

**SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

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

- 1. Approve the proposed amendments to Civil Rule 73, proposed amendments abrogating Rules 74, 75, and 76, and revision of Forms 33 and 34, and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp.3-4
- 2. Approve the proposed amendments to Criminal Rule 58 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp.6-7
- 3. Approve the proposed report, which concludes that it is not advisable to amend the Evidence Rules to include a special privilege for confidential communications between sexual assault victims and their counselors or therapists, for transmission to Congress in accordance with the law..... pp.7-8

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

- ▶ Long-Range Plan implementation..... p.9
- ▶ Status of rules amendments..... p.9

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Your Committee on Rules of Practice and Procedure met on January 9-10, 1997. All the members attended the meeting.

Representing the advisory committees were: Judge James K. Logan, chair, and Professor Carol Ann Mooney, reporter, Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, Advisory Committee on Civil Rules; Judge D. Lowell Jensen, chair, and Professor David A. Schlueter, reporter, Advisory Committee on Criminal Rules; and Judge Fern M. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the committee's Secretary; Professor Daniel R. Coquillette, the committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro, attorney, of the Administrative Office's Rules Committee Support Office; William B. Eldridge of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the committee.

NOTICE

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CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules is reviewing comments submitted on the comprehensive style revision of the Appellate Rules, which is intended to clarify and simplify the language of the rules. The proposed revision was published in April 1996, and the public comment period expired on December 31, 1996. Although the number of comments was modest, virtually all were favorable. The advisory committee is also reviewing comments on the proposed consolidation of Appellate Rules 5 and 5.1 (to account for changes in 28 U.S.C. §1292 governing interlocutory appeal and to accommodate possible amendments to Civil Rule 23) and revision of Appellate Form 4 (to implement provisions in the Prisoner Litigation Reform Act dealing with *in forma pauperis* petitions), which were separately published in August 1996. These amendments will be considered simultaneously with the comprehensive style revision of the Appellate Rules.

The advisory committee presented no items for your committee's action.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented no items for your committee's action. It is reviewing comments submitted on a preliminary draft of proposed amendments to the Official Bankruptcy Forms, which was published for comment in August 1996.

At its September 1995, March 1996, and September 1996 meetings, the advisory committee considered and approved proposed amendments to 14 Bankruptcy Rules, including Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7062, 9006, and 9014.

It is expected that these proposed amendments and possibly a few more — which may be

approved at the advisory committee's spring 1997 meeting — will be presented to the Standing Committee at its June 1997 meeting with a recommendation that they be published for comment in the fall. The advisory committee is working on possible amendments that would substantially revise Rules 9013 and 9014 governing adversary procedures, contested matters, applications, and other litigation proceedings.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Federal Rules of Civil Procedure 73 and proposed amendments abrogating Rules 74, 75, and 76, and revisions of Forms 33 and 34, together with Committee Notes explaining their purpose and intent. These changes are proposed to conform to the provisions in the Federal Courts Improvement Act, Pub. L. No. 104-317 (effective October 19, 1996), which eliminate the alternative appeal to a district judge from a decision entered by a magistrate judge under 28 U.S.C. § 636(c). Consistent with the Act, the proposed amendments would eliminate the alternative appeal route and permit appeals only to the court of appeals.

Since the provisions eliminating the alternative appeal route took effect immediately, the chair of the Committee on Administration of the Magistrate Judges System requested the rules committees to take quick action to reconcile the inconsistency between the rules and the statutory changes.

Under the Judicial Conference's Procedures for the Conduct of Business by the Judicial Conference Committee on Rules of Practice and Procedure, "the Standing Committee may eliminate the public comment requirement if, in the case of a technical or conforming (statutory)

amendment, it determines that notice and comment are not appropriate or necessary." On the recommendation of the advisory committee, your committee agreed that the proposed amendments were technical or conforming and need not be published for comment. If approved by the Judicial Conference and the Supreme Court by May 1, 1997, the proposed amendments could take effect on December 1, 1997, instead of December 1, 1998, when they would otherwise take effect if they were published for comment.

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

Recommendation: That the Judicial Conference approve proposed amendments to Civil Rule 73, proposed amendments abrogating Rules 74, 75, and 76, and revision of Forms 33 and 34, and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Amendments to Rule 23 (Class Action)

The Advisory Committee on Civil Rules has held three public hearings and is reviewing comments submitted on proposed amendments to Civil Rule 23 published for comment in August 1996. Among other things, the proposed amendments provide additional factors for consideration in certifying class actions under Rule 23(b)(3), establish discretionary interlocutory appeal on the certification decision, and expand the permissible time for the court to make a certification decision. The proposal has generated keen interest. Approximately 90 witnesses have testified at the hearings, including class action practitioners, general counsel from large corporations, law school academics, and representatives from public interest groups. One provision in the proposed amendments would expressly permit certifying a class action for

settlement purposes only. That issue is now pending in the Supreme Court in a case granted review after publication of the Rule 23 proposal. The Court scheduled oral argument in *Amchem Prods., Inc. v. Windsor* (No. 96-270) for February 17, 1997. The advisory committee will consider whether to address further problems that have been uncovered from the testimony at the hearings, which indicate a substantial increase in the use of Rule 23.

Scope and Nature of Discovery

At the suggestion of the American College of Trial Lawyers and with the goal of reducing cost and delay in litigation, the advisory committee has also embarked on a major review of the general scope and nature of discovery. A subcommittee was appointed to explore discovery issues. It convened a conference of about 30 prominent attorneys and academics to discuss discovery problems. The advisory committee plans to hold two meetings in the fall to follow up and focus on the results of the subcommittee's conference and begin to select specific issues and possible solutions for further study.

