first local rule concerning Rule 15 of the Federal Rules of Civil Procedure. The same system applies with respect to those Federal Rules with a "1" or "2" after the initial rule number, such as Rule 65.1 entitled "Security: Proceedings Against Sureties." Thus, for example, the first local rule concerning Federal Rule 65 "Injunctions" is designated "LR65.1," while the first local rule concerning Federal Rule 65.1 is designated "LR65.1.1.

This system was explained to the district courts in the original Report of the Local Rules Project on Local Rules of Civil Practice.[40] The Report indicated that courts with difficulties in renumbering should contact the Local Rules Project for assistance. In the summer of 1992, the Standing Committee offered additional assistance to the district courts in their effort to renumber. Specifically, a memorandum from Robert E. Keeton, Chairman of the Committee on Rules of Practice and Procedure, was sent to the courts that explained in more detail how the numbering system worked.[41] The courts were, again, advised to contact the Local Rules Project for assistance. Members of various courts and local rulemaking committees did contact the Project.

During this time, the Advisory Committees were working, through the rulemaking process, to amend the Federal Rules to require uniform numbering of local

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[40] A similar explanation was provided in the Report on Local Rules of Criminal Practice.

[41] Memorandum of August 25, 1992 from Robert E. Keeton to the Chief Judges of the United States District Courts with Memorandum from Mary P. Squiers, dated August 19, 1992, and entitled: "An Example of a Proposed Numbering System for Local Rules, Including a Civil Justice Delay and Expense Reduction Plan" attached.

rules. Amendments to the Federal Rules of Civil Procedure took effect December 1, 1995, and required the use of a uniform numbering system:

> 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.[42]

At its March 1996 session, the Judicial Conference prescribed a uniform number system for local rules that is based on and tracks the relevant Federal Rules.[43] It also set April 15, 1997 as the date of compliance with this numbering system.[44]

By June of 1997, 41 per cent (37 courts) were numbered in compliance with the Judicial Conference recommendation and the Federal Rules; the other 59 per cent (53 courts) had not yet been renumbered.[45] Six months later, there had been greater compliance: 58 per cent (52 courts) were appropriately numbered while 42 per cent (38 courts) were not.[46] In June of 1998, 70 per cent (63 courts) were numbered in compliance with the Federal Rules; the other 30 per cent (27 courts) had still not renumbered.[47]

By December of 2001, the picture is much better but still lacking. Out of all ninety-four of the federal district courts, 81 courts, or 86 per cent of them, are numbered in compliance with the Judicial Conference recommendation and the Federal Rules.

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[42] Fed.R.Civ.P. 83(a)(1).

[43] Report of the Judicial Conference (March, 1996) 34-35.

[44] *Id.*

[45] *See* Memorandum from Mary P. Squiers to the Standing Committee, dated June 5, 1998, and entitled: "Status on Uniform Renumbering of Local Rules." At that time, the local rules for the Districts of Guam, the Virgin Islands, Puerto Rico, and the Northern Mariana Islands were unavailable.

[46] *Id.*

[47] *Id.*

Another eleven courts, or twelve per cent of them, have not been renumbered.[48] The remaining two courts have local rules that are difficult to categorize.[49]

One of these two courts has local rules that, although not renumbered in the text, do contain a cross-referenced list of the local rules arranged according to the Federal Rules.[50] At least arguably, this index does not comply with the uniform numbering system. An example may be illustrative. In this court, the local rules are arranged according to "Articles" so Article 1 of the local rules on civil practice consists of four rules with a "1" as a prefix and with the following subjects: Definitions (1.01), Stipulations (1.02), Extensions of Answer Date (1.03), and Waiver of Service (1.04).[51] The text of these four rules is set forth at the beginning of the civil local rules in this exact order.[52] The index for the local rules explains that these four rules would have the following numbers if renumbered according to the Federal Rules: LR6.1; LR7.1; LR12.1; and LR4.1.[53] Therefore, these local rules are in very different places within the packet of rules than if they were actually moved to their correct locations pursuant to the uniform numbering system. The local rules materials also do not contain an index that lists the Federal Rule numbers in consecutive order with the original local rule numbers attached. This is significant since, for example, a practitioner investigating waiver of

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[48] *See* District of Arizona; District of Connecticut; Middle District of Florida; District of Maryland; District of Montana; Eastern District of North Carolina; District of Puerto Rico, District of Rhode Island; Middle District of Tennessee, Northern District of West Virginia; Southern District of West Virginia; and, Western District of Virginia.

[49] Local Rules of the Eastern District of Missouri and Local Rules of the Northern District of West Virginia.

[50] *See* the Local Rules of the Northern District of West Virginia.

[51] *Id.* at Local Rules of Civil Procedure, Article 1.

[52] *Id.*

[53] *Id.* at Table of Contents.

service (local rule number at present of 1.04) would be forced to either review all of the local rules to find the relevant rule, or the entire index. It is not possible to review the index and quickly retrieve any and all local rules relating to Federal Rule 4 on service. The preface to the Table of Contents of these rules states:

> On August 19, 1997, the United States District Court for the Northern District of West Virginia adopted a uniform numbering system for local rules of court which corresponds with the relevant Federal Rules of Practice and Procedures as directed by the Judicial Conference of the United States. Attorneys are urged to use this table of contents as a cross index to cite the uniform rule number rather than the former local rule number. [54]

It should be noted, however, that the local rules, both on paper and in electronic format, do not have the renumbered rules set out anywhere but in the table of contents; the renumbering is not apparent by looking at the text of the local rules. It is difficult to imagine, then, that practitioners will become accustomed to using the new numbering system since it is extremely difficult to even find the new numbers.

The local rules in the other district court are also arranged according to the original format and not according to the uniform number system.[55] Each local rule, however, has a prefix that consists of the corresponding Federal Rule.[56] There is no index or cross-referenced list of the local rules. For example, the first five rules are numbered as follows:

> Rule 1—1.01 Title and Citation
> Rule 81—1.02 Application and Numbering of Local Rules
> Rule 86--.03 Effective Date
> Rule 86—1.04 Relationship to Prior Rules

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[54] *Id.*

[55] *See* the Local Rules of the Eastern District of Missouri.

[56] *Id.*

Rule 6—1.05 Modification of Time Limits
Rule 1—1.06 "Judge" Defined

Similar to the other court's rules, these local rules are not placed physically where they would be if the uniform numbering system were actually followed. Instead, these rules are placed exactly as they had been previously. A practitioner looking for direction on a particular topic, then, would be forced to examine all of the rules and rule numbers to determine if there was a local rule on the topic. The drafters of the uniform system did not anticipate this type of numbering.

Activities of the Advisory Committee on Civil Rules

The first report of the Local Rules Project determined that some areas of local rulemaking may be more appropriately areas of federal rulemaking.[57] Local rules that covered such topics were brought to the attention of the Advisory Committee on Civil Riles. What follows is a brief description of the suggestions of the Local Rules Project and the activities of the Advisory Committee.

1. **Rule 4 of the Federal Rules of Civil Procedure**. The Local Rules Project suggested that the Advisory Committee consider an amendment to subsection (a) of Rule 4 that provides that the plaintiff, or plaintiff's attorney, complete the summons before giving it to the clerk for the addition of the docket number. The Rule, as written, seemed to imply that the clerk complete the summons even though the litigant, not the clerk, is the person who knows the information necessary for preparing the summons. Rule 4 was

[57] All of these suggestions can be found at *Report of the Local Rules Project*.

amended in significant respects effective December 1, 1993.[58] At that time, this problem was remedied.

2. Rule 5 of the Federal Rules of Civil Procedure. The Local Rules Project suggested that subsection (e) of Rule 5 be amended to require that the clerk accept all documents that are tendered to the court for filing. This amendment was made effective December 1, 1991. As the Advisory Committee noted:

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision.[59]

3. Rule 24 of the Federal Rules of Civil Procedure. The Local Rules Project suggested that there be an amendment to Rule 24(c) to conform that Rule to 28 U.S.C. §2403. Section 2403 of Title 28 permits the United States or a state to intervene in any action where the constitutionality of an act of Congress or the constitutionality of a statute of the state affecting the public interest is drawn in question.[60] Rule 24(c) reiterated the court's responsibility to notify the United States Attorney General but omitted any discussion of notice to state attorneys general. The rule was amended, effective December 1, 1991, "to bring Rule 24(c) into conformity with the statute cited, resolving some confusion reflected in district court rules."[61]

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[58] *See* Fed.R.Civ.P. 4.

[59] Fed.R.Civ.P. 5(e) Note to 1991 Amendments.

[60] 28 U.S.C. §2403(a) (act of Congress); 28 U.S.C. §2403(b) (state statute).

[61] Fed.R.Civ.P. 24 Note to 1991 Amendments.

4. Federal Rules on Discovery Practice. There were several suggestions made to the Advisory Committee concerning the discovery rules. Many of these suggestions were incorporated or made unnecessary by the recent and extensive changes made to discovery practice generally. For example, the Local Rules Project suggested that Rule 5 be amended to allow nonfiling of discovery documents and to explain how discovery documents, which are not filed, can be used in court. That Rule was amended, effective December 1, 2000, to address both issues.[62] Suggestions were also made to consider limits on the number of interrogatories, depositions, requests for production, and requests for admission. The Federal Rules were amended to add limits in certain circumstances,[63] to allow local rules to set limits,[64] and to allow unlimited discovery in other circumstances, consistent with the overall discovery process.[65] The Local Rules Project suggested that Rule 16(b) be amended to impose time limits for completing discovery in those situations when a particular action is exempted from the Rule 16(b) order by local rule. Recent changes in Rule 26 seem to have made any such changes unnecessary and, perhaps, unproductive.[66]

5. Rule 38 of the Federal Rules of Civil Procedure. The Local Rules Project recommended that Rule 38(b) be amended to remove "an apparent ambiguity" between subsections (b) and (d).[67] As written, Rule 38 (b) did not, by its terms, require

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[62] See Fed.R.Civ.P. 5(d).

[63] *See* Fed.R.Civ.P. 30(a) (limit of ten depositions); Fed.R.Civ.P. 33(a) (limit of twenty-five interrogatories).

[64] See Fed.R.Civ.P. 26 Note to 2000 Amendments permitting local rule limits on requests for admission.

[65] *See* Fed.R.Civ.P. 26(b) and 34 (virtually unlimited requests for production).

[66] *See, e.g.*, Fed.R.Civ.P. 26.

[67] Fed.R.Civ.P. 38 Note to 1993 Amendments.

filing in order to make an effective demand; rather, a demand was made by serving it upon the other parties. Yet, an effective waiver pursuant to Rule 38(d) was made only by failing to both serve and file the demand. Under this rule, then, a party could be in the position of having neither demanded a jury trial nor waived the right to one. The rule was amended to require the filing of a jury demand in subsection (b), effective December 1, 1993.

6. Rule 53 of the Federal Rules of Civil Procedure. The Local Rules Project suggested the Advisory Committee consider an amendment to Rule 53 to require the master to serve a copy of the master's report on the parties. The Rule had originally provided that the master give the report to the clerk who must then notify the parties of the existence of the report. The Rule was amended to require the master to not only file the report with the clerk but also "serve on all parties notice of the filing"[68] in order to "expedite proceedings before a master."[69]

While the Advisory Committee reviewed the suggestions of the Local Rules Project, it did not incorporate all of its recommendations. For example, the Project recommended an amendment to Rule 14 requiring that a third-party plaintiff provide copies of pleadings and other documents to a third-party defendant within a pre-determined time period. The Project also recommended that the habeas corpus rules be amended to require that, when a habeas corpus proceeding is initiated, the original of a petition or motion, one copy, and an additional copy for each defendant be filed. The Project recommended that Rule 51 be amended to permit the court to require that jury

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[68] Fed.R.Civ.P. 53(e)(1).

[69] Fed.R.Civ.P. 53 Note to 1991 Amendments.

instructions be filed before the trial rather than only during the trial. Lastly, the Project recommended the Advisory Committee consider adding a rule to the Federal Rules of Civil Procedure that addresses the issue of photographing and broadcasting court proceedings.

The Civil Justice Reform Act

The Civil Justice Reform Act of 1990[70] was enacted to investigate the causes of expense and delay in litigation in the federal courts. Pursuant to the Act, each district court was required to implement "civil justice expense and delay reduction plans" that would "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[71] This resulted in an increase in local rulemaking and a diminished focus on a uniform numbering system and avoiding repetition in local rules.[72] The Judicial Conference was required, "on a continuing basis... [to] study ways to improve litigation management and dispute resolution services in the district courts; and ...[to] make recommendations to the district courts on ways to improve such services."[73] The review by the Judicial Conference culminated in the ***Civil Justice Reform Act of 1990 Final Report***, which was submitted to Congress by the Judicial Conference. That ***Report*** acknowledged the value of the systematic review:

> The intensive review of litigation procedures required by the Act has provided the courts with both a format and a source of funding to continue their efforts to improve and enhance judicial management of civil dockets. And, the judiciary adopted almost all of the principles,

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70 Pub. L. No. 101-650, Title I. 104 Stat. 5089-98 (codified in part at 28 U.S.C. § 471-482 (1994)).

71 28 U.S.C. § 471.

72 *See* 12 Wright, Miller & Marcus, Federal Practice and Procedure §3152, at 505-508 (2d ed. 1997).

73 28 U.S.C. §479 (b).

> guidelines, and techniques in the Act through the 1993 amendments to the Civil Rules and the policy directions set forth in the December 1995 ***Long Range Plan for the Federal Courts.*** The additional experience gained through the pilot courts, demonstration programs, and other experimentation under the Act has been useful to the courts, providing information that can aid policy-making in the future.[74]

In addition to the recent amendments to the Federal Rules and the 1995 *Long Range Plan for the Federal Courts*, the local rules reflect an interest in the various techniques endorsed by the Judicial Conference in this study. For example, there are many rules discussing various forms of alternative dispute resolution, including early neutral evaluation, summary jury trial, mediation, and court-sponsored settlement conferences.[75]

The Long Range Plan for the Federal Courts

The Judicial Conference of the United States presented *The Long Range Plan for the Federal Courts* by cover letter dated December 15, 1995 from L. Ralph Mecham, the Secretary of the Judicial Conference. The cover letter explains that this document is based, in large measure, on the *Proposed Long Range Plan* submitted by the Committee on Long Range Planning in March 1995. The Plan consists of ninety-three recommendations and seventy-six implementation strategies to go along with those recommendations. There is also text that seeks to clarify the drafters' reasoning and provide background information. The Judicial Conference approved only the

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[74] ***Civil Justice Reform Act of 1990 Final Report*** at 1.

[75] *Id.* at 2-7.

recommendations and implementation strategies; the text does not necessarily reflect the views of the Conference.[76]

There is a Recommendation in the *Long Range Plan* that Federal Rules be adopted as needed "to promote simplicity in procedure, fairness in administration, and a just, speedy, and inexpensive determination of litigation."[77] Three Implementation Strategies are also provided: The first of these suggests that rulemaking continue pursuant to the Rules Enabling Act. [78] The third Strategy suggests that the Conference and courts seek "significant participation by the interested public and representatives of the bar" in the rulemaking process.[79] The second Strategy is particularly relevant to local rulemaking and reads, in full:

> The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures.[80]

The explanatory text accompanying this Strategy discusses the drafters' interest in uniformity:

> The federal rules are designed to establish an essentially uniform, national practice in the federal courts. Nevertheless, they authorize individual courts to prescribe legitimate local variations in practice and procedure through local court rules that are "not inconsistent" with the national rules. Members of the bar have complained about the proliferation of local rules imposing procedural requirements. Moreover, the Civil Justice Reform Act of 1990 has encouraged each district court to engage in its own procedural experimentation and

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[76] *See* Cover Letter of December 15, 1995 from L. Ralph Mecham and Long Range Plan for the Federal Courts.

[77] *Long Range Plan for the Federal Courts*, Recommendation 28, p. 58.

[78] *Id.* at Implementation Strategy 28a, p. 58.

[79] *Id.* at Implementation Strategy 28c, p. 58.

[80] *Id.* at Implementation Strategy 28c, p. 58.

> impose additional case management requirements. Accordingly, it is difficult for lawyers, particularly those with a national practice, to know all the current procedural requirements district by district.
>
> Some local procedural variations are appropriate to account for differing local conditions and to allow experimentation with new and innovative procedures. Nevertheless, the long-term emphasis of the courts—at the conclusion of the period of experimentation and evaluation prescribed by the Civil Justice Reform Act—should be on promoting nationally uniform rules of practice and procedure. To this end, an effort should be made to reduce the number of local rules and standing orders. Local rules should be limited in scope and "not inconsistent" with national rules. The Judicial Conference and the judicial councils of the circuits should discourage further "balkanization" of federal practice by exercising their statutory authority to review local court rules.[81]

Activities of the Judicial Councils

As discussed earlier, rules promulgated pursuant to the Rules Enabling Act "shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit."[82] The method used by the judicial councils to review local rules for possible modification or abrogation is not determined by this statute; each circuit council can develop their own procedure. In the spring of 2000, Anthony J. Scirica, Chairman of the Committee on Rules of Practice and Procedure, wrote to the chief judges of the circuit courts indicating that Mary P. Squiers would contact the Circuit Executives to obtain information about their respective Circuit Council's review of local rules.

Each circuit executive was contacted in April and May of 2000. The conversations focused on review of district court local rules but also involved discussions on the use of standing orders, the implementation of uniform numbering, and, to a limited extent, the rulemaking process used in the district courts. The results of those

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[81] *Id.* at p. 59.

[82] 28 U.S.C. §2071(c)(1).

conversations were presented to the Committee on Rules of Practice and Procedure at its June 2000 meeting in Washington, D.C. A brief synopsis of those findings follows.

All of the Circuit Councils have a review process to examine new local rules and amendments to existing rules. These procedures are generally the same among the circuits and begin in the Circuit Executive's office where an initial review of the rule is made in writing. That evaluation and the rule itself are then forwarded to another body for review, for example to a committee of the Council, to the Chief Judge of the Circuit, or to the Conference of District Judges. The reviewers' recommendation or the actual documentation concerning the rule or amendment is then transmitted to the Circuit Council for final action, which may be by paper ballot or voice vote at the actual meeting. At any stage in this process, the reviewing person or entity may be communicating with the particular court to reach an accommodation of any rule or rule amendment that appears problematic. Such discussion may avert a negative vote at the Circuit Council. In fact, abrogation was a rare event in all of the circuits.[83]

None of the circuit councils has any written standards for determining whether a local rule is inconsistent with, or duplicative of, existing law. Instead, each of the reviewing entities makes a judgment call on a case-by-case basis. When there may be disagreement over a particular rule, deference is given to the district court.

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[83] *E.g.*, First Circuit (Incredibly rare and, maybe, it has never been done. It has not been done in the eleven years since the Circuit Executive has been there.); Second Circuit (It has not been done in the two years since the Circuit Executive has been there.); Third Circuit (Circuit Executive cannot recall that a local rule has been abrogated.); Fifth Circuit (Three times in fifteen years.); Eighth Circuit (Since October 1997, a rule has not been abrogated.); Ninth Circuit (It happened during the first comprehensive review five or six years ago.); Tenth Circuit (No abrogation for at least six years.); Eleventh Circuit (The council has never abrogated or modified a rule ever.); District of Columbia Circuit (Never to the knowledge of the Circuit Executive.).

Activities of the American Bar Association

The American Bar Association has also demonstrated concern about the proliferation of local rules. The Litigation Section of the American Bar Association created a Federal Practice Task Force, which in 1998-99 conducted an abbreviated review of the local rules in five predominantly urban districts.[84] The Task Force found that "the quantity of local rules has continued to grow, that the topics they cover continue to be remarkably diverse, and that the local rules in many districts remain difficult to find, especially for lawyers who do not regularly practice there."[85] The House of Delegates of the American Bar Association adopted the Section's *Report and Recommendation on Local Rules* at its winter 2000 meeting.[86] The recommendations in that Report:

> strongly endorsed efforts to make all local rules adopted by federal districts and standing rules or orders adopted by an individual judge conveniently available in written and electronic format in a single national location. The recommendation also urge[d] universal implementation of the uniform numbering system required by Federal Rule of Civil Procedure 83 and suggest[ed] that when federal trial court judges need to vary procedures prescribed by the Federal Rules or by local rules, they do so by issuing case-specific orders that are readily accessible to the parties rather than by adopting additional local rules or individual court rules.[87]

II. Methodology

The first step in the Project was to organize the local rules in a format that could be analyzed. The rules were, first, read by topic. The actual rule numbers were

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[84] *See* Report to the House of Delegates from the American Bar Association Section of Litigation (December 1999) discussed in Litigation Docket Online, (Spring 2000) Vol. 5, No. 3.

[85] *Id.* at p.10-11.

[86] Litigation Docket Online, (Spring 2000) Vol. 5, No. 3.

[87] *Id.*

entered on a database and coded according to the content of the rules themselves. An illustration may be helpful to understanding this process. Copies of two documents relating to jury cost assessment are attached as Appendix A. The first sheet is the code sheet that was developed about jury cost assessment based upon reading the rules themselves. This sheet itemizes the content of the local rules on this topic. The second sheet is an example of the rules relating to jury cost assessment for four jurisdictions. A rule number is placed on this list when the named district court has a rule on the topic. Under the rule number is a checklist with boxes that can be tagged. Those boxes correlate to the code sheet. The boxes are tagged that relate to the content of the rule. When the rules are read and coded from all of the jurisdictions that relate to jury cost assessment, the numbers of rules can be counted. It is also possible to understand the great variety of local rules on the topic. This data along with the code sheet are then used to analyze and evaluate the rules.

Specifically, the Project analyzed the local rules using five broad questions: (1) Do the local rules repeat existing law? (2) Do the local rules conflict with existing law? (3) Should the local rules form the basis of a Model Local Rule for all of the jurisdictions to consider adopting? (4) Should the local rules remain subject to local variation? And, (5) Should the subject addressed by the local rules be considered by the Advisory Committee to become part of the Federal Rules of Civil Procedure?

A brief discussion of each of the five questions listed above, with examples of local rules illustrating them, follows. It is helpful to be mindful of one issue that presents itself. The Local Rules Project intends, in making determinations on which local rules are repetitive and which are inconsistent, to err on the side of over inclusion rather than

under inclusion. In some instances, for example, before a final determination can be made as to whether a rule is inconsistent, it is helpful to know how the rule is interpreted or used in practice. The Project is unable to interview or survey the individual districts in these situations. If a rule appears, on its face, to conflict with existing law, it is included as an inconsistent rule, leaving any further interpretation to the particular district.

The Local Rules Project intended to highlight local rules that repeat existing law since Rule 83 of the Federal Rules of Civil Procedure forbids such repetition.[88] In addition, it is superfluous and may be counterproductive. It is unnecessary since the bench and bar already have access to existing federal rules and statutes through the published United States code services, electronic media, and handbooks of selected rules and portions of Title 28. In addition, attorneys have had courses in law school on some of these subjects. The bar is accountable, of course, for knowledge of existing law. Documentation which restates existing law simply results in more paper with its concomitant production costs. Further, if the law is restated only partially or is restated incorrectly, attorneys may be confused about what law actually applies. Lastly, repetition may cause serious problems if the statute or Rule is amended and the local rule is not. Local rules covering many topics have been found to repeat existing law.[89]

The Local Rules Project noted local rules that are inconsistent with existing law since Rule 83 of the Federal Rules of Civil Procedure and Section 2071 of Title 28 mandate that there be no inconsistency in the local rules with existing law. The

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[88] Fed.R.Civ.P. 83.

[89] *See, e.g.,* local rules relating to Rule 3—Filing Fee; Rule 3—*In Forma Pauperis*; Rule 36—Requests for Admission; Rule 17—Minors and Incompetent Persons; Rule 15—Amended and Supplemental Pleadings; Rule 9—Social Security and Other Administrative Appeals.

determination of whether a particular local rule is inconsistent depends, in the first instance, on the definition of "inconsistency" used. One using a narrow definition of "inconsistency" may conclude that only those local rules that flatly contradict actual statements or requirements in other law are inconsistent.[90]

If one uses a broader definition of "inconsistency," there is more opportunity for disagreement over whether a particular local rule is, in fact, inconsistent. For example, one can argue that a local rule may be inconsistent with the intent or spirit of the Federal Rules.[91] One can also argue that local rules that take away the court's discretion in an individual case are inconsistent with the intent and spirit of the Federal Rules that case management, generally, be addressed on an individual basis.[92] One can also argue that local rules that add further requirements than those set forth in the Federal Rules conflict with the intent and spirit of the Federal Rules.[93]

One can argue that a local rule that is inconsistent with existing case law should be rescinded even though neither Rule 83 nor Section 2071 of Title 28 prohibit such repetition.[94] Case law will surely impact on counsel's activities and the court's decisions in much the same way as the Federal Rules and statutes.

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[90] *See, e.g.*, Rule 5—Filing of Discovery Documents; Rule 81—Naturalization.

[91] *See, e.g.*, Rule 3—*In Forma Pauperis*.

[92] *See, e.g.*, Rule 3—*In Forma Pauperis*.

[93] *See, e.g.*, Rule 81—Jury Demand in Removed Cases.

[94] *See, e.g.*, Rule 3—Filing Fees.

The Local Rules Project found many local rules that seem useful in delineating certain procedures and practices in the individual district courts, in answering the third and fourth questions set forth above.[95]

Lastly, there are local rules that may more appropriately be incorporated in the Federal Rules of Civil Procedure rather than remain as local rules.[96] Such topics should be brought to the attention of the Advisory Committee. Incorporation into the Federal Rules may be advisable for one of several reasons: (1) The particular topic covered by the local rule is critical to the procedural scheme of the Federal Rules; (2) The local rule affects the substantive outcome of a class of cases; (3) The local rule affects litigation costs; (4) The local rule affects the operation of the federal courts generally; or (5) The local rule relates in a significant way to the integrity of the Federal Rules as a unified, integrated set of rules. In addition, a Federal Rule or Rules may already cover the issue. Lastly, the local court rules may have served as an experimental device to test a particular procedure. Further experimentation is no longer necessary and the particular local rules can be incorporated into the Federal Rules or rejected. It should be noted that the Federal Rules of Civil Procedure have undergone extensive examination and amendment recently so that significant amendments may not be helpful.

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[95] *See, e.g.*, Rule 17—Minors and Incompetent Persons; Rule 9—Three-Judge Court; Rule 9—Social Security Numbers; Rule 24—Claim of Unconstitutionality; Rule 5—Certificate of Service.

[96] *See, e.g.*, Rule 36—Requests for Admission.

APPENDIX A

Jury Cost Assessment.

1. Notify one full business day prior to the day jury is set to be selected or the trial is scheduled to commence.
2. Notify by timely notice.
3. Notify priot to prospective jurors reporting for voir dire.
4. Notify prior tonoon on the last court business day before trial.
5. Notify three full business days prior to the day on which the trial is scheduled.
6. Notify by 3:00 pm of the day immediately prior to the trial.
7. Notify prior to selected jurors reporting to try the case.
8. Notify promptly or immediately.
9. Notify prior to the cdlose of business day on the last business day before jurors are to appear for jury selection.
10. Notify in asbestos cases, 5 full business days prior to the day jury is set to be selected or the trial is scheduled to ommence.
11. Notify prior to noon, five business days prior to trial.
12. Notify ten full business days prior to the date of the trial.
13. Types of allowable jury costs: All jury costs.
14. Types of allowable jury costs: Attendance fees.
15. Types of allowable jury costs: Mileage.
16. Types of allowable jury costs: Per diem.
17. Types of allowable jury costs: Marshal's fees.
18. Types of allowable jury costs: Parking.
19. Types of allowable jury costs: Service fees.
20. Types of allowable jury costs: Attorney's fees.
21. Costs assessed against parties and/or counsel.
22. Costs assessed against whomever equally.
23. Costs assessed against as directed by court.
24. Costs assessed against counsel alone.
25. Costs assessed against as agreed by the parties.
26. Costs assessed against one or more parties.
27. Explicit exceptiuon for good cause.
28. Applies to settlement after start of trial and before verdict.
29. Payment as a condition for granting the continuance.
30. Money is paid to clerk and shall be puti n Treasury.
31. Sanctions available.

DISTRICT **C.D.Cal.** **COMMENTS** Crazy numbering re: Rule 3 Civil Cover Sheet. I

LOCAL RULE No. 11.3 11.2

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DISTRICT **E.D.Cal.** **COMMENTS** Rule 38: Following title in coplaint or answer or

LOCAL RULE No. 16-272

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DISTRICT **N.D.Cal.** **COMMENTS**

LOCAL RULE No. 404

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DISTRICT **S.D.Cal.**

COMMENTS Rule 38: Following title of complaint, answer, pe

LOCAL RULE No. 16.4

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Rule 3. Commencement of Action

Rule 3.—Filing Fee

Thirty-nine courts have local rules addressing the payment of fees.[1] Many of these rules exist in response to a statutory provision allowing such local rulemaking. Some of them also seek to supplement the statute and are also appropriate. Rules in two courts simply repeat the applicability of the statute and, as such, are unnecessary. Several of the courts have rules that are inconsistent with case law from their respective Courts of Appeals. These rules should be rescinded.

DISCUSSION

Section 1914 of Title 28 provides guidelines on filing fees.[2] This provision sets the filing fee in the district court at $150.00 and permits "[e]ach district court by rule or standing order [to] require advance payment of fees."[3] Thirty-five of the thirty-nine courts actually do require advance payment of the filing fees.[4] Seven of the courts allow

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[1] D.Alaska LR27; D.Ariz. LR2.2; S.D.Cal. LR4.5; D.Colo. LR4.4; N.D.Ga. LR3.2; N.D.Ill. LRLR5; S.D.Ill. LR3.1; N.D.Iowa LR3.1(d); S.D.Iowa LR3.1(d); E.D.La. LR5.2; M.D.La. LR5.2; W.D.La. LR5.2; D.Me. LR3(a); D.Mass. LR4.5; W.D.Mich. LR3.1; D.Minn. LR4.2; N.D.Miss. LR3.1(C); S.D.Miss. LR3.1(C); D.Neb. LR3.2; D.N.H. LR4.4; D.N.Mex. LR5.3; N.D.N.Y. LR5.2; W.D.N.Y. LR5.6; W.D.N.Car. LR3.1(A); D.N.Dak. LR4.1; N.D.Ohio LR3.12; S.D.Ohio LR3.3; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; W.D.Okla. LR3.2; D.Or. LR3.6(a); M.D.Pa. LR4.3; D.P.R. LR303; D.R.I. LR26(a); E.D.Tenn. LR4.5; N.D.Tex. LR4.2; S.D.Tex. LR4; D.Utah LR108; D.Wyo. LR5.1(f).

[2] 28 U.S.C. §1914.

[3] *Id.* at (c).

[4] D.Alaska LR27; D.Ariz. LR2.2; D.Colo. LR4.4; N.D.Ga. LR3.2; N.D.Ill. LRLR5; S.D.Ill. LR3.1; E.D.La. LR5.2; M.D.La. LR5.2; W.D.La. LR5.2; D.Me. LR3(a); D.Mass. LR4.5; D.Minn. LR4.2; N.D.Miss. LR3.1(C); S.D.Miss. LR3.1(C); D.Neb. LR3.2; D.N.H. LR4.4; D.N.Mex. LR5.3; N.D.N.Y. LR5.2; W.D.N.Y. LR5.6; W.D.N.Car. LR3.1(A); D.N.Dak. LR4.1; N.D.Ohio LR3.12;

the marshal to ask for prepayment of his fee.[5] Other courts refer to a list of the services and their respective fees.[6] These rules are all appropriate.

In addition, a number of courts have local rules concerning the method of payment. One court has a rule allowing payment by credit card.[7] Another court allows the clerk to require payment by cash or certified check.[8] These rules are also appropriate exercises of local rulemaking authority.

Two courts have local rules indicating that the filing fee is $150.9 These rules repeat subsection (a) of section 1914 and should, therefore, be rescinded. 10

Rules in eleven courts discuss the consequences of a failure to accompany the complaint with a filing fee. There is also case law addressing this issue. There is a split among the federal courts on whether the filing fee requirement is jurisdictional. The greater weight of authority indicates that the filing fee is not jurisdictional so that a complaint filed with the court and otherwise proper is appropriately before the court even if the fee has not yet been paid.[11] The rules in these eleven courts may be problematic,

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S.D.Ohio LR3.3; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; W.D.Okla. LR3.2; D.Or. LR3.6(a); M.D.Pa. LR4.3; D.P.R. LR303; D.R.I. LR26(a); E.D.Tenn. LR4.5; N.D.Tex. LR4.2; S.D.Tex LR4; D.Utah LR108; D.Wyo. LR5.1(f).

[5] N.D.Ohio LR3.12; S.D.Ohio LR3.3; N.D.Okla. LR5.1F; M.D.Pa. LR4.3; D.R.I. LR26(a); N.D.Tex. LR4.2; S.D.Tex. LR4.

[6] D.Ariz. LR2.2; S.D.Cal. LR4.5; W.D.N.Y. LR5.6; D.N.Dak. LR4.1; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; D.Utah LR117.

[7] D.Colo. LR4.4.

[8] W.D.Mich. LR3.1.

[9] N.D.Iowa LR3.1(d); S.D.Iowa LR3.1(d).

[10] *See* 28 U.S.C. §1914(a).

[11] *Burnett et al. v. Perry Manufacturing, Inc.* 151 F.R.D. 398, 401 n.3 (D.Kan. 1993). *citing Cintron v. Union Pacific R. Co.,* 813 F.2d 917, 921 (9th Cir. 1987); *Rodgers on Behalf of Jones v. Bowen,* 790 F.2d 1550, 1551 (11th Cir. 1986); *Wrenn v. American Cast Iron Pipe Co.,* 575 F.2d 544, 545 (5th Cir. 1978); *Johnson v. Bowen,* 803 F. Supp. 1414, 1418-1419 (N.D. Ind. 1992); *Bolduc v. United States,* 189 F. Supp. 640, 64-642 (D. Maine 1960). *See also Parissi v. Telechron, Inc.,* 349 U.S. 46, 47, 99 L. Ed. 867, 75 S. Ct. 577 (1955) *(per* curiam)(clerk received timely notice of appeal: "untimely payment of §1917

depending upon which Circuit Court cases control in the district courts.

Six courts have local rules stating that the complaint is not deemed filed until the fee is paid.[12] Five of these courts are in the Tenth Circuit where there is no specific and controlling case law.[13] These rules, then, can stand. The remaining rule is from the Northern District of Georgia which is in the Eleventh Circuit and which reads: "Advance payment of fees is required before the clerk will file any civil action, suit, or proceeding."[14] This rule is inconsistent with the case law in the Eleventh Circuit and should, therefore, be rescinded.[15]

There is a rule in a district court in the First Circuit that forbids the clerk from filing a complaint submitted without the filing fee.[16] A 7-day grace period is provided during which the fee can be paid; if it is not paid within that time, the complaint is dismissed without prejudice.[17] This local rule may also be appropriate since there is no controlling First Circuit opinion on this issue.

Rules in two courts, the District of Minnesota and the Northern District of Illinois, give the clerk the option to accept a complaint without prepayment of the fee or

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fee did not vitiate the validity of petitioner's notice of appeal. Anything to the contrary, ... we disapprove."); *Gilardi v. Schroeder,* 833 F.2d 1226, 1233 (7th Cir. 1987) (stating that "the district court should regard as 'filed' a complaint which arrives in the custody of the clerk within the statutory period but fails to conform with formal requirements in local rules"); *Lyons v. Goodson,* 787 F.2d 411, 412 (8th cir. 1986) (same); *Loya v. Desert Sands Unified School District,* 721 F.2d 279, 281 (9th Cir. 1983) (same). *Contra Wanamaker v. Columbian Rope Co.,* 713 F. Supp. 533, 537 (N.D.N.Y. 1989); *Keith v. Heckler,* 603 F. Supp. 150, 156-157 (E.D. Va. 1985); *Anno v. United States,* 125 Ct. Cl. 535, 113 F. Supp. 673, 675 (Ct. Cl. 1953); *Turkett v. United States,* 76 F. Supp. 769, 770 (N.D.N.Y. 1948).

[12] D.Colo. LR4.4; N.D.Ga. LR3.2; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; D.Utah LR108; D.Wyo. LR5.1(f).

[13] D.Colo. LR4.4; E.D.Okla. LR5.1C; N.D.Okla. LR5.1F; D.Utah LR108; D.Wyo. LR5.1(f).

[14] .N.D.Ga. LR3.2.

[15] *See Rodgers v. Bowen,* 790 F.2d 1550, 1551 (11th cir. 1986).

[16] D.N.H. LR4.4.

[17] *Id.*

to reject such a complaint until the fees are paid.[18] Each of these rules seems inconsistent with existing case law in their respective circuits, the Eighth and Seventh Circuits.[19] As such, they should be rescinded.

There are two courts with local rules requiring that the clerk mark a complaint as received but file it only when the fee is paid.[20] The significance of these rules is unclear. Assuming they intend to indicate that the complaint is filed after the fee is paid *nunc pro tunc*, they are appropriate. It appears, however, that the rule in the District of North Dakota means something different. This local rule seems to say that the complaint is not constructively filed at the earlier time but is only filed when the fee is actually provided.[21] If this interpretation is accurate, the rule seems to run afoul of controlling case law in the Eighth Circuit and should, therefore, be rescinded.[22]

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[18] N.D.Ill. GR11; D.Minn. LR4.2.

[19] *See Lyons v. Goodson*, 787 F.2d 411, 412 (8th Cir. 1986) (complaint should be deemed filed even if it fails to conform with formal requirements of local rules); *Gilardi v. Schroeder*, 833 F.2d 1226, 1233 (7th Cir. 1987) (same).

[20] D.N.Dak. LR4.1; E.D.Tenn. LR4.5.

[21] D.N.Dak. LR4.1.

[22] *See Lyons v. Goodson*, 787 F.2d 411, 412 (8th Cir. 1986) (complaint should be deemed filed even if it fails to conform with formal requirements of local rules).

Rule 3—Civil Cover Sheet

Forty-four courts have local rules concerning the use of a civil cover sheet when filing an action in the federal district courts.[1] Most of these rules are appropriate as local rules if it is assumed that a failure to comply with one of these local rules does not result in a rejection of the complaint. A rule in one district court is inconsistent with existing law by allowing the clerk to reject the complaint for failing to file a civil cover sheet.

The content of these local rules has changed somewhat since the first Local Rules Project Report. In 1989, there were forty-five courts with local rules on this subject, almost the same number as now.[2] The earlier Report, however, identified eleven jurisdictions with local rules that conflicted with existing law by allowing the clerk to refuse to accept the filing of a complaint if a civil cover sheet is not also submitted.[3] The number of courts with such a local rule has now been reduced to only one.

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[1] M.D.Ala. LR3.1; N.D.Ala. LR3.1; S.D.Ala. LR3.2; D.Alaska LR6M; C.D.Cal. LR3.3; E.D.Cal. LR3-200; N.D.Cal. LR3-2(a);S.D.Cal. LR3.1;D.Colo. LR3.1;D.Del. LR3.1;S.D.Fla. LR3.3; S.D.Ga. LR4.1; N.D.Ill. LR2.20; N.D.Iowa LR3.1(c);; S.D.Iowa LR3.1(c); D.Kan. LR3.1; D.Me. LR3(a); D.Md. LR103.1; D.Mass. LR3.1; E.D.Mich. LR3.1; D.Minn. LR3.1; N.D.Miss. LR3.1(B); S.D.Miss. LR3.1(B); E.D.Mo. LR3-2.02(A); D.Mont. LR200-1; D.Neb. LR3.1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.N.Y. LR3.1; M.D.N.Car. LR3.1(a); D.N.Mar.I LR3.1; N.D.Ohio LR3.13; S.D.Ohio LR3.1; E.D.Okla. LR3.1; N.D.Okla. LR3.1; W.D.Okla. LR3.1; W.D.Pa. LR3.1; E.D.Tenn. LR3.1; N.D.Tex. LR3.1; S.D.Tex. LR3.A; W.D.Tex. CV-3(a); D.Utah LR201; D.V.I. LR3.1; D.Wyo. LR3.1

[2] Report of the Local Rules Project: Local Rules on Civil Practice [hereinafter "Report"] at "Suggested Local Rules," p.15; and "Questionable Local Rules" p.13. The first Report of the Local Rules Project was distributed to the Chief Judges of the District Courts by the Honorable Joseph F. Weis, Jr., Chairman of the Committee on Rules of Practice and Procedure, in April 1989. It consisted of several documents, two of which are cited throughout this document. The first document is entitled: "Suggested Local Rules, Including Model Local Rules and Rules that Should Remain Subject to Local Variation" [hereinafter "Suggested Local Rules"]. This document discusses those local rules that should remain as local directives. It includes Model Local Rules that may appropriately be the subject of rulemaking for all jurisdictions. The second document is entitled: Questionable Local Rules [hereinafter "Questionable Local Rules"]. This second document identifies those local rules that are inconsistent with existing law and those local rules that repeat existing law.

[3] *Id.*

DISCUSSION

Forty-two of the forty-four courts have rules requiring that the civil cover sheet be filed with the initial complaint or notice of removal.[4] Eighteen of those courts have rules clearly stating that the civil cover sheet is used only for administrative purposes and that it has no legal effect.[5]

The Judicial Conference at its September 1974 meeting recommended the use of a civil cover sheet for all district courts.[6] The civil cover sheet was part of a civil docket package from the Administrative Office of the United States Courts that had been used experimentally in eleven jurisdictions:

> [It was] decided to reduce the clerical effort required to initiate the docket sheet and ... statistical reports for each case and, in addition, [to remove] the burden of serving the complaint for the issue involved from the filing clerk to the attorney.[7]

The civil cover sheet was recommended for use by all districts as of January 1, 1975 "in accordance with Rule 79(a) of the F.R.Civ.P."[8]

Some courts expand on what the civil cover sheet requires in certain ways.

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[4] M.D.Ala. LR3.1; N.D.Ala. LR3.1; S.D.Ala. LR3.2; D.Alaska LR6M; C.D.Cal. LR3.3; E.D.Cal. LR3-200; N.D.Cal. LR3-2(a); S.D.Cal. LR3.1; D.Colo. LR3.1; D.Del. LR3.1; S.D.Fla. LR3.3; S.D.Ga. LR4.1; N.D.Iowa LR3.1(c); S.D.Iowa LR3.1(c); D.Kan. LR3.1; D.Me. LR3(a); D.Md. LR103.1; D.Mass. LR3.1; E.D.Mich. LR3.1; D.Minn. LR3.1; N.D.Miss. LR3.1(B); S.D.Miss. LR3.1(B); E.D.Mo. LR3-2.02(A); D.Mont. LR200-1; D.Neb. LR3.1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.N.Y. LR3.1; M.D.N.Car. LR3.1(a); D.N.Mar.I LR3.1;; N.D.Ohio LR3.13; S.D.Ohio LR3.1; E.D.Okla. LR3.1; N.D.Okla. LR3.1; W.D.Okla. LR3.1; E.D.Tenn. LR3.1; N.D.Tex. LR3.1; S.D.Tex. LR3.A; W.D.Tex. CV-3(a); D.Utah LR201; D.V.I. LR3.1; D.Wyo. LR3.1

[5] M.D.Ala. LR3.1; E.D.Cal. LR3-200; S.D.Cal. LR3.1; D.Del. LR3.1; S.D.Fla. LR3.3; S.D.Ga. LR4.1; D.Minn. LR3.1; D.Neb. LR3.1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.N.Y. LR3.1; D.N.Mar.I LR3.1; S.D.Ohio LR3.1; N.D.Okla. LR3.1; E.D.Tenn. LR3.1; D.Utah LR201; D.V.I. LR3.1; D.Wyo. LR3.1

[6] Report of the United States Judicial Conference (September 1974) 18.

[7] *Id.*

[8] *Id.*

For example, four courts require that the document be filed in duplicate[9] and another court requires it be filed in triplicate.[10] Several courts also require that additional information be provided on the document such as whether there is a related action.[11] Two of the courts require the submission of a civil cover sheet and another document that seems to supplement the information requested on the official form.[12] Another court requires the use of a completely different form.[13] While these variations may seem small, they may cause difficulties for people who are new to the jurisdiction or who file only infrequently in that court. These local rules may also be problematic to the extent that a failure to comply with them results in a rejection of the complaint.

In nine of the courts, pro se litigants are specifically exempt from filing the civil cover sheet.[14] Two of these courts also exempt prisoners.[15] In another court a court clerk will file the civil cover sheet on behalf of a prisoner.[16]

Some of the rules discuss the significance of a failure to file the civil cover sheet. For example, six courts indicate that a complaint without a civil cover sheet is dated and filed later *nunc pro tunc*.[17] In other courts, the clerk will either help to

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[9] C.D.Cal. LR3.3; N.D.Iowa LR3.1(c); S.D.Iowa LR3.1(c); N.D.Tex. LR3.1.

[10] M.D.N.Car. LR3.1(a).

[11] D.Del. LR3.1.

[12] D.Mass. LR3.1 (civil cover sheet and local category sheet); N.D.Ohio LR3.13 (civil cover sheet and Case Information Sheet).

[13] N.D.Ill. GR2.20 (must file a designation sheet).

[14] D.Del. LR3.1; D.Mont. LR200-1; D.N.H. LR3.1; D.N.Mex. LR3.1; N.D.Okla. LR3.1; S.D.Tex. LR3.A; W.D.Tex. CV-3(a); D.V.I. LR3.1; D.Wyo. LR3.1

[15] D.Mont. LR200-1; W.D.Tex. CV3(a).

[16] N.D.Ill. LR2.20.

[17] M.D.Ala. LR3.1; D.Del. LR3.1; S.D.Ga. LR4.1; D.Minn. LR3.1; D.N.Mar.I LR3.1; D.V.I. LR3.1.

complete the document[18] or notify the litigant of the failure to file the document.[19] These rules are consistent with existing law.

In one court, however, the clerk can refuse a pleading that does not have a civil cover sheet: "The Clerk is authorized to reject for filing any civil case which is not accompanied by a completed and executed civil cover sheet."[20] This local rule is inconsistent with Rule 5(e) of the Federal Rules of Civil Procedure which forbids the clerk from rejecting such a complaint: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form as required by these rules or any local rules or practices."[21] In 1991 this Rule was amended to forbid such action: "[refusing to accept a document for filing] is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision."[22] There is also case law indicating that a complaint filed without a civil cover sheet is still deemed a filed complaint.[23] Because this local rule is inconsistent with the federal rules and case law, it should be rescinded.[24]

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[18] E.D.Mich. LR3.1.

[19] D.N.H. LR3.1; D.N.Mex. LR3.1; S.D.Ohio LR3.1; D.Wyo. LR3.1.

[20] D.Mont. LR200-1.

[21] Fed.R.Civ.P. 5(e).

[22] Fed.R.Civ.P. 5(e) Note to 1991 Amendments; *see also* Fed.R.Civ.P. 5(e).

23 *See, e.g., Cintron v. Union Pacific Railroad Co*, 813 F.2d 917, 920 (9th Cir. 1987) (complaint presented without civil cover sheet in violation of local rule still deemed filed: "The consensus is that 'papers and pleadings including the original complaint are considered filed when they arse placed in the possession of the clerk of the court.'" (*citations omitted*)); *see also In Re Toler*, 999 F.2d 140 (6th Cir. 1993) (complaint presented without summons in violation of local rule still deemed filed); *McDowell v. Delaware State Police*, 88 F2d 188 (3rd Cir. 1996) (complaint presented without filing fee in violation of local rule deemed filed); *McClellon v. Lone Star Gas. Co.*, 66 F.3d 98 (5th Cir. 1995) (defective complaint presented in violation of local rule deemed filed.)

[24] D.Mont. LR200-1(b).

Rule 3.—In Forma Pauperis

Thirty-three jurisdictions have local rules concerning the procedure to obtain permission to proceed *in forma pauperis*.[1] There are rules that explain the content necessary for affidavits seeking to proceed *in forma pauperis* and those that explain the procedure for seeking court approval. These rules are appropriate. There are also rules that require the use of form affidavits and those that allow the clerk to reject a request to proceed *in forma pauperis* without judicial action. These rules are problematic and should be rescinded. There are also rules that permit the assessment of partial payment of fees against non-prisoners. Existing law does not permit these types of assessments, so these local rules are also problematic. Lastly, several courts have local rules that repeat existing law and should, therefore, be rescinded.

DISCUSSION

Most of the procedure for securing *in forma pauperis* status is found in the first instance in Section 1915 of Title 28, which was amended in 1996 by the Prisoner Litigation Reform Act.[2] This provision, generally, allows any person to bring a lawsuit "without prepayment of fees or security therefor" if the person files an affidavit of poverty.[3] Prisoners must also file a trust fund account statement indicating the amount of

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[1] D.Alaska LR27; D.Ariz. LR1.19; C.D.Cal. LR26.3; N.D.Cal. LR3-10; S.D.Cal. LR3.2; M.D.Fla. LR4.07; N.D.Ga. LR3.2; N.D.Ill. LRGR11; S.D.Ill. LR3.1; N.D.Ind. LR4.3; E.D.Ky. LR5.5; W.D.Ky. LR5.5; D.Me. LR3(a); D.Mass. LR4.5; W.D.Mich. LR3.4; D.Minn. LR4.2; E.D.Mo. LR2.05; D.Neb. LR3.5; D.N.H. LR4.2; D.N.Mex. LR5.3; N.D.N.Y. LR5.4; W.D.N.Y. LR5.3; E.D.N.Car. LR22.00; N.D.Ohio LR3.15; W.D.Okla. LR3.3; D.Or. LR3.6(b); M.D.Pa. LR4.6; D.P.R. LR303; E.D.Tenn. LR4.2; D.Utah LR108; W.D.Wash. LRCR3; N.D.W.Va. LRGR6.02; S.D.W.Va. LRGR6.02.

[2] *See* 28 U.S.C. §1915.

[3] *Id.* at (a)(1).

money in the prisoner's account.[4]

There are eight courts with local rules that discuss the required content of any affidavit seeking *in forma pauperis* status.[5] Such directives are appropriate supplements to the existing statutory scheme.[6]

There are, however, rules requiring the use of a form affidavit that may be problematic. Seven courts have local rules requiring that a form application be used in seeking *in forma pauperis* status.[7] These rules do not allow for the use of an equivalent affidavit but rely solely on the form affidavit. Such a requirement is inconsistent with the statute which only requires submission of an affidavit "that includes a statement of all assets such prisoner possesses [and a statement] that the person is unable to pay such fees or give security therefor."[8]

This requirement is also inconsistent with the spirit of the Federal Rules. The Supreme Court Rules and the Federal Rules of Appellate Procedure each have a specific requirement that a party interested in proceeding *in forma pauperis* file an affidavit or declaration "in the form prescribed by the Fed. Rules of App. Pro. Form 4."[9] Even this requirement is not unyielding. For example, the Supreme Court Rules provide for "due allowance" when a document is filed by a pro se litigant if the document, while not

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[4] *Id.* at (a)(2).

[5] D.Ariz. LR1.19; C.D.Cal. LR26.3; N.D.Cal. LR3-10; S.D.Cal. LR3.2; D.Neb. LR3.5; D.N.H. LR4.2; N.D.N.Y. LR5.4.

[6] *See* 28 U.S.C. §1915(a)(1); *see also Zaun v. Dobbin*, 628 F.2d 1990, 992 (7th Cir. 1980); *Adkins v. E.I. DuPont DeNemours & Co.*, 335 U.S. 331, 339-340, 69 S.Ct. 85, 89, 93 L.Ed 43, 47 (1948).

[7] N.D.Cal. LR3-10; S.D.Ill. LR3.1; E.D.Ky. LR5.5; W.D.Ky. LR5.5; D.Mass. LR4.5; E.D.Mo. LR2.05; W.D.Okla. LR3.3; D.Utah LR108; W.D.Wash. LRCR3.

[8] 28 U.S.C. §1915(a).

[9] Sup.Ct.R. 39.1; *see also* Fed.R.App.P. Form 4.

precisely following the form, still complies "with the substance of these Rules."[10] The relevant Appellate Rule also does not require absolute compliance with Form 4 by stating that the necessary affidavit must show "in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay."[11] Lastly, existing case law recognizes that the precise form of the affidavit is not what is important but, rather, the general content.[12] Because these local rules are inconsistent with existing law, they should be rescinded.

There are a variety of local rules that discuss the procedure used to approve a request to proceed *in forma pauperis*. For example, there are local rules explaining that, after filing, the affidavit is provided to the assigned judge,[13] to the chief judge,[14] or to the magistrate judge for approval.[15] Five courts have local rules that explain that, after approval, the clerk files the materials.[16] One court has a local rule indicating that a request to proceed *in forma pauperis* is deemed granted if there is no court action within sixty days.[17] All of these rules are appropriate supplements to the statutory arrangement.

There are, however, rules in two jurisdictions that may be problematic. These rules permit the clerk to return any action that is not accompanied by an affidavit.[18] Such

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[10] Sup.Ct.R. 39.3.

[11] Fed.R.App.P. 24(a)(1)(A).

[12] *See McGore v. Wrigglesworth*, 114 F.3d 601, 605 (6th Cir. 1997) (must file a completed Form 4 or its equivalent); *Adkins v. E.I. DuPont DeNemours & Co.*, 335 U.S. 331, 339, 69 S.Ct. 85, 89, 93 L.Ed 43, 47 (1948) (court can seek particularized information about a party's financial status).

[13] N.D.Cal. LR3-10; M.D.Fla. LR4.07; N.D.Ill. LRGR11.

[14] D.Alaska LR27; M.D.Pa. LR4.6.

[15] D.Minn. LR4.2; W.D.Mich. LR3.4; N.D.N.Y. LR5.4; N.D.Ohio LR3.15; M.D.Pa. LR4.6; D.P.R. LR303.

[16] D.Alaska LR27; N.D.Ill. LRGR11; D.Mass. LR4.5; D.N.Mex. LR5.3; D.Or. LR3.6(b).

[17] N.D.Ill. GR11.

[18] D.Ariz. LR1.19; E.D.Mo. LR2.05.

a requirement is inconsistent with both Rule 5 and Rule 83 of the Federal Rules of Civil Procedure, which seek to protect a litigant from being penalized by an action of the clerk without benefit of judicial action.[19] These rules should be rescinded.

Another potentially problematic issue concerns the circumstances under which the court is permitted to order partial payment of a fee. Local rules in seven courts allow for a partial fee assessment for non-prisoners.[20] These rules are contrary to existing law reflected in both statutory amendments to the *in forma pauperis* statute and case law. These rules should, therefore, be rescinded.

Prior to the Prisoner Litigation Reform Act of 1996, the *in forma pauperis* statute was silent on whether a partial fee could be assessed. The statute allowed a suit to be commenced "without prepayment of fees and costs or security therefor, by a person who made affidavit that he was unable to pay such costs or give security therefor."[21] District courts ordered partial payment of fees for prisoners seeking to proceed *in forma pauperis* after examining the inmate's trust account.[22] The Ninth Circuit Court of Appeals extended this procedure to non-prisoners:

> Appellants' chief contention is that while 28 U.S.C. §1915 permits district courts to require full fees or to wave all fees, it does not grant district courts the authority to require a partial filing fee. We take this opportunity to make the apparent explicit: Courts have discretion to

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[19] Fed.R.Civ.P. 5(e) ("The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices."); Fed.R.Civ.P. 83(a)(2) ("A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.").

[20] S.D.Cal. LR3.2; M.D.Fla. LR4.07; N.D.Ind. LR4.3; D.Neb. LR3.5; D.N.H. LR4.2; W.D.Okla. LR3.3; E.D.Tenn. LR4.2.

[21] 28 U.S.C. §1915(a) (1995).

[22] *See e.g., In Re Williamson*, 786 F.2d 1336 (8th Cir. 1986); *Lambert v. Illinois Department of Corrections*, 827 F.2d 257 (7th Cir. 1987); *Prous v. Kastner*, 842 F.2d 138 (5th Cir. 1988), *rehearing den'd, en banc*, 847 F.2d 840 (5th Cir. 1988), *cert. den'd*, 488 U.S. 941, 109 S.Ct. 364, 102 L.Ed.2d 354 (1988).

impose partial filing fees under the in forma pauperis statute.[23]

That court then cited cases in nine other circuit courts as support for the idea that partial filing fees could be assessed against non-prisoners.[24] All of the cited cases, however, refer only to prisoners proceeding *in forma pauperis*.

The distinction between prisoners and non-prisoners was articulated in the statute in 1996. The Prisoner Litigation Reform Act of 1996 amended section 1915.[25] There is now specific reference to prisoners in the statute, and they are treated differently than non-prisoners. Subsection (a) of the statute allows anyone to proceed "without prepayment of fees or security" if the person can establish an inability to pay.[26] The statute then specifically requires a prisoner to pay the filing fee albeit in installments:

> Notwithstanding subsection (a), if a prisoner brings a civil action ... the prisoner shall be required to pay the full amount of the filing fee. The court shall assess and, when funds exist, collect, as a partial payment [a certain amount based on a formula] .... After payment of the initial partial filing fee ... [payments shall be forwarded] until the filing fees are paid.[27]

The prisoner is also required to make payments for costs in a similar manner.[28] The change in this statute means that, now, the issue for an inmate is not whether that inmate will pay the fees and costs but when—will the inmate pay the filing fee at the beginning of the lawsuit or throughout some period of the lawsuit on an installment plan?[29]

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[23] Olivares v. Marshall, 59 F.3d 109, 111 (9th Cir. 1995).

[24] *Id.*, *see also Zaun v. Dobbin*, 628 F.2d 1990, 993 (7th Cir. 1980) (with respect to a non-prisoner, "it should be within the court's authority to order payment of a portion of the expense while waiving the remainder.")

[25] 28 U.S.C. §1915 last amended by Pub.L. 104-134, April 26, 1996.

[26] 28 U.S.C. §1915(a).

[27] *Id.* at (b).

[28] *Id.* at (f)(2).

[29] *McGore v. Wrigglesworth*, 114 F.3d 601, 605 (6thCir. 1997).

The partial fee assessment discussed in the *in forma pauperis* statute in section (b) refers only to prisoner.[30] The requirement of paying for costs under an installment system is also applicable only to prisoners.[31] At least one court has acknowledged the significance of differentiating between prisoners and non-prisoners in this regard.[32] The statute treats the two categories of people differently and requires prisoners to be assessed the full fee through an installment payment arrangement. This method of payment is not sanctioned in the statute for use with non-prisoners. Accordingly, the local rules seeking to do so in the seven district courts should be rescinded.

Several courts have local rules that repeat existing law and should, therefore, be rescinded. For example, one court has a local rule requiring a person to provide sufficient copies of the complaint for service.[33] This rule simply repeats Rule 4(c)(1) of the Federal Rules of Civil Procedure.[34] Several courts have local rules stating that persons proceeding *in forma pauperis* have agreed to pay the costs and fees from any recovery.[35] These provisions repeat a portion of the *in forma pauperis* statute itself.[36] Two courts have local rules that simply repeat the applicability of this statute.[37]

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[30] 28 U.S.C. §1915(b).

[31] *Id.* at (f)(2).

[32] *Walker v. People Express Airlines, Inc.*, 886 F.2d 598, 601 (3rd Cir. 1989) (Non-prisoner treated the same as a prisoner with respect to partial fee assessment before Prisoner Litigation Reform Act: "[I]nasmuch as neither §1915(a) nor §753(f) differentiates between prisoner and non-prisoner cases, we find it of no consequence that Walker litigated his suit from outside prison walls.")

[33] S.D.Ill. LR3.1..

[34] Fed.R.Civ.P. 4(c)(1).

[35] M.D.Fla. LR4.07; Mass. LR4.5; E.D.Mo. LR2.05D.Neb. LR3.5; W.D.Wash. LRCR3; N.D.W.Va. LRGR6.02; S.D.W.Va. GR6.02.

[36] *See* 28 U.S.C. §1915(f).

[37] N.D.W.Va. GR6.02; S.D.W.Va. GR6.02.

Rule 5. Service and Filing Pleadings and Other Papers

Rule 5—Proof of Service

Thirty-two courts have rules discussing the use of a proof of service.[1] Many of these local rules address either the form or content of any certificate of service and, as such, are appropriate supplements. There is one local rule that questions whether a certificate of service is actually required; given the existence of Rule 5, this rule is problematic and should be rescinded. There are other rules that discuss when the certificate must be filed that are also problematic because they appear inconsistent with Rule 5.

DISCUSSION

Rule 5 of the Federal Rules of Civil Procedure was amended in 1991 to include a requirement that papers be accompanied by a certificate of service when filed: "All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service...."[2] The Committee Note to this Rule recognized that this requirement had previously been provided by local rule.[3] Prior to this amendment, in fact, forty-six courts had local rules requiring that some type of proof of service accompany documents filed

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[1] C.D.Cal. LR5.8; E.D.Cal. LR5-135(a); N.D.Cal. LR5-4; S.D.Cal. LR5.2;; D.Conn. LR7(e); D.Del. LR5.2(a); D.D.C. GR110; N.D.Fla. LR5.1(C);; S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); E.D.La. LR5.3; M.D.La. LR5.3; W.D.La. LR5.3; D.Md. LR102.1; W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; E.D.Okla. LR5.1(D); N.D.Okla. LR5.1(C); W.D.Okla. LR5.1; W.D.Pa. LR5.2; D.R.I. LR10(b); D.S.Dak. ; W.D.Tex. CV-5(c); W.D.Wash. LR5(f); D.Wyo. LR5.1(g).

[2] Fed.R.Civ.P. 5(d).

[3] *See* Fed.R.Civ.P. 5(e) Note to 1991 Amendments.

pursuant to Rule 5.[4]

Most of the current local rules in the thirty-three courts explain the form of the proof of service. For example, twenty-three courts have local rules requiring that the proof of service be by certification from counsel pursuant to 28 U.S.C. §1746.[5] Another ten courts require that the certification be from the person making service.[6] Approximately eleven courts have rules requiring, instead, that the proof be by written acknowledgement from the person served.[7] Lastly, three courts simply state that other proof may be permitted if satisfactory to the court.[8] These rules are all appropriate.

Many of the rules also discuss the content of the proof of service. Twenty-one of the courts have rules requiring that the date of service be set forth.[9] Sixteen courts have rules requiring an explanation of the method or manner of service, such as personal service or mail service.[10] Nine courts have directives indicating that the proof of service

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[4] *See* Report at Suggested Local Rules, p.19.

[5] N.D.Cal. LR5-4; S.D.Cal. LR5.2; D.Conn. LR7(e); D.Del. LR5.2(a); D.D.C. GR110; N.D.Fla. LR5.1(C); S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); E.D.La. LR5.3; M.D.La. LR5.3; W.D.La. LR5.3; D.Md. LR102.1; W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Neb. LR5.2; E.D.Okla. LR5.1(D); N.D.Okla. LR5.1(C); D.R.I. LR10(b); D.Wyo. LR5.1(g).

[6] S.D.Cal. LR5.2; D.Conn. LR7(e); D.Del. LR5.2(a); N.D.Iowa LR5.1(b);; S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; W.D.Okla. LR5.1.

[7] S.D.Cal. LR5.2; D.Conn. LR7(e); D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; W.D.Okla. LR5.1; D.R.I. LR10(b).

[8] S.D.Cal. LR5.2; D.D.C. GR110; D.Mont. LR210-3.

[9] C.D.Cal. LR5.8; E.D.Cal. LR5-135(a); N.D.Cal. LR5-4; S.D.Cal. LR5.2; D.D.C. GR110; N.D.Fla. LR5.1(C); S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Mont. LR210-3; D.Nev. LR5-1; E.D.Okla. LR5.1(D); N.D.Okla. LR5.1(C); D.R.I. LR10(b); W.D.Tex. CV-5(c); D.Wyo. LR5.1(g).

[10] C.D.Cal. LR5.8; E.D.Cal. LR5-135(a); N.D.Cal. LR5-4; S.D.Cal. LR5.2; D.D.C. GR110; D.Idaho LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); W.D.Mich. LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Mont. LR210-3; D.Nev. LR5-1; D.R.I. LR10(b); W.D.Tex. CV-5(c); D.Wyo. LR5.1(g).

must contain the name[11] or name and address[12] of the person being served. These rules are also appropriate.

Some of the courts discuss where the proof of service should be physically located within the pleadings. For example, eight courts have local rules requiring that the proof be a separate attachment or on the document itself.[13] Another four courts require that the proof of service be a separate attachment.[14] Four courts state that, if the proof of service is attached as a document, it must be the last page.[15] These rules may stand.

The courts vary on whether they actually require a certificate of service and, if so, what the effect of a failure to file is. For example, one court has a rule stating that, when a document is filed with the court, it is a representation that it has also been served and that "[n]o further proof of service is required unless an adverse party raises a question of notice."[16] This rule, by its language is inconsistent with Rule 5 (d) of the Federal Rules of Civil Procedure and should, therefore, be rescinded.

Seven courts have local rules stating that the failure to make proof of service does not affect the validity of service.[17] There is, however, some case law to the

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[11] C.D.Cal. LR5.8; S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; D.Idaho LR5.2; N.D.Miss. LR5.2(B); S.D.Miss. LR5.2(B); D.Neb. LR5.2; D.Nev. LR5-1; W.D.Tex. CV-5(c).

[12] D.Conn. LR7(e); S.D.Fla. LR5.2(A); S.D.Ga. LR5.1; N.D.Miss. LR5.2(B);; S.D.Miss. LR5.2(B); D.Neb. LR5.2.

[13] E.D.Cal. LR5-135(a); D.Idaho LR5.2; E.D.La. LR5.3; M.D.La. LR5.3; W.D.La. LR5.3; D.Nev. LR5-1; W.D.Tex. CV-5(c); D.Wyo. LR5.1(g).

[14] D.Del. LR5.2(a); D.D.C. GR110; S.D.Fla. LR5.2(A); S.D.Ga. LR5.1.

[15] C.D.Cal. LR5.8; S.D.Cal. LR5.2; D.Mont. LR210-3; D.Nev. LR5-1.

[16] W.D.Pa. LR5.2.

[17] S.D.Cal. LR5.2; D.D.C. GR110; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1; D.R.I. LR10(b); W.D.Wash. LR5(f).

contrary.[18]

Lastly, some of these local rules indicate when the proof of service must be filed. The Federal Rule on the timeliness of filing the certificate of service reads as follows: "All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service...."[19] Six of the courts have local rules that allow the proof of service to be filed anytime unless material prejudice would result.[20] Five courts have local rules requiring that the proof of service be filed before the court takes action on the filed document.[21] Three other courts mandate that the proof of service be filed "promptly."[22] Because the Federal Rules require that the filing occur "within a reasonable time after service", these local rules are inconsistent and should, therefore, be rescinded.

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[18] *E.g., Patel v. Contemporary Classics of Beverly Hills &Herbert Schachter*, __F.3d __, 2001 W.L. 872901 (2d Cir. 2001); *Eilander v. Federated Mutual Insurance Co.*, 2001 W.L. 770986 (N.D.Tex. 2001) (although court determined that motion was not timely filed since it was not accompanied by a certificate of service and, therefore, was appropriately dismissed, the court noted that there were no substantive grounds to uphold the motion either); *Board of Trustees of the Laborers' District Council Health & Welfare Fund v. Pennsbury Excavating and Landscaping, Inc.*, 2001 W.L. 1201380 (E.D.Pa. 2000) (because there was no certificate of service, the motion was denied but without prejudice).

[19] Fed.R.Civ.P. 5(d).

[20] S.D.Cal. LR5.2; D.D.C. GR110; D.Mont. LR210-3; D.Neb. LR5.2; D.Nev. LR5-1;; W.D.Wash. LR5(f).

[21] S.D.Cal. LR5.2; N.D.Iowa LR5.1(b); S.D.Iowa LR5.1(b); D.Mont. LR210-3; D.Nev. LR5-1.

[22] S.D.Cal. LR5.2; D.Mont. LR210-3; W.D.Tex. CV-5(c).

Rule 5—Filing of Discovery

Eighty-three courts have local rules addressing whether discovery documents are permitted or required to be filed. These rules were promulgated before December 1, 2000, the effective date of the amendments to Rule 5.[1] Most of these rules were rendered ineffective by the new amendments. They should be rescinded. In addition, some rules, specifically those discussing how to obtain access to filed discovery and who maintains non-filed discovery, can remain subject to local variation.

DISCUSSION

Prior to the recent amendments, Rule 5(d) of the Federal Rules of Civil Procedure allowed the court on motion of a party or on its own initiative to order that certain discovery material not be filed.[2] That Rule made the filing requirement subject to a court order that discovery not be filed if so requested by the court or the party.[3] The language in the Committee Note indicates that the Advisory Committee intended in Rule 5(d) that filing be the norm and that non-filing only be permitted in particular cases. The Committee Note to the 1980 amendments states that the requirement of filing is:

> subject to an order of the court that discovery materials not be filed unless filing is requested by the court or is effected by the parties who wish to use the material in the proceeding. [4]

Eighty-three courts have local rules based on this version of Rule 5(d).[5]

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[1] *See* Fed.R.Civ.P. 5(d).

[2] Fed.R.Civ.P. 5(d) prior to the 2000 amendments read, in relevant part: "but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding."

[3] Fed.R.Civ.P. 5 Note to 1980 Amendments.

[4] *Id.*.

[5] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR5-134(e); N.D.Cal. LR26-2;; S.D.Cal. LR30.1;

Basically, these rules require non-filing of discovery in the ordinary course. Seventy-six of them require that general discovery such as interrogatories, requests for production, requests for admission, and answers and responses, not be filed.[6] There are several exceptions written into these rules. For example, forty-six courts have local rules providing that no discovery be filed except on order of the court.[7] Thirty-two courts provide for non-filing except for use at trial.[8] Thirty-six courts provide for non-filing

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D.Colo. LR31; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107;; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Fla. LR26.1; M.D.Ga. LR5.1; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5; C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; D.Kan. LR26.3; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3;; D.Minn. LR26.4; E.D.Mo. LR26-3.02; W.D.Mo. LR26.4; D.Mont. LR200-3; D.Neb. LR5.1; D.Nev. LR26-8; D.N.H. LR26.1; D.N.J. LR26.1(c); ; D.N.Mex. LR26.2; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2; S.D.N.Y. LR5.1; W.D.N.Y. LR26(c);; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; D.N.Mar.I LR26.13; N.D.Ohio LR5.3;; S.D.Ohio LR26.2; E.D.Okla. LR26.1; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.R.I. LR14(b); D.S.Car. LR5.01; D.S.Dak. LR; E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); W.D.Tenn. LR26.1(b); E.D.Tex. LR26(e); N.D.Tex. LR5.2; S.D.Tex. LR5B; W.D.Tex. LR30(b); D.Utah LR204-3(c); D.Vt. LR26.1(f); D.V.I. LR26.1; E.D.Wash. LR26.1; W.D.Wash. LR5(d); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04; D.Wyo. LR26.1(d).

[6] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR32-250; N.D.Cal. LR26-2;S.D.Cal. LR33.1, 36.1; D.Colo. LR31; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Fla. LR26.1; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5; C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; D.Kan. LR26.3; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Minn. LR26.4; E.D.Mo. LR26-3.02; D.Mont. LR200-3; D.Neb. LR5.1; D.Nev. LR26-8; D.N.H. LR26.1; D.N.J. LR26.1(c); D.N.Mex. LR26.2; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2;; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; S.D.Ohio LR26.2; E.D.Okla. LR26.1A; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.S.Car. LR5.01; D.S.Dak. LR; E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); W.D.Tenn. LR26.1(b); N.D.Tex. LR5.2; S.D.Tex. LR5A; W.D.Tex. LR5(b); D.Utah LR204-3(c); D.Vt. LR26.1(f); E.D.Wash. LR26.1; W.D.Wash. LR5(d); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR55.0; D.Wyo. LR26.1(d).

[7] M.D.Ala. LR5.1, LR26.1; N.D.Ala. LR5.1, LR26.1; N.D.Cal. LR26-2, LR26-4; S.D.Cal. LR30.1, LR33.1, LR36.1; D.Colo. LR31; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; M.D.Fla. LR3.03; S.D.Fla. LR26.1; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5; N.D.Ill. LR18; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; D.Minn. LR26.4, LR26.1(a)(2); W.D.Mo. LR26.4; D.Nev. LR26-8; D.N.H. LR26.1; D.N.J. LR26.1(c); E.D.N.Y. LR5.1; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; W.D.Okla. LR26.3; D.Or. LR5.1(c); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.R.I. LR14(b); E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); D.Utah LR204-3(c); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04.

[8] M.D.Ala. LR5.1; N.D.Ala. LR5.1; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; N.D.Cal. LR26-4; S.D.Cal. LR30.1; D.Colo. LR31; D.Del. LR5.4; N.D.Fla. LR26.2; S.D.Fla. LR26.1;

except when needed in connection with motions.[9] Thirty-eight courts require that, when discovery is needed with a motion, only the relevant parts of the discovery be filed.[10] Eighteen courts require that any discovery material needed for an appeal be filed at that time.[11]

There are also local rules specifically discussing depositions. Twenty-three courts have local rules mandating that notices of depositions not be filed.[12] Sixty-three courts have local rules requiring that depositions themselves not be filed.[13] Eight courts

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N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; D.Idaho LR5.5; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Neb. LR5.1; N.D.N.Y. LR26.2; W.D.N.Car. LR26.1; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; M.D.Pa. LR5.4; D.P.R. LR315; D.S.Car. LR5.01; D.S.Dak. LR; W.D.Tenn. LR26.1(b); S.D.Tex. LR5B; D.Vt. LR26.1(f); W.D.Wash. LR5(d).

[9] M.D.Ala. LR5.1; N.D.Ala. LR5.1; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; S.D.Cal. LR30.1, LR33.1, LR36.1; D.Colo. LR31; D.Del. LR5.4; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Fla. LR26.1; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Haw. LR5.1; N.D.Ill. LR18; E.D.Ky. LR5.2; W.D.Ky. LR5.2; D.Md. LR104.5; E.D.Mich. LR26.2; D.Minn. LR26.4, LR26.1(a)(2); E.D.Mo. LR26-3.02; D.Mont. LR200-3; D.N.J. LR26.1(c); N.D.N.Y. LR26.2; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; S.D.Ohio LR26.2; N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.S.Dak. LR; W.D.Tex. LR5(b); D.Vt. LR26.1(f); W.D.Wash. LR5(d); E.D.Wis. LR5.04.

[10] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR32-250; N.D.Cal. LR26-4; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; N.D.Fla. LR26.2; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Idaho LR5.5; C.D.Ill. LR26.3; N.D.Ind. LR26.2; S.D.Ind. LR26.2; D.Mass. LR26.6; W.D.Mich. LR5.3; W.D.Mo. LR26.4; E.D.N.Y. LR5.1; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; W.D.Pa. LR5.3; D.P.R. LR315; D.S.Car. LR5.01; E.D.Tenn. LR26.2; M.D.Tenn. LR9(c); W.D.Tenn. LR26.1(b); N.D.Tex. LR5.2; S.D.Tex. LR5B; W.D.Tex. LR26(a); E.D.Wash. LR26.1; N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; D.Wyo. LR26.1(d).

[11] M.D.Ala. LR5.1; D.Conn. LR7(g); D.Del. LR5.4; D.D.C. LR107; N.D.Fla. LR26.2; S.D.Fla. LR26.1; N.D.Ga. LR5.4; D.Idaho LR5.5; S.D.Ind. LR26.2; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.Mich. LR26.2; E.D.N.Y. LR5.1; S.D.N.Y. LR5.1; M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.S.Car. LR5.01.

[12] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR30-250(a); N.D.Cal. LR26-2; D.Conn. LR7(g); M.D.Fla. LR3.03; D.Haw. LR5.1; N.D.Ill. LR18; N.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2; S.D.N.Y. LR5.1; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); N.D.Tex. LR5.2; W.D.Tex. LR5(b); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04.

[13] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; D.Alaska LR8(A); E.D.Ark. LR5.5; W.D.Ark. LR5.5; C.D.Cal. LR26-8.3; E.D.Cal. LR5-134(e), LR30-250(a); S.D.Cal. LR30.1; D.Colo. LR31; D.Conn. LR7(g); D.D.C. LR107; M.D.Fla. LR3.03; N.D.Fla. LR26.2; S.D.Ga. LR26.6; D.Haw. LR5.1; C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; N.D.Iowa LR5.2; S.D.Iowa LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Minn. LR26.4; E.D.Mo. LR26-3.02; W.D.Mo. LR26.4; D.Mont. LR200-3; D.Nev. LR26-8; D.N.H. LR26.1; D.N.Mex. LR30.3; E.D.N.Y. LR5.1; N.D.N.Y. LR26.2; S.D.N.Y. LR5.1; M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; E.D.Okla. LR26.1A;

have local rules mandating that depositions upon written questions not be filed.[14]

Some courts have local rules that specifically forbid filing of disclosures made pursuant to several portions of Rule 26: Rule 26(a)(1) concerning initial disclosures,[15] Rule 26(a)(2) concerning expert testimony,[16] and Rule 26(a)(3) concerning pre-trial discovery.[17]

Rule 5(d) was amended effective December 1, 2000 to forbid filing of discovery in many cases:

> All papers ... must be filed with the court ... but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.[18]

The existing local rules are rendered ineffective by this new amendment:

> The rule supersedes and invalidates local rules that forbid, permit, or require filing of these materials before they are used in the action.[19]

Most of these local rules, then, should be rescinded.

There are some local rules, however, that may continue to be valid even with the newly amended Rule 5(d). These rules relate to maintenance of the original

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N.D.Okla. LR26.1B; W.D.Okla. LR26.3; D.Or. LR5.1(c); E.D.Pa. LR26.1(a); W.D.Pa. LR5.3; D.P.R. LR315; D.R.I. LR14(b); D.S.Car. LR5.01; E.D.Tenn. LR26.2; W.D.Tenn. LR26.1(b); N.D.Tex. LR5.2; S.D.Tex. LR5A; D.Utah LR204-3(c); D.Vt. LR26.1(f); E.D.Wash. LR26.1; W.D.Wash. LR5(d); N.D.W.Va. LR3.03; S.D.W.Va. LR3.03; E.D.Wis. LR5.04.

[14] S.D.Fla. LR26.1; C.D.Ill. LR26.3; N.D.Ill. LR18; E.D.Mo. LR26-3.02; D.Nev. LR26-8; D.N.H. LR26.1; W.D.Tenn. LR26.1(b); S.D.W.Va. LR3.03.

[15] M.D.Ala. LR26.1; N.D.Ala. LR26.1; N.D.Ind. LR26.2; S.D.Ind. LR26.2; D.Kan. LR26.3; W.D.Mo. LR26.4; D.N.Mex. LR26.2; W.D.N.Y. LR26(c); E.D.Wash. LR26.1; D.Wyo. LR26.1(d).

[16] N.D.Ala. LR26.1; D.Conn. LR7(g); D.Idaho LR5.5; S.D.Ind. LR26.2; D.Kan. LR26.3; D.Me. LR5(b); D.N.H. LR26.1; D.N.Mex. LR26.2; D.Minn. LR26.1(a)(2); W.D.N.Y. LR26(c); D.Or. LR5.1(c).

[17] D.Me. LR5(b); S.D.N.Y. LR5.1.

[18] Fed.R.Civ.P. 5(d).

[19] Fed.R.Civ.P. 5(d) Note to 2000 Amendments.

discovery and access to the unfilled discovery. Forty-two courts, for example, have local rules stating that the party responsible for service of the discovery retains the original.[20] In addition, four courts specifically indicate by local rule that the original deposition be maintained by the party seeking it.[21] Five courts have local rules that specifically indicate that the custodian of the discovery must provide reasonable access of the discovery to all parties.[22] Seven courts indicate that others can obtain the material by paying reasonable copying expenses with leave of the court.[23] Another five courts suggest that the public can ask the court that the discovery be filed.[24]

III. Pleadings and Motions

Rule 9. Pleading Special Matters

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[20] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; C.D.Cal. LR26-8.3; D.Colo. LR31; D.Del. LR5.4; D.D.C. LR107; N.D.Fla. LR26.2; N.D.Ga. LR5.4; S.D.Ga. LR26.6; D.Idaho LR5.5; C.D.Ill. LR26.3; N.D.Ill. LR18; N.D.Ind. LR26.2; S.D.Ind. LR26.2; E.D.Ky. LR5.2; W.D.Ky. LR5.2; E.D.La. LR26.5; M.D.La. LR26.5; W.D.La. LR26.5; D.Me. LR5(b); D.Md. LR104.5; D.Mass. LR26.6; E.D.Mich. LR26.2; W.D.Mich. LR5.3; D.Nev. LR26-8; D.N.J. LR26.1(c); M.D.N.Car. LR5.2; W.D.N.Car. LR26.1; E.D.Okla. LR26.1A; E.D.Pa. LR26.1(a); M.D.Pa. LR5.4; W.D.Pa. LR5.3; D.P.R. LR315; D.R.I. LR14(b); D.S.Car. LR5.01; W.D.Tenn. LR26.1(b); W.D.Tex. LR30(b); D.Utah LR204-3(c); E.D.Wash. LR26.1; N.D.W.Va. LR3.03; S.D.W.Va. LR3.03.

[21] S.D.Fla. LR26.1; N.D.Ga. LR5.4; D.Idaho LR5.5; M.D.Pa. LR5.4.

[22] M.D.Ala. LR5.1; N.D.Ala. LR5.1; C.D.Cal. LR26-8.3; D.D.C. LR107; D.Md. LR104.5.

[23] M.D.Ala. LR5.1; N.D.Ala. LR5.1; S.D.Ala. LR5.5; C.D.Cal. LR26-8.3; D.Haw. LR5.1; N.D.Ill. LR18; D.Neb. LR5.1.

[24] D.Mass. LR26.6; D.Mont. LR200-3; W.D.Pa. LR5.3; N.D.W.Va. LR3.03; S.D.W.Va. LR3.03.

Rule 9.—Three-Judge Courts

Twenty-four jurisdictions have local rules concerning the procedures by which a party seeking a three-judge court files a pleading.[1] The original Local Rules Project suggested that the courts adopt a Model Local Rule, which many of the courts have done. That Model Local Rule is set forth below so that all of the courts can consider its adoption. One sentence has been added to the Model Local Rule for clarification. In addition, there are four courts with local rules that are inconsistent with existing law and those rules should, therefore, be rescinded.

DISCUSSION

The circumstances under which a three-judge court is convened and the procedure for convening such a tribunal are governed by 28 U.S.C. §2284. It provides for a three-judge court in cases challenging the constitutionality of state or federal legislative apportionment and in cases in which the convening of a three-judge court is allowed by other federal law.[2] The jurisdiction of three-judge courts has been largely eliminated since the repeal in 1976 of 28 U.S.C. §§2281 and 2282, which required determination by a three-judge court of injunctions restraining the enforcement, on constitutional grounds, of state and federal statutes. At present, there are relatively few situations where a three-judge court is either required or available, if requested:

1) Actions challenging the constitutionality of the apportionment of congressional districts or of any statewide legislative body (three-

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[1] M.D.Ala. LR9.2; D.Ariz. LR2.3; S.D.Cal. LR9.2; D.Conn. LR7(c); D.Del. LR9.2; D.D.C. LR202; S.D.Fla. LR9.1; N.D.Ga. LR9.1; N.D.Ill. LR31; N.D.Ind. LR9.2; S.D.Ind. LR9.2; E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1; D.Me. LR9(a); E.D.Mich. LR9.1(c); D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; W.D.Okla. LR9.1; D.R.I. LR28; W.D.Wash. LR9(i).

[2] 28 U.S.C. §2284.

judge court required);[3]

2) Actions brought under the Civil Rights Act of 1964 relating to voting rights protection (Attorney General or defendants may request three-judge court);[4]

3) Actions alleging deprivation of rights in public accommodations (Attorney General may request three-judge court and must file certificate stating case is of "general public importance");[5]

4) Actions seeking to protect equal employment opportunities (Attorney General may request three-judge court and must file certificate stating case is of "general public importance");[6]

5) Actions brought under the Voting Rights Act of 1965 challenging tests which may abridge the right to vote (three-judge court in the District Court of the District of Columbia required if action brought by state or political subdivision seeking declaratory relief);[7]

6) Other actions under the Voting Rights Act (three-judge court required)[8]

7) Actions brought under the Presidential Election Campaign Fund Act of 1971 for declaratory or injunctive relief "concerning any civil

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[3] 28 U.S.C. §2284.

[4] 42 U.S.C. §1971(g).

[5] 42 U.S.C. §2000a-5.

[6] 42 U.S.C. §2000e.

[7] 42 U.S.C. §1973(b), (c)

[8] 42 U.S.C. §1973aa-2, 1973H, 1973bb.

matter" (Federal Election Commission may request three-judge court);[9] and,

8) Actions brought under the Presidential Election Campaign Fund Act by an entity or individual "appropriate to implement or construe" the Act (three-judge court required).[10]

The first Local Rules Project suggested that a Model Local Rule be provided that encompassed, generally, the issues addressed by the then-existing local rules. For example, there were provisions requiring that particular notice be given to the clerk or that a special designation be made on the pleading requesting a three-judge court. Those provisions were intended to assist the court in complying with the procedures of 28 U.S.C. §2284 so that, after the clerk was made aware of the designation, the clerk could notify the appropriate judge. There were also local rules establishing the number of copies of pleadings to be filed. The clerk could file the original and then have copies to distribute to the three judges. This requirement was a convenient mechanism for timely receipt of the pleadings by the judges.

It is again suggested that a Model Local Rule be provided to the district courts for adoption. This Rule requires the following: that a particular notation be placed on the pleading to alert the clerk; that the basis for the request be apparent in the pleading or in the document attached thereto; and that three copies of each document, along with the original, be filed. In addition, a sentence has been added to this Model Local Rule to acknowledge that, pursuant to certain federal statutes, other actions may need to be

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[9] 26 U.S.C. §9010(c).

[10] 26 U.S.C. §9011(b).

performed to secure a three-judge court. The Model Local Rule reads as follows:

Model Local Rule 9.1

Request for Three-Judge Court.

(a) If a party believes an action or proceeding is required to be heard by a three-judge district court, the words "Three-Judge District Court Requested" or the equivalent must be included immediately following the title of the first pleading in which the cause of action requiring a three-judge court is pleaded. Unless the basis for the request is apparent from the pleading, it shall be set forth in the pleading or in a brief attached statement. The words "Three-Judge District Court Requested" or the equivalent on a pleading is a sufficient request under 28 U.S.C. §2284. Those words may not be a sufficient request under other Acts of Congress.

(b) In any action or proceeding in which a three-judge court is requested, parties shall file the original and three copies of every pleading, motion, notice, or other document with the clerk until it is determined either that a three-judge court will not be convened or that the three-judge court has been convened and dissolved, and the case remanded to a single judge. The parties may be permitted to file fewer copies by order of the court.

(c) A failure to comply with this local rule is not a ground for failing to convene or for dissolving a three-judge court.

This Model Local Rule seeks to assist the court in complying with 28 U.S.C.

§2284 while, at the same time, avoiding the imposition of overly burdensome tasks on the attorneys. The required designation following the title of the pleading is straightforward and simple and should alert the clerk. The requirement of setting forth the basis of the request is equally straightforward. If the basis is clearly provided, the judge will not be forced to determine what the ground may be. This rule also permits the designation to be a sufficient request pursuant to 28 U.S.C. §2284, although the party requesting the three-judge court is not precluded from making any other request.

A sentence has been added to this Model Local Rule concerning the application of other federal statutory law. Section 2284 specifically states that a three-judge court will be convened when "required by Act of Congress,"[11] Such an Act may impose additional requirements on parties. For example, under both the public accommodation and equal employment provisions of the Civil Rights Act of 1964, the Attorney General must not only file a request for a three-judge court but must also file a certificate stating that the case is of "general public importance."[12] Under this Act, then, a simple designation in the pleading would be insufficient to trigger the convening of a three-judge court.

The Model Local Rule requires that three copies of each document be filed along with the original, unless it is determined that a three-judge court will not be convened or until the three-judge court is convened and dissolved and the case remanded to a single judge. This procedure puts the burden on the litigants, rather than on the court, to provide the copies. In the event, however, that a litigant cannot comply with this requirement, the rule provides that the litigant can have the requirement waived by court

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[11] 28 U.S.C. §2284.

[12] 42 U..S.C. §2000a-5(b), 2000e-6(b).

order.

Finally, any failure to comply with the Model Local Rule will not result in loss of a three-judge court to hear the issue. This provision recognizes that Section 2284(a) is jurisdictional so that a failure to make an appropriate demand does not preclude the judge from convening a three-judge court or empower the judge to hear the case as a single judge.

It should be noted that many of the twenty-four courts with local rules on this subject have adopted, in large measure, the substance of this Model Local Rule. For example, fifteen courts have local rules that require a designation of "Three-Judge Court Requested" or the equivalent in the caption of the first pleading.[13] Nine of these rules indicate that these words are sufficient pursuant to 28 U.S.C. §2284.[14] Twelve of the courts mandate that the basis for the request be apparent from the pleadings,[15] be set forth in the pleading,[16] or be in a brief, attached statement.[17] Eighteen courts have local rules requiring the submission of the original and three copies of all documents.[18] The court

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[13] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Me. LR9(a); E.D.Mich. LR9.1(c); D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28; W.D.Wash. LR9(i).

[14] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; E.D.Mich. LR9.1(c); D.N.Mar.I LR9.2; N.D.Okla. LR9.2.

[15] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28.

[16] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28.

[17] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; D.N.Mar.I LR9.2; N.D.Okla. LR9.2; D.R.I. LR28.

[18] M.D.Ala. LR9.2;; D.Ariz. LR2.3; S.D.Cal. LR9.2; D.Conn. LR7(c); D.Del. LR9.2; D.D.C. LR202; S.D.Fla. LR9.1; N.D.Ill. LR31; N.D.Ind. LR9.2; S.D.Ind. LR9.2; E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1; D.Neb. LR9.2; D.N.H. LR9.2; N.D.N.Y. LR9.1; N.D.Okla. LR9.2; W.D.Wash. LR9(i).

has discretion to order fewer than three copies in ten jurisdictions.[19] Seven jurisdictions indicate that failure to comply with the local rule is not grounds for either denying or dissolving the three-judge court.[20]

There are also some local rules that vary from the Model Local Rule. For example, two courts have local rules that require a memorandum when seeking a three-judge court that contains cited authority to support the application.[21] One court requires only three copies of documents[22] while another requires an original and four copies.[23] Six courts have local rules requiring simply that the party notify the clerk that a three-judge court is requested and state the relevant statutory provision.[24] While these rules may be appropriate exercises of local rulemaking, it seems advisable to reduce the variation among the courts by having one rule for all courts interested in regulating in this area.

Three jurisdictions have local rules that simply state that, in the absence of the required notice, the clerk may treat the case as one not requiring a three-judge court.[25] The requirement of Section 2284 is jurisdictional so that a failure to comply with any notice requirement will not affect the applicability of that provision. These rules should, therefore, be rescinded.

One court has a local rule that seems to refer to a three-judge court but the

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[19] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; N.D.Ind. LR9.2; S.D.Ind. LR9.2; D.Neb. LR9.2; D.N.H. LR9.2; D.N.Mar.I LR9.2; N.D.Okla. LR9.2.

[20] M.D.Ala. LR9.2; S.D.Cal. LR9.2; D.Del. LR9.2; S.D.Fla. LR9.1; D.Neb. LR9.2; D.N.H. LR9.2; D.N.Mar.I LR9.2.

[21] D.D.C. LR202; E.D.Mich. LR9.1(c).

[22] D.Me. LR9(a). .

[23] D.N.Mar.I. LR9.2.

[24] N.D.Ga. LR9.1; N.D.Ill. LR31; E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1; W.D.Okla. LR9.1.

[25] E.D.La. LR9.1; M.D.La. LR9.1; W.D.La. LR9.1.

precise language used in describing this court is "A District Court Composed of Three District Judges."[26] This definition is inconsistent with the clear language of Section 2284 that requires three judges "at least one of whom shall be a circuit judge."[27] This rule should also be rescinded.

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[26] D.Ariz. LR2.3.

[27] 28 U.S.C. §2284(b)(1).

Rule 9.— Social Security and Other Administrative Appeal Cases

Twenty-five courts have local rules that relate to the use of a social security number in appeals from either social security cases[1] or black lung cases.[2] Rules in fourteen courts require the use of the social security number in the complaint and are, therefore, inconsistent with existing law. The original Local Rules Project proposed a Model Local Rule to avoid the problem with using the social security number.[3] There are rules in about seven courts that already rely on this Model Local Rule, in basic substance. These rules are appropriate.

There are also rules that address various other aspects of administrative appeals. For example, there are local rules covering the procedure used to obtain attorneys fees and the briefing schedules for these types of cases that are appropriately the subject of local rulemaking. There are rules concerning the use of form complaints in administrative cases that may be problematic. Another two courts have rules that are inconsistent with the Federal Rules of Civil Procedure in applying different time limits from those set forth in the Federal Rules. Lastly, there are rules in two courts that simply repeat existing law.

DISCUSSION

Most of the twenty-five courts have local rules concerning the use of a social

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[1] *See generally* 42 U.S.C. §405(g).

[2] *See generally* 33 U.S.C. §921(d). *See also* E.D.Ark. LR9.1; W.D.Ark. LR9.1; E.D.Cal. LR8-206; M.D.Ga. LR9.1; D.Idaho LR9.1;; S.D.Ill. LR9.1; E.D.Ky. LR9.1; W.D.Ky. LR9.1; E.D.La. LR9.2; M.D.La. LR9.2; W.D.La. LR9.2; E.D.Mich. LR9.1(f); D.Minn. LR9.1; W.D.Mo. LR9.1; D.Neb. LR9.1(a); D.N.H. LR9.1; D.N.J. LR9.1; N.D.N.Y. LR9.3; D.N.Mar.I LR9.1; N.D.Ohio LR9.1; E.D.Okla. LR9.1; N.D.Okla. LR9.1; E.D.Tenn. LR9.1; N.D.Tex. LR9.1' D.V.I. LR9.1.

[3] Report at Suggested Local Rules, p.43.

security number when seeking judicial review.[4] It is understandable that providing a social security number would be helpful in cases appealing social security and black lung awards since these cases are initially adjudicated at the agency level and are filed according to social security number.[5] The relevant statute, however, does not mandate the provision of the social security number when seeking judicial review.[6] To the contrary, the Social Security Administration specifically discusses the confidential nature of the social security number:

> Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record.[7]

This Act goes on to allow the federal, state, and local governments, and, rarely, private organizations, to use social security numbers as a means of identifying people in specifically enumerated circumstances such as for tax collection,[8] child support,[9] blood donation,[10] and jury selection.[11] It should be noted that the Privacy Act[12] regulates the use of social security numbers generally although it appears to be inapplicable to the courts since the definition of "agency" as used in the Act does not include the courts of

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[4] E.D.Cal. LR8-206; D.Idaho LR9.1; S.D.Ill. LR9.1; E.D.Ky. LR9.1; W.D.Ky. LR9.1;; M.D.La. LR9.2; W.D.La. LR9.2; D.Minn. LR9.1; W.D.Mo. LR9.1; D.Neb. LR9.1(a); N.D.N.Y. LR9.3; D.N.Mar.I LR9.1; N.D.Ohio LR9.1; E.D.Okla. LR9.1; N.D.Okla. LR9.1; N.D.Tex. LR9.1; E.D.Tenn. LR9.1; D.V.I. LR9.1.

[5] *See e.g.*, 42 U.S.C. §405(g); 33 U.S.C. §921, 932, 945.

[6] *Id.*

[7] 42 U.S.C. §405(c)(2)(C)(viii).

[8] *Id.* at §405(c)(2)(C)(i).

[9] *Id.* at §405(c)(2)(C)(ii).

[10] *Id.* at §405(c)(2)(D)(i).

[11] Id. at §405(c)(2)(D)(ii).

[12] 5 U.S.C. §552a note.

the United States.[13]

The Local Rules Project suggests that the courts adopt the following Model Local Rule that is based on the provisions of the policy under the Social Security Act and the Privacy Act. It reads as follows:

> **Model Local Rule 9.2**
>
> **Social Security Number in Social Security and Other Administrative Review Cases.**
>
> Any person seeking judicial review of an agency decision of a case involving a claim for retirement, disability, health insurance, or black lung benefits shall provide, on a separate paper attached to the complaint and served on the defendant, the social security number of the worker on whose wage record the application for benefits was filed. Any person seeking judicial review of an agency decision of a case involving a claim for supplemental security income benefits shall provide, on a separate paper attached to the complaint and served on the defendant, the social security number of the plaintiff. The person shall also state, in the complaint, that the social security number has been attached to the copy of the complaint served on the defendant. Failure to provide a social security number to the defendant will not be grounds for dismissal of the complaint.

This Model Local Rule recognizes the problem of the Commissioner of Social Security or other agency head in identifying and locating a particular record without the

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[13] 5 U.S.C. §551(1) (applicable to the Privacy Act through 5 U.S.C. §552a(a)(1), 552(e), and 551(1)).

benefit of the social security number. A model rule is preferable to various rules among the jurisdictions since the perceived problem relates to an agency of national scope and authority. If such a rule is helpful to the Commissioner in cases arising out of one jurisdiction, it must surely be helpful in those cases arising out of another jurisdiction. A Model Local Rule was provided to the district courts in the first Local Rules Project Report. The current Model Local Rule has been modified from that original rule only to specifically include cases involving supplemental security income benefits and black lung cases.

The requirement in this Model Local Rule is not a burden to the claimant since these claimants have already used social security numbers to apply for benefits in the first instance. Therefore, no one will be obliged to have a number assigned solely for the purpose of judicial review. This Model Local Rule also considers the policy behind the Social Security Act and the Privacy Act by requiring that only the Commissioner of Social Security or other agency head receive the social security number. The number is not required to be filed with the court. The Rule further states that, in the event a claimant does not provide the number, the claimant does not waive any rights to judicial review.

At present, seven courts have adopted, in almost identical form, the original Model Local Rule on this topic, which requires that the social security number be provided on a separate piece of paper and that the person state in the complaint that a separate paper is attached.[14] Eight courts have adopted the provision in this Model Local Rule that the failure to provide this information is not grounds for dismissal of the

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[14] D.Idaho LR9.1; S.D.Ill. LR9.1; D.Minn. LR9.1; D.Neb. LR9.1(a); D.N.Mar.I LR9.1; E.D.Tenn. LR9.1; D.V.I. LR9.1.

complaint.[15] It is suggested that the other courts consider adopting this Model Local Rule.

Fourteen courts have local rules requiring that the social security number be set forth in the complaint.[16] These rules are problematic since they provide for the public display of the social security number. Actually, in two of the courts the local rules require the placement of the social security number in the caption of the complaint or directly below the caption.[17] It is not necessary that these numbers be available for anyone to see in the public court documents. It is necessary only that the person or agency charged with responsibility for certifying the record on appeal be able to accurately and quickly find the relevant record. This duty can be accomplished by providing the social security number on a separate sheet of paper that is not made part of the public court papers. In addition, these local rules are inconsistent with the wording and spirit of two relevant federal statutes, the Social Security Act and the Privacy Act.[18] Accordingly, the Local Rules Project suggests that these courts rescind their existing local rules and adopt the Model Local Rule in their place.

Two jurisdictions have local rules outlining the procedures to be used by attorneys seeking an award of fees.[19] These procedures should remain subject to local variation since they do not impact on any rights of the litigants, they assist the court in processing the material expeditiously, and they appear to impose only a negligible burden

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[15] D.Idaho LR9.1; S.D.Ill. LR9.1; E.D.Mich. LR9.1(f); D.Minn. LR9.1; D.Neb. LR9.1(a); D.N.Mar.I LR9.1; E.D.Tenn. LR9.1; D.V.I. LR9.1.

[16] E.D.Ark. LR9.1; W.D.Ark. LR9.1; E.D.Cal. LR8-206; E.D.Ky. LR9.1; W.D.Ky. LR9.1; M.D.La. LR9.2; W.D.La. LR9.2; E.D.Mich. LR9.1(e); W.D.Mo. LR9.1; N.D.N.Y. LR9.3; N.D.Ohio LR9.1; E.D.Okla. LR9.1; N.D.Okla. LR9.1; N.D.Tex. LR9.1.

[17] E.D.Ark. LR9.1; W.D.Ark. LR9.1..

[18] 42 U.S.C. §405; 5 U.S.C. §552a note.

[19] E.D.Ky. LR9.1; W.D.Ky. LR9.1; *see also* 42 U.S.C. §406; 28 U.S.C. §2412.

on the attorneys, a burden that the court could impose on the attorneys regardless of the existence of any rule.

Eight district courts have local rules setting forth the briefing schedule for social security claims and review of other administrative claims.20 These rules are also appropriate as local directives.

Three courts have local rules that require that the complaint be on a form supplied by the court or be in substantial conformity with the form.[21] To the extent these rules simply provide guidance to a litigant, they are appropriate. To the extent, however, that a failure to be in substantial compliance with the form may result in negative repercussions such as dismissal, the rules are problematic and should be rescinded. The Federal Rules allow for a "short and plain statement of the claim" and require that "all pleadings ... be so construed as to do substantial justice."[22] To punish a litigant solely because the person did not use a form complaint is contrary to Rule 8 of the Federal Rules of Civil Procedure.

Local rules in two jurisdictions extend the time within which the Secretary of Health and Human Services may answer the complaint from sixty days to within thirty days after the record is filed[23] or within ninety days after service.[24] Both of these rules are inconsistent with Rule 4 of the Federal Rules of Civil Procedure, which requires the

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[20] M.D.Ga. LR9.2; S.D.Ill. LR9.1; E.D.Ky. LR9.1; W.D.Ky. LR9.1; W.D.Mo. LR9.1; D.N.H. LR9.1; D.N.J. LR9.1; E.D.Okla. LR9.1.

[21] E.D.La. LR9.2; W.D.Mo. LR9.1; N.D.Ohio LR9.1.

[22] Fed.R.Civ.P. 8(a), and (f).

[23] W.D.Mo. LR9.1 (defendant files answer within thirty days after filing record).

[24] D.N.H. LR9.1 (defendant files answer and record within ninety days after service of complaint).

agency head to file an answer within sixty days after service.25

Four other courts have local rules allowing a one-time automatic extension of time within which the Commissioner of Social Security or the Secretary of Health and Human Services must answer.26 These rules are problematic in allowing extensions of time on a routine basis. They are similar to the local rules just discussed that allow a specific amount of extra time within which to answer. In all of these jurisdictions, the plaintiff is disadvantaged by a delay in answering which Rule 4 of the Federal Rules of Civil Procedure does not permit. These rules should be rescinded.

Two courts have local rules that repeat existing law and should, therefore, be rescinded. One rule repeats the applicability of the Social Security Act to court review of social security awards.[27] The other rule simply repeats the portion of Federal Rule 4, that an answer must be filed within sixty days of service.[28]

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[25] Fed.R.Civ.P. 4(a).

[26] M.D.Ga. LR9.3; E.D.Ky. LR9.1; W.D.Ky. LR9.1; E.D.Tenn. LR9.1.

[27] M.D.Ga. LR9.1; *see also* 42 U.S.C. §405(g).

[28] E.D.Tenn. LR9.1; *see also* Fed.R.Civ.P. 4(a).

Rule 15. Amended and Supplemental Pleadings

Thirty-seven jurisdictions have local rules outlining the procedure and the form of the motion to be used in amending or supplementing a pleading pursuant to Rule 15 of the Federal Rules of Civil Procedure.[1] All of these courts have local rules that are appropriate supplements to this Federal Rule. The Local Rules Project recommends that a Model Local Rule be offered to the jurisdictions setting forth the form of any motion to amend so that requirements in this area can be more uniform. This will reduce the variation among the existing local rules and still provide some guidance in this area. In addition, one of these jurisdictions has a local rule that is inconsistent with Rule 15 and should be rescinded. Four courts have local rules that repeat portions of the Federal Rule that should also be rescinded.

DISCUSSION

Rule 15 allows a party to amend a pleading under certain circumstances: (1) either "before a response is served" or within twenty days after service of a pleading to which no response is allowed; (2)"by leave of court or by written consent of the adverse parties"; or (3) upon motion to conform to the evidence.2 The Rule sets forth the circumstances under which a pleading may relate back to the date of the original pleading.3 Lastly, the Rule allows a party to move to file a supplemental pleading

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[1] Fed.R.Civ.P. LR15; *see* M.D.Ala. LR15.1; D.Alaska LR6J; D.Ariz. LR1.9(e); C.D.Cal. LR3.8; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Del. LR15.1; D.D.C. LR108(Ii); M.D.Fla. LR4.01; N.D.Fla. LR15.1; S.D.Fla. LR15.1; N.D.Ga. LR15.1; D.Idaho LR15.1; S.D.Ill. LR15.1; N.D.Ind. LR15.1; S.D.Ind. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; ; .Kan. LR15.1; D.Md. LR103.6; D.Mass. LR15.1; E.D.Mich. LR15.1; D.Minn. LR15.1; D.Mont. LR200-2; D.Neb. LR15.1; D.Nev. LR15-1; D.N.H. LR15.1; D.N.Mex. LR15.1; ; .D.N.Y. LR7.1; D.N.Mar.I LR15.1; E.D.Okla. LR15.1; D.Or. LR15.1; D.S.Dak. LR15.1; E.D.Tenn. LR15.1; N.D.Tex. LR15.1; D.Vt. LR15.1; D.V.I. LR15.1; D.Wyo. LR15.1.

[2] Fed.R.Civ.P. 15(a) and (b).

[3] *Id* at (c).

"setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."4

The original Local Rules Project recommended a Model Local Rule for the jurisdictions to consider adopting.[5] Although many of the courts have adopted at least some portions of that Model Local Rule, it would be helpful if more courts considering a local rule relating to the form of motions to amend would pass this Model Local Rule. The text of the Model Local Rule follows:

> **Model Local Rule 15.1**
>
> **Form of a Motion to Amend and Its Supporting Documentation.**
>
> A party who moves to amend a pleading must attach the original of the amendment, and one copy, to the motion. Any amendment to a pleading, whether filed as a matter of course or upon a motion to amend, must, except by leave of court, reproduce the entire pleading as amended, and may not incorporate any prior pleading by reference. A failure to comply with this rule is not grounds for denial of the motion.

The Model Local Rule requires submission of the original amended pleading along with the motion to amend. It is already common practice to include the amendment with the Rule 15(a) motion; at present, twenty-nine courts have this requirement6

The Model Local Rule also requires submission of a copy of the amended

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[4] *Id* at (d).

[5] Report at Suggested Local Rules, p.51.

[6] M.D.Ala. LR15.1; D.Alaska LR6J; C.D.Cal. LR3.8; D.Del. LR15.1; D.D.C. LR108(Ii); N.D.Fla. LR15.1; S.D.Fla. LR15.1; S.D.Ill. LR15.1; N.D.Ind. LR15.1; S.D.Ind. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; D.Kan. LR15.1; D.Md. LR103.6; E.D.Mich. LR15.1; D.Minn. LR15.1; ; D.Mont. LR200-2; D.Neb. LR115.; D.Nev. LR15-1; D.N.H. LR15.1; ; D.N.Mex. LR15.1; N.D.N.Y. LR7.1; D.N.Mar.I LR15.1; E.D.Okla. LR15.1; D.Or. LR15.1; D.S.Dak. LR15.1; E.D.Tenn. LR15.1; N.D.Tex. LR15.1; D.V.I. LR15.1.

pleading. In the event the motion to amend is allowed, the copy can remain attached to the motion as a supporting document, and the original can be filed as the pleading. Only eight courts have this requirement at present.7

The Model Local Rule requires that the pleading be complete and not incorporate earlier pleadings by reference. This will ease the process of review for the court and opposing parties. By requiring a party filing a Rule 15(a) motion to include a copy of the proposed amendment without any references to other pleadings, the rule will further aid the disposition of cases on the merits, by allowing a judge to read the amendment in full before ruling on it. Twenty-six courts have local rules that contain this provision already.8

The last sentence of the Model Local Rule provides that the motion will not be denied for failure to comply with the local rule, thus avoiding any denial of the motion to amend for technical matters only. This provision is important in promoting the language of the rule, that leave to amend shall be "freely given when justice so requires."[9] Nine courts have such a local rule now.[10]

Many of the remaining local rules are appropriate exercises of local rulemaking although they may be unnecessary directives if the courts adopt the Model

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[7] M.D.Ala. LR15.1; C.D.Cal. LR3.8; D.Del. LR15.1; S.D.Ind. LR15.1; D.Mont. LR200-2; E.D.Okla. LR15.1; E.D.Tenn. LR15.1; D.V.I. LR15.1.

[8] M.D.Ala. LR15.1; D.Alaska LR6J; D.Ariz. LR1.9(e); C.D.Cal. LR3.8; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Del. LR15.1; M.D.Fla. LR4.01; N.D.Fla. LR15.1; S.D.Fla. LR15.1; N.D.Ind. LR15.1; S.D.Ind. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; E.D.Mich. LR15.1; D.Minn. LR15.1; D.Neb. LR15.1; D.Nev. LR15-1; D.N.H. LR15.1; N.D.N.Y. LR7.1; D.N.Mar.I LR15.1; E.D.Okla. LR15.1; D.Or. LR15.1; E.D.Tenn. LR15.1; D.Vt. LR15.1; D.V.I. LR15.1.

[9] Fed.R.Civ.P. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Ordonez v. Johnson*, 254 F3d 814 (9th Cir. 2001) (disallowing motion to amend because of violation of local rule is abuse of discretion).

[10] M.D.Ala. LR15.1; D.Del. LR15.1; S.D.Fla. LR15.1; D.Idaho LR15.1; N.D.Ind. LR15.1; E.D.Mich. LR15.1; D.N.Mar.I LR15.1; E.D.Tenn. LR15.1; D.V.I. LR15.1.

Local Rule. For example, many of the courts have local rules explaining the form of the pleadings that must accompany the motion to amend. Six courts require that amended pleadings contain all exhibits[11] while one court requires that only newly added exhibits be attached.[12] Another four courts require court permission to remove exhibits from prior pleadings and attach them to the amended pleading.[13] Three courts define the title of such pleadings such as "First Amended Complaint", and "Second Amended Complaint."[14] Some courts require that the motion to amend contain the amended pleading with an explanation of what is different by bracketing and underlining what is newly added in the complaint,[15] or by including a concise statement of the amendment sought.[16] Two courts require that the motion have a copy of the original complaint attached to it.[17] Two courts require that the original amended complaint and two extra copies be provided.[18]

Four courts have local rules that repeat portions of the Federal Rules of Civil Procedure and should, therefore, be rescinded. These four jurisdictions provide that, if the motion to amend a complaint is granted, the party must then file and serve the amended complaint.[19] This requirement simply repeats the service and filing provision of

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[11] D.Alaska LR6J; D.Ariz. LR1.9(e); C.D.Cal. LR3.8; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Nev. LR15-1.

[12] D.Md. LR103.6.

[13] D.Alaska LR6J; E.D.Cal. LR15-220; S.D.Cal. LR15.1; D.Nev. LR15-1.

[14] S.D.Cal. LR15.1; D.Or. LR15.1; D.V.I. LR15.1.

[15] D.Del. LR15.1; S.D.Ill. LR15.1; N.D.Iowa LR15.1; S.D.Iowa LR15.1; D.Md. LR103.6; D.Vt. LR15.1.

[16] D.Kan. LR15.1; D.Neb. LR15.1; D.N.H. LR15.1; N.D.N.Y. LR7.1; D.Or. LR15.1; D.V.I. LR15.1.

[17] N.D.Iowa LR15.1; S.D.Iowa LR15.1.

[18] D.Minn. LR15.1; D.N.Mar.I LR15.1.

[19] D.Minn. LR15.1; D.Neb. LR15.1; N.D.N.Y. LR7.1; D.Or. LR15.1.

Rule 15(a) and Rule 5.[20] One of these courts also states in its local rule that a motion to supplement a pleading is limited to acts occurring after the filing of the original complaint.[21] This rule repeats the requirements in Rule 15(d) that a supplemental pleading must relate to "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."[22]

One court has a local rule that is inconsistent with Rule 15 and should, therefore, be rescinded. This local rule provides that the date for a party to answer shall run from the date of filing the order allowing the pleading or, where there was no order, from the date of service of the amended pleading.[23] This rule is inconsistent with Rule 15(a) that states that the party must plead "within the time remaining for response to the original pleading or within 10 days after service of the amended pleadings, whichever period may be longer...."[24]

IV. Parties

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[20] Fed.R.Civ.P. 15(a), 5(a), 5(b).

[21] N.D.N.Y. LR7.1.

[22] Fed.R.Civ.P. 15(d).