Judicial Conference Report to Congress on the RAND CJRA Study

The advisory committee submitted for your committee's consideration a draft report from the Committee on Court Administration and Case Management (CACM) to Congress evaluating the experiences of the district courts under the respective Civil Justice Reform Act plans. At the request of the CACM committee, your committee met in executive session for the discussion. The draft CACM committee report proposed recommendations for procedural changes, which would initiate the rulemaking process. The CACM committee report itself was based on district courts' reviews of their dockets and procedures, a Federal Judicial Center study of the demonstration courts, and an extensive study conducted by the RAND corporation, which

included several hundred pages of statistical and analytical data. Both your committee and the Civil Rules Advisory Committee are now directing careful attention to the CACM committee draft report and the RAND study. Neither rules committee has taken a collective position on the CACM committee report or on the RAND study. The report to Congress is due by June 30, 1997. Your committee and the advisory committee believe that the report to Congress is an important part of establishing an appropriate working relationship with Congress and are keenly interested in both the report and the RAND study, and their impact on the rulemaking process.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted to your committee proposed amendments to Criminal Rule 58 together with Committee Notes explaining their purpose and intent.

The proposed amendments to Rule 58 conform with the provisions in the Federal Courts Improvement Act, which modify the procedures governing the consent of a defendant to be tried by a magistrate judge. The changes would eliminate the requirement for a defendant to consent to a trial before a magistrate judge in a case when the charge is a Class B misdemeanor motor-vehicle offense, a Class C misdemeanor, or an infraction. The proposed amendments would also permit a defendant to consent to a trial by a magistrate judge in all other misdemeanor cases either orally on the record or in writing.

As in the case of the proposed amendments to the Civil Rules, the Chair of the Committee on Administration of the Magistrate Judges System requested the rules committees to expedite the rulemaking process and eliminate the inconsistency between the rule and the

amended statutory provisions. On recommendation of the advisory committee and in accordance with established Judicial Conference procedures, your committee agreed that the proposed amendments to Criminal Rule 58 were technical or conforming and need not be published for public comment.

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

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rule 58 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Informational Item

The advisory committee is reviewing suggested amendments to Criminal Rule 11 addressing issues that have resulted in conflicting decisions among the circuits. It also is studying suggested procedures governing forfeiture proceedings.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Report to Congress

Under 42 U.S.C. § 13942(c), as amended in 1996, the Judicial Conference “shall evaluate and report to Congress its views on whether the Federal Rules of Evidence should be amended, and if so, how they should be amended, to guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors will be adequately protected in Federal court proceedings.”

The Advisory Committee on Evidence Rules examined state laws and cases, federal cases, and a report to Congress prepared by the Department of Justice, dated December 1995,

entitled "The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counsellors." The advisory committee concluded that it was not advisable to amend the Evidence Rules to include a special privilege for these confidential communications.

Your committee approved the recommended draft report to Congress proposed by the advisory committee. The report explains why no amendment is necessary to guarantee that the confidentiality of these communications will be fairly and adequately protected in federal court proceedings.

Evidence Rule 501 gives the federal courts the primary responsibility for developing evidentiary privileges under a common law approach. Since the rule was enacted in 1975, several evidentiary privileges have been recognized by the federal courts. Most recently, the Supreme Court recognized the existence of a privilege for confidential statements made to a licensed clinical social worker in a therapy session. *Jaffee v. Redmond*, 116 S.Ct. 812 (1996).

In light of the *Jaffee* decision and the well-entrenched, common-law approach to recognizing privilege in the Evidence Rules, there is every reason to believe that confidential communications from victims of sexual assault to licensed therapists and counselors are and will be adequately protected by the common-law approach mandated by Rule 501. More importantly, it would be inadvisable to single out a particular privilege for codification in the rules. It would be anomalous and might cause unwarranted confusion in the bar and bench, because all other federally-recognized privileges would remain grounded in common law. The report is contained in Appendix C with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed report, which concludes that it is not advisable to amend the Evidence Rules to include a special privilege for confidential communications between sexual assault victims and their counselors or therapists, for transmission to Congress in accordance with the law.

Informational Item

The advisory committee is reviewing the rules to identify obsolete provisions and rules generating inter circuit conflict. It is also reexamining proposed amendments to Rule 103 and is reviewing a few other rules, including Rules 404(b), 615, 703, 706, and 803(6).

LONG-RANGE PLAN IMPLEMENTATION

The Standing Rules Committee completed a self-study, which reviewed the present operation and the future course of the rulemaking process. The self-study was published in the Federal Rules Decisions. 168 F.R.D. 679 (1996). A copy of the self-study is not attached due to its length.

Your Committee and the respective advisory rules committees continue to follow the three implementation strategies in the Long Range Plan to effect the Plan's Recommendation 28 dealing with the rulemaking process.

STATUS OF PROPOSED AMENDMENTS

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

Respectfully submitted,



Alicemarie H. Stotler
Chair

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

APPENDICES

Appendix A — Proposed Amendments to the Federal Rules of Civil Procedure

Appendix B — Proposed Amendments to the Federal Rules of Criminal Procedure

Appendix C — Proposed Report to Congress on Amending Evidence Rules Regarding the Confidentiality of Communications Between Sexual Assault Victims and Their Counsellors

Appendix D — Chart Summarizing Status of Rules Amendments

To: Honorable Alicemarie H. Stotler, Chair,
Standing Committee on Rules of Practice and
Procedure

From: Paul V. Niemeyer, Chair, Advisory Committee on
Civil Rules

Date: December 6, 1996

Re: Report of the Advisory Committee on Civil Rules

I Introduction

The Advisory Committee on Civil Rules met on October 17 and 18, 1996, at the Administrative Office of the United States Courts in Washington, D.C. A brief summary of the topics considered at the meeting is provided in this Introduction. Part II recommends that this Committee transmit to the Judicial Conference changes to conform the Civil Rules to the repeal of the statutory provision that allowed parties that had agreed to trial before a magistrate judge to agree also that the first appeal would be taken to the district court.

* * * * *

II ACTION ITEMS

Rules Transmitted for Judicial Conference Approval

Rules 73, 74, 75, 76

Section 207 of S. 1887, the Federal Courts Improvement Act of 1996, Act of October 19, 1996, reshapes the 28 U.S.C. § 636 provisions for appeal from a judgment entered by a magistrate judge following consent to trial before the magistrate judge. Section 636(c) formerly provided two alternative appeal paths. Appeal could be taken to the court of appeals, or, alternatively, the parties could agree at the time of consenting to trial before a magistrate judge that any appeal would be taken to the district court. The judgment of the district court on appeal from the

magistrate judge could be reviewed only by petition to the court of appeals for leave to appeal. This second appeal path has been rescinded, leaving only the path of direct appeal to the court of appeals.

Portions of Civil Rule 73 refer to the former provision for appeal to the district court. Civil Rules 74, 75, and 76 establish the procedure for appeal to the district court. Rule 73 must be conformed to the statute as amended, and Rules 74, 75, and 76 must be abrogated. Portions of Forms 33 and 34 also must be changed to conform to the statutory and rules changes. To conform these rules to the statutory changes, the Advisory Committee recommends the changes shown below in the usual form.

The Advisory Committee also recommends that these changes be transmitted to the Judicial Conference without any period of public comment, with the recommendation that they be sent on to the Supreme Court for submission to Congress. Part I(4)(d) of the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure authorizes this Committee to "eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception."

Parties no longer can consent to appeal from the judgment of a magistrate judge to the district court. Perpetuation of the Civil Rules describing such appeals serves no purpose and may mislead some parties to consent to trial before a magistrate judge for the purpose of also achieving a hoped-for speedy and inexpensive opportunity to appeal "at home." Even if the comment and hearing requirement is excused, conforming amendments can become effective only on December 1, 1997, more than a full year after the statutory change. With comment and hearing, the date would be pushed back to December 1, 1998. Once Congress has made the decision to abolish this means of appeal, the only question for the Enabling Act Process is the technical one of making the right conforming changes. The Advisory Committee believes that the conforming changes are sufficiently clear to justify prompt action.

It is possible that on December 1, 1997, some cases will remain pending before magistrate judges in which the parties have consented to appeal to the district court. There is no need to

defer conforming changes for fear of the impact on these cases. The retroactive effect of the statutory change is not a matter to be resolved by court rule. The effect of the conforming rules changes will be governed by the Supreme Court order making the amendments; the usual provision in rules orders is that the changes take effect on December 1 and "govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." 28 U.S.C.A. § 2074(a) provides that changes do not apply to pending proceedings "to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies."

* * * * *

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14 ~~judge, the parties may consent to appeal on the record to a~~
15 ~~district judge of the court and thereafter, by petition only, to~~
16 ~~the court of appeals.~~

COMMITTEE NOTE

The Federal Courts Improvement Act of 1996 repealed the former provisions of 28 U.S.C. § 636(c)(4) and (5) that enabled parties that had agreed to trial before a magistrate judge to agree also that appeal should be taken to the district court. Rule 73 is amended to conform to this change. Rules 74, 75, and 76 are abrogated for the same reason. The portions of Form 33 and Form 34 that referred to appeals to the district court also are deleted.

~~Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)~~

1 ~~(a) When Taken. When the parties have elected under Rule~~
2 ~~73(d) to proceed by appeal to a district judge from an~~
3 ~~appealable decision made by a magistrate judge under the~~
4 ~~consent provisions of Title 28, U.S.C. § 636(c)(4), an appeal~~
5 ~~may be taken from the decision of a magistrate judge by filing~~
6 ~~with the clerk of the district court a notice of appeal within 30~~

7 days of the date of entry of the judgment appealed from, but
8 if the United States or an officer or agency thereof is a party,
9 the notice of appeal may be filed by any party within 60 days
10 of such entry. If a timely notice of appeal is filed by a party,
11 any other party may file a notice of appeal within 14 days
12 thereafter, or within the time otherwise prescribed by this
13 subdivision, whichever period last expires.
14 ~~The running of the time for filing a notice of appeal is~~
15 ~~terminated as to all parties by the timely filing of any of the~~
16 ~~following motions with the magistrate judge by any party, and~~
17 ~~the full time for appeal from the judgment entered by the~~
18 ~~magistrate judge commences to run anew from entry of any of~~
19 ~~the following orders: (1) granting or denying a motion for~~
20 ~~judgment under Rule 50(b); (2) granting or denying a motion~~
21 ~~under Rule 52(b) to amend or make additional findings of~~
22 ~~fact, whether or not an alteration of the judgment would be~~
23 ~~required if the motion is granted; (3) granting or denying a~~

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24 ~~motion under Rule 59 to alter or amend the judgment, (4)~~
25 ~~denying a motion for a new trial under Rule 59.~~

26 ~~—An interlocutory decision or order by a magistrate judge~~
27 ~~which, if made by a district judge, could be appealed under~~
28 ~~any provision of law, may be appealed to a district judge by~~
29 ~~filing a notice of appeal within 15 days after entry of the~~
30 ~~decision or order, provided the parties have elected to appeal~~
31 ~~to a district judge under Rule 73(d). An appeal of such~~
32 ~~interlocutory decision or order shall not stay the proceedings~~
33 ~~before the magistrate judge unless the magistrate judge or~~
34 ~~district judge shall so order.~~

35 ~~—Upon a showing of excusable neglect, the magistrate judge~~
36 ~~may extend the time for filing a notice of appeal upon motion~~
37 ~~filed not later than 20 days after the expiration of the time~~
38 ~~otherwise prescribed by this rule.~~

39 ~~(b) Notice of Appeal, Service. The notice of appeal shall~~

40 ~~specify the party or parties taking the appeal, designate the~~
41 ~~judgment, order or part thereof appealed from, and state that~~
42 ~~the appeal is to a judge of the district court. The clerk shall~~
43 ~~mail copies of the notice to all other parties and note the date~~
44 ~~of mailing in the civil docket.~~

45 ~~(c) Stay Pending Appeal. Upon a showing that the~~
46 ~~magistrate judge has refused or otherwise failed to stay the~~
47 ~~judgment pending appeal to the district judge under Rule~~
48 ~~73(d), the appellant may make application for a stay to the~~
49 ~~district judge with reasonable notice to all parties. The stay~~
50 ~~may be conditioned upon the filing in the district court of a~~
51 ~~bond or other appropriate security.~~

52 ~~(d) Dismissal. For failure to comply with these rules or any~~
53 ~~local rule or order, the district judge may take such action as~~
54 ~~is deemed appropriate, including dismissal of the appeal. The~~
55 ~~district judge also may dismiss the appeal upon the filing of~~

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56 a stipulation signed by all parties, or upon motion and notice
57 by the appellant.