[23] D.Nev. LR15-1.

[24] Fed.R.Civ.P. 15(a).

Rule 17. Parties Plaintiff and Defendant; Capacity

Seventeen courts have local rules dealing with infants and incompetent persons.[1] These rules address one or both of these topics: (1) who is permitted to represent a minor or incompetent person; and (2) how a settlement is approved and distributed.

Eight courts have local rules discussing who can represent the minor or incompetent person. Rules in three of these courts are appropriate supplements to Rule 17. Rules in seven of these courts should be rescinded because they are either inconsistent with existing law or repeat it.

Sixteen courts have local rules that discuss the settlement of cases involving minors or incompetent persons and the disbursement of any settlement funds for the benefit of such person. These rules should remain subject to local variation.

DISCUSSION

Rule 17 of the Federal Rules of Civil Procedure provides that infants and incompetent persons may sue and be sued under certain circumstance.[2] Subsection (a) requires that an action "be prosecuted in the name of the real parties in interest."[3] Subsection (b) states the capacity of a person "other than one acting in a representative capacity" to sue or be sued is determined by the law of the person's domicile.[4] Subsection (c) relates specifically to infants and incompetent persons and indicates that

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[1] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Haw. LR17.1; D.Idaho LR17.1; D.Minn. LR17.1; D.Mont. LR226; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR20.01; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Okla. LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.01; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[2] Fed.R.Civ.P. 17.

[3] *Id* at (a).

[4] *Id.* at (b).

the representative of such minor or infant "may sue or defend on behalf of the infant or incompetent person."[5]

If the infant or incompetent person is not otherwise represented, either by a nominal party or by another representative, then, under subsection (c), the infant or incompetent person may sue by a next friend or guardian *ad litem*.[6] Even if a representative exists, the court still has discretion to appoint a next friend or guardian *ad litem*:

> [T]he courts have consistently recognized that they have inherent power to appoint a guardian ad litem when it appears that the minor's general representative has interests which may conflict with those of the person he is supposed to represent.[7]

Such appointment is a matter of procedure and, therefore, not a matter of state law.[8]

Eight courts have local rules concerning who the representative of any infant or incompetent person can be.[9]

Three of these courts have local rules that should remain subject to local variation.[10] Two of these local rules simply mandate that the guardian *ad litem* be an attorney.[11] Another local rule explains that any motion for appointment of a guardian *ad*

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[5] *Id.* at (c).

[6] *Id.*

[7] *Hoffert v. General Motors Corporation*, 656 F.2d 161, 164 (5th Cir. 1981) *reh'g and reh'g en banc denied* October 13, 1981, *and cases cited therein. See also Developmental Disabilities Advocacy Center, Inc. v. Melton*, 689 F.2d 281 (1st Cir. 1982); *Wolfe v. Bias*, 601 F.Supp. 426 (S.D.W.Va. 1984); *Slade v. Louisiana power and Light Company*, 418 F.2d 125 (5th Cir. 1969) *cert. denied* 397 U.S. 1007, 90 S.Ct. 1233, 25 L.Ed.2d 419 (1970).

[8] *Bengtson v. Travelers Indemnity Company*, 132 F.Supp. 512, 516-17 (W.D.La. 1955).

[9] E.D.Cal. LR17-202; D.Mont. LR226; E.D.N.Car. LR20.01; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; D.S.Car. LR17.01; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[10] M.D.N.Car. LR17.1; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[11] E.D.Wash. LR17.1; W.D.Wash. LR17(c).

litem be made early in the proceedings.[12] Both of these requirements are appropriate supplements to Rule 17.

Three courts have local rules concerning the appointment of guardians *ad litem* that are problematic and should be rescinded.[13] The local rules in two of the courts require that, in representing a minor or incompetent person, the attorney provide either proof of the appointment of a representative under state law or a motion for an appointment of a guardian *ad litem.*[14] The local rule in the other court states that minors or incompetent persons may sue or defend only by a general or testamentary guardian or by a guardian *ad litem.*[15] To the extent these requirements may eliminate the possibility that the minor or incompetent person is represented by a next friend they are inconsistent with Rule 17(c), which, by its terms, contemplates that a minor or incompetent person may be represented by a next friend as well as by a guardian *ad litem.*[16]

Further, the requirement that an attorney, at the commencement of the action, provide proof of the appointment of a representative made pursuant to state law, conflicts with Rules 8 and 9 of the Federal Rules of Civil Procedure.[17] Rule 9(a) indicates, with respect to the capacity to be sued, that "[i]t is not necessary to aver ... the authority of a party to sue or be sued in a representative capacity";[18] rather, any party wishing to challenge the capacity must raise the issue by "specific negative averment, which shall

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[12] M.D.N.Car. LR17.1.

[13] E.D.Cal. LR17-202; M.D.N.Car. LR17.1; E.D.Wash. LR17.1.

[14] E.D.Cal. LR17-202; E.D.Wash. LR17.1.

[15] M.D.N.Car. LR17.1.

[16] Fed.R.Civ.P. 17(c).

[17] Fed.R.Civ.P. 8, 9.

[18] Fed.R.Civ.P. 9(a).

include such supporting particulars as are peculiarly within the pleader's knowledge."[19]

Another four district courts have local rules concerning, generally, the appointment of a representative that repeat existing law and should be rescinded.[20] Two jurisdictions have local rules that simply repeat the applicability of Rule 17.[21] Another two courts have rules that allow the appointment of a guardian *ad litem* anytime upon a proper showing.[22] Rule 17 clearly articulates the court's authority to make any order at any time "as it deems proper for the protection of the infant or incompetent person."[23]

Sixteen jurisdictions have local rules concerning the resolution of cases involving minors and incompetent person.[24] These local rules may assist in delineating the procedures used in approving any settlement of actions involving minors or incompetents.

Fourteen of these local rules provide that any settlement or compromise of a suit involving a minor or incompetent be approved by the court.[25] Many of these rules also set forth various procedures which the individual district courts use such as: (1) the procedure for the disbursement of any award for the benefit of the minor or incompetent

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[19] *Id.*

[20] D.Mont. LR226; E.D.N.Car. LR20.01; D.N.Mar.I LR17.1; D.S.Car. LR17.01.

[21] E.D.N.Car. LR20.01; D.S.Car. LR17.01.

[22] D.Mont. LR226; D.N.Mar.I LR17.1.

[23] Fed.R.Civ.P. 17(c).

[24] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Haw. LR17.1; D.Idaho LR17.1; D.Minn. LR17.1; D.Mont. LR226; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR 20.02; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.02; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[25] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Haw. LR17.1; D.Idaho LR17.1; D.Minn. LR17.1; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR 20.02; M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.02; E.D.Wash. LR17.1.

person;[26] (2) the procedure for claiming attorneys' fees and expenses;[27] (3) the procedure for securing court approval of any settlement;[28] and, (4) the requirement of state court approval of a settlement, where necessary in addition to federal court approval.[29]

Such court involvement in cases involving minors or incompetent persons is clearly within the powers set forth in Rule 17(c) and the existing case law. Rule 17(c) specifically provides that the court has the authority to "appoint a guardian ad litem ... or ... [to] make such other order as it deems proper for the protection of the infant or incompetent person."[30] Further, it has been recognized that the courts have inherent power to protect the interests of the minor or incompetent person by appointing an appropriate representative and that, after such an appointment, the court has broad authority to inquire into issues bearing on the settlement agreement.[31] The right of the court to approve or fix the amount of the fees for counsel and the expenses for the appointed representative is also well recognized.[32]

These local rules are appropriate as supplements to the existing case law and Rule 17. Local variation is desirable since many of the procedures may be influenced by

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[26] E.D.Cal. LR17-202; S.D.Cal. LR17.1; S.D.Ga. LR17.1; D.Idaho LR17.1; D.Minn. LR17.; D.Mont. LR226; D.N.H. LR17.1; N.D.N.Y. LR17.1; E.D.N.Car. LR20.03: M.D.N.Car. LR17.1; D.N.Mar.I LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.03; E.D.Wash. LR17.1; W.D.Wash. LR17(c).

[27] E.D.Cal. LR17-202; S.D.Ga. LR17.1; D.N.H. LR17.1; M.D.N.Car. LR17.1; W.D.Pa. LR17.1.

[28] E.D.Cal. LR17-202; S.D.Ga. LR17.1; D.N.H. LR17.1; E.D.N.Car. LR 20.02; M.D.N.Car. LR17.1; W.D.Pa. LR17.1; D.S.Car. LR17.02.

[29] E.D.Cal. LR17-202; D.Haw. LR17.1.

[30] Fed.R.Civ.P. 17(c).

[31] *Hoffert v. General Motors Corporation*, 656 F.2d 161, 164 (5th Cir. 1981) *reh'g and reh'g en banc denied* October 13, 1981, *citing M.S. v. Wermers*, 557 F.2d 170, 175 (8th Cir. 1977); *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978); *Horacek v. Exxon*, 357 F.Supp. 71, 74 (D.Neb. 1973).

[32] *See Friends for All Children, Inc. v. Lockheed Aircraft Corporation*, 533 F.Supp. 895 (D.C. 1982) (reasonable cost for the guardian ad litem); *United States v. Equitable Trust Company of New York*, 283 U.S. 738, 51 S.Ct. 639, 75 L.Ed. 1379 (1931) (reasonable cost for the next friend); *Hoffert v. General Motors Corporation*, 656 F.2d 161, 164 (5th Cir. 1981) *reh'g and reh'g en banc denied* October 13, 1981 (attorneys' fees).

the law of the state in which the jurisdiction is located. Such rules do not alter the rights of the litigants since, when a representative is suing or defending on behalf of a minor or incompetent, the court already has discretionary authority to be involved in the formulation of the result.

Rule 24. Intervention

Rule 24.—Claim of Unconstitutionality

The United States or a state is permitted to intervene in certain cases that present a constitutional question.[1] Thirty-three jurisdictions have local rules that, generally, provide a procedure for the parties to notify the court of the presence of a constitutional question so that the court can notify the United States or a state of its opportunity to intervene.[2] The Local Rules Project recommends that a Model Local Rule be offered to the jurisdictions setting forth a procedure to notify the court. In addition, there are rules in six district courts that are inconsistent with existing law and should, therefore, be rescinded.

DISCUSSION

Section 2403 of Title 28 permits the United States or a state to intervene in any action where the constitutionality of an Act of Congress or the constitutionality of a state statute affecting the public interest is drawn into question.[3] The procedure which

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[1] 28 U.S.C. §2403; Fed.R.Civ.P. 24.

[2] M.D.Ala. LR24.1; D.Ariz. LR2.4; E.D.Cal. LR24-133; S.D.Cal. LR24.1; D.Colo. LR24.1; N.D.Fla; LR24.1; S.D.Fla. LR24.1; N.D.Ill. LRGR22; S.D.Ill. LR24.1; N.D.Ind. LR24.1; S.D.Ind. LR24.1; N.D.Iowa LR24.1; S.D.Iowa LR24.1; D.Kan. LR24.1; D.Me. LR24; D.Minn. LR24.1; D.N.H. LR24.1; D.N.J. LR224.; E.D.N.Y. LR24.1; S.D.N.Y. LR24.1; W.D.N.Y. LR24; D.N.Mar.I LR24.1; N.D.Ohio LR24.1; E.D.Okla. LR24.1; N.D.Okla. LR24.1; M.D.Pa. LR4.5; W.D.Pa. LR24.1; D.R.I. LR27; E.D.Tenn. LR24.1; D.Utah LR208; D.V.I. LR24; E.D.Wash. LR24.1; D.Wyo. LR24.1.

[3] 28 U.S.C. §2403(a) (Act of Congress), 2403(b) (state statute).

the court must follow in notifying the United States or a state is set forth in this statute.[4] Specifically, with respect to an Act of Congress, "the court shall certify such fact to the Attorney General";[5] with respect to a state statute, "the court shall certify such fact to the attorney general of the State."[6] This procedure is again set forth in the Federal Rules of Civil Procedure:

> When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. §2403. When the constitutionality of any statute of a state affecting the public interest is drawn in question in any action in which that State or an agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. §2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.[7]

The obligation of the court to notify the proper governmental agency is absolute and certification is not discretionary.[8] This is true even if the court thinks the claim "is obviously frivolous or may be disposed of on other grounds."[9] In fact, judicial discretion was expressly removed by amendment in 1937 when section 2403 was originally adopted.[10] It has been recognized that certification and intervention "are

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[4] *Id.*

[5] *Id.* at (a).

[6] *Id.* at (b).

[7] Fed.R.Civ.P. 24(c).

[8] *Jones v. City of Lubbock*, 727 F.2d 364, 372 (5th Cir. 1984), *reh'g and reh'g en banc denied* April 10, 1984, 730 F.2d 233; *Merrill v. Town of Addison*, 763 F.2d 80, 82 (2d Cir. 1985).

[9] *Merrill, supra*, at 82.

[10] *See* 81 Cong. Rec. 8507 (1937).

permissible at any stage of the proceeding."[11]

The Local Rules Project recommends that a Model Local Rule be provided to jurisdictions that choose to have any rule concerning notification of claims of unconstitutionality. The Local Rules Project proposed this Model Local Rule originally in its first Report.[12] It reads as follows:

> **Model Local Rule 24.1.**
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> **Procedure for Notification of Any Claim of Unconstitutionality.**
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> (a) In any action, suit, or proceeding in which the United States or any agency, officer, or employee thereof is not a party and in which the constitutionality of an Act of Congress affecting the public interest is drawn in question, or in any action, suit, or proceeding in which a State or any agency, officer, or employee, thereof is not a party, and in which the constitutionality of any statute of that State affecting the public interest is drawn in question, the party raising the constitutional issue shall notify the court of the existence of the question either by checking the appropriate box on the Civil Cover Sheet or by stating on the pleading that alleges the unconstitutionality, immediately following the title of that pleading, "Claim of Unconstitutionality" or the equivalent.
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> (b) Failure to comply with this rule will not be grounds for waiving

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[11] *Wallach v. Lieberman*, 366 F.2d 254, 258 n.9 (2d Cir. 1966); *see also Thatcher v. Tennessee Gas Transmission Co*, 180 F.2d 644 (5th Cir. 1950) *cert. denied* 340 U.S. 829, 71 S.Ct. 66, 95 L.Ed 609 (1950); *Tonya K. v. Board of Education*, 849 F.2d 1243, 1247 (7th Cir. 1988); *Merrill, supra*; *Jones, supra.*

[12] *See* Report at Suggested Local Rules p.40.

the constitutional issue or for waiving any other rights the party may have. Any notice provide under this rule, or lack of notice, will not serve as a substitute for, or as a waiver of, any pleading requirement set forth in the Federal Rules or statutes.

The Model Local Rule seeks to assist the court in complying with 28 U.S.C. §2403. At the same time, it removes from the party the responsibility for providing notice to the appropriate governmental entity. Since notification to the state or federal government is the court's responsibility and not the litigant's, this rule requires that the initial notice be directed to the court. No litigant, then, is obliged to give any notice to any governmental entity.

The initial notification to the court is quite simple. If the claim of unconstitutionality is made when the first pleading is filed, the accompanying civil cover sheet may serve as the notice to the court. At present, eight courts have this provision.[13] If the claim is made in a pleading, a designation may be made immediately following the title of the pleading stating: "Claim of Unconstitutionality" or the equivalent. At present, approximately twelve courts provide for this method of notification.[14] Either of these methods will provide sufficient notice to the clerk of the existence of the constitutional question.

The potential for unfair punitive measures is avoided in the Model Local Rule by subsection (b). It states that a litigant will not waive any rights by failing to give

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[13] M.D.Ala. LR24.1; S.D.Ill. LR24.1; D.Minn. LR24.1; D.N.Mar.I LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24; D.Wyo. LR24.1.

[14] M.D.Ala. LR24.1; S.D.Fla. LR24.1; S.D.Ill. LR24.1; D.Minn. LR24.1; D.N.H. LR24.1; D.N.Mar.I LR24.1; N.D.Ohio LR24.1; E.D.Okla. LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24; D.Wyo. LR24.1.

notice under the rule. Twelve courts now have local rules containing this provision.[15] It is appropriate that no significant sanctions be available since this rule exists only to assist the court and not to pursue or protect any rights of the parties.

Lastly, the Model Local Rule indicates that any notice under this rule is not a substitute for any other pleading requirements that may exist in the Federal Rules or statutes. Twelve courts provide this directive as well.[16]

While some courts have adopted the Model Local Rule already, others have not. Non-conforming local rules are problematic in several respects. For example, twelve courts have local rules explaining the particular requirements for the content of the notice.[17] The relevant statute and Federal Rule do not requires such specificity.[18] It should not be permitted in local rulemaking either. To require such detail puts an unnecessary burden on the parties, which is not supported by the existing law. The responsibility for notifying the Attorney General belongs to the court, not the parties. The parties, of course, have the responsibility to provide "a short and plain statement" to demonstrate the court's jurisdiction and "a short and plain statement of the claim showing that the pleader is entitled to relief" along with a demand for judgment.[19] Local rules requiring further specificity are inconsistent with the language and spirit of Rule 8 and

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[15] M.D.Ala. LR24.1; S.D.Fla. LR24.1; S.D.Ill. LR24.1; N.D.Ind. LR24.1; S.D.Ind. LR24.1; D.Minn. LR24.1; D.N.H. LR24.1; D.N.Mar.I LR24.1; N.D.Ohio LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24.

[16] M.D.Ala. LR24.1; S.D.Fla. LR24.1; S.D.Ill. LR24.1; N.D.Ind. LR24.1; S.D.Ind. LR24.1; D.Minn. LR24.1; D.N.H. LR24.1; D.N.Mar.I LR24.1; N.D.Ohio LR24.1; W.D.Pa. LR24.1; E.D.Tenn. LR24.1; D.V.I. LR24.

[17] D.Ariz. LR2.4; E.D.Cal. LR24-133; S.D.Cal. LR24.1; D.Colo. LR24.1; N.D.Fla. LR24.1; S.D.Fla. LR24.1; D.Kan. LR24.1; D.N.J. LR24.1; W.D.N.Y. LR24; M.D.Pa. LR4.5; D.Utah LR208; E.D.Wash. LR24.1.

[18] *See* 28 U.S.C. §2403; Fed.R.Civ.P. 24(c).

[19] Fed.R.Civ.P. 8(a).

should be rescinded.

Three courts have local rules that require the litigant to carry out the court's responsibility in providing notice, requiring that notice be served on the judge, the parties, and the attorney general.[20] Local Rules in three courts have other requirements that may unduly burden litigants. One court mandates that a separate pleading be filed as notice.[21] Another two district courts require duplicate copies.[22] All of these rules should be rescinded.

V. Depositions and Discovery

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

Fifty-three courts have local rules that relate to requests for production of documents and things.[23] Approximately thirty-two courts have local rules defining the form of requests for production. The Local Rules Project originally recommended the jurisdictions adopt a Model Local Rule describing the form of many discovery documents, including requests for production. Most of these thirty-two courts have adopted at least some part of this Model Local Rule. It is recommended that all of the

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[20] E.D.Cal. LR24-133; D.Colo. LR24.1; D.Kan. LR24.1.

[21] N.D.Okla. LR24.1.

[22] M.D.Pa. LR4.5; E.D.Wash. LR9.1.

[23] M.D.Ala. LR26.3; N.D.Ala. LR26.1(a); S.D.Ala. LR26.1; C.D.Cal. LR6.2; E.D.Cal. LR34-250; N.D.Cal. LR34-1; S.D.Cal. LR34.1; D.Del. LR26.1; D.D.C. LR207(d); N.D.Fla. LR26.2; S.D.Fla. LR26.1G; M.D.Ga. LR34; S.D.Ga. LR26.7; D.Haw. LR26.2; N.D.Ind. LR26.1; S.D.Ind. LR26.1; E.D.Ky. LR34.1; W.D.Ky. LR34.1; M.D.La. LR26.2; W.D.La. LR26.2; D.Md. LR104.6; D.Mass. LR34.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Mont. LR200-5; D.Neb. LR34.1; D.Nev. LR34-1; D.N.H. LR26.1(h); D.N.J. LR34.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; S.D.N.Y. LR34.1; E.D.N.Car. LR23.02; N.D.Ohio LR26.1; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.Or. LR34.2; D.R.I. LR13(b); D.S.Car. LR26.02; E.D.Tenn. LR34.1; M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5(c); D.Utah LR204-3; E.D.Va. LR26(c); E.D.Wash. LR34.1; W.D.Wash. LR34.1; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; E.D.Wis. LR7.02; D.Wyo. LR34.1.

courts consider adopting the Model Local Rule. Four courts have local rules that concern the form of such requests and that repeat existing law. Three courts have local rules that require certain items be included in requests for production; these rules also repeat existing law.

Seven courts have local rules concerning when requests for production can be served; these rules either repeat existing law or are inconsistent with it.

Seventeen courts have local rules that explain how objections can be made to requests for production. Rules in all of these courts repeat existing law. In addition, rules in several of these jurisdictions that address this topic are appropriate.

Two courts have limits on the number of requests for production that can be served. These rules are inconsistent with the discovery process set forth in the Federal Rules.

Lastly, two courts impose time limits within which responses to requests for production must be provided. These limits are inconsistent with Rule 34.

DISCUSSION

Rule 34 allows a party to serve on any other party a request for documents and things or for permission to enter land.[24] The Rule defines with some specificity these "documents and things," explains how the requesting party can use or manipulate these documents and things, and explains the purposes for permitting the requesting party to enter property.[25]

The Rule explains the general procedure for making such requests and responding to them. It states that any request for production describe "with reasonable

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[24] Fed.R.Civ.P. 34(a).

[25] *Id.*

particularity" the items to be produced and set forth the "time, place, and manner of making the inspection."[26] The Rule 26 timing provisions come into play here so that, in the absence of a written stipulation or court order, any request for production cannot be served until the parties have met and conferred pursuant to Rule 26(f).[27]

The party responding to the request must serve a written response "within 30 days after the service of the request."[28] For each item, the response must either state that the party gives permission to inspect or enter or that the party objects to the request.[29] The reason for any objection must be provided, and any portion of a request to which there is no objection must be permitted.[30] The actual documents may be provided for inspection if they are kept in the ordinary course or organized and labeled according to the request for production.[31]

At least thirty-two courts have local rules concerning the form of the requests for production.[32] The original Local Rules Project suggested that there be a Model Local Rule setting forth the form of discovery documents including requests for production of documents and things.[33] Most of these courts have adopted, in some form, this Model

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[26] *Id.* at (b).

[27] Fed.R.Civ.P. 26(d).

[28] Fed.R.Civ.P. 34(b).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] M.D.Ala. LR26.3; E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; D.Haw. LR26.2; N.D.Ind. LR26.1; S.D.Ind. LR26.1; E.D.Ky. LR34.1; W.D.Ky. LR34.1; D.Md. LR104.6; D.Mass. LR34.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Mont. LR200-5; D.Neb. LR34.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; N.D.N.Y. LR26.1; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.Or. LR34.2; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5(c); D.Utah LR204-3; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; E.D.Wis. LR7.02.

[33] *See* Report at Suggested Local Rules, p.68.

Local Rule. It is recommended that all of the courts adopt this Rule:

> **Model Local Rule 26.1**
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> **Form of Certain Discovery Documents.** The party serving interrogatories, pursuant to Rule 33 of the Federal Rules of Civil Procedure, serving requests for production of documents or things, pursuant to Rule 34 of the Federal Rules of Civil Procedure, or serving requests for admission, pursuant to Rule 36 of the Federal Rules of Civil Procedure, must provide a space after each such interrogatory, request, or admission, for the answer, response, or objection thereto. The party answering, responding, or objecting to written interrogatories, requests for production or documents or things, or requests for admissions shall either set forth the answer, response, or objection in the space provided or shall quote each such interrogatory or request in full immediately preceding the statement of any answer, response, or objection thereto. The parties shall also number each interrogatory, request, answer, response, or objection sequentially, regardless of the number of sets of interrogatories or requests.

The Model Local Rule is consistent with the Federal Rules of Civil Procedure, which contain general requirements as to form for interrogatories, requests for admission, and requests for the production of documents and things.[34] It governs only the form of discovery documents and is appropriate as a Model Local Rule since it seeks to provide a more efficient system without affecting the substantive rights of the litigants. If

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[34] *See generally* Fed.R.Civ.P. 33(a); 34(b); 36(a).

interrogatories or requests and their respective answers, responses, or objections, are on the same document, the parties and the court can examine them more easily. Requiring that the interrogatories and responses be numbered sequentially prevents attorneys from assigning the same numbers to interrogatories or requests in different sets, which can lead to confusion, particularly at trial. A sequential numbering system also deters the use of "stock" requests that may be inappropriate in a particular case.

The first sentence of this Model Local Rule requires that the party propounding the requests leave a space before each request so that the responding party can insert an answer or objection. Seven courts have local rules that provide for this form.[35] The second sentence of the Model Local Rule requires that the response or objection to a request for production quote the actual request directly before such response or objection. Thirty-two of the district courts have local rules requiring this form.[36] The last sentence of the Model Local Rule provides that the request for production be numbered sequentially. Eleven courts have this same requirement at present.[37]

Several courts have local rules that concern the form of the request for production and repeat existing law. One court has a local rule requiring that a certificate

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[35] D.Haw. LR26.2; M.D.La. LR26.2; W.D.La. LR26.2; E.D.Mich. LR26.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; S.D.Ohio LR26.1.

[36] M.D.Ala. LR26.3; E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; D.Haw. LR26.2; N.D.Ind. LR26.1; S.D.Ind. LR26.1; E.D.Ky. LR34.1; W.D.Ky. LR34.1; D.Md. LR104.6; D.Mass. LR34.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Mont. LR200-5; D.Neb. LR34.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; N.D.N.Y. LR26.1; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.Or. LR34.2; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5(c); D.Utah LR204-3; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; E.D.Wis. LR7.02..

[37] M.D.Ala. LR26.3; D.Del. LR26.1; D.Mass. LR34.1; E.D.Mich. LR26.1; D.N.H. LR26.1(h); D.N.Mex. LR26.1; E.D.N.Car. LR23.02; S.D.Ohio LR26.1; N.D.Okla. LR26.1A; D.R.I. LR13(b); D.Utah LR204-3.

of service accompany any request for production.[38] This rule repeats Rule 5(d) of the Federal Rules of Civil Procedure, that papers be filed "together with a certificate of service."[39] Three courts have local rules reminding litigants that form requests not be used since they may be irrelevant.[40] Rule 26 already provides for discovery of any matter which is not privileged and which is relevant to the subject matter of the action.[41] These local rules should be rescinded.

Three courts have local rules that set forth what should be included in a request for production. These rules repeat existing law. For example, one court has a local rule requiring that insurance information be provided at the outset.[42] This rule repeats the requirement in Rule 26(a)(1)(D).[43] That local rule also requires that the party provide "a computation of any category of damages claimed by it" and provide the documents "not privileged or protected from disclosure, on which such computation is based.[44] This directive appears to simply repeat the portion of Rule 26(a) that requires disclosure of the computation of damages, including the documents needed for such computation.[45] Two other courts have local rules that simply repeat the applicability of Rule 26(a)(1) and are, therefore, unnecessary.[46]

There are rules in some districts that discuss when requests for production can

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[38] D.Neb. LR34.1.

[39] Fed.R.Civ.P. 5(d).

[40] E.D.N.Y. LR26.6; N.D.Ohio LR26.1; D.Wyo. LR34.1.

[41] Fed.R.Civ.P. 26(b).

[42] N.D.Ala. LR26.1.

[43] Fed.R.Civ.P. 26(a)(1)(D).

[44] N.D.Ala. LR26.1.

[45] Fed.R.Civ.P. 26(a)(1)(C).

[46] S.D.Ala. LR26.1; C.D.Cal. LR6.2.

be served. These rules either repeat existing law or are inconsistent with it and, as such, should be rescinded. For example, three courts have local rules that state that the timing constraints set forth in Rule 26(d),[47] that discovery cannot occur until the parties have conferred pursuant to Rule 26(f), are simply not followed.[48] Rule 26(d) not longer permits a court to exempt cases from the discovery moratorium by local rule.[49] Another court has a local rule that forbids discovery until both parties have made an appearance.[50] This time constraint is also not sanctioned by the Federal Rules.[51] There are also rules in three district courts that repeat the time requirements of Rule 26 with respect to requests for production.[52]

There are seventeen district courts with local rules concerning objections that are made to requests for production. [53] All of these rules repeat existing law and should, therefore, be rescinded. Eight courts have local rules requiring that objections contain the reasons.[54] Rule 34 already has such a requirement.[55] Eight courts have local rules that

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[47] Fed.R.Civ.P. 26(d) ("Except in categories of proceedings exempted from initial disclosure, ... a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).")

[48] S.D.Cal. LR34.1; D.Nev. LR34-1; S.D.N.Y. LR34.1.

[49] Fed.R.Civ.P. 26(d). *See also* Fed.R.Civ.P. 26(d) Note to 2000 Amendments: "The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but "standing" orders altering the moratorium are not authorized."

[50] N.D.Ala. LR26.1(a).

[51] *See e.g.*, Fed.R.Civ.P. 26(a)(1)(C) and (d).

[52] S.D.Ala. LR26.1; E.D.Wash. LR34.1; D.Wyo. LR34.1.

[53] E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; N.D.Fla. LR26.2; S.D.Fla. LR26.1G; S.D.Ga. LR26.7; D.Haw. LR26.2; D.Md. LR104.6; D.Mass. LR34.1; D.Mont. LR200-5; N.D.Okla. LR26.1A; D.Or. LR34.2, LR34.3; D.R.I. LR13(b); E.D.Va. LR26(c); N.D.W.Va. LR3.05; S.D.W.Va. LR3.05; D.Wyo. LR34.1.

[54] E.D.Cal. LR34-250; N.D.Cal. LR34-1; D.Del. LR26.1; S.D.Ga. LR26.7; D.Haw. LR26.2; D.Md. LR104.6; D.Mont. LR200-5; D.Or. LR34.2.

[55] Fed.R.Civ.P. 34(b) (If objection is made, "the reasons for the objection shall be stated").

require that the objections be specific.[56] Rule 34 also mandates that the objectionable item or category be specified.[57] Five courts have local rules that require that any claim of privilege be clear.[58] This provision is already set forth in Rule 26.[59]

In addition, four courts have local rules that explain that a failure to object to a request for production is a waiver of any such objection.[60] Two of these courts[61] are in the Ninth Circuit where case law already supports this view: "It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection." [62] This position has been voiced in other courts as well.[63] The rules in these two courts, then, repeat this view and seem unnecessary. The other two courts are both in the Fourth Circuit where the case law is not as well established.[64] These rules, then, may provide guidance in those particular districts.[65]

Two courts have local rules that impose a limit on the number of requests for production that can be served of either 10,[66] or 30.[67] There is no local rule option

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[56] N.D.Fla. LR26.2; S.D.Fla. LR26.1G; S.D.Ga. LR26.7; D.Mass. LR34.1; D.R.I. LR13(b); E.D.Va. LR26(c); N.D.W.Va. LR3.05; S.D.W.Va. LR3.05.

[57] Fed.R.Civ.P. 34(b).

[58] D.Haw. LR26.2; D.Mass. LR34.1; D.N.J. LR34.1; N.D.Okla. LR26.1A; D.Wyo. LR34.1.

[59] *See* Fed.R.Civ.P. (b)(5).

[60] D.Mont. LR200-5; D.Or. LR34.3; N.D.W.Va. LR3.05; S.D.W.Va. LR3.05.

[61] D.Mont. LR200-5; D.Or. LR34.3.

[62] *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473, (9th Cir. 1992), *cert. dismissed sub nom. China Everbright Trading Co. v. Timber Falling Consultants, Inc.*, 506 U.S. 948, (1992).

[63] *Marx v. Kelly, Hart & Hallman*, 929 F.2d 8, 12 (1st Cir. 1991); *Smith v. Conway Org., Inc.*, 154 F.R.D. 73, 76 (S.D.N.Y. 1994); *Dunlap v. Midcoast-Little Rock, Inc.*, 66 F.R.D. 29, 30 (E.D.Ark. 1995); *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 541-41 (10th Cir. 1984) *cert. dismissed*, 469 U.S. 1199 (1985); *Perry v. Golub*, 74 F.R.D. 360, 363 (N.D.Ala. 1976).

[64] *See Mason C. Day Excavating v. Lumbermans Mutual Casualty Co.*, 143 F.R.D. 601 (M.D.N.Car. 1992).

[65] N.D.W.Va. LR3.05; S.D.W.Va. LR3.05..

[66] M.D.Ga. LR34.

available to courts to limit the requests for production in Rule 34 or in Rule 26 of the Federal Rules of Civil Procedure.[68] In fact, Rule 34(a) intimates that unlimited documents and things can be requested. Subsection (a) indicates that the request for production may be made:

> to produce and permit the party making the request ... to inspect and copy, *any* designated documents ... or ... *any* tangible things which constitute or contain materials within the scope of Rule 26(b) ....[69]

Moreover, the Advisory Committee amended Rule 34 on several occasions, most recently in 1993, and did not add a numerical limit on the number of requests that could be made. It should be noted that the Advisory Committee has considered limiting the use of discovery devices in the past and has recently changed the Federal Rules to incorporate national limits on the number of depositions and interrogatories and on the length of depositions.[70]As the Committee Note to the Rule 26 2000 Amendments explain:

> These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).[71]

These disclosure rules require a party to provide, in the absence of any discovery request, "a copy of ... all documents ... that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses...."[72] Given that the current Federal Rules favor national uniformity and that the Federal Rules anticipate a

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[67] D.Md. LR104.1.

[68] *See* Fed.R.Civ.P. 34, 26.

[69] Fed.R.Civ.P. 34(a) [emphasis added].

[70] *See* Fed.R.Civ.P. 30, 31, 33.

[71] Fed.R.Civ.P. 26 Note to 2000 Amendments.

[72] Fed.R.Civ.P. 26(a)(1)(B).

free exchange of discoverable documents without relying on discovery requests, a strong argument can be made that any local rule intending to limit the number of requests is inconsistent with these Federal Rules. These local rules, then, should be rescinded.

There are two courts that impose time limits within which responses to requests for production must be provided.[73] Both of these rules are inconsistent with the clear wording of Rule 34, permitting a party to respond "within 30 days after the service of the request."[74] To the extent these local rules refer to initial disclosures made pursuant to Rule 26, these are also inconsistent with the required time limits in that Rule: "These disclosures must be made at or within 14 days after the Rule 26(f) conference...."[75] These local rules should be rescinded.

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[73] D.Nev. LR34-1 (defendant need not respond sooner than forty-five days after service); D.S.Car. LR26.02, 26.03, 26.04 (plaintiff must file response to "standard directives to produce" at time of filing the first pleading).

[74] Fed.R.Civ.P. 34(b).

[75] Fed.R.Civ.P. 26(a)(1).

Rule 35. Physical and Mental Examinations of Persons

Only five jurisdictions have local rules concerning the physical and mental examination of a person.[1] Two of the courts have local rules that are appropriate in discussing the obligation of the parties to agree on the details of such examinations.[2] Another court's rule provides for an impartial medical examination; this directive is appropriate as a local rule.[3] One of the jurisdictions has a local rule that sets forth procedures to be used in ordering the physical and mental examination of person.[4] Because this local rule is inconsistent with Rule 35 of the Federal Rules of Civil Procedure, it should be rescinded. The other court has a local rule that repeats Rule 35 and should, therefore, be rescinded.[5]

DISCUSSION

Rule 35 provides that, when the mental or physical condition of a party or someone under the party's legal control is "in controversy", the court may order an examination of that person.[6] That order is made "only on motion for good cause shown" with appropriate notice provided to the person being examined.[7] The notice must specify "the time, place, manner, conditions, and scope of the examination and the person" making the examination.[8]

Two courts have rules that place the burden on the parties to attempt to agree

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[1] D.Kan. LR35.1; N.D.Miss. LR35.1; S.D.Miss. LR35.1; W.D.Pa. LR35.1; W.D.Wash. LR35.

[2] N.D.Miss. LR35.1; S.D.Miss. LR35.1.

[3] W.D.Pa. LR35.1.

[4] D.Kan. LR35.1.

[5] W.D.Wash. LR35.

[6] Fed.R.Civ.P. 35(a).

[7] *Id.*

[8] *Id.*

to the time, place, manner, and scope of the examination.[9] If the parties cannot agree on these details, the motion must explain their efforts to do so.[10] These rules are appropriate supplements to Rule 35 in imposing an obligation on the parties to try to reach an accommodation. This obligation is similar to those imposed at other times in the discovery process.[11]

Another court has a local rule that sets forth the procedure used to appoint an impartial expert witness and the circumstances under which that expert may testify.[12] This particular rule recognizes the court's inherent authority to appoint such an expert and seems to be an appropriate supplement to Rule 706 of the Federal Rules of Evidence.[13]

One court has a local rule entitled: "Trial Preparation After Close of Discovery" that simply acknowledges that "[p]ursuant to Fed.R.Civ.P. 35 the physical and mental examination of a party may be ordered at any time prior to trial."[14] This rule seems poorly drafted. It is true that the Federal Rule does not forbid an order for an examination after the close of discovery so the rule, read only in conjunction with its title, seems accurate. The rule standing alone, however, is inconsistent with the Federal Rules since Rule 26 indicates that, in at least most cases, there can be no discovery until after

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[9] N.D.Miss. LR35.1; S.D.Miss. LR35.1.

[10] *Id.*

[11] *See e.g.*, Fed.R.Civ.P. 26(f) (discovery conference); 29 (stipulations regarding discovery); 30(b) (stipulations regarding means of taking depositions); 33(a) (stipulations regarding number of interrogatories); 34(b) (agreement concerning inspection of documents and things and entry upon land); 36(a) (stipulations regarding timing of service of requests for admission).

[12] W.D.Pa. LR35.1.

[13] *See* Fed.R.Evid. 706; *Gallagher v. Latrobe Brewing v. Dill Construction Co.*, 31 F.R.D. 36 (W.D.Pa. 1962).

[14] D.Kan. LR35.1.

the Rule 26(f) discovery conference is held.[15] The rule is inaccurate, then, in stating that an examination can be ordered at any time.

Another court has a local rule that simply repeats Federal Rule 35.[16] This rule is unnecessary and should be rescinded.

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[15] Fed.R.Civ.P. 26(d).

[16] W.D.Wash. LR35.

Rule 36. Requests for Admission

Sixty-two courts have local rules dealing with requests for admission.[1] Seventeen courts have local rules concerning when, in the litigation process, requests for admission may be served;[2] all of these rules are either inconsistent with or repeat the Federal Rules on discovery.

Forty-three courts have local rules that delineate the form of requests for admission.[3] The Local Rules Project originally suggested the courts consider a Model Local Rule concerning the form of discovery documents, including requests for admission.[4] Most of the existing local rules adopt at least some of the Model Local Rule. In addition, five courts have local rules concerning the form of requests for admission that either repeat existing law or are inconsistent with it.

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[1] M.D.Ala. LR26.2; N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); N.D.Fla. LR26.2; M.D.Ga. LR36; S.D.Ga. LR26.7; D.Haw. LR26.1(c); S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Md. LR104; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; N.D.Miss. LR26.1; S.D.Miss. LR26.1; W.D.Mo. LR26.2; D.Neb. LR36.1; D.Nev. LR36-1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; S.D.N.Y. LR36.1; W.D.N.Y. LR26; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; S.D.Ohio LR36.1; N.D.Okla. LR26.1; W.D.Okla. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.1; D.R.I. LR13(b); E.D.Tenn. LR26.1; M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; W.D.Tex. LR36; D.Utah LR204-3; E.D.Va. LR26(c); E.D.Wash. LR36.1; W.D.Wash. LR36; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01; E.D.Wis. LR7.02; D.Wyo. LR36.1.

[2] N.D.Ala. LR26.1(c); M.D.Ala. LR26.2; S.D.Ala. LR26.1(c); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR6.7; S.D.Cal. LR36.1; D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.Nev. LR36-1; D.N.H. LR26.1; D.N.Mex. LR26.1; S.D.N.Y. LR36.1; W.D.N.Y. LR26; E.D.Tenn. LR26.1; D.Wyo. LR36.1.

3 D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Md. LR104; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Neb. LR36.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; N.D.Okla. LR26.1; M.D.Pa. LR36.1; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; W.D.Tex. LR36; D.Utah LR204-3; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01E.D.Wis. LR7.02.

[4] Report at Suggested Local Rules p.68.

Fourteen jurisdictions have local rules that define the content of the responses to requests for admission; all of these rules are either inconsistent with existing law or repeat it.[5]

Lastly, there are local rules in twelve courts that limit the number of requests for admission that can be served.[6] Although such local rulemaking may be consistent with existing law, the Local Rules Project recommends that the Advisory Committee on Civil Rules consider forbidding such limits since they thwart the intent of the discovery process, generally, and they prevent national uniformity in this aspect of discovery.

DISCUSSION

Rule 36 permits a party to serve on another party "a written request for the admission ... of the truth of any matters within the scope of Rule 26(b)(1).[7] The responding party has thirty days within which to answer or object to each matter in the request for admission.[8] Upon receiving the response, the party requesting the admissions may move "to determine the sufficiency of the answers or objections."[9] Any admission is applicable only for the pending action and is considered "conclusively established unless the court on motion permits withdrawal or amendment of the admission."[10] There is no limit in the rule on the number of requests that can be served.

Seventeen courts have local rules concerning when, in the litigation process,

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5 E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Ga. LR26.7; D.Mass. LR36.1; D.N.J. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.2; D.R.I. LR13(b); E.D.Va. LR26(c); E.D.Wash. LR36.1.

6 S.D.Cal. LR36.1; N.D.Fla. LR26.2; M.D.Ga. LR36; D.Md. LR104; N.D.Ohio LR36.1; S.D.Ohio LR36.1; W.D.Okla. LR36.1; M.D.Pa. LR36.1; W.D.Tex. LR36; E.D.Wash. LR36.1; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01.

7 Fed.R.Civ.P. 36(a).

8 *Id.*

9 *Id.*

10 *Id.* at (b).

requests for admission may be served.[11] All of these rules are either inconsistent with or repeat the Federal Rules on discovery.

Seven courts have local rules that are inconsistent with existing law. Four courts have local rules state that a party is not required to wait until the Rule 26(f) conference to serve requests for admission.[12] These local rules are inconsistent with Rule 26(d) which states that, unless "exempted from initial disclosure ... or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rules 26(f)."[13] Waiting until this conference before serving discovery is sensible given that one of the purposes of this conference is to develop a proposed discovery plan.[14] Allowing the parties to begin the discovery process in advance of the conference defeats at least in part the usefulness of the conference. The Committee Note to the 2000 Amendments to Rule 26 recognize that local rulemaking authority in this area is being removed: "The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference...."[15]

Another court has a rule stating that discovery cannot occur until the self-executing discovery is complete.[16] This rule is also inconsistent with the current time sequences set forth in Rule 26: "These disclosures [initial, self-executing disclosures]

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[11] N.D.Ala. LR26.1(c); M.D.Ala. LR26.2; S.D.Ala. LR26.1(c); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR6.7; S.D.Cal. LR36.1; D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.Nev. LR36-1; D.N.H. LR26.1; D.N.Mex. LR26.1; S.D.N.Y. LR36.1; W.D.N.Y. LR26; E.D.Tenn. LR26.1; D.Wyo. LR36.1.

[12] S.D.Cal. LR36.1; D.Nev. LR36-1; S.D.N.Y. LR36.1; W.D.N.Y. LR26.

[13] Fed.R.Civ.P. 26(d).

[14] *See* Fed.R.Civ.P. 26(f).

[15] Fed.R.Civ.P. 26 Note to 2000 Amendments.

[16] D.Wyo. LR36.1.

must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order...."[17] Another rule requires that no request for admission be served until after a scheduling order is entered pursuant to Rule 16(b).[18] This rule is also contrary to the timing sequence of discovery explained in the Federal Rules. Rule 16(b) anticipates that the court will enter a scheduling order "after receiving the report from the parties under Rule 26(f) ...."[19] That scheduling order will, among other things, set out time limits for completing discovery, not starting discovery, and define the extent of discovery that will be permitted.[20] The Rule 26(f) conference is the crucial event in determining the start of discovery, not the subsequent Rule 16(b) scheduling order.

Two other courts have local rules that limit discovery based on times that run from the service of pleadings rather than from the Rule 26(f) conference.[21] One of the rules indicates that there can be no discovery of the defendant until twenty days after service of the complaint on that defendant.[22] Again, this rule is inconsistent with the Rule 26 timing of discovery.[23] The other rule states that the defendant need not answer a request for admission sooner than forty-five days after service of the summons.[24] In 1970, Rule 36 provided this identical time constraint.[25] In 1993, however, the language

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[17] Fed.R.Civ.P. 26(a)(1).

[18] M.D.Ala. LR26.2.

[19] Fed.R.Civ.P. 16(b).

[20] *Id.*

[21] C.D.Cal. LR6.7; D.Nev. LR36-1.

[22] C.D.Cal. LR6.7.

[23] *See* Fed.R.Civ.P. 26.

[24] D.Nev. LR36-1.

[25] *See* Fed.R.Civ.P. 36(a) (1970).

was deleted "to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery until after the meeting of the parties required by Rule 26(f)."[26] This local rule is also inconsistent with the new Rule 26(f).

Ten courts have local rules that address the timing issue and that repeat portions of various Federal Rules.[27] Eight courts have local rules that repeat Rule 26(d) by stating that requests for admission must not be served until after the Rule 26(f) discovery conference,[28] unless either ordered by the court[29] or unless agreed upon by the parties in writing.[30] Two other courts have local rules that merely highlight that a party must pay attention to the time limits in Rule 36.[31] All of these rules are unnecessary and should be rescinded.

Forty-three courts have local rules that discuss the required form of requests for admission.[32] Rules in all of these jurisdictions but one are appropriate as local rules. The first Local Rules Project Report suggested that those courts considering regulation in

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[26] Fed.R.Civ.P. 26 Note to 1993 Amendments.

[27] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); E.D.Ark. LR33.1; W.D.Ark. LR33.1; D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.N.H. LR26.1; D.N.Mex. LR26.1; E.D.Tenn. LR26.1

[28] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); D.Haw. LR26.1(c); D.Minn. LR26.1; W.D.Mo. LR26.1; D.N.H. LR26.1; D.N.Mex. LR26.1; E.D.Tenn. LR26.1.

[29] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c); D.Haw. LR26.1(c); D.Minn. LR26.1.

[30] N.D.Ala. LR26.1(c); S.D.Ala. LR26.1(c).

[31] E.D.Ark. LR33.1; W.D.Ark. LR33.1.

[32] D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Md. LR104; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Neb. LR36.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; E.D.N.Y. LR26.6; N.D.N.Y. LR26.1; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; N.D.Okla. LR26.1; M.D.Pa. LR36.1; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; W.D.Tex. LR36; D.Utah LR204-3; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01E.D.Wis. LR7.02.

this area adopt the same local rule so that there would be uniformity among the courts.[33] The Model Local Rule regulates the form of many discovery documents, not just requests for admission. It reads as follows:

> **Model Local Rule 26.1**
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> **Form of Certain Discovery Documents.** The party serving interrogatories, pursuant to Rule 33 of the Federal Rules of Civil Procedure, serving requests for production of documents or things, pursuant to Rule 34 of the Federal Rules of Civil Procedure, or serving requests for admission, pursuant to Rule 36 of the Federal Rules of Civil Procedure, shall provide a space after each such interrogatory, request, or admission, for the answer, response, or objection thereto. The party answering, responding, or objecting to written interrogatories, requests for production of documents or things, or requests for admission shall either set forth the answer, response, or objection in the space provided or shall quote each such interrogatory or request in full immediately preceding the statement of any answer, response, or objection thereto. The parties shall also number each interrogatory, request, answer, response, or objection sequentially, regardless of the number of sets of interrogatories or requests.

Many of the courts have already adopted, at least in part, this Model Local Rule. For example, the first two sentences of this Model Local Rule require that the party serving requests for admission leave a space below each request where the party can

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[33] *See* Report at Suggested Local Rules p.68.

answer or object and require the answering party to either respond in that space or repeat the request in full just before responding. Thirty-seven courts require that an answer to a request for admission quote the entire admission just above the answer.[34] Another six courts have local rules requiring that, when serving requests for admission, the party leave a space where the responding party can answer.[35] The last sentence of the Model Local Rule requires that the requests be numbered sequentially. Thirteen courts already have this requirement.[36]

The Model Local Rule is consistent with the Federal Rules of Civil Procedure, which contain general requirements as to form for interrogatories, requests for admission, and requests for the production of documents and things.[37] It governs only the form of discovery documents and is appropriate as a Model Local Rule since it seeks to provide a more efficient system without affecting the substantive rights of the litigants. If interrogatories or requests and their respective answers, responses, or objections, are on the same document, the parties and the court can examine them more easily. Requiring that the interrogatories and responses be numbered sequentially prevents attorneys from assigning the same numbers to interrogatories or requests in different sets, which can lead

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[34] D.Alaska LR8(D); D.Ariz. LR2.5(a); E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Cal. LR36.1; D.Del. LR26.1; D.D.C. LR207(d); S.D.Ga. LR26.7; S.D.Ind. LR26.1; E.D.Ky. LR36.1; W.D.Ky. LR36.1; E.D.La. LR36.1; M.D.La. LR36.1; W.D.La. LR36.1; D.Mass. LR36.1; E.D.Mich. LR26.1; D.Minn. LR26.2; W.D.Mo. LR26.2; D.Neb. LR36.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; N.D.N.Y. LR26.1; D.N.Mar.I LR26.9; N.D.Ohio LR36.1; N.D.Okla. LR26.1; M.D.Pa. LR36.1; D.R.I. LR13(b); M.D.Tenn. LR9(b); W.D.Tenn. LR26.1; S.D.Tex. LR5.C; D.Utah LR204-3; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01E.D.Wis. LR7.02.

[35] D.Ariz. LR2.5(a); E.D.Mich. LR26.1; D.N.H. LR26.1; D.N.J. LR36.1; D.N.Mex. LR26.1; N.D.Ohio LR36.1.

[36] E.D.Ark. LR33.1; W.D.Ark. LR33.1; C.D.Cal. LR8.2; N.D.Cal. LR36-1; S.D.Ind. LR26.1; E.D.Mich. LR26.1; D.N.H. LR26.1; D.N.Mex. LR26.1; N.D.N.Y. LR26.1; E.D.N.Car. LR23.02; M.D.N.Car. LR26.1; N.D.Okla. LR26.1; D.Utah LR204-3.

[37] *See generally* Fed.R.Civ.P. 33(a); 34(b); 36(a).

to confusion, particularly at trial. A sequential numbering system also deters the use of "stock" requests that may be inappropriate in a particular case.

There are also rules that discuss the form of the requests that either repeat existing law or are inconsistent with it. Two courts have local rules that repeat portions of two Federal Rules by requiring that requests for admission be accompanied by a certificate of service,[38] or by requiring that form requests be relevant.[39] Another three courts have local rules that indicate that requests for admission cannot be combined with any other discovery.[40] These directives are inconsistent with Rule 26(d) that permits discovery in any order and while other discovery is taking place.[41] All of these directives should be rescinded.

Fourteen courts have local rules concerning the content of any responses to requests for admission.[42] Rules in eleven courts require that any objections be specific and contain the reasons.[43] These rules repeat Rule 36(a) that reads, in relevant part:

> If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.[44]

Another court requires in its local rule that, when a privilege is claimed, the nature of that

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[38] D.Neb. LR36.1; *see* Fed.R.Civ.P. 5(d).

[39] E.D.N.Y. LR26.2; see Fed.R.Civ.P. 26(b)(1).

[40] E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Wash. LR36.1.

[41] Fed.R.Civ.P. 26(d).

[42] E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Ga. LR26.7; D.Mass. LR36.1; D.N.J. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.2; D.R.I. LR13(b); E.D.Va. LR26(c); E.D.Wash. LR36.1.

[43] E.D.Ark. LR33.1; W.D.Ark. LR33.1; E.D.Cal. LR36-250; N.D.Cal. LR36-1; S.D.Ga. LR26.7; D.Mass. LR36.1; D.Or. LR36.2; M.D.Pa. LR36.2; D.R.I. LR13(b); E.D.Va. LR26(c).

[44] Fed.R.Civ.P. 36(a).

privilege be identified.[45] This rule repeats, generally, both Rules 26(b) and 36 of the Federal Rules of Civil Procedure.[46] These rules are unnecessary.

Rules in three courts require that objections to requests for admission be made earlier than responses to the requests.[47] These rules are inconsistent with Rule 36 that sets the same time limit for the parties to respond either by admitting, denying, or objecting.[48] These rules should be rescinded.

Twelve jurisdictions have local rules that limit the number of requests for admission a party can serve.[49] These limits vary from a low of ten[50] to a high of fifty[51] with the largest number of jurisdictions, five, imposing a limit of thirty.[52] Three of these courts also allow a different number of requests for good cause.[53] One court limits the number of requests based on the kind of case.[54] Because these local rules at least arguably conflict with the spirit and intent of the Federal Rules of Civil Procedure, the Local Rules Project recommends they be rescinded. The Local Rules Project suggests that the Advisory Committee on Civil Rules consider an amendment to Rule 36 of the Federal Rules of Civil Procedure forbidding a limitation on the number of requests for

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[45] D.N.J. LR36.1.

[46] Fed.R.Civ.P. 26(b), 36.

[47] E.D.Va. LR26(c).

[48] Fed.R.Civ.P. 36(a).

[49] S.D.Cal. LR36.1; N.D.Fla. LR26.2; M.D.Ga. LR36; D.Md. LR104; N.D.Ohio LR36.1; S.D.Ohio LR36.1; W.D.Okla. LR36.1; M.D.Pa. LR36.1; W.D.Tex. LR36; E.D.Wash. LR36.1; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01.

[50] M.D.Ga. LR36.

[51] N.D.Fla. LR26.2.

[52] S.D.Cal. LR36.1; W.D.Okla. LR36.1; M.D.Pa. LR36.1; N.D.W.Va. LR3.01; S.D.W.Va. LR3.01; *see also* D.Md. LR104 (limit of thirty); W.D.Tex. LR36 (limit of thirty); S.D.Ohio LR36.1 (limit of thirty); E.D.Wash. LR36.1 (limit of 15).

[53] S.D.Cal. LR36.1; N.D.Fla. LR26.2; M.D.Ga. LR36.

[54] N.D.Ohio LR36.1.

admission that may be made.

The purpose of Rule 36, as expressed by the Advisory Committee, is to simplify litigation by narrowing the issues, when possible, and facilitating proof with respect to issues that cannot be eliminated.[55] The 1970 Amendments furthered these objectives by resolving disputes about the scope of the requests in favor of a broader purpose. The amended rule specifically allows requests to encompass opinions of fact and the application of law to fact, in addition to merely "matters of fact."[56] These amendments also provide that any admissions have a conclusively binding effect for the purposes of the particular action.[57]

In the recent amendments to the Federal Rules on discovery, national limits on the numbers of depositions and interrogatories were established as well as a new national limit on the length of depositions.[58] The earlier version of Rule 26(b)(2) allowed the courts to establish different presumptive limits on the number of depositions and interrogatories by local rule.[59] This rulemaking authority was taken away by the 2000 amendments:

> There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but "standing" orders imposing different presumptive limits are not authorized.[60]

With respect, specifically, to requests for admission, the Note continues:

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[55] Fed.R.Civ.P. 36 Note to 1970 Amendments.

[56] *Id.*

[57] *Id.*

[58] *See* Fed.R.Civ.P. 26 Note to 2000 Amendments.

[59] *Id.*

[60] *Id.*

> Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them.[61]

Although this statement reflects a clear willingness to allow local rules limiting the number of requests for admission, the Local Rules Project recommends that the Advisory Committee on Civil Rules specifically forbid limits on the number of requests for admission by local rule since such regulation is contrary to the intent of the Federal Rules on discovery.

Interrogatories and depositions are quite different from requests for admission and the reasons for limiting requests for admission are not as compelling as they may be for these other forms of discovery. In the first instance, requests for admission are not really discovery devices at all. They are different from discovery in that they presuppose known facts and seek only a concession from the responding party as to the truth of those facts.[62] As one commentator explains:

> Requests are not useful tools for discovering the unknown. They are best used to establish the undisputed, relieving the parties of the need to prove such matters and shortening the trial.[63]

Interrogatories and depositions, on the other hand, can seek information about material that is not yet known by inquiring of a party or, sometimes, of other persons. The purpose of discovery, as stated by the Advisory Committee in 1946 is:

> to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case....[64]

Although there is potential for misuse of requests for admission, abuses

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[61] *Id.*

[62] Wright & Miller, *Federal Practice and Procedure*, Civil §2253.

[63] Epstein, *Rule 36: In Praise of Requests to Admit*, 7 Litigation 30 (Spring, 1981).

[64] Fed.R.Civ.P. 26 Note to 1946 Amendments.

cannot be determined by the number of requests submitted, but from the content of those requests.[65] Whether limitations on the number of requests for admission exist or not, the court retains its ability to sanction litigants if necessary.[66] The Committee Note recognizes the power of the district court to curb such abuses:

> Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference....
>
> On the other hand, requests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c).[67]

Because there are significant advantages to narrowing the issues for trial through the use of requests for admission and because there are mechanisms to curb potential abuses, short of limiting the actual number of requests in all cases, the Local Rules Project suggests that the Advisory Committee consider forbidding local rule limits on the number of requests.

VI. Trials

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[65] *Baldwin v. Hartford Accident and Indemnity Co.*, 15 F.R.D. 84 (D.Neb. 1953).

[66] *Misco Inc. v. U.S. Steel Corp.*, 784 F.2d 198 (6th Cir. 1986), *Baldwin, supra.*

[67] Fed.R.Civ.P. 36 Note to 1970 Amendments.

Rule 38. Jury Trial of Right

Thirty-two jurisdictions have local rules governing civil jury demand.[1] The Local Rules Project has recommended that there be a Model Local Rule requiring that any party who makes a jury demand on a pleading, as allowed by Rule 38(b), place that demand immediately below the title of the pleading in addition to, or instead of, any other indorsement on the pleading. The Model Local Rule is set forth below. In addition five district courts have local rules concerning jury demand that are duplicative of Rule 38 of the Federal Rules of Civil Procedure and should be rescinded.

DISCUSSION

Rule 38(b) sets forth the procedure for making a demand for a jury trial:

> Any party ma demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.[2]

Rule 38 is silent about the physical placement of a jury demand on a pleading. Courts have, however, determined what is a sufficient demand under this subsection. For example, the Court of Appeals for the Second Circuit has held that an indorsement on the front of the last page of the defendants' answer is sufficient under Rule 38(b).[3] The court explained that, although the better practice may be to place the demand on the front of the

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[1] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; D.Del. LR38.1; D.Idaho LR38.1; C.D.Ill. LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; E.D.La. LR38.1; M.D.La. LR38.1; W.D.La. LR38.1; D.Me. LR38; D.Minn. LR38.1; N.D.Miss. LR38.1; S.D.Miss. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; W.D.N.Y. LR38; N.D.Ohio LR38.1; S.D.Ohio LR38.1; E.D.Okla. LR38.1A; N.D.Okla. LR38.1A; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; E.D.Va. LR38; E.D.Wash. LR38.1; W.D.Wash. LR38(b).

[2] Fed.R.Civ.P. 38(b).

[3] *Gargiulo v. Delsole*, 769 F.2d 7 (2d Cir. 1985).

pleading, the placement on the last page was consistent with Rule 38:

> The Rule does not state that the demand, if made on the pleading, must be made on the back thereof as the District Court found. While the etymology of the word "indorse" suggests a writing on the back, the modern meaning of the word is broad enough to encompass a writing on the face of the document as well. [Citation omitted.] Indeed, the recommended practice is to write the demand on the first page of the pleading. [Citations omitted.] While defendants' demand, made on the last page of their answer, was not in the preferred style, and its obscure placement perhaps caused the clerk of the court to overlook it, we nonetheless conclude that it complied with Rule 38(b).[4]

In fact, it has been recognized that, even though "endorsement of a demand for jury trial on the pleading would seem to be better practice," a demand in the body of the answer constitutes a proper demand.[5]

In determining the exercise of a waiver of the right to a jury trial, "[t]he service of a jury demand on the other parties in a case is central to the operation of Rule 38.[6] A notation, therefore, on the United States District Court civil cover sheet that a jury trial was demanded was insufficient in spite of the fact that the clerk's office was aware of the purported demand, because no demand was served on the defendants:

> The mere notation on the Cover Sheet and in the docket can not substitute for service of notice upon the Defendants as required by the rule.[7]

Rule 38 is silent concerning the placement of the demand. There is case law,

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[4] *Id.* at 78-79. *See also Rosen v. Dick*, 639 F.2d 82 (2d Cir. 1980), *reh'g denied* Feb. 10, 1981; *Rutledge v. Electric Hose and Rubber Company*, 511 F.2d 668, 674 (9th Cir. 1975) *corrected* March 3, 1975.

[5] *Allstate Insurance Company v. Cross*, 2 F.R.D. 120 (E.D.Pa. 1941). *Cf. Whitman Electric Inc. v. Local 363, International Brotherhood of Electrical Workers, AFL-CIO*, 398 F.Supp. 1218 (S.D.N.Y. 1974) (*dictum*).

[6] *Rosen v. Dick, supra*, at 89.

[7] *Biesencamp v. Atlantic Richfield Company*, 70 F.R.D. 365, 366 (E.D.Pa. 1976). *See also Cochran v. Birkel*, 651 F2d 1219 (6th Cir. 1981) *cert denied* 454 U.S. 1152, 102 S.Ct. 1020, 71 L.Ed.2 307 (1982); *Omawale v. WBZ*, 610 F.2d 20 (1st Cir. 1979); *Houston North Hospital Properties v. Telco Leasing, Inc.* 688 F.2d 408 (5th Cir. 1982) (words "Jury Requested" on docket cover sheet insufficient); *Early v. Bankers Life & Casualty Co.*, 853 F. Supp. 268 (N.D.Ill. 1994).

however, discussing whether a party who fails to comply with a technical requirement as to placement of a demand in a local rule waives the right to a jury trial, even though that party made a demand in a different form.[8] The Court of Appeals for the Eighth Circuit, for example, overturned a district court decision that the plaintiff had waived his right to a jury trial by failing to comply with a local rule of the Eastern District of Arkansas, since the plaintiff had complied with Rule 38(b) and since the local rule at issue was only suggestive:

> The quoted language recites no legal requirement applicable to jury trial demands and is suggestive only. The failure to comply with such a "suggestion" does not constitute waiver of a right to jury trial when one has been demanded in accordance with Federal Rule of Civil Procedure 38(b).[9]

In another case involving a local rule, *Pradier v. Elespuru*, the Court of Appeals for the Ninth Circuit conceded that the local rule of the District of Oregon was more than just suggestive since it said that, when the demand is made on a pleading pursuant to Rule 38(b), the words "Demand for Jury Trial" or their equivalent were to be placed in the title of the pleading.[10] The court, however, held that such a notation did "not effect the substance of the demand itself" so that the failure to make such a notation was only a "minor deviation from the form required by the local rules."[11] The court explained:

> [T]he failure to fulfill an additional requirement of a local rule to place a notation to that effect in the title cannot constitute a waiver of a trial by jury. Because the right to a jury trial is a fundamental right guaranteed to our citizenry by the Constitution, courts should indulge

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[8] *See, e.g., Drone v. Hutto*, 565 F.2d 543 (8th Cir. 1977); *Pradier v. Elespuru*, 641 F.2d 808 (9th Cir. 1981).

[9] *Drone, supra*, at 544.

[10] *Pradier, supra*, at 810-811.

[11] *Id.* at 811.

every presumption against waiver.[12]

In 1975, however, the Court of Appeals for the Ninth Circuit allowed a waiver to stand upon a showing that the demanding party failed to comply with a local rule in *Rutledge v. Electric Hose and Rubber Company.*[13] In *Rutledge*, the court noted that Rule 38(b) used the phrase "indorsed upon a pleading" but was silent "as to the form and substance of the indorsement" so that the local rule which "merely refine[d] or prescribe[d] the form and substance of the indorsement" was reasonable and the district court was correct in insisting on compliance with the local rule.[14] The court held that the local rule did not conflict with Rule 38 and did not "impose additional basic procedural requirements beyond the local rule making power."[15] The Rutledge opinion seems grounded on a belief that the district court can alter the intent of the jury demand requirement:

> [T]he demand for jury trial on the face of the pleading is to alert the clerk in the docket process, and the signed statement at the end is to constitute the affirmative action required by Rule 38.[16]

Yet, it must be stressed that the Supreme Court, as well as other inferior courts, have maintained that, because of the constitutional implications inherent in Rule 38, a court must "indulge every reasonable presumption against waiver"[17] and should

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[12] *Id. and cases cited therein.*

[13] 511 F.2d 668 (9th Cir. 1975).

[14] *Id.* at 674.

[15] *Id. citing Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973).

[16] *Rutledge, supra*, at 674.

[17] *Aetna Insurance Company v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 811, 81 L.Ed. 1177, 1180 (1937). *See also In Re Zweibon*, 565 F.2d 742, 746 (D.C. Cir. 1977) ("These procedural rules are not intended to diminish this right … and should be interpreted, where possible to avoid giving effect to dubious waivers of rights," (citations omitted).)

"not presume acquiescence in the loss of fundamental rights."[18] Further, the decision in *Rutledge* has been criticized but not overruled by the Court of Appeals for the Ninth Circuit which noted:

> serious concern with the alternate holding in the *Rutledge* majority opinion wherein it was stated that a failure to comply with Local Rule 13 constituted a waiver of a jury trial.[19]

The Court of Appeals for the Seventh Circuit has also recently rejected the Rutledge reasoning:

> [W]e chose to adopt the reasoning in [*Pradier*] ... because there was a proper jury demand under Rule 38(b) which Local Rule 5(f) could not invalidate, and ... because the right to a jury trial is 'fundamental'."[20]

Of the thirty-two jurisdictions that now have local rules governing civil jury demands, twenty-nine courts have local rules that stipulate the form of the demand when it is placed on the pleading.[21] Twenty-two of these courts have rules that allow an indorsement on the front page of the pleading immediately following the title by using the words "Demand for Jury Trial" or the equivalent.[22] This language tracks the Model Local Rule that was originally proposed in the first Local Rules Project Report.[23] The other seven courts have local rules that vary from this requirement. For example, one

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[18] *Ohio Bell Telephone Co., v. Public Utilities Commission*, 301 U.S. 292, 307, 57 S.Ct. 724, 81 L.Ed. 1093 (1937).

[19] *Pradier*, supra, at 811 n.3.

[20] *Partee v. Buch*, 28 F.3d 636 (7th Cir. 1994) (citations omitted).

[21] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; D.Del. LR38.1; D.Idaho LR38.1; C.D.Ill. LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; E.D.La. LR38.1; M.D.La. LR38.1; W.D.La. LR38.1; D.Me. LR38; D.Minn. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; N.D.Ohio LR38.1; S.D.Ohio LR38.1; E.D.Okla. LR38.1A; N.D.Okla. LR38.1A; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; W.D.Wash. LR38(b).

[22] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; D.Del. LR38.1; D.Idaho LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; D.Minn. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; N.D.Ohio LR38.1; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; W.D.Wash. LR38(b)..

[23] See Report, Suggested Local Rules at p.35.

court requires that the demand be made at the conclusion of the appropriate pleading,[24] while two other courts require that an indorsement be made in the document title and also "asserted in the last paragraph of the document."[25] Two courts mandate that the demand be in capital letters.[26] The remaining two courts have local rules that require the demand be in the upper right hand corner[27] and consist of the word "jury".[28]

Nine of the courts that have adopted the Model Local Rule previously proposed explicitly note in their local rules that failure to use the suggested language is not a waiver of the right to a jury trial.[29] The remaining twenty courts do not have local rules addressing this issue. These omissions may be problematic.

On the basis of the case law, an argument can be made that a local rule, which dictates the form for a demand and which, if not followed, may result in an inadvertent waiver of the right to a jury trial, is inconsistent with the intent and wording of Rule 38. Rule 38 acknowledges a constitutional right and sets forth the procedure to exercise that right. Moreover, such a local rule maybe inconsistent with Rule 8 of the Federal Rules of Civil Procedure which provides that technical forms of pleading are not required and that all pleadings shall be interpreted "so as to do substantial justice."[30]

The Local Rules Project recommends that a Model Local Rule be adopted which will eliminate the need for varying local rules concerning jury demand. This

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[24] W.D.Mo. LR 38.1.

[25] D.Or. LR38.1; *see also* C.D.Cal. LR3.4.10.

[26] D.Nev. LR38-1; W.D.Wash. LR38(b).

[27] E.D.Mo. LR2.04.

[28] E.D.Tex. LR38.

[29] M.D.Ala. LR38.1; D.Idaho LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; D.Minn. LR38.1; D.Neb. LR38.1; D.N.H. LR38.1; N.D.Ohio LR38.1; D.V.I. LR38.1.

[30] Fed.R.Civ.P. 8(f).

Model Local Rule not only will protect litigants' constitutional right to a jury trial, but also will notify the district court clerks of such a demand. Further, it will eliminate the need for additional local rules regarding jury demand. The Model Local Rule is as follows:

> **Model Local Rule 38.1**
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> **Notation of "Jury Demand" in the Pleading.** If a party demands a jury trial by indorsing it on a pleading, as permitted by Rule 38(b) of the Federal Rules of Civil Procedure, a notation shall be placed on the front page of the pleading, immediately following the title of the pleading, stating "Demand for Jury Trial" or an equivalent statement. This notation will serve as a sufficient demand under Rule 38(b). Failure to use this manner of noting the demand will not result in a waiver under Rule 38(b).

The Model Local Rule satisfies both the Rule 38(b) requirement of an affirmative demand and the local courts' need for clear notification. It is also helpful in providing notice to the clerk. It provides that a pleading containing a jury demand have a statement following the title indicating such demand. This statement may serve as the actual demand for purposes of Rule 38(b), or the party may include a prayer or averment in the pleading making the demand. The person making the demand, then, is not required to rely solely on this designation. An important aspect of this Model Local Rule is that a failure to make the proper designation following the title will not result in a waiver under Rule 38(d). If a failure to make the notation results in a waiver, then a party who had made an affirmative demand in the pleading would be denied a jury trial regardless of

such affirmative demand.

Because this rule is suggested for use by all jurisdictions, those attorneys who practice in more than one jurisdiction are less likely to make technical errors, as the procedure will be common knowledge among those who practice in federal court. Fewer errors will facilitate a more efficient management of the court system, and will avoid litigation concerning this issue.

Twenty-two of the courts have already adopted the language concerning the placement of the demand.[31] Only nine of the courts, however, have acknowledged that a failure to comply with this rule does not operate as a waiver of the right to a jury trial. This sentence is a key addition to any local rule on this subject because of the constitutional dimension recognized by Rule 38:

> The right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statue of the United States shall be preserved to the parties inviolate.[32]

Three courts have local rules that simply repeat a portion of Rule 38(b) acknowledging that any party may make a demand.[33] These rules should be rescinded.

Five courts have local rules stating that checking off a box on the civil cover sheet indicating that a jury trial is requested is insufficient as a demand for a jury trial.[34] There is extensive case law, as mentioned above, indicating that, although the civil cover

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[31] M.D.Ala. LR38.1; C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; D.Del. LR38.1; D.Idaho LR38.1; C.D.Ill. LR38.1; S.D.Ill. LR38.1; S.D.Ind. LR38.1; E.D.La. LR38.1; M.D.La. LR38.1; W.D.La. LR38.1; D.Me. LR38; D.Minn. LR38.1; E.D.Mo. LR38-2.04; W.D.Mo. LR38.1; D.Neb. LR38.1; D.Nev. LR38-1; D.N.H. LR38.1; D.N.J. LR38.1; N.D.N.Y. LR38.1; N.D.Ohio LR38.1; S.D.Ohio LR38.1; E.D.Okla. LR38.1A; N.D.Okla. LR38.1A; D.Or. LR38.1; E.D.Tex. LRCV-38(a); D.V.I. LR38.1; W.D.Wash. LR38(b)..

[32] Fed.R.Civ.P. 38(a).

[33] C.D.Cal. LR3.4.10l; N.D.Miss. LR38.1; S.D.Miss. LR38.1; *see also* Fed.R.Civ.P. 38(b).

[34] C.D.Cal. LR3.4.10; E.D.Cal. LR38-201; S.D.Cal. LR38.1; N.D.Miss. LR38.1; S.D.Miss. LR38.1d.

sheet does alert the clerk of the interest in a jury trial, the civil cover sheet is not served on the opposing parties and does not provide notice to them of the demand as required by Rule 38.[35] Because these rules repeat existing law, they should be rescinded.

VII. Judgment

Rule 54. Judgment; Costs

[35] *See, e.g., Omawale v. WBZ*, 610 F.2d 20 (1st Cir. 1979); *Houston North Hospital Properties v. Telco Leasing, Inc.* 688 F.2d 408 (5th Cir. 1982); *Biesencamp v. Atlantic Richfield Company*, 70 F.R.D. 365, 366 (E.D.Pa. 1976); *Cochran v. Birkel,* 651 F2d 1219 (6th Cir. 1981) *cert denied* 454 U.S. 1152, 102 S.Ct. 1020, 71 L.Ed.2 307 (1982); *Early v. Bankers Life & Casualty Co.,* 853 F. Supp. 268 (N.D.Ill. 1994).

Rule 54.—Jury Cost Assessment

Fifty-six courts have local rules explaining the procedures used to assess costs in calling a jury when one is not actually needed because the case has already settled.[1] All of these rules are appropriate as local directives.

DISCUSSION

There is no particular federal rule or statute covering this issue although there are several provisions relating to taxation of costs and fees, generally. Rule 54 of the Federal Rules of Civil Procedure provides that costs and attorneys fees may be sought by the prevailing party by following certain general procedures.[2] A list of what costs may be taxed is set forth in Section 1920 of Title 28.[3] Another provision in Title 28 allows the court to assess costs and fees against an attorney, personally, if that attorney "multiplies the proceedings in any case unreasonably and vexatiously."[4]

Specific local directive is unnecessary since the courts have inherent authority to impose this type of sanction.[5] At least one court has suggested that, although a court need not rely on a local rule to provide authority for imposing jury costs: "a local rule on

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[1] N.D.Ala. LR54.2; C.D.Cal. LR11.3; E.D.Cal. LR16-272; N.D.Cal. LR404; S.D.Cal. LR16.4; D.Colo. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; D.Idaho LR54.2; C.D.Ill. LR83.14; S.D.Ill. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; D.Mass. LR40.3; E.D.Mich. LR38.2; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.Neb. LR54.2; D.N.H. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; N.D.N.Y. LR47.3; S.D.N.Y. LR47.1; W.D.N.Y. LR11(c); E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; N.D.Ohio LR54.1; E.D.Okla. LR38.1; N.D.Okla. LR38.1; D.Or. LR47.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); S.D.Tex. LR10; D.Vt. LR47.1; E.D.Va. LR54(G); E.D.Wash. LR1.1; W.D.Wash. LR39; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f); D.Wyo. LR54.4.

[2] Fed.R.Civ.P. 54.

[3] 28 U.S.C. §1920.

[4] 28 U.S.C. §1927.

[5] *See e.g., U.S. v. Claros*, 17 F.3d 1041 (7th Cir. 1994); *Eash v. Riggin Trucking, Inc.*, 757 F.2d 557 (3rd Cir. 1985); *White v. Raymark Industries, Inc.* 783 F.2d 1175 (4th Cir. 1986).

the imposition of such a sanction might well be salutary."[6]

All of the fifty-six courts have local rules explaining how the parties can dispose of the case before trial without incurring any costs for the jury. Twenty-one of these courts require that notice of settlement be provided one full day before the day the jury is set to be selected or the day the trial is scheduled to commence.[7] Six courts require that notice be provided by 3:00 pm of the day immediately prior to the trial,[8] and another six courts require notice by noon on the last business day before trial.[9] Four courts require that notice be given several days in advance of the scheduled trial date.[10] Five courts require notice of settlement before the jurors have reported to try the case.[11] Twelve of the courts simply require that notice be timely[12] or made promptly.[13]

Most of the jurisdictions acknowledge the court's power to assess these costs and identify the specific costs that may be assessed. Fifty-two of the courts have local rules that allow the court to assess all jury costs.[14] Many of these courts articulate

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[6] *Eash, supra*, at 569.

[7] N.D.Ala. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; N.D.Miss. LR54.1; S.D.Miss. LR54.1; D.Neb. LR54.2; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.S.Car. LR54.01; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1.

[8] D.Idaho LR54.2; S.D.Ill. LR54.1; D.N.H. LR54.2; D.Or. LR47.1; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f).

[9] D.Colo. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; S.D.N.Y. LR47.1; N.D.Ohio LR54.1; D.P.R. LR323.

[10] D.Del. LR54.2 (three business days); W.D.Wash. LR39 (three business days); D.Wyo. LR54.4 (five business days); D.N.Mar.I. LR54.2 (ten business days).

[11] E.D.Cal. LR16-272; S.D.Cal. LR16.4; C.D.Ill. LR83.14; E.D.Mich. LR38.2; D.Vt. LR47.1.

[12] N.D.Cal. LR404; E.D.Mich. LR38.2; W.D.Mich. LR40.3; E.D.Okla. LR38.1; N.D.Okla. LR38.1; E.D.Tenn. LR68.2.

[13] C.D.Cal LR11.2; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.Mo. LR41-8.04; D.Or. LR47.1; S.D.Tex. LR10.

[14] N.D.Ala. LR54.2; C.D.Cal. LR11.3; E.D.Cal. LR16-272; N.D.Cal. LR404; S.D.Cal. LR16.4; D.Colo. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1;

precisely what those costs are such as, for example, the per diem,[15] mileage,[16] marshal's fees,[17] and parking.[18]

These rules also explain who may be made financially responsible for these costs. For example, forty-eight of the courts allow an assessment to be made against either the parties, counsel, or both.[19] Two courts have local rules that require the

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D.Idaho LR54.2; C.D.Ill. LR83.14; S.D.Ill. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; E.D.Mich. LR38.2; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; D.Neb. LR54.2; D.N.H. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; N.D.N.Y. LR47.3; S.D.N.Y. LR47.1; W.D.N.Y. LR11(c); E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; N.D.Ohio LR54.1; E.D.Okla. LR38.1; N.D.Okla. LR38.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); D.Vt. LR47.1; E.D.Va. LR54(G); E.D.Wash. LR1.1; W.D.Wash. LR39; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f); D.Wyo. LR54.4.

[15] N.D.Ala. LR54.2; C.D.Cal. LR11.3; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; D.Idaho LR54.2; C.D.Ill. LR83.14; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.N.Mex. LR54.4; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; D.Or. LR47.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1; D.Wyo. LR54.4.

[16] N.D.Ala. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; C.D.Ill. LR83.14; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.N.H. LR54.2; D.N.Mex. LR54.4; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1; D.Wyo. LR54.4.

[17] D.Del. LR54.2; D.Haw. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; D.Neb. LR54.2; D.N.H. LR54.2; N.D.N.Y. LR47.3; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; D.Or. LR47.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Va. LR54(G)E.D.Wash. LR1.1; D.Wyo. LR54.4rt.

[18] N.D.Ga. LR39.2; E.D.Mo. LR41-8.04; E.D.N.Car. LR16.00; E.D.Tenn. LR68.2.

[19] N.D.Ala. LR54.2; E.D.Cal. LR16-272; N.D.Cal. LR404; S.D.Cal. LR16.4; D.Colo. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; C.D.Ill. LR83.14; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.Ky. LR54.1; W.D.Ky. LR54.1; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; E.D.Mich. LR38; W.D.Mich. LR40.3; N.D.Miss. LR54.1; S.D.Miss. LR54.1; E.D.Mo. LR41-8.04; D.Neb. LR54.2; D.N.Mex. LR54.4; E.D.N.Y. LR47.1; N.D.N.Y. LR47.3; S.D.N.Y. LR47.1; W.D.N.Y. LR11(c); E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; N.D.Ohio LR54.1; E.D.Okla. LR38.1; N.D.Okla. LR38.1; M.D.Pa. LR83.3.2; W.D.Pa. LR54.1; D.P.R. LR323; D.S.Car. LR54.01; E.D.Tenn. LR68.2; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); E.D.Wash. LR1.1; .W.D.Wash. LR39; N.D.W.Va. LRCiv2.04(f); S.D.W.Va. LRCiv2.04(f); D.Wyo. LR54.4.

assessment be made against counsel alone.[20] Another two courts allow the parties to agree to divide the responsibility.[21]

Some of the courts explain the standard used to avoid a sanction even if a case is settled at the last minute. Twenty-four courts specifically state that an assessment will not be made upon a showing of good faith for the delay.[22]

Some courts also explain that an assessment of juror costs may be made during the trial itself. Eleven courts extend the operation of this rule to any settlement that occurs after the start of the trial and up to the verdict.[23]

XI. General Provisions

Rule 81. Applicability in General

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[20] C.D.Cal. LR11.3; D.Idaho LR54.2..

[21] N.D.Ind. LR47.3; S.D.Ind. LR42.1. .

[22] N.D.Ala. LR54.2; D.Del. LR54.2; S.D.Fla. LR47.1(B); N.D.Ga. LR39.2; D.Haw. LR54.1; N.D.Ind. LR47.3; S.D.Ind. LR42.1; N.D.Iowa LR83.8; S.D.Iowa LR83.8; E.D.La. LR54.1; M.D.La. LR54.1; W.D.La. LR54.1; N.D.N.Y. LR47.3; E.D.N.Car. LR16.00; M.D.N.Car. LR83.3; D.N.Mar.I LR54.2; M.D.Pa. LR883.3.; W.D.Pa. LR54.1; D.P.R. LR323; E.D.Tex. LRCV-38(c); S.D.Tex. LR10; E.D.Va. LR54(G); E.D.Wash. LR1.1; D.Wyo. LR54.4.

[23] D.Colo. LR54.2; N.D.Ga. LR39.2; N.D.Miss. LR54.1; S.D.Miss. LR54.1; D.Neb. LR54.2; D.N.Mex. LR54.4; E.D.N.Car. LR16.00; N.D.Ohio LR54.1; E.D.Tex. LRCV-38(c); E.D.Va. LR54(G); D.Wyo. LR54.4.

Rule 81--Naturalization

Eleven courts have local rules outlining various procedures used to hear naturalization petitions.[1] All of these rules should be rescinded since the district courts no longer have authority to hear naturalization petitions.

DISCUSSION

Prior to 1990 the federal district courts had jurisdiction to hear petitions for naturalization.[2] The procedure for filing those petitions was regulated by section 1445 of the Immigration and Nationality Act which, among other things, set forth the form of the petition, who may file the petition, where petitions were to be filed, and the use and purpose of any declaration of intention.[3] The local rules which explain how and when petitions are filed and heard may have been appropriate as supplements to this law.

The Immigration and Nationality Act was amended, however, in significant respects effective November 29, 1990 so that these rules are now inappropriate. The district courts no longer have nationalization authority: "The full authority to naturalize persons as citizens of the United States is conferred upon the Attorney General."[4] The application for naturalization is now filed with the Attorney General and investigated and determined by the Attorney General.[5]The district court's role now is to administer the oath of allegiance if requested by the applicant.[6] These local rules explain where the petitions are filed and when they are heard. They are inconsistent with the clear wording

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[1] D.Alaska LR28; N.D.Ga. LR83.10; E.D.La. LR83.1; M.D.La. LR83.1; W.D.La. LR83.1; D.N.J. LR81.1; W.D.N.Y. LR78; E.D.N.Car. LR14.00; M.D.N.Car. LR77.1(c); D.Utah LR120; D.Wyo. LR83.8.

[2] *See* 8 U.S.C. §1421 (1989).

[3] 8 U.S.C. §1445 (1989).

[4] 8 U.S.C. §1421 (2001).

[5] *See* 8 U.S.C. §§1445, 1446, and 1447 (2001).

[6] 8 U.S.C. §§1421(b) (2001).

of the relevant statutes and, as such, should be rescinded.

Rule 81—Jury Demand in Removed Cases

Local rules in ten courts address the procedure used to secure a jury trial in a removed case. Rules in five of these courts repeat existing law. Rules in six jurisdictions may be inconsistent with existing law. Rules in two courts are flatly contradictory with existing law and should be rescinded.

DISCUSSION

Rule 81(c) regulates the procedure used to obtain a jury trial when a case has been removed from state court.[1] Three specific circumstances are set forth in that Rule. The first concerns the procedure for making an actual demand:

> If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition.[2]

The second situation arises when the party already made an express demand for a jury trial in state court. In this instance, Rule 81 provides that the party need not make a demand at all after removal.[3] The last situation arises when state law did not require that a specific jury demand be made. Rule 81 provides, in these cases, that the parties

> need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party.[4]

Local rules in five courts either repeat the language of Rule 81(c) and Rule

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[1] Fed.R.Civ.P. 81(c).

[2] *Id.*

[3] *Id.*

[4] *Id.*

38(b) or repeat that these Federal Rules are applicable to removed cases generally.[5] Rule 83 of the Federal Rules of Civil Procedure does not permit such repetition.[6]

Local rules in four district courts appear to discuss a party's obligation to reassert its demand for a jury trial after removal.[7] For example, one court specifically requires a new jury demand even if one was already made pursuant to state law: "Notwithstanding state law, trial by jury is waived ... [in a removed case] unless a demand for a jury trial is filed...."[8] One local rule also requires an additional jury demand after removal by stating that a failure to make a demand as directed in the local rule is a waiver of the right to a jury trial.[9] Another local rule acknowledges that the party may have already filed a demand pursuant to state law but still requires that a party reassert its request for a jury unless that demand "is in the removed case file."[10] Another local rule requires that a written jury demand be filed within thirty days of the clerk's notice of removal or the right to a jury trial will be deemed waived.[11] A party is under no obligation to reassert its demand for a jury trial if one was properly made pursuant to state law. To the extent these local rules require exactly that, they are inconsistent with Rule 81 and should, therefore, be rescinded. To the extent, however, these rules are in states where there is no need to make specific demand in state court, then these rules fall under the third circumstance where district court regulation is appropriate.

Two courts have local rules that set forth times within which the parties must

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[5] C.D.Cal. LR3.4.10; N.D.N.Y. LR81.3; D.Me. LR38; E.D.Va. LR38; E.D.Wash. LR38.1.

[6] Fed.R.Civ.P. 83(a)(1).

[7] D.Neb. LR81.2; W.D.N.Y. LR38; N.D.Okla. LR38.1A; W.D.Okla. LR81.1.

[8] W.D.Okla. LR81.1.

[9] D.Neb. LR81.2.

[10] N.D.Okla. LR81.2.

[11] W.D.N.Y. LR38.

file jury demands after removal.[12] For example, one local rule provides thirty days from the date of removal to make a demand or it is deemed waived unless Rule 38 gives a longer time.[13] These time limits are different from those set forth in Rule 81(c).[14] Because they flatly contradict the stated time limits in the Federal Rule, these local rules should be rescinded.

Two courts have local rules that seem suggestive only.[15] The significance of these rules is not apparent. One of the rules simply states that a "party may file a 'Demand for Jury Trial.'"[16] The other rule states that, if a demand for a jury trial was made already in state court, the removing party "shall include the word 'jury' with the caption of the notice of removal."[17] If these rules are only trying to suggest what a party could do, perhaps to assist the clerk in determining what cases should be given jury trials, the rules are not problematic. If, on the other hand, they are actually requirements and a failure to comply with them will act as a waiver, then they are inconsistent with existing law and should be rescinded.

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[12] N.D.Okla. LR81.2; D.Neb. LR81.2.

[13] N.D.Okla. LR81.2.

[14] *See* Fed.R.Civ.P. 81(c) (demand must be served "within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition").

[15] N.D.N.Y. LR38.1; E.D.Tex. LR81(b).

[16] N.D.N.Y. LR38.1.

[17] E.D.Tex. LR81(b).

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Memorandum To: Members of the Standing Committee on Rules of Practice and Procedure
From: Professor Dan Capra
Re: **Discussion Paper on Local Rules**
Date: December 14, 2001

Judge Scirica and Dan Coquillette have asked me to prepare a discussion paper on local rules, in light of the new report of the Local Rules Project that is being so ably prepared by Mary Squiers. This paper considers the following very broad questions:

1. Which local rules are objectionable?

2. How can the findings of the Local Rules Project be best used in any effort to have the objectionable local rules rescinded?

3. Are there any other remedies that might reduce the proliferation of objectionable local rules?

It is important to emphasize that I have no particular expertise on the subject of local rules, other than the fact that I prepared model local rules on electronic case filing earlier this year. The points raised in this paper are in no way definitive or fully-developed. There is no intent to offend anyone. The paper is simply designed to generate discussion on the difficult subject of the proliferation of local rules.

I. Which Local Rules Are Objectionable?

The Knox Committee in 1940 concluded that almost all local rules should be rescinded because they conflicted with the letter or spirit of the federal rules, covered preempted ground, or provided rigid procedure in areas left to discretion. The same complaints about local rules are heard today.

The charges against local rules are by now familiar. Local rules lead to disuniformity in the federal practice, contrary to the very reason for national rules and rulemaking. Local rules impose costs to lawyers who have to determine what the rule is, and this cost is especially burdensome on lawyers who practice nationwide or who rarely practice in the local court. The very existence of local rules tends to favor local practitioners at the expense of outsiders. And local rules can cause significant confusion when they are actually or even possibly inconsistent with or duplicative of national rules or applicable statutes.

As Mary Squiers' report indicates, the proliferation of local rules is a problem that is not going away on its own. The original Local Rules Project discovered over 5000 local rules; there are even more today.

This is not to say, however, that local rules are objectionable *per se.* Indeed, many of the national rules permit, and even encourage, the adoption of local rules. See, e.g., Civil Rules 16 and 54. The first Local Rules Project encouraged the use of certain model local rules covering procedural details (e.g., Model Rule 15.1, concerning the form of a motion to amend and its supporting documents) and the new Local Rules Project will make similar recommendations. Most recently, the Standing Committee took part in a project by CACM that prepared and distributed model local rules on electronic case filing.

The position of the ABA Litigation Section is that local rules are appropriate only when necessary to accommodate unique circumstances faced by the specific district. An example of an acceptable local rule (putting aside its facial inconsistency with Civil Rule 54(d)) is the rule in the Alaska District that allows a few more days to serve a notice of motion regarding taxation of costs. The Ninth Circuit local rules committee observed that "the modest extension is useful to assure fairness to parties in light of the unique geography of the District of Alaska." Another example might be local rules governing case management in response to a heavy caseload in the district.

It is clear, however, that if geographical or local distinctiveness is the only acceptable reason for a local rule, then there would be precious few acceptable local rules. The new Local Rules Project establishes that the proliferation of local rules is not dependent on the geopolitical aspects of any district. Some urban districts have few local rules and others have many. Some rural districts have many local rules and some have few. As Paul Carrington has stated, differences in local rules "seldom, if ever, reflect variations in local conditions. What they reflect are differences in the styles and values of particular groups of judges."[1] In a similar vein, Professor Johns, the Reporter for the Ninth Circuit Local Rules Project, has concluded that local rules are not based on local conditions but rather on "the personality of the particular Chief Judge."

Supporters of local rules give three other reasons, besides the need to address specific local problems, for promulgating local rules: 1) detail-oriented local rules can and should fill the gaps left

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[1] Paul Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L. J. 929 (1996).

by broad, general national rules; 2) local rules can be used to experiment with new procedures to determine whether they would work at the national level (a point recognized in the Long Range Planning Report of the Judicial Conference); and 3) local rules are useful in handling areas subject to quickly changing conditions, as compared to the more deliberate pace required for national rulemaking (the best example being rules on electronic case filing).

While those three arguments in favor of local rules have merit, the problem is that most of the existing local rules do not provide such advantages. The new Local Rules Project clearly establishes that a large number of local rules provide none of the asserted advantages, and indeed impose substantial costs of disuniformity on the one hand and problematic duplication on the other.

The most objectionable local rules not surprisingly fall into the two categories prohibited by Rule 83 and its counterparts: those that are inconsistent with national rules, and those that are duplicative of national rules. A third category of objectionable rules–also prohibited by Rule 83 and its counterparts–are local rules that do not conform with the uniform numbering system. A fourth category of problematic local rules are those that have been rendered inoperative by changes in the national rules or federal statutes. Each of these categories merits some discussion.

1. Inconsistent Rules

Rules that are inconsistent with national rules are obviously objectionable, because they result in difficulties for lawyers and create an offensive disuniformity. A major problem for the Local Rules Project is determining whether a particular local rule is indeed inconsistent with a national rule or statute. There are several possible forms of inconsistency, not all of which are equally objectionable.

a. Direct contradiction: An example of a local rule in direct contradiction is one that permits a request for admission to be served before the time provided by the national rule. In this case, action that is permitted by the local rule would violate the national rule. A different example is a local appellate rule imposing a page limit on briefs that is less than permitted by FRAP 32. In this case, action that is permitted by the national rule would violate the local rule. In either case, the local rule is ultra vires under the Enabling Act and violative of Rule 83 and its counterparts. In either case, practitioners are left in a quandary as to how to proceed, and a trap for the unwary is created. Presumably all would agree that abrogation of directly contradictory local rules should be a central goal of the Local Rules Project.

b. Inconsistency with the spirit of the national rules: A more nebulous inconsistency can arise when a local rule seems contrary to the *spirit* of the national rules. One possible "spirit" conflict is where the national rule calls for the use of discretion to be exercised on a case-by-case basis, while the local rule provides for a hard and fast requirement. An example is a local rule requiring bifurcation, where Civil Rule 42 permits bifurcation on a case-by-case basis when necessary to avoid

prejudice. Another example is local rules providing numerical limits on discovery requests, where the national rule carries no such absolute limit but provides for a protective order under the circumstances if discovery requests are too burdensome.

An argument can be made that the "inconsistency" between a local bright line and a national case by case approach is not problematic, at least if the local rule has made an honest attempt to establish a bright line that is consistent with the policy of the national rule. There are obvious benefits to a bright-line rule, so long as it is a bright-line that will usually lead to the same result as a case-by-case approach. If, for example, a judge would usually grant a protective order in favor of a defendant who was served with his fiftieth request for admission, it makes some sense to have a local rule limiting the number of requests to 50. If, on the other hand, a judge would usually not order bifurcation, then the rule requiring it would be in conflict with the national rule and should be rescinded. It is for the Standing Committee to decide whether to take a nuanced approach to local rules that contain concrete requirements in the face of a discretion-based national rule.

A different kind of "spirit" conflict arises when the local rule reverses a presumption that is set forth in a national rule. An example would be a local rule requiring good cause for amending a pleading, in contrast with the national rule stating that leave to amend shall be freely granted. By reversing the presumption, the local rule has changed the policy of the national rule, and this would seem to be as objectionable as any direct conflict. It is not as if the local rule is providing helpful bright-line guidance; it is rather that the local rule stakes out a point of view that is directly contrary to the policy of the national rule.

c. Inconsistency with case law: There is of course extensive case law construing the federal rules. Some local rules are not inconsistent with the text or even the spirit of the federal rules, but are inconsistent with case law construction of a national rule. An example is a local rule providing that failure to pay a filing fee is jurisdictional, whereas case law states that it is not, and the federal rule is silent on the matter.

Rule 83 does not prohibit local rules that are inconsistent with case law; nor does the Enabling Act. Thus, an attack on a rule inconsistent with case law lacks the clout of an attack on a local rule that is clearly prohibited under Rule 83 and the Enabling Act. Yet such inconsistency is certainly problematic for practitioners trying to cope with the applicable law. It is for the Standing Committee to decide whether to address local rules that are inconsistent with case law, and how to deal with the problem of convincing the districts that such rules should be abrogated. "Inconsistency" in this sense should probably be limited to a conflict with the case law of the circuit in which the district sits.

2. Local Rules That Duplicate National Rules

Rule 83 and its counterparts prohibit local rules that duplicate the national rules. Duplication might appear harmless, and perhaps even helpful to practitioners who might not know about the national rule. But duplication is in fact a road to mischief. The major risk is that the national rule or

applicable statute might change, leading to an inconsistency between the local rule and the national standard. Local rules committees are unlikely to keep track of such changes and disparities. Experience has shown that this risk is real. The Local Rules Project notes the many local rules on discovery that restated national standards, only to create a conflict with those standards when the national rules changed.

The asserted benefit of duplicative local rules is that they assist practitioners who would not otherwise know of a national rule, by providing another source under which the controlling rule can be consulted. But this argument assumes a practitioner totally without a clue. It is more reasonable to think that a practitioner, even an unseasoned or dim one, would look first to the national rule for the governing standard, then to the local rule, rather than the other way around.

a. Duplicative National Rules: It should be noted that there are many national rules that do little more than restate a federal statute. Examples are Civil Rule 24(c), and Rule 83 itself. (Rule 83 is arguably more problematic because it tracks the statute without exactly replicating it; the Rule paraphrases the statute and imposes additional requirements). Local rules drafters may find it difficult to see what is wrong with a duplicative local rule when the national rules sometimes commit the same offense.

One possible distinction is that national rules might need to replicate statutes if the statute deals with a procedural question that a practitioner would expect to find in the rules of procedure. One might expect a practitioner to look first in the national rules for guidance on a procedural question, perhaps not thinking to look to a statute. That same expectation does not justify replicating a national rule in the local rules. The bottom line, though, is that duplicative local rules are prohibited by Rule 83 and its counterparts, while duplicative national rules are not prohibited by a higher law. Nonetheless, national rulemakers who are concerned about duplicative local rules might well extend a similar concern to duplicative national rules. A review might be appropriate to determine whether duplication in a national rule is necessary to accommodate the expectations of some practicing lawyers. If not, such duplication might be superfluous and should probably be eradicated.

b. Paraphrasing: An even more problematic form of "duplication" is represented by those local rules that seek to paraphrase a national rule. Paraphrasing carries all of the negative effects of duplication, with the added risk of inconsistency. Moreover, paraphrasing imposes costs on lawyers, who will have to determine whether the local rule is really intended to mean the same thing as a national rule or something else. The problem, in terms of regulation of local rules, is to determine whether the local rule is indeed an attempt to paraphrase a national rule, or is instead an attempt to set local standards that fill the gaps left by a national rule. This calls for judgment, and Mary Squiers is an expert at exercising that kind of judgment.

c. Duplicating case law: Neither Rule 83 nor the Enabling Act prohibit local rules that duplicate case law construing a national rule. The Local Rules project takes the position that a local rule restating the case law is problematic and should be rescinded. There is a good argument, however, that local rules codifying case law should be allowed to stand. To return to the model of the unschooled practitioner–we would expect him to know the text of the federal rule, so that a local rule restating a federal rule provides little or no benefit. But we might not expect that practitioner to be aware of all the applicable case law construing a national rule. Thus, local rules duplicating case law may be beneficial. There is a risk, though, that the case law will change and the local rule will then become inconsistent. The question is whether the benefits provided by a local rule duplicating case law are outweighed by that risk. At any rate, it is not immediately obvious that local rules that duplicate controlling case law should be rescinded.

3. Local Rules That Do Not Conform With the Uniform Numbering System

Rule 83 and its counterparts require that local rules must conform to the uniform numbering system established by the Judicial Conference. Uniform numbering makes it easier for newcomers and outsiders to find the pertinent local rule. According to Mary Squiers, there are still at least eleven districts that are not in compliance with the uniform numbering system. This is so despite the fact that uniform numbering has been recommended by the Judicial Conference since 1998 and required by the Federal Rules since 1995. The fact that at least eleven districts still operate in direct violation of the Federal Rules shows the difficulty of enforcing any limitation on local rulemaking.

It seems obvious that noncomplying districts somehow must be brought into compliance–though it should be noted that "uniform" numbering involves some subjective determinations and that there is no such thing as perfect uniformity. For example, some districts place their local rules on requests for admissions under Uniform Rule 36, while others place these rules under Uniform Rule 26. Nonetheless, even an attempt at uniform numbering is far preferable to living with the idiosyncratic numbering systems of each local district.

There might also be another practical problem with enforcing the uniform numbering system. The Ninth Circuit committee reviewing the local rules concluded that the Circuit Council did not have statutory authority to enforce uniform numbering. The Circuit Council is authorized to abrogate any rule that is "inconsistent" with the national rules. 28 U.S.C. § 332(d)(4). The Ninth Circuit committee took the position that a failure to conform to uniform numbering did not make a local rule "inconsistent" with a national rule. Of course, the same argument could be made about duplicative local rules–i.e., that such rules are not "inconsistent" and therefore the Circuit Councils do not have the authority to abrogate them.[2] There is a persuasive argument, however, that the

[2] Interestingly, the Ninth Circuit Committee found that the statute giving the Circuit Council authority to abrogate "inconsistent" rules also gave it authority to abrogate duplicative rules–but not rules that failed to conform with uniform numbering.

Circuit Councils do have the authority to abrogate or demand a change to rules that do not conform to uniform numbering or that are duplicative. Such rules are indeed "inconsistent" with the national rules because they are contrary to the specific requirements of Rule 83 and its counterparts. So despite the conclusion of the Ninth Circuit committee, it would appear that nonconformity with the uniform numbering system is a problem that the Circuit Councils can and should address.

4. Local Rules That Have Become Outmoded

Some local rules govern practices that no longer exist in the federal courts. For example, some districts have local rules governing naturalization petitions. As Mary Squiers' report indicates, these rules are outmoded because of an intervening statute providing that naturalization petitions are no longer heard in the district courts. It can be argued that local rules that are no longer useable do no serious harm. Moreover, because they are neither in conflict with nor duplicative of a national rule, they are not prohibited by Rule 83 and its counterparts. Nonetheless, there is no reason at all for such rules to remain on the books. Therefore, outmoded rules would seem to be a proper target of the Local Rules Project. It would also seem that the district courts would be quite amenable to rescinding these rules when reminded of their existence. Suggesting that outmoded rules be deleted does not seem to offend any local prerogative.

In sum, it would appear that the local rules that are the most objectionable–and the abrogation of which should be given the highest priority–are as follows: 1. Rules that are flatly contradictory of national rules or federal statutes; 2. Rule that reverse a presumption in a national rule; 3. Rules that duplicate national rules or federal statutes; 4. Rules that paraphrase the requirements of national rules or statutes; 5. Rules that fail to conform to the uniform numbering system; and 6. Rules that can no longer be used because they refer to outmoded procedures. Other local rules present problems, as discussed above, but are probably more difficult to address, either because the political case for deleting them is not as strong, or because they might serve some positive function.

II. How Can the Findings of the Local Rules Project Be Used?

The goal of the Local Rules Project is not just informational. Another important objective is to use the findings from the project as a tool for abrogating objectionable local rules. This section of the paper considers briefly how the findings from the new Local Rules Project might be used to effectuate change.

The findings from the previous Local Rules Project were used as follows: 1) A report on local civil rules was circulated to the chief judges of the district courts by the Chair of the Standing Committee, and a report on local criminal rules followed shortly thereafter; 2) Additional material was sent to help the courts renumber in accordance with Judicial Conference guidelines; 3) The report on Appellate Rules was given to the chief judges of the courts of appeals with the suggestion that each court respond in writing to Mary Squiers about the offending local rules mentioned in the report; 4) Mary Squiers submitted memoranda to the Advisory Committee on Appellate Rules explaining the areas of dispute concerning the local appellate rules so that the Committee could decide what to do.[3]

The first Local Rules Project essentially used information and persuasion to spur the courts to abrogate objectionable local rules. This process met with a good deal of success. Many offending local rules were abrogated. Many districts adopted uniform numbering. But on the other hand, the new Local Rules Project demonstrates that many inconsistent and duplicative rules remain, and more broadly that the proliferation of local rules has continued unabated.

A good argument can be made that the same informational and persuasional approach should be taken with the new Local Rules Project. The virtues of a non-aggressive approach are well-summarized by Professors McMorrow and Coquillette in *The Federal Law of Attorney Conduct:*

> Given the natural, and sensible, inclination to resolve local rule challenges by mutual consultation, it is very unlikely that the formal powers possessed by the judicial councils will be frequently used. More is likely to occur by voluntary compliance following suggestions by the Local Rules project or by the rules committees of the judicial councils of the circuits.

The Ninth Circuit District Local Rules Review Committee took a slightly more aggressive approach than the original Local Rules project. The rules that the Committee found inconsistent or duplicative were first brought to the attention of the Chief Judge of the district. In most cases, the Chief Judge agreed with the Committee that the specified rules were problematic, and agreed to consider amending the rule. The Committee went no further with any rule that the Chief Judge

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[3] The rationale for this somewhat more aggressive scrutiny of Appellate Rules is that the Enabling Act gives authority to the Judicial Conference to abrogate local rules, while authority to abrogate other local rules is delegated to the Circuit Councils. History shows it to be unlikely that the Judicial Conference will take the extreme step of abrogating a local appellate rule. See McMorrow & Coquillette, *The Federal Law of Attorney Conduct* at 801-50.

agreed was problematic. As to areas of disagreement, the Committee requested a response in writing from the Chief Judge. Those responses were evaluated, and in most instances the Committee agreed with the Chief Judge's explanation that the particular rule was neither duplicative of nor inconsistent with a national rule. That ended the matter as to the challenged rule. If the Committee disagreed with the Chief Judge's explanation, it brought the matter to the Conference of Chief District Judges, to which the Circuit Council had delegated the responsibility for reviewing local rules. By this point in the process, there were only a handful of rules that had not been resolved. In each case, the Conference sided with the Committee, and the offending rule was abrogated.

The extra step employed by the Ninth Circuit Committee was to bring unresolved conflicts directly to the Circuit Council or its delegated authority. The Standing Committee might consider taking this extra step under the new Local Rules Project.

There is an interesting post-script to the Ninth Circuit rules project: The Committee's decision to end inquiry on rules that the Chief Judge agreed were duplicative or inconsistent may have been premature. The Chief Judges, while ostensibly agreeing with the Committee's position on those rules, did not state that those rules would in fact be abrogated. The Chief Judges simply stated that abrogation would be considered. The Committee suggested that a separate committee be instituted and funded to monitor whether the districts actually abrogated the rules that were agreed to be inconsistent with or duplicative of a national rule. It appears, however, that such a committee was never funded. At any rate, some of those duplicative or inconsistent rules were not abrogated; they are still on the books today. The experience in the Ninth Circuit indicates that it might be appropriate to set up a monitoring function to determine whether offending rules are actually abrogated. Perhaps a subcommittee of the Standing Committee would be an appropriate vehicle for this monitoring function.

III. What Other Remedies To Local Rule Proliferation Might Be Considered?

In addition to using the findings from the Local Rules Project to provide information and encourage change, there are other possible courses of action that might stem the tide of local rule proliferation. This section of the paper considers some of these potential solutions. All of the solutions discussed would, if implemented, be in addition to and not in substitution of the process of encouraging change by disclosing the findings of the Local Rules Project.

Before addressing any of these possible supplementary remedies, a most important proviso must be kept in mind: any aggressive or coercive attempt to abrogate offending local rules may lead not to ending those rules but rather to having them reconstituted as general orders or standing orders. Local rules, for all their problems, are usually preferable to standing orders because local rules are at least subject to a notice and comment process, and most local rules are now available on the internet. The same cannot be said of standing orders. The risk that judges will simply reconstitute offending local rules into standing orders counsels generally in favor of an approach that emphasizes persuasion and encouragement, rather than conflict and coercion.

With that said, this paper proceeds to articulate some possible supplementary remedies for addressing objectionable local rules. As will be seen, some of these remedies hold more promise than others; and some are probably dependent on statutory change.

1. Funding of Circuit Councils and/or Volunteered Assistance to the Councils

Congress has given the Circuit Councils the authority to review local rules (other than appellate rules) and to abrogate those that are inconsistent with the national rules. Congress has not, however, authorized funding for the Circuit Councils to carry out this task. It has been noted that some Circuit Councils have shown little interest in exercising their statutory authority to regulate local rules. In part this might be because the Circuit Councils, perhaps understandably, are more concerned about the judges and lawyers in their own circuit than in abstract concepts of national uniformity. But another possibility is that the Circuit Councils' lack of interest in the subject of local rules may result from lack of funding. The Ninth Circuit's review of local rules, which resulted in the abrogation of many inconsistent and duplicative rules, was a product of special funding from the Administrative Office. The Ninth Circuit Executive has stated that such an in-depth review of local rules would never have been attempted if not for this special funding. So it would appear that providing funding to the Circuit Councils for a periodic review of local rules might hold some promise for a more systematic and effective regulation of local rule proliferation.

In the absence of or in addition to funding of the Circuit Councils, consideration might be given to volunteered assistance to the Circuit Councils in their efforts to oversee the local rules. This volunteer effort could be under the auspices of the Standing Committee or the Administrative Office. The Standing Committee might, by way perhaps of a subcommittee, support and coordinate efforts to assist the Circuit Councils in seeking abrogation of objectionable local rules.

2. Regulating the Effective Date of Local Rules

Recently the Advisory Committees considered amendments to Rule 83 and its counterparts that would have provided that new local rules could only go into effect on December 1, unless a majority of the court's judges found an immediate need for the amendment. The purpose of the proposal was to limit the frequency with which local rules would go into effect, so that practitioners would not have to keep constantly updated on continually changing local rules.

The proposal was tabled for possible further consideration as part of the Local Rules Project. One concern expressed about the proposal was that it might be inconsistent with the local rule Enabling Act, section 2071, which states that local rules "shall take effect upon the date specified by the prescribing court." On that statutory question, it is possible to argue that an amendment to Rule 83 regulating the effective date of a local rule *would* be permissible because section 2071 states that local rules shall be consistent with the national rules prescribed under section 2072, and any amendment to Rule 83 would be prescribed under section 2072. That argument would mean that any limitation to local rulemaking in Rule 83 would by definition be permitted under section 2071. But

some members of the Advisory Committees were uncomfortable about the prospect of one section of the Enabling Act being used to limit another. These members expressed the opinion that §§ 2071 and 2072 should be read in pari materia, as part of an integrated set of rulemaking provisions.

The proposal to amend Rule 83 and its counterparts to provide for a uniform effective date for local rules is therefore at the least a controversial exercise of the rulemaking power. It is unlikely that the benefits of a uniform effective date for local rules outweigh the costs of such a proposal. The benefits of a uniform effective date are disputable. While a uniform effective date might assist practitioners in keeping track of the progress of local rule enactment, such a change would be unlikely to stop the actual proliferation of local rules. Moreover, the exception in the proposal–allowing enactment on a different date should a majority of judges of the court find an immediate need–may well swallow the rule. It is possible if not likely that the same majority of judges promulgating a local rule would also determine as a matter of course that the rule is needed immediately. So it is arguable that little would be gained by a uniform effective date requirement.

One solution to the Enabling Act problem is to propose that section 2071 be amended to provide for a uniform effective date for local rules. As discussed above, the benefits of such a proposal are debatable. But a statutory amendment might be warranted for other, more substantial limitations on local rulemaking, discussed below.

3. Conditioning the Effectiveness of a Local Rule on Filing with the Administrative Office and Circuit Council and Proper Publication

When the proposal for a uniform effective date for local rules was being considered, the Advisory Committees also entertained the possibility of a "stronger" amendment to Rule 83 and its counterparts: one that would prohibit enforcement of a local rule until it had been filed with the Administrative Office and the Circuit Council and was properly published to the public. This proposal could have at least two salutary effects: 1) A publication requirement would assure that practitioners would at least know what the local rules are–currently, many districts have posted their local rules on the internet, but many have not; and 2) Filing with the Administrative Office and the Circuit Council would tend to highlight problematic rules; it might operate as a good substitute for extensive and expensive reviews of local rulemaking.

One problem with the proposal is, again, that it may not be permitted by section 2071, as it imposes limitations on local rulemaking that do not exist in that statute. If this is considered a controversial or impermissible exercise of the rulemaking power, the solution would have to be a statutory amendment. The benefits of the proposal might be worth the cost of an amendment, however.