COMMITTEE NOTE

Rule 74 is abrogated for the reasons described in the Note to Rule 73.

~~Rule 75. Proceedings on Appeal From Magistrate Judge to District Judge Under Rule 73(d)~~

1 ~~(a) Applicability. In proceedings under Title 28, U.S.C. §~~
2 ~~636(c), when the parties have previously elected under Rule~~
3 ~~73(d) to appeal to a district judge rather than to the court of~~
4 ~~appeals, this rule shall govern the proceedings on appeal.~~

5 ~~(b) Record on Appeal.~~

6 ~~(1) Composition. The original papers and exhibits~~
7 ~~filed with the clerk of the district court, the transcript~~
8 ~~of the proceedings, if any, and the docket entries shall~~
9 ~~constitute the record on appeal. In lieu of this record~~

10 ~~the parties, within 10 days after the filing of the notice~~
11 ~~of appeal, may file a joint statement of the case~~
12 ~~showing how the issues presented by the appeal arose~~
13 ~~and were decided by the magistrate judge, and setting~~
14 ~~forth only so many of the facts averred and proved or~~
15 ~~sought to be proved as are essential to a decision of~~
16 ~~the issues presented.~~

17 ~~(2) Transcript. Within 10 days after filing the notice~~
18 ~~of appeal the appellant shall make arrangements for~~
19 ~~the production of a transcript of such parts of the~~
20 ~~proceedings as the appellant deems necessary. Unless~~
21 ~~the entire transcript is to be included, the appellant,~~
22 ~~within the time provided above, shall serve on the~~
23 ~~appellee and file with the court a description of the~~
24 ~~parts of the transcript which the appellant intends to~~
25 ~~present on the appeal. If the appellee deems a~~
26 ~~transcript of other parts of the proceedings to be~~

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27 ~~necessary, within 10 days after the service of the~~
28 ~~statement of the appellant, the appellee shall serve on~~
29 ~~the appellant and file with the court a designation of~~
30 ~~additional parts to be included. The appellant shall~~
31 ~~make arrangements for the inclusion of all such parts~~
32 ~~unless the magistrate judge, upon motion, exempts the~~
33 ~~appellant from providing certain parts, in which case~~
34 ~~the appellee may provide for their transcription.~~

35 ~~(3) *Statement in Lieu of Transcript.* If no record of~~
36 ~~the proceedings is available for transcription, the~~
37 ~~parties shall, within 10 days after the filing of the~~
38 ~~notice of appeal, file a statement of the evidence from~~
39 ~~the best available means to be submitted in lieu of the~~
40 ~~transcript. If the parties cannot agree they shall~~
41 ~~submit a statement of their differences to the~~
42 ~~magistrate judge for settlement.~~

43 ~~(c) Time for Filing Briefs. Unless a local rule or court~~
44 ~~order otherwise provides, the following time limits for filing~~
45 ~~briefs shall apply.~~

46 ~~(1) The appellant shall serve and file the appellant's~~
47 ~~brief within 20 days after the filing of the transcript,~~
48 ~~statement of the case, or statement of the evidence.~~

49 ~~(2) The appellee shall serve and file the appellee's~~
50 ~~brief within 20 days after service of the brief of the~~
51 ~~appellant.~~

52 ~~(3) The appellant may serve and file a reply brief~~
53 ~~within 10 days after service of the brief of the~~
54 ~~appellee.~~

55 ~~(4) If the appellee has filed a cross-appeal, the~~
56 ~~appellee may file a reply brief limited to the issues on~~
57 ~~the cross-appeal within 10 days after service of the~~
58 ~~reply brief of the appellant.~~

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59 ~~(d) Length and Form of Briefs.~~ Briefs may be typewritten.

60 ~~The length and form of briefs shall be governed by local rule.~~

61 ~~(e) Oral Argument.~~ The opportunity for the parties to be

62 ~~heard on oral argument shall be governed by local rule.~~

COMMITTEE NOTE

Rule 75 is abrogated for the reasons described in the Note to Rule 73.

Rule 76. Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs

1 ~~(a) Entry of Judgment.~~ When the parties have elected
2 ~~under Rule 73(d) to appeal from a judgment of the magistrate~~
3 ~~judge to a district judge, the clerk shall prepare, sign, and~~
4 ~~enter judgment in accordance with the order or decision of the~~
5 ~~district judge following an appeal from a judgment of the~~
6 ~~magistrate judge, unless the district judge directs otherwise.~~
7 ~~The clerk shall mail to all parties a copy of the order or~~
8 ~~decision of the district judge.~~

9 ~~(b) Stay of Judgments.~~ The decision of the district judge
10 shall be stayed for 10 days during which time a party may
11 petition the district judge for rehearing, and a timely petition
12 shall stay the decision of the district judge pending disposition
13 of a petition for rehearing. Upon the motion of a party, the
14 decision of the district judge may be stayed in order to allow
15 a party to petition the court of appeals for leave to appeal.

16 ~~(c) Costs.~~ Except as otherwise provided by law or ordered
17 by the district judge, costs shall be taxed against the losing
18 party, if a judgment of the magistrate judge is affirmed in part
19 or reversed in part, or is vacated, costs shall be allowed only
20 as ordered by the district judge. The cost of the transcript, if
21 necessary for the determination of the appeal, and the
22 premiums paid for bonds to preserve rights pending appeal
23 shall be taxed as costs by the clerk.

COMMITTEE NOTE

Rule 76 is abrogated for the reasons described in the Note to Rule 73.