4. Conditioning the Effectiveness of a Local Rule on Approval of a Central Authority

The previous proposal would require *disclosure* before a local rule could become effective. An even more aggressive proposal would require *approval* by a central authority, such as the Judicial Conference or the Circuit Council, before a local rule could become effective. Paul Carrington and Professor Carl Tobias have each made proposals for central authority approval of local rules. Tobias suggests that approval should come from the Judicial Conference, while Carrington suggests that the approval power be located in the Circuit Councils. Both suggest that any central authority approval mechanism should be accompanied by clearly stated criteria for that approval. Both Tobias and Carrington suggest similar criteria for approval: the local rule must be responsive to a specific local need that justifies the cost of disuniformity. Professor Sisk, focusing on appellate local rules, proposes an amendment to the Enabling Act that would require approval by the Judicial Conference of any local rule, with a statutory direction to the Conference "to pass upon requests for local rulemaking only after a serious screening for compatibility with the federal rules."[4]

The proposals for central authority approval would obviously go a long way to limit the proliferation of local rules and to assure that local rules would not be duplicative of or inconsistent with the national rules. There are two possible problems in effectuating such proposals, however. First, the proposals would almost certainly require a statutory amendment (as Professor Sisk appears to recognize in his proposal). A central approval requirement is even more aggressive than the uniform effective date and notification proposals discussed above, which were themselves controversial exercises of the rulemaking power. Second, there are sensitive issues of prerogative involved when local rulemaking is subject to approval by a central authority. This proposal may be considered an affront to local rulemaking, to the extent that district courts may seek to evade the local rulemaking process in favor of standing orders.

5. Model Local Rules

The original Local Rules Project proposed model local rules on a number of topics, including three judge courts, social security appeal cases, and notification to the court of a claim of unconstitutionality. The new Local Rules Project has refined the originally-proposed model local rules and renews the suggestion that they be adopted by districts that want to have rules on the particular subject covered. The Knox Report in 1940 also proposed a number of model local rules, several of which eventually became national rules.

The apparent objective for a model local rule is premised on an acceptance that local rules are going to cover a certain procedural area, usually an area considered too detailed and specialized

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[4] Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1 (1997):

for a national rule. As long as local rules are going to cover this area, the thinking goes, those rules might as well be uniform.

Model local rules have proven to have only limited success as a vehicle to establish uniformity. The model local rules proposed by the original Local Rules Project were not universally adopted; even in those districts that adopted the model local rule, the adoption was rarely verbatim, so disuniformity remained. The Ninth Circuit local rules review committee concluded that the districts essentially had no interest in changing an existing local rule to accord with a model local rule on the subject–the districts appeared to be happy with their own version and saw no need to comply with a model not even required by a national rule. So one might question the utility of proposing a model rule, especially in an area that the districts have already covered with a local rule.

But there is a more fundamental objection to model local rules, often expressed by commentators on the subject: If a rule is good enough to be a model on a nationwide basis, why isn't it be good enough to be a national rule? Model local rules are problematic because they envision a national solution to a problem, and yet they bypass the rulemaking measures instituted by Congress for national solutions–indeed they bypass congressional review entirely. The probable response to this concern is that model local rules have been proposed to regulate only those particularized procedures that are in the nature of details–subject matter that is assertedly not appropriate to the more general coverage of a national rule. But if we are truly interested in stopping proliferation of local rules, and if we are truly interested in uniformity, and if model local rules further neither of those interests, then it might be time to consider adding more particularized and detail-oriented procedures to the national rules. After all, it is not as if the national rules are bereft of detail. See, e.g., Civil Rules 44, 45.

6. Amending National Rules to Provide a Uniform Federal Rule in Areas Where There is a Significant Amount of Local Rule Activity

The Local Rules Projects have identified a number of areas in which there is a particularly high amount of local rule activity. One example is procedures governing ADR; another is procedures governing simplified proceedings; a third category is all of those areas in which a model local rule has been proposed. It would seem that local rule proliferation would be substantially limited if a national rule were adopted in these areas of intense local rule activity. The local rules would then become either duplicative or inconsistent with the national rule, and a strong argument could then be made that those rules should be abrogated. Thus, the Advisory Committees might consider a project that would focus on areas of intense local rules activity highlighted by the Local Rules Project, to determine whether national rules should be proposed to cover those areas. The rejoinder, as discussed above, would be that all of these areas are in the nature of detail, somehow beneath the

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[5] This might distinguish the recently published model rules on electronic case filing. These rules were published merely to give the districts some drafting suggestions, because only a handful of districts had enacted ecf rules.

radar of the national rules. But again the response to that argument is that if we are truly interested in limiting the proliferation of the local rules, we might need to consider whether the national rules should be amended to cover more detailed procedures.

7. Limiting Local Rules to Certain Subject Matter

Professor Roberts has suggested an amendment to the Enabling Act that would limit local rules to certain subject matter.[6] His proposed subject matter limitations are: 1) Where a specific national rule authorizes local rulemaking on specific subject matters (e.g., pretrial conferences and case management under Rule 16); 2) Administrative matters concerning the court's own operation (e.g., hours of operation, how to file with the court, etc); 3) Attorney conduct rules;[7] 4) Rules concerning hearings and arguments on motions; 5) Rules concerning bonds, undertakings and fees; 6) Rules governing trial calendars; 7) Rules covering proceedings before magistrate judges; 8) Receiverships; 9) Rules governing the size of juries; and 10) Taxation of costs and awards of fees and expenses.

Professor Roberts' goal is essentially the same as that of the proposal that would limit local rules to those approved by a central authority upon a showing that they met a specific local need. The innovation in the Roberts approach is an attempt to define what subject matter will actually trigger a specific local need. If a subject matter approach is taken to limit local rulemaking, the matters to be placed on the list will obviously be a matter of debate.

8. Limiting the Number of Local Rules

A few years ago, a member of the Standing Committee, Judge Bill Wilson, made a motion to limit the local rules in any district to a certain (small) number, including a restriction on subdivisions. The intent of the proposal was to draw attention to the proliferation of local rules. This proposal was narrowly defeated. The real purpose of the motion was doubtless symbolic. A limitation on the number of local rules in any district is probably not a viable remedy for a number of reasons.

First, for reasons discussed above, a limitation on the number of local rules would be a controversial use of the rulemaking power, and might well require a statutory amendment. Second,

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[6] David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers,* 8 UNIV. PUGET SOUND L. REV. 537 (1985).

[7] Whether attorney conduct rules are properly dealt with by local rules, or should be the subject of uniform rulemaking, or a combination of both, is a matter currently under serious discussion by the Standing Committee's Subcommittee on Attorney Conduct. A full discussion of these matters is found in the first two chapters of McMorrow & Coquillette, *The Federal Law of Attorney Conduct.*

many local rules are currently either suggested or mandated by national rules (e.g., Civil Rule 16); it would not seem fair to limit the number of local rules when the national rules encourage or require them. Third, a numerical limitation would suffer from problems of definition. What does it mean to be a single local rule, or for that matter, a subdivision? What would stop a district from combining a number of separate rules, say, on discovery, into a single rule 26.1 with a large number of subparts, or a large number of separate rules in a single rule? Fourth, a numerical limitation is such an aggressive and undifferentiated attack on local rulemaking that it might lead district courts to move local rules into standing orders.

9. Authorizing Experimental Local Rules

One of the stated reasons for local rules– recognized in the Judicial Conference Long Range Planning Report– is that they provide a means of experimenting with new procedures that could lead to national solutions. The problem with local rulemaking as experimentation, however, is that the experiments are unregulated and unscientific. The "experiments" do not seem designed or controlled, but rather appear to be the result of an ad hoc decision to "try something different." And the results are not reliable because there is no attempt to root out possible alternative causes for perceived changes, no attempt to establish control groups, and no systematic effort to retrieve data. As Professor Chermerinsky has stated: "True experimentation should occur with strong central control . . . to assure that the experiments actually yield results and conclusions can be drawn across districts."[8]

One possible way to permit experimentation and yet limit local rule proliferation is to provide specifically for controlled experimentation with new procedures in a small number of district. In 1991, the Advisory Committee on Civil Rules proposed an amendment to Rule 83 that would have permitted district courts to experiment with local rules that conflicted with national rules; the rules would sunset after 5 years. Similar proposals have been made by several commentators. Professor Levin proposed a plan permitting local rules conflicting with national rules when approved by the Judicial Conference, upon a showing of "an experimental design that may be expected to yield valid data and to facilitate the collection and reporting of that data." His proposed legislation would provide for the involvement of the FJC in data gathering and number crunching. Professor Levin was convinced that controlled experimentation would limit the unnecessary proliferation of local rules because much of this proliferation occurred under the guise of experimentation:

> [T]he primary justification for tolerating uncontrolled inconsistency, the effort to remedy perceived defects, to improve conditions, would no longer exist since experimentation with the identical solutions, designed to the same end, would be available. In short, controlled inconsistency that promised useful results would replace uncontrolled inconsistency, which

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[8] Erwin Chermerinsky, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995) The nightmare scenario for experimentation was of course the CJRA, when 94 laboratories were ordered to experiment without any control or regulation. Proliferation of local rules abounded.

frequently has little to offer.[9]

The Advisory Committee withdrew its proposed "experimentation" amendment due to concerns that it was outside the authority granted by the Enabling Act. As discussed above, the argument for further regulation of local rules under Rule 83 and its counterparts is that section 2071 requires local rules to be "consistent" with the national rules, and because Rule 83 is a national rule, it can be changed through the rulemaking process to provide greater regulation of the local rules. This is a controversial argument, as discussed above, because it might be characterized as using national rulemaking power granted under section 2072 to regulate local rulemaking power granted under section 2071. As applied to experimental local rules, the use of Rule 83 is even more controversial, because Rule 83 would be used to authorize local rules that directly conflicted with other national rules. Professor Levin took the position that an amendment to the Enabling Act was required before local rules could be authorized to conflict with national rules. The Advisory Committee apparently came to agree with that position.

Recognizing that legislation is probably required, the fact remains that a system of limited, controlled experimentation might well be promising. National rulemakers could obtain concrete data that would be useful in determining whether a procedural innovation was worthy of a national rule. Experimentation could occur on a controlled basis in a small number of districts; this would avoid excessive proliferation of experimental local rules (as occurred under the CJRA) and yet would generate data that would be broader than what could be found in a single district. Most importantly, local rules in other districts outside the experimental programs could be pruned to the extent they are justified on experimental grounds. As Professor Levin states, controlled inconsistency could replace uncontrolled inconsistency.

10. Amending National Rules to Limit Unnecessary Invitations To Local Rulemaking

As discussed above, many of the national rules invite and even require local rulemaking. This is not necessarily a bad thing. For example, the invitation to local rulemaking in Civil Rule 16(c)(9) might be considered an appropriate recognition that districts may have different approaches to case management based on their particular dockets. On the other hand, a concern over local rule proliferation must recognize the fact that many of the local rules are in response to explicit invitation or mandate in the national rules. Accordingly, the Standing Committee might consider a project in which the Advisory Committees would review all federal rules that contain references to local rules, in order to determine whether such references are necessary to deal with unique local concerns. If that necessity standard is not met, consideration might be given to deletion of the reference to the local rule.

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[9] A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U.PA. L. REV. 1567 (1991)

11. Moving Detail-Oriented Local Rules Into Standard Operating Manuals

Many local rules are not really "rules" at all. As Professor Carrington notes:

> Local rules often include matters that the court uttering them does not expect to enforce judicially. For example, if the clerk's filing cabinets are built for eleven-inch paper, lawyers and parties must be informed that fourteen-inch documents may not be filed. However, transmissions of such local knowledge need not take the form of a command. They take that form chiefly because courts are accustomed to speaking only in the imperative voice. Local rules dealing with housekeeping in the clerk's office are therefore dispensable.[10]

Other examples of local rules that are not rules include provisions on the court's hours of operation and information on case assignment. On the one hand, these rules are not problematic, and might not be considered part of the problem of local rule proliferation, because they are not rules at all. On the other hand, to the extent these informational provisions are contained in local rules, they form part of the legal clutter that gives an appearance of disuniformity and uncontrolled local rulemaking. 5000 local rules is by most accounts an unacceptable number, regardless of the fact that the number might consist partly of rules that are not really rules.

If local rules on operating procedures and the like are deemed problematic, the Standing Committee might consider, as part of the Local Rules project, a venture that would encourage districts to shift such informational rules into standard operating procedures or manuals that would be available to all practitioners. The rules on electronic case filing provide a good analogy. The local rules govern the procedures for filing, service, attachments, etc., the violation of which are enforced judicially. The details of electronic case filing, such as software format, how to enter the website, etc., are set forth in an operating procedures manual that is made available to all practitioners using electronic case filing.

Conclusion

Any solution to local rule proliferation must first focus on what is wrong with "proliferation". Is it that the rules are duplicative? Inconsistent? Outmoded? Hard to find? Wrong-headed? Or are there simply too many local rules? Each of the possible remedies set forth for discussion in this paper may cover some of those concerns but not others. Some would require action well beyond the Standing Committee, such as congressional action or action by the Circuit Councils. The bottom line is that there is no easy solution to local rule proliferation.

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[10] Paul Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L. J. 929 (1996).

Experience shows that it is difficult to get judges to do something they don't want to do. Judges who write and apply rules that they are happy with are understandably reluctant to change. This is why the use of information through the Local Rules Project probably remains the most effective means of regulating local rules. For example, if a district judge is made aware that a local rule has become outmoded by intervening legislation, it seems likely that the judge will use that information voluntarily to effectuate change. On the other hand, if a district judge is told that all local rules must be approved by a national authority, the judicial reaction might well be different.

BOSTON COLLEGE

THE J. DONALD MONAN, S.J. UNIVERSITY PROFESSOR
LAW SCHOOL

Memorandum

To: Committee on Rules of Practice and Procedure (Standing Committee)

From: Daniel R. Coquillette, Reporter

Date: December 11, 2001

Re: Rules and Rulemaking: "Where We've Been and Where We Are Going

Rules and Rulemaking

I. Introduction

At the suggestion of the Chair, the Honorable Anthony J. Scirica, Friday morning of our 2002 Tucson meeting has been set aside. The purpose is to reflect on "where we've been and where we are going" in terms of "rules and rulemaking." We are most fortunate to have help in organizing this discussion from one of America's most prominent experts on law reform, Geoffrey C. Hazard, the Trustee Professor of Law in the University of Pennsylvania. Not only has Geoffrey Hazard led the American Law Institute through some of its most important projects, but he served as a most active and valuable member of the Standing Committee for many years. In addition, a group of distinguished former Chairs has returned to assist with this discussion. As of this date, these include the Honorable Eugene Davis, the Honorable Patrick Higginbothom, the Honorable Paul K. Niemeyer, and the Honorable Fern M. Smith. We are most grateful to them.

In 1995, the Standing Committee appointed a Subcommittee on Long Range Planning, consisting of Professor Thomas E. Baker and the Honorable Frank H. Easterbrook. On January 12, they presented an excellent report, *A Self-Study of Federal Judicial Rulemaking* (1996), published at 168 Federal Rules Decisions 680 (1996). The following outline of topics to be covered owes much to that excellent report.

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II. Topics:

It was agreed that we should focus our morning's discussion on five central topics. For each topic, a brief appendix has been added to provide some background.

Topic I, "Deliberative Procedure"

Professor Hazard has prepared a short memorandum attached as "*Appendix I.*" It is his view that the Rules Committee should be considering some fundamental changes in how they do their jobs. For example, instead of reacting to problems in a "piecemeal" way, perhaps it would be better to proceed with "large packages" over an extensive period of time. For example, perhaps the best way to deal with discovery problems is to re-examine F.R. Civ. P. Rules 26 to 37 in one major effort. The effect would be fewer small changes in the rules. When changes did occur, they would be infrequent, but very significant. [See Memorandum of Geoffrey C. Hazard, attached as "*Appendix I.*"]

Topic II, "Restyling"

In 1994, under the leadership of the Honorable Will L. Garwood and the Honorable Robert E. Keeton and the Reporter Carol Ann Mooney, the Advisory Committee on Appellate Rules and the Standing Committee undertook to restyle the Federal Rules of Appellate Procedure. In January 1996, these revised rules were published for comment. Also published in 1996 was *Guidelines for Drafting and Editing Court Rules* (1996) by the Committee's excellent consultant, Bryan A. Garner.

The success of the restyled Appellate Rules venture led to the restyling of the Federal Rules of Criminal Procedure, under the leadership of the Honorable Eugene Davis and Reporter David A. Schlueter. This, too, appears to be a major success.

The question now is "where to go from here?" One obvious question is whether the Federal Rules of Civil Procedure should be next. But restyling such a massive body of rules, used daily by hundreds of thousands of lawyers, present new difficulties.

In addition, it has been the goal of the Standing Committee to also "restyle" rules as they are changed "piecemeal." But this has led to problems of coordination and to process issues—such as whether an entire rule should be "restyled" when only a minor change is made. Are we doing the right thing with "piecemeal" restyling?

To assist in this discussion, excerpts from the Honorable Robert E. Keeton's "Preface" and the Honorable George C. Pratt's "Introduction" to Bryan G. Garner's *Guidelines for Drafting and Editing Court Rules* (1996) are attached as "Appendix II." In addition, a "restyled" version of F.R. Civ. P. 27, prepared four years ago as part of an experimental approach to restyling the Federal Rules of Civil Procedure, has been included. [See "*Appendix II.*"]

Topic III, "Response to Technological Change"

The "computer age" has brought both great opportunities, and new problems. These include "paperless" electronic filing and electronic discovery. These changes have been the focus of a Standing Committee Subcommittee, chaired ably by Gene W. Lafitte and now by the Honorable Sidney A. Fitzwater. Both have received invaluable assistance from Reporter Dan Capra. These changes have also been the focus of other Judicial Conference task forces, such as the Subcommittee on Electronic Filing Rules of the Committee on Court Administration and Case Management (hereafter "CACM") and the CACM Subcommittee on Privacy and Public Access to Electronic Case Files.

Are we responding appropriately to the challenges of the new technologies? To assist our discussion, the latest CACM "Report on Privacy and Public Access to Electronic Case Files" (April 25, 2001) and the latest CACM report of the Subcommittee on Electronic Filing Rules "Model District Court Rules for Electronic Case Filing" [May 8, 2001] are included in these *Agenda Materials*. [See "*Appendix III.*"]

Topic IV, "Committee Notes"

Over the past three years, there have been a series of informal discussions about the appropriate role of "Committee Notes." It has long been agreed that Committee Notes are the joint responsibility of the Advisory Committee and the Standing Committee, and should not be changed unless the rule is changed. But this can result in Committee Notes that are clearly misleading, due to case law or legislative changes. Further, Committee notes are increasing in length and complexity, and often include many case citations. Is this good or bad?

In 1998, Reporter Daniel J. Capra, with the support of the Advisory Committee on Rules of Evidence, published an excellent booklet, *Advisory Committee Notes to the Federal Rules of Evidence that May Require Clarification* (Federal Judicial Center, 1998). This booklet ably attempts to notify judges and practitioners of Committee Notes that had become misleading over time. This appears to be a good idea. Should it be done for other sets of rules?

To assist discussion, Daniel J. Capra's "The Problems Posed by Some of the Original Advisory Committee Notes" and "The Most Important Congressional Changes to the Advisory Committee's Draft Federal Rules" have been excerpted from his 1996 booklet and attached as "Appendix IV." [See *Appendix IV.*]

Topic V, "Simplified Rules of Federal Procedure"

For several years, the Advisory Committee on Civil Rules has been considering a most intriguing idea, simplified procedural rules to be applied to specific kinds of actions. Due to the inspired work of the former Chair, the Honorable Paul V. Niemeyer and the Reporter Edward H. Cooper, draft "Simplified Procedure" rules have already been proposed. These are clearly influenced by discussion drafts of the American Law Institute/UNIDROIT *Principles and Rules of Transnational Civil Procedure* (See Discussion Draft No. 2, April 12, 2001), a project in which Professor Geoffrey C. Hazard has been very active.

Is this a good idea? What kind of actions should be covered by such "simplified rules?" Should their application always be consensual? Is the Standing Committee being of adequate assistance to the Civil Rules Advisory Committees in developing these ideas? To aid discussion, Reporter Edward H. Cooper's "Simplified Rules of Federal Procedure?," soon to appear in the 100th Anniversary volume of the *Michigan Law Review*, is attached as "*Appendix V*" to this memorandum. [See "*Appendix V.*"]

Again, we are greatly indebted to Professor Hazard and the former Chairs for their participation in this important discussion.

Daniel R. Coquillette
Reporter

Appendix I

"Deliberative Procedure"

Memorandum of Geoffrey C. Hazard, the Trustee
Professor of Law in the University of Pennsylvania

(To be distributed in a later mailing)

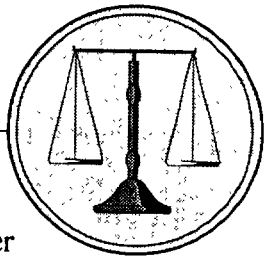
Appendix II

"Restyling"

(1) "Preface," by the Honorable Robert E. Keeton, and "Introduction," by the Honorable George C. Pratt from Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules*

(2) "Restyled" F.R. Civ. P. 27

GUIDELINES FOR DRAFTING AND EDITING COURT RULES



By Bryan A. Garner

Preface by Robert E. Keeton

1.

Federal Rules of Practice and Procedure ought to be user-friendly. This is the prime characteristic of good rules of procedure. They should be easy to read and understand — as clear in content and meaning as it is possible to make them, and as crisp and readable as clarity permits.

Of almost equal importance is another characteristic. Rules of procedure should be that and no more. They should be substantively neutral. In other words, we should draft procedural rules that neither favor nor disfavor any particular legal interest. To that end, we should do our best to foster institutional arrangements for resolving disputes about substantive issues in the appropriate forums for substantive lawmaking, and to keep substantive issues out of procedural rulemaking. Rules of practice and procedure are used in resolving individual cases and, at their best, are as fair, impartial, and substantively neutral as we can make them.

2.

Even superbly drafted rules are at risk of becoming less consistent, clear, and readable as they are amended. And the need for amendments is inevitable. The only effective remedy for the risks incident to amendment is twofold — eternal vigilance and a commitment to excellence in style as well as content. Fortunately, good style and good content reinforce each other.

3.

The first of the Federal Rules were the Rules of Civil Procedure, drafted in the 1930s. By the year 1990, we had five sets of Federal Rules — Appellate, Bankruptcy, Civil, Criminal, and Evidence — and five Rules Committees of the Judicial Conference of the United States — one each for Appellate, Bankruptcy, Civil, and Criminal (not for Evidence), and a coordinating committee commonly called the Judicial Conference Standing Committee on Rules. Each committee had its own set of consultants and drafters and its own set of stylistic preferences. The predictable result was five sets of

rules that sometimes said almost the same thing, but in different ways and without being clear about whether they meant the same thing. In addition, substantial differences existed both within and among the different sets of rules, without any explanation of why lawyers and judges should have to adjust to so many different ways of behaving in different court proceedings.

Lawyers and judges necessarily have spent — or wasted — precious time thinking, conversing, and writing about ambiguities in the rules. Occasionally a lawyer falls into a procedural trap and a client suffers an injustice that trial and appellate courts, giving due respect to the rules as construed, are unwilling or unable to redress.

4.

When I came to chair the Standing Committee in the fall of 1990, I was tempted by the thought that some of the enormous resources of time and talent being committed to making and interpreting rules might better be redirected. Some resources might be directed toward a long-term aim of combining all the separate sets of rules into one set, integrated in both style and content: the Federal Rules of Practice and Procedure.

Substantive integration would have the benefits of (1) reducing length by stating only once a rule of general application; (2) reducing complexity, even where repetition is warranted, by using precisely the same phrasing when expressing the same idea; and (3) improving clarity by explaining why different phrasing is used to address analogous problems in the different settings — for example, in bankruptcy, civil, and criminal rules. But substantive integration may prove to be an elusive ideal.

Stylistic integration, however, is a different matter: even with different sets of rules, there is much that rulemakers can do to sharpen style. Having a consistent drafting style in all the rules carries major benefits. Foremost among these, of course, is that clear expression promotes clear thought. Variation, elegant or not, impairs clarity: it is seldom commendable where clarity of meaning is paramount.

5.

Good writing of any kind is labor-intensive. Good legal writing is even harder work because content is paramount. One simply cannot arrive at good content without mastery of the subject matter.

Good drafting of a contract, statute, or procedural rule is at least as labor-intensive as good drafting of a judicial opinion, a lawyer's opinion letter, or an article because contracts, statutes, and rules serve as prescriptions for ongoing conduct and relationships. In this context, there must be a heightened sensitivity to such matters as striking an appropriate balance between rigor and flexibility, choosing between hard-edged rules and guidelines for discretion, and determining who among foreseeable actors is to be allowed discretion.

Undertaking to draft all federal rules so that they excel in style as well as content is, to say the least, daunting. The predictable reaction to the proposal to do so runs along these lines: "The federal rulemaking process, even though vested finally in Congress and the Supreme Court, depends in the first instance on volunteer committee members and overloaded staff — including reporters and Administrative Office support staff. Trying to make all federal rules consistent in style asks too much of both the volunteers and the staff." I fully agree that members and staff of the Judicial Conference Rules Committees are overloaded and underappreciated.

6.

Now that I am no longer a member of any of the Rules Committees, I feel free to add that, with two exceptions, I believe no other entities in our legal culture rival the Rules Committees for the impartial drafting of proposals for legislation or rules. The two exceptions are the American Law Institute and the National Conference of Commissioners on Uniform State Laws — both of which are committed to excellence in drafting.

With a view to the importance of style, in 1991 the Standing Committee on Rules of Practice and Procedure created a Style Subcommittee. Its charge was to review the drafting style of all amendments to federal rules. Because of the importance of this new undertaking, we needed a leader with a demonstrated sense of good writing style. Fortunately, Charles Alan Wright, a dedicated stylist whose writings rank with the best in legal literature, was then serving on the Standing Committee. He accepted the appointment to chair the Style Subcommittee. To serve as the original members of the Subcommittee, I invited Judge George C. Pratt, of the Second Circuit; Judge Alicemarie H. Stotler, of the United States District Court in Santa Ana, California, who now chairs the Standing Committee; and Joseph F. Spaniol, Jr., the former Clerk of the United States Supreme Court. I participated in the Subcommittee's work, ex officio, during 1991–93.

Not long after the Subcommittee began its work, we realized just how time-consuming — and arduous — the detailed work on the rules would be. We saw the need for a style consultant, and with the support of L. Ralph Mecham, Director of the Administrative Office of the United States Courts, we were able to engage Bryan A. Garner, whose books on legal writing the members of the Style Subcommittee were frequently consulting.

Initially, the Style Subcommittee worked on amendments only, but the value of the work was so readily apparent that the Style Subcommittee was asked to produce fully restyled drafts of two sets of rules: the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. The Style Subcommittee finished preliminary versions of the Civil Rules in 1992, and of the Appellate Rules in 1994.

In the course of those two major projects, however, the membership of the Style Subcommittee had changed. When Professor Wright asked to be relieved of this responsibility upon assuming the presidency of the American Law Institute in 1993,

Judge George C. Pratt became the new chair. And when, that same year, Judge Stotler began chairing the Standing Committee, she likewise resigned from the Style Subcommittee. To fill the two open positions, Judge Stotler appointed Judge James A. Parker, of the United States District Court in New Mexico, and Professor Geoffrey G. Hazard, Jr., of the University of Pennsylvania.

In the fall of 1995, Judge Pratt's term on the Standing Committee expired, and Judge Parker became chair of the Style Subcommittee. Meanwhile, Judge Stotler appointed Judge William R. Wilson, Jr. as a member.

Every member of the Style Subcommittee has served with extraordinary skill and energy.

An important part of the subcommittee's work is to call attention to ambiguities of substantive meaning. But the subcommittee does not make substantive recommendations because the Standing Committee and the five Rules Committees (a Committee on Evidence having been added) are responsible for substantive recommendations.

Despite some initial reservations among committee members about the scope of this undertaking regarding style, the several committees have cooperated generously. This team effort has already developed restyled drafts of Civil Rules and Appellate Rules. These drafts dramatically illustrate how readable and easily comprehensible court rules can be — if, that is, the drafters devote themselves to the clearest possible style.

7.

Out of this team effort has evolved, in addition to early model drafts, another product — the *Guidelines for Drafting and Editing Court Rules.* I am delighted and encouraged that this publication will now be available to everyone who has an interest in improving the quality of legal writing.

Improving and maintaining the style of Federal Rules of Practice and Procedure is a long-term project. The early drafts have already demonstrated, in my view, that benefits far outweigh costs. Also, I believe we can maintain a continuing enterprise whose primary resources are the time and energy of talented professional volunteers — members of the rules committees of the Judicial Conference of the United States. This is the group who, with painstaking care, will examine every proposal suggested to them by the Style Subcommittee and will then recommend to the Judicial Conference and the enacting authorities proposed Rules that excel in style and readability as well as fair and impartial content.

–ROBERT E. KEETON
U.S. District Judge
Boston, Massachusetts

Introduction by George C. Pratt

When Judge Robert E. Keeton, then Chair of the Judicial Conference's Standing Committee on the Rules of Practice and Procedure, asked me to join Professor Charles A. Wright, Judge Alicemarie H. Stotler, and Joseph F. Spaniol, Jr. on a new Style Subcommittee, I expected the work to be a relatively mundane experience of scouting for inconsistencies, typographical errors, and occasional grammatical slip-ups in the existing rules of practice. Working with Professor Wright, however, was an opportunity I couldn't pass up. His treatise on federal courts had been my bible for many years on both the district and circuit courts, and I envied his clarity of expression and his simple, direct style. I knew I could learn a lot, and perhaps our work might be useful to the entire rules process.

Developing the Guidelines

The Style Subcommittee began its work by reviewing a series of amendments that were being proposed by the four advisory committees. Very soon, however, we recognized a need for guiding principles and a more systematic process. With the aid of our consultant, Bryan A. Garner, we initially agreed on and outlined some basic goals, and then more specific guides for achieving those goals. Our goals, which should apply to all legal writing, were clarity, brevity, and readability.

For clarity, we sought to express rules in terms and in a form that could most accurately express the idea behind the rule. This meant avoiding ambiguities and developing consistent modes of expression. Readability, we found, could be enhanced by using an outline format, applying it consistently, keeping sentences relatively short, and adhering to a series of conventions on how to treat exceptions, conditions, and qualifying phrases. Brevity is always a hallmark of good legal writing. While we consciously worked for it by eliminating all unnecessary words and searching for shorter, more accurate expressions, in many instances we found that our quest for clarity and readability had automatically given us brevity through shorter, more tightly written rules.

We reached a turning point when the subcommittee agreed to undertake a complete reworking of two set of rules — civil and appellate. We began with the civil rules. Our procedure was to have Bryan Garner first do a restyled version of an entire set of rules. Then the subcommittee would separately review his work, looking first for any inadvertent substantive changes but also making further suggestions on style. Next, we would put our collective thoughts into a final version, which the subcommittee, with an occasional additional edit, would approve for eventual submission to the Civil Advisory Committee.

Having successfully followed that process, we have now completed a restyled version of the appellate rules and substantial work on the civil rules. For various reasons, the appellate rules have moved more swiftly through the Advisory Committee, and in January 1996 the Standing Committee voted unanimously to publish those rules for comment by the bench and bar. As of early 1996, the appellate rules represent a bellwether for the desirability of revising sets of federal rules for clarity and consistency. Ultimately, a restyled set of rules is subject to approval by the Judicial Conference and the Supreme Court, and to review by Congress.

When the Style Subcommittee first went to work, we realized after a few conferences that the matters we were discussing, debating, and agreeing upon represented valuable conventions for our work, and that they needed to be preserved and collected in a coherent, organized manual. We asked Bryan Garner to undertake that task, using his notes from the hundreds of edits and decisions that the subcommittee had already made. Bryan has now formalized his work into this manual, *Guidelines for Drafting and Editing Court Rules.*

Using the Guidelines

The subcommittee has found the Guidelines to be invaluable. They provide a handy reference to the conventions we have previously addressed and agreed on. When Professor Wright and Judge Stotler left us for higher callings, their replacements, Judge James A. Parker and Professor Geoffrey G. Hazard, Jr., quickly picked up the nature and direction of our work by referring to the Guidelines, which permit us to operate from a common base of understanding.

Bryan Garner has always worked closely with the reporters of the respective advisory committees. Using the Guidelines, the reporters now draft their proposed amendments and new rules following what has rapidly become the accepted style for federal rules.

The potential value of these Guidelines is not restricted to federal rulemaking. They could fruitfully be applied to the practice codes and even the substantive statutes of the various states. Even local ordinances would benefit from their use. When clarity and readability of statutes and rules increase, the need for litigation over meaning decreases and voluntary compliance increases.

Outside the rulemaking area, many types of legal drafting — contracts, opinion letters, and even judicial opinions — might be improved if legal writers followed these Guidelines. And it goes without saying that these Guidelines could provide a core for teaching legal writing and legal drafting — areas in which law-school graduates are notoriously deficient.

Lessons Learned from the Style Process

Working on the Style Subcommittee has underscored a number of lessons for many of us. Three in particular stand out in my mind. First, legal drafting is not easy; it is a demanding, exacting discipline that requires careful and constant attention. Second, if the result of any drafting effort is to be successful, style must be an integral part of the process. Third, paying attention to writing style requires us to clarify our own thinking. Clear style demands clear thinking, which is a prerequisite to any effective legal writing.

The Style Subcommittee is grateful to Bryan Garner for his inspiration and guidance through our labors on restyling the rules. His *Guidelines for Drafting and Editing Court Rules* will not only help us as we continue working through demanding, exacting revisions of all of the rules; they also will provide continuing benefit to future members of the rules committees and ultimately, through the clarity and readability that these Guidelines can produce, to the legal profession as a whole.

–GEORGE C. PRATT
Retired Judge of the U.S. Court
of Appeals for the Second Circuit and Former
Chair of the Style Subcommittee

Rule 27. Depositions before Action or Pending Appeal	RULE 27. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL
(a) Before Action. (1) Petition. A person who desires to perpetuate testimony regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.	(a) Before Action.[1] (1) Petition. A person who wants to perpetuate testimony regarding any matter that may be cognizable in any court of the United States may file a verified petition in the district court for the district where any expected adverse party resides. The petition must request an order authorizing the petitioner to depose the named examinees. The petition must be titled in the petitioner's name and must show: (A) that the petitioner expects to be a party to an action cognizable in a court of the United States but cannot presently bring it or cause it to be brought; (B) the subject matter of the expected action and the petitioner's interest in the action; (C) the facts that the petitioner wants to establish by the proposed testimony and the reasons for wanting to perpetuate it; (D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, to the extent known; and (E) the name, address, and expected substance of the testimony of each examinee.
(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.	(2) Notice and Service. At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and notice, stating the time and place of the hearing on the petition. The notice may be served either inside or outside the district or state under Rule 4. But if that service cannot be made with due diligence on any expected adverse party, the court may order service by publication or otherwise. For a person not served under Rule 4 and not otherwise represented, the court must appoint an attorney to represent the person and cross-examine the deponent. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

1. The word "motion" is ordinarily used to refer to applications and requests. But in subdivision (a) of this rule, the word "petition" is retained as more appropriate, since made before any action has been filed.

(3) **Order and Examination.** If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.	(3) **Order and Examination.** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must enter an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions are to be taken orally or upon written questions. The depositions may then be taken according to these rules, and the court may make orders under Rules 34 and 35.
(4) **Use of Deposition.** If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).	(4) **Use of Deposition.** If a deposition to perpetuate testimony is taken under these rules or if, though not so taken, it would be admissible in evidence in the courts of the state where it is taken, it may, under Rule 32(a), be used in any action involving the same subject matter if the action is later brought in a federal district court.
(b) **Pending Appeal.** If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.	(b) **Pending Appeal.** The district court in which a judgment has been rendered may, within the time for taking an appeal or after an appeal has been taken, allow a party to take witnesses' depositions to perpetuate their testimony for use in further proceedings in district court. (1) The party wanting to perpetuate testimony may move the district court for leave to take the depositions, upon the same notice and service as if the action were pending in that court. The motion must show: (A) the names and addresses of the deponents and the expected substance of each one's testimony; and (B) the reasons for perpetuating their testimony. (2) If satisfied that perpetuating the testimony is proper to avoid a failure or delay of justice, the court may allow the depositions to be taken and make orders under Rules 34 and 35. The depositions may then be taken and used as if taken in an action pending in a district court.
(c) **Perpetuation by Action.** This rule does not limit the power of a court to entertain an action to perpetuate testimony.	(c) **Perpetuation by Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony.

Appendix III

"Response to Technological Change"

Reports of the Committee on Court Administration and Case Management ("CACM")

(1) "Report of the Judicial Conference Committee on Court Administration and Case Management's Subcommittee on Privacy and Public Access to Electronic Case Files" (April 25, 2001)

(2) "Model Local District Court Rules for Electronic Case Filing." Approved by Judicial Conference (Sept. 2001)

(Both items are located behind Tab 11)

Appendix IV

"Committee Notes"

Daniel J. Capra, Philip Reed Professor of Law, Fordham School of Law, "Introduction" and "The Most Important Congressional Changes to the Advisory Committee's Draft Federal Rules," from *Advisory Committee Notes to the Federal Rules of Evidence that May Require Clarification* (Federal Judicial Center, 1998), pp. 1-23.

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Memorandum To: Advisory Committee on Evidence Rules and Other Interested Parties
From: Dan Capra, Reporter
Re: Advisory Committee Notes Project
Date: September 1, 1998

Two years ago, the Committee decided that it wanted to do something about the fact that many of the original Advisory Committee Notes to the Federal Rules of Evidence are either incorrect or misleading. The main problem was that Congress had changed or refused to enact many of the Advisory Committee's proposals, meaning that the Committee Notes provided comment on many proposals different from those eventually enacted.

The Committee ultimately agreed that the Reporter would prepare a report on the problematic Committee Notes. The goal was to have the report published for distribution to publishers of the Federal Rules of Evidence, as well as to the Bench and Bar.

Enclosed is the culmination of this project--a report written by me and published by the Federal Judicial Center. The report will be widely distributed, and it will also be republished in the Federal Rules Decisions and in Wright and Miller.

I would like to thank the Committee for the opportunity to do this project. Also, special thanks are due to Joe Cecil and David Marshall of the Federal Judicial Center, without whom the publication would not have been possible.

Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification

DANIEL J. CAPRA

Reed Professor of Law
Fordham University School of Law

FEDERAL JUDICIAL CENTER
1998

Introduction

The Problem Posed by Some of the Original Advisory Committee Notes

Assume that a lawyer is reading one of the Federal Rules of Evidence to determine whether a piece of evidence will be admissible or excluded at trial—for example, whether testimony from another trial can be admitted at a current trial. Assume further, as is not improbable, that the lawyer finds the language of the rule unclear. Thus, in our example, the relevant rule calls for admissibility if a party's "predecessor in interest" had a similar motive and opportunity to develop the testimony of the witness at the previous trial—but what does "predecessor in interest" mean?

Most lawyers faced with statutory ambiguity would seek clarification from some ready source of legislative intent. As it happens, the Federal Rules of Evidence have a ready source: the Advisory Committee Notes. These notes are printed by virtually every publisher of the Federal Rules of Evidence.

The Advisory Committee Notes are indeed *usually* a good source for determining the meaning of an evidence rule. In the 1970s, the Advisory Committee on Evidence Rules prepared a complete draft of proposed Federal Rules of Evidence. This draft was approved by the Judicial Conference of the United States, and then approved by the Supreme Court for referral to Congress. The original Federal Rules of Evidence were the product of the rule-making process established by Congress in the Rules Enabling Act, 28 U.S.C. § 2072.

A problem arises, however, where the rule drafted by the Advisory Committee was either rejected or substantially changed by Congress. Where that is the case, the Advisory Committee Note on the effected rule is a commentary on legislation that never came into being. A lawyer who looks at the Advisory Committee Note for guidance may become confused, or worse, when the Advisory Committee Note conforms by number, but not in substance, to the rule ultimately adopted.

While the most serious problem in reviewing the Advisory Committee Notes is their occasional dissonance with some of the rules actually adopted, there are other discrepancies in the original notes that must also be recognized. Some of the notes have cross-references to rules that were never adopted; some cross-references are simply erroneous. There

are also some "typos" that if read literally change the meaning of particular notes in a way not intended by the drafters.

The recently reconstituted Advisory Committee on Evidence Rules, which this author currently serves as reporter, has from its inception expressed an interest in correcting those original Advisory Committee Notes that might mislead lawyers and courts. The committee explored various means of achieving this goal, including the possibility of providing completely new Advisory Committee Notes to all the Federal Rules of Evidence. The committee ultimately determined, however, that the original Advisory Committee Notes could not be changed by way of rule making—nor would change even be advisable with respect to most of the notes. The Advisory Committee concluded that the original notes are invaluable legislative history, even if they are misleading in spots. Moreover, the committee concluded that the notes could not be amended through the rule-making process—if the notes were to be definitively changed or updated, it would have to happen in conjunction with changes to the rules themselves. And there was, understandably, no interest in a complete recodification of the Federal Rules of Evidence. A massive recodification effort would undoubtedly create more problems—by upsetting settled expectations and by creating inadvertent changes—than would be solved.

The Advisory Committee finally resolved to take a less drastic course—a course that would not require an amendment of any rules and yet would inform judges and lawyers about inaccurate or outmoded Advisory Committee Notes. The committee directed the reporter to prepare a list of Advisory Committee Notes that might be considered outmoded by congressional changes to a rule, or that were simply incorrect when written. The objective was to send this list to publishers of the Federal Rules of Evidence, so that it might be included either as an appendix or as a series of editorial notes to be placed within the respective Advisory Committee Notes that needed to be corrected.

At the Advisory Committee meeting where the reporter submitted the list of editorial comments, Joe Cecil of the Federal Judicial Center suggested that the Center might prepare the reporter's list as a pamphlet for publication. The Advisory Committee agreed wholeheartedly with this proposal, and expresses its gratitude to Joe and the Federal Judicial Center for all the work that has been contributed to this project.

This publication is styled as a set of editorial comments to the particular Advisory Committee Notes that are either inaccurate as written or that became outmoded when the proposed rule was changed by Congress. The proposed editorial notes are placed immediately after the statement in the original Advisory Committee Note that is inaccurate or misleading. In order to save space, the original Advisory Committee Notes are not reprinted *in toto*. Only the portions of the notes that need correcting are reproduced.

The Most Important Congressional Changes to the Advisory Committee's Draft Federal Rules

What follows, by way of introduction, is a short discussion of some of the major changes that Congress made to the Federal Rules of Evidence as proposed by the Advisory Committee. These are the rules that pose the most serious risk of misunderstanding when compared to the original Advisory Committee Notes.

1. Judicial Notice—Rule 201(g)

Federal Rule 201(g) determines the instructions that a court must give when a fact satisfies the standards for judicial notice proscribed in Rule 201(b). (Rule 201(b) provides that a fact is subject to judicial notice when it is not subject to reasonable dispute, either because it is generally known within the jurisdiction or because its accuracy can be readily determined by reference to unimpeachable sources.) The Advisory Committee Note to Rule 201(g) states as follows:

> Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases.

In fact, however, the rule *does* distinguish between civil and criminal cases. In civil cases, the jury must accept a judicially noticed fact as conclusive; in criminal cases, the court must instruct the jury "that it may, but is not required to, accept as conclusive any fact judicially noticed." Congress rejected the Advisory Committee proposal on the ground that a mandatory instruction was "contrary to the spirit of the Sixth Amendment right to a jury trial."

2. *Presumptions—Rule 301*

Federal Rule 301 provides that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." The rule is the culmination of a battle between two conflicting views of the effect a presumption should have. The views are known by the law professors who propounded them. Under the "Morgan" view, a presumption shifts the risk of nonpersuasion to the party against whom the presumption operates. Thus, if there is a presumption that a mailed letter is received, the party claiming non-receipt has the burden shifted to it to prove, by a preponderance of the evidence, that the letter was never received. In contrast, under the "Thayer" view, the opponent must merely offer credible evidence sufficient to support a finding contrary to the presumed fact in order to take the presumption out of the case. (The Thayer view has been termed the "bursting bubble" view of presumptions, because the presumption "bursts" when contrary evidence as to the presumed fact is introduced.) The practical difference between these views is in the quality and quantity of evidence required to overcome the presumption.

The Advisory Committee Note to Rule 301 is essentially a brief for the Morgan view of presumptions. It states that presumptions under the rule are given "the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it." The Advisory Committee reasoned that presumptions are based on a combination of probability and fairness. If that combination of factors is strong enough to warrant a presumption, it should also be strong enough to shift the risk of nonpersuasion to the party against whom the presumption operates. The Advisory Committee Note has this to say about the Thayer view:

> The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect.

The problem with the note is that Congress rejected the Advisory Committee's view of the matter. Rule 301 adopts the "bursting bubble"

view of presumptions—the party against whom the presumption operates need only present evidence sufficient to support a finding contrary to the presumed fact. When that occurs, the presumption vanishes from the case. Thus, a lawyer operating with a presumption in her favor should not rely on the Advisory Committee Note; if she did, she would have a misplaced confidence in the ability of the presumption to withstand contrary evidence.

3. *Rule 406—Proof of Habit*

Rule 406 provides that evidence of habit is admissible to prove conduct in accordance with the habit. The Advisory Committee Note to Rule 406 refers to a subdivision (b) of the rule governing the permissible methods of proving habit. The note states that habit can be proven only through opinion evidence or by proof of specific instances of conduct.

The problem is that there is no subdivision (b) to Rule 406. Congress believed that the method of proof of habit should be left to the courts on a case-by-case basis. So the Advisory Committee Note should not be relied on as a correct statement of the only possible means of proving habit. For example, habit could potentially be proven through reputation evidence.

4. *Rule 501—Privileges*

The rules on privilege provide the most notable example of Advisory Committee proposals that were rejected by Congress. As originally approved by the Supreme Court, Article V of the Federal Rules contained thirteen proposed rules. These rules defined nine separate privileges and delineated certain rules for controlling the use of privileges. Congress rejected the proposed Article V in its entirety. In its place, Congress adopted a single rule on privileges, Rule 501, which provides that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," except where state law provides the rule of decision, in which case the state law of privilege applies.

So a lawyer looking to the Advisory Committee Note for Rule 501 in particular, and the notes on Article V in general, would be looking to commentary on rules that were never adopted. This is not to say, however, that the Advisory Committee Notes to Article V are worthless or necessarily misleading in all respects. Most courts have held that the rec-

ommendations of the Advisory Committee and the Supreme Court are a useful guide, though not controlling in determining the existence and scope of a federal privilege. As Judge Edward Becker put it:

> [T]he proposed rules prove a useful reference point and offer guidance in defining the existence and scope of evidentiary privileges in the federal courts. . . . The Standards are the culmination of three drafts prepared by an Advisory Committee consisting of judges, practicing lawyers and academicians. . . . Finally, they were adopted by the Supreme Court. . . . The Advisory Committee in drafting the Standards was for the most part restating the law currently applied in the federal courts.

In re Grand Jury Investigation, 918 F.2d 374, 380 (3d Cir. 1990) (adopting a clergy–penitent privilege and relying on the Advisory Committee's proposed rule). *See also United States v. McPartlin,* 595 F.2d 1321 (7th Cir.), *cert. denied,* 444 U.S. 833 (1979) (applying the common-interest rule of the attorney–client privilege, citing proposed Rule 503(b)(3): "Although the Congress, in its revision of the Federal Rules of Evidence, deleted the detailed privilege rules . . . the recommendations of the Advisory Committee, approved by the Supreme Court, are a useful guide to the federal courts in their development of a common law of evidence.").

Similarly, in *Jaffee v. Redmond,* 116 S. Ct. 812 (1996), the Court, in adopting a psychotherapist–patient privilege, relied heavily on the fact that it was one of the nine specific privileges originally recommended by the Advisory Committee. The Court also stressed the reverse proposition—that if a privilege was not one of those proposed by the Advisory Committee, this would cut against its recognition under federal common law.

While the Advisory Committee Notes to Article V can provide some guidance, it would not be wise to treat the Advisory Committee proposals, or the notes, as a totally accurate description of federal common law. For example, federal common law protects confidential marital communications, while the proposed federal rule (505) did not. Under Rule 501, the common law governs and the privilege for confidential marital communications continues, something one would not know from looking at the proposed federal rule and its accompanying note. Moreover, the proposed marital privilege rule gave the criminal defendant the right to bar a spouse's testimony, whereas the Supreme Court has now held that the testifying spouse has the sole right to claim the spousal immunity privilege. *Trammel v. United States,* 445 U.S. 40 (1980). Also, proposed Rule

512, in conjunction with proposed Rule 511, would have provided more protection for privileged communications disclosed erroneously or overheard improperly than many common-law decisions. Finally, even in *Jaffee,* the Court, by extending the privilege to cover statements to social workers as well as statements to psychotherapists, went further than the Advisory Committee's proposal.

In sum, the Advisory Committee Notes to Article V provide one source for determining the federal law of privileges; but the source should not be given undue weight. And the specific Advisory Committee Note to Rule 501 has nothing at all to do with the rule ultimately adopted.

5. Rule 601—Competence

Rule 601 is a broad rule providing that every witness is presumed competent. The rule proposed by the Advisory Committee had only one sentence: "Every person is competent to be a witness except as otherwise provided by these Rules." The intent of the Advisory Committee was to wipe out all the ancient rules of incompetency—most particularly the Dead Man's statute. Dead Man's statutes generally provide that a person interested in an action brought against the estate of a dead person is incompetent to testify in his own behalf or interest as to a transaction or communication between himself and the dead person. The Advisory Committee Note to Rule 601 states that the "Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind."

The Advisory Committee thought, correctly, that Dead Man's statutes are misguided. Under the Dead Man's Rule, a person is disqualified from testifying because it is thought that he will be able to lie on the witness stand without the possibility of contradiction from someone now dead. Yet this is really a concern over credibility, that the factfinder is easily able to comprehend, and that can be addressed adequately through argument. For every piece of fraudulent testimony screened out by the Dead Man's statute, there are probably three or more meritorious claims that are dismissed because of the failure of proof. Moreover, the Dead Man's statutes are so complicated that they give rise to much wasteful litigation as to their precise meaning. For example, the New York Dead Man's statute uses over 300 words to establish a rule of incompetency; not surprisingly, there are hundreds of reported cases attempting to di-

vine the meaning of the New York Dead Man's statute. (For a discussion of the New York statute, see Martin, Capra & Rossi, New York Evidence Handbook, ch.6, Aspen Press 1997.)

So the Advisory Committee was undoubtedly correct to condemn Dead Man's statutes and to reject them in proposed Rule 601. The problem, however, is that many states still have a Dead Man's statute. The Advisory Committee proposal left no room for state Dead Man's statutes, even where state law provided the rule of decision in federal court. The Advisory Committee Note to Rule 601 specifically declares that state Dead Man's statutes are not to have effect in diversity cases. Congress, however, was concerned that Dead Man's statutes represent state policy which should not be disregarded in diversity cases. Therefore, Congress added a second sentence to Rule 601, providing that "in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." Thus, the Advisory Committee's Note is incorrect in its comment on the inapplicability of state Dead Man's statutes in diversity cases.

6. Rule 608—Impeachment with Bad Acts

Rule 608 provides for impeachment of a witness's character for veracity. Rule 608(b) states that a witness's character can be attacked through specific instances of misconduct on the witness's part. Thus, a witness can be asked on cross-examination about his having lied to Congress. The inference is that if he lied to Congress, he has a propensity to lie, and therefore he is more likely to be lying on the witness stand. The Advisory Committee's proposed Rule 608 permitted specific instances of conduct to be brought out on cross-examination of the witness being attacked, within the discretion of the trial judge, if probative on the witness's character for veracity, "and not remote in time." The Advisory Committee Note to Rule 608, provides, correspondingly, as follows:

> Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time.

Congress, however, deleted the language precluding the use of acts remote in time to impeach a witness's character for veracity. Congress was

of the view that the reference to remoteness in time was confusing—would remoteness be determined by the time between the bad act and trial, or the time between the bad act and the incident involved at trial? Congress believed that the reference to judicial discretion in the rule was sufficient to protect against impeachment with truly stale bad acts.

Counsel confronted with bad acts of a witness that have occurred years before the trial should not place much reliance on the Advisory Committee's proposed total exclusion of acts that are remote in time. Congress's reference to judicial discretion is the key to making an argument to admit or exclude bad acts that occurred long ago. Contrary to the Advisory Committee's implication, there are no ironclad rules. Cases can be found admitting acts that might well be considered "remote in time." For example, in *United States v. Jackson,* 882 F.2d 1444 (9th Cir. 1989), the court found no error when the defendant, a disbarred lawyer charged with mail and tax fraud, was impeached with his acts of misappropriating client funds fourteen years earlier. The defendant argued that the acts could not be the subject of impeachment because they were "remote in time." The court found that while remoteness is a relevant factor, there is no time limit in Rule 608(b), and that the court did not abuse its discretion in allowing inquiry into the bad acts. The acts were clearly probative of the defendant's character for veracity. On the other hand, in *United States v. Kennedy,* 714 F.2d 968 (9th Cir. 1983), the court held that a witness's involvement with the Hell's Angels ten years earlier was properly excluded, the court remarking that the bad acts "detracted only minimally" from the witness's credibility.

Thus, remoteness, while not dispositive as it would appear to be under the Advisory Committee's Note, remains an important factor because the older the act, the less it says about the witness's current propensity to lie on the stand. Still, if the act occurred long ago and yet evidences dishonest character, it may be sufficiently probative to justify consideration by the factfinder.

7. Rule 609—Impeachment With Prior Convictions

Rule 609 provides that certain prior convictions of a witness can be introduced to impeach the witness's character for veracity. As originally drafted by the Advisory Committee and approved by the Supreme Court, rule 609(a) provided for automatic admission of all felony convictions, unless it had been more than ten years since the conviction or the witness's

confinement thereon, in which case Rule 609(b) provided that the conviction would be absolutely inadmissible. The rule further provided for admissibility of misdemeanor convictions, but only if they involved dishonesty or false statement. The Advisory Committee Note sets forth opposing views on the admissibility of prior convictions. One view, which Congress had previously adopted for the District of Columbia courts, provided for automatic admission of all felonies, and automatic admission of misdemeanors based on dishonesty or false statement. A more moderate view provided that crimes involving dishonesty should be automatically admitted, while other convictions (e.g., murder, bank robbery, etc.) should be excluded. The judgment behind this latter view was that only convictions involving dishonesty or false statement (also called "crimen falsi" convictions) were truly probative of the witness's character for truthfulness. A third view provided, in the words of the Advisory Committee, that "the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965)."

The Advisory Committee expressed no view on the merits of these conflicting proposals. It opted for the automatic admissibility view because Congress, in 1970, had taken this position in providing rules of evidence for the District of Columbia courts. See section 14-305 of the District of Columbia Code. Rule 609(a) was "drafted to accord with the congressional policy manifested in the 1970 legislation."

Apparently Congress had a change of heart on the matter when it reviewed the proposed Federal Rules of Evidence. As to automatic admission of felonies, the House Committee on the Judiciary report expresses concern over "the danger of unfair prejudice . . . and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused" that would result from automatic admission of all felony convictions for impeachment. The House's position was that *only* crimen falsi crimes should be admissible. Eventually, Congress settled on a modified approach in Rule 609(a), whereby all recent crimen falsi crimes would be automatically admitted, while felony convictions not involving dishonesty or false statement would be admissible if they pass a judicial balancing of probative value and prejudicial effect; criminal defendants receive a somewhat more protective balancing test with respect to non-crimen falsi crimes, in deference to their

constitutional right to testify. (The balancing process for non-crimen falsi crimes was clarified by a 1990 amendment to Federal Rule 609(a)(1).)

The end result is a complex rule. Anyone seeking to master it should not rely on the original Advisory Committee Note, however—it is completely out of sync with the rule as passed and later amended, since it describes the rule as automatically admitting all recent felony convictions, which is not the case. The Advisory Committee Comment to the 1990 amendment to Rule 609(a) is a far more accurate guide to the rule.

As to old crimes (i.e., where more than ten years have passed since conviction or confinement), Congress decided, contrary to the Advisory Committee's position, that they could have probative value in assessing the credibility of a witness. The Senate Committee on the Judiciary stated that "[A]lthough convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness." Accordingly, Rule 609(b) as adopted states that if more than ten years have passed since the date of conviction or confinement (whichever is later), the conviction can be admitted to impeach the witness, but only if the probative value of the conviction substantially outweighs the risk of prejudice. Yet the Rule 609(b) test, while exclusionary, does not exclude all old convictions. Thus a lawyer attempting to divine the meaning of Rule 609(b) should not look to the Advisory Committee Note—she would get the mistaken impression that convictions more than ten years old can never be admitted.

8. Rule 611(b)—Scope of Cross-Examination

There are basically two views concerning the proper scope of cross-examination of a witness. The "English Rule" states that the cross-examiner should be free to inquire about any information relevant to the case; in contrast, the traditional "American Rule" is that the cross-examiner may only ask questions that concern the subject matter of the direct examination (with the exception, of course, of questions pertaining to the witness's credibility). An illustration of the difference is instructive. Assume a wrongful death case in which the plaintiff is suing for the death of his wife. The plaintiff calls the next door neighbor who testifies that he saw the decedent walking across the street in front of her house whereupon she was run down by the defendant's bakery truck. On cross-examination, defense counsel wants to inquire into the neighbor's knowl-

edge of any extramarital affairs that the plaintiff had during the course of the plaintiff's marriage. Under the English Rule, this would be perfectly permissible; the information is relevant to the damages that the plaintiff has suffered from the loss of his wife. Under the American Rule, the information is, of course, equally relevant, but it cannot be brought up on cross-examination. The subject matter of direct dealt with the accident, which is a question of liability. The subject matter of the proposed cross-examination goes to damages.

The rationale for the American Rule is that a party generally should be free to follow its own order of proof without distraction from the adversary. The American Rule does not, of course, prevent the adversary from ever inquiring into a subject matter beyond the scope of a witness's direct examination. It operates simply as a timing device. The solution for the adversary is to call the witness to testify again during its own case.

The Advisory Committee opted for the wide-open cross-examination model in its proposed Rule 611(b), with the proviso that the trial judge would have discretion, in the interests of justice, to "limit cross-examination with respect to matters not testified to on direct examination." Quoting McCormick, the note states: "The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only."

Despite this cogent argument, Congress rejected the Advisory Committee's proposal. In essence, Congress reversed the presumption in the Advisory Committee's proposed rule. As promulgated, Rule 611(b) limits cross-examination to the subject matter of direct and to questions of credibility, but grants the trial judge discretion to expand the scope of cross-examination in a particular case. Congress' position, as expressed by the House Committee on the Judiciary, was that the traditional American Rule "facilitates orderly presentation by each party at trial." The safety valve of judicial discretion was included to limit the hair-splitting arguments as to the proper "scope of direct" at trial and on appeal, that would otherwise surely occur under the American Rule. The result is that a lawyer seeking to determine the proper scope of cross-examination should not refer to the Advisory Committee Note.

9. Rule 611(c)—Leading Questions

Federal Rule 611(c) provides that leading questions are generally impermissible on direct examination, and generally permissible on cross-examination. The proviso is that when a party calls "a hostile witness, an adverse party, or a witness identified with an adverse party," the party may use leading questions on direct. The reason for restricting leading questions is that we prefer testimony of the witness to testimony of the lawyer. If the witness is sympathetic to the lawyer's cause (as is ordinarily the case when the witness is called on direct) the risk is that he will be too easily led to simply affirm the closed-ended statements of the lawyer. On the other hand, if the witness is unsympathetic to the lawyer's cause (as is ordinarily the case on cross-examination), there is a possibility that open-ended, non-leading questions could be evaded or exploited by the witness—therefore leading questions should generally be permitted on cross-examination.

The Advisory Committee's proposal for Rule 611(c) was somewhat more restrictive in permitting leading questions than the rule ultimately adopted by Congress. The Advisory Committee would have permitted leading questions on cross-examination in civil cases only. The Advisory Committee gave no explanation for this limitation. The proviso for leading questions on direct was limited to situations in which the witness was either an adverse party, or a person identified with an adverse party.

Congress believed that the permission for leading questions on cross-examination should be applicable to criminal as well as civil cases, "to reflect the possibility that in criminal cases a defendant may be entitled to call witnesses identified with the government, in which event the . . . defendant should be permitted to inquire with leading questions." (Statement of House Committee on the Judiciary). Moreover, Congress was of the view that leading questions should be permissible with respect to *all* hostile witnesses, not merely those witnesses who were adverse parties or identified with them. Consequently, the Advisory Committee Note to the rule gives an inaccurate impression—it describes the rule as more narrow in permitting leading questions than it actually is.

10. Rule 612—Writing Used to Refresh Memory

Federal Rule 612 addresses the problem of a witness using a writing to refresh memory. The rule provides that in certain circumstances the adversary has the right to have the writing produced, to cross-examine the

witness thereon, and to introduce into evidence the portions of the writing that relate to the testimony. This right is granted whenever the witness uses a document to refresh recollection while testifying. If the writing was used to refresh recollection before trial, inspection and use by the adversary is only granted if the trial court finds it necessary in the interests of justice.

The Advisory Committee's proposed Rule 612 was significantly broader in dealing with recollection refreshed before trial. The Advisory Committee noted that the bulk of the case law to that point had "denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter." The Advisory Committee Note criticizes this position, stating that the "risk of imposition and the need of safeguard" is just as great when the witness refreshes recollection pre-trial as it is when recollection is refreshed at trial. The risk in either case is that it is the writing, and not the witness, that is really testifying.

But Congress thought that the Advisory Committee's position would create a risk of abuse on the other side, i.e., by the party demanding disclosure. As the House Committee on the Judiciary put it, "permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial." In light of the concerns expressed by Congress, it appears that most trial judges have exercised discretion to prevent discovery of statements used before trial to refresh recollection, in order to prevent harassment and to ensure that lawyers are not inhibited in carefully preparing witnesses for their trial testimony. *See, e.g., Cosden Oil v. Karl O. Helm A.G.*, 736 F.2d 1064 (5th Cir. 1984) (no abuse of discretion in refusing to require production of document used by witness to refresh his recollection prior to testifying). Yet a lawyer looking at the Advisory Committee Note to the rule would think that there is an absolute right to demand production of a document if it was used to refresh recollection before trial.

11. Rule 704—Opinion on Ultimate Issue

Rule 704 presents a different problem from the ones previously discussed, in that Congress did not reject the Advisory Committee's proposal at the time that the Federal Rules of Evidence were initially adopted. Rather, in 1984, Congress added a subdivision to Rule 704 that renders the original

Advisory Committee Note misleading. As originally proposed by the Advisory Committee and adopted without change by Congress, Rule 704 provided that "[T]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The reasoning behind the rule is sound: assuming that an expert provides a solid foundation and explanation on an issue for which the fact finder needs assistance, the expert should not be precluded from providing a logical and helpful conclusion to his testimony. The fact finder is simply left hanging if the expert is not permitted to cap off the testimony by stating a conclusion on the ultimate issue to which the expert is testifying. Sometimes, a conclusion on an ultimate issue ties the expert's testimony into a coherent whole, and as such it helps the jury to understand the issues in dispute. Illustrative is *United States v. Buchanan,* 787 F.2d 477 (10th Cir. 1986), a case in which the issue was whether an explosive device possessed by the defendant had to be registered as a firearm. This presented a difficult question of application of fact to law, given the variety of possible explosive devices and the complexity of federal firearms regulations. The government called an expert from the Bureau of Alcohol, Tobacco & Firearms, who led the jury through the regulations and described in detail how each of the characteristics of the device was covered by an applicable regulation. The agent concluded that the device was one that had to be registered under federal firearm regulations. While this was an ultimate conclusion that the jury would eventually have to reach, the court held that the conclusion was helpful to the jury, because the "question before the jury involved the consideration of a particular homemade device against an array of statutory definitions." Accordingly, the conclusion was properly admitted under Rule 704.

The Advisory Committee Note to Rule 704 states that the "ultimate issue" rule is abolished. It criticizes any per se limitation on ultimate issue testimony as "unduly restrictive, difficult of application, and generally serv[ing] only to deprive the trier of fact of useful information." The Advisory Committee Note asserts that that the ultimate issue rule can lead to "odd verbal circumlocutions". For example, "a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard."

The note provides a powerful argument for rejecting the ultimate issue rule. But Congress passed the Insanity Defense Reform Act of 1984,

one provision of which added a subdivision (b) to Rule 704. *See* 18 U.S.C. §§ 4241–4247. This amendment was promulgated outside the rule-making process, and so there is no Advisory Committee Note that can be referred to. Rule 704(b) provides that an expert in a criminal case is not permitted to testify to whether the defendant did or did not have the requisite mental state to commit the charged crime.

It is obvious that there is a conflict between the original Advisory Committee Note to Rule 704 and the subsequent amendment. Rule 704(b) plainly revives the ultimate issue rule in criminal cases. It raises the very anomaly referred to in the Advisory Committee Note—that an expert witness could say something about the mental state of the defendant, but simply cannot say the buzzword "intent" or "incapable of understanding the wrongfulness of his actions." The fact remains, however, that Congress has amended Rule 704, and as a result, the original Advisory Committee Note to the rule is misleading, at least as to ultimate issue testimony in criminal cases.

12. Prior Inconsistent Statements—Rule 801(d)(1)(A)

Under the common law, a statement of a witness that was inconsistent with his in-court testimony could be admitted to impeach the witness's credibility, but there was no special hearsay exception to allow such a statement to be admissible for its truth. The Advisory Committee thought that the common-law rule, distinguishing between impeachment and substantive use of prior inconsistent statements, was nonsensical. It noted that the major concern of the hearsay rule is that an out-of-court statement could not be tested for reliability because the person who made the statement could not be cross-examined about it. But with prior inconsistent statements, "[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter." Moreover, "[t]he trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency." Finally, "the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation." For all these reasons, the Advisory Committee's proposed Rule 801(d)(1)(A) would have exempted all prior inconsistent statements of testifying witnesses from the hearsay rule. The Advisory Committee's

Note to the proposal makes this clear: "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence."

Congress, however, cut back on the Advisory Committee proposal. In the form ultimately adopted, Rule 801(d)(1)(A) states that only those prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" are admissible as substantive evidence. The rationales for this limitation, as expressed by the House Committee on the Judiciary, are that: 1) if the statement was given under oath at a formal proceeding, "there can be no dispute as to whether the prior statement was made"; and 2) the requirements of oath and formality of proceeding "provide firm additional assurances of the reliability of the prior statement."

The requirements imposed by Congress in Rule 801(d)(1)(A) have little to do with the concerns that are at the heart of the hearsay rule. First, while the requirement of a formal proceeding tends to alleviate concern over whether the prior inconsistent statement was ever made, that concern has nothing to do with the hearsay rule. The making of the statement (as distinguished from its truth) is a question addressed by in-court testimony—the in-court witness testifies that the statement was or was not made, and this becomes a jury question. Second, the requirements of oath and formality do little to guarantee the reliability of the prior out-of-court statement. The whole basis for reliability of these statements is that the declarant is the same person as the witness who is testifying under oath at the time of trial, and can therefore be cross-examined about the prior statement. That reliability guarantee is not dependent on the circumstances under which the out-of-court statement was made. Thus, the limitations imposed by Congress do not seem to mesh very well with the concerns expressed.

However, while the Advisory Committee's proposal has a stronger basis in the theory of the hearsay rule, the fact remains that it is not the law. Therefore, the Advisory Committee's categorical assertion that prior inconsistent statements "are substantive evidence" is misleading.

13. Rule 803(6)—Business Records

The Advisory Committee's proposed exception for business records was somewhat broader than that ultimately adopted by Congress. As a result, the Advisory Committee Note to the business records exception, Rule

803(6), is somewhat misleading. The Advisory Committee proposal covered any record made "in the course of a regularly conducted activity." It specifically eschewed the term "business" on the ground that other types of regularly prepared records should not have to be shoehorned "into the fact patterns which give rise to traditional business records." This was so even though the definition of "business" in the predecessor statute to Rule 803(6) (28 U.S.C. 1732) covered far more than traditional profit-making activity.

Again, Congress was concerned about the breadth of the Advisory Committee proposal. The House Committee believed that there were insufficient guarantees of reliability in records made in the course of activities "falling outside the scope of business activities as that term is broadly defined in 28 U.S.C. 1732." Therefore, the version of Rule 803(6) adopted by Congress covers records "kept in the course of a regularly conducted business activity." "Business" is defined as including "business, institution, association, profession, occupations, and calling of every kind, whether or not conducted for profit."

In the end, there is probably not much difference between the Advisory Committee's proposed Rule 803(6) and the rule ultimately adopted. Whether the term "business" is excised from the language of the rule, or whether it is defined so broadly as to cover all regularly conducted activity, is probably of little moment. Nonetheless, it is confusing to read the Advisory Committee Note and then to look at the rule. The note should be read with the understanding that the Advisory Committee's push to liberalize the hearsay exception was tempered, at least somewhat, by Congress.

14. Rule 804(a)(5)—Deposition Preference

Rule 804 sets forth exceptions to the hearsay rule that are premised on the unavailability of the hearsay declarant. The rationale of these exceptions is that while statements falling within them are not as reliable as the in-court testimony of the declarant, they are better than nothing at all. Therefore, if the declarant is unavailable, statements falling within these exceptions are admissible for their truth.

Rule 804(a) defines unavailability for purposes of the Rule 804 exceptions. Rule 804(a)(5) sets forth the ground of "absence," and defines when a declarant can be considered absent so that a qualifying hearsay statement can be admitted. The Advisory Committee's proposed definition

of absence was that the proponent "has been unable to procure [the declarant's] attendance by process or other reasonable means." The Advisory Committee Note states categorically that "[t]he rule contains no requirement that an attempt be made to take the deposition of a declarant." The question of absence was to be determined, in the Advisory Committee's view, by "whether the declarant could be physically produced; if not, any statement qualifying under the Rule 804(b) exceptions would be admissible."

The House Committee on the Judiciary was in favor of requiring the proponent to attempt to depose a witness before a witness could be declared absent. The Senate Committee on the Judiciary disagreed with this position, calling a deposition requirement a "needless, impractical, and highly restrictive complication." Nonetheless, the House version was adopted in Conference and incorporated in Rule 804(a)(5). Now, before a declarant can be found absent for purposes of dying declarations, declarations against interest, and statements of pedigree (i.e., Rules 804(b)(2),(3), and (4)), the proponent must show that an attempt was made to depose the declarant. Such an attempt must be made even if the declarant is abroad, since both the Civil and Criminal Rules of Procedure provide a means for deposing witnesses outside the country. It should be noted, however, that there is no deposition preference for an absent declarant who has given prior testimony that would otherwise be admissible under Rule 804(b)(1). This is because, as the House recognized, prior testimony has already been cross-examined either at trial or deposition, so it makes little sense to require the proponent to try to depose the declarant again to give exactly the same kind of testimony.

Because of Congress's inclusion of a deposition preference in Rule 804(a)(5), the Advisory Committee Note to that rule, which treats absence only in terms of inability to physically produce the declarant at trial, should not be relied upon as a proper statement of the rule.

15. Rule 804(b)(1)—Prior Testimony

Congress and the Advisory Committee were in disagreement about the proper scope of the prior testimony exception to the hearsay rule. The justification for the exception is that the declarant has already been cross-examined under oath about the same subject matter previously, so the statement is reliable enough to be admitted despite the fact that it is hearsay. The dispute between Congress and the Advisory Committee was over

whether a party could be bound by the testimony if someone other than that party conducted the prior cross-examination.

The Advisory Committee proposal provided for admissibility if the party against whom it was offered *or a person with motive and interest similar to that of the party* had an opportunity to examine the declarant when the testimony was given. An example may help to illustrate how this would work. Assume a series of cases arising from an airplane accident. In the first case, a witness gives favorable testimony for the airline, and is cross-examined thoroughly by the first plaintiff's counsel. Under the Advisory Committee's version of Rule 804(b)(1), the transcript of this testimony could be admitted against subsequent plaintiffs, since the first plaintiff had a "similar motive and opportunity" to cross-examine the witness as the subsequent plaintiffs would have were the witness now available.

The House Committee on the Judiciary objected to the Advisory Committee's proposal on the ground that it is "generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party." The sole exception to this principle, according to the House Committee, is when a party's "predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness." The House Committee's view prevailed in Congress even though, in the words of the Senate Committee on the Judiciary, there is "considerable merit" to the Advisory Committee's version. The merit in the Advisory Committee position is that if the prior party conducted basically the same cross-examination that the current party would conduct if the witness were available, there is no unfairness in admitting the testimony against the current party; indeed, it is patently unfair to exclude such testimony when the alternative is no evidence at all, given the declarant's unavailability. The Senate Committee consoled itself, however, with the conclusion that the difference between the House and Advisory Committee versions was "not great."

As enacted, Rule 804(b)(1) provides that prior testimony is admissible "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony." This would seem to mean that in the hypothetical airplane cases posed above, the testimony favorable to the airline would not be admissible against subsequent plaintiffs. The first plaintiff could not be deemed a "predecessor in interest" of subsequent unrelated parties, at least insofar as that term is ordinarily used in a legal context. The common understanding of "predecessor in interest" is, of course, that the first party is in some kind of privity relationship with the subsequent party. Accordingly, the Advisory Committee Note to Rule 804(b)(1) would appear to be misleading when it states that the rule allows "substitution of one with the right and opportunity to develop the testimony with similar motive and interest."

Interestingly, however, on this point the Advisory Committee Note may have more vitality than the words of the rule itself. For example, in *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), the court construed the "predecessor in interest" language as requiring only a "sufficient community of interest" between the prior litigant and the party against whom the prior testimony is offered. No property, title, or juridical relationship was required for the prior litigant to be considered a "predecessor in interest." In *Lloyd*, an altercation between Lloyd and Alvarez resulted in the Coast Guard proceeding against Lloyd to revoke his license. Lloyd testified at the Coast Guard proceeding, and was cross-examined by counsel for the Coast Guard. The motion to revoke Lloyd's license was ultimately denied. In a subsequent action under the Jones Act, in which Alvarez claimed that the shipper was negligent in allowing Lloyd to work on the ship, the shipper offered Lloyd's testimony at the Coast Guard proceeding against Alvarez, even though Alvarez was not a party to the Coast Guard proceeding and there was no privity relationship between Alvarez and the Coast Guard.

The *Lloyd* court noted that Congress failed to define the term "predecessor in interest" in the rule; the court found telling the language from the Senate Committee that the intended change from the Advisory Committee proposal was "not great." It therefore held that the predecessor in interest requirement is satisfied whenever the prior litigant had a similar motive and opportunity to develop the testimony as the current litigant would have were the declarant available to testify. As Judge Stern cogently pointed out in a concurring opinion, this expansive construction of the term "predecessor in interest" effectively reads that term out of the rule—it defines the term as equivalent to "similarity of motive"— a requirement that is already part of the rule. (Judge Stern was of the view that the more honest approach would be to permit admission of testimony such as that involved in *Lloyd* under the residual exception to the hearsay rule.)

Subsequently, in *Horne v. Owens-Corning Fiberglass Corp.*, 4 F.3d 276 (4th Cir. 1993), an asbestos action, the court held that a deposition from another asbestos case was properly admitted against the plaintiff as prior testimony, even though she had no relationship whatever with the plaintiff in the previous litigation. The court relied *solely* on the Advisory Committee Note to Rule 804(b)(1), and stated that to preclude admissibility under that rule, a new party "must point up distinctions in her case not evidenced in the earlier litigation that would preclude similar motives of witness examination." In this case, the plaintiff was in the same situation with respect to asbestos exposure as was the prior plaintiff.

In sum, while the Advisory Committee Note has technically been superseded by a stricter Rule 804(b)(1), the courts have generally opted in this area for the Advisory Committee approach.

16. Residual Exception

A final aspect of dissonance between the Advisory Committee Notes on hearsay and the resulting Federal Rules involves the residual exceptions to the hearsay rule. The residual exceptions were proposed by the Advisory Committee, and adopted by Congress, to permit the admission of reliable hearsay that was "not specifically covered" by any of the foregoing categorical exceptions. The intent of the Advisory Committee and Congress was to provide some flexibility to admit clearly reliable statements that could not have been anticipated by the drafters.

The Advisory Committee proposed, and Congress adopted, two residual exceptions. One was placed in Rule 803 (subdivision 24), and one was placed in Rule 804 (subdivision (b)(5)). The former provision technically applied when the declarant was available to testify, while the latter provision technically applied when the declarant was unavailable. The exceptions were identically worded, and it soon became clear that it made little difference which of the two exceptions was invoked; regardless of enumeration, the question for residual hearsay was whether the statement was reliable, and whether it was, as both rules required, "more probative" than other evidence reasonably available to prove the point.

In 1994, the reconstituted Advisory Committee proposed a consolidation of the two residual exceptions into a single exception, Rule 807. The intent was to clarify any confusion resulting from two identically worded hearsay exceptions, and also to provide a means of adding new exceptions to Rules 803 and 804 without having to worry about the reference in Rules 803(24) and 804(b)(5) to "the foregoing exceptions." The proposal to consolidate the two residual exceptions into one became effective on December 1, 1997.

While the consolidation of two residual exceptions into one is not intended to have a substantive effect, it does render the original Advisory Committee Notes on the residual exceptions somewhat confusing. Obviously, the original Advisory Committee Notes refer to two residual exceptions, located in Rules 803 and 804, respectively. While the substance of the original Advisory Committee Note is still very useful in determining the scope of a residual hearsay exception, the note as a whole must be considered in light of the procedural shift to a new Rule 807.

Appendix V

"Simplified Rules of Federal Procedure"

Edward H. Cooper, Reporter, Civil Rules Advisory Committee, "Simplified Rules of Federal Procedure" (To appear in the *University of Michigan Law Review*).

Simplified Rules of Federal Procedure?

Edward H. Cooper[1]

Foreword

Writing in 1924, 78 volumes ago, Edson R. Sunderland began *The Machinery of Procedural Reform* with this sentence: "Much has been said and written about the imperfections of legal procedure."[2] Much of his article describes circumstances in which procedural reform occurred only in response to conditions that had become "intolerable." A decade later, Congress enacted the Rules Enabling Act that still provides the framework for reforming federal procedure.[3] The Enabling Act establishes a deliberate and open process for amending the rules initially adopted under its authority. It may take longer today to consider and adopt a single rule amendment than the original rulesmakers took to create the original body of Civil Rules.[4] The process surely provides the "close and pains-taking study of an intricate mechanism which is necessary for successful regulation" that Professor Sunderland hoped for.[5] It is difficult to be as

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[1] Thomas M. Cooley Professor of Law, The University of Michigan.

Professor Cooper is Reporter for the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. The draft rules discussed here were prepared for consideration by the Advisory Committee. The Advisory Committee has begun work on the draft, but has not yet decided whether there is reason to pursue the project further. If the project is pursued, any rules that emerge will be strongly influenced by the designation of the cases that may be governed by the rules. The draft thus remains in its original form as an outline of one of many possible approaches to the task. It is a Reporter's draft and does not in any way represent the work or position of the Advisory Committee.

[2] [Sunderland, The Machinery of Procedural Reform,] 22 Mich.L.Rev. 293.

[3] The core of the current version is 28 U.S.C. § 2072. The full scope of the enterprise is reflected in 28 U.S.C. § 331 and §§ 2071-2077. Section 331 directs the Judicial Conference of the United States to:

> carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court * * *.

[4] A succinct summary of the creation of the Civil Rules is provided in 4 C.A. Wright & A.R. Miller, Federal Practice & Procedure: Civil 2d, § 1004 (1987). The original Advisory Committee — of which Professor Sunderland was a member — was appointed on June 3, 1935. The Committee submitted its third draft to the Supreme Court in May 1936. The final report issued in November 1937. After submission to Congress, the rules took effect on September 16, 1938.

Current consideration of Rule 23, the class-action rule, has been rather more deliberate. After a deliberate moratorium following the 1966 amendments, the Advisory Committee took the subject up again in 1991. An interim memorial of the project is provided by the four-volume Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Administrative Office of the United States Courts (1997). A related undertaking is reflected in Mass Tort Litigation, Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States (February 15, 1999). The only amendment yet to be adopted was the addition of a new Rule 23(f), effective on December 1, 1998, establishing a system for permissive interlocutory appeals from orders granting or denying class certification. The continuing work is reflected in proposed amendments published for comment in August 2001; see 2__ F.R.D. ___. The amendments also are available at www.uscourts.gov/rules. Still further amendments remain under consideration. This is not the work pace of the original rulesmakers.

[5] Sunderland, note 1 above, at 298.

confident about the overall effect of the pains-taking changes that have gradually accumulated since the Civil Rules first took effect in 1938.

It may be inevitable that a continuing revision process lengthens the rules and adds complexity to them. Doubts grow up around old solutions and new problems appear. The Civil Rules have not escaped this effect. Yet time and again, the Rules adhere to a pervading characteristic. The effort is less to provide detailed controls and more to establish general policies that guide discretionary application on a case-specific basis. Many a district judge may view one provision or another as unwarranted intrusion on the proper sovereignty of a trial court, but vast discretion remains at virtually every turn. It does not yet seem fair to charge the revision process with a descent into the niggling detail and sterile ossification that have overtaken earlier procedural systems.

Rigidity is, however, not the only danger to be avoided. Discretion is a useful rulemaking technique when it is difficult — as it almost always is — to foresee even the most important problems and to determine their wise resolution. But reliance on discretion is vindicated only when, most of the time and in most cases, district judges and magistrate judges use it wisely. The ongoing revisions of the Civil Rules time and again reflect an implicit judgment that confidence is well placed in the discretionary exercise of power by federal trial judges. In a wonderful way, there may be an interdependence at work — the very fact that there is discretionary authority to guide litigation to a wise resolution may enable us to attract to the bench judges who will use the authority wisely. It is not clear beyond dispute, but let us assume that the open-textured reliance on trial-judge discretion is working well. Even then, another set of questions remains.

Open-ended rules that call for wise discretion cannot depend on the wisdom of trial judges alone. The structure of our courts, considered in relation to the volume of litigation, the structure of the legal profession, and the basic nature of an adversary system, requires reliance on the willingness of litigators to work within the general spirit of the rule structure. One cause for concern is doubt whether we have sufficiently contained the risks of inept misuse and the temptations to deliberate strategic over-use of the rules. There are some grounds for reassurance on that score, noted tangentially below, but also grounds for continuing concern. A different cause for concern is that the sheer power of the rules structure, with the concomitant complexity and cost, has grown out of proportion. Some litigation that might better be brought in federal court may be discouraged, either to go to state court or to vanish without filing.

This fear that the FEDERAL RULES OF CIVIL PROCEDURE provide too much procedure for some cases underlies a current Advisory Committee project. The Simplified Rules project was launched at the suggestion of Judge Paul V. Niemeyer during his term as Advisory Committee Chair. Part of the inspiration for considering adoption of an alternative and simplified procedure was the ongoing work on The American Law Institute/UNIDROIT *Principles and Rules of Transnational Civil Procedure*.[6] The evolving transnational rules model involves, among many other things, a paring back and simplification. This Introduction is a brief description of the

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[6] Discussion Draft No. 2 of this project was circulated for discussion and comment on April 12, 2001. The basic purpose is to draft a set of procedure rules for transnational disputes, based on the common principles that underlie both "common" and "civil" law systems, as well as other legal systems that do not derive from either of those great traditions. The hope is that the rules could be adopted in many countries, providing a good procedure that is comfortingly familiar to litigants from many different systems. Even as the project remains in mid-stream, it is apparent that it requires simplification, a stripping away of details to reveal a basic core procedure that is significantly different from any particular domestic system.

general issues that surround a vaguely similar undertaking to simplify federal procedure even for an uncertainly defined subset of cases. The pages that follow set out the first draft to be submitted to the Advisory Committee, [many] imperfections and all.

The basic character of the draft is easily described. The draft proposes more detailed pleading, enhanced disclosure obligations, and restricted discovery opportunities. Other provisions seek to reduce the burden of motion practice and establish an early and firm trial date. The core justification for this approach is that current reliance on notice pleading and searching discovery puts too much weight on time-consuming and expensive discovery. This justification deserves a few more words of examination, after a preliminary look at the question of choosing the cases that might come within the simplified rules.

Draft Rule 102 is no more than a preliminary sketch of the issues that must be addressed in determining the cases that might come within a set of simplified rules. It was drafted for purposes of illustration, suggesting the issues by seeming to resolve them. It would make application of the rules mandatory in an action "in which the plaintiff seeks only monetary relief and the amount is less than $50,000." Rather complicated provisions contemplate application to other actions by consent of the parties, and exclude described categories of actions. All of the other rules depend on the choices made in determining the covered cases. As one simple illustration, a decision to apply the rules only when all parties consent would open the possibility of discarding jury trial. Any attempt to discard jury trial without party consent would require such elaborate justification, and encounter such stiff resistance, as to impede seriously, if not fatally, any serious attempt at adoption.

The justification for attempting to frame a simplified procedure must withstand many challenges. Most of the challenges raise empirical issues. Two sets of empirical issues lead the list. One ties directly to the definition of cases covered by the rules — it makes little sense to create a set of rules for cases that do not, and should not, come to the federal courts. The other set goes directly to the underlying premise: are the present rules in fact too complex, too full of opportunities for excessive lawyering and strategic manipulation, to work well with some cases that do, or should, come to the federal courts?

The draft that applies the simplified rules to all actions that seek money only, and less than $50,000, prompted the question whether such actions exist in the federal courts. The Federal Judicial Center — a constant source of valuable assistance in considering empirical rules reform questions — undertook to examine the data currently available. Looking at all cases filed in federal courts from 1989 through 1998, some 2,248,547 cases, they found that information about a stated money demand greater than $0 was available for only 610,002, less than 28%. Of this reduced set of cases, 236,212 involved demands from $1 to $50,000. Another 103,326 involved demands from $51,000 to $150,000.[7] It is not possible to assume that the same distribution would hold for all cases if the amount of the dollar demand were known for all. That more than one-half of the cases in this subset involved demands for less than $150,000 is an interesting datum, but little more. That nearly a quarter of a million cases in ten years involved less than $50,000 is also interesting and more tangible. If there is otherwise reason to fear that the Civil Rules provide more procedure than is appropriate for relatively small-dollar litigation, there are cases enough to justify further consideration.

That observation leads directly to the empirical questions whether general federal procedure is indeed too elaborate for many of the actions brought in federal court. There are

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[7] December 21, 1999 letter from Thomas E. Willging to Hon. Paul V. Niemeyer (copy on file).

many reasons to question the premise that federal procedure often proves unnecessarily burdensome. Empirical studies of discovery have repeatedly disclosed that for most cases in federal court there is no discovery or only a few hours devoted to discovery.[8] Recent amendments have sought to reduce the burden of discovery still further by adopting and then modifying disclosure requirements and by providing for the Rule 26(f) meeting of the parties. Many practicing lawyers have reported that the Rule 26(f) meeting has proved useful. If lawyers actually confer about the realistic needs of the case, they commonly agree to behave reasonably.

The counterpoint to assertions that federal procedure is too elaborate for some cases commonly is that state procedure is more suitable. But many state systems are modeled on the federal rules, and outsiders are not likely to view the more distinctive state systems as more efficient. If there is point in this comparison, the most likely support lies in the procedures adopted for state courts of limited, not general, jurisdiction.

Even if there is reason to fear that general federal procedure should not apply in all its sweep to every case in federal court, it is not clear that "general federal procedure" is as procrustean as the champions of simplified procedure may claim. The Civil Rules provide many opportunities for tailoring procedure to the realistic needs of individual actions. Judges are given general and discretionary authority to cabin discovery and to manage the litigation. Vigorous use of this authority can directly limit the dangers of excessive procedure. Indirect benefits may prove even greater as lawyers come to understand that they will be forced to behave reasonably.

The general power to shape procedure to specific cases has been elaborated in some districts by adoption of differentiated case management plans. Several courts have established tracking systems that are designed to provide expedited procedures for cases that do not require full utilization of all the tools made available by the Civil Rules. The experience of these courts is important to the simplified procedure proposal for at least two reasons. The first is that these practices may provide all the relief that is needed. If so, reliance on these procedures may prove more effective than an attempt to generate special rules and to identify the categories of cases to be covered by special rules. The second is that if special rules remain a promising approach, local tracking systems may point the way toward the kinds of procedures that prove useful and the kinds of cases that benefit from them.

Examples of the more specific issues presented by local tracking systems are easy to provide. Several systems attempt to assign tracks by case categories only for cases that can be categorized with relative ease — cases involving review on an administrative record, bankruptcy appeals, and so on. Other cases are assigned to tracks by a judge after a Rule 16 conference that considers such matters as the number of parties, the degree of contentiousness, the stakes, the level of agreement on what issues need to be resolved, and so on. Most cases wind up on the "standard" track. "Expedited" tracks seem not to draw many cases. All of this may suggest that case-by-case determinations by a judge who is actively involved in the early stages are better than an attempt to establish more abstract definitions and categories.[9]

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[8] See Willging, Shapard, Stienstra & Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change (Federal Judicial Center 1997).

[9] Information about differentiated case management plans remains diffuse. Two good sources provide information about general variations; although the details of specific court programs have surely changed, the overall picture remains useful. See Stienstra, Johnson & 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 January 24, 1997); Rauma & Stienstra, The Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook (Federal Judicial Center 1995). A summary of Judge Jean C. Hamilton's description of the expedited track in the Eastern District of Missouri plan is provided in

Another example is provided by the common requirement in differentiated case management plans, similar to the Rule 26(f) meeting, that attorneys meet to prepare a joint statement before the first Rule 16 conference. This joint statement supports the track assignment. When approached in the proper spirit, the attorney conference and Rule 16 conference may provide a far more direct and effective method of identifying the nature of the dispute and the issues that need to be resolved than any method that relies on detailed pleading and unilateral disclosure.

Yet another alternative is possible. In 1992 the Advisory Committee proposed to amend Civil Rule 83 to authorize adoption, with Judicial Conference approval, of experimental local rules inconsistent with the national rules. The proposal was withdrawn in the June 1992 Standing Committee meeting. The proposal presented obvious statutory difficulties — 28 U.S.C. § 2071(a) authorizes district courts to prescribe rules "consistent with * * * rules of practice and procedure prescribed under section 2072 * * *." It may seem circular to make an inconsistent local rule consistent with the national rules by adopting a national rule that authorizes inconsistent local rules. There also may be some hesitation about wishing the tasks of review and approval on the Judicial Conference. But as compared to the uncontrolled proliferation of local rules, more or less at random, there may be real advantages in facilitating well-designed and carefully monitored local experiments. Empirical data are hard to come by in the world of procedure. "Pilot" and "demonstration" programs may yield valuable insights. Rather than adopt national rules that apply to all federal courts at once, local experiments might better advance progress toward simplified procedure, whether for some distinctive portion of the federal docket or for all cases.

These empirical questions, and the possibility of experimental local rules, point to another possible purpose in adopting simplified rules for a yet-to-be-defined portion of federal civil actions. The simplified rules could be themselves an experiment, designed to pave the way for gradual revision of the rules for all actions. The approach that combines notice pleading with sweeping discovery is deeply entrenched. But it is not inevitable. Discovery, and the recently adopted and amended disclosure rules, has been the subject of continual study by the Advisory Committee since the work that led to the 1970 discovery amendments.[10] Should some form of simplified rules be adopted, it is possible that several years of developing experience would provide the foundations for simplifying the general rules as well.

This foreword sets the general stage. The pages that follow present the draft presented to the Advisory Committee as a means of focusing discussion. As an artifact of the rulemaking process, the draft is presented without change. The many refinements that suggest themselves even to the scribe, let alone the sharp minds of Law Review editors and other students, are left for another day. For now it suffices to present the draft in the hope that it will stir comment, providing advice that may guide future Advisory Committee deliberations.

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the Civil Rules Advisory Committee Minutes for October 16-17, 2000, available on the Rules website, www.uscourts.gov/rules.

[10] A concise history of the discovery rules is provided in 8 C.A. Wright, A.R. Miller & R.L. Marcus, Federal Practice & Procedure: Civil 2d, §§ 2002-2003.1 (1994).

Simplified Procedure

Introduction

Some of the persisting questions about the Federal Rules of Civil Procedure arise from the "one size fits all" character of the Rules. The Committee has struggled regularly with the "transsubstantive" character of the rules, ordinarily reaching the conclusion that serious Enabling Act questions are posed by any effort to create special rules for specific substantive problems. Perhaps the time has come to consider a different aspect of the Rules' unvarying uniformity. As they stand now, and as they have been from the beginning, the Rules apply alike to all cases, no matter how complex or how simple. It has been common to wonder whether the inevitable compromises have produced rules that work well for most litigation in the middle range, but do not work as well for cases at the extremes. One extreme has been frequently studied. The recent discovery proposals are only the most recent in a long line of efforts to adapt the rules to the needs of complex or contentious litigation. Not as much has been done for simple litigation. It is possible to adopt special provisions for simple litigation without in any way departing from the transsubstantive principle. The purpose would not be to establish a second-class set of procedures for second-class litigation, but to provide procedures that provide more efficient, more affordable, and better justice for litigation that cannot reasonably bear the costs of unnecessarily complex procedures.

The simplified rules that follow are very much a first draft. Coverage is limited to actions demanding only money damages, and in relatively small amounts, unless all parties agree to adopt the rules. The central feature is a major transfer of pretrial communication away from discovery and to fact pleading and disclosure. There also is a demand-for-judgment procedure that could accelerate and clarify disposition of many actions that today go by default. Use of Rule 16(b) scheduling orders is made optional. Finally, there is a beguiling proposal to require court permission for presentation of expert testimony under Evidence Rules 702, 703, or 705.

The draft is presented to stimulate thinking at several levels. The first is consideration whether it is sensible to launch a project of this nature. It should be easier to consider this question in light of a model, however crude, of the core topics that are likely to be addressed in any effort to create a simplified procedure track.

A second set of questions goes directly to the topics addressed by the draft. Can we effectively restore fact pleading that achieves the hopes of the Field Code drafters, not the sorry legalisms that lawyers and judges conspired to inflict on the worthy Code provisions? Should we require pleading of law as well as fact — something not done by the draft? Should we at least provide limited law-pleading requirements for special situations? (One possibility would be to require a party to plead the source of the governing law — federal or state, which state or foreign country, and so on.) How far should initial disclosure be expanded beyond the 1993 26(a)(1) model? How far should discovery be restricted — an illustration is provided by the alternatives in Rule 106 that either allow three depositions as a matter of right or require court permission for any deposition?

A third set of questions goes to the questions that might be addressed outside the core. One possibility, for instance, would be to encourage the parties to agree to a partly paper trial, in which witness statements or deposition transcripts are used in place of direct testimony and live trial testimony focuses on cross-examination and, perhaps, rebuttal. Or, as a variation, trial could be integrated with summary judgment in a process by which the court first considers the paper record, then determines what witnesses should be heard in court and shapes the trial accordingly.

The following list exemplifies, but does not begin to exhaust, the questions that might be addressed.

Finally, review of questions not addressed suggests a different issue. It is tempting to adopt in the simplified rules provisions that seem to be improvements for all actions but that also seem easier to move through the Enabling Act process if limited to actions that do not have an actively involved constituency. Summary judgment procedure is an illustration. Rule 56 could be substantially improved. A substantially improved Rule 56 failed in the Judicial Conference nearly a decade ago, and it has been difficult to muster enthusiasm for a renewed attempt. But it might be possible to adopt revisions for the simplified rules.

Should permissive Rule 13(b) counterclaims be permitted in a simplified action? Why not make optional counterclaims that arise out of the same transaction or occurrence as the claim, and prohibit others? If counterclaims are permitted, should all claims be aggregated to determine whether the simplified rules apply? Should a counterclaim for injunctive relief automatically oust application of the simplified rules in the cases identified by Rule 102 for mandatory application?

It seems likely that a relatively high proportion of simplified procedure cases will be resolved by default. The Rule 104 demand for judgment is a beginning effort to expedite and clarify this outcome, but — even if something like Rule 104 is adopted — cannot resolve all default cases. Should we adopt an express requirement for proof of the claim by affidavit? Should the requirement be measured differently than the test that would justify summary judgment on the affidavits if there are no opposing affidavits? Is this an illustration of a reform that should be adopted as part of Rule 55 for all cases?

Direct attorney-fee provisions seem outside the scope of Enabling Act rules. But many people believe that the rules can affect implementation of fee statutes. One temptation is to revise the offer-of-judgment procedure so that a Rule 68 offer does not cut off the right of a prevailing plaintiff to recover statutory attorney fees. (An illustration: the rejected offer is for $100,000; the plaintiff wins $90,000. The offer now destroys the right of the plaintiff to recover statutory attorney fees if, but only if, the statute describes the fee recovery as "costs." This wildly improbable result cries out for correction for all cases. But correction quickly becomes bogged down in the dismal swamp of Rule 68.) There may be a special justification for addressing this question in the simplified rules, since they will apply in many actions that will be feasible only if there is a realistic prospect of recovering attorney fees. Fear of the strategic gamesmanship inherent in Rule 68 may deter initial filing, and may easily distort the decision whether to accept an unfair Rule 68 offer.

Now that the rulemaking power includes determinations of appealability, it would be possible to seek out rules that impose particular burdens in small-stakes litigation. The most obvious candidate, official-immunity appeals, is likely to prove untouchable. The sorrily confused discussion in 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.10 (current supplement) reflects an even deeper confusion in the law. One suspicion, increasingly voiced by the courts of appeals, is that official defendants are using immunity appeals to inflict delay. There may be a substantial number of small-stakes § 1983 actions and potential actions that are deterred by the availability of (potentially multiple) interlocutory appeals. The deterrent effect is likely to be greater in small-stakes cases, affording some excuse to approach these problems in the simplified rules. One easy but partial remedy would be to provide that only one pretrial immunity appeal may be taken. A more effective remedy would be to expand the scope of the one permitted appeal, permitting direct review of a denial of summary judgment. Official-

immunity appeal doctrine, however, derives from the substantive perception that this form of immunity — unlike many other important protections, such as the rules of personal jurisdiction — affords a right to be protected against the burdens of pretrial and trial procedures. Even with the enthusiastic cooperation of the Appellate Rules Committee and staunch support of the Standing Committee, efforts to address these problems could undermine a simplified rules project.

As drafted, the simplified rules model does not address a set of scope problems that likely require consideration. If application of the rules is defined in terms of amount in controversy, what happens when cases are consolidated or claims are severed?

Would it be desirable to consider a majority-verdict rule for jury trials? (There is no possibility of ousting jury trial, and little point in making it more difficult to demand jury trial.)

Should the Rule 53 special masters Subcommittee be asked to consider a provision barring reference to a special master in a simplified rules case?

How about a rule that establishes presumptive time limits for trial — perhaps one day per "side"? (See this again with Rule 109.)

Traditionally the rules have left res judicata to be developed by decisional law. But the nature of simplified procedure raises at least one question. Is it fair to base nonmutual issue preclusion on a simplified-procedure judgment? How far should this question depend on the nature of the simplified rules: is it unwise to belittle the fairness and adequacy of the rules by providing that the results are acceptable to dispose of "small" claims but not to govern something that "really matters"?

If simplified rules are adopted, Rule 81 should be amended to recognize them.

There is another frustrating choice that also must be considered. The draft simply incorporates the Civil Rules for most questions. That approach makes the project much easier. But it also defeats one of the goals of a simplified procedure. A pro se party will not find any of the comfort that might be provided by a self-contained, short, and clearly stated set of rules. This draft does not address directly any of the questions that are raised by the proposal of the Federal Magistrate Judges' Association that a special set of rules should be adopted for pro se actions.

Many other questions are likely to be raised as collective deliberation is brought to bear. The immediate questions are two: Should this project be developed? And if it is to be developed, what forms of support might be sought in developing a more polished model for publication?

A more general question might be added. What sorts of actions are likely to be encouraged by these rules? Will the result be to bring to federal courts actions that otherwise would be brought in state courts — and is that a good use of federal judicial resources? Will the result be to encourage people to bring in federal court actions that otherwise would not be brought in any court? If the ceiling for mandatory application is set at $50,000, is there something awkward about wishing on civil rights actions, or maintenance-and-cure claims, or proceedings that cannot readily be inflated above $50,000, procedures that are not invoked for any diversity action?

XII. SIMPLIFIED PROCEDURE

Rule 101. Simplified Rules

These simplified rules govern the procedure in actions described in Rule 102. They should be construed and administered to secure the advantages of simplified procedure to serve the just, speedy, and economical determination of these actions.

Committee Note

The Civil Rules have applied a single general form of procedure to all civil actions. Many changes have been made over the years to facilitate individualized adaptation of the general rules to the distinctive needs of complex litigation and to the need to provide increased judicial management when adversary contentiousness threatens to disrupt orderly disposition. Not as much has been done to adapt the rules to the needs of simple litigation that can be managed by the parties with little need for elaborate discovery or pretrial management. Often the parties meet this need on their own. Several studies have shown, for example, that no discovery at all is conducted in a significant portion of federal civil cases. See *Willging, Shapard, Stienstra, & Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center 1997). The lack of discovery, and the limited use of formal discovery in another significant portion of cases, often reflects a low level of fact dispute. In other cases the parties recognize the need to hold the costs of litigation in sensible proportion to the stakes. Yet such restraint is not universal. Whether from excessive zeal, ineptitude, or deliberate motive to increase cost and delay, notice pleading and sweeping discovery practices can entail pretrial practice out of any sensible relationship to the stakes or needs of relatively simple litigation. These rules are designed to provide an improved package of pleading and discovery procedures that will enhance the opportunity to avoid costly discovery. More exacting pleading and disclosure requirements are provided to reduce further the need for formal discovery.

Other changes are made to complement the alternative pleading, disclosure, and discovery practices. These changes, however, are modest. The core of the simplified procedure is the alternative pleading, disclosure, and discovery practice.

Rule 102. Application of Rules

(a) Except as provided in Rule 102(b), these simplified rules apply in an action:

(1) in which the plaintiff seeks only monetary relief and the amount is less than $50,000; or

(2) in which the plaintiff seeks only monetary relief and the amount is less than $250,000, if all plaintiffs elect [in the complaint] to proceed under these rules [and if no defendant objects to application of these rules by notice filed no later than 20 days after service of the summons and complaint {on the objecting defendant}].

(b) These simplified rules do not apply in an action described in Rule 102(a):

(1) for interpleader under Rule 22 or under 28 U.S.C. § 1335;

(2) under Rules 23, 23.1, or 23.2;

(3) under 28 U.S.C. §§ 1602-1611;

(4) for condemnation of real or personal property under Rule 71A;

(5) in which the United States is a party and objects to application of these rules

(A) in the complaint, or

(B) — if a defendant — by notice filed no later than

(i) 30 days after service of the summons and complaint, or

(ii) a motion to substitute the United States as party-defendant; or

(6) if the court, on motion or on its own, finds good cause to proceed under the regular rules.

(c) These simplified rules apply in an action in which:

(1) all plaintiffs offer in the complaint to proceed under these rules,

(2) all defendants named in the complaint accept the offer by notice filed no later than 20 days after the last of these defendants is served, and

(3) no party involuntarily joined after the offer is accepted shows good cause to proceed under the regular rules.

Committee Note

Determination of the actions that the simplified rules govern should be approached conservatively at the outset. Broader application may prove appropriate after experience with the rules determines their success and points the way to improvements.

Subdivision (a) establishes the basic core of application. The simplified rules apply to all actions in which the plaintiff seeks only monetary relief less than $50,000. They apply also to actions for only monetary relief less than $250,000 if the plaintiff elects to invoke them and no defendant makes timely objection. The rules do not apply if the plaintiff seeks specific relief such as a declaratory judgment, an injunction, specific performance, or habeas corpus, unless the parties agree to apply the rules under subdivision (c). The exclusion of actions for specific relief enables a plaintiff to impose the regular civil rules on a defendant who would prefer simplified procedures. The cost of attempting to measure the significance of the stakes in actions that seek more than money, however, seems too great to bear, at least while the simplified rules are new.

Subdivision (b) excludes specific categories of actions that do not seem amenable to simplified procedure because of the dignity of a party or the potential complexities of multiparty proceedings. Paragraph (6) allows the court to exclude any other action for good cause. The court may exercise this power at any time, and may act at the behest of a party or on its own.

Subdivision (c) allows the parties to any action to agree to follow the simplified rules. The agreement is made by the plaintiffs and defendants identified in the initial complaint; a party who is involuntarily joined after the agreement may move to have the action governed by the regular rules for good cause.

Reporter's Comment

The scope of the simplified rules is critical. The choice as to scope is bound up with the actual rules. The more curtailed the simplified rules, the narrower the scope of initial application. The more closely the simplified rules approach the regular rules, the broader the scope of application might be.

The brackets in Rule 102(a)(2) flag one of the issues that deserves attention: Should the plaintiff be given sole choice whether to invoke these rules for an action seeking less than $250,000? Or should the plaintiff be given only the power to invite the defendant to accept the rules? There is a powerful argument that allowing a defendant to opt back into the regular Civil Rules will lead many defendants to choose the more cumbersome, prolonged, and expensive procedure for wrong reasons — the hope is to harass and wear down the plaintiff, not to achieve a better disposition on the merits. On the other hand, few people would regard stakes between $50,000 and $250,000 as insignificant, and lawsuits are brought against real people as well as institutions that may view the loss of a quarter of a million dollars with equanimity. The issues may have a factual complexity beyond the dollars involved. In the end, the choice may turn on our level of confidence in the rules that emerge. If we believe that they will work well even in more complex cases, we might simply raise the mandatory threshold, or give the plaintiff — but not the defendant — a choice. Giving the plaintiff a unilateral choice may not be unfair — if the action is indeed one that requires resort to the regular rules, the plaintiff may be relied upon to choose them.

All of the exclusions in Rule 102(b) are tentative; perhaps none of them deserve adoption. The exclusion of the United States, for example, may be challenged; an accommodation is made in Rule 109 to allow an additional month before trial when the action involves the United States or a United States agency or employee.

Subdivision (c) is an effort to allow all parties to agree to proceed under the simplified rules, free from any of the limits in (a) or (b). The provision that allows later-added parties to defeat the initial election is limited in two ways. It does not apply to those who voluntarily become parties, as by an amended complaint or intervention. And it requires a showing of good cause. These limitations are suggested because of the risks of disruption that would follow if it were too easy to shift procedural tracks after the initial election. Perhaps it would be better to add a simpler alternative: "These simplified rules apply in an action in which all parties agree to proceed under these rules, or * * *."

If we go down this road, consideration must be given to several complicating factors. Rule 81(c) applies "these rules" to removed actions, but requires repleading only if ordered by the court. Pleading a dollar amount may not be required, or even permitted, by state practice. Must we provide for this in the rule?

Another problem arises from Rule 54(c) — "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such

relief in the party's pleadings." More than $50,000 or $250,000? Injunctive relief? Can we allow curtailed procedure to yield unrestricted judgments? To the extent that we make the simplified rules mandatory, we cannot rely on a waiver theory, unless it is waiver by choosing to go to federal court [and not be removed]. (A much smaller problem arises with respect to declaratory judgments: there is no apparent reason to oust these rules in a "reversed parties" action in which the declaratory plaintiff seeks only to establish nonliability for less than $50,000.)

Rule 103. Pleading

(a) General Rules. Except as provided in Rule 103(b), (c), (d), (e), (f), and (g), pleading in actions governed by these rules is governed by Rules 7 through 15.

(b) Stating a claim. A pleading that asserts a claim for relief must, to the extent reasonably practicable:

(1) state the details of the time, place, participants, and events involved in the claim; and

(2) attach each document the pleader may use to support the claim.

(c) Answering a claim. A pleading that answers a claim for relief must admit or deny the matters pleaded in asserting the claim under Rule 8(b) and also, to the extent reasonably practicable:

(1) state the details of the time, place, participants, and events involved in the claim to the extent those details are not admitted; and

(2) attach each document the pleader may use to support its denials or Rule 103(c)(1) statement.

(d) Avoidances and affirmative defenses. A pleading that asserts an avoidance or affirmative defense must:

(1) identify the avoidance or affirmative defense as an avoidance or affirmative defense; and

(2) plead the avoidance or affirmative defense under the requirements of Rule 103(b) for making a claim for relief[, including attachment of each document the pleader may use to support the avoidance or affirmative defense].

(e) Reply.

(1) A party must reply to an avoidance or affirmative defense identified under Rule 103(d)(1) by admissions, denials, and avoidances or affirmative defenses.

(2) A party must serve a reply no more than twenty days after being served with the pleading addressed by the reply.

(f) Length. No pleading may exceed a limit of twenty pages, eight and one-half inches by eleven inches, with reasonable spacing, type size, and margins.

(g) Forms. Forms 3 through 22 in the Appendix of Forms do not suffice under Rule 103.

Committee Note

The fact pleading required by Rule 103 is, with the expanded disclosure requirements in Rule 105, the foundation for the Rule 106 discovery limits and the core of the simplified rules. Fact pleading is adopted for these rules to encourage careful preparation before filing. The general system of notice pleading and sweeping discovery works well for most litigation, but can, when misused, impose undue costs. It is hoped that shifting part of the pretrial exchanges between the parties from discovery to more detailed pleading and disclosure can enhance the realistic opportunity of all parties to litigate effectively claims that involve amounts of money that are relatively small in relation to the costs that litigation can entail. Plaintiffs can better

afford to pursue worthy claims, and defendants can better afford to resist rather than capitulate to unworthy claims.

Fact pleading cannot be successful if it is approached in a spirit of technicality, much less hypertechnicality. Neither can it be successful if it assumes the mien of detailed witness statements or deposition transcripts. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement of the pleader's claim, denial, or defense in the detail that might be provided in proposed findings of fact, recognizing that the information available at the pleading stage often is not as detailed or as reliable as the information available at the trial stage.

The test for measuring attachment of a document as one a party "may use" to support a claim, denial, or defense is the same as the test used under Rule 26(a)(1)(A) and (B). The duty to supplement the initial attachments to reflect information gained after filing the pleading is not a matter of pleading but of disclosure under Rule 105.

A reply is required to respond to an avoidance or affirmative defense, but only if the avoidance or affirmative defense is identified under Rule 103(d). To the extent that a reply asserts an avoidance or affirmative defense, a reply to the reply is required, although it is expected that this situation will arise infrequently. The twenty-day period to reply is borrowed from Rule 12(a)(2) because it seems better to have a single period to reply to a pleading that states both an avoidance or affirmative defense and also a counterclaim.

A party who believes that its positions cannot be pleaded adequately in 20 pages may seek leave to amend under Rule 15.

Reporter's Comment

This rule really gets to the heart of the project.

The decision to invoke the general pleading rules has great and obvious advantages. One obvious question is whether to incorporate all of Rule 9, which includes particularity requirements not only in the oft-invoked provisions of Rule 9(b) but also in Rules 9(a) and 9(c). Rule 9(g) on pleading special damage may raise a similar question. On balance, it seems better to retain these familiar provisions. The fact pleading required by this draft should not be equated automatically to the "particularity" requirements attached to specific claims, and most especially should not be equated to the statutory pleading requirements in the securities laws.

Another question is whether to retain the time provisions of Rule 12. The 60-days to answer allowed the United States or its employees seems long, but the reasons for allowing the additional time seem compelling even in this setting. Compare the proposal that the United States be allowed to opt out of the simplified rules, Rule 102(b)(5). There also is a temptation to expedite matters by providing that the time to answer is not suspended by a Rule 12(b) motion. On balance, this temptation seems better resisted.

Perhaps the most important question is whether to retain without change the Rule 15 amendment provisions. A policy of free amendment might undermine the purposes of fact pleading. But easy amendment may be even more important in a system that requires the parties to state relatively detailed positions early in an action; this need may be enhanced by the prospect that expensive prefiling investigation may not make sense in low-stakes actions. The greatest temptation, indeed, is to use the simplified rules as the excuse for a change in Rule 15 that may well be warranted for all cases. There is much to be said for allowing a plaintiff to amend once, as a matter of course, after an answer points out defects in the complaint. The same is true when a reply points out defects in an answer. Present Rule 15(a) allows amendment once as a matter

of course if a defect is pointed out by motion but not if it is pointed out by pleading. This question deserves further consideration.

The reply obligation is limited to an avoidance or affirmative defense identified as such. Too much grief would come from requiring a reply to "new matter."

The particularized pleading requirement raises interesting questions about compliance with Rule 11: is more careful investigation required to support more careful pleading? Is that backward — we make it more difficult to bring a small-stakes action, even though the burdens are less, than to bring a more complex action?

Rule 104. Demand for Judgment

(a) Demand for judgment. A party may attach a demand for judgment to a pleading that asserts a contract claim for a sum certain. The demand must be supported by:

(1) a verified copy of any writing that evidences the obligation, and

(2) a sworn statement of

(A) facts establishing any obligation that is not completely evidenced by a writing,

(B) facts establishing total or partial nonperformance of the obligation, and

(C) the amount due.

(b) Response to demand for judgment.

(1) Within the time provided for answering the pleading asserting the claim, a party served with a demand for judgment must admit the amount due stated in the demand or file a response.

(2) The response must be sworn, and must respond specifically by admission, denial, avoidance, or affirmative defense to each matter set forth in the demand for judgment. The answer to the pleading asserting the claim may incorporate the response by reference.