Form 33. Notice of Availability of Magistrate Judge to Exercise Jurisdiction and Appeal Option

* * * * *

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. ~~Alternatively, upon consent by all parties, an appeal from a judgment entered by a magistrate judge may be taken directly to a district judge. Cases in which an appeal is taken to a district judge may be reviewed by the United States court of appeals for this judicial circuit only by way of petition for leave to appeal.~~

Copies of the Form for the "Consent to Jurisdiction by a United States Magistrate Judge" and "Election of Appeal to a District Judge" are available from the clerk of the court.

Form 34. Consent to Exercise of Jurisdiction by a United States Magistrate Judge, Election of Appeal to District Judge

* * * * *

~~ELECTION OF APPEAL TO DISTRICT JUDGE~~

~~[Do not execute this portion of the Consent Form if you desire that the appeal lie directly to the court of appeals.]~~

~~In accordance with the provisions of Title 28, U.S.C. § 636(c)(4), the undersigned party or parties elect to take any appeal in this case to a district judge of this court.~~

Date Signature

Note: Return this form to the Clerk of the Court if you consent to jurisdiction by a magistrate judge. Do not send a copy of this form to any district judge or magistrate judge.

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal
Procedure

SUBJECT Report of Advisory Committee on Rules of Criminal Procedure

DATE: December 4, 1996

I. INTRODUCTION.

At its meeting on October 7th and 8th, 1996, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting and proposed amendments to Rule 58 are attached.

II. ACTION ITEMS

A. Action on Proposed Changes to Rule 58

After the Committee met in October, the President signed the Federal Courts Improvement Act of 1996 (S. 1887). Section 202 amended 18 U.S.C. § 3401(b) and (g) and 28 U.S.C. § 636(a); those amendments eliminated the requirement that a defendant consent to a trial before a magistrate judge in those cases where the defendant is charged with a petty offense which is either a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction. That same section also amended §3401(b) by allowing the defendant to consent to a trial by a magistrate judge in all other misdemeanor cases either orally on the record or in writing. Those statutory changes will require conforming amendments to Rule 58, Procedure for Misdemeanors and Other Petty Offenses.

On the recommendation of Hon. Phillip M. Pro (Chair of the Committee on the Administration of the Magistrate Judges System) and with the assistance of Mr. Rabiej

(who drafted suggested conforming language) the Criminal Rules Committee was polled and agreed that the changes should be forwarded to the Standing Committee for action at its January 1997 meeting. The Style Committee has reviewed the draft and has made its suggested changes.

Under the rule-making procedures, "The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary." The Committee views the proposed amendments as "conforming" changes resulting from the changes in the underlying statutory provisions and believes that public comment is not necessary. If the changes are forwarded without public comment, and assuming they are approved by the Supreme Court, they would go into effect on December 1, 1997. If the normal procedure of publication and comment is followed, they would not go into effect until December 1, 1998.

A draft of the proposed changes to Rule 58, the Committee Note, and a copy of Section 202 of the Federal Courts Improvement Act of 1996, are attached.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 58, without publication, and forward them to the Judicial Conference for approval.

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE*

**Rule 58. Procedure for Misdemeanors and Other Petty
Offenses**

1 (a) SCOPE.

2 (1) *In General.* This rule governs the procedure and practice
3 for the conduct of proceedings involving misdemeanors and
4 other petty offenses, and for appeals to district judges of the
5 ~~district courts~~ in such cases tried by United States magistrate
6 judges.

7 * * * * *

8 (b) PRETRIAL PROCEDURES.

9 * * * * *

10 (2) *Initial Appearance.* At the defendant's initial appearance
11 on a misdemeanor or other petty offense charge, the court
12 shall inform the defendant of:

13 * * * * *

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

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14 (C) ~~unless the charge is a petty offense for which~~
15 ~~appointment of counsel is not required;~~ the right to
16 request the ~~assignment~~ appointment of counsel if the
17 defendant is unable to obtain counsel, unless the
18 charge is a petty offense for which an appointment of
19 counsel is not required;

20 * * * * *

21 (E) the right to trial, judgment, and sentencing before
22 a district judge ~~of the district court~~ , unless:

23 (i) the charge is a Class B misdemeanor
24 motor-vehicle offense, or a Class C
25 misdemeanor, or an infraction; or

26 (ii) the defendant consents to trial, judgment,
27 and sentencing before a magistrate judge;

28 (F) ~~unless the charge is a petty offense,~~ the right to
29 trial by jury before either a United States magistrate

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30 judge or a district judge of the district court, unless the
31 charge is a petty offense; and

32 (G) ~~if the defendant is held in custody and charged~~
33 ~~with a misdemeanor other than a petty offense, the~~
34 ~~right to a preliminary examination in accordance with~~
35 ~~18 U.S.C. § 3060, and the general circumstances~~
36 ~~under which the defendant may secure pretrial release,~~
37 if the defendant is held in custody and charged with a
38 misdemeanor other than a petty offense.

39 (3) *Consent and Arraignment.*

40 (A) PLEA TRIAL BEFORE A UNITED STATES
41 MAGISTRATE JUDGE. ~~If the defendant signs a written~~
42 ~~consent to be tried before the magistrate judge which~~
43 ~~specifically waives trial before a judge of the district~~
44 ~~court, the magistrate judge shall take the defendant's~~
45 ~~plea. A magistrate judge shall take the defendant's plea~~
46 in a Class B misdemeanor charging a motor-vehicle

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47 offense, a Class C misdemeanor, or an infraction. In
48 every other misdemeanor case, a magistrate judge may
49 take the plea only if the defendant consents either in
50 writing or orally on the record to be tried before the
51 magistrate judge and specifically waives trial before
52 a district judge. The defendant may plead not guilty,
53 guilty, or with the consent of the magistrate judge,
54 nolo contendere.

55 (B) FAILURE TO CONSENT. ~~If the defendant does not~~
56 ~~consent to trial before the magistrate judge, In a~~
57 misdemeanor case — other than a Class B
58 misdemeanor charging a motor-vehicle offense, a
59 Class C misdemeanor, or an infraction,— the
60 ~~defendant shall be ordered~~ magistrate judge shall
61 order the defendant to appear before a district judge of
62 ~~the district court for further proceedings on notice,~~
63 unless the defendant consents to trial before the

64 magistrate judge.

65 *****

66 (g) APPEAL.

67 (1) *Decision, Order, Judgment or Sentence by a District*
68 *Judge.* An appeal from a decision, order, judgment or
69 conviction or sentence by a district judge of the district court
70 shall be taken in accordance with the Federal Rules of
71 Appellate Procedure.

72 (2) *Decision, Order, Judgment or Sentence by a United*
73 *States Magistrate Judge.*

74 (A) INTERLOCUTORY APPEAL. A decision or order
75 by a magistrate judge which, if made by a district
76 judge of the district court, could be appealed by the
77 government or defendant under any provision of law,
78 shall be subject to an appeal to a district judge of the
79 district court provided such appeal is taken within 10
80 days of the entry of the decision or order. An appeal

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81 shall be taken by filing with the clerk of court a
82 statement specifying the decision or order from which
83 an appeal is taken and by serving a copy of the
84 statement upon the adverse party, personally or by
85 mail, and by filing a copy with the magistrate judge.

86 (B) APPEAL FROM CONVICTION OR SENTENCE. An
87 appeal from a judgment of conviction or sentence by
88 a magistrate judge to a district judge of the ~~district~~
89 court shall be taken within 10 days after entry of the
90 judgment. An appeal shall be taken by filing with the
91 clerk of court a statement specifying the judgment
92 from which an appeal is taken, and by serving a copy
93 of the statement upon the United States Attorney,
94 personally or by mail, and by filing a copy with the
95 magistrate judge.

96 *****

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97 (D) SCOPE OF APPEAL. The defendant shall not be
98 entitled to a trial de novo by a district judge of the
99 district court. The scope of appeal shall be the same
100 as an appeal from a judgment of a district court to a
101 court of appeals.

102 * * * * *

COMMITTEE NOTE

The Federal Courts Improvement Act of 1996, Sec. 202, amended 18 U.S.C. § 3401(b) and 28 U.S.C. § 636(a) to remove the requirement that a defendant must consent to a trial before a magistrate judge in a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction. Section 202 also changed 18 U.S.C. § 3401(b) to provide that in all other misdemeanor cases, the defendant may consent to trial either orally on the record or in writing. The amendments to Rule 58(b)(2) and (3) conform the rule to the new statutory language and include minor stylistic changes.

**REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
ON THE CONFIDENTIALITY OF COMMUNICATIONS
BETWEEN SEXUAL ASSAULT VICTIMS AND THEIR COUNSELORS
(March 11, 1997)**

Introduction

Section 40153 of the Violent Crime Control and Law Enforcement Act of 1994 directed that:

The Judicial Conference of the United States shall evaluate and report to Congress its views on whether the Federal Rules of Evidence should be amended, and if so, how they should be amended, to guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors will be adequately protected in Federal court proceedings. 42 U.S.C. § 13942(c) (1996).

The Advisory Committee on Evidence Rules examined the advisability of amending the Federal Rules of Evidence to include a specific privilege protecting confidential communications from victims of sexual assault to their therapists and counselors. The advisory committee examined state laws and cases, federal cases, and a Report to Congress prepared by the Department of Justice, dated December, 1995, entitled "The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors." After this extensive review by the advisory committee, the committee concluded that it is not advisable to amend the Federal Rules of Evidence to include a privilege for confidential communications from sexual assault victims to their therapists or counselors. The Committee on Rules of Practice and Procedure agreed with the conclusion of the advisory committee at its January 9-10, 1997 meeting.

Discussion

Based on the analysis and conclusions of the Advisory Committee on Evidence Rules and the Committee on Rules of Practice and Procedure, the Judicial Conference recommends to Congress that the Federal Rules of Evidence not be amended to include a privilege for confidential communications from sexual assault victims to their therapists or counselors. An amendment is not necessary to guarantee that the confidentiality of

these communications will be fairly and adequately protected in federal court proceedings.

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Recently the Supreme Court, operating under the common law approach mandated by Rule 501, recognized the existence of a privilege under federal law for confidential statements made in psychological therapy sessions. The Court specifically held that this privilege protected confidential statements made to a licensed clinical social worker in a therapy session. *Jaffee v. Redmond*, 116 S.Ct. 812 (1996). In *Jaffee* the Court further held that the privilege was absolute rather than qualified.

While the exact contours of the privilege recognized in *Jaffee* remain to be developed, the Court's generous view of the therapeutic privilege can be adequately applied to protect confidential communications from sexual assault victims to licensed therapists or counselors. In light of the recency of *Jaffee* and the well-entrenched common law approach to privileges set forth in the Federal Rules, the Judicial Conference concludes that legislative intervention at this time is neither necessary nor advisable. There is every reason to believe that confidential communications from victims of sexual assault to licensed therapists and counselors are and will be adequately protected by the common law approach mandated by Rule 501. At the very least, the federal courts should be given the chance to apply and develop the *Jaffee* principle before legislative intervention is considered.

Most importantly, it is not advisable to single out a sexual assault counselor privilege for legislative enactment. Amending the Federal Rules to include a sexual assault counselor privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law. The Judicial Conference believes that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving sexual assault in the federal courts. Granting special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar.

Conclusion

For these reasons, the Judicial Conference recommends that the Federal Rules of Evidence not be amended to include a specific privilege for confidential communications from sexual assault victims to their therapists or counselors.