(c) Judgment. Unless the court directs otherwise, the clerk must prepare, sign, and enter judgment for any amount admitted due under Rule 104(b). A judgment that does not completely dispose of the action is not final unless the court directs entry of final judgment under Rule 54(b).

Committee Note

The demand-for-judgment procedure is new. A substantial number of actions in federal court are brought by the United States to collect relatively small sums that are due on unpaid loans or overpaid benefits. The demand procedure is essentially a motion for summary judgment that is made with the pleading that states the claim, paving the way for efficient and inexpensive disposition of the cases in which the plaintiff sues only for the amount that in fact is due. This procedure also may be useful in other small claims brought under federal law, and in diversity actions that fall under these rules through Rules 102(a)(2) or 102(c).

Reporter's Comment

It may be asked why this procedure is not available to defendants as well as plaintiffs: an opportunity to confess judgment in a stated amount. At least two observations may be offered. Defendants have summary judgment. And a competing offer-of-judgment procedure would be just that: a Rule 68-like device. Probably we do not want to go down that road with a simplified procedure. A defendant always can concede liability even if the plaintiff does not make a demand for judgment.

Rule 104A. Motion Practice

(a) Rule 12 applies to actions under these simplified rules except as provided by Rule 104A(b), (c), and (d).

(b) The times to answer provided by Rule 12(a)(1), (2), and (3) are not suspended by any motion; Rule 12(a)(4) does not apply to an action governed by these simplified rules.

(c) The answer to a pleading stating a claim for relief must state any defenses described in Rule 12(b).

(1) A motion to dismiss based on any of the defenses enumerated in Rule 12(b)(2), (3), (4), (5), or (7) may be made in the answer or by separate motion filed no later than 10 days after the answer is filed.

(2) A motion under Rule 104A(c)(1) does not suspend any time limitation for further proceedings unless the court by order in the particular case directs a different time limitation.

(d) A party seeking an order under Rules 12(b)(6), 12(c), 12(f), or 56 must combine the relief sought under any of those Rules into a single motion filed no later than 30 days after the filing of the answer or reply to the pleading stating the claim for relief addressed by the motion. If one party makes a timely motion under this Rule 104A(d), any other party may file a motion under this Rule 104A(d) no later than 20 days after being served with the first Rule 104A(d) motion.

Committee Note

Many lawyers and judges express frustration with the delays that arise from pretrial motion practice, and often note a suspicion that pretrial motions frequently are made for the purpose of inflicting delay and expense on an adversary. Rule 104A is designed to reduce the delay, while preserving the necessary functions served by Rules 12 and 56. Other pretrial motions are not affected by Rule 104A.

Subdivision (b) removes the delay that may be occasioned by Rule 12(a)(4). To make the meaning clear, the redundant clauses both state that Rule 12(a)(4) does not apply and that the time to answer is not suspended by any motion. It is important to establish the basic framework of the pleadings as early as possible so that other pretrial activities can proceed.

Subdivision (c) sets outer limits on the time to move to dismiss on grounds that go to personal jurisdiction or venue. A motion based on failure to join a party under Rule 19 is included as well, but the court retains power to act on its own or on suggestion by a party when needed to protect the interests of an absent person. This subdivision further provides that a motion to dismiss under paragraph (1) does not suspend the time limitations for further proceedings; Rule 105 disclosures provide an immediate illustration.

Subdivision (d) combines into a single motion the motions to dismiss for failure to state a claim, for judgment on the pleadings, to strike matters from the pleadings, and for summary judgment. Because the time provided is short with respect to summary judgment, the moving party may add to the motion a request for additional time under Rule 56(f).

Reporter's Comment

This is a very rough first pass at a very complicated set of questions. The questions addressed seem likely candidates for discussion. It is possible that we will want to consider time

limits on motion practice, or perhaps elimination of some motions, even if we decide to abolish the dramatic 6-month trial date proposed in Rule 109. But if we adhere to Rule 109 or anything much like it, we almost certainly will have to do something to prevent the use of motion practice to make a shambles of pretrial preparation.

It might be possible to add deadlines for ruling on motions. There are so many problems, however, that perhaps this question can be put aside.

Rule 105. Disclosure

(a) General. Disclosure requirements are governed by Rule 26(a), 26(e), 26(f), 26(g), [and 37(c)(1)], except as provided in Rule 105(b), (c), (d), and (e).

(b) Plaintiff's disclosure. No later than twenty days after the last pleading due from any present party is filed, each plaintiff must, with respect to its own claims, provide to other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to facts disputed in the pleadings, identifying the subjects of the information *{, together with a sworn statement of relevant facts made by plaintiff, if the plaintiff has discoverable information, and by any other person whose sworn statement is reasonably available to the plaintiff}*;

(2) a copy of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are known to be relevant to facts disputed in the pleadings; and

(3) the damages computations and insurance information described in Rule 26(a)(1)(C) and (D).

(c) Other Parties' Disclosures. No later than twenty days after a plaintiff's Rule 105(a) disclosures are due, unless the time is extended by stipulation or court order, each other party must provide to all other parties a disclosure that meets the requirements of Rule 105(a)(1), (2), and (3) *{, including a sworn statement made by the disclosing party, if the disclosing party has discoverable information, and by any other person whose sworn statement is reasonably available to the disclosing party and has not already been provided in the action}*.

(d) Disclosure of Expert Testimony. If the court permits expert testimony under Rule 108, Rule 26(a)(2) governs disclosure unless the court limits or excuses the disclosure.

(e) Available Information; Obligation not Excused.

(1) A disclosure under Rule 105(a), (b), (c), or (d) must be based on the information then reasonably available to the disclosing party.

(2) The disclosure obligation is not excused because the disclosing party:

(A) has not fully completed its investigation of the case,

(B) challenges the sufficiency of another party's disclosure, or

(C) has not been provided another party's disclosures.

Committee Note

The disclosure obligation is expanded beyond Rule 26(a)(1)(A) and (B) obligations to disclose witnesses and documents in the belief that disclosure will prove more efficient than discovery for many of the actions governed by these simplified rules. Disclosure is required, however, only with respect to facts disputed in the pleadings. If a defendant defaults, or concedes liability under Rule 104, a plaintiff need not make any disclosure.

As to witnesses, it is required that a party provide the party's own sworn statement if the party has discoverable information, and also the sworn statement of any other witness that is reasonably available to the disclosing party. The test of reasonable availability is deliberately pragmatic, and is to be administered in the understanding that a party is not always able to secure a statement from a person that seemingly would be willing to cooperate. If a person's sworn statement has already been provided in the action, another disclosing party need provide a supplemental statement by the same person only if the disclosing party wishes to elicit additional evidence from that person. Disclosure of these statements is an important support for the restrictions on deposition practice in Rule 106(d).

Disclosure requires copies of documents, not mere identification, but extends only to documents known to be relevant to facts disputed in the pleadings. A document is "known to be relevant" if a party, an agent of a party, or an attorney responsible for participating in the litigation is consciously aware of the document and its relevance. No duty is imposed to search for documents that a party does not seek out in its own investigation and preparation of the case.

Disclosures are sequenced, with plaintiffs going first, so that the plaintiffs' disclosures will provide a framework for more meaningful disclosures by other parties. Disclosures by other parties are due twenty days after plaintiffs' disclosures are due, whether or not plaintiffs have complied with their disclosure obligations. The parties may stipulate to a later date for disclosures after the first plaintiff's disclosure. The court likewise may order a later date; the best reason for deferring disclosure by other parties is a substantial failure of disclosure by the plaintiffs. A plaintiff who makes Rule 105(b) disclosures with respect to its own claims may make separate disclosures as to the claims of other parties under Rule 105(c), but may elect instead to combine those disclosures with its Rule 105(b) disclosures.

Rule 108 discourages the use of expert testimony in actions governed by these simplified rules. But if expert testimony is to be permitted at trial, Rule 26(a)(2) disclosure may be an important substitute for discovery. In determining whether to direct Rule 26(a)(2) disclosure, the court should consider whether the need for disclosure justifies the expense of securing a written report from the expert.

Reporter's Comment

Rule 105(e)(2) is taken from the final paragraph of Rule 26(a), as a matter of emphasis without cross-reference.

Rule 106. Discovery

(a) General. Discovery is governed by Rules 26 through 37, except as provided in Rule 106(b), (c), (d), (e), (f), and (g).

(b) Discovery Conference. A Rule 26(f) conference must be held only if requested [in writing] by a party. The request may be made before or after disclosures are due under Rule 105.

(c) Timing of Discovery. A party may make discovery requests only after a Rule 26(f) conference, or on stipulation of all parties or court order.

(d) Depositions.

(1) Number. The number of depositions permitted under Rule 30(a)(2)(A) and Rule 31(a)(2)(A) without leave of court is three. *{Alternative: A deposition may be taken under Rule 30 or Rule 31 only on stipulation of all parties or court order.}*

(2) Duration. The presumptive time limit for a deposition under Rule 30(d)(2) is one day of three, not seven, hours.

(e) Interrogatories. The presumptive number of interrogatories permitted under Rule 33 is ten.

(f) Rule 34 Discovery. A request for production or inspection of documents and tangible things under Rule 34 must specifically identify the things requested *{unless the court grants permission to identify the things requested by reasonably particular categories}.*

(g) Requests to Admit. A party may serve more than ten Rule 36 requests to admit on another party only on stipulation of all parties or court order.

Committee Note

The Rule 106 limitations on discovery are made possible by the expanded pleading requirements of Rule 103 and the expanded disclosure requirements of Rule 105. Together, these rules seek to assure plaintiffs that an action for relatively small stakes can be brought without undue expense, and to provide comparable assurance to defendants contemplating the costs of defending rather than defaulting.

The Rule 26(f) discovery conference is made available on request by any party. The discovery is not made mandatory because it is expected that the pleading and disclosure requirements of Rules 103 and 105, supplemented by the Rule 104 demand for judgment, will greatly reduce the need for discovery. But if a party wishes to use any discovery device, it must request a discovery conference or obtain a stipulation or court order allowing discovery without the conference.

Limits on the numbers of depositions and interrogatories are reduced to match the predictable reasonable limits of discovery in cases governed by the simplified rules. Expansion in the numbers may be obtained in the same way as under Rules 30, 31, and 33. A parallel limitation has been created for requests to admit.

Rule 34 requests are subjected to an obligation to specifically identify the documents or tangible things requested. Rule 105 imposes an obligation to produce, as disclosure, copies of all documents known to be relevant to facts disputed in the pleadings. Full and honest compliance with this obligation, including the duty to supplement initial disclosures under Rule 26(e)(1), will meet the reasonable needs of most litigation governed by these simplified rules. *{Although no express limit is built into the provision allowing a court to permit a request that identifies the*

things requested by reasonably particularized categories, permission should be granted only if there is some reason to suspect that a reasonable further inquiry will produce useful information.}

Reporter's Comment

Rules 106(d) and (e) are drafted by reference. The intention is to incorporate, for example, all of Rule 30(a)(2)(A), substituting "three" for "ten." That means all plaintiffs get three depositions, all defendants get three, all third-party defendants get three. It may be better to adopt a lengthier, but self-contained version that tracks the language of Rules 30, 31, 33, and 36.

Rule 107. Scheduling Orders

A rule 16(b) scheduling order is not required, but the court may, on its own or on request of a party, make a scheduling order.

Committee Note

Although Rule 16(b) scheduling orders may be useful in an action governed by the simplified rules, it is hoped that the shift in the balance between pleading, disclosure, and discovery will enable the parties to manage most actions without need for judicial administration.

Reporter's Comment

It is tempting to attempt to provide a firm discovery cutoff and a firm trial date by uniform rule. It seems likely, however, that the obstacles that persuaded the Advisory Committee not to adopt that approach for all civil actions will be found even with simplified actions. There may be a significant number of districts where it is not possible to provide a meaningfully firm trial date even for small-claims actions. In addition, it may be wondered whether it is wise to introduce an indirect docket priority for these actions by way of a firm trial date.

Rule 108. Expert Witnesses.

A party who wishes to present evidence under Federal Rules of Evidence 702, 703, or 705 must move for permission no later than the time for serving its initial disclosures under Rule 105, ten days after another party has moved for permission to present such evidence, or a different time set by the court. The court should consider the nature of the disputed issues, the amount in controversy, and the resources of the parties in determining whether to permit expert testimony. The court also may consider appointment of an expert under Rule 706 of the Federal Rules of Evidence as an alternative to hearing testimony from experts retained by the parties.

Committee Note

There is a risk that a party to an action governed by these simplified rules may seek to increase the costs of litigating by offering expert testimony that would not be offered if the only motive were a desire to invest an amount reasonably proportioned to the stakes of the litigation. A party who seeks to offer expert testimony that is reasonably justified in terms of the difficulty of the issues to be tried should be allowed to present the testimony, even though the expense seems great in relation to the money at stake, unless the result may be an unfair advantage in relation to another party who cannot reasonably incur the cost of securing its own expert testimony.

Rule 108 cannot be applied to exclude expert testimony that is required by applicable substantive law. In professional malpractice actions, for example, expert testimony often is required to establish the elements of the claim.

Rule 109. Trial date

(a) Trial Date Set on Filing. At the time an action governed by these rules is filed, the clerk must set a trial date that is [no later than]:

(1) six months from the filing date, or

(2) seven months from the filing date if any party is the United States, an agency of the United States, an officer or employee of the United States sued in an official capacity, or an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States.

(b) Serving Notice of Trial Date. Notice of the Rule 109(a) trial date must be served

(1) with the summons and complaint or,

(2) if a defendant has waived service, promptly after the action is {filed} [commenced].

(c) Amending Trial Date. The Rule 109(a) trial date may be extended by order [of the court] to a date later than the period set by Rule 109(a) only on showing that:

(1) the plaintiff had good reason for failing to serve a defendant within 20 days from the filing date, or

(2) extraordinary reasons require a deferred trial date, but it is not sufficient reason **(A)** that the parties have not completed disclosure or discovery, nor **(B)** that the nature of the action requires deferral.

Committee Note

Expeditious disposition is an important element of these simplified rules. Setting a firm trial date when the action is filed will prompt the parties to proceed expeditiously. This effect requires that the date be quite firm. Extensions are allowed only when there is good reason for failing to effect service within 20 days from filing, or when extraordinary reasons require greater time. Failure to complete disclosure and discovery, and pleas that an action is by its nature too complex to prepare in six months (or seven months if the parties include the United States or its agents), do not provide sufficient reason. It is expected that courts will manage their dockets so that only extraordinary docket conditions will require an extension because the court is unable to honor the initial trial date.

Reporter's Note

This provision might well be moved up to lie between Rule 103 and Rule 104.

The draft Committee Note points to the objections that may be advanced to the "speedy trial" requirement. Particularly with individual docket systems, it may prove very difficult to honor a trial date set at the time of filing. On the other hand, the importance of speedy trial cannot be denied, particularly with a procedural system that is designed to achieve economy. These issues are important, and deserve hard work to craft the best possible rule. A firm six-month trial date could be more easily achieved if districts that have a substantial number of judges would adopt a centralized docket for these cases. If indeed these cases are amenable to simplified procedure, a centralized docket system might work reasonably well.

Because this draft rule was a last-minute addition, it has been created without attempting to work through the many issues that should be considered if it is to be adopted. A six-month trial date could create havoc if the plaintiff is allowed to make service at any time within the 120-day period allowed by Rule 4(m). Many other time periods also need to be considered, including those that suspend the time to answer while a Rule 12 motion is pending, the time to complete disclosure, and so on. Beyond the time periods set in the Rules, it may be necessary to consider

time periods set by local rules — a lengthy notice requirement for motions in general, or more specific timing requirements for summary judgment motions, could be incompatible with the 6-month trial date.

Another source of time problems may arise from local ADR practices. Commonly ADR establishes a "time out" from ordinary requirements. Adjustments may be needed on this score as well.

All of these firm timing requirements suggest another problem. If firm deadlines are set for several steps along the way, the result may be more expensive litigation. Forced to "do it now or never," lawyers may feel compelled to do many things that, without this pressure, would never be done. It is not necessarily a good answer to require that all motions be made within X days, or to require that an answer be filed before the court decides a motion to dismiss or for more definite statement, and so on.

A firm trial date provision could be drafted in different terms that might reduce these difficulties. For example, the date might be set by order after the pleadings are closed.

In addition to a firm trial date, it also may be desirable to think about trial time limits. It might be provided, for instance, that good cause must be shown to obtain more than one trial day for all plaintiffs or for all defendants.

Long-Range Planning (Action)

Almost all Judicial Conference committees have a responsibility for long-range planning. Thus, it is important for those committees to identify planning issues that may have a significant impact on the judiciary's mission, programs, and operations. By combining these issues in a comprehensive list, it is possible to see the broad scope of strategic issues confronting the judiciary. This serves four important purposes. First, the identification of strategic issues helps each committee determine its agendas for study and action. Second, the committee chairs can address matters of crosscutting interest at the chairs' long-range planning meetings. Third, it informs the Executive Committee and the Judicial Conference that matters of importance to the future operations of the federal judiciary are being addressed. Fourth, it serves to achieve consensus regarding the most important strategic issues confronting the courts.

Background

The Committee on Long-Range Planning was created by the Judicial Conference in recognition that "the judiciary needs a permanent and sustained planning effort," and to promote, encourage, and coordinate planning activities within the judicial branch. The 1995 *Long Range Plan for the Federal Courts* was the Committee's final product before it was dissolved and planning responsibility transferred by the Chief Justice to individual Conference committees, with coordination by the Executive Committee. The *Long Range Plan* identified the judiciary's core values and goals as:

- Safeguarding the rule of law
- Guaranteeing equal justice
- Preserving judicial independence
- Sustaining our system of federalism with national courts of limited jurisdiction
- Maintaining excellence
- Ensuring accountability

In 1999, the Executive Committee tasked Judicial Conference committee chairs with long-range planning responsibility and initiated semi-annual meetings. At their first meeting in April 1999, the committee chairs identified seven key crosscutting strategic issues that influence the judiciary's ability to sustain the core values identified in the *Long Range Plan*. These are:

- Preserving the quality of justice and the excellence of judicial services
- Coping with changing work and increasing workload
- Managing resources effectively
- Maintaining effective judicial governance and management mechanisms
- Making effective use of technology and information

- Preserving judicial independence, obtaining adequate resources, and maintaining effective external communications and relationships
- Attracting and retaining a highly competent workforce

Since then, the long-range planning group has been addressing these issues. Within each committee's programs, discrete issues may be related to the broad issues or they may be entirely distinct to that program. The semi-annual long-range planning meetings of committee chairs are an opportunity to discuss cross-committee issues, develop a common understanding of key issues confronting the judiciary, and consider resource and other implications for the future. The report of the September 2001 long-range planning meeting is included as Attachment 1.

Requested Actions

Committees are asked to address two topics: the identification of strategic issues, and a discussion of how the committee can incorporate long-range planning into its regular business.

1. Strategic Issues

Committees are asked to consider what future needs or developments are most critical for long-range planning efforts.

- **Identify three to five of the most important upcoming or possible events, changes, problems, opportunities, or issues for the judiciary over the next few years.** Consider what developments in litigation policies, statutes, socio-economic factors, technology, or other factors may affect the mission and operations of the federal courts. In particular, consider what might affect the future requirements, resource needs, quality, or results of the committee's programs, and also what key objectives the committee would like to achieve.

- **Take a fresh look at the strategic issues previously identified by the committee and consider whether they reflect all of the important questions or developments that pertain to the committee's areas of jurisdiction.** (See Attachment 2.) Some issues may require more time and thought before it is possible to identify what actions, if any, might be appropriate in the future.

- **Report the committee's observations, conclusions, and revised list of strategic issues to the long-range planning coordinator by January 31, 2002.**

2. Ongoing Planning Efforts

Chief Judge Charles R. Butler, Jr., the long-range planning coordinator for the Executive Committee, has asked committee chairs to incorporate a long-term view into nearly every aspect of committee business by considering the long-range and quality-of-justice implications of

matters dealt with by the committees. With regard to defining and measuring the quality of justice, not every program is easily measured. It should be possible, however, to describe some aspects of quality within the focus of the committee's jurisdiction, such as defining what is meant by quality with regard to defender services, information systems, clerks' office operations, court facilities, probation supervision, etc.

In April 1999, the long-range planning group endorsed a five-step planning process for committees to follow (see Attachment 3). These steps can be applied to many of the policy and business matters before a committee.

- **Discuss how the committee can incorporate long-range planning into its regular business.**

Attachment 1: Report of the Chairs' Long-Range Planning Meeting September 10, 2001

Attachment 2: Committee Strategic Issues and Goals from *Strategic Planning Issues of the Committees of the Judicial Conference of the United States* (February 2001)

Attachment 3: Long-Range Planning Process

Attachment 1: Report of the Chairs' Long-Range Planning Meeting September 10, 2001

Judicial Conference Committee Chairs Long-Range Planning Meeting

September 10, 2001

Report

Administrative Office of the United States Courts
Office of Management Coordination and Planning

SUMMARY REPORT
SEPTEMBER 2001 LONG-RANGE PLANNING MEETING

Judicial Conference committee chairs representing 13 committees met on September 10, 2001 in Washington, D.C. The meeting was led by Chief Judge Charles R. Butler, Jr., a member of the Judicial Conference's Executive Committee and coordinator of the long-range planning process for the Executive Committee. Also in attendance were Administrative Office Associate Director Clarence A. Lee, Jr., and Deputy Associate Director, Cathy A. McCarthy, who provides principal staff support for the integrated long-range planning process. Other senior Administrative Office staff also attended. A list of participants is included as Appendix A.

Trends in Judges' Decisions to Retire and/or Resign from Judicial Office

Chief Judge Deanell R. Tacha, chair of the Committee on the Judicial Branch, presented statistics outlining recent trends in judges' elections to take senior status and retire from the bench. The vast majority of judges (about 83 percent) who have become eligible for senior status since 1984 have opted to take senior status. In the 1990's, about two-thirds of the judges taking senior status did so within the first year of eligibility. In the previous decade, this percentage was closer to 50 percent. (The presentation and charts are attached as Appendix B.)

With more judges taking senior status earlier, projections indicate a probable 25 percent increase in the number of senior judges by 2009. The number of years spent in senior status is also expected to increase because of longer life expectancy, which is higher than average for judges. There is no question that senior judges perform a valuable service to their courts, but the increasing number of senior judges will pose management and resource issues regarding space and personnel. Judge Tacha mentioned that affected committees – Security and Facilities, Judicial Resources, and the Judicial Branch – might wish to consider establishing a working group to look at the situation as an interrelated set of issues.

Although the number of judges electing to depart the bench has risen over the last four decades, the percentage of judges leaving has remained relatively stable at about 7-9 percent. Judge Tacha noted that the Committee has only anecdotal data about the reasons judges leave the bench, but indications are that more judges are being drawn by the lure of escalating private sector salaries. The loss of experienced judges has implications for the principle of a life-tenured Article III bench, and it is also costly to the third branch. When judges determine to resign from the federal bench, not only

does the judiciary lose experienced jurists, it also loses the benefit of the judicial work that would have been provided had the judges taken senior status.

Is the Judiciary Facing a Labor Crisis in Technology?

Judge Dennis Jacobs, chair of the Committee on Judicial Resources, informed the group that his committee examined the judiciary's information technology (IT) employment situation and concluded that the judiciary has no immediate problem in recruitment and retention but could face such issues in the future. He reported that the committee analyzed the IT special salary rates implemented by the Office of Personnel Management in the executive branch, which are targeted at entry and development-level technology staff. The committee determined that the program was designed to address problems in the executive branch that the judiciary does not have.

A large proportion of IT professionals in the executive branch are nearing retirement age and agencies have experienced wide-spread problems with recruiting and retaining younger IT workers. Compared to the executive branch, the judiciary has a younger IT workforce: 44 percent are over the age of 41, with 12 percent over age 51 in the judiciary, compared to 70 percent and 19 percent, respectively, in the executive branch. Likewise, fewer persons in the judiciary IT workforce are eligible to retire. At present, the "quit rate" of IT professionals in the judiciary is about 1.7 percent, which is lower than the quit rate of all employees in the judiciary, excluding law clerks. By comparison, the quit rate for IT professionals in the executive branch is about 2.5 percent. (See charts in Appendix C.)

The judiciary's existing personnel policies offer a variety of tools, such as recruitment and retention bonuses and waivers of qualifications, that offer the courts the flexibility to deal with those recruitment problems that exist in some locations. Judge Jacobs cited statements from court unit executives that they are reluctant to create pay differentials for IT staff because altering the notion of internal equity might cause morale problems among court employees. They were reluctant to use the available tools which would single out IT employees and treat them differently from other court employees.

In the long term, however, Judge Jacobs suggested that this cultural value may get the judiciary into trouble if the courts remain unwilling to consider using special incentives for technical staff. He suggested that the need to compete for high-wattage IT employees will pressure the judiciary to adopt Darwinian personnel techniques that run counter to the values that have stood the judiciary in good stead but may become outmoded.

Challenges to the Judiciary's Ability to Obtain Needed Resources

Judge John G. Heyburn II informed the chairs that the judiciary's budget projections of about 7 percent annual growth in obligations through fiscal 2006 might not be sustainable in light of the current and predicted fiscal climate. In conjunction with fewer dollars available, Congressional appropriations committees are asking for more justification of budget requests than they did in the past. Judge Heyburn noted that although caseloads are growing, the rate of increase has been less than what existed a few years ago. Thus, it is harder to use caseload growth as a main argument for all of the budgetary increases. He noted that the judiciary will need to find more persuasive ways to explain its needs for additional resources, including an assessment of the benefits or value received. For example, he noted the increasing amounts spent for technology (from about $87 million to $197 million during the decade of the 1990's) and pointed out that Congress is likely to ask for data about the effectiveness of money spent for information technology. The judiciary may be expected by Congress to accomplish more with the same level of resources. In the future, there may come a point when we cannot rely solely on increased caseload to justify equivalent increases in appropriations.

Personnel remains the prime cost element in the budget. The judiciary's workforce continues to increase its skill levels, and the judiciary is likely to be asked to accomplish more with fewer people. He also pointed to increasing space and facilities costs associated with the judiciary's success in attaining new courthouses, and noted continuing pressures to reduce the costs of new buildings.

Judge Heyburn described the successful efforts, after many years, to obtain increases in panel attorney hourly rates, which he attributed in large part to the efforts of judges who attested to real quality of justice concerns if the rates were not increased.

Judge Robin Cauthron, chair of the Defender Services Committee, added that the defender services program is continuing its efforts to develop measures of quality that can be used to assess performance and help justify resource needs. She noted that similar efforts to define quality are likely to be necessary in other areas, which even more directly relate to judges themselves. Judge Lawrence L. Piersol, chair of the Budget Committee's Economy Subcommittee, added that descriptors, other than statistics, could be developed to define aspects of quality of justice. Although this kind of measure is difficult to develop, he suggested that in certain program areas, defining quality may be easier than in others.

Quality of Justice

Chief Judge Charles R. Butler, Jr. observed that although the concept of quality of justice is not easily measured, ideas of fairness and equal justice are part of the judiciary's core values that underlie the planning process. Efforts to develop descriptors of quality in each program area should be continued.

Judge John W. Lungstrum suggested that user surveys might be used as indicators of quality. He remarked that existing surveys indicate that the federal courts are held in high regard. Judge Butler noted that individual judges give constant messages of quality of justice simply in the way they relate to jurors, litigants, and the bar.

Judge Butler encouraged the chairs and their committees to consider long-range planning and quality of justice not simply as a separate agenda topic, but to integrate planning and quality of justice considerations into all committee initiatives.

Update on the Evaluation of the Decline in the Number of Trials

Judge John W. Lungstrum, chair of the Committee on Court Administration and Case Management, briefed the chairs on the Committee's study of the declining number and rate of trials in civil and criminal cases. He noted that the Committee has defined the issue more broadly as "changes in the nature of case dispositions." The Committee's focus has been to determine, first, whether federal court procedures or case management practices have created unintended impediments to trial, and second, what implications fewer trials have for the federal judiciary.

Judge Lungstrum reported that the Committee has devoted a considerable amount of time to this issue. Based on its work and discussions, the Committee concluded that – separate and apart from the question of whether the decline is a good or bad phenomenon for the courts – it does not present a significant problem that could be addressed by the federal judiciary. Most of the causes are understood, and many are beyond the control of the courts – for example, changes in law (statutes and Supreme Court decisions), impact of sentencing guidelines and mandatory minimum sentences on guilty pleas, and various societal and economic phenomena. He remarked that increased resolution of cases through means other than trial is entirely consistent with the goals of the Civil Justice Reform Act. He also repeated an observation, previously made by Judge D. Brock Hornby (his predecessor as Committee chair), that the federal judiciary's reputation has been based on the ability of its judges to address difficult legal issues in a fair and impartial manner, rather than their ability – or that of juries –

to resolve factual disputes through trial proceedings. This, he concluded, is one of the fundamental reasons why Article III judges receive lifetime appointments.

Judge Lungstrum said that the Committee will continue to explore whether trials can be made more available to litigants who want them. For example, some districts have developed "fast track" procedures that will be studied to determine if they have had an impact on trial rates. He also noted that, although a decline in trials might be beyond the control of a court, judges should be careful not to unduly pressure litigants to settle or use alternative dispute resolution. The Committee believes that overemphasizing settlement can occur either through a judge's personal urging, or simply by having extreme or onerous individual practices that effectively act as a deterrent to going to trial. Therefore, the Committee has asked the Federal Judicial Center to review its judicial education curricula to ensure that these issues are approached in a balanced manner. Judge Lungstrum also observed that the judiciary also needs to reexamine how it defines and describes judicial activity, because many other proceedings are just as complicated and time-consuming as trials.

Finally, Judge Lungstrum suggested that other Judicial Conference committees and the Administrative Office (AO) might need to address the political and resource implications of fewer trials. The group agreed with this premise and discussed questions raised in the FY 2002 Senate Appropriations Committee report that demonstrated both an interest in the decline in jury trials and some misunderstanding of the judicial process. Judge Jane R. Roth, chair of the Committee on Security and Facilities, pointed out that judges who testify before Congress are often asked questions beyond their particular topic, and so it would be useful to develop information that can be used if questions are raised in that context about the decline in trials.

AO Assistant Director Peter G. McCabe reported that a task force established by Director Mecham is providing support to the study of the decline in trials by the Committee on Court Administration and Case Management, and is developing additional information on that subject. Among other things, the task force is continuing to analyze the nature and cause of the declining trial rate phenomenon, and to obtain data on the variety of judicial activity. Based on judges' comments, the task force has focused on two key issues: (1) whether state courts are experiencing the same trends with respect to trials; and (2) how to demonstrate to the public that judicial workload has not declined even though fewer trials are held.

On the first issue, AO Deputy Associate Director Cathy A. McCarthy reported that data from 22 states indicate a general decline nationwide in civil and criminal trial rates. Based on this data, it appears that litigants seeking a trial are not turning away from the federal courts in favor of state courts. Indeed, federal court trial rates are

higher than the trial rates in many states. The federal civil trial rate of 2.2 percent falls in the mid-range of the corresponding rates seen in 22 states, and the criminal trial rate in the federal courts is higher than the rates in all states but one.

On the second issue, AO Deputy Assistant Director Jeffrey A. Hennemuth introduced a pair of draft white papers (see Appendix D) that describe the changing nature of case dispositions and the myriad ways in which judges act to resolve cases in the federal district courts. The two papers were prepared by the task force as source materials for the AO and the courts to use in responding to public (including congressional and media) inquiries about the decline in trials. Mr. Hennemuth also informed the group that the task force has developed a detailed set of research questions to provide an analytical framework for collecting and analyzing data on the changing manner in which civil and criminal cases are resolved and the judicial role in those processes.

Ellyn L. Vail, Chief of the AO Analytical Services Office, detailed what statistics are available to describe judicial activity beyond traditional trials on the merits (see charts in Appendix D). These data show that, even though the numbers of completed trials have dropped, other case-related activities have been generally rising in number over the last 20 years. In particular, the numbers of pretrial conferences and motions hearings increased from 1980 to 1990, and sentencing hearings and arraignments have been on the rise since that time. In discussing this information, the group noted the limitations of current data and raised questions about how certain data elements are defined and reported.

Mr. McCabe assured the group that the AO task force will continue to gather and analyze additional information on this subject and consider ways to improve the reporting, definition, and collection of data on case disposition and the work of judges. He described two ongoing efforts – a review of the judiciary's need for district court statistical information under Recommendation 73 of the *Long Range Plan*, and the implementation of enhanced case management and data collection capabilities in the new district court CM/ECF systems – that will improve the availability of relevant data within the next few years. The group acknowledged the importance of these efforts.

Impact on Workload of Supervised Release Revocation Proceeding

Judge William W. Wilkins, Jr., chair of the Committee on Criminal Law, informed the group that the Committee has begun an analysis of the time and judicial workload impact of supervised release revocation proceedings. He noted that the Committee has been concerned about the increased workload associated with this type of proceeding since the enactment of the Sentencing Reform Act. Judge Wilkins briefed

the group on a Federal Judicial Center effort to update the current district court case weights. The updated case weights will not only include workload associated with supervision violation hearings, but other legislative actions not reflected in the current weighting system. The study, which will involve a data collection effort of case-related time information from approximately 660 district and magistrate judges, is expected to take one year to complete. A preliminary report will be presented to the Subcommittee on Judicial Statistics of the Judicial Resources Committee in early 2003.

In the meantime, the Criminal Law Committee asked the Administrative Office to collect data using the JS-10 form, an instrument that captures trials and certain categories of trial-related work of district judges. Judge Wilkins summarized the first six months' data collection, which showed that 585 contested and 5,554 noncontested supervision violation proceedings were reported by judges nationally (see Appendix E). In the future, the data are expected to be considered in new judgeship requests and will also be included in the *Judicial Business of the United States Courts* as a separate table and the number of hearings will be published in the *Federal Court Management Statistics*.

Assessment of a Proposal for a National Electronic Docket

Judge John W. Lungstrum reported that the Committee on Court Administration and Case Management was asked to examine a proposal for a national electronic docket. The idea was to create an electronic docket consisting of civil jury-waived cases that could be transferred from judges to whom they were originally assigned. These cases would be tried through video-conferencing by other judges sitting in their resident courts who had picked them up from the electronic docket. Judge Lungstrum presented the Committee's unanimous assessment that, while there may be benefits such as reducing the disparity of caseloads among judges, such benefits are outweighed by numerous legal, policy, political and practical concerns. These concerns are detailed in the Committee's September 2001 report to the Judicial Conference.

In closing, Judge Butler thanked all presenters and staff for their efforts, and reiterated his request that they continue to consider quality of justice issues and other long-range planning considerations as an integral part of their program oversight activities.

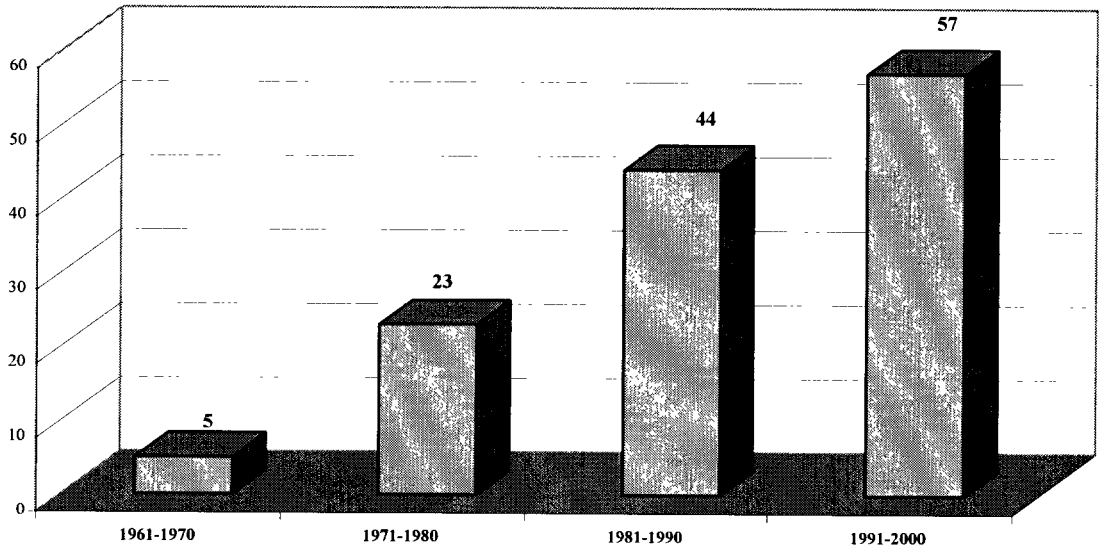
Appendix A: Participants in the March 2001 Long-Range Planning Meeting

Committee Representatives	Administrative Office Staff
Planning Coordinator, Executive Committee Hon. Charles R. Butler, Jr.	Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic
Committee on the Administrative Office Hon. Lourdes G. Baird, Chair	Cathy A. McCarthy
Committee on Automation and Technology Hon. Edwin L. Nelson, Chair	Mel Bryson Terry Cain
Committee on the Administration of the Bankruptcy System Hon. Michael J. Melloy, Chair	Francis F. Szczebak Kevin Gallagher
Committee on the Budget Hon. John G. Heyburn II, Chair Hon. Lawrence L. Piersol	George H. Schafer Gregory Cummings Bruce Johnson Jim Baugher
Committee on Court Administration and Case Management Hon. John W. Lungstrum, Chair	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky
Committee on Criminal Law Hon. William W. Wilkins, Jr.	John M. Hughes Kim Whatley
Committee on Defender Services Hon. Robin J. Cauthron, Chair	Theodore J. Lidz Steven G. Asin

Committee on Federal-State Jurisdiction Hon. Frederick P. Stamp, Jr., Chair	Mark W. Braswell
Committee on the Judicial Branch Hon. Deanell R. Tacha, Chair	Steven Tevlowitz
Committee on Judicial Resources Hon. Dennis Jacobs, Chair	Alton C. Ressler Charlotte G. Peddicord H. Allen Brown
Committee on the Administration of the Magistrate Judges System Hon. Harvey E. Schlesinger, Chair	Thomas Hnatowski Charles E. Six
Committee on Rules of Practice and Procedure Hon. Anthony J. Scirica, Chair	Peter G. McCabe John K. Rabiej
Committee on Security and Facilities Hon. Jane R. Roth, Chair	Willam J. Lehman Linda Holz
	Other Administrative Office Staff: Jeffrey A. Hennemuth Ellyn L. Vail Steven Schlesinger Catherine Whitaker Helen Bornstein Robert Deyling Barbara Kimble Robert Downey Glen Palman Tara Treacy
	Others: Donna J. Stienstra, Federal Judicial Center Kevin Blackwell, United States Sentencing Commission

Appendix B: Trends in Judicial Retirement

Circuit and District Judge Departures by Decade



Year	# of Judges Who Became Eligible to Retire	Eligible Judges Who Took Senior Status		Of Judges Who Took Senior Status								Eligible Judges Who Retired from Office Directly from Active Service	
				Those Who Did So Within 1 Year after Eligibility		Those Who Did So From 1 to 5 Years after Eligibility		Those Who Did So More Than 5 Years after Eligibility		Those Who Subsequently Retired from Office			
		# of Judges	% of All Eligible Judges	# of Judges	% of All Eligible Judges	# of Judges	% of All Eligible Judges	# of Judges	% of All Eligible Judges	# of Judges	% of All Eligible Judges	# of Judges	% of All Eligible Judges
1984-1989	164	146	89%	82	50%	51	31%	13	8%	7	4%	6	4%
1990-1995	224	197	88%	145	65%	38	17%	14	6%	16	7%	10	4%
1996-2000	191	140	73%	128	67%	12 (1996-99)		N/A		7	4%	7	4%
1984-2000	579	483	83%	355	61%	101 (1984-99)		27 (1984-95)		30	5%	23	4%

Appendix C: Comparisons of Judiciary and Executive Branch Information Technology Workforce

Chart 1

Age of IT Employees in the Executive Branch and the Judiciary

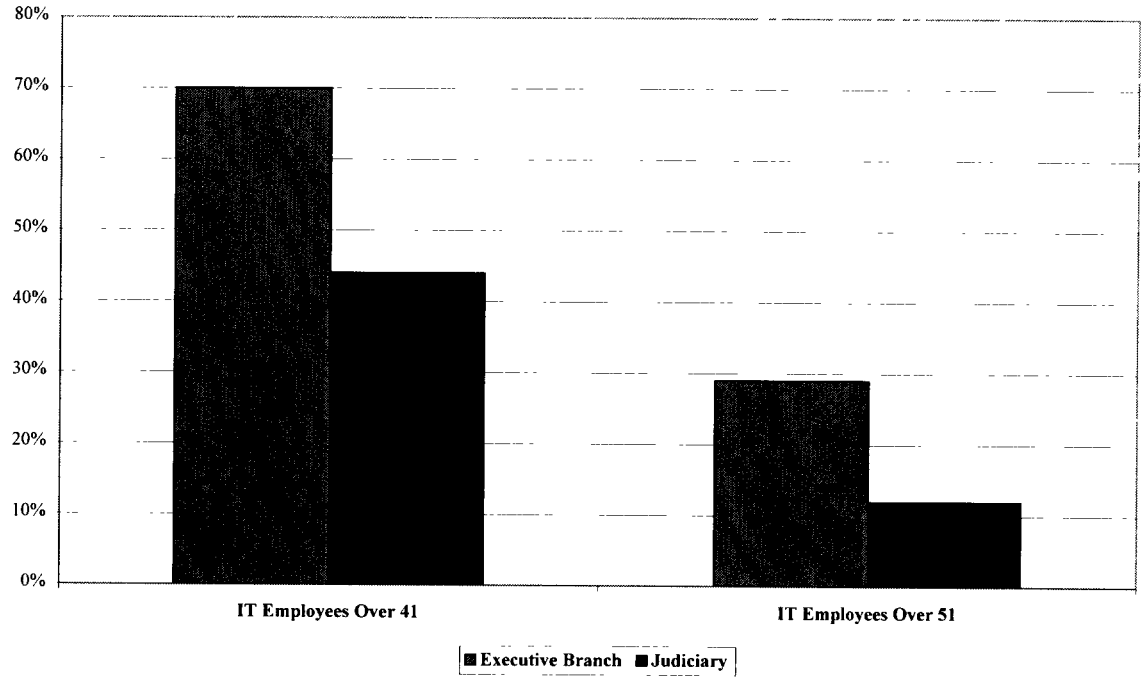


Chart 2

Retirement Eligible Percentage of IT Employees Over the Next Five Years

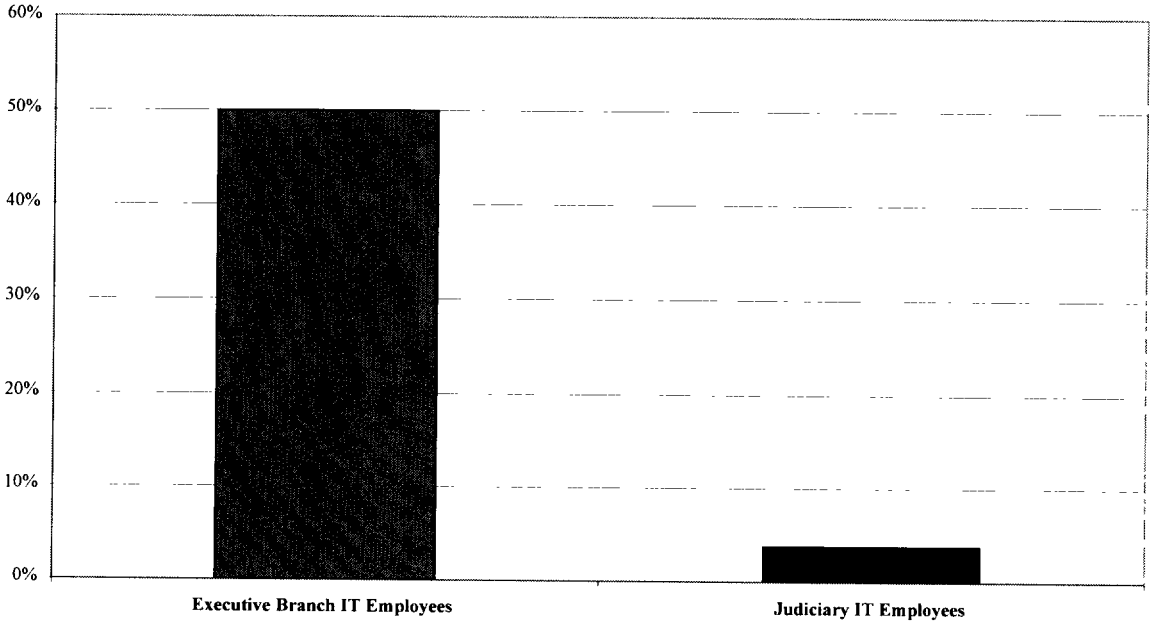
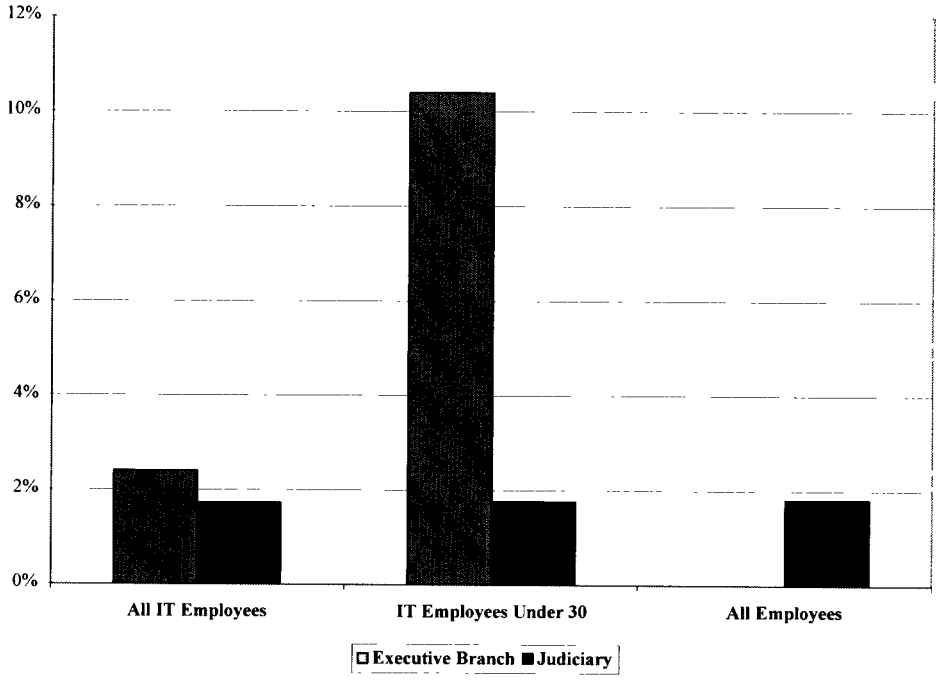


Chart 3

Quit Rates for Executive Branch and Judiciary Employees



Appendix D: Staff Discussion Papers and Charts of Selected Statistics on the Work of Judges

Paper 1: "Changing Nature of Case Disposition in Federal District Court" (Working Draft)

Paper 2: "Beyond Trials: The Work of Federal District Court Judges" (Working Draft)

Charts: Selected Statistics of Trial-Related Activity

The Changing Nature of Case Dispositions in Federal District Court

In our system of justice, courtroom trials serve an important purpose: to provide a means of resolving questions of fact that are material to determining the rights and liabilities of the parties in a civil or criminal case. But the number of cases in the United States district courts that actually reach a full-fledged trial on the merits of the parties' claims, charges, and defenses has always been a small percentage of the total cases filed, and relatively few cases today involve that kind of trial. Increasingly, civil disputes are disposed of by motion, through settlement efforts, by other kinds of pretrial judicial activity, and by various forms of alternative dispute resolution (ADR). Most criminal matters are concluded on the basis of a guilty plea by the defendant. At the same time, a corresponding decrease is seen in the percentages of cases, civil and criminal, in which the merits are determined by a judge and/or jury following a full evidentiary trial. Many state court systems are also experiencing similar trends.

Even though trials on the merits are held with less frequency, the work performed by federal judges continues to increase. With growing numbers of cases filed, the workload of the district courts is on the rise nationally—up 22% since 1990 and 153% since 1970. (The workload of the federal courts of appeals is also rising dramatically across the nation—up 34% since 1990 and 369% since 1970.) Because the number of judgeships authorized by Congress has not kept pace with the increased workload, judges are very busy.

In general, judges in the district courts are spending a greater portion of their time preparing for court proceedings, researching and writing opinions, and conducting conferences with attorneys and other litigants. There has also been an increase in the types of proceedings conducted in the courtroom that often involve trial-like activity. In criminal cases, for example, these encompass such proceedings as sentencing hearings, detention hearings, supervised release revocation hearings, and forfeiture proceedings. On the civil side, these include hearings on expert testimony under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), arguments on summary judgment motions, and hearings on the construction of patents under *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). Overall, judges are devoting time, including time in the courtroom, to focused efforts to manage their civil cases toward resolution in the most just, speedy, and inexpensive manner. Of course, in most instances the litigants and their attorneys ultimately decide whether to resolve their disputes through trials or by other means.

Although the trend toward disposition without a trial on the merits is evident in both criminal cases and civil cases, different reasons can be identified for each category. It is therefore appropriate to discuss criminal and civil cases separately.

Criminal Cases

A growing percentage of criminal defendants are pleading guilty in the federal courts. During the 1970s and 1980s, for example, the percentage of all defendants entering guilty pleas and waiving trial ranged from a low of 62% to a high of 70%. After 1990, it increased substantially, reaching 85% by 2000. Looked at another way, the percentage of defendants

who plead not guilty and demand their right to trial has decreased from 14% to 6% over the last decade.

The decrease in the criminal trial rate has been accompanied by an increase in the overall rate of convictions. The conviction rate—encompassing both those who plead guilty and those who go to trial—has risen from 81% of all defendants in 1985 to 89% in 2000. Coupled with a large (58%) increase in the number of defendants charged, the net effect over the past 15 years has been a 74% increase in the total number of federal criminal defendants convicted and sentenced.

The principal factors behind this trend are most likely the Sentencing Reform Act of 1984, development and implementation of the Sentencing Guidelines, and legislation establishing mandatory minimum sentences. Observers have speculated that these changes induce defendants to plead guilty by removing much uncertainty from the sentencing process. Because the prosecution and defense can negotiate on charges and other factors affecting the sentence, a guilty plea becomes more attractive than a trial carrying the risk of conviction on an offense requiring a more severe sentence.

Another likely contributing factor is the significant increase in prosecutorial resources (prosecutors and law enforcement agents) during the past decade. For example, between 1992 (the approximate point at which the criminal trial rate began to drop most significantly) and 1999, the total number of assistant United States attorneys devoted to criminal prosecutions rose by 31%. This arguably enhances the government's ability to develop stronger cases against defendants, identify a larger pool of potential prosecutions, and select from that pool those most likely to produce a conviction. In turn, this may enable prosecutors to secure more guilty pleas and, thus, reduce the percentage of defendants going to trial.

While the new sentencing regime and other factors outside the judiciary's control may result in proportionately fewer trials, many more defendants are being charged, convicted, and sentenced. Judges now must spend considerably more time calculating and imposing sentence, regardless of whether a defendant pleads guilty or is convicted at trial. By law, they are required to determine relevant conduct and analyze and apply all information made pertinent under the applicable Guidelines. This often necessitates an evidentiary hearing and the presentation of live courtroom testimony. Judges must also hold hearings to consider objections to presentence investigation reports, make the specific factual findings required by the Guidelines, provide a statement of reasons for the sentence imposed, and write an opinion that is subject to appeal. Clearly, these procedures require more of a judge's time than under the discretionary sentencing system in use before the Guidelines.

The Sentencing Reform Act also has added to the judicial workload by authorizing supervised release as an element of a sentence and transferring oversight of released prisoners from the United States Parole Commission to the courts. Judges must conduct revocation hearings whenever a defendant on supervised release is accused of violating the terms of his or her supervision. These hearings often involve courtroom presentations of evidence and testimony and require the judge to make specific findings of fact.

Thus, although judges may be spending less time in trials to determine guilt or innocence in criminal cases, they devote substantial time in criminal cases on matters related to sentencing and supervised release. The changing manner of disposition, coupled with increased filings, may be increasing the criminal workload of the district courts. In a number of districts, the criminal docket occupies a predominant amount of the judges' time.

Civil Cases

Rule 1 of the Federal Rules of Civil Procedure states that the principal objective in a civil case is to "secure the just, speedy and inexpensive determination of every action." Traditionally, trials on the merits have occurred in only a minority of civil cases. Limited statistics and academic commentary suggest that only one out of every five civil cases went to trial before the Federal Rules of Civil Procedure took effect in 1938. The Federal Rules established judicial authority and formal pretrial procedures aimed at narrowing the issues in a case and providing alternate means to dispose of cases where trials are unnecessary. In the 1980s the rules were amended to promote active judicial management of civil cases.

Over the last several decades, a trial on the merits has been seen increasingly—by litigants, their attorneys, the courts, and Congress—as not necessarily the best way to achieve justice, avoid delay, and promote economy in many cases. The civil trial rate has fallen from 10% in 1970 to 2.2% in 2000. At the same time, the number of civil cases filed has grown by nearly 200%. A number of factors have played a part in this evolutionary change in the way the federal courts are disposing of their civil cases.

As the civil caseload of the federal courts has increased, judges (as well as the legal profession in general) have focused on more efficient ways to manage cases from filing to disposition. Recent legislation has highlighted this focus. The Civil Justice Reform Act of 1990 (CJRA) mandated the development of court-wide case management plans, greater attention to alternative dispute resolution, and formalization of ways to reduce costs and delays. The CJRA also requires individual judges to report every six months on cases and other matters pending before them for specified periods of time. The Alternative Dispute Resolution Act of 1998 requires that every district court make at least one form of ADR available to litigants in all civil cases, implement a local ADR program, and designate a judge or court employee to oversee the program.

By facilitating early resolution of cases, changes in the Federal Rules of Civil Procedure to implement the CJRA have affected the nature of case disposition. They encourage judges to take an active role in case management (including establishment of firm trial dates that often promote settlement efforts) and facilitate the resolution of procedural and legal motions. They require parties to meet early in the course of litigation to discuss the case, including potential settlement, and they mandate or encourage disclosure of reports and other information that enable parties to evaluate more realistically the likelihood of success on the merits.

Other developments in the law have also made dispositions before trial more common. For example, following the Supreme Court's decisions in *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), and related cases, summary judgment has become much more common in the federal courts. Judges are encouraged to decide cases without a full trial on the merits by resolving claims and defenses on which there are no genuine issues of material fact. Even when partial summary judgment is granted, the more limited scope of the prospective trial often makes settlement more attractive and likely.

More recently, the Court's decision in *Daubert* and corresponding amendments to the Federal Rules of Evidence have clarified the standard for the admissibility of expert witness testimony. Judges must exercise an important "gatekeeper" function that requires more hearings and may result in the exclusion of expert testimony critical to a party's case.

The practices and culture of the bar have also impacted the trend in case dispositions. In recent years, lawyers have tended to place more emphasis on settlement and negotiation than on litigation. Especially in mass tort litigation and other class actions, the principal goal for counsel appears to be negotiating a settlement rather than going to trial. This has been encouraged by the fact that law school curriculums and continuing legal education programs include instruction on these subjects, by increasing reliance on mediation and arbitration in the kinds of disputes handled by federal and state administrative agencies and state courts, and by growing concerns about the cost of litigation and the fairness and accuracy of jury decisions. Some observers have also suggested that the federal courts' mandatory disclosure requirements, active judicial case management, and emphasis on alternative dispute resolution encourage attorneys to bring cases in state court to avoid "front-loading" of litigation expenses. Even so, the bar has expressed little concern about the prospect of fewer civil trials in federal court.

Litigants also have powerful financial incentives to settle cases. They may elect to resolve their disputes outside the court system rather than endure the expense and uncertainty of a trial. A desire to avoid the time and expense of discovery may be a factor as well. The growing use of binding arbitration clauses in various employment, commercial, insurance, and consumer contracts reflects the societal shift away from traditional litigation.

In civil cases, as in the criminal context, the change in the nature of dispositions has occurred simultaneously with an overall increase in the workload of the district courts. On the one hand, judges are trying a lesser percentage of civil cases. On the other hand, they are getting involved earlier in the litigation process by resolving discovery disputes, becoming involved in earlier case management activity, overseeing settlement negotiations and alternative dispute resolution efforts, hearing and deciding summary judgment (and other) motions, and supervising the parties' efforts to identify issues appropriate for trial.