PROMULGATION OF RULES AMENDMENTS

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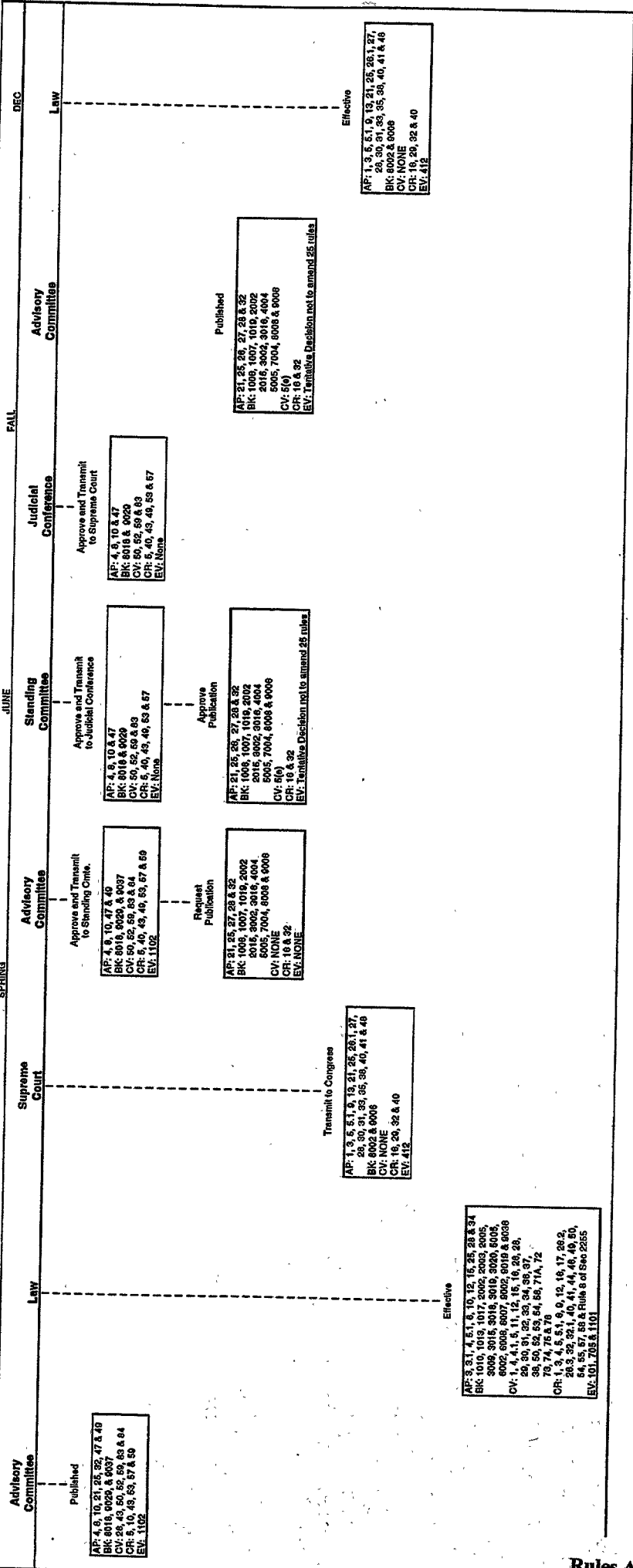
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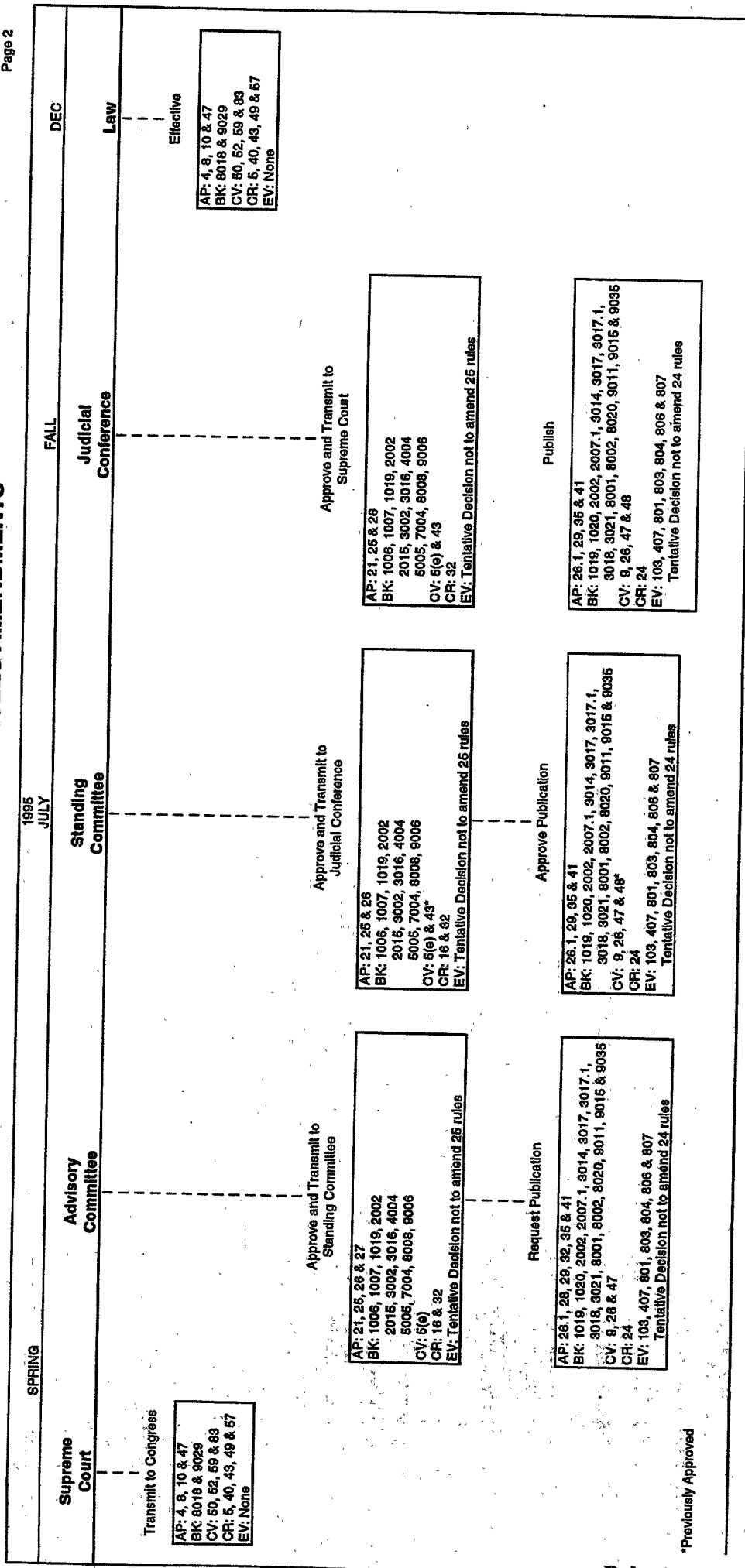
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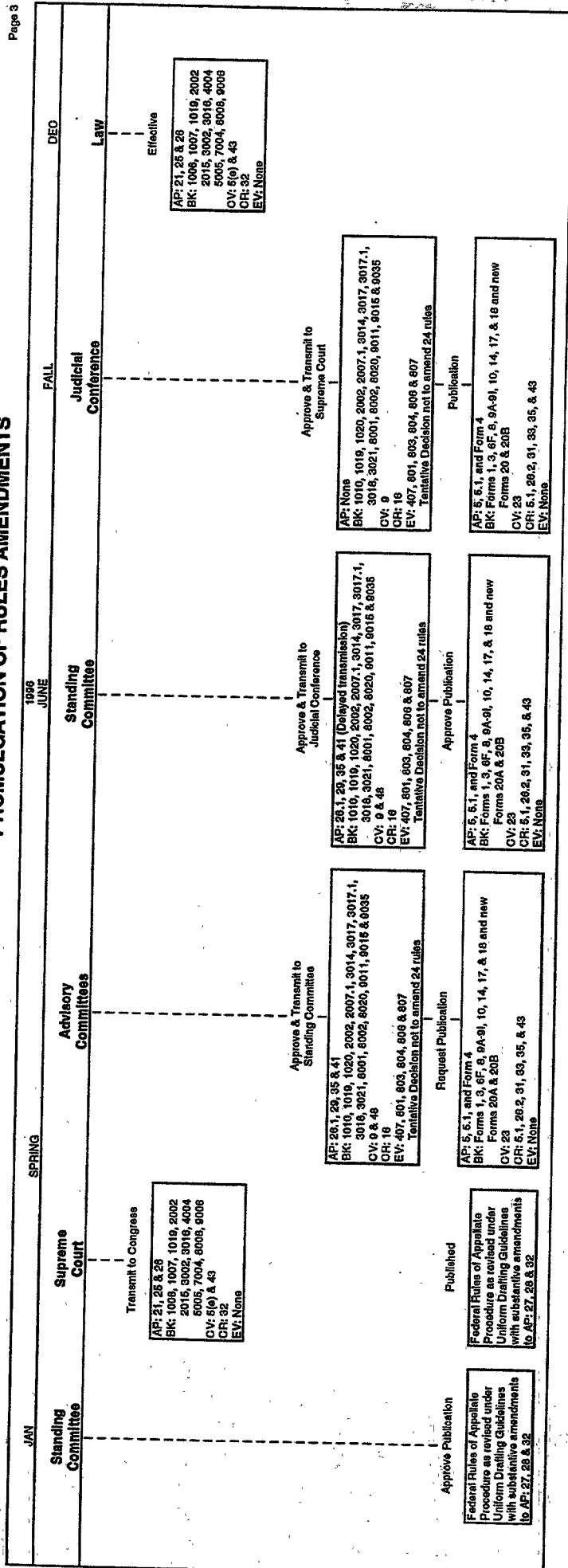