Beyond Trials: The Work of Federal District Court Judges

Popular culture perceives the trial—a courtroom proceeding involving lawyers, witnesses, evidence, and in some cases, a jury—to be the essential centerpiece of the judicial process. Books, movies, the news, and television focus almost exclusively on trials, typically those involving sensational issues, dramatic episodes, and newsworthy people. But for most of the past century, the vast majority of cases have been resolved without a full-fledged trial on the merits. The work of the federal judiciary involves much more than the popular image indicates: judges work in many different ways to manage and resolve the civil and criminal cases brought before them.

Statistics show that federal judges have taken an increasingly active, "hands on" role in their cases. For example, in the 1970s and early 1980s, about 60 percent of all dispositions of civil cases involved some personal intervention of a judge. By 2000, judicial involvement occurred in 83 percent of all civil cases concluded. Bringing civil disputes to successful, final conclusions and ensuring that those charged with criminal offenses are brought through the criminal justice system fairly, swiftly and impartially—whether by trial on the merits, through a judicial decision on purely legal issues, or by agreement of the parties—is the essence of judges' work in the federal district courts.

Civil Disputes

The advent of the Federal Rules of Civil Procedure in 1938 changed the traditional mode of judging by introducing the practice of pretrial management and eliminating "trial by ambush." The days of the merits of a case being resolved only at a trial were over. During the course of the next 60 years, the Civil Rules, later amendments to those rules, and other actions by Congress strongly encouraged—even required—federal judges to become active in overseeing the adjudicative process in civil matters from case filing, through settlement discussions, to final disposition.

Under the Civil Justice Reform Act of 1990 and the complementary 1993 revisions to the Federal Rules of Civil Procedure, judges are ever more active participants in all phases of civil litigation. The two key components of civil adjudication in federal district court are the pretrial case management process and the trial. The former serves the latter. Because a judge in the district court is responsible for managing a civil case from filing to disposition, the judge usually is involved in the case from its earliest stages to ensure that it progresses efficiently and effectively through the court.

A judge's involvement with a case often begins when a scheduling order is entered, as required by the Federal Rules of Civil Procedure. In the order, the judge, after consultation with the parties, establishes deadlines for amending pleadings, filing motions, and concluding discovery (the exchange of potential evidence, documents, and related information among the parties before trial). The judge's scheduling order often controls the scope and extent of discovery and establishes dates for a final pretrial conference and trial of the case. It is important

that the judge devote attention to the careful drafting of the order, since it functions as the outline for future progress of the litigation.

In the course of conducting discovery, disputes may arise among the parties, and these disputes may develop into collateral litigation that takes on a life of its own. Judges typically devote considerable effort to presiding over the discovery process. For example, during the taking of a deposition, a judge may be asked to rule on an objection concerning a refusal to answer a question. The judge may also need to resolve discovery disputes concerning requests for document production and claims of privilege asserted by owners of documents. A party may also call upon the judge to issue protective orders restricting the disclosure of documents beyond the litigants in the case. This often may require the judge to review the relevant documents and draft a written order spelling out the reasons for the decision.

The December 2000 amendments to the Federal Rules of Civil Procedure are designed to control the scope of discovery and the time within which the discovery process must be completed. The judicial role in supervising the process, however, continues. Parties may object to the disclosure requirements, which mandate disclosure of certain information about witnesses, evidence, and exhibits that are relevant to their claims or defenses. Under the rule, the judge can also broaden discovery to include anything relevant to the subject matter of the case if a party shows good cause for doing so.

Judges may be called upon to facilitate negotiations between parties to settle a dispute and avoid further costs and delay in litigation. They may conduct settlement conferences in cases over which they are not presiding. This requires them to meet with the parties and serve as an impartial arbiter in an attempt to resolve the dispute.

In some cases, a party asks the court for a temporary restraining order or preliminary injunction as an interim measure to preserve the party's rights from irreparable harm while the case is pending. Time is of the essence with these emergency motions, which are entitled to priority consideration, and a judge must put aside other matters to review the evidence and provide a prompt ruling. These requests often involve complicated issues of constitutional law or complex commercial transactions. In exceptional cases, a temporary restraining order, which seeks to prevent immediate, irreparable harm to the party seeking the order, can be issued without notice to the opposing side. If this is done, the judge must hear argument on the issues at the earliest possible time and, under the Federal Rules of Civil Procedure, the hearing takes precedence over all other matters. In cases where injunctive relief is sought to command or prevent an action by another party and notice to all parties is given, the judge will conduct a courtroom hearing that is very similar to a full trial, including the taking of testimony and hearing of oral argument from the parties. To resolve the motion, the judge must draft a carefully worded opinion, setting out the reasons for granting or denying the injunctive relief. Depending on the circumstances, the order may be subject to immediate review in the court of appeals.

In some cases, parties ask the judge to resolve the case solely on legal grounds. Other than a full trial on the merits, the resolution of these case-dispositive motions is perhaps the single

most time consuming function that a judge in the district court performs. In civil cases, the primary examples of these are motions to dismiss and motions for summary judgment. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) requires the judge to decide whether the pleadings filed by the parties seek relief that the federal court is authorized to grant. The judge's ruling may resolve the case, thus preventing it from going to trial.

Motions for summary judgment require a judge to determine whether the parties are disputing any genuine issues of fact that are material to the case and, if not, whether the law requires that judgment be entered in favor of one side or another. Supported and enhanced by three important Supreme Court decisions in 1986, summary judgment motions have become commonplace in recent decades. To rule on these motions, the judge must become familiar with the facts of the case, review the results of discovery (*e.g.*, deposition transcripts, documents produced), and read the briefs of the parties. Especially when both parties file these motions, the courtroom proceedings may turn into something closely resembling a trial on the merits, involving arguments from counsel and requiring the judge to resolve disputes based on the law and a factual record. In determining whether summary judgment is appropriate, judges are frequently called upon to address difficult legal issues involving complex or technical matters, such as the scope of patents. Motions for summary judgment require a judge to draft an opinion stating the reasoning behind the ruling. These opinions must address the facts and the law and are often lengthy, especially when the motion is granted. A decision granting summary judgment is immediately subject to review by the court of appeals if the losing party requests it.

Most cases are disposed of on motion or settled by the parties. Those matters not fully resolved in these ways proceed to a trial on the merits. In order for the trial to go smoothly, a judge must supervise the pretrial preparation. Most often, the judge's involvement comes in the form of holding a final pretrial conference shortly before the scheduled trial date. At the conference, the judge and the parties go over the list of witnesses expected to testify, the evidence expected to be presented, and the objections that one side may raise to the intended presentations of the other. The judge tries to resolve any evidentiary or procedural motions before trial. Resolution of these motions may require the judge to review facts and documents and may require holding a hearing in court in advance of the trial. In some instances, the court's actions on evidentiary issues—for example, whether to admit testimony from expert witnesses—can have a bearing on the outcome of the case.

In cases involving expert witnesses, a judge must also resolve issues concerning the expert's qualifications to testify about the specific issue, including whether the expert's opinion is based upon sufficient facts or data, is the product of reliable principles and methods, and is relevant. In such an instance, the judge often reviews the written report of the witness and may take testimony in open court before making a decision on whether the expert will be permitted to testify and the scope of admissible testimony.

Sometimes multiple plaintiffs present similar legal or factual questions and ask the court to certify their claims as a class action on behalf of themselves and others similarly situated. The judge must exercise sound discretion in deciding whether to certify a class but must make

findings on a variety of eligibility criteria specified in the Federal Rules of Civil Procedure. The certification process involves arguments by the parties, courtroom hearings, often-lengthy judicial opinions, and appeals. It is usually complex and time-consuming, and the judge's decision on class certification frequently has a significant impact on how the plaintiffs' claims are eventually resolved.

Once a trial begins, the judge oversees all aspects of the proceedings. In jury trials, the judge conducts the selection of a jury and gives preliminary instructions to the chosen jurors about the case and the general operation of the court. In all cases, the judge controls the official trial record by ruling on objections about questions posed to witnesses or about documents or other materials sought to be admitted into evidence. Once the evidence is presented, the judge must rule on motions by the parties for judgments as a matter of law. These motions require the judge to decide whether the party opposing the motion has presented sufficient evidence that, if believed, could support a verdict in favor of that party. Deciding these motions, which can bring the trial to an early conclusion, requires the judge to review relevant case law and, in some cases, draft an opinion explaining the rationale for the ruling. If these motions are not granted, closing arguments are presented.

At the conclusion of closing arguments in a jury trial, the judge instructs the jurors on the law that applies to the facts of the case. After the jury arrives at a verdict, the judge may have to rule on a motion for a new trial, or to reduce the jury's award, or to set aside the verdict as contrary to the law. While these motions may be argued in open court, the jury is no longer involved in the proceedings. These motions involve legal decisions by the judge alone. If the case does not involve a jury, the judge takes the case under consideration and begins the difficult and often lengthy process of deciding the case and drafting an opinion. The judge must make specific conclusions of law and fact to decide the outcome of the case.

Even after the case is resolved, the judge's involvement may not end. The judge will often retain jurisdiction over implementation of the judgment or settlement agreement and may be called on by the parties to resolve any disputes that arise. Such continued judicial involvement can last for years and require the judge to devote a great deal of additional effort to the case.

In cases resolved by trial or motion, the prevailing party may ask the court to require the opposing party to pay the costs and fees the prevailing party incurred in gaining a favorable result. These motions are governed by specific statutes and often require the judge to make detailed findings about the reasonableness of the use of attorney time and resources.

Certain categories of civil cases in the district courts do not follow the normal litigation course of pretrial case management and trial because they involve review of proceedings conducted in another court or body. Appeals from a bankruptcy court, for example, may present complicated issues that a judge in the district court must resolve. Many cases come from federal administrative agencies, including unsuccessful claimants' requests for judicial review of decisions denying Social Security disability benefits. The record in these cases routinely consists of detailed medical information and a transcript of an evidentiary hearing conducted by an

administrative law judge in the Social Security Administration. The judge hearing the case in the district court must review the record thoroughly and prepare a decision that is subject to further appellate review.

Habeas corpus petitions, in which prisoners convicted of crimes under state law attack the validity of their sentences under federal law, require judges in the federal district court to review the records of trials and other proceedings conducted in state courts. (They can also be called upon to conduct similar reviews of convictions and sentences rendered in the *federal* courts.) These matters may involve complicated constitutional and procedural issues under federal and, where relevant, state law. The record of the earlier proceedings, especially in cases in which the death penalty has been imposed, can be voluminous. The judge in the district court reviews all the earlier proceedings and briefs of counsel and may hold hearings. The reviewing judge's opinion may have to be lengthy in order to address the myriad substantive and procedural questions presented.

Judges in the district courts may also decide issues related to proceedings pending in another district court that are brought in their district because of the location of a witness or potential evidence. An example is a motion to quash, or invalidate, a subpoena for documents held in one state that may be relevant to a federal case in another state. The judge is called upon to review the issues involved, listen to courtroom argument, and make a ruling.

Criminal Prosecutions

The Speedy Trial Act requires federal judges to conduct various proceedings in criminal cases within certain specified time limits. Also, judges often play an important part in criminal prosecutions even before arrests are made, issuing search and arrest warrants and reviewing other law enforcement and investigatory methods. They must also preside over the activities of grand juries and be available to receive indictments.

Once taken into custody, an individual has the right to appear before a judge within a relatively short time. The judge conducts an initial appearance proceeding to determine whether the defendant will be released from custody before trial or be detained. To prepare for the hearing, the judge must review the report of the court's pretrial services office, which provides a recommendation as to the defendant's release or detention based on relevant information, including the potential danger that the defendant poses to other persons or the community. A judge may also need to determine whether a defendant is entitled to a court-appointed lawyer under the Criminal Justice Act, which ensures the availability of legal representation for all financially eligible individuals charged with federal crimes. In some cases, the judge may need to conduct a further inquiry into the identity of the individual or the possible need to transfer prosecution to another district.

Criminal cases generally do not present as many discovery disputes as civil cases, but they can generate several different types of motions that require a judge's involvement. In a multiple-defendant case, a judge will likely have to rule on a motion to try the defendants separately. The

judge may also have to rule on motions to suppress evidence, which often require conducting a trial-like courtroom hearing that includes witness testimony.

A judge must spend a significant amount of time on sentencing, whether the defendant pleads guilty (as is most often the case) or is convicted after a trial. If the defendant pleads guilty, the judge must be satisfied that the defendant is entering the plea knowingly and voluntarily and without the expectation of any future benefit. The Federal Rules of Criminal Procedure provide judges with an outline of specific questions that they must ask the defendant at a hearing in open court. The judge may accept the guilty plea only if satisfied by the defendant's responses and if certain that the defendant is answering truthfully.

If the criminal defendant does not enter a plea of guilty, or the judge rejects the plea of the defendant, the case will proceed to trial. As in civil cases, the judge must question the prospective jurors and provide them with preliminary instructions about the case.

The functions of a judge during the core events of a criminal trial are very similar to those during a civil trial. The judge must rule on objections to questions and evidence as well as on motions made by both sides for judgment in their favor after they have completed the presentation of evidence. As in civil cases, the judge must also prepare and confer with lawyers about jury instructions and then deliver the instructions to the jury.

The sentencing of criminal defendants typically has required a great deal more judicial time and attention since the advent of the Sentencing Guidelines in 1987. At sometimes-lengthy sentencing hearings, the judge must make factual findings on issues such as a defendant's relevant conduct and criminal history. In order to make these required findings, a judge may need to take testimony from law enforcement officers and others involved with the case. Evidence may also be needed to resolve any objections a defendant may have to the presentence report prepared by the probation office, especially since the report is normally used by prison authorities to make decisions as to the conditions of the defendant's incarceration. The judge must listen to the arguments of prosecution and defense counsel, who often argue to increase or decrease the sentence within or outside the range of penalties prescribed by the Sentencing Guidelines.

After a defendant is sentenced, the judge may be called upon to address a variety of matters related to the case. For example, the judge must review and approve the calculation of time and the corresponding payment for the services and expenses rendered by court-appointed attorneys. The judge who sentences a defendant is also responsible for hearing all post-conviction challenges to the sentence.

Post-conviction motions normally do not call for a hearing but regularly require a judge to review the original sentence and related proceedings. The vast majority of federal sentences today also include, in addition to a term of actual imprisonment, a period of supervised release during which the defendant, once released from prison, is required to observe certain conditions to remain at liberty. Any motion to alter a sentence, such as a motion to reduce the sentence because the defendant substantially assisted the prosecution (which must be made by the prosecutor and

agreed to by the judge) or to revoke the term of supervised release, will be heard in open court by the sentencing judge. These types of motions can require a judge to review previous decisions in a case, conduct a hearing, and take evidence on new issues that arise. Additionally, judges have a wide range of discretion in ruling on motions to revoke supervised release and can spend a great deal of time determining whether it is appropriate for the defendant to continue under supervised release or return to prison.

Conclusion

The past several decades have seen many changes in the law that have had significant impact on the judicial processes in the federal district courts. The Federal Rules of Civil Procedure and congressional legislation have required judges to become more personally involved in sound case management and settlement in civil cases in order to reduce unnecessary cost and delay in litigation. Managed cases tend to settle earlier and more efficiently, and those cases that do go to trial are generally more focused and use judges' and parties' time more efficiently. In criminal cases, the Sentencing Reform Act of 1984, the ensuing Sentencing Guidelines, and statutorily mandated sentences have decreased judicial discretion in what sentence to impose, but they have also resulted in more detailed courtroom sentencing hearings in which counsel argue forcefully on issues of upward and downward departures from the Guidelines and on issues of revocation of supervised release.

The popular image of what judges do may be limited to overseeing trials that resolve issues in litigation. On closer examination, however, it is very clear that federal judges engage in a much more extensive variety of judicial activity—all in an effort to facilitate and ensure just, speedy, and inexpensive determinations in civil and criminal cases.

Defining Trials in Statistical Databases

CIVIL/CRIMINAL DATABASE	TRIALS DATABASE

CAPTURES:

DISTRICT COURT CASELOAD

Two Snapshots of Each Case

(Filing and Disposition)

WORK OF ARTICLE III JUDGES

Monthly Reports of Activity

EXAMPLES OF DATA COLLECTED:

- **Number & Types of Cases**
  - **Origin**
  - **Nature of Suit/Offense**
- **Disposition of Each Case**
  - **Settled/Dismissed**
  - **Acquitted/Convicted**
  - **Trial**

- **Arraignments**
- **Motions**
- **Pre-Trial Conferences**
- **Trials on Merits/Charges**
- **Sentencing Hearings**
- **Other Proceedings**

Chart 1. Rate of "Traditional" Trials in U.S. District Courts
Civil and Criminal Databases

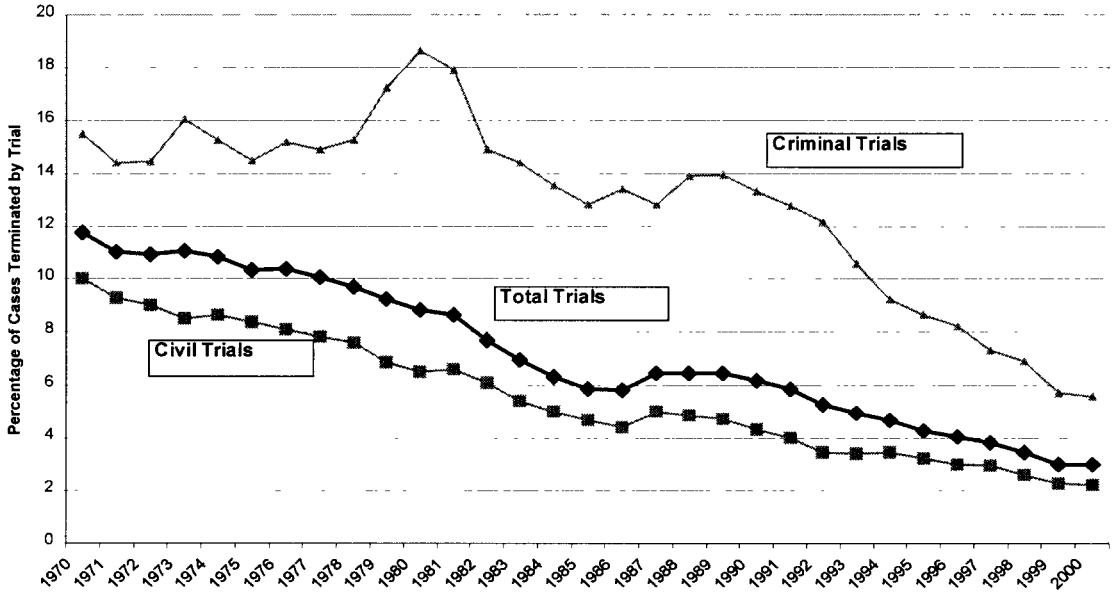
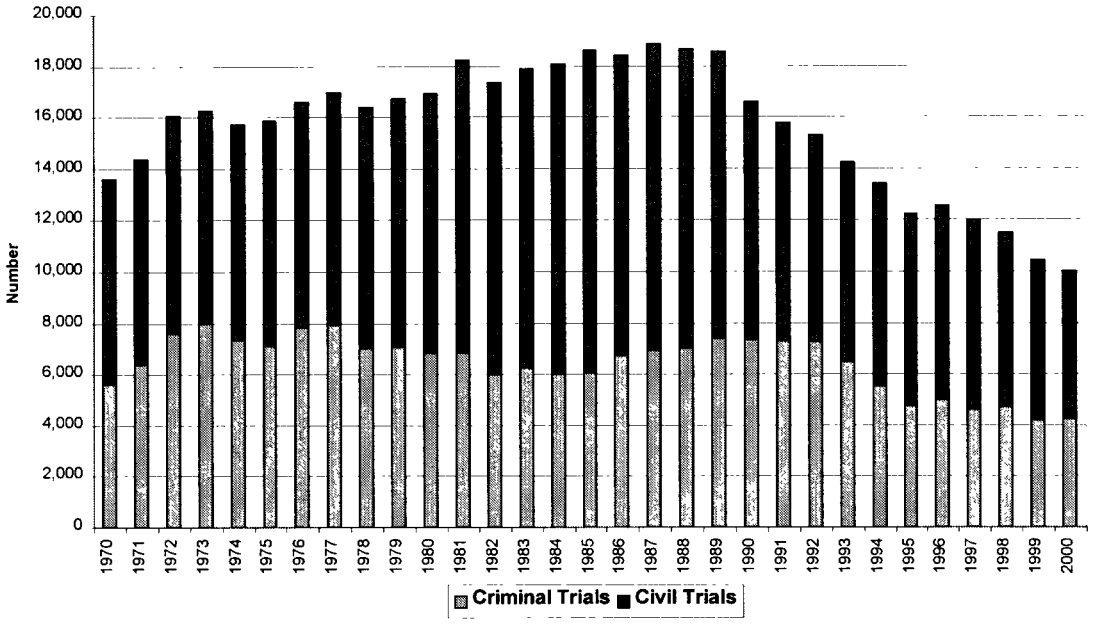


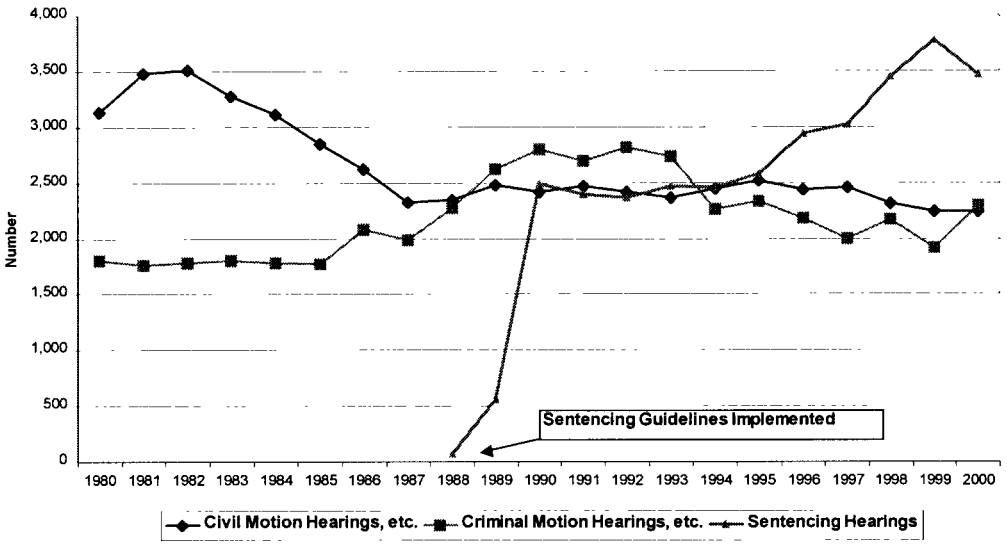
Chart 2. Number of Civil and Criminal Cases Closed by Trial Civil/Criminal Databases



For the purposes of reporting on the monthly JS-10 Report of Trials and Other Court Activity, a trial is defined as:

"a contested proceeding before either the court or a jury in which evidence is introduced."

Chart 3. Other Activities Defined as Trials
Motions and Contested Sentencing Hearings
JS-10 Report



Reported Work of District Court Judges = Civil and Criminal Trials + Other Trial Activity + Other Court Activity

(Obviously this does **not** reflect all work of judges ! !)

Chart 4. Number of Reported Trials and Other Court Activity
JS-10 Report

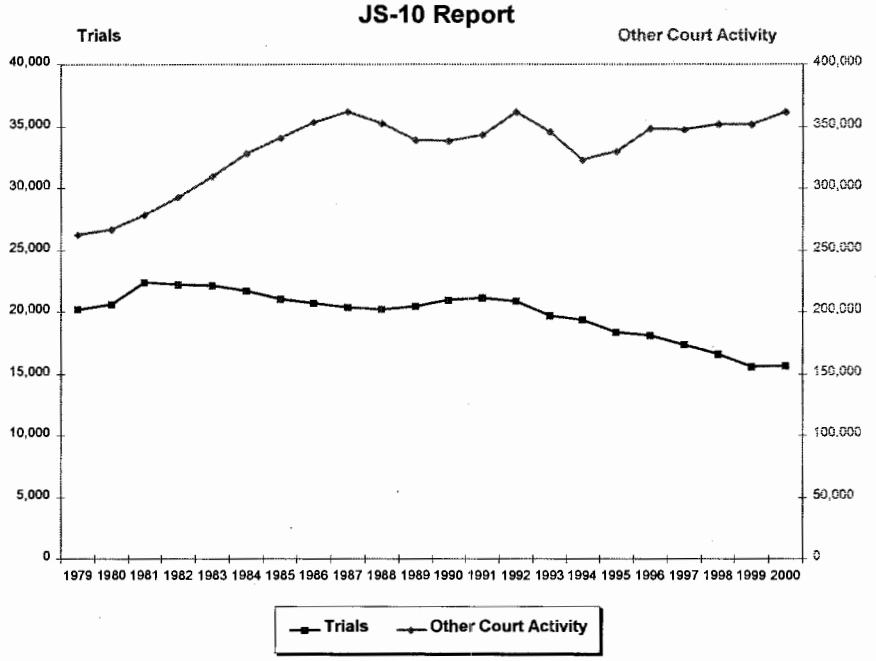


Chart 5. Civil and Criminal Other Court Activity
JS-10 Report

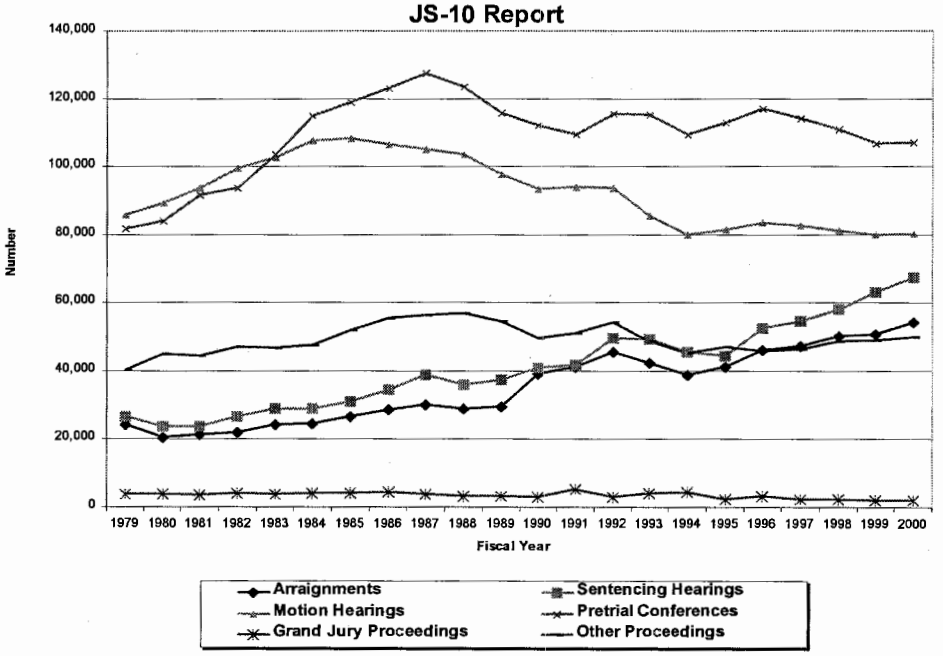


Chart 6. Number of Criminal Defendants Filed vs Convicted and Sentenced
Criminal Database

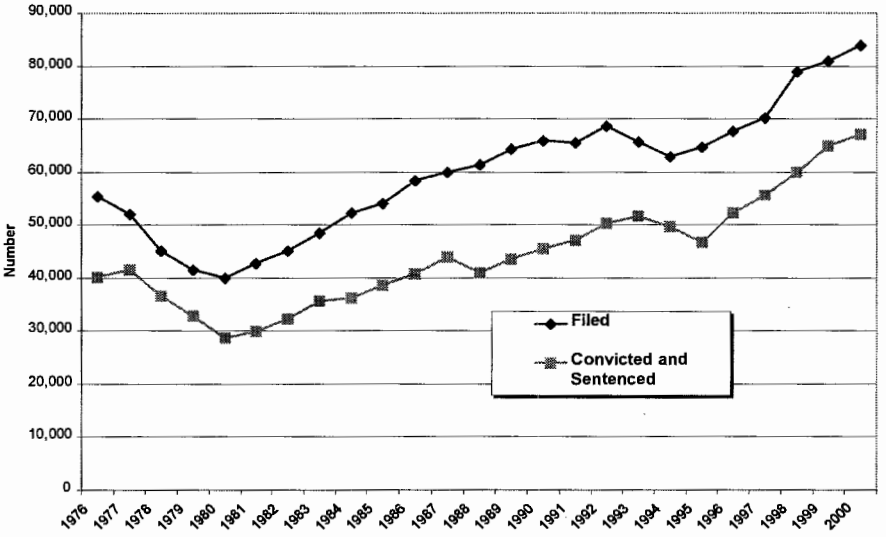


Chart 7. Length of Civil and Criminal Trials
JS-10 Report

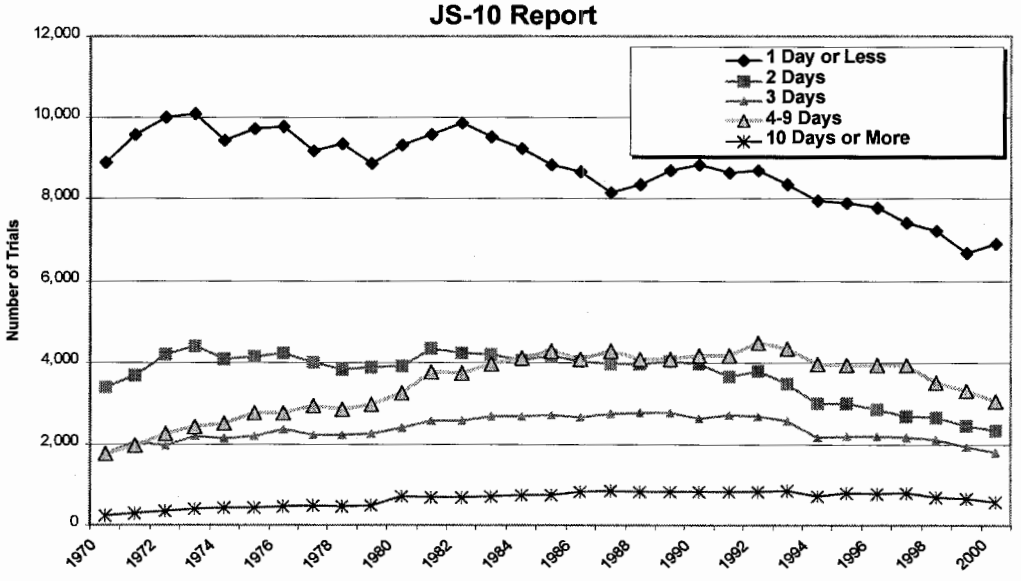


Chart 8. Total Reported Trial and Other Court Activity Hours
JS-10 Report

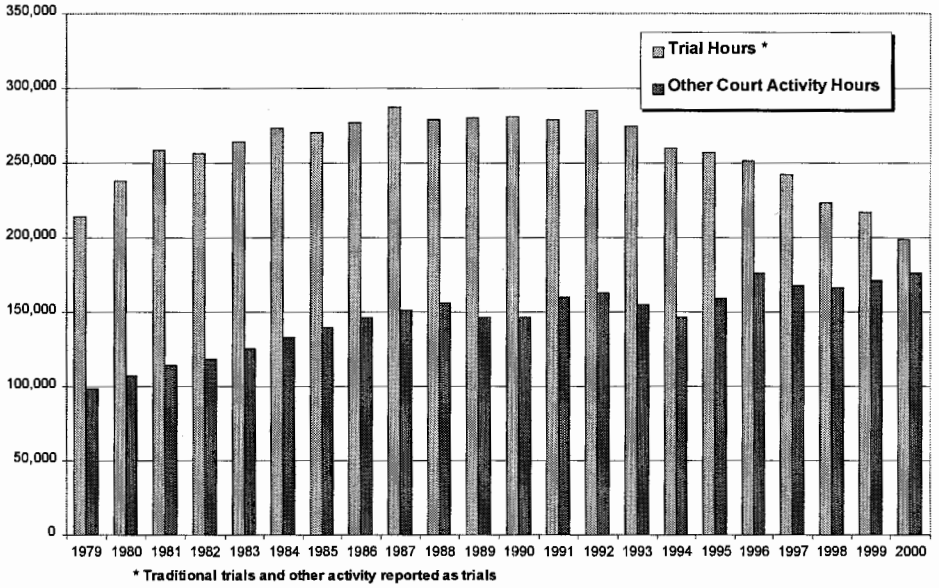
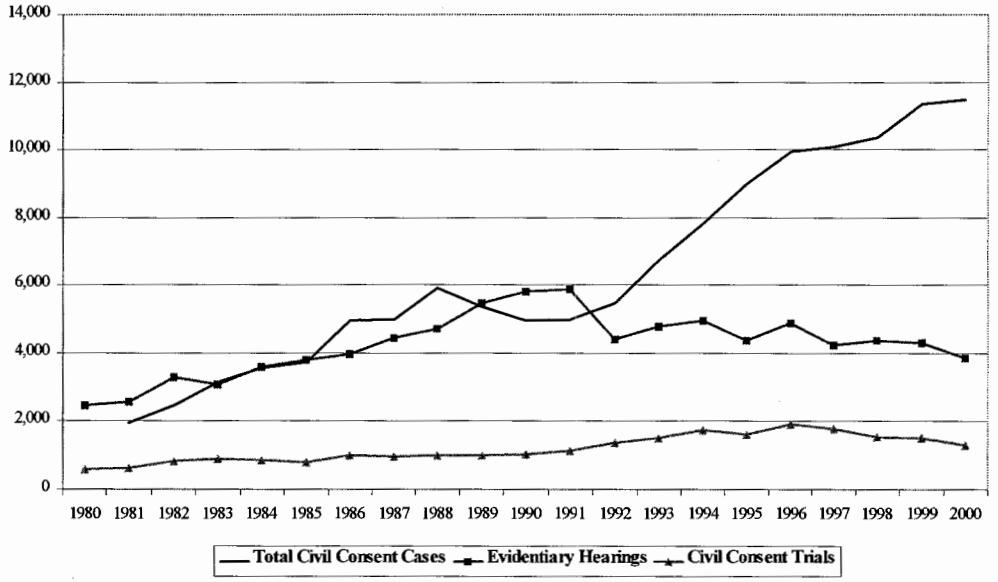


Chart 9. Trials Conducted by Magistrate Judges
1980-2000



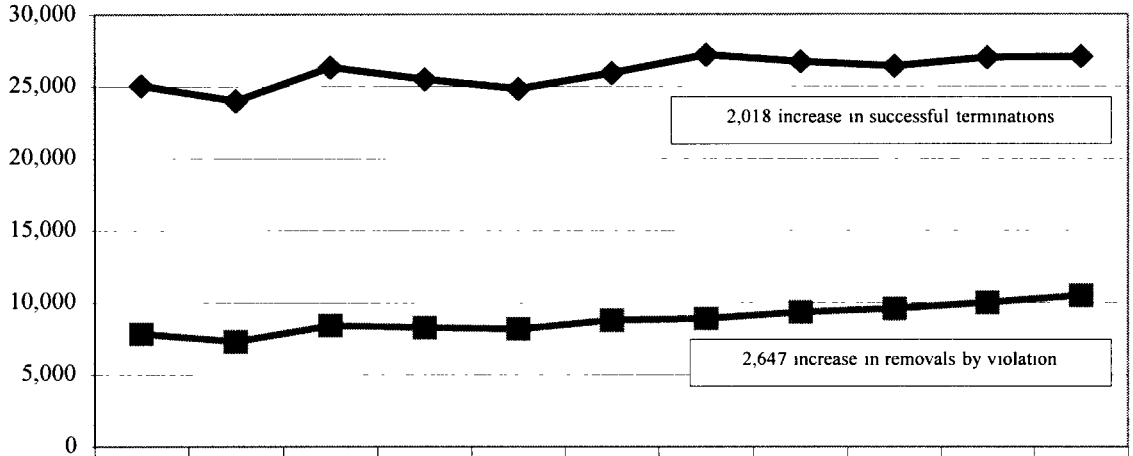
Where Do We Go Next?

- What else is useful to explain the work of judges?
- Are more data needed? If so, what types?
  -- Surveys? Judges? Bar? Litigants?
- More statistical analysis to understand the changes?
  -- (e.g., differences among districts?)
- How do we address the impact of these changes:
  -- On court administration?
  -- On staffing, space, other resources?

Appendix E: Assessment of the Workload Impact of Supervised Release Revocation Hearings

Chart 1

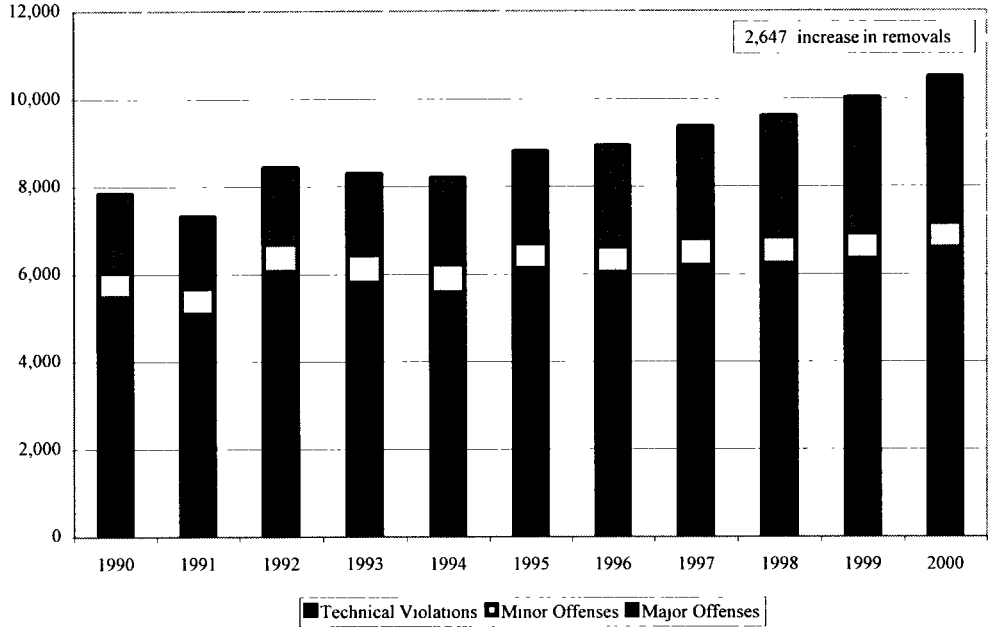
Successful Terminations and Removals from Supervision with Violations



	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
# Successful Terminations	25,070	23,993	26,338	25,493	24,848	25,937	27,202	26,718	26,401	27,016	27,088
Total Removed by Violation	7,849	7,315	8,433	8,297	8,199	8,797	8,922	9,361	9,599	10,014	10,496

Chart 2

Removals from Supervision with Violation by Type of Violation



Supervision Violation Proceedings						
Six-Month Period Ending June 30, 2001						
	Contested Proceedings			Non-Contested Proceedings		
	Supervised Release	Probation	Total	Supervised Release	Probation	Total
Number of Proceedings	458	127	585	4,801	753	5,554
Number of Hours	503	167	650	2,340	478	2,818

Chart 4

Supervised Release and Probation Contested Proceedings and Hours
Six Month Period Ending June 30, 2001
Circuit Totals

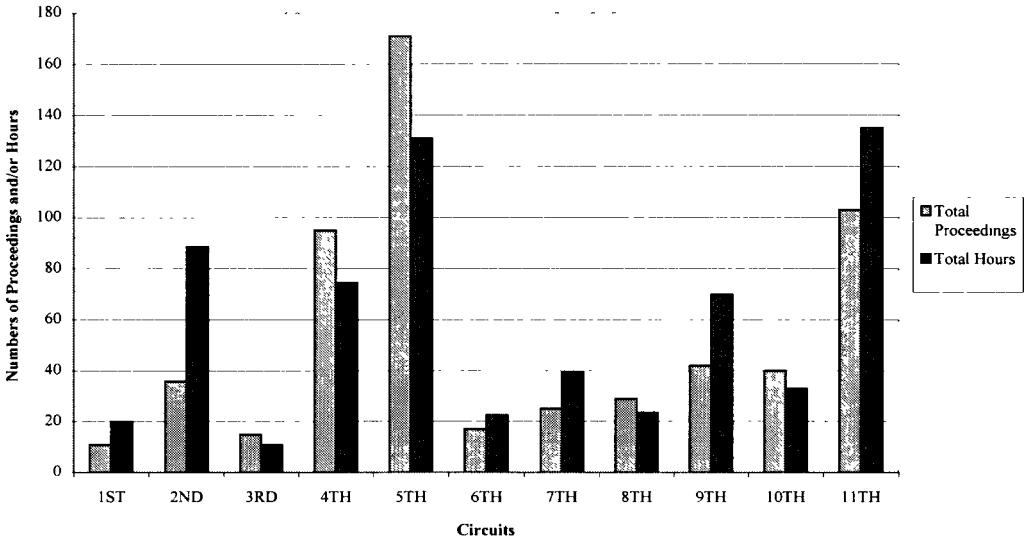
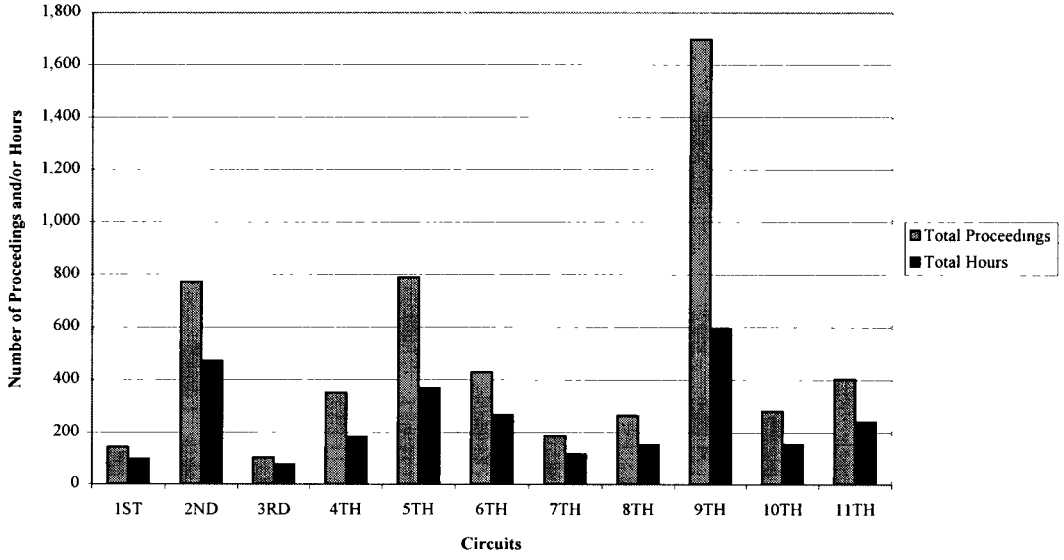


Chart 5

Supervised Release and Probation Non-Contested Proceedings and Hours
Six Month Period Ending June 30, 2001
Circuit Totals



Attachment 2: Committee Strategic Issues and Goals from *Strategic Planning Issues of the Committees of the Judicial Conference of the United States* (February 2001)

Committee on Rules of Practice and Procedure

Honorable Anthony J. Scirica, Chair

Strategic Issues

1. **Making effective use of technology and information**
2. **Monitoring, analyzing, and addressing the proliferation of local rules**
3. **Upholding the integrity of the rules process**

Strategic Issue: Making effective use of technology and information

The courts are moving rapidly to expand the use of technology by the bench and bar.

Strategic Objectives

- Ensure that the rules of practice and procedure do not unintentionally impede the increased use of technology by the courts.

Initiatives or Courses of Action

- Formed a technology subcommittee with representatives from each advisory committee.
- Published for public comment proposed amendments that would allow electronic service with consent of the parties.
- Participate in the Committee on Court Administration and Case Management's ad hoc committee discussions and meetings on privacy.
- Closely monitor the CM/ECF project.

Strategic Issue: Monitoring, analyzing, and addressing the proliferation of local rules

A comprehensive review of the local rules of court was last made in 1986 in accordance with a Congressional mandate. The local rules were reviewed for legal error, internal inconsistency, and consistency with federal law and national rules. The report identified particular local rules that made sense for national adoption. The project resulted in many changes to the national rules and the implementation of a uniform numbering system for local rules.

The Standing Committee believes it is time for another comprehensive review of local rules to assess their consistency with national rules and statutes and to suggest changes to the courts, when appropriate. Many amendments have been made to local rules since the last review. Moreover, case law on local rules has substantially increased. In addition, local rules have been revised to account for changes prompted by the Civil Justice Reform Act. As courts struggle to develop alternative dispute resolution programs and incorporate increased reliance on electronic filing, more and more local rules and internal operating procedures are being promulgated. Finally, the uniform numbering system authorized by the Judicial Conference has been in place for approximately two years. A review of local rules would show the extent of its adoption in the courts. It would also provide hard data on the overall increase in the number of local rules since 1990.

The bar routinely complains about the growing number of local rules. Local rule proliferation has now become a primary concern of the Litigation Section of the ABA. In the past, Congress has listened to the bar's complaints and called for reform — including the 1986 local rules project initiated by Congress. The rules committees are statutorily responsible for monitoring the operation and effect of the rules. The project is consistent with the committees' statutory obligations. It will provide the courts with a useful service and may dissuade any direct Congressional interference.

Strategic Objectives

- The Rules Committee will review all local rules and identify possible new national rules.

Courses of Action

- A law professor has been selected to gather and study all local rules.
- The project is expected to be completed in about one year.

Strategic Issue: Upholding the integrity of the rules process

The current rulemaking process carefully balances the authority and responsibility of courts to enact procedures to govern cases it must decide with the authority and responsibility of Congress to enact substantive law. In recent years Congress has become increasingly involved in the rulemaking process.

Strategic Objective

- Ensure the rulemaking process remains within the Third Branch.

Initiatives or Courses of Action

- Work closely with the Office of Legislative Affairs to educate members and staff of Congress about the rulemaking process.
- Diligently monitor legislation to quickly identify any attempts to directly or indirectly amend the Federal Rules of Practice and Procedure.
- Respond to specific bills that would amend the rules.

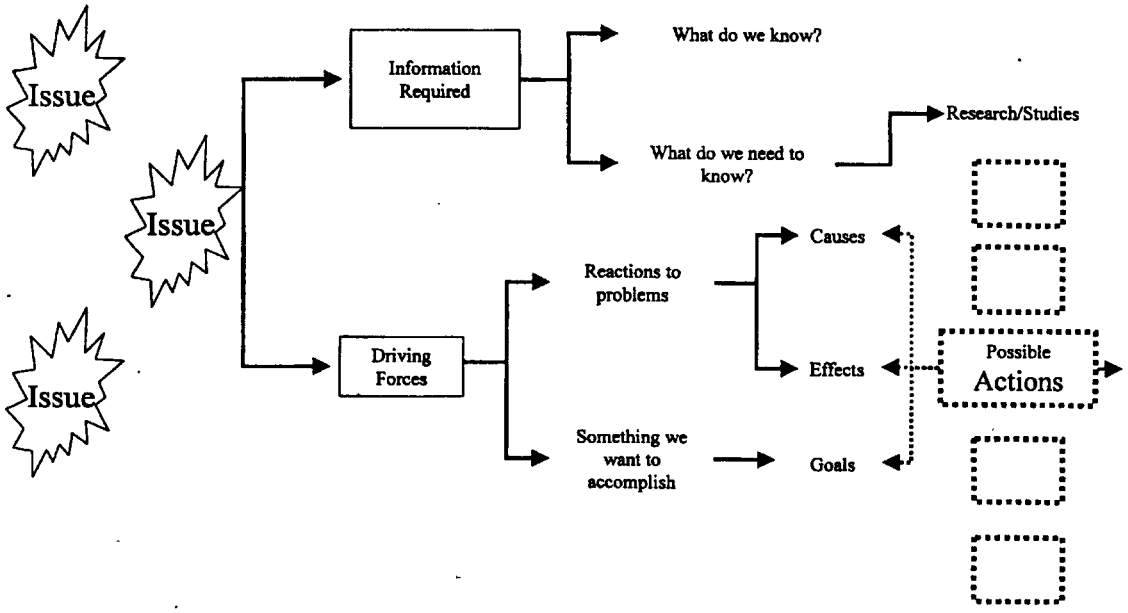
Attachment 3: Long-Range Planning Process

JUDICIARY LONG-RANGE PROGRAM PLANNING PROCESS

Working Through Strategic Issues

Step 1. Define Strategic Issues

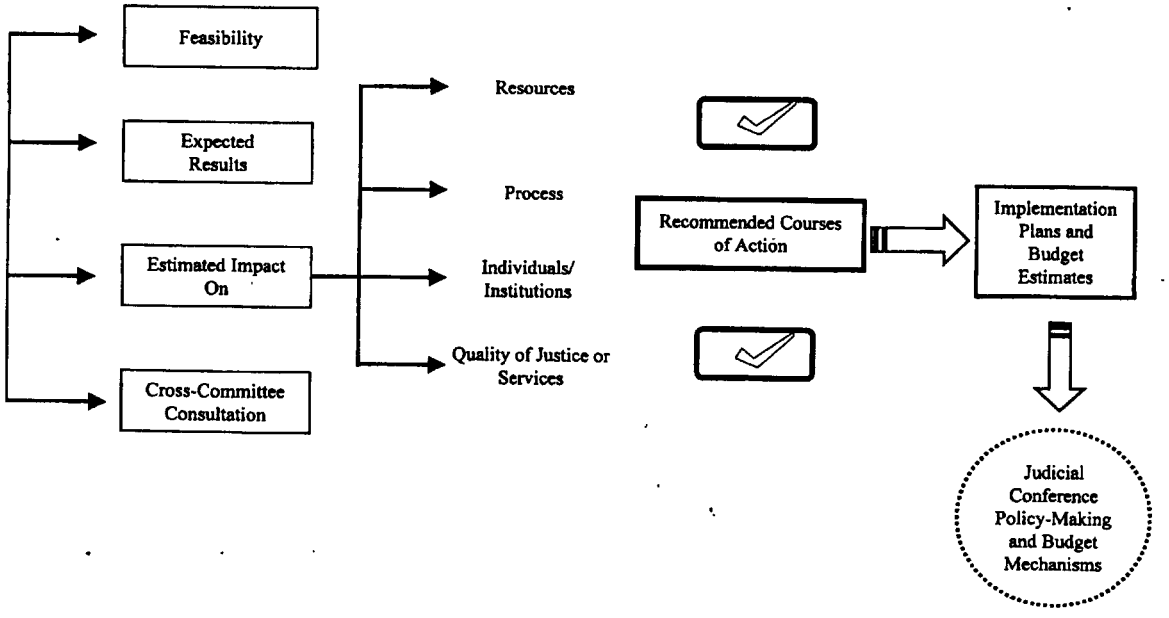
Step 2: Assess Each Issue



Step 3: Identify and Analyze Possible Actions

Step 4: Recommend Courses of Action

Step 5: Develop Plans and Budget Estimates



5 Steps in the Planning Process

1. Define strategic issues
2. Assess each issue
3. Identify and analyze possible actions
4. Recommend courses of action
5. Develop plans and budget estimates

The Elements of Each Step

❶ Define Strategic Issues

Strategic issues may be **problems to solve** OR **goals to achieve**.

⇨ Consider what has happened, what is happening, what may happen, and what you want to happen--in order to identify the range of challenges facing the judiciary and its programs.

⇨ Consider all trends, events, initiatives, and policies that will or may affect your programs over the next five years. What problems are there? What changes may be necessary? What changes are desired? Where can improvements be made?

⇨ Decide what issues are most important for program success. These may represent problems that require action, or they may reflect goals to pursue. Strategic issues can be broad or narrow in focus. Issues can emerge and change frequently.

⇨ For each strategic issue, identify the key questions to explore.

❷ Assess Each Issue

(a) What do we know? What do we need and want to know?

⇨ Determine your information requirements

- historical data (workload, staffing, costs, etc.)
- forecasts
- program performance indicators/benchmarks
- expert opinions
- results of studies/research

⇨ Review and question all assumptions. Think about possible future scenarios, including *"what if...?"* analysis.

(b) Analyze driving forces

For **problems** or **trends**:

⇨ Identify underlying **causes**

This will help you determine if the problem may be addressed through countermeasures that target the underlying source of a problem.

⇨ Determine the **effects** of the problem

Understanding the nature and scope of the effects will help you determine ways to mitigate them.

For **goals**:

⇨ Be specific in defining what you are seeking to achieve.

This will help in aiming initiatives to achieve the desired results, and it will ultimately help in measuring the success of any actions taken.

❸ Identify and Analyze Possible Actions

(a) Speculate freely on possible courses of action.

⇨ Think about all of the possibilities for solving a problem, moving in a desired direction, or achieving a desired outcome.

(b) Analyze each possible action in order to determine how well it will solve the problem or achieve the goal.

⇨ Consider how **feasible** it is, including factors such as:

- Support or opposition expected
- Timing, complexity, risk, and/or other constraints

⇨ Articulate **expected results**

- Identify the benefits and/or outcomes to be achieved.
- Compare alternatives to determine which actions are most likely to achieve the goal or address the problem.

⇨ Estimate **costs, savings, and impact** on:

- Resources: staffing, operating costs, facilities, etc.
- Processes: practices, systems, and operations
- Institutions and individuals: image, behavior, relationships, etc.
- Quality of justice or services

⇨ Consult with other committees to consider and assess cross-committee program impact and coordinate possible actions.

❹ Recommend Courses of Action

⇨ Based on feasibility, expected results/benefits, cost considerations and impact, determine preferred actions.

❺ Develop Plans and Budget Estimates

Following the steps in the planning process will assist committees in developing and recommending new program initiatives, and in estimating budget requirements.

⇨ Submit initiatives and associated budget requirements through the normal Judicial Conference budget and policy mechanisms.

For any significant program initiative or policy recommendation forwarded for Judicial Conference approval and/or incorporation in the judiciary's budget, committees should be able to provide the following information:

- Description of the issue (i.e., the problem or goal) that the initiative will address
- Specific benefits or outcomes expected as a result of the recommended action
- The estimated impact--across relevant programs--on staffing and other resources, operations, services, individuals or institutions, and/or quality of justice
- Budget estimates (or expected savings), by major resource category, for the initial year and subsequent four years.

➥ **Remember, planning is a continuous process!**

April 1999

Administrative Office of the U.S. Courts
Office of Management Coordination & Planning

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 10, 2001

MEMORANDUM TO STANDING COMMITTEE

SUBJECT: *Five-Year Committee Self-Evaluation Form*

In accordance with established Judicial Conference procedures, each Conference committee is requested to complete the attached self-evaluation form.

John K. Rabiej

Attachment

2001 Judicial Conference Committees' Self-Evaluation Form

Committee Name: _____

1. Should the Committee _____ continue to exist?

_____ be abolished?

Please explain why:

2. Amount of work: Does the Committee have

____ too much to do?

____ too little to do?

____ the appropriate amount of work?

If too much or too little, please explain:

3. Size/Composition: Is the size of the Committee

____ too big?

____ too small?

____ appropriate?

If too big or too small, please explain:

Is the Committee membership appropriately representative (e.g., of court entities with an interest in the areas within the Committee's jurisdiction; of the geographic circuits; etc)? ____ yes ____ no

If no, please explain:

4. Functions:

Is the work of the Committee appropriate to its jurisdictional statement?
____ yes ____ no

If no, please explain:

Has the Committee been working in any areas that overlap with other committees?
____ yes ____ no

If yes, please explain:

Are there areas within the jurisdiction of this Committee that might be handled by another committee? ____ yes ____ no

If yes, please explain:

Are there areas within the jurisdiction of other committees that might go to this Committee? ____ yes ____ no

If yes, please explain:

5. Meetings:

How often does the Committee meet each year (either face-to-face or by teleconference)? Please specify.

What percentage of Committee meetings are held in Washington, D.C.?

6. Would you suggest any other changes related to this Committee?

7. Would you suggest any changes related to the committee structure as a whole? For example, should the number of committees be enlarged or reduced? Should committees be combined, eliminated or divided?

* * * * * *

Please return to: Judicial Conference Executive Secretariat
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544