PROMULGATION OF RULES AMENDMENTS



*Previously Approved

PROMULGATION OF RULES AMENDMENTS



PROMULGATION OF RULES AMENDMENTS

1997		1997		1997	
SPRING		JUNE		FALL	
Supreme Court	Advisory Committees	Standing Committee	Judicial Conference	Law	Law
<p><i>(Transmitted to Congress)</i></p> <p>AP: None BK: 1010, 1016, 1020, 2002, 2007.1, 3014, 3017, 3017.1, 3018, 3021, 8001, 8002, 8020, 8011, 8015, & 8035 CV: 9, 73, 74, 75 & 76 and Forms 33 & 34** CR: 16, 38* EV: 407, 801, 803, 804, 808, & 807</p>	<p><i>(Approve & Transmit Standing Committee)</i></p> <p>AP: Federal Rules of Appellate Procedure as Revised, 5, 5.1, 27, 28, & 32, and Form 4 BK: Forms 1, 3, 6F, 6, 9A-9I, 10, 14, 18, & new forms 20A & 20B CV: 23 CR: 5.1, 28.2, 31, 33, 35, & 43 EV: None</p>	<p><i>(Approve and Transmit to the Judicial Conference)</i></p> <p>AP: Federal Rules of Appellate Procedure as Revised, 5, 5.1, 26.1*, 27, 28, 29*, 32, 35*, & 41* and Form 4 BK: Forms 1, 3, 6F, 6, 9A-9I, 10, 14, 18, & new forms 20A & 20B CV: 23 CR: 5.1, 28.2, 31, 33, 35, & 43 EV: None</p>	<p><i>(Approved & Transmitted to Supreme Court)</i></p> <p>AP: Federal Rules of Appellate Procedure as Revised, 5, 5.1, 26.1, 27, 28, 29, 32, 35, & 41 and Form 4 BK: Forms 1, 3, 6F, 6, 9A-9I, 10, 14, 18, & new forms 20A & 20B CV: 23 CR: 5.1, 28.2, 31, 33, 35, & 43 EV: None</p>	<p><i>(Effective)</i></p> <p>AP: None BK: 1010, 1016, 1020, 2002, 2007.1, 3014, 3017, 3017.1, 3018, 3021, 8001, 8002, 8020, 8011, 8015, 8035 CV: 9, 73, 74, 75, 76 and Forms 33 & 34 CR: 16, 38 EV: 407, 801, 803, 804, 808, & 807</p>	

*Previously Approved
 **Conforming Amendments, Not Published for Public Comment